Judicial Discretion in Constitutional Cases

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A damaging dichotomy is hindering the nation’s ability to talk intelligently and constructively about the constitutional work of the courts. The “legitimacy dichotomy” holds that, when adjudicating constitutional disputes, judges either obey the sovereign people’s determinate constitutional instructions or illegitimately trump the sovereign people’s value judgments with their own. The legitimacy dichotomy leaves little or no room for the possibility that an array of conflicting interpretations of the Constitution might be reasonably available to a judge; it leaves little or no room, in other words, for judicial discretion. This article begins by examining the legitimacy dichotomy from three different vantage points: evidence which suggests that rhetorical invocations of the legitimacy dichotomy mask more complex beliefs about the role of judicial discretion in constitutional adjudication, Justice Kagan’s critique of the now-famous umpire analogy during her confirmation hearing in June 2010, and the debate between Justice Stevens and Justice Scalia in McDonald v. City of Chicago about the extent to which judges may properly exercise their discretion when adjudicating questions of substantive due process. The article then suggests that law schools are inadvertently and regretfully encouraging at least some of their students to believe that judges’ discretion is almost entirely unconstrained and that judges often thus behave as democratically illegitimate actors. Finally, in an effort to provide law students and others with an understanding of constitutional adjudication and of constitutional change that is both descriptively accurate and democratically legitimate, the article draws connections between democratic constitutionalism and judicial discretion, and then offers metaphors for explaining that relationship.
“There is a tremendous temptation for journalists, for readers, and the average person who thinks about the Court, particularly today, to think these are a group of junior-league politicians, and what they are doing is deciding things on a political basis. That, I think, plays virtually no role in what we do at the Court.”

— Justice Stephen Breyer

INTRODUCTION

Judges frequently make discretionary judgments when adjudicating constitutional cases. When using the term “discretionary” in this way, I mean to refer to those judgments that courts must make when, due to the indeterminacy of the relevant legal texts, there are two or more ways in which a judge who conscientiously applies the interpretive conventions of the legal profession could resolve a given dispute. Whether they are identifying the contents and implications of the American people’s constitutional commitments or discerning the import of judicial precedent, judges faced with constitutional controversies often must choose from an array of conflicting—and conventionally permissible—interpretive options.

The claim that constitutional adjudication entails discretionary choices of this sort is not likely to be controversial among most teachers of constitutional law. But in popular political rhetoric, one often encounters fierce resistance to the proposition that much of the Constitution’s text is indeterminate and that judges thus can reasonably disagree about what the Constitution prohibits or permits. That resistance frequently

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1 As quoted in Jeffrey Toobin, *Without a Paddle*, THE NEW YORKER, Sept. 27, 2010, at 34, 41.
2 See infra Parts I.C, III.B, III.C.
3 Cf. STEVEN J. BURTON, JUDGING IN GOOD FAITH 7 n.11 (1992) (“‘Discretion means the power to choose between two or more courses of action each of which is thought of as permissible.’”) (quoting HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 162 (10th ed. 1958)); *id.* at 43 (“[A] judge has discretion . . . when the legal reasons support incompatible outcomes and no further legal reason requires one result.”); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) (“Sometimes we use ‘discretion’ in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment.”); Kent Greenawalt, DISCRETION AND JUDICIAL DECISION: THE ELUSIVE QUEST FOR THE FETTERS THAT BIND JUDGES, 75 COLUM. L. REV. 359, 368 (1975) (“[D]iscretion exists if there is more than one decision that will be considered proper by those to whom the decision-maker is responsible, and whatever external standards may be applicable either cannot be discovered by the decision-maker or do not yield clear answers to the questions that must be decided.”).
4 See infra Parts III.B, III.C.
manifests itself in the form of what I will call the *legitimacy dichotomy*—the notion that judges faced with constitutional disputes either behave in a democratically legitimate manner by dutifully obeying the sovereign people’s constitutional instructions or behave in a democratically illegitimate manner by usurping the role of the sovereign people and imposing their own personal preferences on the rest of the nation. The legitimacy dichotomy posits that properly behaving judges are apolitical instruments who simply apply the policy judgments previously made by the sovereign people; the American people have provided judges with clear instructions, the dichotomy claims, and it is judges’ job simply to follow them. The question one ought to ask about any judicial nominee is thus the question that Senator Orrin Hatch asked about Elena Kagan at the start of her June 2010 confirmation hearing for a seat on the Supreme Court: “Will the Constitution control her? Or will she try to control the Constitution?”

One encounters the legitimacy dichotomy each time the Supreme Court hands down a ruling on a publicly divisive constitutional question. Many of those who find the ruling objectionable will insist that the justices in the majority allowed their own personal preferences to trump the demands of the law, while those who are pleased with the ruling will claim that the Court simply followed the Constitution’s plain dictates. The dichotomy leaves little or no room for reasonable disagreements about what compliance with the Constitution should be deemed to entail. It leaves little or no room, in other words, for judicial discretion.

Consider, for example, senators’ commentary on *Citizens United v. Federal Election Commission* during Justice Kagan’s confirmation hearing. In that five-to-four ruling, the Court struck down federal legislation restricting corporations’ and unions’ ability to use money from their general treasuries to pay for certain forms of political speech within prescribed time periods prior to primary and general elections. During

within and without the legal community,” many people question the legitimacy of judicial discretion and judicial lawmaking “in any form”); Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 514 (1989) (“[O]riginalism suggests inevitability in the outcome of political controversy. . . . Originalism suggests that the past is determinative of the present, leaving no space for the art of political construction. Accordingly, originalism denies that the present decisionmaker has any role except as conveyor of the historical facts.”).

7 I am presupposing, of course, that American citizens regard a judicial ruling as legitimate, and thus as meriting their obedience, only if it traces its authority to the will of the sovereign people.

8 At the time this article went to press, the official transcript of Justice Kagan’s confirmation hearing still had not been released. The author thus relied upon the online transcripts provided by *The Washington Post*. The Post’s transcript for the first day of the hearing may be found at http://www.washingtonpost.com/wp-dyn/content/article/2010/07/01/AR2010070103025.html; the Post’s transcript for the second day of the hearing may be found at http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf; and the Post’s transcript for the third day of the hearing may be found at http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf. Unfortunately, pinpoint cites are not available for these online transcripts.

9 130 S. Ct. 876 (2010).

10 See *id.* at 887–88 (summarizing the challenged regulatory scheme); *id.* at 913 (declaring the law facially unconstitutional).
their opening statements at Justice Kagan’s hearing, Democratic senators insisted that the ruling was an illegitimate product of judicial partisanship. Senator Russ Feingold charged, for example, that the Court had “reach[ed] out to change the landscape of election law in a drastic and unnecessary way” and had “badly damaged its own integrity” by giving the public reason to believe that the justices decided the case based upon “an ideological or partisan political agenda.”

Senator Charles Schumer said that the ruling was “a step backward towards Lochner, backward to the era of conservative Supreme Court activism,” and that “the conservative bloc on the Court [was driven by] its zeal to bend the Constitution to an ideology.” Senator Ted Kaufman declared that the majority had ruled “based on personal policy preferences rather than law.”

Republican Senator Orrin Hatch, on the other hand, insisted that the Court’s ruling flowed naturally from the demands of the First Amendment. He argued that the Court had vindicated the free-speech rights of “family farmers, ranchers, mom-and-pop stores and other small businesses,” and that, save for one anomalous Supreme Court ruling in 1990, the decision was grounded in “at least twenty-five precedents dating back almost seventy-five years.”

My chief purpose in this article is to encourage readers to push back forcefully—both in the classroom and in the public square—against the legitimacy dichotomy’s characterization of the constitutional work that the American people rely upon their judges to perform. One of my foils will be the (in)famous umpire analogy that Chief Justice Roberts invoked during his confirmation hearing in 2005. When a judge crosses the line that divides applying law and making law, that analogy goes, he or she is like a baseball umpire who calls balls and strikes based upon which team he or she hopes will win, rather than upon the strike zone that baseball’s rulemakers have defined. On one level, the umpire analogy simply illustrates the widely accepted proposition that judges commit the cardinal sin of their profession when they decide cases based upon their own biases or personal policy preferences, rather than upon democratically legitimate sources of law. On another level, however, the umpire analogy both feeds upon and reinforces the legitimacy dichotomy by suggesting that judges inherit a determinate set of constitutional rules and that disagreements among judges in a given case are warranted

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11 Kagan Hearing, supra note 8.

12 Id.; see also Lochner v. New York, 198 U.S. 45, 53 (1905) (controversially holding in a 5-4 decision that a New York statute limiting how many hours a baker could work violated bakery owners’ and bakers’ Fourteenth Amendment right “to purchase or to sell labor”).

13 Kagan Hearing, supra note 8.

14 Id.; see also U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . ”).


16 See infra Part I.B.

17 See infra Parts I.B, I.C.
only if those judges have differing perceptions of the facts to which the Constitution’s rules must be applied.

My primary concern, however, is not the umpire analogy itself, but rather the dichotomous conception of constitutional adjudication that has enabled the umpire analogy to find a warm welcome in American political discourse. The nation has not been well served by the legitimacy dichotomy’s insistence that judges either apply the clearly expressed will of the sovereign people or commit the cardinal sin of judging by deciding cases based upon their own personal preferences. We thus must redouble our efforts to foster understandings of constitutional adjudication and constitutional change that honor the public’s instinctive distinction between law and politics but that do not apologize for the relationship between the words judge and judgment.

I begin in Part I by providing three preliminary vantage points from which to begin to question the legitimacy dichotomy and its denial of judicial discretion. In Part II, I urge those who teach and study in law school classrooms to explicitly reject the legitimacy dichotomy and to construct a more accurate conception of the constitutional work of the courts. In Part III, I provide a framework for rejecting the legitimacy dichotomy by arguing that there are important ways in which our system of democratic constitutionalism relies upon the exercise of judicial discretion. I conclude with brief remarks about the future of judicial confirmation proceedings.

I. THREE WINDOWS ON THE LEGITIMACY DICHOTOMY

In this Part, I provide three initial vantage points from which to question the legitimacy dichotomy’s insistence that judicial discretion should play little or no role in constitutional adjudication. I argue that the frequent appearance of the legitimacy dichotomy in political rhetoric masks more complex popular beliefs about the role of judicial discretion in resolving constitutional disputes, I examine Justice Kagan’s critique of the umpire analogy during her June 2010 confirmation hearing, and I examine the recent debate between Justice Stevens and Justice Scalia about the degree to which judges may exercise their discretion when adjudicating questions of substantive due process.

A. The Rhetoric and the Belief

Given the widespread appeal of the legitimacy dichotomy’s way of describing judges’ proper role in constitutional adjudication, it might seem that much of the

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18 Numerous other authors have offered useful critiques of the umpire analogy. See Michael P. Allen, A Limited Defense of (at Least Some of) the Umpire Analogy, 32 SEATTLE U. L. REV. 525, 526 n.4 (2009) (gathering numerous critiques of the analogy). Ronald Dworkin found fault with the analogy nearly forty years before Chief Justice Roberts introduced it to the American public. See Ronald M. Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14, 25–27 (1967) (identifying ways in which legal principles are unlike the rules of baseball).

19 See Theodore A. McKee, Judges as Umpires, 35 HOFSTRA L. REV. 1709, 1710 (2007) (stating that “the [umpire] metaphor has become accepted as a kind of shorthand for judicial ‘best practices’”); Neil S. Siegel, Umpires at Bat: On Integration and Legitimation, 24 CONST. COMMENT. 701, 703 (2007) (“Much of the public may think—or want to think—that judges can and should decide even the most momentous constitutional cases according to ‘the law.’”).
American public leaves judges no room in which to make discretionary judgments when resolving constitutional disputes. Yet when one more closely examines popular perceptions of how judges adjudicate constitutional controversies, a more complex picture emerges. Despite all of the public rhetoric suggesting that judicial discretion plays no role in properly adjudicating constitutional disputes, the evidence suggests there is a pervasive belief that constitutional rulings are sometimes permissibly driven by little more than judges’ subjective value judgments. Briefly consider, for example, the logic of popular rhetoric, anecdotal evidence drawn from my own teaching experience, and arguments recently made by the dean of the Yale Law School.

Many lay citizens who have never studied the legal sources on which they ostensibly believe judges should rely do not hesitate to allege that judges have grounded particular constitutional rulings in their own preferences rather than in law. There is a telling irony here. If the critic has not examined the sources on which he or she purports to believe judges should depend, then the very act of condemning a judge’s handling of a constitutional question presupposes that the invocation of those sources is ultimately not much more than window-dressing.

20 After all, if the critic can confidently find his or her way to constitutional conclusions without the aid of legal niceties, then what dispositive purpose does the critic believe those legal niceties actually serve? Indeed, it seems on this view that the judge’s job consists simply of vindicating what the critic believes in his or her gut to be true—and if the judge says that the critic’s convictions have no basis in the Constitution, then there must be something wrong with the way the judge is doing his or her job. The judge who fails to return from constitutional battle with victory in hand is to be condemned not strictly for failing to follow the law, but (in what our critic’s behavior suggests amounts to the same thing) for not sharing the critic’s moral and political convictions. For our critic, a judge’s moral and political sensibilities apparently play a much larger role in constitutional adjudication than the legitimacy dichotomy would acknowledge.

That same outlook frequently manifests itself among my second- and third-year law students. Each fall, for example, I teach a seminar in which students read the briefs filed in a handful of cases pending before the U.S. Supreme Court, debate the cases’ merits, cast votes, and then write majority opinions, concurrences, and dissents. When the time comes for students to draft those opinions, there always are some who, having spent additional time in the library, find themselves struggling to reconcile the votes they initially cast with what they now perceive to be the thrust of the law. There always are others, however, whose first drafts are indistinguishable from closed-book essays on the relevant issues—pages go by with little evidence of legal research. When I ask them to...

20 See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 12 (1959) (“The man who simply lets his judgment [about a ruling’s merits] turn on the immediate result may not . . . realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law.”); cf. Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518, 556 (1986) (arguing that “the popular conception of law is internally contradictory, embracing the notions that (a) ‘the law is the law,’ a determinate result-producing technique, and (b) the law is intrinsically an affair of justice, so that it is always ‘for the best . . . ’”).
explain the dearth of citations, they tell me that these were just first drafts and that they intend to locate supporting sources once they have worked out precisely what they want to say. These students are not acting in bad faith. They are doing what they believe judges actually do. After one or two years of law school, they have come to perceive (or have not been shaken loose from their preexisting perception) that, even when encountering previously unfamiliar legal questions, Supreme Court justices often choose the outcomes they prefer to reach before having any encounter with what one conventionally would call “law,” and then dress up their written opinions with an array of legal citations in the closing stages of the drafting process. Indeed, one student told me that she had not intended even to go that far—she feared that adding too many citations would make her opinion “look like a brief.” These students, it would seem, believe that litigators often cite what they describe as “authorities” in order to try to shape the judge’s preferences—but at the end of the day, the judge’s preferences are what centrally matter.

