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A Paradox in America: The Academic Debate on the Legitimacy of Judicial Review

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Abstract

The debate of the legitimacy of judicial review in American legal and political scholarship has experienced over two hundred years, and there is no sign of coming to an end. Viewed from the debate context, it is found that most arguments focus on three issues about the judicial review, namely, the institutional establishment, the institutional operation, and the institutional effect. This article calls it a tripartite debate. From the outset of building the Constitution, some commentators argued on the legitimate role of judicial review, the classical debate would be Alexander Hamilton v. Robert Yates. In light of the rise of judicial power from the second part of the twentieth century, the trend of the debate became prevalent. More scholars concentrated their energy on the issue of democratic legitimacy after the concept of countermajoritarian difficulty was coined by Alexander M. Bickel in 1962. And some other researchers paid more attention to the eligible role for interpreting the Constitution when Larry Kramer claimed the popular constitutionalism in 2001. It is to be regretted, however, that because commentators paid little attention to the definition of legitimacy and patterns, most arguments disputed the legitimacy issue without a commensurable base, so that each of the disputants was likely to tell a different story. Paradoxically, while many critics keep challenging the legitimacy of judicial review from various perspectives, theoretical or practical, evidences demonstrate that majorities of American people, members of political branches, and most political elite, accept the Court’s role and obey its decisions, either adopting a qualitative analysis relied on empirical data or a quantitative analysis rested on social facts. This article tries to explore the fact that the paradox was shaped in American constitutional context. It unfolds on six parts. In addition to introduction (Part I), Part II tries to define and characterize the concept of legitimacy, in order to lay the foundation for the following analysis. Second, we will respectively sketch the legitimacy debate over the institutional establishment, the institutional operation, and the institutional effect of the American judicial review. Third, employing both quantitative and qualitative analyses to show the high acceptance of the judicial review in American society at large, it will highlight the discrepancy between public opinion and academic community, and show the paradoxical nature of the legitimacy debate in American academia. Then, it tries to analyze the factors of the paradox. Finally, it makes an overall criticism and draws some conclusions.
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I. INTRODUCTION

As the worldwide development of the judicialization of politics\(^1\) continues to progress, the institution of judicial review has come to be globally embraced. However, the debate of the legitimacy of judicial review in the United States of America, *i.e.*, the motherland of the very institution, has been ongoing for over two hundred years.

Since the time of crafting the Constitution, some commentators have argued over the legitimate role of judicial review in the American constitutional democracy. A well-known case would be the classical debate between Alexander Hamilton and Robert Yates. The trends of the debate came into focus in light of the rise of judicial power in the second half of the twentieth century. More scholars concentrated their energy on the issue of democratic legitimacy after Alexander M. Bickel proposed the concept of countermajoritarian difficulty in 1962. Other researchers have paid greater attention to the eligibility of courts to interpret the Constitution and to the binding effect of judicial interpretation of the Constitution after Larry Kramer advocated the notion of popular constitutionalism in 2001. Viewed in the context of this longstanding debate in America,\(^2\) most arguments focus on three issues concerning judicial review, namely, the legitimacy of institutional establishment, institutional operation, and institutional effect. This article calls it a tripartite debate.

Regrettably, because commentators paid little attention to the definition of legitimacy, most arguments addressed the legitimacy issue without a commensurable base and thus each of disputants was likely to tell a different constitutional story. There is at least a paradox looming in the context of above-mentioned debate. According to periodical public polling in America, while many critics keep questioning the legitimacy of judicial review from various theoretical or practical perspectives, the very institution maintains a diffuse and longstanding support by the majorities of American people. What leads to this paradox? How does one explain the discrepancy between public acceptance and academic skepticism?

This article tries to explore the fact that the paradox was shaped in American constitutional context. It unfolds in six parts. In addition to introduction (Part I), Part II tries to define and characterize the concept of legitimacy, in order to lay the

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\(^1\) In a broad sense, the judicialization of politics is a trend that more and more countries rely on courts and judicial means for addressing public issues and solving political controversies. See Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 721-54 (2006); Tom Ginsburg, *Judicialization of Administrative Governance: Causes, Consequences and Limits*, 3 NATIONAL TAIWAN U. L. REV. 1, 1-29 (2008).

\(^2\) Gibson’s emphasis on the trend of American social studies showed the same assessment. See James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New Style” Judicial Campaigns*, 102(1) AM. POL. SCI. REV. 59, 61(2008) (noting that “social scientists have long been concerned with understanding the legitimacy of all political institutions, but of courts in particular”).
analytical foundation. Part III sketches the legitimacy debate over American judicial review on the issues of the institutional establishment, the institutional operation, and the institutional effect, respectively. Part IV highlights the discrepancy between public opinion and academic critics and show the paradoxical nature of the legitimacy debate within American academia by assessing the empirical data on public opinion to show the high acceptance of the judicial review in American society at large. Part V analyzes an American academic syndrome that may shape the paradox. Part VI concludes that American judicial review is a constitutional institution which spontaneously arose from the historical process; it has stood a severe test in American history. However, debates are beneficial to institutional development. In order to promote the quality of debates and overcome the problems of American academic syndrome, we propose the idea of academic minimalism.

II. UNDERSTANDING THE LEGITIMACY: ITS DEFINITION, FEATURES AND EVALUATION

The concept of legitimacy is, like “the rule of law” and many other academic terms, an “essentially contestable concept”\(^3\) in social science studies. The word “legitimacy” is frequently used in many political and academic debates, but seldom defined precisely\(^4\) and rarely analyzed.\(^5\)

Pragmatically, an argumentatively foundational definition is necessary for launching out a meaningful debate over legitimacy issues. Furthermore, as the conventional wisdom of legitimacy studies demonstrates, the concept of legitimacy encompasses diverse usages\(^6\) and some critical features. In this section, I will define and characterize the concept, and then depict the assessing methods.

