BYU Law Review

Volume 2007 | Issue 6 Article 10

12-18-2007

Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution

Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution

I. INTRODUCTION

A growing number of countries, particularly the so-called "third wave"[1] democracies, have given some level of protection for positive rights—those rights requiring affirmative government action for their provision[2]—in their constitutions.[3] America has not yet joined the group of nations embracing the constitutional provision of positive rights,[4] and scholars have speculated as to the reasons why.[5] The

---

1. *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE 15–26 (1991). Huntington defined the third wave of democracy as including countries that had transitioned from authoritarian rule since 1974. *Id.*

2. Examples include a right to universal health care, shelter, food, and employment. Positive rights stand in contrast to so-called "negative rights," which require the government simply to refrain from certain actions.

3. *See, e.g.*, S. AFR. CONST. 1996, §§ 26, 27, 29 (setting out rights to food, water, housing, health care services, and education). A 2003 study by Bassat and Dahan examined constitutional commitments to five different positive rights: (1) the right to social-security, (2) the right to education, (3) the right to health, (4) the right to housing, and (5) the protection of workers' rights. Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice* 6, (Hebrew Univ. of Jerusalem Sch. of Pub. Policy, Working Paper No. 05-03, May 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=407260#PaperDownload. Their study evaluated sixty-eight countries and found forty-seven countries with a constitutional commitment to social-security, fifty-one with a commitment to the right to education, thirty-two that provided some constitutional protection for a right to health, twenty-one that provided some level of constitutional assurance regarding housing, and twenty-nine that provided some constitutional protection for workers' rights. *Id.* at 24. Bassat and Dahan found that countries with a French civil law origin had a higher level of constitutional commitment to positive rights than did countries with an English common law tradition. *Id.* at 22–23. The United States scored very near the bottom of all sixty-eight countries interviewed, finishing lower than Brazil, Colombia, Turkey, Iran, South Africa, Sierra Leone, and Israel. *Id.* at 30.

4. CASS SUNSTEIN, THE SECOND BILL OF RIGHTS 105 (2004). America's Constitution has been described as "a charter of negative rather than positive liberties." *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

5. *See, e.g.*, SUNSTEIN, *supra* note 4 (resting America's failure to recognize positive rights on the historical accident of Nixon's election in 1968); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 202–17 (2001) (contending that the constitutional welfare rights movement of the New Deal stalled because the Southern

analysis of positive rights and the American Constitution could potentially proceed along two strands. The first strand seeks to explain why Americans have not amended the Constitution to include positive rights. The second strand focuses on why the Supreme Court has not found such rights protected in the existing Constitution itself.[6]

This Comment fits primarily within the second strand of research efforts, although it offers insights into the first as well, and advances a theory as to why no protection for positive rights currently exists in the American Constitution. It does so by responding to an argument made by Professor Cass Sunstein in *The Second Bill of Rights.*[7] Sunstein contends that the primary reason the Supreme Court has not found constitutional protection for positive rights in the American Constitution is essentially a twist of fate in the 1968 election, which resulted in Richard Nixon becoming President of the United States.[8] In contrast to the realist explanation advanced by Sunstein, I propose a counter-thesis: that the institutional structure of the American government, combined with America's classically liberal political culture, has prevented the Supreme Court from interpreting such rights into the Constitution. I refer to this throughout this Comment as the "cultural-institutional thesis."

This approach is in contrast to the way other authors have addressed the question of positive rights in the American

---

Democratic political block on which it depended became co-opted during the Civil Rights Movement); Gregory S. Alexander, Why Are There No Socio-Economic Rights in the American Constitution? (Sept. 20, 2004) (unpublished manuscript on file with the Stellenbosch Institute for Advanced Study), *available at* http://academic.sun.ac.za/stias/projects/7_social_econ_justice/documents/abstracts/greg_alexander.pdf (arguing that an American legal culture of anti-paternalism prevented the judicial recognition of socio-economic rights in the 1960s and 1970s).

6. *See, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Jenna McNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 753, 775–81 (2001) (contending for the recognition of positive rights but acknowledging the force of arguments that such rights have practical difficulties associated with their enforcement that must be overcome prior to their recognition).

7. SUNSTEIN, *supra* note 4.

8. *Id.* at 153, 162–63, 169 (arguing that had there been a small shift in the popular vote, Hubert Humphrey would have been elected rather than Nixon and positive rights would have been secured through Supreme Court action by liberally-appointed justices).

Constitution, which have either focused on the legal[9] or political contexts.[10] By focusing on the combination of both, this Comment offers unique insights not only regarding the history of positive rights in America, but also as to their future.

With that in mind, this Comment proceeds as follows. Part II briefly summarizes Sunstein's argument, and provides a brief articulation of the cultural-institutional thesis. Part III discusses classical liberalism in American political culture, using Louis Hartz's controversial classic *The Liberal Tradition in America*[11] as a theoretical guide. Part IV contains a discussion about how the institutional structure of American government operates in conjunction with political culture to constrain counter-majoritarian judicial review, illustrated by specific examples from Supreme Court case law and public opinion data. Part V provides a brief synthesis of the political culture and institutional limitation arguments and applies the cultural-institutional thesis to the question of the constitutional provision of positive rights in America, concluding that the constitutionalization of positive rights will not occur absent a shift in America's classically liberal political culture. Finally, Part VI is a brief conclusion.

II. SUNSTEIN'S ARGUMENT AND THE CULTURAL-INSTITUTIONAL RESPONSE

In *The Second Bill of Rights*, Sunstein outlines four possible explanations for why the constitutionalization of positive rights has not occurred in America: (1) the chronological explanation, (2) the institutional explanation, (3) the cultural explanation, and (4) the realist explanation.[12] Sunstein rejects all but the fourth explanation. This Part first sets forth Sunstein's responses to each possible explanation, followed by an explication of the cultural-institutional thesis.

9. *See, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (discussing the question of the plausibility and desirability of the concept of positive rights in the Constitution).

10. *See, e.g.*, SUNSTEIN, *supra* note 4, at 99–171 (offering an in-depth discussion of the problem of positive rights in America from a political and then from a legal perspective).

11. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

12. SUNSTEIN, *supra* note 4, at 105–08.

A. Sunstein's Possibilities

1. The chronological explanation

The chronological explanation for America's failure to constitutionalize positive rights focuses on the fact that the American Constitution predates the idea of state provision of positive rights.[13] When the Bill of Rights was added to the Constitution in 1791, no one seriously contended that the government had a responsibility to guarantee individuals food, work, and shelter;[14] indeed, this would have been far beyond the capabilities of any government of the period. Perhaps America's lack of constitutional protection for positive rights is a relic of this historical fact.

Sunstein, however, rejects the chronological argument because the Constitution is a flexible document,[15] with potential to change over time. Certainly, the Constitution has changed substantially in the two hundred years since its adoption, both through amendment and interpretation. It underwent a particularly radical restructuring with the adoption of the reconstruction amendments following the Civil War.[16] Because of the Constitution's demonstrated flexibility, Sunstein rightly rejects a strictly chronological explanation for the absence of positive rights protection.[17]

2. The institutional explanation

Sunstein also sets forth and rejects an institutional explanation for why America has never recognized positive rights. This explanation begins with the premise that Americans only include rights in their Constitution that are justiciable and enforceable.[18] The

13. *Id.* at 109.

14. *Id.* at 109–10.

15. *Id.* at 119; *see* U.S. CONST. art. V (setting out the amendment process).

16. SUNSTEIN, *supra* note 4, at 119–26 (noting major changes in America's constitutional history). In addition to changes by amendment, the Constitution has undergone just as significant changes through interpretation. The changing view of Congress's authority under the commerce clause and the economic and social substantive due process doctrines are obvious examples.

17. *Id.* at 126.

18. *Id.* at 142–43. In other words, Sunstein contends that Americans do not like the idea of potentially meaningless guarantees in their Constitution, preferring to see their Constitution as practical and enforceable, rather than aspirational.

argument posits that Americans, unconvinced that court-enforced positive rights would be anything more than empty promises,[19] have thus purposefully excluded them from the catalog of constitutional protection.[20]

In response to the institutional argument, Sunstein contends that worrying over judicial enforceability of positive rights is a pastime of academic intellectuals rather than a broad public concern.[21] He rightly notes that there are currently guarantees in national and state constitutions—such as the right to counsel or the right to education—that require state action, and are often imperfectly provided, yet not rejected by the American people.[22] The institutional explanation, by itself, does not explain America's lack of constitutional protection for positive rights.

3. The cultural explanation

The third explanation Sunstein rejects is a cultural one that he refers to as the story of "American exceptionalism."[23] This explanation proposes that America's culture is hostile to the idea of

19. Some credence to this fear may be found in the experience of South Africa. The South African Constitution guarantees many different types of positive rights, *see supra* note 3, but only requires that the government take reasonable steps to achieve the progressive realization of such rights. S. AFR. CONST. 1996, §§ 26, 27, 29. In their effort not to make the guarantees no more than an empty promise, the South African Constitutional Court, while requiring the government to take steps to meet the rights, has given the government latitude to make decisions on how to allocate their resources. The end result has been that, as of 2006, ten years after the adoption of the Constitution itself, and four years after its decision in *Government of the Republic of South Africa v. Irene Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.), in which the Constitutional Court required the government to make reasonable efforts to provide universal housing, little has changed. *See* SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT, 6TH ECONOMIC AND SOCIAL RIGHTS REPORT 26–27 (2006), *available at* http://www.sahrc.org.za/sahrc_cms/downloads/Chapters%201_5.pdf (noting that despite the government's legislative efforts to secure housing for all South Africans, evictions remain high among the urban and rural poor and that the number of families dwelling in "informal" honsing nnits, i.e. shanty towns, continues to increase).

20. SUNSTEIN, *supra* note 4, at 139–47.

21. *Id.* at 144.

22. *See id.* at 146–47; *see also* Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 47 AM. J. JURIS. 159, 159 (1997). Both Sunstein and and Barber refer to things like guarantees of a fair and speedy trial, the right to couusel, and right to education found in the constitutions of many states—both of which require affirmative state action and economic resources.

23. SUNSTEIN, *supra* note 4, at 127; *see also* Alexander, *supra* note 5, at 12 ("It is the familiar story of American exceptionalism).

positive rights because of America's unique history, which has never included any significant experiment with socialism.[24] Sunstein rejects the cultural argument because he believes that "it is utterly implausible to suggest that something in the [nation's] culture foreordains our practices, present and future."[25] Additionally, Sunstein points out that although the political left in America is relatively conservative in comparison to almost all other developed countries, America is not without its own social welfare tradition.[26] He cites Roosevelt's New Deal, the movement for female equality, and the recent movement for recognition of gay and lesbian rights as examples of the flexibility of American culture, and, therefore, the falsity of the cultural argument.[27]

4. The legal realist argument

The explanation for America's rejection of constitution protection for positive rights that Sunstein accepts is what he refers to as the "legal realist" argument. Sunstein posits that America's current non-recognition of positive constitutional rights results from an unfortunate twist of fate in the 1968 presidential election. According to Sunstein's view, had Hubert Humphrey, rather than Richard Nixon, won the 1968 election, America would have a catalog of judicially created, positive constitutional rights today.[28] However, Nixon won the election, and he was able to use his presidential appointment power to reshape the Supreme Court[29] and, according to Sunstein, effectively eliminate any chance of the recognition of positive constitutional rights in the near future.

Sunstein supports this thesis by noting that through its so-called "new property" cases[30] of the late 1960s, the Supreme Court came

24. *Id.*

25. *Id.* at 138.