These students’ working methods are not far off the mark, if arguments recently made by the dean of the Yale Law School and one of his colleagues are on target. In their contribution to a 2009 collection of essays, Robert Post and Reva Siegel contend that progressives need to learn an important lesson from conservatives’ successful deployment of originalism as a theory of constitutional interpretation. Originalism has been powerfully influential since its emergence in the 1970s, Post and Siegel argue, not because its rhetorical separation of law and politics is grounded in reality, but precisely because it is not. They write:

> What made originalism so compelling was the way its claims about interpretive method conveyed a motivating constitutional vision and the authority to assert that vision as law. The association of the originalist interpretive method with a particular substantive vision was not an accidental but an essential feature of its popular appeal. . . . The genius of originalism is that it gave conservatives confidence to claim that their ideals were law . . . .

What progressives need to do, Post and Siegel insist, is identify their own core commitments, and then “select from among the traditional modalities of interpretation those which are the best suited to give [those commitments] authoritative legal expression.” On that theory, my students are not mistaken (or at least they are not always mistaken) when they begin by independently identifying the outcome they wish to reach. What they must do next, Post and Siegel say, is “identify the modes of argument

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22 See id. at 30 (“[T]he power of originalism in fact lies [not in its objective separation of law and politics, but rather] in the way that it aligns constitutional vision and constitutional law.”).

23 Id. at 30–31.

24 Id. at 31.
that give [their desired outcome] its most powerful legal form.”

The desired outcome comes first; the encounter with the “law” comes second.

One is left, therefore, with a puzzle. Popular constitutional discourse is filled with rhetoric suggesting that properly behaving judges place their discretion wholly to the side when adjudicating constitutional disputes and simply apply the policy judgments that the sovereign people have enshrined in the Constitution. Yet it seems that many believe (even if only tacitly) that judges’ discretion sometimes legitimately plays a crucial role in securing constitutional victories. That pairing of rhetoric and belief gives our public constitutional debates a surreal quality. Truths about the role of judges’ value-laden judgments in constitutional adjudication are perpetually lurking nearby, but many have concluded that it is politically advantageous to ignore them. It is tactically wisest to try to lay sole claim to the mantle of “law,” the political calculus apparently goes, and to charge one’s opponents with ignoring the Constitution’s demands and securing their political victories through democratically illegitimate judicial activism.

That strategy might carry political benefits, but it comes at the cost of blunting the American people’s ability to engage in constructive constitutional dialogue. That cost is painfully apparent during Senate confirmation hearings for Supreme Court nominees, when senators on both sides of the aisle spend more time accusing their political opponents or the nominee of favoring unconstitutional judicial activism than asking questions calculated to illuminate what kind of justice the nominee will be.

B. Supreme Court Confirmation Hearings

When Republican Senator Jeff Sessions delivered his opening remarks on the first day of Chief Justice Roberts’ confirmation hearing in September 2005, he likened judges to umpires.

Our judicial system, he said, demands that a judge be “a fair and unbiased umpire, one who calls the game according to the existing rules. . . . The people rightly demand judges who follow, not make law.” Senator Sessions was the first to draw the analogy that day, but Roberts himself had invoked the umpire imagery prior to the hearing during a conversation with Republican Senator Sam Brownback. Senator Brownback recounted that conversation during his opening comments, saying that Roberts had told him that “it is a bad thing when the umpire is the most watched person on the field.” Senator Brownback declared that he agreed. “The umpire should call the

25 Id. at 33.

26 Cf. DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW 7 (2010) (“If a politician wants to attack another politician’s policies in a way that seems nonpartisan, the claim that the policy is unconstitutional is the best bet.”).


28 Id.

29 Id. at 46 (statement of Sen. Sam Brownback, Member, S. Comm. on the Judiciary).
ball fair or foul—if it is in or it is out,” he said, “but not get actively involved as a player on the field.”

When the time came for him to make his own opening statement, Roberts drew the analogy again:

Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

I have no agenda . . . . And I will remember that it’s my job to call balls and strikes and not to pitch or bat.

During an exchange with a senator the following morning, Roberts conceded “that in some cases the question of whether you’re interpreting the law or making the law” is a difficult one. But, he said, a judge has “an obligation to draw the line.”

Two Democrats on the committee resisted the analogy. Then-Senator Joe Biden said that he thought the comparison was “not very apt,” particularly with respect to cases that involve open-ended provisions of the Constitution. In those instances, Biden said, judges “get to determine the strike zone” because, unlike umpires, they must reach their conclusions by drawing inferences. Senator Herbert Kohl pointed out that judges bring their own personal experiences to the job, then asked Roberts whether he was suggesting “that judges merely operate as automatons.” Roberts agreed that judges “all bring [their] life experiences to the bench” and that reasonable people can sometimes disagree about how best to resolve difficult constitutional disputes. But he insisted that judges are obliged to strive for the ideal of making their rulings based upon “the rule of law, not their own preferences.”

During Justice Alito’s confirmation hearing four months later, Republicans and Democrats staked out similar positions. Republican Senators Orrin Hatch and Charles

30 Id.
31 Id. at 55–56 (statement of John G. Roberts, Jr., Nominee); see also Siegel, supra note 19, at 702 (“Politically, Roberts’ use of the umpire analogy was an instant success . . . .”).
32 Roberts Hearing, supra note 27, at 162 (making the statement during an exchange with Sen. Hatch).
33 Id.
34 Id. at 185 (remarks of Sen. Joseph R. Biden, Jr., Member, S. Comm. on the Judiciary).
35 Id. at 185–86.
36 Id. at 204–05 (remarks of Sen. Herbert Kohl, Member, S. Comm. on the Judiciary).
37 Id. at 205 (remarks of John G. Roberts, Jr., Nominee).
38 Id. at 206.
39 Id. at 205.
Grassley both used their opening statements to remind the public of Chief Justice
Roberts’ image of the judge as an unbiased umpire.\footnote{See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 109th Cong. 10 (2006) (statement of Sen. Orrin G. Hatch, Member, S. Comm. on the Judiciary) (“We do not hire umpires by showing them the roster for the upcoming season and demanding to know which teams they will favor . . . .”); id. at 14 (statement of Sen. Charles E. Grassley, Member, S. Comm. on the Judiciary) (“Like Chief Justice Roberts, it appears that Judge Alito tries to act like an umpire, calling the balls and strikes rather than advocating a particular outcome.”).} Senator Kohl renewed his
opposition to the analogy, arguing that, “[j]ust as no two umpires call the same game
exactly,” the Constitution is frequently susceptible to multiple interpretations and will be
viewed differently by judges with different philosophies.\footnote{Id. at 378 (remarks of Sen. Herbert Kohl, Member, S. Comm. on the Judiciary).} Like Chief Justice Roberts
before him, Alito agreed that difficult cases sometimes arise, but said that “what the
judge has to do is make sure that the judge is being true to the principle that is expressed
in the Constitution and not to the judge’s principle, not to some idea that the judge has.”\footnote{Id. at 379 (remarks of Samuel A. Alito, Jr., Nominee).}

When the time came for Justice Sotomayor’s confirmation hearing in July 2009,
many senators arrived with the umpire analogy squarely in mind: six of them remarked
on the analogy during their opening statements. Senator Sessions argued that President
Obama had ignored the umpire ideal by choosing a nominee who would bring “empathy”
to the bench.\footnote{See Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 111th Cong. 6–7 (2009) [hereinafter Sotomayor Hearing] (statement of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary); see also James Oliphant, From Bronx to the Brink, CHI. TRIB., May 27, 2009, at C15 (noting President Obama’s stated desire to select a nominee with “empathy”).} Democrats, meanwhile, plainly had determined that they needed to come
to grips with the analogy’s popular appeal. Senator Charles Schumer embraced the
analogy long enough to say that he believed Sotomayor’s judicial record met the standard
better than Chief Justice Roberts’ record.\footnote{Sotomayor Hearing, supra note 43, at 25 (statement of Sen. Charles Schumer, Member, S. Comm. on the Judiciary) (“[A]ny objective review of Judge Sotomayor’s record on the Second Circuit leaves no doubt that she has simply called balls and strikes for seventeen years, far more closely than Chief Justice Roberts has during his four years on the Supreme Court.”).} Four of Schumer’s Democratic colleagues
rejected the analogy out of hand. Senator Dianne Feinstein argued that justices make
decisions based upon “their own experiences and philosophies,”\footnote{Id. at 16 (statement of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary) (arguing that Chief Justice Roberts’ own performance on the Court illustrated the point).} and Senator Russ
Feingold agreed.\footnote{See id. at 19–20 (statement of Sen. Russell Feingold, Member, S. Comm. on the Judiciary) (holding up several celebrated precedents as examples).} Senator Richard Durbin said that the analogy could not be reconciled
with the many 5–4 rulings that the Court had handed down during the prior Term.\footnote{See id. at 41–42 (statement of Sen. Richard J. Durbin, Member, S. Comm. on the Judiciary).} Senator Sheldon Whitehouse argued that nine justices would not be needed if
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Constitutional adjudication were merely a mechanical exercise, and that Chief Justice Roberts himself had shown a strong disposition toward ruling in favor of prosecutors, corporations, and the Executive Branch.\(^48\) As for the nominee, Sotomayor appeared disinclined to accept Senator Kohl’s invitation to deconstruct the analogy,\(^49\) saying simply that “analogies are always imperfect” and that she believed judges must be impartial.\(^50\)

Justice Kagan was the first Supreme Court nominee to offer a detailed critique of the umpire analogy. Her confirmation hearing began in familiar fashion, with several senators either invoking or rejecting the comparison.\(^51\) Although Kagan herself would not explicitly reference the judge-umpire comparison until the hearing’s third day,\(^52\) she took several opportunities during the first round of questioning to defuse that comparison by severing its implied linkage between judicial disagreement and democratic illegitimacy. Those efforts began when Republican Senator Jon Kyl asked Kagan whether she agreed with the notion that, in some instances, constitutional rulings may permissibly be determined “by what’s in the judge’s heart.”\(^53\) Kagan responded by introducing a phrase that she would repeat several times: “Senator Kyl,” she said, “I think it’s law all the way down.”\(^54\) There are cases in which the Constitution’s requirements are unclear, she observed, and in those instances

> [j]udging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court. A lot of them are very difficult. And . . . people can disagree about how the constitutional text or precedent, how they apply to a case. But it’s law all the way down, regardless.\(^55\)

Kagan returned to the “law all the way down” language twice more that day. In a colloquy with Republican Senator John Cornyn, she asserted:

\(^48\) See id. at 36 (statement of Sen. Sheldon Whitehouse, Member, S. Comm. on the Judiciary).

\(^49\) See id. at 78 (remarks of Sen. Herbert Kohl, Member, S. Comm. on the Judiciary) (“We have heard much recently about Chief Justice Roberts’ view that judges are like umpires simply calling balls and strikes. So, finally, would you like to take the opportunity to give us your view about this sort of analogy?”).

\(^50\) Id. at 79 (remarks of Sonia Sotomayor, Nominee).

\(^51\) See, e.g., Kagan Hearing, supra note 8 (remarks of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary) (charging that Kagan would not be a “neutral umpire”); id. at [citation forthcoming later this fall] (remarks of Sen. Herbert Kohl, Member, S. Comm. on the Judiciary) (contending that constitutional adjudication “is not merely a mechanical application of the law” akin to “calling balls and strikes”).

\(^52\) See infra notes 60–65 and accompanying text (recounting Kagan’s colloquy with Senator Klobuchar).

\(^53\) Kagan Hearing, supra note 8 (remarks of Sen. Jon Kyl, Member, S. Comm. on the Judiciary) (attributing that notion to President Obama).

\(^54\) Id. (remarks of Elena Kagan, Nominee) (emphasis added).

\(^55\) Id.
I think that judges are constrained by the law. . . . Sometimes the text speaks clearly and then they’re constrained by the text alone. Where the text doesn’t speak clearly, they look to other sources of law. They look to original intent, they look to continuing history and traditions. They look to precedent and the principles embodied in those precedent[s]. But they’re always constrained by the law. It’s law all the way down.\textsuperscript{56}

She made the same point in response to questions posed by Senator Durbin. Judges must always ground their rulings in legal sources, she said; they should never “import their own personal preferences . . . or their moral values.”\textsuperscript{57} Yet judges often can reasonably disagree about the direction in which those legal sources point.\textsuperscript{58} So long as judges in those instances rely wholly upon legal, rather than personal, sources of constitutional premises, Kagan argued, their rulings will be “law all the way down,” no matter what they precisely hold.\textsuperscript{59}

Kagan closed the circle of her argument the following day, when Democratic Senator Amy Klobuchar asked her whether she believed that “the balls and strikes analogy is a useful one.”\textsuperscript{60} Kagan replied that the analogy helpfully illustrates the need for judges not to be biased in favor of one litigant rather than another and the need for judges to play a limited role in the nation’s governance.\textsuperscript{61} Yet the analogy wrongly suggests, she argued, “that law is a kind of robotic enterprise” and “that there is no judgment in the process.”\textsuperscript{62} Especially in the kinds of hotly contested cases that the Supreme Court adjudicates, she said, judges must “exercise judgment.”\textsuperscript{63} Judges might disagree about how such disputes should be resolved, but that does not mean that any of those judges are behaving illegitimately or that their ultimate rulings are not grounded in law.\textsuperscript{64} She explained:

They’re not easy calls. That doesn’t mean that they’re doing anything other than applying law. I said yesterday, on a couple of different occasions, it’s law all the way down. You know, you’re looking at the text. You’re looking at structure. You’re looking at history. You’re looking at precedent. You’re looking at law and only at law, not your political preferences, not your personal preferences. But we do know that not every case is decided 9-0.

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} See id. (reiterating that one thus cannot “say that law is robotic”).
\textsuperscript{59} Id.
\textsuperscript{60} Id. (remarks of Sen. Amy Klobuchar, Member, S. Comm. on the Judiciary).
\textsuperscript{61} See id. (remarks of Elena Kagan, Nominee).
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} See id.
and that’s not because anybody’s acting in bad faith. It’s because those legal judgments are ones in which reasonable people can reasonably disagree sometimes.65

Several observations about these encounters between the Senate Judiciary Committee and the Court’s four newest justices are important for our purposes here. Apart from Justice Kagan’s effort to discredit the linkage between judicial disagreement and democratic illegitimacy, each of those four hearings illustrated the limited value of a constitutional dialogue that is beset by the legitimacy dichotomy. Even before the umpire analogy helped bring that dichotomy into such explicit favor, confirmation hearings already were notably lacking in illuminating content. Ever since Judge Robert Bork’s candor helped seal the demise of his Supreme Court nomination in 1987,66 judicial nominees have invoked the standard that Justice Ruth Bader Ginsburg described at the outset of her own confirmation hearing in 1993—namely, refusing to provide “hints” or “forecasts” about likely votes on specific issues that could come before the Court.67 Wisely or unwisely, that standard alone helps to strip judicial confirmation hearings of useful substance.68 Because Justice Kagan herself ultimately embraced the Ginsburg standard, notwithstanding her earlier criticism of it,69 her confirmation hearing was not significantly more substantive than the hearings held for her recent predecessors. Apart from asking Kagan to explain some of her own past actions and statements,70 senators used the hearing primarily as an opportunity to condemn or defend recent Supreme Court rulings,71 to elicit pledges of respect for precedent and for Congress,72 and to ask Kagan

65 Id.


68 Kagan, supra note 66, at 920 (arguing that “the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public” when nominees refuse to discuss their views of specific constitutional issues).