A. Definition of Legitimacy

The concept of legitimacy is best conceived as comprising multiple elements.\(^7\) In order to establish a foundational definition of the concept of legitimacy; we are obliged to incorporate the essential elements of the term in the first place. As a matter of fact, some social scientists, especially those who are political scientists, psychologists, and jurists, have worked on this issue and offered some significant

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\(^7\) See Jack M. Balkin, Legitimacy and the 2000 Election, in BUSH V. GORE-THE QUESTION OF LEGITIMACY 210, 214 (Bruce Ackerman ed., 2002) (arguing that legitimacy is a complicated concept with many different elements).
Reviewing on the literature, social scientists have rendered many descriptions about legitimacy, as cited in notes, but few of them are satisfactory. By filtering those descriptions, I induce three core statements of legitimacy as follows:

First, *legitimacy is a condition with both static and dynamic interrelation between two parties.* Legitimacy does not exist in a vacuum. Empirically, it always functions in the certain circumstance that is embedded in some kind of interplay between two parties, either static\(^8\) or dynamic. Typically, social scientists explicitly or implicitly confirm that the legitimacy has been demonstrated in the relationship between government/institutions and citizens.\(^9\)

Second, *legitimacy is a condition in which the granted status and decisions of one given party will be provided with a lawful and/or rightful character.* In a constitutional democracy, the status of a given party must be consented, and thus legitimatized, by democratic elections or by appointments under a legal process. That is the reason why Rosenfeld emphasized the central role of the consent in legitimacy issues.\(^10\) Based on the granted status, the given party has powers to make decisions which would influence others. Significantly, legitimacy issue is closely concerned with whether the decisions would be made in accordance with legal process, and whether the goals of those decisions would be just, right and proper. Scholars have paid much attention on this issue. The descriptions that were stated by Ranney,\(^11\)

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\(^8\) Using a psychological perspective, Tyler notes that “legitimacy can reside either in a person who occupies a position or in an institution.” See *Tom R. Tyler, Why We Obey the Law* 29 (2006).

\(^9\) Some perspectives illustrate this relationship: (1) Legitimacy means the general belief of the members of a society that the government’s powers to make and enforce rules are proper, lawful and its rules are entitled to obedience. See *Austin Ranney, Governing- An Introduction to Political Science* 30 (2001); (2) Legitimacy can be defined as follows: a state is more legitimate the more that it is treated by its citizens as rightfully holding and exercising political power. See Bruce Gilley, *The Determinants of State Legitimacy: Results for 72 Countries*, 27(1) Int’l Pol. Sci. Rev. 47, 48 (2006); (3) When citizens believe that they ought to obey the laws, then legitimacy is high. If they see no reason to obey, or if they comply only from fear, then legitimacy is low. See Gabriel A. Almond, G. Bingham Powell Jr., Russell J. Dalton, and Kaare Strom, *Comparative Politics Today- A World View* 47 (8th ed., 2006); (4) If the public views a decision as legitimate, the public will voluntarily obey it; If a claim were recognized and accepted, then the role of that authority would be legitimized. See *Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703, 715 (1994); (5) The legitimacy of their fundamental political institutions ultimately depends on some kind of consent among all those who are subjected to such institutions. See Michel Rosenfeld, *supra note* 3, at 1311-12; (6) Legitimacy means that an institution is in compliance with a superior norm or ethics and is thereby accepted by the people who vest this institution with moral and political authority. See Alain A. Levasseur, *Legitimacy of Judges*, 50 THE AM. J. OF COMP. L. 43, 45 (2002); (7) The purpose of legitimacy inquiries is to determine whether citizens have a moral reason to accede to political decisions with which they substantively disagree or whether government officials are morally justified in coercively enforcing the laws. See Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, *supra note* 6, at 1719.

\(^10\) See Michel Rosenfeld, *supra note* 3, at 1311-12.

\(^11\) See *Austin Ranney, supra note* 9.
Gilley, Levasseur, Heywood, and Tyler manifested this argument.

Third, legitimacy is a condition in which the granted status and decisions of one given party will lead to some kind of recognition, identification, trust, acceptance, support, and voluntary obedience of the other. Since legitimacy entails a bilateral relation between two parties, the status and decisions of the given party would cause the other to make some responses. These responses, listed in the order of weak to strong, consist of recognition/or at least acquiescence, identification, trust, acceptance, support, and voluntary obedience. Most social scientists, who have probed into the legitimacy issues, address this concern.

As depicted above, this article tries to merge these three statements of legitimacy, and define it as follows:

Legitimacy is a condition with both static and dynamic interrelation between two parties, in which because the granted status and decisions of one given party are provided with lawful or/and rightful character, they lead to some kind of recognition, identification, trust, acceptance, support and voluntary obedience of the other party.

B. Features of Legitimacy

According to the preceding definition, the concept of legitimacy will be inherently characterized by some features.

First, legitimacy is provided with a feature of relativity. Put another way, it is built on some relationship between two involved parties, and it is generally

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12 See Bruce Gilley, supra note 9.
13 Alain A. Levasseur emphasized that “legitimacy is described as the condition of being in accordance with law or principle.” See Alain A. Levasseur, supra note 9.
14 Andrew Heywood described as follows: legitimacy (from the Latin *legitmare*, meaning ‘to declare lawful’) broadly means rightfulness; legitimacy refers to the rightfulness of a political system; it confers upon an order or command an authoritative or binding character, ensuring that it is obeyed out of duty rather than because of fear. See ANDREW HEYWOOD, KEY CONCEPTS IN POLITICS 29 (2000); ANDREW HEYWOOD, POLITICAL THEORY- AN INTRODUCTION 141, 150 (3rd ed., 2004).
15 Tom R. Tyler depicted legitimacy as “the belief that authorities, institutes, and social arrangements are appropriate, proper, and just. Legitimacy was examined in two ways: as the perceived obligation to obey the law and as support for legal authorities.” See TOM R. TYLER, supra note 8, at 45; Tom R. Tyler, Psychological Perspectives on Legitimacy and Legitimation, 57 ANN. REV. OF PSY. 375, 376 (2006).
16 E.g., Ranney, Tyler & Mitchell, Almond et al., Levasseur, and Fallon. See supra note 9; Heywood, supra note 14; Tyler, supra note 15; In addition, James L. Gibson states that “most agree that legitimacy is a normative concept, having something to do with the right to make decisions; institutions perceived to be legitimate are those with a widely accepted mandate to render judgments for a political community.” See James L. Gibson, Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New Style” Judicial Campaigns, 102(1) AM. POL. SCI. REV. 59, 61(2008); Jeremy Waldron notes that “in social science, legitimacy often means little more than popular support.” Jeremy Waldron, Dignity and Defamation: the Visibility of Hate, 123 HARV. L. REV. 1596, 1642 (2010).
demonstrated, in democratic regimes, by the relationships between governor and the governed, government and citizens, as well as principal and agent.

Second, legitimacy possesses a feature of variation. This feature is characterized by dual facts: on the one hand, the relationship between parties floats frequently, and thus the legitimacy varies with various conditions; on the other hand, legitimacy is a matter of degree. Namely, power holders, and institutions, may possess a high degree of legitimacy in some given period, and may suffer a low degree of legitimacy in other duration.