26. *Id.* at 129–38. America was without any type of significant public welfare tradition until shortly before World War II. Roosevelt's Social Security program provided state assistance to retired persons, and during the 1960s Congress created Medicaid, Medicare, and public housing, as well as unemployment benefits for those out of work.

27. *Id.* at 137–38.

28. *Id.* at 153.

29. Nixon nominated Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist to the Court. Although the Court did not make a dramatic shift to the right in many areas, it did as far as the recognition of positive rights was concerned. *Id.* at 154.

30. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261, 270–71 (1970) (holding that the Due Process Clause of the Fourteenth Amendment required that states hold a full evidentiary

very close to interpreting some positive rights into the Constitution.[31] The term "new property" originated in an influential law review article by the same name written by Charles Reich.[32] Reich defines the "new property" as the "the jobs we hold, plus benefits, credentials, licenses, public welfare and all of the other kinds of valuables that come from large organizations and government" that provide the economic security that is necessary for the exercise of liberty.[33] Reich argues that these entitlements served the same role as land and more traditional personal property—securing the liberty of the individual—and therefore should receive a similar level of protection.[34]

Sunstein sees the post-New Deal period and the "new property" movement as evidence that Americans are not as opposed to the idea of positive rights as many have assumed. The implication of Sunstein's legal realist explanation is that "[w]ith modest shifts in the future, parts of the second bill of rights[35] could well be included in our constitutional understandings, and certainly in the nation's constitutive commitments."[36]

B. The Cultural-Institutional Thesis

I believe Sunstein misses the mark and reaches the wrong

---

hearing before discontinuing welfare payments); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (setting out, in an influential law review article, the new property theory adopted, at least temporarily, by the Court in *Goldberg* and cited by Justice Brennan in his opinion).

31. SUNSTEIN, *supra* note 4, at 154–62. In *Goldberg*, Justice Brennan opined that "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property," 397 U.S. at 263 n.8, and held that the Fourteenth Amendment Due Process Clause required a state to give a welfare recipient a hearing before terminating his or her benefits, *see id.* at 266–67.

32. Reich, *supra* note 30.

33. Charles R. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295, 295 (1990) (citing Reich, *supra* note 30, at 738).

34. *Id.* at 295–96.

35. The phrase "the second bill of rights" is in reference to a speech by President Franklin D. Roosevelt advocating that Congress adopt a second bill of rights. Roosevelt's version of a second bill of rights included the right to a useful and remunerative job, the right to a decent home, the right to adequate medical care, and the right to protection from economic fears stemming from old age, sickness, accident, and unemployment. *See* SUNSTEIN, *supra* note 4, at 243.

36. *Id.* at 108.

conclusion because he considers the merits of the institutional and cultural arguments separately. Because of this separation, he discounts the probability that the Supreme Court's "new property" retrenchment of the 1970s and Humphrey's defeat in 1968 resulted, at least in part, from a cultural backlash to the liberal movement of the Court's jurisprudence during previous Democratic administrations played out through institutional structures—as opposed to simply being a bit of bad political luck.[37] This public response resulted from certain Supreme Court decisions that portended a course of action fundamentally hostile to American political culture and that seriously threatened to endanger the legitimacy of the Supreme Court. Because the Court's effective operation within American government depends upon its ability to maintain public confidence, the Court, rather than risk its legitimacy and influence, made significant course corrections—including abandoning any constitutional positive rights agenda.

Therefore, far from being the product of a mere twist of fate, I argue that America's refusal to recognize positive rights in its Constitution is an important reflection of both the institutional structure of its government[38] and its unique, consensus political culture of classical liberalism.[39] This theory challenges Sunstein's contention that "modest shifts" in election results are all that is necessary for America's recognition of positive constitutional rights. Instead, any such recognition would require either significant structural-institutional changes in American government or a significant alteration of American political culture. The following two sections flesh out this argument by describing more fully the nature

37. Sunstein acknowledges that, "[o]f course, it remains necessary to explain the election of President Nixon, and cultural factors obviously contributed to his victory." *Id.* at 153. However, Sunstein notes that Nixon's victory was "hardly inevitable," and, "[i]f the election had been held two weeks later, Humphrey, whose candidacy was surging, might well have won. . . . [and] would in all likelihood have appointed justices who understood the Constitution to protect social and economic rights." *Id.* Even acknowledging the possibility of a Humphrey victory, however, this Comment challenges the idea that this would have led to the protection of positive rights. *See infra* Parts III–IV.

38. *See infra* Part IV.

39. I adopt Almond and Verba's definition of political culture as "the specifically political orientations—attitudes toward the political system and its various parts, and attitudes toward the role of the self in the system." GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS 13 (1963). The character of American political culture is discussed more in Part III, *infra*.

of America's political culture and the limitations it imposes on judicial interpretation through the institutional structure of American government.

III. THE LIBERAL TRADITION AND AMERICAN POLITICAL CULTURE

Sunstein rejects the possibility that something in America's cultural past foreordains the reach of its constitutional law, both present and future.[40] There are few, if any, who would quarrel with this conclusion. Obviously, culture is a dynamic concept that can undergo significant and important changes over time; history and experience provide substantial evidence of his point.[41] However, practical experience also supports the conclusion that culture does exert a significant influence over individual and collective decision-making.[42] Therefore, one does not have to accede to the proposition that present cultural traits are fully and forever deterministic to believe that a certain cultural characteristic can exert substantial and sustained influence upon the evolution of individuals or societies. I contend that America's unique history and cultural background continues to exert an important influence upon its constitutional evolution, and that this provides one-half of the answer to the question of why no constitutional protection for positive rights exists in the American Constitution.

While not stagnant or devoid of real debate and development, American political culture has been, and remains, one of classical liberal consensus, emphasizing individuality, private property rights, and limited government.[43] This political consensus defines the

40. SUNSTEIN, *supra* note 4, at 138.

41. *See, e.g.*, U.N Dev. Program [UNDP], *United Nations Human Development Report 2004*, at 5, *available at* http://hdr.undp.org/reports/global/2004/pdf/hdr04_complete.pdf (noting that the theory of "cultural determinism" has been unsuccessful because it "ignores the fact that while there can be great continuity in values and traditions in societies, cultures also change and are rarely homogeneous," and setting out specific examples).

42. *See id.* (acknowledging the influence of culture despite rejecting ideas of cultural determinism).

43. *See* HARTZ, *supra* note 11; *see also* JOHN PATRICK DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM 16–17 (1984) (arguing that American political culture is a fusion of liberal Lockean values with Puritanist, Calvinist theology that "[has] given the American male the natural right to be free, to become rich . . . [but with] 'an agonized conscience'") (internal citation omitted); ROBERT BOOTH FOWLER, ENDURING LIBERALISM: AMERICAN POLITICAL THOUGHT SINCE THE 1960S ix (1999) (contending that "there has not been a collapse of [liberal] consensus among

boundaries of acceptable American political dialogue. While there is a real conflict of ideas within the limits of this consensus, its boundaries are relatively narrow.[44] Essentially, America's political culture remains generally hostile to any non-liberal, political philosophies—including the concept of positive rights.[45] The following sections discuss the evidence supporting the existence of a political culture of American liberal consensus, as well as outline and respond to the major criticisms of this thesis.

---

the general public since the 1960s," and that, although "the common wisdom is just the opposite, such a view flies in the face of the substantial information we have on public attitudes about basic values"); WILLIAM C. MITCHELL, THE AMERICAN POLITY 105–21 (1962) (setting out some of the liberal aspects of American political culture, and stating that "[the American] contribution to philosophy, pragmatism, is a descendant and variation of the basic tenets of Locke's liberalism" and that "[i]n the sense of adherence to the central doctrines of Locke, we are all 'little liberals'"); Philip Abbott, *Hartz, Lincoln, and the Liberal Tradition*, 57 REV. POL. 181, 182 (1995) (reviewing J. DAVID GREENSTONE, THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM (1993)) (arguing in favor of Hartz's theory of consensus liberal culture, but fitting Southern justifications for the Civil War within that consensus rather than as a limited exception that proves the rule); Arthur Schlesinger, Jr., *Liberalism in America: A Note for Europeans* (1956), http://www.writing.upenn.edu/~afilreis/50s/schleslib.html (reviewing HARTZ, *supra* note 11).

Hartz's theory of consensus Lockean political culture has been heavily disputed and is probably accepted by a minority of academics today. However, it has gained some new defenders, including the authors mentioned in the paragraph *supra*. His thesis is disputed by both those who view Civic Republicanism, rather than classical liberalism, as the dominant American political tradition, *see, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (photo. reprint 1992) (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969), and those who argue for a more "multi-traditional" approach to American political culture. *See, e.g.*, GARY BRYNER & RICHARD VETTERLI, IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT 8 (1987); Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549 (1993). For the reasons more fully set out in Part III.B, *infra*, I subscribe to the Hartzean view.

44. *See* Marvin Meyers, *Louis Hartz, The Liberal Tradition in America: An Appraisal*, 5 COMP. STUD. IN SOC'Y & HIST. 261, 266 (1963) ("[I]ndeed it would be hard to deny . . . that American minds have worked within relatively narrow limits of political possibility, holding on to essential articles of faith with remarkable tenacity over the course of national history."). *But see* James Kloppenberg, *In Retrospect: Louis Hartz's The Liberal Tradition in America*, 29 REVS. IN AM. HIST. 460, 473 (2001) (arguing that Hartz's view of consensus political culture in America "[devalues] . . . American political thought [and] has thus helped justify the failure of American political scientists to take seriously their own intellectual heritage, which may be poor in Aristotles and Hegels but has been rich in debates about what democracy is and what it should be").

45. FOWLER, *supra* note 43, at 245.

A. The American Liberal Tradition Thesis

Louis Hartz's work *The Liberal Tradition in America* has most influentially articulated the theory of American liberal consensus.[46] Hartz argued that near-consensus on three main principles characterizes American political culture. These principles are: (1) an emphasis on individuality, (2) a strong devotion to private property rights, and (3) a belief in limited government. These consensus beliefs form the core of the classical liberal philosophy of John Locke.[47] Hartz contends that the liberal consensus results from the "storybook truth . . . that America was settled by men who fled from the feudal and clerical oppressions of the Old World."[48] According to Hartz, because America never had to undergo a revolution to overcome feudal oppressions and class-inequities within its own borders,[49] Americans have adopted a view of government that is not characterized by the extremes in political philosophy found in most other—especially European—countries.[50]

In countries that underwent a revolution to overcome feudal oppression, the government played an important and necessary rule in correcting the inequality. Hartz argued that since, as Tocqueville noted, Americans were "born equal, instead of becoming so,"[51] the

---

46. HARTZ, *supra* note 11. For other well-known "consensus historians" contemporary with Hartz, see DANIEL BOORSTEIN, THE AMERICANS: THE NATIONAL EXPERIENCE (1965), and RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION (1948).

47. *See* JAMES P. YOUNG, RECONSIDERING AMERICAN LIBERALISM: THE TROUBLED ODYSSEY OF THE LIBERAL IDEA 25–37 (1996) (discussing the three main principles of Locke's political view: the individual in society, property and economy, and society and the theory of consent).

48. HARTZ, *supra* note 11, at 3.

49. Although Hartz acknowledges that America underwent its own revolution, he views it as being of a fundamentally different character than European feudal revolutions. *Id.* at 35–36, 43–44. Hartz saw the European revolutions as primarily class-based, as a response to oppressive feudal regimes whereas the American Revolution was not. *See id.* at 53–59.

Scholars also question Hartz's assertion that America was free of feudalism and class inequality, especially given the existence of slavery during America's first eighty years and the racial equality continuing thereafter. For more discussion on this criticism, along with Hartz's and his defenders' responses, see *infra* Part III.B.