69 Compare id., with Kagan Hearing, supra note 8 (remarks of Elena Kagan, Nominee) (“I did have the balance a little bit off, and . . . I skewed it too much toward saying that answering is appropriate even when it would, you know, provide some kind of hints.”).

70 See, e.g., Kagan Hearing, supra note 8 (remarks of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary) (asking Kagan to explain her treatment of military recruiters at the Harvard Law School).

71 See, e.g., supra notes 9–13 and accompanying text (noting Democrats’ condemnation of Citizens United).
questions aimed at supporting or discrediting the notion that her personal policy preferences would dictate her rulings.\textsuperscript{73} One could hardly be surprised when senators on both sides of the aisle lamented the hearing’s limited value.\textsuperscript{74}

The legitimacy dichotomy makes the Senate’s confirmation hearings even less substantively valuable. Rather than encouraging one to acknowledge that there frequently is room for reasonable disagreement and then explore what might make one line of argument better than another, the legitimacy dichotomy and the umpire analogy are intrinsically polarizing.\textsuperscript{75} They prompt one to see (or at least to portray) one’s political opponents not as mistaken but nevertheless honorably behaving individuals with whom one can look forward to further intellectual engagement, but rather as menaces bent on destroying the nation’s democratic system.\textsuperscript{76} That mindset hardly sets the stage for useful exchanges between senators and nominees. Moreover, once the legitimacy

\textsuperscript{72} See, e.g., \textit{Kagan Hearing}, supra note 8 (remarks of Sen. Charles Grassley, Member, S. Comm. on the Judiciary) (asking Kagan whether she would respect the Court’s ruling in \textit{Heller}).

\textsuperscript{73} See, e.g., id. (remarks of Sen. Jon Kyl, Member, S. Comm. on the Judiciary) (asking Kagan whether she would be biased in favor of “disadvantaged” litigants).

\textsuperscript{74} See id. (remarks of Sen. Herbert Kohl, Member, S. Comm. on the Judiciary) (“We hear the overused platitudes from every nominee that he or she will apply the facts to the law and faithfully follow the Constitution. . . . [W]e . . . have a right to understand your judicial philosophy and what you think about fundamental issues that will come before the [C]ourt.”); id. (remarks of Sen. Herbert Kohl, Member, S. Comm. on the Judiciary) (“[Kagan’s] opaque and limited answers to questions about who she is and her views on important issues left us with little insight into what informs her unique legal judgment and how it will impact those close cases.”); id. (remarks of Sen. Tom Coburn, Member, S. Comm. on the Judiciary) (“[T]his is my fourth Supreme Court hearing. It’s obvious that what we’ve heard in the previous hearings are [sic] not predictive of the decisions of the nominees that came before the hearing. . . . [W]hy should we have this dance if we’re not going to find out real answers about real issues about what you really believe?”). Consider the reflections of Senator Arlen Specter during Kagan’s third day of testimony before the committee:

\begin{quote}
Well, Solicitor General Kagan, I think the commentaries in the media are accurate. We started off with [the] standard that you articulated at the University of Chicago Law School about substantive discussions. And they say we haven’t had them here, and I’m inclined to agree with them. The question is where we go from here. You have been following the pattern which has been in vogue since—since Bork. . . . But I think we are searching for a way how senators can succeed in getting substantive answers, as you advocated in the Chicago Law Review, short of voting no.
\end{quote}

\textit{Id.}

\textsuperscript{75} Cf. \textit{id.} (remarks of Sen. Sheldon Whitehouse, Member, S. Comm. on the Judiciary) (“If [judging] were simple, every decision would be 9 to 0. Some of our colleagues would have us believe that it should be that easy. The right answer, it appears, is what they think it is, and any other conclusion must be liberal judicial activism.”).

\textsuperscript{76} Cf. \textit{id.} (remarks of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary) (“There are two views of the courts. One is the judge as a neutral umpire. . . . The other view is . . . that a judge should be activist. . . . I think that we have a glorious legal system. The greatest threat to it, the greatest threat to the independence of the federal judiciary . . . is judges who become political and see they have a right to advance a political agenda.”).
dichotomy takes root in one’s mind, one is left demanding of nominees not much more than mere pledges to follow the law (prompting one then to assess the pledge-taker’s sincerity) because one’s conception of adjudication is so simplistic that one need not demand anything more sophisticated than that.

Democratic senators’ repeated criticism of the umpire analogy might seem to be a step in the right direction, but it turns out that those same senators cannot resist invoking the very dichotomy that makes the umpire analogy so problematic. By implicitly invoking the legitimacy dichotomy—as they frequently did during Justice Kagan’s hearing when condemning rulings of the Roberts Court—Democratic senators undercut their claim that the umpire analogy fundamentally mischaracterizes what it is that judges do when they confront difficult constitutional cases. Of course, one who rejects the umpire analogy need not always refrain from charging the Court with privileging their own personal preferences and thereby behaving in a democratically illegitimate manner. To say that the Constitution often permits reasonable disagreement is not to say that all disagreements are reasonable. But one byproduct of relentlessly charging a group of justices with behaving illegitimately is that one thereby helps to entrench even more deeply the notion that judges either follow the plain will of the sovereign people or advance their own personal preferences. So long as senators on the left and the right continue to invoke the legitimacy dichotomy, one should expect to see a paucity of illuminating content in confirmation hearings and a refusal among senators to concede even the mere reasonableness of constitutional perspectives other than their own.

Seen in that light, the recent rise in divisive Supreme Court confirmation votes is not surprising. Setting aside the Senate’s closely divided vote to confirm Justice Clarence Thomas in 1991—a nomination that was anomalously plagued by allegations of sexual harassment—none of President George H.W. Bush’s or President Bill Clinton’s Supreme Court nominees attracted more than nine negative votes: Justices David Souter and Stephen Breyer each attracted that slight degree of opposition in 1990 and 1994, respectively, and Justice Ruth Bader Ginsburg drew only three negative votes in 1993. In fact, between 1969 and 2005, the only successful Supreme Court nominee (besides Justice Thomas) to attract significant Senate opposition was William Rehnquist,

77 See supra notes 34–36, 41, 45–48, 51 and accompanying text (noting Democratic criticism of the analogy).
78 See, e.g., supra notes 11–13 and accompanying text (noting Democrats’ condemnation of Citizens United).
81 See Supreme Court Nominations, supra note 79.
who received twenty-six negative votes at the time of his initial appointment to the Court and thirty-three negative votes at the time of his elevation to Chief Justice. Chief Justice Warren Burger drew only three negative votes, Justice Lewis Powell drew only one, and Justices Harry Blackmun, John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, and Anthony Kennedy did not draw any negative votes at all. Beginning with Chief Justice Roberts and the umpire analogy’s rise to prominence, however, the Senate’s votes have been much more sharply divided, with Chief Justice Roberts drawing twenty-two negative votes, Justice Alito drawing forty-two, Justice Sotomayor drawing thirty-one, and Justice Kagan drawing thirty-seven. Of course, the increased politicization of Supreme Court appointments undoubtedly has been shaped by numerous influences. Yet the correlation between these changes in senators’ voting practices and the explicit ascendance of the legitimacy dichotomy is striking. The more the legitimacy dichotomy permeates our political consciousness, the less open to good-faith disagreement one can expect our elected leaders to be.

The pernicious effects of the legitimacy dichotomy and the umpire analogy certainly were not lost on Justice Kagan; indeed, she arrived at her confirmation hearing seeming determined to push back strongly against them. She rejected both of the dichotomy’s branches, insisting that judges frequently must make discretionary judgments in constitutional cases and that judges’ disagreements about those discretionary matters are permissible, so long as the judges are drawing their inferences and conclusions from appropriate legal sources rather than from their own personal preferences. Justice Kagan made it clear that she believes judges often do their constitutional work in a middle realm that the legitimacy dichotomy simply fails to acknowledge—a realm in which judges who sharply disagree with one another can

82 See id. During that same era, the Senate formally rejected only three Supreme Court nominees: Clement Haynsworth, Jr. in 1969, G. Harrold Carlswell in 1970, and Robert Bork in 1987. See id. Harriet Miers, whom President George W. Bush nominated in 2005, withdrew before the Senate took any official action on her nomination. See id. I have chosen 1969 as my starting point simply to underscore how, until recently, Senate opposition usually registered only in the single digits. In 1967, Justice Thurgood Marshall received eleven negative votes. See id. Prior to Justice Marshall, many (but not all) nominees were brought to the Senate floor for a voice vote, making Senate opposition more difficult to calibrate. See id. For those nominees for whom precise votes were counted, one has to go back all the way to the New Deal to find Senate opposition that approached the level that one routinely finds today. See id.

83 See id.

84 See id.

85 See, e.g., BRIAN Z. TAMANAHÀ, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 174 (2006) (arguing that the increased politicization of judicial appointments “reflects a marked worsening, deepening, [and] coarsening, owing to the spread and entrenchment of instrumental views of law in a context of sharp disagreement over the social good”).

86 See supra note 7 and accompanying text (defining the legitimacy dichotomy).

87 See supra notes 54–65 and accompanying text (describing Kagan’s arguments).
nevertheless each credibly claim that their differing stacks of premises and conclusions are “law all the way down.”

Justice Kagan’s use of that particular phrase is susceptible to at least two different readings. First, it reminds one of the various iterations of the classic anecdote involving an individual’s benighted beliefs about the role of (yes) turtles in sustaining our cosmology. Stephen Hawking, for example, began *A Brief History of Time* in this way:

A well-known scientist . . . once gave a public lecture on astronomy. He described how the earth orbits around the sun and how the sun, in turn, orbits around the center of a vast collection of stars called our galaxy. At the end of the lecture, a little old lady at the back of the room got up and said: “What you have told us is rubbish. The world is really a flat plate supported on the back of a giant tortoise.” The scientist gave a superior smile before replying, “What is the tortoise standing on?” “You’re very clever, young man, very clever,” said the old lady. “But it’s turtles all the way down!”

Several years ago, Justice Scalia used a variation of the same anecdote to condemn the reasoning of one of his colleagues. The imagery is used to characterize an argument as impenetrably naïve, beset by fatal circularity or problems of infinite regress.

That hardly appears to be the mantle that Justice Kagan was trying to claim for her own understanding of legal reasoning. Her remarks plainly were in the nature of a genuine attempt to explain (and indeed sell) her views, rather than in the nature of a candid confession. It surely is better to take her “law all the way down” language quite literally. It suggests images of structures, foundations, or drill cores—it invites one to examine each layer of material on which a judge’s conclusion rests, looking to ensure that the judge’s own moral or political preferences were not slipped in as a premise somewhere along the way. Justice Kagan used the imagery as part of her effort to cast a favorable light on the fact that judges frequently disagree about the law’s requirements. Unlike the umpire analogy, her imagery does not demand that the law, properly applied, always yield only one right answer to any given constitutional question; it leaves judges with significant room to construct conflicting lines of argument and still honorably claim that they each are doing “law,” devoid of reliance upon personal, non-legal premises.

Meanwhile, as Justice Kagan was defending the notion that judges who make conflicting interpretive choices can nevertheless each be doing “law,” events across the street at the Supreme Court that same week were providing a case study in just how contentious—yet inescapable—questions regarding judicial discretion in constitutional cases can be.

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88 Cf. Burton, supra note 3, at 93 (“When judges weigh legal reasons in good faith . . . they are constrained by the law even when they have discretion.”).


C. The Stevens-Scalia Debate

On the final day of its 2009-2010 Term, the Supreme Court returned to the issue of an individual’s right to possess a handgun.91 Two years earlier, in District of Columbia v. Heller,92 the Court had struck down a District of Columbia law that barred individuals from possessing handguns in their homes for any purpose.93 With Justice Scalia writing for a five-justice majority,94 the Court held that, under the Second Amendment,95 an individual has a right to possess a handgun in his or her home for the purpose of self-defense.96 Last Term, in McDonald v. City of Chicago,97 the Court was asked to determine whether that right could be invoked against state and local authorities, or whether it applied only against laws enacted by federal entities. Led by Justice Alito, the Court found that the right recognized in Heller is “fundamental to our scheme of ordered liberty”98 and is “deeply rooted in this Nation’s history and tradition.”99 For Justice Alito, Chief Justice Roberts, Justice Scalia, and Justice Kennedy, this meant that the right to keep a handgun in one’s home is incorporated by the Due Process Clause of the Fourteenth Amendment100 and that states and locales are thus obliged to honor it.101 Justice Thomas concurred in part and concurred in the judgment.102

91 See McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).
93 See id. at 2788 (describing the District of Columbia’s regulatory scheme); id. at 2821–22 (concluding that the District of Columbia’s handgun ban was unconstitutional).
94 Justice Scalia was joined by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Alito.
95 See U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).
96 See Heller, 128 S. Ct. at 2817–18 (finding that, “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights,” a law that flatly bars all individuals from possessing handguns in their homes for the purpose of self-defense violates the Second Amendment).
97 130 S. Ct. 3020 (2010).
98 Id. at 3036 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)) (emphasis omitted).
100 See id. at 3050 (plurality opinion) (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller.”) (emphasis omitted); see also id. at 3031–36 (summarizing the Court’s incorporation framework). See generally U.S. CONST. amend. XIV (“No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”).
101 See McDonald, 130 S. Ct. at 3050 (plurality opinion) (concluding that the Second Amendment “applies equally to the Federal Government and the States”).
102 Justice Thomas agreed that the right recognized in Heller is fundamental, but chose not to rely upon the Due Process Clause or the Court’s incorporation jurisprudence. See id. at 3058-59 (Thomas, J., concurring in part and concurring in the judgment); see also id. at 3062 (acknowledging the Court’s incorporation jurisprudence, but finding “that neither [the] text [of the Due Process Clause] nor its history
Justice Breyer, Justice Ginsburg, and Justice Sotomayor filed a dissenting opinion, arguing that, “taking Heller as a given, the Fourteenth Amendment does not incorporate the Second Amendment right to keep and bear arms for purposes of private self-defense.”

Justice Stevens did not join that opinion. He dissented on other grounds—and, in the process, he closed his thirty-four-year tenure on the Court by engaging Justice Scalia in an extraordinary debate about the degree to which constitutional adjudication requires judges to make subjective, value-laden judgments.

In Justice Stevens’ view, McDonald should not have been treated as an incorporation case. He believed that the Court correctly declined the invitation to incorporate the Second Amendment more than a century ago and that the question of states’ and locales’ ability to regulate handgun possession should turn entirely on the freestanding meaning of the term “liberty” in the Due Process Clause. To conduct the necessary substantive due process analysis, Justice Stevens wrote, a judge must make a “reasoned judgment” about whether the right to keep a handgun in one’s home for purposes of self-defense is “vital to ordered liberty” and about whether judicial enforcement of that right would “materially contribute to ‘a fair and enlightened system of justice.’” The doctrine of substantive due process does not give judges “a license for unbridled judicial lawmaking,” he argued, but it does require them to make “practical and normative judgment[s]” and to explain the reasons on which those judgments are based. When engaging in those deliberations, he said, judges should consider a wide range of factors, including “[t]extual commitments laid down elsewhere in the Constitution, judicial precedent, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the ‘traditions and conscience of our people.’”

suggests that it protects the many substantive rights this Court’s cases now claim it does”). Rather, he concluded that “the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.” See id. at 3059 (emphasis omitted). Justice Thomas acknowledged the Court’s longstanding practice of reading that clause much more narrowly, but rejected that precedent on originalist grounds. See id. at 3084–88. See generally U.S. Const. amend. XIV (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”).