Third, legitimacy is normative in theoretical level. Theoretically, the given party, either power holders or institutions, must be provided with lawful or/rightful authority so that it will generate some extent of binding effect to the other party.

Finally, legitimacy is empirical in practical level. Practically, legitimacy is demonstrated by human attitude and behavior, including recognition, identification, trust, acceptance, support, and voluntary obedience. The status the power holders or institutions possess, and decisions they have made, will be treated as valid only when the relative parties recognize those status and decisions at least as well as voluntarily obey them at best. If the relative parties recognize, identify, trust, accept, support, and obey those status and decisions, then the power holders or institutions empirically enjoy the factual authority.

C. Evaluation of Legitimacy

How does one evaluate the legitimacy? It may be the critical concern in various legitimacy debates. Admittedly, the extent to which any government or any branch of the government enjoys legitimacy is relative. As a matter of degree, the task for assessing legitimacy will depend on more reliable and effective methods.

As social sciences evolve, research methods vary. As far as the methods for assessing legitimacy can be judged, the accumulative contributions of social sciences supply us with at least three options: qualitative, quantitative, and synthetic. The qualitative method may shed light on the causation analysis, phenomenal depictions, and logical argumentations with illustrative factual cases. Conventionally, legal scholars prefer to use this method. By contrast, the quantitative method intends to


highlight the empirical analysis based on statistical data, such as the results of periodical elections and regular reliable polling. Political scientists usually prefer to adopt quantitative methods. A synthetic approach that combines qualitative and quantitative methods will be optimal, because one who adopts this approach can justify his argument by juxtaposing the qualitative explication and quantitative empirical data, as well as making some further illuminations about their reciprocal relation.

Taking into account two of legitimacy features, that is, normative in theory and empirical in practice, this article asserts that the synthetic method would be appropriate for scholars to justify their arguments when they embark on debating over legitimacy issues. On the one hand, opponents or proponents are able to employ the data, which are gathered by qualitative method, to argue against or for the specific claims from normative level of legitimacy. On the other hand, commentators can rely on some empirical data, which are sought by quantitative method, to defend their own claims or refute opposite assertions from empirical level of legitimacy. On basis of comparative interest, one who adopts a synthetic method is more likely to make a plausible argumentation.

III. A TRIPARTITE DEBATE ON THE LEGITIMACY OF JUDICIAL REVIEW IN AMERICA

The fear of “government by judiciary,” is a specter that has long lingered around in America. Most academic debates on the legitimacy of judicial review among American legal scholars result from this sense of fear. A comprehensive survey of the debates in American constitutional history, summarized below, shows that most debates relating to the legitimacy of judicial review address one of three issues: the institutional establishment, the institutional operation, and the institutional effect.

A. Debating the Legitimacy of Judicial Review’s Institutional Establishment

Legitimacy concerns relating to judicial review’s institutional establishment manifest through two questions: (1) is there any constitutional command for Americans to craft the institution of judicial review? And (2) is there any legitimacy


19 The charge of “government by judiciary” implicitly means that the unelected federal judiciary, headed by the Supreme Court, would commandeer much of the task of governance and policymaking. See Frederick Schauer, The Supreme Court 2005 Term, Foreword: The Court’s Agenda-and the Nation’s, 120 HARV. L. REV. 4, 7 (2006).
for unelected judges, especially the Supreme Court’s Justices, to wield the power of judicial review?


Before the disputes about these two questions are unfolded, to understand the “unstaged debate of 1788 between Robert Yates and Alexander Hamilton”\(^{20}\) is significant for comprehending the whole context of American debate on judicial review, because it took place at the outset of constitutional founding moment and focused on the legitimate role of judicial review in American democracy. We call it a classical debate. Robert Yates, an anti-federalist, vehemently refused to grant the judicial branch a final say over the constitution’s meaning. He argued that if the Supreme Court acts as a final arbiter of constitution’s meaning, the power of judicial branch will be superior to that of the legislature, and hence “this power in the judicial, will enable them to mould the government, into almost any shape they please.”\(^ {21}\) However, Yates was not an advocate for legislative supremacy, and doubted that if the legislature is in charge of interpreting the Constitution, the nation will be in perilous state. Judging from the opinion of Yates, he believed that the constitution is the compact between the public and their rulers. Therefore, he would like the people to retain the right to interpret their own constitution as a last resort when the rulers violate that compact. In this sense, Robert Yates might be considered as the vanguard of popular constitutionalism in American history.

In contrast and in response to Yates, the federalist Alexander Hamilton devoted himself to defending the legitimacy of judicial review. In his celebrated “the least dangerous branch” theory,\(^ {22}\) Hamilton claimed that the judiciary has neither force nor will, \(i.e.\) neither sword nor purse, but merely judgment. In order to promote the legitimate status of courts, Hamilton resorted to the doctrine of checks and balances, and advocated the indispensability of judicial control over legislative power. Without judicial review, he emphasized that “all the reservations of particular rights or privileges would amount to nothing.”\(^ {23}\) Further, based on the doctrine of popular sovereignty and the hierarchy of norms, Hamilton asserted that no legislative act contrary to the Constitution can be valid and, furthermore, judicial nullification of statutes is simply an illustration of popular sovereignty. Namely, in Hamilton’s phrases, the fact that courts wield the power of judicial review only supposes that the


\(^{21}\) Id., at 59.

\(^{22}\) In an essay in the Federalist Papers (No.78), the federalist Alexander Hamilton eloquently argued that “in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injury them…. “ See JAMES MADISON, ALEXANDER HAMILTON, AND JOHN JAY, THE FEDERALIST PAPERS 437 (1987) (Penguin Books).

\(^{23}\) Id., at 438.
power of the people is superior to judicial power and the legislative power.\textsuperscript{24} After these arguments, Hamilton succinctly concludes: “the interpretation of the laws is the proper and peculiar province of the courts.”\textsuperscript{25} Hamilton’s argument, especially “the least dangerous branch” theory, maintains a far-reaching influence\textsuperscript{26} on the legitimacy debate of judicial review in America.

This classical debate depicted above is just a prelude. Afterward, many of American academic members have dedicated themselves to the longstanding debate over the legitimacy of judicial review, summarized below. The full account of the academic debate is elaborated in Barry Friedman’s serial works.\textsuperscript{27}

2. Contesting on Constitutional Mandate

The term “judicial review” is not found anywhere among the 7591 words\textsuperscript{28} of the United States Constitution. The judicial clause (Article III), which is designed to establish the judiciary, simply provides some succinct descriptions of judicial power,\textsuperscript{29} tenure of federal judge,\textsuperscript{30} jurisdiction,\textsuperscript{31} trial by jury, and treason. Do Americans have a constitutional mandate to build an institution of judicial review?