50. *See* James A. Morone, *The Struggle for American Political Culture*, 29 POL. SCI. & POL. 424, 425 (1996) (articulating Hartz's thesis).

51. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 123 (6th ed. 1876) ("The great advantage of the Americans is, that they have arrived at a state of democracy without having to endure a democratic revolution; and that *they are born equal, instead of becoming so.*") (emphasis added).

classically liberal ideas of Locke—especially those of individualism and limited government—found a fertile ground in America and formed the bedrock for its unique political culture:

> In contrast to the people stirring in early modern Europe, these American settlers did not need class movements or state power to clear paths of upward mobility. In the new world there was no *ancien regime*; no revolutionary tradition to attack it; no reactionary conservatism to counterattack. The result would be a profound faith in individualism. Americans came to believe in personal social mobility, and (eventually) in competitive economic markets. In short, they became unshakable liberals.[52]

Hartz contended that the attachment to classical liberalism that emerged in America due to its unique history continued intact and sets the bounds of America's unique political culture.[53]

B. Criticisms of Hartz's Liberal Tradition Thesis

While Hartz's thesis has been very influential, it is not without strenuous critics.[54] There have been three basic criticisms of Hartz's liberal tradition thesis: (1) that it is belied by decidedly non-liberal events and attitudes in American history,[55] (2) that it trivializes the significant political diversity that actually exists in America,[56] and (3) that Civic Republicanism is an alternative to the liberal tradition that is also deeply embedded in American culture.[57] The following subsections articulate, and respond to, the major premises of these critiques.

52. Morone, *supra* note 50, at 425 (setting forth Hartz's argument).

53. HARTZ, *supra* note 11, at 9–11.

54. Morone states that "[u]ltimately, the critique against the liberal consensus turns on a single point: celebrating a single, homogenous, American political culture means listening to only some of the [American] voices—to a large extent, the powerful ones." Morone, *supra* note 50, at 427. Specific critics include BAILYN, supra note 43 (focusing on the significant influence of classical republicanism on American political thinking during the revolutionary period), J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 509, 545 (1975) (disputing Hartz's interpretation and setting forth an interpretation of the American experiment that "stresses Machiavelli [and virtue] at the expense of Locke"), and, more recently, Smith, *supra* note 43.

55. *See, e.g.*, Smith, *supra* note 43, at 549; *see also*, FOWLER, *supra* note 43, at 68–69.

56. *See, e.g.*, Kloppenberg, *supra* note 44, at 465.

57. *See, e.g.*, WOOD, *supra* note 43.

1. The challenge of non-liberalism in American history

Scholars argue that one major failing of the liberal consensus theory is that it cannot account for two important American historical realities directly contrary to classical liberal principles: the existence of slavery in America and Roosevelt's New Deal.[58] Hartz himself recognized the difficulties posed by these two events and addressed both of them in *The Liberal Tradition.*

Hartz acknowledged that, at the time of the Civil War, nearly one-half of America began what he termed a "great conservative reaction," which seemed to be an outright repudiation of the ideals of liberalism.[59] The Southern insistency on slavery, even at the price of armed rebellion, seemed to herald a widespread acceptance of a type of feudalism in America.[60] However, Hartz contended that the leaders and political philosophers of the South were unable to escape the influence of the liberal tradition and struggled throughout the Civil War to reconcile their actions with the principles of liberalism.[61] Rather than viewing this as a challenge to his liberal tradition thesis, Hartz saw this exception as proving his rule:

> One thing in any case is clear. The political thought of the Civil War symbolizes not the weakness of the American liberal idea but its strength, its vitality, and its utter dominion over the American mind. The strange agonies the Southerners endured trying to break out of the grip of Locke and the way the nation greeted their effort, stand as a permanent testimony to the power of that idea.[62]

Hartz also viewed the New Deal as an affirmation of, rather than a challenge to, his liberal tradition thesis. During the New Deal period, Roosevelt, generally successfully and with broad public

58. *See, e.g.*, FOWLER, *supra* note 43, at 68–69 (setting out the criticism).

59. HARTZ, *supra* note 11, at 145.

60. *Id.* at 145–47.

61. *Id.* at 153. Hartz contended that because, in America, liberalism was traditionalism, Southern conservatives struggled through the "philosophic pain" of trying to reconcile the European conservatism that supported slavery with the liberal principles of Locke:

> The more consistently a man advanced the antiliberal arguments of Burke, the farther away he got from the traditionalist substance they were designed to protect. The more he cherished the traditionalist substance, the farther away he got from the antiliberal arguments. The only question was on which horn of the dilemma he wanted to impale himself.

Id. at 153–54.

62. *Id.* at 177.

support, experimented with what seemed to be his variant of a socialist welfare state. Such an experiment seems contrary to the Lockean liberal principles of individualism and limited government. Hartz argued, however, that proponents of the social welfare legislation of the New Deal were very much aware of the liberal ideals that bounded the American political consensus and were very careful to characterize the legislation as compatible with the American liberal commitment to individuality, liberty, and private property.[63] According to Hartz, "[w]hat emerged was a movement, familiar now for fifty years in Western politics, which sought to expand the sphere of the state and at the same time retain the basic principles of Locke."[64]

Although Hartz himself may have dismissed the challenges posed by slavery and the New Deal too summarily, subsequent defenders of his thesis have articulated other reasons why these events do not render the thesis inaccurate. While James Young agrees with Hartz that Southern intellectuals had a difficult time breaking free of their Lockean liberal heritage during the Civil War, he contends that "[t]he liberalism that Louis Hartz saw as dominant from the start of American history finally emerged triumphant with the destruction of the most fundamentally antiliberal institution," slavery.[65] Additionally, both Greenstone and Fowler argue that the American liberal consensus is broader than many—perhaps even Hartz himself—assumed, and that the comparatively limited social reforms of the New Deal fall within that consensus as well.[66]

63. *Id.* at 260 ("Republicans trie[d] to expose the non-Lockian [sic] nature of much of the New Deal, [trying] to precipitate the moral crisis that would inevitably come if Americans thought they were 'un-American,' but . . . [t]he experimental mood of Roosevelt, in which Locke goes underground while 'problems' are solved often in a non-Lockian [sic] way, [won] out persistently. . . . [W]ho will deny that this . . . is a tribute to the irrational liberal faith of America? Eating your cake and having it too is very rare in politics."); *see also* FOWLER, *supra* note 43, at 29. Hartz viewed the expansion of government during the New Deal years as "an example of the government acting to save liberalism, as was the New Deal specifically. By this view, the New Deal succeeded because its advocates portrayed it as it was, liberalism in action, and far from socialism." *Id.*

64. HARTZ, *supra* note 11, at 259.

65. YOUNG, *supra* note 47, at 125.

66. *See* FOWLER, *supra* note 43, at 101 ("The expansion of liberal individualism in recent years is reflected in the public's sharp post-1960s shift to anti-institutionalism. . . . Especially relevant here is current public discontent with government and political institutions, although there is also support for aspects of the welfare state. Numerous studies of public opinion confirm this antigovernment and antipolitics phenomenon—and its increase over the

Therefore, although the American experiences of civil war and limited statutory welfare reform may call for caution against a too stringent or static view of the liberal tradition, they do not necessarily refute the liberal consensus theory's central contention that Americans generally respond positively to classical liberal ideas and skeptically to those outside that tradition.

2. The trivialization and diversity challenges to the liberal tradition thesis

The second criticism of the liberal tradition thesis contends that it discounts the existence of real political differences in America. As stated by Richard Ellis, simply because both parties of opposing viewpoints justify their positions using words such as "liberry" and "equality," we should not close our eyes to the fact that real political conflict exists.[67]

While Ellis is surely correct, one need not assume, however, that the acknowledgment of a consensus liberal tradition leaves no room for meaningful political debate. Hartz's theory does not necessarily propose that meaningful conflict is completely absent in American political discourse.[68] Rather, it views the range of conflict as relatively narrow in comparison with what occurs in other nations.[69] Although one must acknowledge the presence of diversity in political philosophy existing in America today, debates over politics still occur within the boundaries of the liberal consensus.[70]

---

past three decades . . . .").

67. RICHARD ELLIS, AMERICAN POLITICAL CULTURES 151 (1993).

68. While Hartz himself was no admirer of what he saw as America's "irrational" commitment to liberal ideas, he did not necessarily view America as a politically meaningless lost cause: "[Hartz] rejected pessimism about the situation . . . [and one] should not [take] . . . an image of him as 'some splendid exotic bird, cruelly forced to live on the coarse and indigestible flora of America.'" FOWLER, *supra* note 43, at 29 (quoting RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON 448–49 (photo. reprint 1979) (1970)).

69. A major focus for Hartz was the fact that America has lacked any meaningful experiments with socialism that have characterized European countries. HARTZ, *supra* note 11, at 308–09. Indeed, one view of *The Liberal Tradition in America* was that it was ultimately a comparative study, developed and articulated through the comparison of America with Europe.

70. *See, e.g.*, SEYMOUR MARTIN LIPSET, THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE 366–370 (1978) (adopting the theory of two-focused liberal consensus in American politics: a consensus acceptance of equality and opportunity, and arguing that it is the interplay between these twin, liberal goals that generates

Additionally, Hartz himself acknowledges that American history provides evidence that, even as the liberal tradition sets boundaries for American popular political discourse, there is significant debate regarding the boundaries of the tradition itself.[71] Indeed, America's seventy-year struggle over its comparatively limited social welfare legislation confirms that America's political culture is continually being defined and refined. Recent supporters of the liberal tradition thesis have focused on the thesis' limited but inclusive nature.[72] Therefore, in this sense, rather than foreclosing meaningful debate, the liberal tradition serves primarily to shift the ground to debate over conflicting positions that are both situated within the tradition itself, or the wisdom of adopting positions currently on the fringe of the liberal ideal. Such a situation admittedly biases the status quo, but does account for the meaningful exchange of ideas and viewpoints that occurs in America.

3. The alternative, or multiple tradition, challenge to liberal dominance

The third critique of the liberal consensus thesis posits that the liberal tradition is subordinate to, or at the most co-equal with, other traditions of political thought in America and therefore cannot act as the "boundary-setter" that Hartz claimed it to be.[73] Multi-traditionalists often focus on Civic Republicanism as a historically influential counter-philosophy to Locke's classical liberalism. The basic principles underlying Civic Republicanism are, first, a focus on duty rather than individual rights; second, a focus on the good of the

much of the political discourse in America).

71. Hartz himself implicitly acknowledged this debate in his recognition that Americans are able to see the social welfare reforms of the New Deal as necessary liberal reforms. HARTZ, *supra* note 11, at 263–66. Greenstone views Hartz as having "effectively armed the consensus thesis against many . . . criticisms" by acknowledging the play in the term liberalism and "painting the consensus in very broad terms." J. DAVID GREENSTONE, THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM 40 (1993).

72. *See* Morone, *supra* note 50, at 425 (noting the "stretching" of liberalism "almost to the edge of democratic socialism" in the more recent scholarship on liberal consensus). For specific examples of scholars who have viewed the liberal tradition as broader and more diversity-inclusive, see FOWLER, *supra* note 43, at 68–85 (setting out examples); YOUNG, *supra* note 47, at 6–7 (noting at least "three major currents of thought," including the "reform liberalism" that characterizes today's Democratic Party, that can fit within Hartz's liberal tradition); Abbott, *supra* note 43, at 182.

73. Morone, *supra* note 50, at 425.

collective whole rather than on the individual; and third, a view of property rights as primarily a means for obtaining the public good rather than the natural right of individuals.[74] Civic Republicanism's focus on the individual's duty to the public stands in contrast to the individual-centric Lockean liberalism.