103 See McDonald, 130 S. Ct. at 3122–23 (Breyer, J., dissenting) (emphasis omitted).

104 See id. at 3088 & n.1 (Stevens, J., dissenting) (citing Miller v. Texas, 153 U.S. 535, 538 (1894); Presser v. Illinois, 116 U.S. 252, 265 (1886); and United States v. Cruikshank, 92 U.S. 542, 553 (1876)).

105 See id. at 3090-92 (“This is a substantive due process case.”). Justice Stevens believed that the plurality had acted wisely when it refused to breathe new life into the Privileges or Immunities Clause. See id. at 3089.

106 Id. at 3096 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

107 Id. at 3103.

108 Id. at 3109 n.36.

109 Id. at 3096 (quoting Palko, 302 U.S. at 325) (additional internal quotation omitted).
How can judges who follow Justice Stevens’ methodology avoid “injecting excessive subjectivity” into their rulings? They can do so, Justice Stevens claimed, by grounding their reasoning in “historical experience,” by shunning reliance upon “merely personal and private notions,” by refusing to adopt a “rigid, context-independent definition of a constitutional guarantee that was deliberately framed in open-ended terms,” by showing deference to elected bodies that have included the asserted liberty interest in their political deliberations, by “approach[ing their] work with humility and caution,” by taking seriously the doctrine of stare decisis and the need for stability in the legal order, by developing doctrines “slowly and incrementally,” and by tailoring their holdings to “the precise liberty interests the litigants have asked [them] to vindicate.” The “historical pedigree” of an asserted liberty interest is relevant, on this view, but must not be taken as “the exclusive or dispositive determinant of [that interest’s] status under the Due Process Clause.” Justice Stevens insisted that judges who “outsouce” their understanding of the term “liberty” to historical understandings dishonor the drafters’ decision to use language that speaks at a high level of generality and “abdica[te]” their duty to ensure that “the development and safekeeping of liberty [is not left entirely] to majority political processes.”

Most importantly for our purposes here, Justice Stevens argued that the majority’s history-focused analysis “promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently ‘rooted’” to warrant constitutional protection. “[E]ven the most dogged historical inquiry into the ‘fundamentality’ of the Second Amendment right (or any other),” he wrote, “necessarily entails judicial judgment—and therefore judicial discretion—every step of the way.” No matter what interpretive methods they invoke, judges simply cannot avoid making discretionary value judgments. Justice Stevens

110 Id. at 3100.
111 Id.
112 Id. (quoting Rochin v. California, 342 U.S. 165, 170 (1952)).
113 Id. at 3101 n.24.
114 See id. at 3101 (“If a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate.”).
115 Id.
116 See id. at 3102.
117 Id.
118 Id.
119 Id. at 3097.
120 Id. at 3099.
121 Id.
122 Id. at 3098-99.
123 Id. at 3112.
insisted that judges should not try to conceal that dimension of their work. “[O]nly an honest reckoning with our discretion,” he argued, “allows for honest argumentation and meaningful accountability.” For a variety of reasons that he then identified, Justice Stevens made the judgment that states should be permitted to ban the possession of handguns in homes.

Justice Scalia was having none of it. In a concurring opinion targeted squarely at Justice Stevens, he argued that Justice Stevens’ approach left judges free to “pick[] the rights we want to protect and discard[] those we do not.” Indeed, Justice Scalia charged that Justice Stevens had voted against handgun rights based on his own public-policy beliefs. Justice Scalia was not impressed by the various guideposts that his colleague claimed would prevent judges from rendering unduly subjective judgments. With the exception of the kind of historical inquiry that Justice Stevens insisted should not be dispositive, Justice Scalia found fault with each of Justice Stevens’ guideposts, both individually and as a group. “The ability of omnidirectional guideposts to constrain,” he wrote, “is inversely proportional to their number.” In his view, Justice Stevens’ approach “does nothing to stop a judge from arriving at any conclusion he sets out to reach.” He argued that substantive due process questions should be resolved

124 Id. at 3103.

125 He reasoned, for example, that the right to own a specific type of firearm is not “critical to leading a life of autonomy, dignity, or political equality,” see id. at 3109; that other advanced nations have restricted the possession of handguns, so there is reason to doubt that the issue must be removed from the political process in the United States, see id. at 3110–11; that the drafters of the Second Amendment principally intended to protect the states from oppression by the newly created federal government, and so courts should be reluctant to strip the states themselves of the ability to regulate individuals’ possession of firearms, see id. at 3111; and that proponents of gun rights have demonstrated that they are able to win substantial protections through majoritarian political processes, see id. at 3115–16.

126 See id. at 3050 (Scalia, J., concurring) (“I write separately only to respond to some aspects of Justice Stevens’ dissent.”).

127 Id. at 3052.

128 See id. at 3051 (asserting that Justice Stevens had voted to exclude in-home handgun possession from the meaning of the term “liberty” only because he “deeply believes it should be out”).

129 See id. at 3052–54 (criticizing various individual guideposts that Justice Stevens had claimed would constrain judges).

130 Id. at 3052. But cf. Mark Tushnet, When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law, 90 Minn. L. Rev. 1275, 1281 (2006) (“At least as an abstract proposition, looking at more material might produce greater rather than weaker constraints.”).

131 McDonald, 130 S. Ct. at 3054 (Scalia, J., concurring). See generally Joan L. Larsen, Importing Constitutional Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St. L.J. 1283, 1309 (2004) (“[C]onstitutional interpretation that invites judicial discretion threatens self-governance because it allows the unaccountable judiciary to substitute its own policy preferences for those of the representatives of the people.”); Steven D. Smith, Law Without Mind, 88 Mich. L. Rev. 104, 106 (1989) (“A central concern of originalism is that judges be constrained by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless.”) (emphasis omitted).
solely by asking whether the asserted liberty interest “is ‘deeply rooted in this Nation’s history and tradition.’”\textsuperscript{132}

Justice Stevens replied that Justice Scalia was not coming clean about just how much subjectivity his history-intensive analysis entails:

\begin{quote}
[N]umerous threshold questions arise before one ever gets to the history. At what level of generality should one frame the liberty interest in question? What does it mean for a right to be deeply rooted in this Nation’s history and tradition? By what standard will that proposition be tested? Which types of sources will count, and how will those sources be weighed and aggregated? There is no objective, neutral answer to these questions. . . .

It is hardly a novel insight that history is not an objective science, and that its use can therefore point in any direction the judges favor. . . . The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole.\textsuperscript{133}
\end{quote}

Justice Stevens pointed to his and Justice Scalia’s competing opinions in \textit{Heller} as an example.\textsuperscript{134} In that case, he observed, the two justices drew dramatically different inferences from the historical record, and “[n]o mechanical yardstick can measure which of us was correct.”\textsuperscript{135} Borrowing a phrase that Justice Scalia had deployed in a different setting several years earlier, Justice Stevens argued that, under Justice Scalia’s historical

\textsuperscript{132} \textit{McDonald}, 130 S. Ct. at 3036 (quoting \textit{Washington v. Glucksberg}, 521 U.S. 702, 721 (1997)); \textit{see also id.} at 3050 (Scalia, J., concurring) (endorsing the majority’s analytic framework).

\textsuperscript{133} \textit{Id.} at 3116–17 (Stevens, J., dissenting) (citations and internal quotations omitted). \textit{See generally} Paul Brest, \textit{The Misconceived Quest for the Original Understanding}, 60 B.U. L. Rev. 204, 237 (1980) (“The moderate originalist acknowledges that the text and original history are often indeterminate and that the elaboration of constitutional doctrine must often proceed by adjudication based on precedent, public values, and the like.”); Erwin Chemerinsky, \textit{Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making}, 86 B.U. L. Rev. 1069, 1072 (2006) (“Even originalism, which presents itself as a theory of constitutional interpretation divorced from the values of individual judges, allows tremendous judicial discretion.”); Peter J. Smith, \textit{Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning}, 52 UCLA L. Rev. 217, 284 (2004) (concluding, based upon empirical analysis, “that originalism’s advantage over other approaches to constitutional interpretation with respect to its ability to constrain judicial discretion is marginal”).

\textsuperscript{134} \textit{See District of Columbia v. Heller}, 128 S. Ct. 2783, 2787–822 (2008); \textit{id.} at 2822–47 (Stevens, J. dissenting). Judge J. Harvie Wilkinson III has used Justice Scalia’s opinion for the Court in \textit{Heller} to make a comparable point. \textit{See J. Harvie Wilkinson III, Of Guns, Abortions, and the Unraveling Rule of Law}, 95 Va. L. Rev. 253, 256 (2009) (“While \textit{Heller} can be hailed as a triumph of originalism, it can just as easily be seen as the opposite—an exposé of original intent as a theory no less subject to judicial subjectivity and endless argumentation as any other.”); \textit{see also id.} (arguing that “the aggressive brand of originalism practiced in \textit{Heller} conflicts with the demand that ‘the judiciary . . . resist the lasting temptation to enshrine its own preferences in law’”).

\textsuperscript{135} \textit{McDonald}, 130 S. Ct. at 3117.
approach, “the judge has more than ample opportunity to ‘look over the heads of the crowd and pick out [his] friends.’”  

Justice Scalia replied that he would “stipulate to” the proposition that historical analysis can sometimes “be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.” But he insisted that his approach contains less subjectivity than Justice Stevens’ because “the historically focused method . . . depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.” Disagreements among historians “are nothing,” he said, “compared to the differences among the American people . . . with regard to the moral judgments Justice Stevens would have courts pronounce.”  

Justice Stevens closed his side of the debate—and his long career on the Court—with a plea for candor. In any case involving constitutional texts whose meanings are not facially apparent, he said, judges are obliged to exercise a significant measure of discretion. It is far better for judges to exercise that discretion transparently than to cloak it in false suggestions of objectivity:

My point is simply that Justice Scalia’s defense of his method, which holds out objectivity and restraint as its cardinal—and, it seems, only—virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be smuggled into his historical analysis. Worse, they may be buried in the analysis. At least with my approach, the judge’s cards are laid on the table for all to see, and to critique.

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136 Id. at 3117–18 (Scalia, J., dissenting) (alteration in original) (quoting Roper v. Simmons, 543 U.S. 551, 617 (2005)). Justice Scalia’s Roper opinion borrowed the metaphor of selectively choosing one’s friends from a still earlier opinion, where he criticized the Court’s reliance upon legislative history when interpreting statutes. See Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

137 McDonald, 130 S. Ct. at 3057 (Scalia, J., concurring).

138 Id. at 3058; cf. Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 864 (1989) (“Originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”).

139 McDonald, 130 S. Ct. at 3057-58 (Scalia, J., concurring); see also supra note 111 and accompanying text (noting Justice Stevens’ endorsement of reliance upon “historical experience”).

140 McDonald, 130 S. Ct. at 3118 (Stevens, J., dissenting); cf. Harry T. Edwards, The Role of the Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication, 32 CLEV. ST. L. REV. 385, 410 (1984) (“The real threat that a judge’s personal ideologies may affect his decisions in an inappropriate case arises when the judge is not even consciously aware of the potential threat.”); Jonathan R. Macey, Originalism as an “ism”, 19 HARV. J.L. & PUB. POL. Y 301, 304 (1996) (arguing that “originalism is not nearly so determinate as its most vocal proponents would suggest,” and that it is especially dangerous when originalists embed their personal preferences in their analysis because they refuse to acknowledge what they are doing); McKee, supra note 19, at 1719 (arguing that it is better for McKee and other federal appellate judges to be transparent regarding the subjective components of their
In Justice Scalia’s eyes, however, Justice Stevens’ eagerness to conduct his analysis transparently made matters “even worse.”\textsuperscript{141} “In a vibrant democracy,” Justice Scalia concluded, “usurpation should have to be accomplished in the dark.”\textsuperscript{142}

Two features of that remarkable exchange are especially important. The first concerns the central difference between Justice Stevens’ and Justice Scalia’s understandings of the job that the American people rely upon them to do. For Justice Stevens, the Constitution’s use of the term “liberty”\textsuperscript{143} obliges judges to make “practical and normative judgment[s]”\textsuperscript{144} about whether enforcing a particular claimed right would move the nation toward a more “fair and enlightened system of justice.”\textsuperscript{145} His view posits that the American people have assigned judges the forward-looking tasks of helping to define the features of a “fair and enlightened” justice system and of helping to bring citizens and their elected leaders into ever-closer alignment with what such a justice system entails.

For Justice Scalia, judges have been given no such charge. Rather, a judge’s job is backward-looking in nature—it is to examine the sovereign people’s legal texts, traditions, and history in order to identify what the people themselves have deemed to be the necessary features of a “fair and enlightened” society.\textsuperscript{146} He praised the interpretive approach that the Court applied in \textit{McDonald} because, in his view, “the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision.”\textsuperscript{147} Unlike Justice Stevens, who proceeded under the belief that the sovereign reasoning, rather than “continuing to delude ourselves into thinking that our decisions are solely the result of our objective application of neutral legal principles”\textsuperscript{148}).

\textsuperscript{141} \textit{McDonald}, 130 S. Ct. at 3058 (Scalia, J., concurring).

\textsuperscript{142} Id.

\textsuperscript{143} \textit{See} U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”); U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”).

\textsuperscript{144} \textit{See McDonald}, 130 S. Ct. at 3109 n.36 (Stevens, J., dissenting); \textit{see also supra} note 108 and accompanying text.

\textsuperscript{145} \textit{See McDonald}, 130 S. Ct. at 3096 (Stevens, J., dissenting) (internal quotation omitted); \textit{cf.} L\textsc{awrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice} 5 (2004) (“Judges . . . are not merely or even primarily instruction-takers; their independent normative judgment is expected and welcomed.”); Thomas C. Grey, \textit{Do We Have an Unwritten Constitution?}, 27 STAN. L. REV. 703, 706 (1975) (arguing that judges must play the role of “expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution”).

\textsuperscript{146} \textit{See McDonald}, 130 S Ct. at 3050 (Scalia, J., concurring) (praising the \textit{McDonald} majority for applying a theory of interpretation that, in Justice Scalia’s view, “makes the traditions of our people paramount”); \textit{see also supra} notes 126–32 and accompanying text (summarizing Justice Scalia’s argument).

\textsuperscript{147} \textit{McDonald}, 130 S. Ct. at 3058 (Scalia, J., concurring).
people have asked judges to help guide them toward better understandings of justice, Justice Scalia insisted that it is the job of the sovereign people to provide the guidance and the job of their judges to follow it.

With respect to the distinction between making law and applying law, one thus can imagine a spectrum along which judges’ positions in a given case will fall. Imagine that the extreme left end of the spectrum marks the point at which judges are permitted to implement their own personal preferences in each case that comes before them (that is, they may legitimately make law as they see fit) and that the extreme right end of the spectrum marks the point at which judges may not exercise any discretion at all (that is, they may only apply the determinate policy judgments that the sovereign people and their politically accountable leaders have made on their own). No matter where on that spectrum one might place Justice Stevens’ and Justice Scalia’s McDonald opinions, there is no question that Justice Scalia believed he was well to the right of Justice Stevens, and that Justice Stevens believed Justice Scalia was further to the left than he acknowledged.