Most American commentators answer this in the negative. People who adopt the negative stances are usually based on originalist and textualist standpoints, denying that courts can derive their power of judicial review from explicit constitutional mandate. They believe that the courts’ power of judicial review is “simply a special

\textsuperscript{24} Id., at 439.
\textsuperscript{25} Id.
\textsuperscript{26} One of the prominent evidences would be the famous publication of Alexander M. Bickel in 1962, his celebrated book, entitled as “The Least Dangerous Branch: The Supreme Court at the Bar of Politics,” was inspired by Hamilton’s theory. In the book, Bickel coined the well-known term “countermajoritarian difficulty.”
\textsuperscript{28} See Stephen Gardbaum, The Myth and the Reality of American Constitutional Exceptionalism, 107 MICH. L. REV. 391, 399 (2008). (Comparing the word number of some constitutions in effect, arguing that if the U. S. Constitution is not the shortest, it is among the shortest.) By contrast, the Indian Constitution of 1950, including more than 100,000 words and 444 articles, is the longest basic law among the world’s independent countries. See Pratap Bhanu Mehta, The Rise of Judicial Sovereignty, 18(2) J. OF DEMOCRACY 70, 70 (2007).
\textsuperscript{29} U. S. CONST., art. III, § 1: The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish
\textsuperscript{30} U. S. CONST., art. III, § 1: The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.
\textsuperscript{31} U. S. CONST., art. III, § 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority….
instance of the implied judicial power to interpret,“ because “the text of the Constitution, of course, nowhere mentions the power of judicial review.” In simple words, American judicial review has an atextual nature.

It is worth noting that most of opponents recognize the standard account that the power of judicial review in the United States was invented by Chief Justice John Marshall in the case Marbury v. Madison, or only established by the way that the public generally acquiesces the reasoning of the Marbury. There are numerous commentators who maintain this viewpoint, such as Bickel, Dworkin, Wellington, Dershowitz, White, and Kramer. Phyllis Schlafly even argued that “federal judges and law professors all say that the most important legal case in American history is the U.S. Supreme Court case of Marbury v. Madison.”

On the contrary, there are still proponents who strongly defend the constitutional foundation for establishing judicial review. In 1959, Herbert Wechsler argued for the legitimacy of judicial review on basis of “the Supremacy Clause” of the Constitution.


5 U. S. (1 Cranch) 137 (1803); Mary Sarah Bilder, Why We Have Judicial Review, 116 Yale L. J. Pocket Part 215, 215 (2007); In this case, the Chief Justice John Marshall announced that “It is, emphatically, the province and duty of the judicial department, to say what the law is.” 5 U. S. (1 Cranch) 137, 176 (1803); what Marshall proclaimed was regarded by Larry Kramer as “the Supreme Court’s own Declaration of Independence.” See Larry D. Kramer, The Supreme Court 2000 Term, Foreword: We the Court, 115 Harv. L. Rev. 4, 5 (2001).


See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 12 (2nd ed., 1986) (arguing that “our discussion has centered on the claim actually staked out in Marbury v. Madison—that is, that a federal court has the power to strike down a duly enacted federal statute on the ground that it is repugnant to the Constitution.”

See RONALD DWORKIN, A MATTER OF PRINCIPLE 33 (1985). (“On that simple and strong argument John Marshall built the institution of judicial review of legislation, an institution that is at once the pride and the enigma of American jurisprudence”).

See Harry H. Wellington, Foreword, in THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS IX (2nd ed., Alexander M. Bickel, 1986) (“When scholarship turns to judicial review…John Marshall’s opinion in the 1803 case of Marbury v. Madison—the case that established the authority of the courts to review, under the Constitution, the actions of other branches of government…”).

See ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, 4 (2001) (“The awesome power of the United States Supreme Court to declare unconstitutional the actions of the other branches of government is nowhere explicitly granted by the Constitution itself. It was asserted by the justices in Marbury v. Madison (1803)”).


See Larry D. Kramer, supra note 35, at S-6. (“Marbury staked out a considerably more modest position, venturing only that it was proper for the Court to interpret the Constitution…”).


U. S. Const., art. VI, § 2: This Constitution, and the Laws of the United States which shall be made
Wechsler was convinced that the Constitution enjoys the highest hierarchical position, and that judges have the duty as well as the power to enforce the Constitution. Therefore, he never doubted the legitimacy of judicial review.\textsuperscript{45}

Some prominent scholars agreed with Wechsler’s argumentation. Bradford R. Clark,\textsuperscript{46} highlighted the dual nature of the Supremacy Clause, that is, it constitutes an “express command for judges” not only “to prefer federal to state law” but also to prefer the Constitution to federal statutes. Pursuant to this dual nature, judicial review of federal statutes was authorized by the Clause. He elaborated on the American constitutional context\textsuperscript{47} to prove that the text, history and structure of the Constitution supported his conclusion. Similar arguments appeared in the works\textsuperscript{48} of Saikrishna B. Prakash & John C. Yoo, Mary Sarah Bilder,\textsuperscript{49} and William Michael Treanor.\textsuperscript{50} Prakash & Yoo even assumed that \textit{Marbury v. Madison}, which has been characterized as the invention of Chief Justice John Marshall, also relied on the Supremacy Clause.\textsuperscript{51} In addition, some scholars defend the constitutional foundation of judicial review on structural grounds. For example, Stephen Gardbaum acknowledged that enforcing the constitution by the power of judicial review is a distinguished feature of American constitutional structure.\textsuperscript{52} Mary Sarah Bilder, applying a structuralist account,\textsuperscript{53} claimed that judicial review reflects the unique structures of American politics, like a written constitution, federalism, popular sovereignty, the separation of powers, checks and balances, distinctions of law and politics, independent judiciary, and so forth.

3. Disputing on Authority of Unelected Judges

\textsuperscript{47}Id., at 323-33.
\textsuperscript{49}Mary Sarah Bilder, \textit{supra} note 35, at 216 (noting that in fact, the word “Constitution” in the Supremacy Clause and the clause describing the Supreme Court’s jurisdiction appeared to give textual authorization for judicial enforcement of constitutional constraints on state and federal legislation”).
\textsuperscript{50}William Michael Treanor, \textit{Original Understanding and the Whether, Why, and How of Judicial Review}, 116 THE YALE L. J. POCKET PART 218, 218 (2007) (asserting that the Constitution’s text contemplates judicial review of federal legislation, and it seems clear that the Supremacy Clause assumes that the federal judiciary has the power to review state legislation).
\textsuperscript{51}Saikrishna B. Prakash and John C. Yoo, \textit{The Origins of Judicial Review; supra} note 48, at 903.
Under the U. S. Constitution, federal judges are appointed and “shall hold their Offices during good Behavior.” Put simply, they are unelected officials with lifetime tenure. Are the unelected federal judges eligible to wield the power of judicial review?