Proponents of the multi-traditional view of American political culture vary in the extent to which they view other political philosophies as being co-equal to, or more important than, Hartz's liberal consensus.[75] However, they agree on the primary point that American political culture is "complex[] and [more] multiply constituted"[76] rhan consensus explanations, such as Hartz's, would imply, and that consensus accounts constrict Americas view of its past and future.[77]

Beginning about twenty years after the publication of *The Liberal Tradition in America*, some influential historians advanced the theory that Civic Republicanism, rather than Lockean liberalism, lies at the center of American political thought. The most influential of these have been Bernard Bailyn[78] and Gordon Wood.[79] Wood wrote that "[t]he sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution."[80] If this, rather than Lockean principles of individuality, was the driving force behind the American Revolution and subsequent American political project, it, at the least, calls into question the assumption that American politics have always been dominated by classically liberal ideals.[81] Other scholars have made a similar critique by asserting the

74. *Id.* at 425–27. For comprehensive treatment of the Civic Republicanism philosophy and influence on early American political culture, see BAILYN, *supra* note 43; WOOD, *supra* note 43.

75. For a list of some of the different approaches to multi-traditionalism, see Smith, *supra* note 43, at 564 n.8.

76. *Id.* at 558.

77. *See id.* at 550.

78. BAILYN, *supra* note 43.

79. WOOD, *supra* note 43.

80. *Id.* at 53.

81. Importantly for the purposes of this paper, the Civic Republican tradition of individual sacrifice for broader societal benefit would seem supportive of the idea of positive human rights. Therefore, if the Civic Republican tradition were ascendant in political culture, that culture would be less likely to pose a significant barrier to the constitutional provision of positive rights.

substantial influence (if not the ascendancy) of religious, or biblical, traditions on American political culture.[82]

However, the question of the influence of alternative traditions in America is not necessarily zero-sum, in which the existence of the liberal tradition forecloses the existence of any counter or supplemental tradition. It does seem that there is room for elements of both the liberal and the republican ideologies within the consensus of American politics.[83] Indeed, Hartz himself specifically made this argument.[84] While some might suggest that Hartz's broad definition of the term "liberalism" robs his thesis of any meaning, Greenstone disagrees. He asserts that, Hartz's theory was not intended as a causal or exclusive explanation; rather, it was intended as a meta-narrative identifying a "boundary condition" in American political culture.[85] Thus, in the Hartzean view, classical liberalism is not the sole influence on America's political culture, but it acts as a boundary, or perhaps a filter, through which the alternative

82. *See* Smith, *supra* note 43, at 564 n.8 (collecting such arguments in the context of works on American citizenship).

83. This is true whether you view the two as "separate traditions," like Smith, *supra* note 43, or see Civic Republicanism as the public virtue or concern for equality that moderates the essential so-called "reform liberalism" that YOUNG, *supra* note 47, at 6–7, fits within the liberal tradition. Alexander, *supra* note 5, takes the view that "Civic Republicanism . . . is a recessive gene in America['s] constitutional genetic order." *Id.* at 3. Bryner and Vetterli propose that the Founders subscribed to Locke's liberalism but recognized the necessity of it being modified by individual virtue rather than coercive government:

> [W]e argue that the Founders attempted to, and were ultimately successful, in responding to both traditions. They believed that republican virtue and liberal individualism—*self interest, properly understood*—are compatible and interdependent. Liberty requires individual restraint . . . . If voluntary constraints are lacking, if the people are not able to limit their own interests when necessary to accomplish public purposes or to protect the rights of others, then government intervention becomes increasingly pervasive, and the purposes of liberalism are not achieved.
>
> The tensions between liberal and republican ideas are greatly reduced as the evolutionary nature of virtue is recognized. Actually, the kind of stringent classical virtue that Wood, Diggins, Pocock, and others were discussing clearly was, to a significant degree rejected by the Founders as inconsistent with the "genius" or spirit of the American people. . . .
>
> Public virtue, general religious beliefs, personal restraint and concern for others, were not to be provided for through national governmental institutions and efforts in the classical tradition, but through private efforts and primary institutions, supported by local government.

BRYNER & VETTERLI, *supra* note 43, at 8–9.

84. *See* GREENSTONE, *supra* note 71, at 43 (noting Hartz's usage of the term liberalism in a broad way that encompassed some aspects of other traditions).

85. *Id.* at 42.

traditions exert their influence.

Therefore, while alternative traditions of political thought, including Civic Republicanism, have and continue to exert their influence, they do so in a moderated and subordinate form. As Gregory Alexander has observed, "[c]ivic republicanism . . . is a recessive gene in [America's] constitutional genetic order."[86] The same is true for the other alternative traditions. They continue to exert their influence on American history and culture, but do so within the context of the basic assumptions that comprise the American liberal tradition.[87]

C. Is The Liberal Tradition Still Present in America Today?

Hartz published *The Liberal Tradition in America* in 1955, at the height of consensus politics in America.[88] Is his thesis still applicable today? While it is difficult to find specific data to evaluate the influence of the liberal tradition in contemporary America, it does appear that American political culture remains one of fundamental liberal consensus.

Robert Fowler examined this question in his book *Enduring Liberalism: American Political Thought Since the 1960s.* Fowler concludes that while significantly more political and cultural diversity exists *among American intellectuals* today than in 1955, in American public opinion, the liberal tradition remains dominant. Indeed, Fowler contends that the "consensus . . . that there is no consensus at all" is held primarily by academics[89] and that there is an "accelerating triumph of liberal values" among the general public

86. Alexander, *supra* note 5, at 3.

87. FOWLER, *supra* note 43, at 243 (describing the 1950s as the "glory years of consensus analysis").

88. Many contend that Hartz's thesis was a product of his times. *See, e.g.*, Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 536 (1995) (noting that Hartz's account was "too grand an explanation based upon too little investigation," an explanation "perfectly pitched for Eisenhower's America"); Kloppenberg, *supra* note 44, at 460 (arguing that Hartz's analysis should be historicized and seen "in the context of the early post–World War II era rather than treating it as a source of timeless truths about America"). Hartz was writing at a time when policy differences between the two major American parties were less fundamental than at almost any other time in history. Therefore, some critics believe that he was blinded to the complexity of American political thought by the then-current situation. *See* Kloppenberg, *supra* note 44, at 463.

89. FOWLER, *supra* note 43, at 100.

over the last forty years,[90] manifested in increasing glorification of individualism and distrust of government institutions. Because "[no] substantial differences of opinion on basic (and liberal) political values . . . exist within the American public,"[91] he concludes that even the most controversial and conflicting political debate in America occurs inside the traditional liberal framework.[92]

Fowler bases his conclusion primarily on public opinion studies that show that Americans have increasingly embraced Lockean liberalism in their private, as well as public, lives. Fowler points to increasing public distrust of government, the so-called "Conservative Revolution"[93] of the 1990s, and the "unconventional partnership" between liberalism and religion[94] as examples of the continued vitality of the liberal tradition. Fowler also discusses the liberalization of public attitudes regarding women as evidence that a liberal consensus, although perhaps uncertainly defined, remains influential in America today.[95] Additionally, if the public outrage over the Supreme Court's decision in *Kelo v. City of New London*[96] is any indication, the American people, by and large, continue to take the Lockean view of the importance and sacredness of private property.

However, as even proponents of the continued vitality of the liberal tradition in American culture admit,[97] the philosophy of liberalism that governs American political culture today is a developing and evolving, rather than a static, one. The liberal ideals of individuality, property, and limited government have, during the last century, been invoked to justify some positive rights goods, such as limited welfare benefits and a comprehensive right to government-

90. *Id.* at ix.

91. *Id.* at 62.

92. *Id.* at 66–67; *see also* Nancy S. Love, *Enduring Liberalism: American Political Thought Since the 1960s*, 95 AM. POL. SCI. REV. 977, 977 (2001).

93. Although titled a "conservative" revolution, the movement toward limited government begun by Goldwater and Reagan is consistent with the classically liberal ideas of Locke that form the basis for the liberal tradition. See discussion in Part III.A, *supra*, for an exposition of the fundamental tenets of the liberal tradition.

94. Fowler sets out the terms of this partnership as follows: "While religions in the United States often have values that conflict with the culture, they will not seriously challenge it. In return, the state will cede religion great liberty and often-considerable material support (as with the tax-exempt status of its nonprofit facilities)." FOWLER, *supra* note 43, at 141.

95. *Id.* at 130.

96. 545 U.S. 469 (2005).

97. *See, e.g.*, FOWLER, *supra* note 43 at 68–85; YOUNG, *supra* note 47, at 6–7.

funded education.[98] Although the liberal tradition is not static and has shown itself flexible enough to accommodate the needs and desires of a changing society, it nonetheless remains influential in American political culture.

D. The Liberal Tradition and Positive Constitutional Rights

The continuance of the liberal tradition in American political culture, by itself, does a good job of explaining why positive rights have not made their way into the American Constitution by amendment; however, it alone fails to adequately explain why the Supreme Court has not interpreted the Constitution in a way that provides protection for positive rights. The very idea of positive rights stands in contrast to what is perhaps the most important principle of the liberal tradition: a profound faith in individualism.[99] Therefore, legislation requiring the government provision of socioeconomic goods through mass taxation pushes the boundaries of the liberal tradition in a significant way. However, such legislation has fit within the liberal tradition of individuality in the past, primarily justified as being necessary to advance the cause of liberalism.[100] The legislation of the New Deal, which was justified as enabling the exercise of liberty, is a primary example.[101]

A Constitutional mandate of government provision of socioeconomic goods, however, presents a much more difficult case for those seeking to incorporate it into America's fundamental liberal tradition. Constitutional rights are, by design, heavily insulated from the arena of political debate. To say that, in order to advance the ideals of classical liberalism, Americans today should eliminate the political choice of current and future generations of Americans in that sphere is a proposition very difficult to square with the fundamental ideas of the liberal tradition. Such a dichotomy presents an especially formidable barrier in the context of Constitutional

98. SUNSTEIN, *supra* note 4, at 161–62 (briefly discussing the New Deal and New Property cases).

99. FOWLER, *supra* note 43, at 22 (recognizing the centrality of faith in the individual to the liberal philosophy).

100. *See* FOWLER, *supra* note 43, at 22, 29 (primarily summarizing Hartz's view); HARTZ, *supra* note 11, at 263–72; *see also* LIPSET, *supra* note 70, at xxxiii (viewing the dual American focus on equality and opportunity as part of the consensus tradition of American politics).

101. *See supra* notes 63–66 and 70–72 and accompanying text.

action—an amendment of the Constitution requires a tremendous public exertion;[102] one that requires near consensus among the political participants. To say that the goal of constitutionally mandated positive rights could achieve a consensus in opposition to the liberal consensus itself seems a dubious prospect.

However, the Supreme Court, through judicial interpretation, has the ability to interpret such rights into the Constitution independent of the will of the country's elected representatives.[103] The Constitution specifically includes a number of provisions designed to limit the effects of public opinion upon the Supreme Court Justices.[104] Given these limitations, the impact of political culture on non-politically accountable judges is not as immediately clear as in the amendment process. Therefore, a solely cultural explanation of why America has not yet provided some level of constitutional protection for positive rights is incomplete. The following section sets out the rest of the framework through which culture exerts its influence on the American Constitution through a discussion of the institutional limits that the Constitution places on the Supreme Court.

IV. INSTITUTIONAL LIMITATIONS ON JUDICIAL REVIEW

Sunstein discounted the probability that the abandonment of positive rights in the 1970s resulted from any cultural or institutional limitation on Supreme Court jurisprudence.[105] However, this Part discusses how the institutional structure of the American government operates to constrain counter-majoritarian judicial review and

102. Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L 1, 9–10 (2000); Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 112 (1993) (citing RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 169 (1993)) ("Since the adoption of the Constitution in 1789, only twenty-seven amendments have been enacted out of the more than 10,000 proposed in Congress," and all 27 were proposed by the easier method of congressional rather than state action).

103. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is.").

104. The Constitution provides that judges are life tenured, U.S. CONST. art. III, § 1, cl. 2, that Congress is unable to reduce salaries of judges during their term in office, U.S. CONST art. III, § 1, cl. 3, and that they are presidentially appointed, U.S. CONST. art. II, § 2.

105. SUNSTEIN, *supra* note 4, at 3–7.

ultimately influence the Court's ability to recognize positive rights.

The efficacy and desirability of judicial review in a majoritarian democracy is an issue that has been hotly debated since the Founding.[106] Alexander Bickel captured the essence of the debate when he coined the term the "counter-majoritarian difficulty."[107] According to Bickel, the counter-majoritarian difficulty exists because "judicial review is a counter-majoritarian force in our [otherwise majoritarian democratic] system."[108]

The counter-majoritarian problem presented by judicial review is that the nine Justices of the Supreme Court—who are life tenured and presidentially appointed—have the final say in determining the constitutionality of legislation passed by the people's elected representatives. Although even opponents of judicial review acknowledge that the legislative and executive branches do not perfectly reflect the views of the people they represent,[109] if the public does not like the direction they are pursuing, the legislators and executive are electorally accountable. The statutes passed and enforced by them can be reversed with a simple majority vote. However, when the Supreme Court speaks constitutionally, through judicial review, the possibilities for such a popular reversal are severely curtailed.[110]

A. The Institutional Limitation Theory of Judicial Review

As a theoretical matter, the possibility of Supreme Court counter-majoritarianism poses a real threat to popular government.

106. Indeed, Professor Barry Friedman describes this as an "academic obsession." Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155, 159 (2002) [hereinafter Friedman (*Obsession*)].

107. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1986).

108. *Id.*

109. *See* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2605 (2003) (acknowledging the "messy fact" that enacted laws do not always carry popular support) [hereinafter Friedman (*Mediated*)]; *see also* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 629–643 (1993) [hereinafter Friedman (*Dialogue*)] (questioning the premise whether a court's invalidation of a statute or executive action necessarily contravenes the will of the majority or whether such a thing as "majority will" can even be definitively ascertained).

110. If the Supreme Court refuses to reverse itself, the only option for change is through a constitutional amendment, which requires two-thirds support in each House plus ratification of three-fourths of the states. U.S. CONST. art. V.

Scholars, however, disagree as to the amount of practical danger that judicial review actually poses to majoritarian democracy.[111] Despite its apparent counter-majoritarian authority, there is a large body of evidence, gathered by both political scientists[112] and members of the legal academy,[113] which suggests that the Court is reluctant to use its counter-majoritarian power either substantially or frequently.

Robert Dahl, in his groundbreaking study about the role of the Supreme Court as a national policy maker,[114] determined that the Court's dependence upon the executive and legislative branches meant that it would invariably be a part of the dominant political alliance and thus, rarely be out of step with majority opinions.[115] I shall refer to Dahl's theory throughout the rest of the paper as the "institutional limitation theory" of judicial review.

This institutional limitation theory focuses primarily on the constraints imposed on the Court because of its relationship with the other branches of government. The Supreme Court is not wholly dependent upon other branches of government; the unique legitimacy given its interpretations of the Constitution by the American people provides it with real influence of its own.[116] However, the institutional limitation theory posits that since the Court possesses neither the purse nor the sword,[117] it relies upon its

111. *See* Friedman (*Obsession*), *supra* note 106, at 155 n.5 (noting different viewpoints set out by academics in various law review articles).

112. *See, e.g.*, Robert Dahl, *Decision-Making in a Democracy, in* THE DEMOCRACY SOURCEBOOK 246–51 (Robert A. Dahl, Ian Shapiro, & Jose A. Cheibub, eds., 2003) (concluding that the Supreme Court's role as a counter-majoritarian protector of minority rights was more myth than reality and that the Court's primary function was to confer legitimacy on the policies of the ruling alliance); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the post-New Deal Period*, 47 J. POL. 652, 662–64 (1985) (arguing that most of the Warren Court's "activism" was supported by the then-current trend in public opinion and therefore was much more majoritarian than supposed); William Mischler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 98 (1993).

113. *See, e.g.*, ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 94 (photo. reprint 1978) (1970); Friedman (*Mediated*), *supra* note 109, at 2607–08 ("[S]tudies suggest . . . that the Court bows to public opinion" and that "mood swings in the general public are mirrored in the output of the Supreme Court") (citation omitted).

114. Dahl, *supra* note 112, at 246–51.

115. *Id.* at 249.

116. *Id.* at 249–50.

117. THE FEDERALIST No. 78 (Hamilton) ("The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the

legitimacy in the eyes of the American people in order to pressure the legislative and executive branches to enforce its decrees:

> The Supreme Court . . . possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution. This legitimacy the Court jeopardizes if it flagrantly opposes the major policies of the dominant alliance; such a course of action, as we have seen, is one in which the Court will not normally be tempted to engage.[118]

Without legitimacy in the eyes of the public, both Congress and the President might feel justified in resisting the ruling of the Court either through jurisdiction-stripping[119] or by simply refusing to enforce its decrees.[120] There is precedent for both in American history.[121] The Court risks becoming substantially weakened, or even irrelevant, when the political branches ignore judicial decrees and where it nonetheless doggedly pursues the counter-majoritarian course.[122]

---

society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

118. Dahl, *supra* note 112, at 249–50.

119. Jurisdiction stripping occurs when Congress statutorily prohibits the Supreme Court from ruling on certain issues. *See, e.g.*, *Ex parte* McCardle, 74 U.S. 506, 514–15 (1868) (upholding the authority of Congress to limit the appellate jurisdiction of the Supreme Court under the Exceptions and Regulations Clause). For an introduction to the ongoing academic debate over the proper scope of jurisdiction-stripping, see Akhil Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442 (1991); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (arguing that the correct approach to jurisdiction stripping is a cooperative effort between Congress and the Supreme Court); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (seminal discussion of the issue).

120. Jackson's supposed response noting his refusal to enforce Marshall's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), is the most famous example. Jackson is alleged to have said "John Marshall has made his decision; now let him enforce it." Whether the statement was actually made or not, it represents an attitude not entirely foreign to America's constitutional tradition. For example, Abraham Lincoln unilaterally suspended the Writ of Habeus Corpus, ignoring Justice Taney's decision in *Ex parte Merryman*, 17 F. Cas. 144 (1861), during the Civil War, and the Supreme Court's banning of school prayer went unenforced throughout parts of the United States for many years after its decision in *Engel v. Vitale*, 370 U.S. 421 (1962). *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1830–31 (2005).

121. *See supra* notes 119–20 for some specific examples.

122. "[T]here is a natural quantitative limit to the number of major, principled interventions the Court can permit itself . . . . A Court unmindful of this limit will find that

According to the institutional limitation theory, the Supreme Court Justices are aware that the vitality of their institution depends upon its continued legitimacy in the eye of the American public.[123] Therefore, the Court, seeking to avoid the fate of irrelevance, is careful not to stray too far in invalidating the work of the popularly elected branches.[124] Within this theory, the primary role of the Court is to legitimate the policies of the dominant political alliance.[125] Additionally, the system of presidential appointments ensures that the political composition of the Supreme Court, with perhaps a short time lag, generally remains in line with the dominant political opinion.[126]

Although the institutional limitation theory opines that public opinion operates as a substantial check on the Supreme Court's ability to undertake counter-majoritarian judicial review, it nonetheless acknowledges that the Court is more than just a "rubber-stamp"; it recognizes that the federal judiciary possesses real power and influence. When the dominant political alliance is in flux and the Supreme Court consists largely of the "old guard" in the "new regime," the Court has its greatest potential for influence and possible counter-majoritarian action.[127]

---

more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the function of constitutional adjudication." BICKEL, *supra* note 113, at 94–95.

123. Indeed, the entire institutional limitation theory is premised on the assumption that Supreme Court Justices are aware of the institutional limitations of the Court and of public opinion, at least as to more controversial cases. There is, however, substantial evidence supporting this, not the least of which is the Court's "switch in time" discussed in Part IV.B.1.a, *infra*; *see also* Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) (discussing the potential damage done to the Court's legitimacy by unprincipled decision making); Planned Parenthood of Pa. v. Casey, 505 U.S. 833, 865–66 (1992) (plurality opinion discussion of the Court's need to maintain legitimacy); *infra* notes 141, 156.

124. Dahl, *supra* note 112, at 249.

125. *Id.* Although this may be the primary role as a practical matter, there is also little doubt that some of the Court's rulings have pushed the democratic branches toward political positions they might not have otherwise reached at that particular time, and, as Dahl noted, "at its best the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy." *Id.* at 251. For more of a discussion of specific examples regarding the Supreme Court's counter-majoritarian behavior, see Part IV.B, *infra*.

126. Friedman (*Mediated*), *supra* note 109, at 2609–10.

127. Dahl, *supra* note 112, at 249–50. Perhaps the best examples of this type of situation are the Supreme Court during the beginning of Roosevelt's term and the Warren Court during the Eisenhower years. The early Marshall Court—packed with Federalists during the years of Jefferson's Presidency—is another example.

During such periods, the Court's actions both in striking down legislation and in exercising its power of independent constitutional interpretation could have significant support from different portions of the American populace. In these cases, the Court may be able to act as something of a vanguard in the final shift of presently unsettled public opinion.[128] Dahl concludes that this provides the explanation for the few times that the Supreme Court has acted in a counter-majoritarian way.[129] However, such periods of uncertainty are not necessarily the standard state of affairs, since periods of dominant alliance have been as much the norm as the exception in American history.[130]

In addition, even when the Court strikes down a piece of legislation, it may not be acting in a counter-majoritarian way, since not all enacted legislation represents the "will of the majority."[131] While the general assumption is that the current statutory law does reflect the views of the public, there is always the possibility it does not. If the Court strikes down a statute that is itself counter-majoritarian, either because it was enacted at the local level—as a relic of past public opinions no longer widely held[132]—or in the context of current or emerging national opinion,[133] then the Court might actually be acting in a *majoritarian* way when it invalidates legislation.[134]

---

128. Perhaps the preeminent example of this is the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which likely served as a primary impetus for the Civil Rights movements and accompanying legislation.

129. Dahl, *supra* note 112, at 249.

130. Dahl identifies four major political alliances throughout American history: the Jeffersonian alliance, the Jacksonian alliance, the Reconstruction Republican alliance, and the New Deal Democratic alliance. *Id.* Dahl was writing in the late 1950s, so one might add the Reagan Republican Alliance.

131. For a good discussion of this point, see Friedman (*Dialogue*), *supra* note 109.

132. *See, e.g.*, RICHARD POSNER, OVERCOMING LAW 194 (1995) (arguing that the ban on dissemination of information to aid in contraception (struck down in *Griswold v. Connecticut*, 381 U.S. 479 (1965)) was "out of step with dominant public opinion in the country, genuinely oppressive, a vestige maintained by legislative inertia").

133. *See* Barnum, *supra* note 112, at 664 (noting that data in his survey suggests that one of the important functions of the Supreme Court "may be to detect a conflict between state policy and national opinion and to exercise its power of judicial review in order to stimulate the process by which state policy is brought into conformity with existing or emerging national preferences").

134. The converse may also be true—by upholding an unpopular, but largely forgotten and hitherto unenforced, statute the Court may be perceived as counter-majoritarian.