That leads to the second important point: Justice Stevens and Justice Scalia both disclaimed the extreme ends of the spectrum and thereby disclaimed the legitimacy dichotomy, as well. Justice Stevens intended to take the left-most point on the spectrum out of play when he asserted that “merely personal and private notions” have no place in a judge’s constitutional analysis. He argued that a judge has broad room to make normative judgments, but he limited the bases of those judgments to sources of information and beliefs that are external to the judge herself—texts, precedents, facts, theories, practices, and traditions that the judge finds by looking beyond herself, rather than within. These judgments are often highly subjective, in the sense that reasonable judges may disagree about how the relevant factors ought to be interpreted, prioritized, and weighed, and judges lack a “mechanical yardstick” by which to determine “which of [them is] correct.” But subjectivity in this sense is not a problem on Justice Stevens’ view—to the contrary, it is demanded by the job of being a judge. The sense in which he regarded subjectivity as problematic is captured by what I described earlier as the cardinal sin of judging—resting one’s subjective judgments upon reasons that are merely personal in nature. Of course, Justice Scalia is irrevocably skeptical about whether jurists who take into account a broad range of non-historical sources really can avoid committing that cardinal sin. But that skepticism should not be permitted to obscure Justice Stevens’ earnest desire to draw that important line.

148 Id. at 3100 (Stevens, J., dissenting) (internal quotation omitted).
149 See id. at 3096; cf. Roberts Hearing, supra note 27, at 178 (“Sometimes it’s hard to give meaning to a constitutional term in a particular case. But you don’t look to your own values and beliefs. You look outside yourself to other sources.”) (remarks of John G. Roberts, Jr., Nominee).
150 McDonald, 130 S. Ct. at 3117 (Stevens, J., dissenting).
151 See supra note 17 and accompanying text.
152 See McDonald, 130 S. Ct. at 3051 (Scalia, J., concurring) (accusing Justice Stevens of committing that cardinal sin).
Justice Scalia, meanwhile, took the right-most point on the spectrum out of play when he “stipulate[d]” that even his history-intensive analysis “requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.”\(^{153}\) His use of the vaguely noncommittal term “stipulate” might be taken as signaling that he wishes to reserve the right to defend the objectivity of his methods on a later occasion. But he has elsewhere acknowledged the malleability of historical analysis, \(^{154}\) and so it surely is better to read him as simply claiming—as he claimed immediately after making the stipulation—that historical analysis is “much less subjective” than the approach taken by Justice Stevens. \(^{155}\) Given just how much subjectivity Justice Scalia believes Justice Stevens’ methods entail, \(^{156}\) this does not tell us much about the extent of the subjectivity to which Justice Scalia is willing to confess. But if he does concede (as undoubtedly he must) that his methods require judges to make discretionary decisions when answering the kinds of threshold questions that Justice Stevens recited \(^{157}\) and when deciding which historical sources to use and how to interpret them, then he has made what is, for our purposes here, a significant concession indeed. Justice Scalia does not place himself on the far right end of the spectrum, where the only subjective, value-laden judgments that play a legitimate role in constitutional adjudication are those made by the sovereign people and their elected leaders. Even if one accepts Justice Scalia’s claim that his methods leave less room for judicial discretion than the methods endorsed by Justice Stevens, it is plain that the differences between them are differences of degree, not of kind.

The exchange between Justice Stevens and Justice Scalia thus illustrates the gross descriptive inaccuracy of the legitimacy dichotomy. If Justice Stevens and Justice Scalia both aptly described what it is they believed they were doing, then it is clear that, at least in textually difficult disputes of the sort that McDonald exemplifies, the legitimacy dichotomy utterly fails to capture what it is that constitutional adjudication entails. Neither Justice believed his vote was free of subjective judgments, and neither Justice believed he was giving vent to his own personal policy preferences. Both Justices believed they were operating in a realm that the legitimacy dichotomy does not acknowledge. Both Justices were endeavoring to do what they believed the sovereign people had asked them to do, and both Justices found it necessary to make subjective, value-laden judgments when doing it.

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\(^{153}\) Id. at 3057.

\(^{154}\) See Scalia, supra note 138, at 864 (“The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, causes most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values . . . .”); cf. Wilkinson, supra note 134, at 257 (“Originalism, though important, is not determinate enough to constrain judges’ discretion to decide cases based on outcomes they prefer.”).

\(^{155}\) McDonald, 130 S. Ct. at 3058 (Scalia, J., concurring) (emphasis added).

\(^{156}\) See supra notes 126–32, 137–39 and accompanying text (recounting Justice Scalia’s critique of Justice Stevens’ methods).

\(^{157}\) See supra note 133 and accompanying text (quoting Justice Stevens’ critique of Justice Scalia’s methods).
II. THE LEGITIMACY DICHOTOMY IN THE CLASSROOM

In this Part, I briefly suggest that even some of those who firmly reject the legitimacy dichotomy’s claims might inadvertently be abetting the dichotomy in law school classrooms by pushing some students from one of the dichotomy’s extremes to the other. In Part III, I then turn to the task of making an affirmative case for embracing the role of judicial discretion in constitutional adjudication.

When they arrive for their first day of class, filled with optimism and anxiety, many law students plainly embrace the formalistic, determinate branch of the legitimacy dichotomy. As any teacher of first-year courses can attest, many beginning law students believe they are about to learn black-letter rules of law that will enable them to predict the outcomes of legal disputes with a high degree of certainty. If professors in first-year courses refuse to try to articulate rules that are capable of predictable application, do not confidently say how a court would decide hypothetical cases, or persist in finding fault with students’ efforts to describe the law’s boundaries with precision, they are accused of “hiding the ball.” By the time students reach their second or third year, however, a fair number of them have decided that there often is no ball to be hidden. For those students, Pierre Schlag has it exactly backwards when he suggests that professors’ refusal to articulate determinate legal rules ironically fosters “a pious faith in the ontological and epistemic character of law.” Many of our students arrive with the “pious faith” that Schlag describes, but they leave our classrooms feeling skeptical and

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158 See supra note 7 (defining the legitimacy dichotomy).

159 See Kimberlee K. Kovach, New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem-Solving: Mediation, 28 FORDHAM URB. L.J. 935, 955 (2001) (“New law students become almost ‘programmed,’ if you will, to want to know the rules, the black letter.”).

160 Pierre Schlag explains:

In the true law school Socratic method, the student is always wrong. The resolution [of a posited legal problem] always founders on a new fact scenario, or some previously unnoticed implication, or some unforeseen consequence. And there is always another question, one that is carefully tailored to expose the inadequacy of the student’s previous answer. . . . Law students have a name for this procedure. . . . They call it “hiding the ball.”

Pierre Schlag, Hiding the Ball, 71 N.Y.U. L. REV. 1681, 1684 (1996); see also Jess M. Krannich et al., Beyond “Thinking Like a Lawyer” and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education, 86 DENV. U.L. REV. 381, 385 (2009) (“Most first-year students struggle, at least initially, with the fact that the case method requires them to continually try to answer questions that appear to have no ‘right’ answer. The process leaves many students feeling that their professors are ‘hiding the ball.’”).

161 Schlag, supra note 160, at 1684; see also id. at 1685 (“What the student has learned unconsciously through the relentless Socratic examination of case after case is that there is a ball and it is knowable. What will never be given to the student—and, indeed, this is the gist of the law student’s complaint—is any strong account of what the ball is . . . or how it can be known . . . .”).
particularly with respect to constitutional law—where the primary legal texts are often highly elliptical, where the cases often concern high-profile, value-laden issues on which the American public is divided, and where one not infrequently finds the justices divided into familiar ideological clusters—our traditional pedagogical methods implicitly encourage students to conclude that outcomes depend largely (if not entirely) on judges’ personal political preferences. As one student put it when evaluating my own upper-division survey course in constitutional law, “Good class, considering that Con Law is all b.s. anyway.”

In our constitutional law classrooms (and surely when teaching other subjects, as well), we do a terrific job of shaking students loose from the notion that judges merely apply determinate policy judgments made by others. By relentlessly homing in on textual ambiguities, by pushing students to read judicial opinions critically, by pointing out apparent inconsistencies in individual justices’ reasoning from one case to another, by helping students develop the skills necessary to argue multiple sides of a given issue, and by a host of other means as well, we go a long way toward convincing our students that legal texts are often susceptible to conflicting—but nevertheless reasonable—interpretations. In the constitutional law setting, our students rapidly come to see (if they had not already) how naïve it is to believe that difficult constitutional questions can be resolved by mechanistically applying the sovereign people’s clear and determinate wishes.

As a result, we provide excellent training for litigators and other attorneys whose desired case outcomes will largely be prescribed by clients. We help our students develop the creativity and the flexibility of mind needed to take a set of client-specified objectives and do one’s best to achieve them. These are the very same kinds of abilities that Robert Post and Reva Siegel surely have in mind when they urge progressives to articulate attractive public-policy objectives and then “identify the modes of argument” necessary to credibly claim that those objectives are consistent with the Constitution.

As I suggested earlier, however, some of the students whom we pry away from the determinate branch of the dichotomy quickly veer to the opposite extreme.

162 Accord Dworkin, supra note 18, at 39–40 (stating that if a person initially “thinks of law as a system of [determinate] rules” and then realizes “that judges change old rules and introduce new ones,” he or she will come to believe that judges exercise unbounded discretion); Elizabeth Price Foley, *The Role of International Law in U.S. Constitutional Interpretation: Original Meaning, Sovereignty and the Ninth Amendment*, 3 Fla. Int’l L. Rev. 27, 30 (2007) (“Many young law students come into constitutional law as bright-eyed and bushy-tailed idealists, only to leave with a cynical view that the Court’s disregard of text and its historical context has transformed the Constitution into a politically manipulable document with very little or no real fixed meaning.”); Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 Va. L. Rev. 1, 77 (1993) (stating that “widely perceived departures from coherence, integrity, and political morality” in courts’ constitutional rulings “cause widespread cynicism, disappointment, and the angry conclusion that constitutional law is just another form of politics”).

163 I do not relate this anecdote with pride.

164 Post & Siegel, supra note 21, at 33; see supra notes 21–25 and accompanying text (recounting Post and Siegel’s argument).

165 See supra text between notes 20 and 21.
concluding that judges’ personal conceptions of justice are often all that matter. Students surely feel encouraged along that path when they encounter Supreme Court rulings in which the justices are divided into familiar, ideologically identifiable groups. Our students might even be pushed in that direction by casebook editors’ common practice of stripping nearly all citations from the redacted rulings they choose to publish.

Removing citations helps to bring casebooks down to a manageable size, but it comes at the cost of implicitly sending students the message that judges often rely on nothing more than their own armchair reflections. Seen in this light, my student’s reluctance to include numerous citations in her draft of a judicial opinion, lest it “look like a brief,” might be a bit less surprising. After all, if most of the judicial rulings that one sees are those that appear in casebooks, one might well conclude that appellate opinions and appellate briefs look very different indeed. From there, it is only a short step to the conclusion that judges often resolve difficult constitutional questions based largely upon their personal political and moral convictions.

Our teaching methods thus are not broadly calculated to instill in students an appreciation of what it is that judges believe they actually do when they confront open-ended constitutional texts. We do well in our efforts to teach our students how to create reasonable disputes when it serves the interests of their clients; we do less well when it comes to teaching them how to adjudicate those disputes. In Socratic dialogues, in moot court programs, and in a variety of clinical settings, we repeatedly challenge our students to develop the litigator’s flexibility of mind, such that they feel what it means to be ultimately responsible for finding client-favoring interpretations of the law. But rarely do we provide sustained experiences (that is, experiences that extend beyond fleeting questions in the classroom) in which our students must stand in the shoes of judges, such that they feel what it means to be ultimately responsible for finding the law’s constraints in the face of fierce argumentation by litigants.

We rarely put our students in situations

166 According to statistics compiled by the staff of the SCOTUS blog, for example, the justices split along familiar ideological lines in eleven of the Court’s sixteen 5–4 rulings in the Court’s October 2009 Term, see Memorandum from SCOTUSblog.com (July 7, 2010), http://www.scotusblog.com/wp-content/uploads/2010/07/Summary-Memo-070710.pdf, and in sixteen of the Court’s twenty-three 5–4 rulings in the Court’s October 2008 Term, see Memorandum from Akin Gump Strauss Hauer & Feld LLP and SCOTUSblog.com (June 30, 2009), http://www.scotusblog.com/wp-content/uploads/2009/07/summary-memo-final.pdf.

167 Consider, for example, the highly regarded casebook that I have long used. In that casebook’s reproduced passages from Hamdi v. Rumsfeld, 542 U.S. 507 (2004), fifty-nine of the full opinion’s sixty-seven citations have been removed. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 277–81 (17th ed. 2007). In that casebook’s reproduced passages from Griswold v. Connecticut, 381 U.S. 479 (1965), twenty-five of the full opinion’s thirty-three citations have been removed. See SULLIVAN & GUNTHER, supra, at 429–30.

168 See supra text between notes 20 and 21.

169 Cf. supra notes 148–57 and accompanying text (discussing Justice Stevens’ and Justice Scalia’s judicial self-conceptions).

170 Would we not at least pause to reflect upon the suitability of our curriculum and pedagogical methods if we believed that, upon graduation, most of our students would immediately become judges, rather than litigators or other representatives of clients?
comparable to the scenario that Duncan Kennedy constructed for himself in his 1986 essay *Freedom and Constraint in Adjudication: A Critical Phenomenology*, where those students must make a serious and sustained effort to manage all of the conflicting incentives and impulses that press upon judges when they perceive a conflict between what the law appears to demand in a given case and what they personally believe is that case’s most desirable outcome. We thus do not do as much as we could to help our students resist simply assuming that judges resolve difficult constitutional questions based primarily on their own personal preferences, biases, or interests. Some of our students might ultimately join a number of thoughtful scholars in coming to some version of that view of adjudication—but if they do, it should be after a sustained effort to view the law through the lens of the judge, rather than solely through the lens of the litigator.

Of course, in making the claim that there is a meaningful difference between creating reasonable disputes and adjudicating them, and in taking seriously judges’ claim that they aspire not to be outcome-driven in the way that one branch of the legitimacy dichotomy claims that they are, I am rejecting Post and Siegel’s suggestion that sometimes we should regard the work of litigators and the work of judges as ultimately not all that different. On their view, it is permissible (at least up to a point) for judges to be driven by their personal political agendas; indeed, they encourage progressive judges to be outcome-driven. Justices’ own ideological biases and political preferences undoubtedly do sometimes reverberate in their rulings. But no member of the Court

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171 See Kennedy, supra note 20, passim (discussing how he might adjudicate a labor dispute in which—at least initially—he personally wishes to rule in favor of the employees but perceives that the law favors the employer); see also id. at 560–61 (concluding that, although applying a given legal rule necessarily entails making a host of subjective judgments, and that one might thus claim that legal rules are infinitely malleable, “[w]hat I can say as a legal arguer is that sometimes I come up against [a] rule as a felt objectivity, and can’t budge it”).