Many debates arise from this concern. Some skeptics of the legitimacy of unelected judges, in light of certain democratic theories, always conceive a sensible concept by posing a typical question like this: To the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions? Or, on special occasions, such as when the Supreme Court handed down its *Bush v. Gore* in 2000, some critics challenge the legitimacy of the Justices and cynically note the following. Although we live in a representative democracy, the extent to which either representation or democratic elections have force and effect depends on the will of a majority of the nine unelected, lifetime-serving justices. In addition to a lack of democratic accountability, critics also fear that judicial appointments would become a tool of party patronage and cronyism.

Conversely, defenders of judicial review generally bolster the legitimacy of unelected judges by a two-prong strategy: demonstrating the merits of judicial appointment and the demerits of judicial election. First, those who approve of judicial appointment enumerate several advantages of unelected judges: They are able to be insulated from momentary political pressure, act as an impartial arbiter of political

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54 U. S. Const., art. II, § 2.
56 The most popular among these theories is the consent theory, which entails a premise that the legitimacy of government power derives from the consent of the people. In other words, government officials shall be accountable to the public. This theory is closely related to the notions of collective self-government, popular sovereignty, and democracy. See David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265, 273-77 (2008); Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 Loyola of Los Angeles L. Rev. 671, 676 (2009).
58 Even if judges are elected, like most state judges, the degree of democratic accountability they bear is still different from those of political branches. The challenge might be: If democracy is king, then why should a handful of infrequently elected judges have the final say over the work of the people’s more frequently elected representatives? See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061, 1140 (2010).
61 See supra note 58, at 1063, 1140. Critics are also concerned that if judges were appointed, the influence would come from the officials who appointed and retained judges; Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L. J. 623, 632 (2009).
disputes, protect American democracy, minority rights, and values that Americans care about, possess technical proficiency, and have the opportunity, the incentive and the ability to interpret the Constitution carefully. Second, they use empirical data to show that judicial election is a flawed arrangement in which the disadvantages outweigh the advantages. The vices they pointed out include: (1) damages to the functions of state courts to enforce the rule of law; (2) conflict with the judiciary’s core function to protect individual rights against majority encroachment; (3) favoritism and bias; (4) likelihood of being more corrupt than that of judicial appointment; thereby tarnishing the judicial integrity; and (5) compromise to the procedural fairness, thereby infringing on litigants’ right. A recent Supreme Court case is an illustration of some demerits of judicial election. In Caperton v. A. T. Massey Coal Co., the Court firstly ruled that due process requires an elected judge to recuse himself from the cases that his or her main contributor is

<table>
<thead>
<tr>
<th>States judges removed or convicted</th>
<th>Bribes accepted by state judges</th>
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</thead>
<tbody>
<tr>
<td>Elected judges</td>
<td>Appointed judges</td>
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<tr>
<td>Number of judges</td>
<td>Percent</td>
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<tr>
<td>Appointed judges</td>
<td>5</td>
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<tr>
<td>Elected judges</td>
<td>14</td>
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<tr>
<td>Appointed judges</td>
<td>15%</td>
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<tr>
<td>Elected judges</td>
<td>0.5%</td>
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See Molly McLucas, supra note 56, at 684.

involved. Generally speaking, people who bolster unelected judges believe that elected judiciary is not desirable, and judicial appointment is a better alternative, for its virtues outweigh the vices.

**B. Disputing on the Legitimacy of Judicial Review’s Institutional Operation**

The second part of the tripartite debate focuses on the legitimacy of judicial review’s operation. Put in a question form, does the institution of judicial review, in practice, keep itself in line with democracy? Political experience and knowledge suggest that the essential characteristics of democracy are best conceptualized as consisting of certain basic procedural principles and core substantive values enumerated in Table 1 below. The central procedural principles include equal participation, representative government, deliberative discourse, and majority rule. The core substantive values include human rights protection, enduring values maintenance, pluralistic toleration preservation, and minority rights assurance.

<table>
<thead>
<tr>
<th>Basic procedural principles of democracy</th>
<th>Core substantive values of democracy</th>
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<tr>
<td>Equal participation</td>
<td>Human rights protection</td>
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<tr>
<td>Representative government</td>
<td>Enduring values maintenance</td>
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<tr>
<td>Deliberative discourse</td>
<td>Pluralistic toleration preservation</td>
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<tr>
<td>Majority rule</td>
<td>Minority rights assurance</td>
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Even though majority rule is merely one of the procedural principles of democracy, as mentioned above, many critics equate democracy with majority rule. Interestingly, there is hardly a debate about the democratic legitimacy of judicial review without addressing the issue of majority rule in America. Accordingly, most debates over the legitimacy of the institutional operation of judicial review converge on the intractable issue that judicial review inevitably contravenes the majoritarian principle of democracy. Inspired by Alexander M. Bickel’s concept of “counter-majoritarian difficulty,” many American constitutional scholars have been obsessed by the

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75 Brettschneider embraced the same viewpoint. See Corey Brettschneider, *Balancing Procedures and Outcomes within Democratic Theory: Core Value and Judicial Review*, 53 POLITICAL STUDIES 423, 427-28 (2005) (portraying that right of participation in democratic procedures, as well as substantive rights, should both be justified with reference to the ideal of democratic authority and stating that “procedural rights express what it means for rule to be by the people, while substantive guarantees express the ideal of democratic rule for the people”) (emphases added).

76 As Theodore W. Ruger noted, on some important sense, almost every debate about judicial review power is also a debate about the normative attractiveness of majority rule. See Theodore W. Ruger, “A Question Which Convulses a Nation”: The Early Republic’s Greatest Debate about the Judicial Review Power, 117 HARV. L. REV. 826, 855 (2004).

77 Bickel proclaimed that the root difficulty is that judicial review is a counter-majoritarian force in American constitutional system. See Alexander M. Bickel, supra note 37, at 16.
notion and its related issues. Drawing from the ingenious analysis of Steven P. Croley on academic responses to Bickel’s “countermajoritarian difficulty,” we divide those responses into three types:

1. The Countermajoritarian Difficulty Is a Misguided Problem

The first response to countermajoritarian difficulty is the argument that there is no countermajoritarian difficulty problem with judicial review; it is a fallacious and misguided problem. Some commentators defend this argument.