It is also possible that the Court might misjudge how the public, or its representatives, will react to a particular decision. This could happen where the Court rules on an issue governed by precedent with which the public is not familiar and the Court's ruling catches the people by surprise.[135] Alternatively, the Court might be confronting a situation it has not previously addressed. In these situations, the Court may appear to have blatantly disregarded the preferences of the majority, when, in reality, it simply did not accurately perceive public opinion. In past such cases, the Court has moderated its stance on the issue in subsequent rulings to bring it more into conformity with public opinion on the matter.[136]

The effectiveness of the institutional check upon the Court's counter-majoritarian action is largely dependent upon the salience of the issue before the Court.[137] Much of the Court's current workload involves administrative oversight decisions that go unreported in the popular media.[138] If the general public, or even political representatives, are unaware of the Court's actions, the effectiveness of the institutional check is limited—if it operates at all.

While there is little doubt that most people are unaware of most of the Court's decisions, a significant number of the Court's cases

135. This seems to be exactly what happened with the recent Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court simply followed well-established precedent regarding eminent domain, but the intensity of the public reaction surprised both the Court members and legal academics, *see* Daniel H. Cole, *Why* Kelo *is Not Good News for Local Planners and Developers*, 22 GA. ST. U. L. REV. 803, 803 (2006), and spawned a flood of corrective legislation, *see* Donald E. Sanders & Patricia Pattison, *The Aftermath of* Kelo, 34 REAL EST. L.J. 157, 171–75 (2005).

136. *See* Barnum, *supra* note 112, at 661 (referring to the Court's decisions on affirmative action, and pointing out that when public opinion was highly negative to the initial decisions, the Court handed down rulings "conciliatory in their tone and ambiguous in their meaning" ever since); *see also infra* Part IV.B.2 (discussing judicial retrenchment in the context of its controversial rulings in the right to privacy and the death penalty cases).

137. If the public is not aware of counter-majoritarian action by the Court, then it is unlikely to affect public perception. Thus, for those decisions which are of little or no concern to the public, there really is no political check—unless one of the other branches is able to mobilize public opposition against it.

138. *See* Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 793 (1957) (noting that, even in 1957, "[r]eview of administrative action, mainly reflecting enforcement of federal regulatory statutes, constitutes the largest category of the Court's work, comprising one-third of the total cases decided on the merits"). In any event, in most cases it would likely be very difficult, if not impossible, to interpret regulations promulgated by the unelected executive bureaucracy as reflective of "public opinion" in any meaningful sense.

and issues *do* receive coverage in the popular media.[139] Some of the more controversial decisions of the Court have been very important in defining issues with the general political debate over the last 50 years.[140] The public is very aware of what the Court does on these issues, and the Court is aware of how the public feels, or is likely to feel, about its ruling.[141] When the issue is, or becomes, a salient one, the institutional check operates effectively.

Although many within the legal academy accept the primary premise of the institutional limitation theory—that the Constitution imposes institutional checks on the judiciary through its relationship with the political branches—it is not without its critics. The following section sets out the two primary criticisms of the theory and explains why they do not destroy the essential validity of the institutional limitation theory.

B. Criticism of the Institutional Limitation Theory

There are two substantial criticisms of the institutional limitation theory. First, some contend that the Court builds up a reservoir of diffuse support over time, through the majority of its uncontroversial work and popular decisions, that allows it to act in a counter-majoritarian way while retaining its legitimacy.[142] The diffuse support

139. Jeffery J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675, 678–79 (1994) (noting that while the majority of the Supreme Court's decisions receive little or no media coverage, certain decisions generate front page news, although usually no longer than one day; but concluding that this is sufficient to inform the general public as to the decision, albeit minimally).

140. *Roe v. Wade*, 410 U.S. 113 (1973), obviously comes to mind, but *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Miranda v. Arizona*, 384 U.S. 436 (1966), have also been both highly influential and controversial.

141. An interesting exchange of memos between Justices O'Connor and Blackmun over the Court's controversial decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), was recently discovered in the Library of Congress archives and posted online by Professor Ben Barros: "As the formal votes of the Justices were filtering in in the case, Justice Blackmun wrote a memo to Justice O'Connor, asking 'if I may raise a point of personal privilege. I shall be in Honolulu May 20-22. Do you think the decision in [*Midkiff*] could be withheld until after the 22nd? I run into enough flak as it is these days, and I think it would be better if I were out of the State by the time the decision comes down.' . . . Justice O'Connor replied that 'I will be more than happy to get you safely back on the Mainland before lowering the boom by announcement of this decision.'" D. Benjamin Barros, *Nothing "Errant" About it: The* Berman *and* Midkiff *Conference Notes and How the Supreme Court Got to* Kelo *With its Eyes Wide Open* 14 n.58 (working paper, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902926 (internal citation omitted).

142. *See* discussion *infra* in Part IV.B.1; Friedman (*Mediated*), *supra* note 109, at 2617.

critique postulates that the public will tolerate counter-majoritarian decisions by the Supreme Court because other decisions of the Court cause them to see the federal judiciary as an institution that makes decisions upon neutral legal principles rather than political arguments. The second critique proposes that the institutional limitation theory wrongly views the institutional structure of government as a barrier to the agency of politically-insulated Justices. Advocates of this second position cite historical examples of apparently counter-majoritarian action by the Court as evidence for their theory.[143]

While such critiques remind us that the reality of the institutional limitation theory is complex, both history and theory bear out the existence of practical institutional limitations that provide a real check on the counter-majoritarian ability of the Court. The following two subsections respond to the diffuse support and agency criticisms, and conclude that, while the critiques caution against dismissal of the political influence of the Supreme Court, they do not destroy the essential validity of the institutional limitation thesis.

1. The diffuse support criticism

The diffuse support theory rests on the premise that the Court, acting over time, develops a reservoir of legitimacy that an individual decision does not substantially undermine, even though it may be counter-majoritarian in nature.[144] Diffuse support, or support of the Court as an institution independent of its decisions, must be differentiated from the "specific support," or public support that may accompany the Court's individual decisions.[145]

Essentially, the "diffuse support" theory posits that the public will accept some counter-majoritarian action from the Court because it believes that the Court's decisions are based upon neutral principles necessary for the effective functioning of democracy rather than political arguments. The Court itself, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, subscribed to this view:

> The Court's power lies . . . in its legitimacy . . . [and] [t]he

143. See *infra* Part IV.B.2(b)–(c), for discussion of specific examples from the Warren and Burger Courts.

144. *See* Friedman (*Mediated*), *supra* note 109, at 2617.

145. *Id.* at 2613–20 (discussing the theory of diffuse support and referring to it as "the Court's slack").

> underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[146]

Diffuse support theorists cite public opinion polls, which show that support for the Court has remained remarkably high and stable—especially in comparison with other political institutions—even during periods when the Court handed down controversial decisions, in support of their hypothesis.[147]

For example, diffuse support theorists often cite the Court's divisive decision in *Bush v. Gore* to show that diffuse support allows a court to weather a controversial storm of public opinion. Many assumed that the Court's participation in a controversial political decision would reduce its reservoir of diffuse support. Justice Stevens himself expressed the fear in his dissenting opinion:

> The endorsement . . . by the majority of this court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. . . . Although we may never know with complete certainty the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[148]

However, in actuality, studies in the aftermath of *Bush v. Gore*

146. 505 U.S. 833, 865–66 (1992).

147. *See, e.g.*, Gregory A. Caldeira, & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635–36 (1992) (noting that "the Supreme Court has traditionally fared well in the estimations of the public, especially in comparison with other political institutions," including during the 1960s, when public support of government generally plummeted and the Court made some of its most controversial decisions).

148. Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

have shown that the decision did not significantly affect public confidence in the Supreme Court. Gibson, Caldeira, and Spence undertook a public opinion study in the aftermath of the decision and concluded

> that the Supreme Court decision in *Bush v. Gore* did not have a debilitating impact on the legitimacy of the US Supreme Court. Perhaps because the Court enjoyed such a deep reservoir of good will, most Americans were predisposed to view the Court's involvement as appropriate and therefore dissatisfaction with the outcome did not poison attitudes toward the institution.[149]

Despite the evidence that the Supreme Court does retain some level of popular legitimacy that is not directly tied to particular decisions, the evidence unearthed so far does not substantiate the contention that "diffuse support" is entirely independent of the Court's actions in individual cases.[150] At some level, specific support or dissatisfaction with the Court's individual decisions shades into, and impacts, the Court's reservoir of diffuse support.[151]

The probability that specific disagreement with the Supreme Court's decisions can drain its reservoir of diffuse support to the point where counter-majoritarian action endangers its legitimacy is perhaps best shown by President Roosevelt's battle with the Court during the early stages of his New Deal. The Court's repeated frustration of New Deal legislation[152] caused real damage to its institutional legitimacy. Throughout the height of the Progressive Era and the early years of the Great Depression, when the modern realities of urbanization and industrialization were testing the old

149. James L. Gibson, Gregory A. Caldeira, & Lester K. Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 555 (2003).

150. Even while acknowledging the relatively modest effect of *Bush v. Gore* on the public view of the legitimacy of the Supreme Court, Gibson, Caldeira, and Spence cautioned that "no one can doubt that loyalty towards an institution is influenced by the policy outputs of that institution, at least in the long term." *Id.*

151. *See* Friedman (*Mediated*), *supra* note 109, at 2615 ("[I]ntense enough specific disagreement with an institution ultimately will have an impact on diffuse support.").

152. From 1935-1936, the Supreme Court struck down the Railroad Retirement Act, Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935), the National Recovery Act, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the National Bituminous Coal Act, Carter v. Carter Coal, 298 U.S. 238 (1936), the Frazier-Lemke Act, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), and the Agricultural Adjustment Act, United States v. Butler, 297 U.S. 1 (1936).

liberal assumptions of American independence and individualism, the Court repeatedly invalidated economic and social reform legislation because it infringed upon individual freedom to contract.[153]

Roosevelt, frustrated by the invalidation of much of his New Deal legislation, proposed a plan to pack the Court in 1937. When the plan was proposed, a Gallup poll found that close to 50 percent of Americans supported the proposal.[154] Despite the large amount of initial support, the court-packing proposal actually ended up dying in Congress without a vote.[155] Conventional wisdom suggests that Roosevelt simply miscalculated public opinion.[156] However, the Gallup poll, and other opinion data dispute that assertion. At least one-half of the American population initially supported the bill. Gregory Caldeira hypothesizes that the real reason for the significant defeat of the Court-packing bill is that "the Supreme Court outmaneuvered the president. Through a series of shrewd moves, the Court put President Roosevelt in the position of arguing for a radical reform on the slimmest of justifications."[157]

In the weeks after Roosevelt proposed the bill to pack the Court, the Court handed down its decisions in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* ("*Jones & Laughlin Steel*"),[158] and *West Coast Hotel Co. v. Parrish* ("*West Coast Hotel*").[159] In these decisions, the Court made clear that it had decided to stop invalidating New Deal legislation that interfered with freedom of contract. This was seemingly an overnight switch from its stubborn, forty-year position.

In its most well-known (and infamous) economic substantive

153. Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 L. & INEQUALITY 1, 6 (2005).

154. Gregory A. Caldeira, *Public Opinion and the US Supreme Court: FDR's Court-packing Plan*, 81 AM. POL. SCI. REV. 1139, 1147 (1987).

155. HAROLD J. SPAETH, SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION 89 (1979).

156. Caldeira, *supra* note 154, at 1139 (arguing in support of the contention that the Supreme Court is acutely aware of, and can be very sensitive to, public opinion).

157. *Id.* at 1150.

158. 301 U.S. 1 (1937) (upholding the constitutionality of Roosevelt's National Labor Relations Act).