172 See generally ROBERTSON, supra note 26, at 23 (“Authors like Karl Llewellyn, Felix Cohen, and Jerome Frank made assumptions about judges being result oriented and about rules and doctrine being ‘constructed’ post hoc to reach results, assumptions of the sort that have since become common in political science.”); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 659 n.27 (1995) (stating that “[c]ritical scholars typically argue that, despite law’s claim to objectivity, judges are socially situated persons whose rulings tend to serve the interests of particular segments of society,” but asserting that, today, “only true nihilists will find fault with [the] premise that law has some constraining force”); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462 (1987) (noting critical scholars’ claim that “the existing body of legal doctrines . . . permits a judge to justify any result she desires in any particular case”).

173 See supra notes 21–25 and accompanying text (recounting their argument).

174 See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 788–89 (2009) (finding “that ideological voting [among Supreme Court Justices] has increased” since 1980 and stating that ideology’s influence on justices’ voting patterns “is not surprising; since the lower courts will have decided the straightforward cases . . . the cases that the Supreme Court decides will tend to involve disputes that cannot be resolved legalistically”); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004) (“No reasonable person seriously doubts that ideology, understood as normative commitments of various sorts, helps to explain judicial votes.”).
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would happily admit to that fact, nor would any member of the Court endorse it as a practice to be encouraged. To do so would be to give one’s blessing to what I have described as the cardinal sin of judging. Eric Posner and Adrian Vermeule rightly observed in The New Republic that a judge’s decision to openly embrace political partisanship would run directly counter to the “ideal of judicial impartiality” and would ultimately be “loopily self-defeating.” As Brian Tamanaha puts it, “the particular virtue of judging” rests in “sincerely striving to figure out what the law requires (however uncertain), [rather than] instrumentally manipulating the legal rules to reach a particular end, much as a lawyer does in service of the client.” Justices sometimes accuse one another of relying upon personal premises that lack the status of “law”—as Justice Scalia accused Justice Stevens in McDonald—but such statements remain accusations, not value-neutral observations. At bottom, Post and Siegel’s prescriptions simply do not square with what judges tell us they believe they have been hired to do.

What is the nature of the work, then, that judges have been asked to perform? Despite all of their disagreements in McDonald, Justice Stevens and Justice Scalia each believed he was operating in a realm between the legitimacy dichotomy’s two extremes, a realm in which judges shun reliance upon personal preferences but still must make discretionary, value-laden judgments when adjudicating constitutional disputes. It is that realm, where Justice Stevens and Justice Scalia met to do battle and where Justice Kagan said she expected to do much of her constitutional work, that we need to help our students and the citizenry better understand. Our public constitutional debates will continue to fall short of their constructive potential until we retire the legitimacy dichotomy and the umpire analogy and replace them with understandings and images that more accurately describe the constitutional work that the American people rely upon their judges to do.

175 See Eric A. Posner & Adrian Vermeule, Outcomes, Outcomes, NEW REPUBLIC, Aug. 12, 2009, at 43, 47 (“Whatever you think of the motivations of Supreme Court justices, they never say that they decide cases in order to advance a political agenda.”).

176 See supra note 17 and accompanying text (defining the cardinal sin).

177 Posner & Vermeule, supra note 175, at 47; see also id. (“[A legal movement] must believe in the innocence of its reasons, or at least pretend to believe in them. The conservative political inflection of originalism is a truth that dare not speak its name, and it only succeeds because it is such.”).

178 TAMANAH, supra note 85, at 244.

179 See supra notes 128 and accompanying text (noting Justice Scalia’s accusation).

180 See supra notes 143–47 and accompanying text (describing the justices’ competing understandings of what the American people wish their judges to do).

181 See supra text following note 147 (describing the Justices’ placements on a spectrum ranging from purely subjective lawmaking to purely objective law-applying).

182 See supra notes 52–65 and accompanying text (describing Justice Kagan’s conception of constitutional adjudication in cases involving indeterminate texts).
III. DEMOCRATIC CONSTITUTIONALISM AND THE VALUE OF JUDICIAL DISCRETION

Forty years ago, Alexander Bickel observed that “[v]irtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.” In harmony with that insight, a number of scholars have worked hard in recent years to develop better descriptive accounts of the process of constitutional change in the United States—accounts in which the Court’s constitutional rulings play an important role, but in which those rulings are contextualized in ways aimed at demonstrating that the sovereign American people play a much greater part in shaping the nation’s constitutional story than scholars have traditionally acknowledged. Having quarreled with Dean Post and Professor Siegel earlier in this article, I eagerly acknowledge the debt that I and others owe to them here. Indeed, much of the recent scholarly work on the question of constitutional change is nicely described by the label that Post and Siegel have proposed: democratic constitutionalism. In the following few paragraphs, I quickly sketch democratic constitutionalism’s broad outlines, relying on readers who wish to delve more deeply into these matters to consult some of the sources on which my brief account relies. I then argue that scholars’ accounts of democratic constitutionalism help to illuminate the necessarily discretion-laden constitutional work that judges perform.

A. Democratic Constitutionalism’s Broad Contours

As Post and Siegel explain, “[d]emocratic constitutionalism observes that adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.” Much about democratic constitutionalism is captured by the title of Barry Friedman’s recent book, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution. In his sweeping historical narrative, Friedman describes scores of instances in which the Court, politicians, and ordinary citizens have engaged with one another over time to slowly and deliberatively produce judicially endorsed doctrines that reflect the public’s well-considered constitutional judgments. The lesson, Friedman argues, is clear:

What matters most about judicial review . . . is not the Supreme Court’s role in the process, but how the public reacts to those


184 Cf. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 365 (2009) (“For two centuries the dominant understanding of the Supreme Court had been that it frustrated public opinion, often on the most important and central issues the polity faced.”).

185 See supra notes 173–79 and accompanying text.


187 Id. at 379.

188 FRIEDMAN, supra note 184.
decisions. This is the most important lesson that history teaches. Almost everything consequential about judicial review occurs after the judges rule, not when they do. Judges do not decide finally on the meaning of the Constitution. Rather, it is through the dialogic process of “judicial decision—popular response—judicial re-
decision” that the Constitution takes on the meaning it has.189

Friedman’s claim is not that the Court does, or should, respond to short-term shifts in popular sentiment. Rather, it is that the Court proposes constitutional directions in which the nation might move, and then, “[o]ver time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public.”190

The power to place items on the nation’s constitutional agenda for the kind of long-term consideration that Friedman describes is shared by judges, politicians, and lay citizens alike.191 Once a constitutional question has captured the nation’s attention, there then often follows an extended dialogue both at the state and national levels. That conversation is mediated in part by the nation’s political parties192 and is marked by actions and reactions, as citizens, judges, and elected officials signal their intentions and desires and then wait for others to respond.193 Each participant in this untidy process

189 Id. at 381–82; cf. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 241 (2006) (arguing that courts’ unpopular rulings are rarely “able to withstand sustained majoritarian pressure for more than a generation or so”).

190 FRIEDMAN, supra note 184, at 383.

191 See Larry D. Kramer, “The Interests of the Man”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAL. U. L. REV. 697, 751 (2006) (“Social movements, different parts of civil society, even individuals may equally launch a campaign based on a novel reading of the Constitution, with the test of validity being only whether they can persuade enough others to embrace or adopt their position.”); Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. PA. L. REV. 297, 303 (2001) (“During periods of constitutional mobilization, citizens make claims about the Constitution’s meaning in a wide variety of social settings.”).

192 Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 VA. L. REV. 1045, 1068 (2001) (“A key function of political parties is to negotiate and interpret political meanings and assimilate the demands of constituents and social movements; as such, parties are the major source of constitutional transformations.”).

193 See Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 679 (1993) (“The judiciary is both visionary and reactionary simply because it is always somewhat out of sync with the waves of more political branches—always inching ahead or lagging behind. The divergence between popular sentiment and the judiciary is what makes the dialogue work.”); Robert C. Post, The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4, 8 (2003) (“[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943, 2029 (2003) (“The plain historical fact is that judicial and nonjudicial interpretations of the Constitution frequently coexist and contend for the allegiance of the country.”); Siegel, supra note 191, at 303 (“[D]ialogue between citizenry and judiciary about constitutional meaning is far more commonplace in our constitutional order than constitutional theory commonly acknowledges.”).
hopes to propose the synthesis of the nation’s constitutional values that ultimately wins the acceptance of the sovereign citizenry.\textsuperscript{194}

The formal amendment mechanisms of Article V\textsuperscript{195} play a remarkably small role in this process of constitutional development.\textsuperscript{196} In areas ranging from the increase in the federal government’s regulatory powers, to the heightened powers of the president, to the recognition of a right to privacy, to dramatic reforms of the criminal justice system, many important changes have been made in the nation’s constitutional landscape over the past century without any correlating alterations of the nation’s formally ratified constitutional texts.\textsuperscript{197} The Court’s shift in constitutional trajectory during the New Deal, for example, was undoubtedly influenced by President Franklin Roosevelt’s electoral successes.\textsuperscript{198} Citizen-fueled social movements play an especially important role in “chang[ing] the meaning of constitutional norms, and thus alter[ing] the constitutional legitimacy or illegitimacy of particular social practices.”\textsuperscript{199} The movement led by the National Organization for Women and others, for example, helped prompt the Court to alter its equal protection framework for evaluating sex-based classifications, even as efforts to formally ratify the Equal Rights Amendment were ending in failure.\textsuperscript{200}

Citizens also can influence the courts by shaping the culture in which judges do their constitutional work.\textsuperscript{201} Women who reconceived their career and family objectives in the 1960s and 1970s, for example, helped to reshape the social norms that ultimately were manifested in the Court’s equal protection and privacy rulings.\textsuperscript{202} Similarly, by

\begin{itemize}
  \item \textsuperscript{194} Cf. Richard H. Fallon, Jr., Implementing the Constitution 18–19 (2001) (arguing that a proposition’s constitutional validity ultimately turns upon its acceptance by the citizenry).
  \item \textsuperscript{195} See U.S. Const. art. V (prescribing formal mechanisms for amending the Constitution’s text).
  \item \textsuperscript{196} See Bruce Ackerman, The Living Constitution, 120 Harv. L. Rev. 1737, 1750 (2007) (“[E]very American intuitively recognizes that the modern [formal] amendments tell a very, very small part of the big constitutional story of the twentieth century . . . .”); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 884 (1996) (“Most of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment.”).
  \item \textsuperscript{197} See Strauss, supra note 196, at 884 (listing these and other examples).
  \item \textsuperscript{198} See 1 Bruce Ackerman, We the People: Foundations 48–49 (1991) (discussing these events).
  \item \textsuperscript{200} See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 94 Cal. L. Rev. 1323, 1366–418 (2006) (discussing the adoption of what Siegel aptly calls “the de facto” Equal Rights Amendment). Compare, e.g., Goeaert v. Cleary, 335 U.S. 464, 466–67 (1948) (strongly deferring to a state’s sex-based classification), with United States v. Virginia, 518 U.S. 515, 531 (1996) (stating that sex-based classifications are unconstitutional if they are not backed by an “exceedingly persuasive justification”) (internal quotation omitted).
  \item \textsuperscript{201} See Jack M. Balkin, Original Meaning and Constitutional Redemption, 24 Const. Comment. 427, 513–14 (2007) (discussing culture’s impact on judges).
  \item \textsuperscript{202} See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy includes, within limits, the right to obtain an abortion); see also supra note 200 (citing an equal protection example).
\end{itemize}
taking their relationships public and winning for themselves a greatly increased public perception of normalcy, gays and lesbians have reshaped the culture in ways without which rulings such as Lawrence v. Texas\(^{203}\) would be difficult to imagine.

The Court’s nine justices play leading roles in the process of trying to articulate the nation’s constitutional values in the form of legal texts, but ultimately it is up to the sovereign people to decide whether to accept any given constitutional synthesis and allow it to “sink deeply into [their] normative consciousness.”\(^{204}\) The road to constitutional change can demand tremendous patience and can entail great uncertainty. At any given moment in time, it can be difficult to ascertain whether the sovereign people have decisively spoken and, if so, what it is they have said.\(^{205}\) But as Friedman’s historical narrative demonstrates,\(^{206}\) and as I have observed elsewhere, “[t]he sovereign people get what they want in the end.”\(^{207}\)

B. The Functional Importance of Judicial Discretion

Judges’ ability to make discretionary judgments when adjudicating constitutional disputes is central to the mechanics of democratic constitutionalism. Indeed, in the sense in which I defined the term discretion at the outset,\(^{208}\) the sovereign people rely upon their judges to make discretionary judgments in constitutional cases. Rather than attempt to frame and ratify fine-grained, determinate constitutional texts using the onerous mechanisms of Article V each time a controversial constitutional question arises, the citizenry opted long ago to address most of the nation’s constitutional questions using the dialogic processes that scholars’ accounts of democratic constitutionalism describe. The sovereign people have articulated a number of overarching constitutional values in the nation’s formally ratified texts.\(^{209}\) Judges make discretionary choices about how best to


\(^{204}\) William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 DUKE L.J. 1215, 1217 (2001) (discussing the way in which certain statutes acquire constitution-like status); see also 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 29 (1998) (arguing that rigid adherence to Article V would “stifle the expression of constitutional movements that have won the continuing support of a decisive and sustained majority after years of mobilized debate penetrating deeply into the consciousness of ordinary citizens”).

\(^{205}\) See Kramer, supra note 191, at 751 (observing that the process of amending the Constitution outside of Article V “is as undefined and unspecified as anything else that gets decided in the hurly burly of politics and public debate”).

\(^{206}\) See FRIEDMAN, supra note 184, at 383 (“It is apparent time and again that what the Supreme Court responds to most often is the sustained voice of the people as expressed through the long process of contesting constitutional decisions.”).


\(^{208}\) See supra note 3 and accompanying text (defining this usage of the term “discretionary”).

\(^{209}\) See, e.g., U.S. CONST. amend. I (protecting “the freedom of speech” and the “free exercise” of religion); U.S. CONST. amend. IV (proscribing “unreasonable searches and seizures”); U.S. CONST. amend.
bring those abstract and value-laden provisions to bear upon the specific controversies that come before them. It then falls to the sovereign people to decide whether to embrace those interpretive choices or to contest them through the extended societal dialogue that democratic constitutionalism permits.

The very notion of engaging in an extended dialogue about the meaning of the Constitution’s provisions presupposes that those provisions are indeed often susceptible to conflicting interpretations. If the conventions of the legal profession ordinarily restricted judges to rigidly insisting upon just one interpretive alternative, the American people would not be in a position to reap the dialogic, judgment-refining benefits of democratic constitutionalism, and Article V would play a much more prominent role in the nation’s constitutional life. It is precisely because the Constitution often can reasonably be interpreted in conflicting ways that the American people are able to move slowly toward well-considered constitutional judgments through a dialogue involving judges, litigants, elected officials, and ordinary citizens. Through those exchanges, the nation gradually moves from one interpretive alternative to another, or assesses the merits of the interpretive path that the courts proposed at the outset, until the sovereign people are satisfied that the right balance of competing interests has been struck.