Harry H. Wellington criticized that the conflicts over the undemocratic character of judicial review would have been overstated. Based on the political reality, Wellington argued that, in fact, nonjudicial policies of great importance were never made directly in response to the majority will. Moreover, judicial decisions would not become the final words unless they were accepted by political branches.

Barry Friedman rejected the argument of countermajoritarian difficulty by rebutting its twin premises of that argument: (1) In the first place, he pointed out those two premises, that is, American democracy is ruled by a majority will; and (2) the majority will is trumped by the judicial decisions which have a final say. With respect to the first premise, Friedman argued that there is no static and identifiable majority in American democracy, because the majoritarian preferences are always transient. Friedman believed that the second premise is seriously exaggerated. He noted that even “final” decisions are always checked by the power of political branches to overrule by statute, civil disobediences, and even the ability of the courts to overrule their precedents. After refuting those two assumptions, Friedman concluded that courts play two roles in American constitutional dialogue, that is, the role of speaker and the role of shaper or facilitator. As a result, courts are regarded as the promoters and participants in national constitution’s discourse. Under these conditions, Friedman believed that there is no countermajoritarian difficulty problem

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79 Although the phrase is originally invented by Alexander M. Bickel, it has variant forms in American history, and hence arouses many related issues. See Adrian Vermeule, The Supreme Court 2008 Term, Foreword: System Effects and the Constitution, 123 HARV. L. REV. 6, 37 (2009).
80 See Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 THE U. OF CHI. L. REV. 689, 748-51 (1995) (analyzing that there are three types of response to Bickel’s countermajoritarian difficulty: the first is that countermajoritarian difficulty states a false problem, the second is that the countermajoritarian difficulty is insoluble, and the third is that the countermajoritarian difficulty is real, but resolvable).
81 See Harry H. Wellington, supra note 39, at xi-xii.
83 Id., at 641-42.
84 Id., at 644.
85 Id., at 644-48.
86 Id., at 668.
87 Id., at 582.
with judicial review.

The third rebutter is Christopher L. Eisgruber. Relying on three statements, Eisgruber tried to prove the false problem of countermajoritarian difficulty. First, democracy is not equal to majority rule; it is a profound mistake to equate democracy with government by voters.\(^{88}\) Second, judges are the potential representatives for the people on moral issues, because judges have two merits in defending moral principles.\(^{89}\) Third, judicial review is an ingredient in the democratic process.\(^{90}\) Eisgruber reminded us that it is a mistake to consider judicial review as an external curb on the democratic process. Judicial review is, in fact, an essential of the democratic process.\(^{91}\) By this inference, Eisgruber contended that the countermajoritarian difficulty is a misguided problem.

The fourth disputant is Frederick Schauer. He compared the public agenda with the Supreme Court’s by examining ten-year worth of empirical polling data collected by reliable agencies such as Gallup and Harris Poll, as well as by probing into press coverage or headlines of critical presses such as *New York Times*, *USA Today*, and *Los Angeles Times*. The results demonstrate that, among those issues that most concern the public, courts left the critical decisions to be made by the institutions which were accountable to the people.\(^{92}\) Schauer concluded that “the judicial incursion on democracy—if an incursion it is—is quite a bit smaller in quantity and aggregate consequence than might be thought.”\(^{93}\) This implied that the countermajoritarian difficulty problem with judicial review is in all probabilities overstated.\(^{94}\)

2. The Countermajoritarian Difficulty Is Real, and Inextricable

The minority response to countermajoritarian difficulty is the argument that the difficulty problem is real and insoluble. Because the action that unelected judiciary reviews legislative outcomes is inherently and irreconcilably undemocratic, and by

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\(^{88}\) CHRISTOPHER L. EISGRUBER, supra note 66, at 50, 62.

\(^{89}\) Id., at 62, 77-78 (Eisgruber contended that judges have two advantages in standing for the public on moral issues. First, life tenure makes judges less self-interested, and thus unlikely to disregard or distort moral judgments. Second, judges must account for their votes and reasons in cases, and then therefore have stronger incentive to defend moral principles. Finally, he offered an argument that unelected judges, especially the Supreme Court, construct a special representative institution in a democracy).

\(^{90}\) Id., at 77-78.

\(^{91}\) Fiss expressed a similar opinion, See Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1275 (2009). He explicated that democracy makes popular consent the foundation of legitimacy, and that consent is not granted to individual institution, but extends to the system of government as a whole. However, Vermeule disagreed. Through the perspective of system effect, Vermeule noted that it is fallacious to hold that if the overall constitutional order is democratic, then the Supreme Court is democratic. See Adrian Vermeule, supra note 79.

\(^{92}\) Frederick Schauer, supra note 19, at 53. Alexander and Schauer also rendered a similar opinion that “the Court cannot pick its agenda, although Congress can.” See Larry Alexander and Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 477 (2000).

\(^{93}\) Id.

\(^{94}\) See Adrian Vermeule, supra note 79, at 38.
nullifying the legislation, courts really trump the majority will.\textsuperscript{95} Jeremy Waldron’s case against judicial review\textsuperscript{96} may be an illustration.

Waldron argued that judicial review is not a proper institution for settling the disagreements about rights which generally exist in democracies, though the practice of judicial review may be appropriate in some circumstances.\textsuperscript{97} There is no justification to assume that courts have better capacity than legislatures in protecting rights.\textsuperscript{98} Based on process-related reasons, and ensuing legislative supremacy,\textsuperscript{99} Waldron contended that a society ought to settle disagreements about rights by means of the mechanism of majority decision.\textsuperscript{100} Put in other way, for the reason that courts embrace the counter-majoritarian nature, the inevitable disagreements concerning rights issue should be left to the democratic process of legislative institutions.\textsuperscript{101}

3. The Countermajoritarian Difficulty Is Real, but Compatible

The most prevalent response is that there is a countermajoritarian difficulty problem with judicial review, but it can be reconciled in some way.\textsuperscript{102} For clear understanding, we will divide them into three subtypes on bases of the methods they adopt and the central issues they concern—that is, process-based argument, substance-based argument, and synthetic argument.\textsuperscript{103}

\begin{enumerate}
\item[\textbf{a. Process-Based Argument for Being Compatible with Democracy}]