159. 300 U.S. 379 (1937) (declining to invalidate a minimum wage law for women, and stating that the Court's role was not to pass on the wisdom of the legislation but only to determine whether the law was "arbitrary or capricious").

due process decision, *Lochner v. New York*,[160] the Court had established its right to independently evaluate the justifying reasons of a New York statute limiting the maximum weekly working hours for bakers. The Court stated that the question of validity of the regulation was one for the Court to answer and that "[there was], in [their] judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law."[161] The language of the majority opinion in *West Coast Hotel* shows the Court's sudden break with the *Lochner* doctrine:

> [This] Legislative response . . . cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.[162]

With the Court's sudden switch-in-time, the counter-majoritarian specter that Roosevelt had used to justify support for the Court-packing bill evaporated, as did public support for Roosevelt's court-packing bill.[163] Faced with the possibility of becoming a mere pawn of the executive branch due to the erosion of its diffuse support, the Court had reversed its jurisprudence without warning—choosing to preserve its institutional legitimacy rather than take a suicidal stand on principle. While the prolonged nature of the Court's apparent counter-majoritarian action provides support for the theory of diffuse support, the Court's switch also demonstrates the Court's awareness of the need for diffuse support and the fact that it can be dissipated by controversial and counter-majoritarian decisions, especially when those decisions are well-publicized.

At first glance, *Bush v. Gore* and the Court's "switch in time" present apparently different pictures of the diffuse support theory. However, there are some key differences between the two that provide some insight about the nature of diffuse support and what kind of decisions tend to erode it and those that do not. First, the Court's switch in time was in response to public pressure exerted on the Court because of a period of continuous counter-majoritarian action related to a particular subject matter that the majority of the

160. 198 U.S. 45 (1905).

161. *Id.* at 57.

162. *West Coast Hotel*, 300 U.S. at 399.

163. Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 POL. SCI. Q. 267, 286 (1988).

public opposed. *Bush v. Gore*, in contrast, was the quintessential one-time decision that likely angered exactly one-half of the American public, rather than a substantial majority.

While it should be clear that diffuse support can be affected by non-counter-majoritarian but controversial decisions, as well as those that are clearly counter-majoritarian, the contrast in these two experiences suggests that diffuse support (which theorists argue is built up over time) appears to be more likely lost when the Court embarks upon what a majority view as a long-term and substantially counter-majoritarian project.

Therefore, although the Court's diffuse support enables it to render the occasionally controversial, and perhaps even counter-majoritarian, decision, the fact that the diffuse support reservoir is filled or drained based on the public's reaction to specific decisions prevents it from becoming a blanket enabler of substantial counter-majoritarian action. Additionally, the more salient the issue, the less likely diffuse support will provide the necessary insulation required to preserve its legitimacy and act in a counter-majoritarian way.

2. Agency and past counter-majoritarian action

The second critique advanced in opposition to the institutional limitation theory claims that the theory wrongfully discounts the ability of insulated judges to act as free agents in standing up to the will of the people in order to protect minority rights or other vital constitutional interests. Proponents of this critique point to past decisions where the Supreme Court has stood against the expressed will of the majority as evidence of its accuracy.[164] The Warren and Burger Courts are often cited as examples. On its face, this argument has substantial appeal and perhaps even some historical support. Certainly, many individuals criticized the Warren and Burger Courts for being activist and counter-majoritarian.[165]

However, a close examination of two of the most controversial lines of cases, the right to privacy and the death penalty decisions, reveals that the public might have painted the Warren and Burger

164. All studies agree on one point: while apparently counter-majoritarian decisions do exist, they are very rare. Supreme Court decisions align with popular preferences the vast majority of the time. *See* Dahl, *supra* note 112, at 249–50.

165. Barnum, *supra* note 112, at 662–63.

Courts with an overly broad counter-majoritarian stroke.[166] Indeed, despite its political insulation, the Supreme Court has been surprisingly majoritarian.[167] The following sections first set out the institutional realities that operate to effectively constrain judges, despite their political isolation, and then test this examination empirically with an analysis of some controversial decisions of the Warren and Burger Courts.

a. Institutional constraints. While there is no doubt that a Supreme Court Justice is free to act in a counter-majoritarian way without endangering his or her position, several institutional factors operate to constrain the willingness of Supreme Court Justices to do so and to limit the effectiveness of the counter-majoritarian decisions of the individual Justice.

(1) Individual constraints. The discussion of the diffuse support criticism in the prior section focused on the Court's awareness of its need for legitimacy. The Supreme Court, however, is an entity comprised of nine individuals. The diffuse support check on the counter-majoritarian ability of the Supreme Court operates *through the Justices themselves.* Indeed, Justice Stevens' statement, from *Bush v. Gore*, that the "loser" in that case was "the Nation's confidence in the judge as an impartial guardian of the rule of law"[168] shows his personal awareness and concern regarding the limitation that America's institutional structure placed on the counter-majoritarian abilities of America's most politically unaccountable public servants. The plurality opinion in *Planned Parenthood v. Casey* shows a similarly keen awareness.[169] Judges are cognizant of the fragile nature of their institution's position and often voluntarily curtail what otherwise might be broad, individual counter-majoritarian beliefs or tendencies.

166. *Id.*

167. *See* discussion *infra* Parts IV.B.2.b–c.

168. Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

169. Justices O'Connor, Kennedy, Stevens, and Souter comprised the plurality. *See* Planned Parenthood v. Casey, 505 U.S. 833, 865–66 (1992) ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.").

(2) Limitation of effectiveness. The second half of the response to the agency criticism of the institutional limitation theory lies primarily in the process through which the Supreme Court, and the federal judiciary more broadly, is created. The individuals granted the counter-majoritarian powers of an unelected and life-tenured judgeship are drawn from the same political culture that they are called on to judge.[170] But, more importantly, the regular process of political appointment and confirmation[171] ensures that the mix of personalities and ideologies that comprise the Court remains ultimately controlled by the American politics of consensus.[172]

This not only prevents the long-term entrenchment of particular ideologies on the Court[173] but also tends to dilute the impact of the individual counter-majoritarian voice in the particular case by ensuring the presence of a large group of moderates on the Court.

---

170. *See* Friedman (*Dialogue*), *supra* note 109, at 672 ("[T]he bases for judicial decisionmaking are firmly grounded in the norms of society. . . . Many references to sources supporting constitutional judgments are an appeal to the values of the people. . . . What is important is that judges find it necessary to, and can, support their conclusions with sources that appear to reflect the sentiment of the people. Thus, one properly might question the entire notion that courts enforce norms contrary to popular will. Because judges are chosen from and live among 'the people,' their decisions naturally reflect popular will to some degree.") (footnotes omitted).

171. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President,] by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law . . . .").

172. *See* Friedman (*Dialogue*), *supra* note 109, at 678 ("This tentative thinking suggests a picture of a judiciary that rarely is completely on target with the body politic but is never too far ahead or behind. The judiciary can be at times visionary, and at times reactionary, but never too much of either.") (footnote omitted).

173. While the political appointment process does allow a President to attempt to "stack" the federal judiciary while in office, it prevents long-term entrenchment of ideology through the regular political process. Indeed, Professors Balkin and Levinson view the process of political appointment, combined with political cycles, as leading to gradual and limited entrenchment and retrenchment of constitutional doctrines. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1083 (2001) ("[N]othing is more natural than periods of constitutional retrenchment following periods of constitutional upheaval and innovation . . . ."). Additionally, the requirement of Senate confirmation, especially given the increasing focus on the ideological stridency of the nominee, helps to ensure that a President's judicial appointments—especially those to the Supreme Court—tend to be more moderate than they might otherwise be. *See* Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POLS. 296, 296 (2006) (discussing every nomination to the Supreme Court since Hugo Black in 1937 and concluding that ideology is the preeminent concern of the Senate in its determination to confirm or deny any particular appointee). This limitation is most effective, of course, when the Senate is not securely controlled by the President's own party.

Finally, while presidential administrations since John Adams have attempted to entrench their own political views on the federal judiciary, the process of entrenchment is an uncertain one at best.[174] History is replete with appointments that seem to have backfired on the appointing presidents,[175] assuming partisan entrenchment was the ultimate goal of the nominations. This shifting and dilution, combined with the generally incremental nature of change in federal judicial doctrines due to standing, case and controversy requirements,[176] and the doctrine of *stare decisis*, combine to limit the ability of the individual judge to act in significantly counter-majoritarian ways.

b. Empirical example: the right to privacy cases. Two examples demonstrate that the Supreme Court is truly subject to institutional limitations in its decision making. Some of the most vocal counter-majoritarian criticism leveled at the Supreme Court has resulted from its decisions in the two most noteworthy and controversial of its right to privacy decisions: *Griswold v. Connecticut*[177] and *Roe v. Wade*.[178] While there is no doubt that both of these decisions were

174. *See* Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1209–12 (2005). *See generally* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007) (chronicling the difficulties faced by the Reagan, Bush I, and Bush II administrations in entrenching republican ideology in the Supreme Court).

175. Eisenhower is supposed to have stated that his two mistakes—Earl Warren and William Brennan—were sitting on the Supreme Court. *See* Stephen J. Wermeil, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515, 536 (1994). Other appointments that could be viewed as having "backfired" are Justices White (Kennedy), Stevens (Ford), Kennedy (Reagan), and Souter (Bush). For an interesting discussion of the failure of Republican presidential administrations since Reagan to pack the Court with conservatives, see GREENBURG, *supra* note 174.

176. *See* Lawrence Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 823 (1967) ("In the main, courts still deny their power to make new law. This denial is itself no small limitation on their power. It helps ensure that judge-made law results in only small, incremental changes in the existing fabric of doctrine. A great leap forward is rare. Even constitutional law—where a major change can be legitimated through appeal to the higher mandate of the Constitution—shuns sudden advances. The reapportionment cases, for instance, exemplify a cautious, step-by-step movement. In general, judge-made law inches forward in a glacial kind of creep."); *see also* CASS SUNSTEIN, ONE CASE AT A TIME ix (1999) (arguing in favor of judicial minimalism and noting that the "Court's usual approach" is to leave larger questions undecided, moving in "small rather than large steps, bracketing the hardest and most divisive issues").

177. 381 U.S. 479 (1965).

178. 410 U.S. 113 (1973).

controversial, there is significant evidence supporting the conclusion that they were not clearly counter-majoritarian.

In *Griswold*, the Court struck down a Connecticut statute prohibiting the provision of counseling or medical services for the purposes of prohibiting conception.[179] In 1965, when *Griswold* was decided, only two states still had similar statutes in effect.[180] The nationwide distribution of public opinion was heavily in favor of the Supreme Court's ruling rather than against it.[181] Although the *Griswold* Court did invalidate a legislative act, it was an old statute that was clearly in conflict with the majority of public opinion at the time.[182] It is possible that a greater public uproar would have arisen had the Supreme Court upheld the statute, which would have been in conflict with the preferences of the vast majority of Americans.[183] Indeed, much of the controversy that has arisen over the *Griswold* decision has been retrospective, primarily because of its association with *Roe v. Wade*.

Roe v. Wade is considered by many to be a better example of a clearly counter-majoritarian decision than *Griswold*. In 1970, just three years before the Court decided *Roe*, the possibility of a constitutional right to an abortion was described as "fantastic, illusory."[184] Moreover, when the Court's 1973 decision in *Roe* established such a right, the decision took much of the public and legal community by complete surprise,[185] and it has remained controversial since.[186] Given this deviation from public expectations, is there any basis for not finding *Roe* significantly counter-majoritarian?

---

179. *Griswold*, 381 U.S. at 485–86.

180. Kevin L. Yingling, Note, *Justifying the Judiciary: A Majoritarian Response to the Countermajoritarian Problem*, 15 J.L. & POL. 81, 92 (1999).