The space that the Constitution leaves for judges to make discretionary judgments is important for another reason. The very fact that much about the Constitution’s meaning remains reasonably contestable helps to ensure that the nation’s diverse citizens will remain bound together by the project of interpreting their shared constitutional texts and by the hope that the national community might yet turn in the direction that one prefers. As Post and Siegel explain, “[t]he ongoing possibility of shaping constitutional meaning helps explain why Americans remain faithful to their Constitution even when their constitutional views do not prevail.” The nation’s ratified texts are able to unite a diverse population because they do not rigidly dictate how all constitutional controversies must be resolved. If the Constitution left no room for judges and others to shift from one interpretive alternative to another, the Constitution would be drained of much of its unifying force.

C. Matters Necessitating Judicial Choices

The interpretive choices that judges make thus play a crucial role in helping to advance the American people’s constitutional deliberations. The way in which judges

XIV, § 1 (declaring that a state must neither “deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

210 See H. Jefferson Powell, A Community Built on Words: The Constitution in History and Politics 213 (2002) (“American constitutionalism can be read as an ongoing proposal to maintain political community in the teeth of, and indeed through means of, robust disagreement.”).

211 Post & Siegel, supra note 186, at 383.

exercise their discretion in particular cases—and the way in which they thereby move the national dialogue forward—will be shaped in large part by the choices they make regarding three overarching matters of concern.

1. **Locating and Interpreting the People’s Constitutional Commitments**

First, judges must decide where to search for the sovereign people’s constitutional commitments and how to interpret them. Of course, everyone would agree that the nation’s formally ratified constitutional texts are a sensible place to start, but the whole enterprise of democratic constitutionalism presupposes that the text of the Constitution is often indeterminate and that the sovereign people often express their constitutional judgments in ways other than through the formal amendment mechanisms of Article V. Judges thus must make numerous difficult choices. For example, when should judges rely heavily upon the nation’s pre- and post-ratification traditions, what counts as evidence of a tradition, at what level of abstraction should a tradition be defined, and how widespread and longstanding must a tradition be before it takes on constitutional significance? When should judges examine shifts in prevailing public norms and values, where are those shifts most clearly revealed, and how does one calibrate the point at which such a shift takes on constitutional significance? When should a court find that social movements’ legislative or electoral successes reveal judicially cognizable changes in the sovereign people’s fundamental commitments? Do certain federal statutes embody values that ought to exert constitutional force?

2. **Keeping Faith with Past Judicial Narratives**

Second, bearing in mind that they are just one of the parties engaged in the nation’s constitutional deliberations, judges must make difficult choices about how, and when, they ought to keep faith with the precedents they have inherited from their judicial predecessors. Viewing the doctrine of stare decisis through the lens of democratic constitutionalism, one can obtain a fresh perspective on why a firm, yet flexible, doctrine of stare decisis is functionally so important. The doctrine helps to ensure that the sovereign people are able to respond to the courts’ rulings in ways that they deem appropriate. It can take time for citizens to sort through whether a particular line of cases corresponds to citizens’ own understanding of the Constitution-shaping project of which...

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213 See supra Part III.A.


215 See, e.g., Grey, supra note 145, at 709 (endorse interpretive methods that permit the Court to take account of changing national values).

216 See, e.g., Siegel, supra note 200, at 1352–56 (arguing that, under certain conditions, social movements may legitimately change “the American constitutional order,” thereby indirectly influencing the decisions that courts render).

217 See, e.g., Peter M. Shane, Voting Rights and the “Statutory Constitution”, 56 LAW & CONTEMP. PROBS. 243, 244–45 (1993) (arguing that certain voting-rights statutes should functionally be treated as part of the nation’s Constitution).
they are a part. 218 When citizens decide that they wish to contest the courts’ chosen constitutional trajectory, they can take steps to try to ensure that future courts will tell the people’s constitutional story differently—but those steps are not easily or quickly taken. 219 In many instances, therefore, the American people are best served if courts keep a steady hand when reflecting their perceptions back to the American people, rather than continually changing the stimuli to which citizens are attempting to respond. 220

Yet principles of democratic constitutionalism also help explain why judges’ obligation to keep faith with precedent cannot be absolute. 221 Given the complexity of the ways in which the people reveal their constitutional commitments and of the interpretive task with which courts have been charged, judges cannot reasonably be expected to remain faithful to every theme and storyline that has appeared in judges’ past rulings. There will be occasions when judges are convinced that some of those themes and storylines can no longer be squared with the American people’s constitutional commitments. Although champions of sex equality failed to secure formal ratification of the Equal Rights Amendment, for example, their sustained reform efforts helped prompt the Court to ratchet up the constitutional standard by which it assesses sex-based classifications. 222 One would be hard pressed today to find many who would argue that the Court’s narrative shift was a mistake—but the shift would not have occurred if the Court had felt obliged to remain faithful to all of its prior rulings.

The doctrine of stare decisis also must be flexible if electing politicians who will choose differently oriented judges is to remain one of the ways in which the sovereign people control their own constitutional fate. This is a tool that has been used to significant effect by both the political left and the political right—witness, for example, President Franklin Roosevelt’s consolidation of his New Deal victories by appointing

218 See Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596, 2602 (2003) (“Judicial decisions need not be instantly popular or accepted. . . . Sorting immediate preferences from longstanding and deeply held constitutional views may take some time. The question is whether on reflection a judicial decision will win popular acceptance.”).

219 See Kramer, supra note 191, at 752 (observing that it takes “an enormous amount of political energy” to respond to unpopular Supreme Court rulings).

220 A lesser degree of deference to precedent might be appropriate if the precedent in question itself hinders people’s ability to show their unhappiness with the ruling through ordinary democratic processes. See Kurt T. Lash, Originalism, Popular Sovereignty, and Reverse Stare Decisis, 93 Va. L. Rev. 1437, 1441–42 (2007) (“The cost of judicial error increases with the severity of the intrusion into the democratic process, and this accordingly increases the need for strong pragmatic justifications if precedent is to control.”).


222 See Siegel, supra note 200 (citing cases); id at 1366–418 (discussing activists’ failure to secure formal ratification of the ERA and the successful creation of what Professor Siegel aptly calls “the de facto ERA”).
like-minded justices after the departure of the Four Horsemen\textsuperscript{223} and Republicans’ successful push in recent decades to stock the federal judiciary with judges who are more conservative than their predecessors.\textsuperscript{224} If this is to continue to be one of the ways in which the sovereign people can effectively engage in a dialogue with the nation’s courts, the doctrine of stare decisis cannot be regarded as “an inexorable command.”\textsuperscript{225}

Of course, each time judges or justices appear to break faith with the narratives their predecessors have written, they open themselves to the charge that they have allowed their own moral or political preferences to get the better of them. As the Court explained in Planned Parenthood of Southeastern Pennsylvania v. Casey,\textsuperscript{226}

\begin{quote}
[t]here is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.\textsuperscript{227}
\end{quote}

This leaves judges in a tight spot. If they overturn precedent too readily, they open themselves to accusations of improper activism and they risk undercutting citizens’ long-term efforts to demonstrate their acceptance or rejection of the precedent at issue.\textsuperscript{228} Yet judges also frustrate the sovereign people’s efforts to engage in a dialogue with the courts if they remain inflexibly committed to precedent no matter how relentlessly citizens make clear their contrary constitutional desires. Very little is clear-cut in this arrangement, but it is the arrangement under which the nation operates. As Friedman observes, the resulting process of constitutional change “is ungainly and difficult to model. . . . [J]udicial meanings shift in response to changing public understandings, and judicial

\begin{footnotesize}
\item[223] See Richard E. Levy, Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C. L. Rev. 329, 344 n.66 (1995) (stating that the liberal gains that were narrowly secured by a five-justice majority during the New Deal were “soon consolidated through a series of Roosevelt appointments to the Court . . . ”).
\item[224] See TAMANAH, supra note 85, at 180 (describing President Ronald Reagan’s and President George H.W. Bush’s success in moving the federal judiciary to the right); Barry Friedman & Scott B. Smith, The Sedimentary Constitution, 147 U. Pa. L. Rev. 1, 26 (1998) (“In time, originalism became the official interpretive methodology of American conservatives, and the Reagan administration promoted originalism in a public relations campaign to transform the federal judiciary.”).
\item[225] The quoted language, though not the sentence’s overarching point, comes from Payne v. Tennessee, 501 U.S. 808, 828 (1991) (“Stare decisis is not an inexorable command . . . ”).
\item[227] Id. at 866 (explaining the Court’s decision to refuse to abandon the central holding of Roe v. Wade, 410 U.S. 113 (1973)); cf. KARL N. LLLEWELYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 73 (1951) (arguing that a judge’s need to appear faithful to “the decisions of the past” serves as “the public’s check upon his work.”).
\item[228] See supra notes 218–20 and accompanying text (making these points).
\end{footnotesize}
decisions provoke the public to consider what the Constitution ought to mean. Through this interaction, the Constitution changes.”

3. Discerning the Proper Role of the Courts

Finally, judges must make difficult choices about when they should and should not speak as one of the chief partners in the nation’s constitutional dialogues. Of course, Article III, standards of review, and a variety of jurisdictional statutes and justiciability doctrines go a long way toward defining the role of the courts.\(^\text{230}\) Even beyond the reach of formal doctrines, however, judges must make choices regarding the degree to which they should allow particular constitutional questions to be answered (at least for the time being) in the realm of day-to-day politics.\(^\text{231}\) As Cass Sunstein has pointed out, some of “[t]he largest struggles on the Supreme Court have been over when to speak and when to remain silent.”\(^\text{232}\) Should the Court seek out opportunities to decide questions involving campaign finance, gun rights, same-sex marriage, and other hotly contested matters? Or should the justices delay further entry into those fields of controversy and allow (at least for the time being) citizens and elected officials to find their way on their own? When federal judges at any level of the judiciary do take on a controversial constitutional question, should they craft broadly reaching opinions that speak to a wide range of factual scenarios, or should they narrowly limit their holdings to the facts of the cases before them?\(^\text{233}\) Do judges believe they ought to try to bring clarity to large swaths of the law? Or do they feel, instead, that they are treading in areas where broadly reaching rulings might prove regrettable?

D. The Law-Politics Distinction

Making choices thus lies at the heart of what judges must do when they adjudicate difficult constitutional cases. Of course, elected officials take an oath to uphold the Constitution,\(^\text{234}\) and so they, too, must make choices in their effort to discern what the Constitution does and does not permit. What is it, then, that distinguishes judges’ choices


\(^{230}\) The political-question doctrine, for example, formally calls upon judges to decide whether a given constitutional question should be reserved for the political branches. See Baker v. Carr, 369 U.S. 186, 217 (1962) (reciting six canonical factors for courts to consider when deciding whether a given issue should be deemed a nonjusticiable political question).

\(^{231}\) Cf. Greenawalt, supra note 3, at 388 (“Some students of the judicial process think judges are warranted in using doctrines of standing and justiciability quite flexibly to avoid rendering substantive decisions for which society is not ready or in respect to which the judges are badly split.”).

\(^{232}\) Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court xi–xii (1999).

\(^{233}\) See id. at 46–60 (discussing factors that weigh in favor of narrow or broad rulings); Edwards, supra note 6, at 413–20 (identifying circumstances when “wide-angle adjudication” seems appropriate and defending the identification of those instances against various criticisms).

\(^{234}\) See U.S. Const. art. VI, § 3 (stating that all federal and state legislative, executive, and judicial officials “shall be bound by Oath or Affirmation, to support this Constitution”).
from the choices made by politicians and that thereby provides the best account of the public’s common distinction between law and politics?

There are at least two interrelated ways in which judges’ power to make interpretive choices differs from that of other governmental officials. First, judges are expected to explain the reasons for the interpretive choices they make. Politicians’ oaths oblige them to make judgments about what the Constitution allows, but they need not publicly justify those judgments with reasoned arguments; indeed, they need not demonstrate that they have consciously attended to the Constitution at all. Short of political pressure that their constituents might apply, there is nothing to stop elected officials from doing whatever seems politically expedient at the moment, relying on judges to determine whether those actions can be reconciled with the American people’s constitutional commitments.235 Judges are in a very different position.236 As Justice Breyer recently explained, a judge “must examine and explain all the factors that go into a decision.”237 To appreciate the way in which this need to justify choices with reasons helps to mark the law-politics distinction, one need only try to imagine how the public would respond if the nation’s judges merely announced their raw votes in each of the cases that came before them, without any explanation or justification.

Second, when seeking to justify their interpretive choices with reasoned arguments, judges are limited to a narrower set of reasons than those that are available to citizens and other governmental officials.238 As my colleague Steve Burton has explained, judges must rely entirely upon “legal reasons”—they must base their discretionary choices on “reasons provided by the law, and not on reasons excluded by judicial duty or the law’s standards.”239 Judge Richard Posner makes the same point when he writes that “[a] judge is not acting lawlessly unless there is no authorized method by which he could deny some claim that a litigant was urging on him, yet he denied it nevertheless.”240 A politician, on the other hand, can decide that a constitutional provision permits him to do X for no better reason than that doing X would bring him

235 See Abner J. Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C. L. REV. 587, 609 (1983) (“Both institutionally and politically, Congress is designed to pass over the constitutional questions, leaving the hard decisions to the courts.”); id. at 610 (stating that Congress has powerful incentives to enact popular legislation and then let courts do the unpopular work of striking it down).

236 See Neal Devins & Louis Fisher, The Democratic Constitution 234 (2004) (arguing that judges play a unique role in our constitutional democracy because they “must offer justifications for their decisions” and thus “are especially interested in making reasoned arguments.”).


238 See Burton, supra note 3, at 156–57 (stating that this marks a key distinction between judges and political actors).

239 Id. at 92; cf. Wechsler, supra note 20, at 19 (arguing that a court’s ruling has the force of law when it is based upon “reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”).

pleasure. The fact that his constituents can throw him out of office if his doing X does not bring them comparable pleasure cloaks his actions with at least a modicum of democratic legitimacy. Judges, however, are obliged to rest their decisions wholly upon premises supplied by democratically legitimate law, such that their rulings are, in Justice Kagan’s words, “law all the way down.” It is by shunning reliance upon purely personal, non-legal reasons when making their discretionary judgments that judges are accurately able to claim that they are doing “law” in a realm that lies between the legitimacy dichotomy’s two extremes.

Of course, judges will not always agree with one another about what are and are not appropriate sources of “legal” reasons in constitutional cases. In McDonald, for example, Justice Stevens and Justice Scalia sharply disagreed about whether the Court should rely upon reasons derived from sources other than history and tradition when adjudicating questions of substantive due process. In those situations, the identification of judicially cognizable sources of legal reasons itself becomes the focus of judicial choices that judges must explain and defend (just as Justice Stevens and Justice Scalia explained and defended their respective source-related choices in McDonald). Citizens and governmental officials are then able to respond to those choices through the same dialogic mechanisms that they use when responding to the merits of judges’ constitutional interpretations. This is how debates about originalism and “strict constructionism” became part of the national political dialogue—judges, politicians, and citizens have placed, and kept, the desirability of those interpretive orientations on the nation’s political agenda. The precise placement of the line that divides law and politics is thus itself the subject of an extended national exchange.