Many arguments have been made to reconcile judicial review with democracy or majoritarian principle from the perspectives of democratic procedure; this article would call them process-based arguments. The main aspects of democratic procedure, as Table 1 notes, consist of equal participation, representative mechanism, deliberative

\begin{itemize}
\item See Steven P. Croley, \textit{supra} note 75, at 750.
\item Waldron acknowledged that judicial review might justify itself in some rare situations, such as peculiar pathologies, dysfunctional legislative institutions, corrupt political cultures, legacies of racism and other forms of endemic prejudice. \textit{See id.}, at 1406.
\item \textit{Id.}, at 1346.
\item \textit{Id.}, at 1376, 1386.
\item \textit{Id.}, at 1387-88.
\item \textit{Id.}, at 1360.
\item Just like Sherry described, “one might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today.” \textit{See} Suzanna Sherry, \textit{Too Clever by Half: The Problem with Novelty in Constitutional Law}, 95 NW. U. L. REV 921, 921 (2001); Fletcher has the similar observation. \textit{See} William A. Fletcher, \textit{Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word “All” in Article III}, 59 DUKE L. J. 929, 954 (2010).
\item Croley made efforts to categorize the resolutions of reconciliation between judicial review and democracy as three types—representation-orientation models, participation-orientation models, and rights-orientation models. \textit{See} Steven P. Croley, \textit{supra} note 76, at 751, 765-76. Owing to the fact that the former two must be reduced to the same category—process-based argument, this article would not like to use it; besides, some others characterize the defenses of judicial review as instrumentalist arguments and non-instrumentalist arguments. \textit{See} Guha Krishnamurthi, John Reidy, Michael J. Stephen, and Shane Pennington, \textit{An Elementary Defense of Judicial Majoritarianism}, 88 TEXAS L. REV. 33, 35-36 (2009).
\end{itemize}
discourse, and majority rule. Among those prominent arguments in defending judicial review from different aspects of democratic procedure, some of them are eminent. They may comprise Robert A. Dahl’s “supporting ruling regime theory,” John H. Ely’s “representation-reinforcing theory,” Michael J. Perry’s “promoting deliberative politics theory,” Lee Epstein et al.’s “supporting majority preference theory,” Eylon & Harel’s “facilitating participation right theory,” and others.

b. Substance-Based Argument for Being Compatible with Democracy

Other scholars attempted to reconcile judicial review with democracy based on substantive democratic values. As Table 1 demonstrates, the core substantive democratic values would contain human rights protection, enduring values maintenance, pluralistic toleration preservation, and minority rights assurance. All arguments that are calculated to defend judicial review from the perspectives of substantive democratic values will be called “substance-based arguments” in this article. Those salient arguments pertaining to this category include Alexander M. Bickel’s “enduring values theory,” Jesse H. Choper’s “protecting human rights theory,” Bruce Ackerman’s “democracy preservationist theory” or “constitutional

104 See Robert A. Dahl, supra note 65, at 563, 570, 581 (2001) (Dahl’s thesis of “supporting ruling regime” is rested on an empirical analysis of unconstitutional laws, suggests that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majority of the United States,” “the main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition.” Thus, the power of judicial review is not at odds with the principle of majority rule).

105 See JOHN HART ELY, DEMOCRACY AND DISTRUST- A THEORY OF JUDICIAL REVIEW 105, 135 (1980). (Ely opined that the power of judicial review, via “clearing the channels of political change” and “facilitating the representation of minorities,” will be compatible with democracy).

106 See MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 154-55 (1988) (Perry argued that judicial review enables itself to square with democracy by facilitating deliberative politics).

107 See Lee Epstein, Jack Knight, and Andrew D. Martin, The Supreme Court as a Strategic National Policymaker, 50 EMORY L. J. 583-611 (2001) (To some extent, Lee Epstein et al.’s “supporting majority preference theory” confirmed Dahl’s “ruling regime thesis.” They found that “the Justices deviate from their personal preferences when those preferences are not shared by the members of the ruling regime,” and “adjust their decisions in anticipation of the potential responses of the other branches of government.” Under this explication, judicial review would not run afloat of the principle of majority rule).

108 See Yuval Eylon and Alon Harel, The Right to Judicial Review, 92 VA. L. REV. 991, 1021-22 (2006) (Eylon and Harel contended that the right to judicial review is a right to a hearing, and that judicial review, by rendering a right to a hearing, is able to further the values of participatory democracy).

109 See Alexander M. Bickel, supra note 37, at 16, 18, 24, 25-26. (Although Alexander M. Bickel coined the term “countermajoritarian difficulty” and characterized judicial review as a deviant system in American democracy, the ultimate goal he intended to accomplish was to reconcile judicial review with democracy, especially with the majority rule; Bickel claimed that democratic governments should serve not simply the immediate material needs of people but also certain enduring values, and that courts should be the appropriate pronouncer and guardian of such values, because courts have capacity and advantage that legislatures and executives do not possess. In this case, if courts adhere to passive virtues, the power of judicial review will substantively promote the legitimacy of whole government, and hence will not be at odds with majority rule).

110 See JESSE H. CHOPER, supra note 65, at 7, 60, 64, 68 (Choper adopted a rights-based argument in defending the legitimacy of judicial review. First, he asserted that democracy is not equivalent to pure majoritarianism, and that basic human rights will be the essential values of a democratic society. Second, Choper argued that the power of judicial review is granted to guard against governmental
moment theory,” Ronald Dworkin’s “maintaining constitutional principles theory” and “partnership democracy theory,” William N. Eskridge’s “theory of pluralism-facilitating judicial review,” Richard H. Fallon’s “morally better outcomes theory,” David N. Law’s “guarding people's interest theory,” and infringement of human rights secured by the Constitution, especially the rights of minorities. As a result, Choper concluded that the Court’s role as final constitutional arbiter is conducive to promote the precepts of democracy.

111 See Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, 93 THE YALE L. J. 1013, 1051 (1984); Bruce Ackerman, Constitutional Politics/ Constitutional Law, 99 THE YALE L. J. 453, 461 (1989); Bruce Ackerman, WE THE PEOPLE: FOUNDATIONS 6-7, 267, 288-89 (1991). Ackerman grounded his “democracy preservationist theory” or “constitutional moment theory” on the dual nature of American politics, that is, normal politics and constitutional politics. The decisions are made by government in the normal politics; by contrast, the decisions are made by “We the People” in constitutional politics. Significantly, the degree to which constitutional politics enjoys legitimacy is superior to that of normal politics. Under these circumstances, when the Court incorporates the mobilized will of the people into constitutional interpretation by judicial review, it actually acts as a democracy preservationist, and hence stays in tune with democracy. Ackerman eloquently announced that “the democratic task of the Supreme Court is to interpret the Constitution of the United States.”