181. Indeed, at the time *Griswold* was decided, 80 percent of Americans were in favor of making contraception information available to all who requested it. Barnum, *supra* note 112, at 655.

182. *Id.*

183. *See* Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1438–39 (1995). The uproar that resulted was primarily from religious interest groups who opposed the decision. The Catholic Church was particularly vocal. *Id.*

184. *Id.* at 1433 (quoting Linda J. Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. TIMES MAG., Jan. 25, 1970, § 6, at 30).

185. *Id.* (stating that the "Supreme Court's opinion in *Roe* sent shock waves throughout the nation" and that *Roe* caught "the nation—including most legal academics—by surprise").

186. *Id.* at 1455.

By 1973, the women's liberation movement was approaching the height of its influence. The Equal Rights Amendment (ERA) was a major subject of debate. A growing percentage of Americans supported either legalizing abortion or at least a relaxation of the laws prohibiting it.[187] A few states had already enacted laws that came close to legalizing abortion and others had liberalized existing law significantly.[188] As controversial as it was, *Roe v. Wade* did not lack significant (albeit likely minority) support. Therefore, while the Court's decision in *Roe* was counter-majoritarian by definition, it was not, even at the time it was decided, a decision that blatantly disregarded the clearly expressed public will.[189]

Additionally, the impacts of the institutional limitation theory are perhaps better shown, in the case of *Roe*, by subsequent Supreme Court action on the abortion issue. Because of its decision in *Roe*, the Court has received more criticism than at any time since the New Deal and even perhaps since the Civil War.[190] In the nearly thirty-five years since it decided *Roe v. Wade*, the Court has retreated from the

187. Michael Comiskey, *The Rehnquist Court and American Values*, 77 JUDICATURE 261, 264–65 (1994) (citing Donald Granberg & Beth Wellman Granberg, *Abortion Attitudes, 1965-1980: Trends and Determinants*, *in* 12 FAM. PLANNING PERSPECTIVES 250–61 (1980)) (noting that "[p]ublic support for legal abortion rose sharply" from the 1960s to 1970s).

188. *See* Robert F. Drinan, *Abortion and the Law: A Problem Without a Solution?*, 89 MICH L. REV. 1390, 1391 (1991) (citing MARY ANN GLENDEON, ABORTION AND DIVORCE IN WESTERN LAW 48 (1987) (noting that at least three states, Hawaii, Alaska, and New York, had nearly eliminated all restrictions on abortion and that nineteen others had liberalized existing law)); David J. Garrow, *Abortion Before and After Roe v. Wade: A Historical Prospective*, 62 ALB. L. REV. 833, 834 (1999) (citing DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 323–25, 327–30, 330–32, 418–421 (Univ. of Cal. Press 1998) (1994)) (discussing the legalization of abortion in New York and the liberalization of existing abortion laws in Colorado, California, and North Carolina).

189. *See id.* (noting that American public opinion had the appearance of a growing consensus in 1972 but that the reality quickly proved to be more complex, as growing support basically peaked at one-half of the population).

190. *Roe. v. Wade* likely rivals *Dred Scott*, 60 U.S. 393 (1856), in the minds of some, as the most infamous Supreme Court decision in history. For specific criticism of the decision, see John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (criticizing *Roe* ultimately because "it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"); David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme* Court, 75 MARQ. L. REV. 975, 985 (1992) (noting that criticism of Roe has come from both those who supported the result and those that did not); Lynn D. Wardle, *Rethinking* Roe v. Wade, 1985 BYU L. REV. 231; Curtis E. Harris, Comment, *An Undue Burden, Balancing in an Age of Relativism*, 10 OKLA. CITY U. L. REV. 363, 414 n.147 (1993) (collecting commentary on *Roe*).

strict trimester standard and adopted a more flexible approach while accommodating regulation of abortion by upholding measures such as parental notification requirements and the restriction on federal funding for abortion procedures through Medicaid.[191] These accommodations have generally had the support of large majorities.[192]

Roe v. Wade shows that the institutional limitations placed on the Supreme Court through the Constitution do not prevent it from acting as a vanguard on an issue with significant and growing support. However, the experience of *Roe* also provides a good example of the ways in which the Court, once it has determined it has pushed the boundaries of its independent decision-making power, responds to subsequent criticism. While there remains substantial, although not a clear majority, support in America for the constitutional protection of a right to choose, public opinion and institutional limitations have combined to force the Court to modify the inflexible standard of *Roe* in its subsequent holdings.[193]

c. Empirical example: death penalty cases. The Court's decision in the controversial death penalty case, *Furman v. Georgia*, provides a second example of institutional constraints limiting the Court's ability to rule completely independently of public opinion.[194] It is also frequently cited as an example of counter-majoritarian decision-making.[195] The Court's decision in *Furman* required that the states put in place standards and procedures that governed the imposition of the death penalty in capital cases.[196] This led to a de facto

191. Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (allowing states to prohibit the use of federal funds for counseling in favor of or performing abortions); *see, e.g.*, Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding the constitutionality of a Minnesota law which required a 48-hour waiting period in between parental notification and performance of an abortion for a minor).

192. *See, e.g.*, Michael Vitello, *How Imperial is the Supreme Court? An Analysis of Supreme Court Abortion Doctrine and Popular Will*, 34 U.S.F. L. REV. 49, 96 (1999) (noting the Gallup polls have consistently found around a seventy percent rate of support for parental notification requirements).

193. *See supra* notes 191–92 and accompanying text.

194. 408 U.S. 238 (1972).

195. *Id.* at 239–40 (holding that unguided sentencing is in violation of the Eighth Amendment's prohibition on cruel and unusual punishment and that a deprivation of life without due process of law is in violation of the Fourteenth Amendment).

196. Austin Sarat, *The "New Abolitionism" and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO ST. L.J. 343, 343–44 (2002) (noting that many thought *Furman* marked the end of capital punishment in the United States, and that although it did

cessation of all criminal executions in the United States.[197] The Court's decision in *Furman* came when American support for the death penalty was at its lowest ebb. In the late 1960s, just a few short years before *Furman* was decided, only 42 percent of Americans supported the death penalty.[198] During the 1960s, there were less than 150 executions, as compared to just less than 1,300 during the 1940s.[199] It was in this climate of flagging support that *Furman* originated.

Barry Friedman has argued that *Furman* was a type of "experiment" conducted by the Court, in which it tested the bounds of public support for the death penalty.[200] From its low-water mark in the 1960s, support for the death penalty climbed steadily, reaching a stable high in between 70 and 80 percent of Americans polled during the 1980s and 1990s.[201] As public support for the death penalty increased, Supreme Court decisions such as *Gregg v. Georgia*[202] moderated the holding of *Furman*, and today the Supreme Court has approved a number of sentencing schemes that allow for near mandatory death sentences in certain cases.[203]

Given the substantial amount of counter-majoritarian, or "activist," rhetoric directed at the Warren and Burger Courts, their record is surprisingly majoritarian. The Court's responses in the right to privacy and death penalty decisions supports the contention that the need for public legitimacy imposes a real and substantial barrier to the ability of the Court to act in a sustained, clearly counter-majoritarian manner. Although Supreme Court Justices are politically insulated, the institution whose existence justifies their insulation is politically vulnerable. Available evidence supports the conclusion that, while they may make individual counter-majoritarian decisions, the Justices are limited in their ability to take sustained action against established public opinion.

---

lead to a four-year cessation, capital punishment resumed with *Gregg* four years later).

197. Friedman (*Dialogue*), *supra* note 109, at 609 n.160.

198. *Id.*

199. *Id.*

200. *Id.* at 609.

201. *Id.* at 609 n.159.

202. 428 U.S. 153 (1976).

203. *See, e.g., id.* at 197 (holding that Georgia's sentencing guidelines satisfy the *Furman* requirement that the death penalty not be imposed arbitrarily or capriciously).

V. SYNTHESIS & APPLICATION

The interaction between America's liberal tradition and the institutional limits of the judiciary prevents the Supreme Court from entrenching non-liberal ideals—including positive rights—in the Constitution. The institutional checks on the Court's ability to engage in counter-majoritarian action imposed by the Constitution operate only to the extent that there is a substantial and discernible public position on the issues likely to come before the Court. Public opinion on specific issues—especially in political matters—is formed in the context of the overall attitudes of the people regarding their government—in other words, the political culture.[204]

In America the broad outlines of political culture—or the area of substantial agreement on matters relating to government—are set by the liberal tradition. The vast majority of political debate occurs over the wisdom or means of adopting positions compatible with classical liberalism. On such issues, where the opposing positions are both situated within the liberal tradition, there is generally not a consensus (or near-consensus) level of agreement on any one position, and, therefore, the effect of the institutional checks on the political and judicial branches is less effective.

However, when the question under debate is one of a choice between whether to adopt a position compatible with the liberal tradition or to adopt one that is not, the debate is much more lopsided. On these questions, there is a substantial and discernible, even a consensus, public position—one in favor of the liberal ideal. The current intellectual celebration of (or longing for) political diversity within America nothwithstanding, America remains, by and large, a country of Lockean liberals. Thus, despite the realities of diffuse support and the constitutional insulation of judges from political accountability, the institutional check on the judiciary continues to operate effectively against non-liberal positions, preventing the courts from using their counter-majoritarian abilities to adopt non-liberal positions that the American public has not been willing to adopt through the normal political process. Therefore, while neither America's liberal consensus nor the institutional structure of its government alone is sufficient to maintain the fundamentally liberal nature of America's government, the

204. *See* ALMOND & VERBA, *supra* note 39, at 13 (defining political culture).

combination of the two works to keep the ship of state securely in the liberal channel.

The reason, then, that America has not yet enshrined positive rights in its Constitution is not, as Sunstein contends, because of a twist of electoral fate. It is because the constitutional protection of positive rights—while a modern "liberal" idea—is profoundly classically illiberal.

Looking forward, what does this theory mean for the future of positive constitutional rights in America? Currently, American political culture remains one of liberal consensus, as Hartz recognized over fifty years ago. However, as subsequent historians have noted, the nature of the liberal tradition in America was more complex than Hartz supposed. Events in American history, especially the New Deal, provide evidence for the common-sense proposition that the liberal tradition is not static, but evolutionary in nature. Significant pieces of social welfare legislation have become a regular, and widely accepted, part of American life during the last sixty years. The liberal tradition has broadened to accommodate them. Could the same happen for positive rights?

Although such a broadening is possible, it is unlikely to occur absent a fundamental shift in American thinking about politics, rights, and responsibilities. Not only would such a finding require a general shift in America's cultural attitude, but it would require the *constitutionalization* of that shift. Removing the issue of positive rights provision from the discretion of the democratic branches would be a truly monumental and sustained change in a nation that defines itself as the embodiment of the philosophy of Lockean individualism and limited government. Given the institutional constraints placed on the judiciary, it will be unable to create such a movement in the current political and cultural climate—but it may be able to serve as the vanguard in the future if a significant shift in political culture begins to occur.

Significant changes are not unprecedented in American history, but they require substantial time and effort. I do not see it happening anytime in the near future. While Sunstein correctly asserts that the Eighteenth Century writings of John Locke do not mandate the course of the American future, the liberal tradition in America continues to exert a profound influence on individual thoughts and political discourse and, therefore, on the federal judiciary as well.

VI. CONCLUSION

The Supreme Court may one day find protection for a catalog of positive rights in the American Constitution. Nevertheless, it is unlikely to do so while the American culture remains, as at present, fundamentally opposed to the recognition of positive rights. Given the structure of American government and system of constitutional interpretation, positive rights will first have to find acceptance within America's liberal tradition before they enter into its Constitution.

Curt Bentley