By operating in a realm that the legitimacy dichotomy refuses to acknowledge—a realm in which they exercise discretion but endeavor to confine themselves to legal reasons—judges thus operate in a domain that Dworkin once likened to the hole of a doughnut, surrounded by a “belt of restriction.” Judges have the space in which to make discretionary choices, but that space is not unbounded. When judges fail to persuade the public that their interpretive choices are grounded in democratically legitimate sources of law, they open themselves to the charge that they have strayed to the wrong side of the law-politics divide.

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241 See supra notes 54–65 and accompanying text (discussing Justice Kagan’s use of this phrase).
242 See supra Part I.C (discussing that debate).
243 See, e.g., FRIEDMAN, supra note 184, at 282 (noting President Richard Nixon’s desire to appoint Justices who would be “strict constructionists,” in order to correct the perceived excesses of the Warren Court) (internal quotation marks omitted).
244 Dworkin, supra note 18, at 32 (defining the discretion exercised within this realm as “weak” discretion) cf. TAMANAH, supra note 85, at 242 (“There are other aspects to proper judging, such as not favoring one side or the other, but being consciously rule-bound is the essence of a system of the rule of law.”).
245 If one likes pastry analogies, one could further say that, when it comes to constitutional adjudication, proponents of the legitimacy dichotomy claim that the Constitution leaves no room for judicial discretion at all, and that there thus are no doughnuts, only Danishes. See generally CADDYSHACK
E. The Search for Metaphors

The umpire analogy is powerful: it immediately connects with lay and educated citizens alike, it demands little elaboration, and it strongly conveys a set of convictions about how judges should behave. But as my discussion of democratic constitutionalism and its relationship to judicial discretion indicates, the actual processes of constitutional adjudication and constitutional development are far more nuanced than a simple analogy can easily convey. Yet if we wish to increase our and our students’ influence in the nation’s conversations about the Constitution and the courts, we must work toward creating metaphors and images that accurately and accessibly convey important truths about the constitutional work that our judges do. As an initial step in that direction, I offer two metaphors.

1. The Homeowner-Architect Relationship

First, imagine a property owner who wishes to build a home. He has numerous ideas about what he wants in a home; some of those ideas are quite specific, but others take the form of more abstract notions about the values or purposes he hopes his home will serve. He hires an architect to help him bring his vision to fruition. The architect’s job is not to design a home that she would design if she were building a home for herself; rather, her job is to listen to the property owner and to help translate the property owner’s desires into concrete, tangible realities. The property owner and the architect proceed to engage in a series of exchanges, with each reacting to the remarks and contributions of the other. Throughout that process, the architect—as the party responsible for doing the drafting—proposes a variety of ways in which the property owner’s desires might be reflected in the home’s final design, and these proposals provoke the property owner to think with ever-increasing specificity about the goals he hopes to achieve and the tradeoffs he is willing to make. At the end of the day, the property owner holds the ultimate power to decide when the design is satisfactory.

It is much the same with the sovereign people (the property owners) and their judges (the architects). With varying degrees of abstraction, the American people have expressed many of their fundamental commitments in the text of the Constitution. Because some of those commitments are stated at a particularly high level of abstraction, judges initially have great (although not unbounded) discretion to interpret those commitments in one manner rather than another. Over time, as judges endeavor to apply those commitments in a variety of different factual circumstances and as the citizenry appraises and reacts to those interpretive judgments, the nation slowly moves toward a constitutional arrangement that the present generation of the sovereign people deems satisfactory.

(Orion Pictures 1980) (“The Zen philosopher Basho once wrote, ‘A . . . doughnut with no hole is a Danish.’”) (“Ty Webb,” played by Chevy Chase).

246 See supra Part I.B. (discussing the umpire analogy’s deployment).

247 See supra Part III.A–C.

248 I have briefly invoked this metaphor once before. See Pettys, supra note 207, at 953–54.
2. The Narrator-Actor Relationship

The narrator-actor metaphor is somewhat more complicated, but is aimed at illustrating the same dynamic relationship. By way of introduction to the narrator imagery, consider the chain-novel metaphor that Ronald Dworkin introduced in the 1980s, first in a debate with Stanley Fish and then in Law’s Empire. To explain the situation in which a judge finds himself or herself when confronted with a legal dispute on which a line of precedent bears, Dworkin asked his readers to imagine an author who has been presented with a partially finished novel that has been written by a series of other authors and who now has been tasked with writing the next chapter in a manner that makes it “the best novel it can be[,] construed as the work of a single author rather than, as is the fact, the product of many different hands.” In order to carry out that task, Dworkin said, the author must make numerous judgments about how best to understand the extant chapters’ themes, plot, characters, and the like. Those extant chapters do not dictate just one single way in which the story must be continued; different authors might make different interpretive judgments about how best to carry the story forward. Yet the author is constrained by the fact that she is not “beginning a new novel of [her] own” and by the fact that she has internal convictions (which she will find difficult to disregard) about how the extant chapters should best be read. So too, Dworkin wrote, judges must make difficult judgments about how best to carry forward the legal stories they have inherited. When judges disagree about the truth value of legal propositions, he argued, they are disagreeing about which of the available interpretive options offers the best account of the legal chapters that have already been written.

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249 Ronald Dworkin and Stanley Fish debated whether it is useful to think of judges as akin to a certain kind of novelist. The spirited nature of their exchange was reflected in the trajectory of their papers’ titles. It began with Dworkin’s Law as Interpretation, supra note 221, and Fish’s Working on the Chain Gang: Interpretation in Law and Literature, 60 TEX. L. REV. 551 (1982), then was followed by Dworkin’s My Reply to Stanley Fish (and Walter Benn Michaels): Please Don’t Talk About Objectivity Any More, in THE POLITICS OF INTERPRETATION 287 (W.J.T. Mitchell ed., 2d rev. ed.1983), and Fish’s Wrong Again, 62 TEX. L. REV. 299 (1983).

250 RONALD DWORKIN, LAW’S EMPIRE (1986).

251 Id. at 229.

252 See id. at 230. Dworkin argued that the interpretation the author chooses need not fit perfectly with each and every detail of what she has inherited. Provided that her interpretation accounts for the great bulk of what has already been written, it is permissible for her to regard relatively minor details as mistakes that ought to be disregarded going forward. See id.

253 See id. at 238 (“A chain novelist, then, has many difficult decisions to make, and different chain novelists can be expected to make these differently.”); id. at 237 (stating that “[m]ore than one interpretation” might fit well with the bulk of the extant text).

254 Id. at 234. Stanley Fish insisted that authors who appear late in Dworkin’s authorial sequence do not operate under significantly greater constraints than those who wrote the novel’s first chapters. See Fish, Working on the Chain Gang, supra note 249, at 553–55.

255 See DWORKIN, supra note 250, at 234–36.

256 See Dworkin, My Reply to Stanley Fish, supra note 249, at 291.
of law to which the judge believes she must remain faithful, the more constrained the judge ordinarily (even if not inevitably) will feel.257

When viewed through the lens of democratic constitutionalism, Dworkin’s chain-novel metaphor suffers from one primary defect: it fails to take account of judges’ ongoing dynamic exchanges with the sovereign American people. Dworkin’s metaphor suggests that judges are the primary decision-makers when it comes to appraising past chapters in the nation’s constitutional story and determining what chapters ought to be written next. Indeed, although Dworkin has acknowledged that judges “must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality,”258 there are instances in which he believes judges ought to have the last word, thereby removing certain fundamental questions of moral principle from the realm of majoritarian politics.259 Jeremy Waldron contends—quite persuasively—that Dworkin thereby endorses what amounts to a paternalistic judicial aristocracy.260

In keeping with the insights of democratic constitutionalism, one must alter Dworkin’s metaphor in order to account for the fact that the American people ultimately must be (and are) the authors of their own constitutional fate. Rather than see judges as authors of a chain novel, one might instead see them as the narrators of the constitutional story that the American people act out over time. Judges (like many narrators) are themselves a part of the story they are articulating, but their charge is to give an account of the action that is occurring around them, rather than tell a story wholly of their own devising.261 Through the narrative accounts they construct, judges reflect back to the American people the network of constitutional commitments that those judges believe the sovereign people have made and the ways in which those perceived commitments can manifest themselves in concrete factual situations. It then falls to the American people to assess the degree to which those narratives correspond to the people’s own understanding of the generation-spanning constitutional project to which they feel attached.262

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257 See id. at 304–06.
259 See id. at 15–18, 339–45, 397–99.
260 See JEREMY WALDRON, LAW AND DISAGREEMENT 264–65 (1999); cf. Todd E. Pettys, Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?, 86 WASH. U. L. REV. 313, 317 (2008) (arguing “that the American people can be trusted to preserve the distinction between ordinary and fundamental law that constitutionalism requires, and that the American people thus do not need to rely upon politically insulated judges to preserve that distinction for them.”).
261 Cf. ACKERMANN, supra note 198, at 34 (stating that “modern Americans tell themselves stories that assert the deep continuity of two centuries of constitutional practice”).
262 Cf. Kramer, supra note 191, at 742–43 (arguing that judicial review provides a “source of leadership for the community,” but that the final interpretive power rests with the sovereign people). See generally JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 77 (David Campbell & Philip Thomas eds., Dartmouth Publ’g Co. 1997) (1909) (“The principal evidence that declarations of judges are inconsistent with the organization of the State, or beyond the limits fixed by it for their action, is the opinions of the members of the community to that effect.”).
citizens are satisfied with the courts’ narratives, they can continue to focus their energies on the ordinary activities of day-to-day policymaking. When citizens wish to contest the courts’ narratives, they may pursue a variety of strategies—such as launching litigation campaigns aimed at exposing the undesirability or impracticality of the courts’ premises or electing politicians who will select judges who seem likely to make different narrative choices—in an effort to ensure that the courts will narrate the people’s constitutional story differently in the future. When judges disagree with one another and construct competing narratives, they thereby identify possible loose ends in the constitutional story that the American people have acted out thus far, and alert the people to ways in which they might want to clarify their fundamental commitments.

IV. Conclusion

Politicians and lay citizens often insist that the exercise of judicial discretion in constitutional cases is both unnecessary and democratically illegitimate. As Justice Kagan explained during her June 2010 confirmation hearing, and as Justice Stevens and Justice Scalia demonstrated through their exchange in McDonald v. City of Chicago last Term, the truth is quite to the contrary. Judges and justices from across the political spectrum endeavor to carry out their work in a realm where reliance upon personal, non-legal premises is shunned, but where the text of the Constitution is indeterminate and the exercise of discretion is thus inevitable. Indeed, judicial discretion is more than simply inevitable—it is central to the success of our system of democratic constitutionalism. Rather than attempt to craft determinate constitutional texts that judges can mechanistically apply, the American people decided long ago to conduct much of their constitutional business under open-ended, value-laden provisions of the Constitution that are susceptible to a wide range of conflicting interpretations. Through extended national dialogues involving judges, elected officials, and ordinary citizens, each generation of the sovereign people slowly works its way toward agreement about

263 Cf. ACKERMAN, supra note 198, at 6 (arguing that we should try to distinguish between the people’s engagement in ordinary politics and their engagement in constitutional politics).


265 See U.S. CONST. art. II, § 2, cl. 2 (“[T]he President . . . shall appoint, and by and with the advice and consent of the Senate shall appoint, . . . 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 . . . .”); see also Balkin & Levinson, supra note 192, at 1068 (“Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”).

266 See supra Part I.B (noting several senators’ claims to this effect).

267 See supra notes 52–65 and accompanying text.

268 See supra Part I.C.
how the values expressed by the Constitution’s open-ended texts can best be instantiated in their daily lives.\textsuperscript{269}

Because judicial confirmation hearings in recent years have provided the legitimacy dichotomy with such a prominent and hospitable stage,\textsuperscript{270} it seems fitting to conclude by reflecting for a moment on how those hearings might change if the legitimacy dichotomy were pushed to the side and if all of the principals openly acknowledged both the inevitability and the importance of judicial discretion in resolving constitutional disputes. As it stands now, those confirmation hearings are remarkably devoid of substance (as Justice Kagan acknowledged before she herself was the nominee sitting before the Senate Judiciary Committee\textsuperscript{271}), causing many to wonder whether those hearings are worth the trouble.\textsuperscript{272} Apart from answering questions about their past activities (memoranda they wrote, political positions they endorsed, and so forth), nominees spend a good deal of their time listening patiently as senators rail against Supreme Court rulings they find objectionable, pledging to respect precedent and to show due deference to the federal government’s other two branches, and insisting that they will never decide cases based upon their own personal public policy preferences. Might greater candor about judges’ constitutional work lead to more substantive exchanges?

It certainly is possible. If the centrality of judicial discretion were openly and broadly acknowledged, public debates about judicial nominees’ merits would presumably move beyond superficial disagreements about whether a nominee is to be believed when he or she pledges to uphold the law. Nominees might more accurately pledge to explain their discretion-laden rulings and to endeavor to rely wholly upon legal reasons,\textsuperscript{273} but this then would beg the question of which sorts of reasons nominees regard as “legal.” There thus might be great pressure on nominees to engage in the kind of substantive discussions that Justice Kagan once argued are essential to the confirmation process.\textsuperscript{274} How, for example, would the nominee identify judicially cognizable traditions? When would the nominee regard present-day attitudes and norms as relevant, and where would he or she look to find them? Returning to one of the issues that divided Justice Stevens and Justice Scalia in \textit{McDonald}, does the nominee believe that the American people have asked judges to lead the nation in the direction that judges conclude are fair and just, or does the nominee believe it always is the job of the sovereign people to lead and the job of judges to follow?\textsuperscript{275} How would the nominee distinguish between those occasions when courts should speak and those in which (at least for the time being) courts should

\textsuperscript{269} See supra Part III.
\textsuperscript{270} See supra Part I.B.
\textsuperscript{271} See supra note 66 and accompanying text.
\textsuperscript{272} See supra note 74 and accompanying text.
\textsuperscript{273} See supra Part III.D.
\textsuperscript{274} See supra note 66 and accompanying text.
\textsuperscript{275} See supra notes 143–47 and accompanying text (noting the justices’ disagreement on this point).
allow constitutional controversies to remain wholly in the hands of politicians and their constituents?

Of course, engaging in such substantive exchanges would do little to curb the recent rise in divisive confirmation votes, given that those exchanges surely would provide fodder for nominees’ detractors. But so long as the nation remains closely divided about some of the fundamental constitutional questions on which our courts rule, perhaps it is a mistake to presume that divisive confirmation votes are invariably a symptom of a malfunctioning system. Indeed, in a system in which judges exercise significant discretion, it should hardly be surprising to find the public frequently divided about the choice of those in whose hands that discretionary power is to be placed. And our judges do exercise significant discretion. What Judge Richard Posner has said regarding the nation’s highest tribunal could be said regarding any judicial body charged with adjudicating controversies that arise under the Constitution: “The Court is awash in an ocean of discretion.”

It is time for the nation to embrace that essential truth about our system of democratic constitutionalism. As Justice Stevens observed after spending more than three decades on the nation’s highest Court, our constitutional system depends in significant part “on judges’ exercising careful, reasoned judgment. As it always has, and as it always will.”

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276 See supra notes 79–85 and accompanying text (noting the recent increase in the number of negative votes that Supreme Court nominees receive).

277 POSNER, supra note 240, at 272; see also id. at 5 (“Our judges have and exercise discretion.”).