112 Ronald Dworkin explored two arguments for judicial review-- “maintaining constitutional principles theory” and “partnership democracy theory.” So far as “maintaining constitutional principles theory” is concerned, Dworkin described that what legislatures make are momentary policies, and what judiciary ought to maintain is enduring principle; there are many moral principles embedded in the Constitution, and judges protect them by means of judicial review. See RONALD DWORFIN, TAKING RIGHTS SERIOUSLY 84 (1978); RONALD DWORFIN, LAW’S EMPIRE 244 (1986); RONALD DWORFIN, FREEDOM’S LAW-THE MORAL READING OF THE AMERICAN CONSTITUTION 7-8, 354-55 (1996). As to “partnership democracy theory,” Dworkin opined that democracy is not only majority rule, but also a partnership in self-government; Americans are committed by the history to granting judges to enforce the protections of equal citizenship, and thus judicial review is conducive to the realization of partnership democracy. See RONALD DWORFIN, JUSTICE IN ROBES 139 (2006); RONALD DWORFIN, JUSTICE FOR HEDGEHOGS 382-99 (2011).

113 See William N. Eskridge Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 THE YALE L. J. 1279, 1293, 1294-95 (2005). Eskridge’s “theory of pluralism-facilitating judicial review” rests on the notion that pluralist democracy is dynamic and fragile, depicting that the polity shall encourage existing groups and emerging groups to participate in the marketplace of politics, and that it will not be in favor of democracy if groups drop out of or never drop into the democratic system. Therefore, if results of judicial review do not aim to insulate groups from democratic politics, or even strengthen the participatory chances of groups, then the institution of judicial review will keep itself in line with democracy. See also Robert Post and Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. C. R.-C.L. L. REV. 373, 396-98 (2007).

114 See Richard H. Fallon Jr., The Core of an Uneasy Case for Judicial Review, supra note 6, at 1700, 1709, 1713-1715, 1716, 1718, 1720, 1726, 1727-28. Fallon adopted a result-based reason to justify the legitimacy of judicial review. He plausibly asserted that owing to the fact that judicial review may produce morally better results from some dimensions, such as rectifying the errors of rights underenforcement, helping to minimize fundamental rights violations, protecting the constitutive norms of political democracy, and promoting the overall moral quality of political decisions, it is relatively beneficial to a democratic society. Fallon concluded that “a constitutional democracy with a well-designed system of judicial review would produce a morally better pattern of outcomes than a political democracy without judicial review.”

115 See David S. Law, A Theory of Judicial Power and Judicial Review, 97 THE GEORGETOWN L. J. 723, 723-24, 730-34, 793-94 (2009). David S. Law tried to construct a theoretical foundation for overcoming the countermajoritarian dilemma. He contended that “judicial review supports popular sovereignty by mitigating the principal-agent problem that lies at the heart of democratic government,” and thus, “the relationship between judicial power and popular rule is not antagonistic, but symbiotic.” Since judicial review actually underpins and reinforces the power of the people over their government, he argues, the power of judicial review substantively guards the interests of the
c. Synthetic Argument for Being Compatible with Democracy

In addition to the “process-based argument” and “substance-based argument” that we have mentioned above, some commentators embark on reconciling judicial review with democracy from a synthetic perspective. Put in another way, they may take account of both process-based and substance-based arguments. This article calls it “synthetic argument.” In this category, to the best of our knowledge, there will be at least two eminent arguments—Samuel Freeman’s “theory of social and historical circumstances,” and Cass R. Sunstein’s “judicial minimalism.”

C. Contesting with the Legitimacy of Judicial Review’s Institutional Effect

The debate over the legitimacy of judicial review’s institutional effect in America can be expressed in two questions: First, is judicial branch granted the exclusive authority to interpret the Constitution? Second, does judicial interpretation of the Constitution have a final and binding effect? These two questions converge upon the elements of judicial supremacy.

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116 See Samuel Freeman, Constitutional Democracy and the Legitimacy of Judicial Review, 9(4) LAW AND PHILOSOPHY 327, 354, 361, 365-66, 367 (1991). Samuel Freeman emphasized that majority rule is not the best means to protect all citizens in a democracy from infringement, “whether judicial review is needed to maintain the requirements of a democratic constitution is then dependent on social and historical circumstances.” Freeman argued that anyone cannot single out a feature of democratic constitutions (such as majority rule, political accountability, or equal participation) and criticize that judicial review is undemocratic because it does not meet the demands of this standard. Generally speaking, judicial review will comport with democracy if it is able to protect basic human rights, clear democratic procedures, cultivate a shared sense of justice and the public good, promote public discussion and legislative deliberation, as well as compensate legislative failures.

117 See Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 6, 10, 13, 15, 20 (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME-JUDICIAL MINIMALISM ON THE SUPREME COURT 10, 11, 77 (1999). In broad sense, Sunstein’s “judicial minimalism” consists of two parts—that is, “procedural minimalism” and “substantive minimalism.” See Christopher J. Peters, Assessing the New Judicial Minimalism, 100 COLUM. L. REV. 1454, 1464-66, 1522 (2000). That is why this article attributes it to a synthetic argument. Pragmatically, “procedural minimalism” is manifested by two principles of “narrow rather than wide” and “shallow rather than deep.” The former principle means that judges “decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases, and unless they are pretty much forced to do so.” In other words, “minimalists try to decide cases rather than to set down broad rules.” The latter principle means that judges “generally try to avoid issues of basic principle and instead attempt to reach incompletely theorized agreements.” Second, as far as “substantive minimalism” is concerned, it means that courts pay deference to the decisions of political branches unless the decisions involve infringing basic human rights or hollowing the core values of the Constitution. If judicial actions rely on “procedural minimalism” and “substantive minimalism,” then the power of judicial review will not run afoul of democracy.

The argument for judicial supremacy began with the celebrated case *Marbury v. Madison* in 1803 when Chief Justice John Marshall announced that “it is, emphatically, the province and duty of the judicial department, to say what the law is.” Joseph Story became the first Justice to explicitly bolster judicial supremacy when he embarked on the systematic argument for judicial supremacy in 1833. At the end of the Civil War, the trend of supporting for judicial supremacy among elected officials, judges, and citizens became increasingly supportive of judicial supremacy. James B. Thayer, however, espoused his legislative supremacy in 1893, arguing that legislature rather than court should be the primary arbiter of the Constitution’s meaning, unless there is a “law’s obvious unconstitutionality” or “legislative clear mistake.” Academic anxiety towards the Court’s role increased during the Warren Court era (1954-1968), partly because the Court pronounced its authority of judicial supremacy in the case of *Cooper v. Aaron* in 1958 and *Baker v. Carr* in 1962, and partly because its engagement with judicial activism. Since the 1980s and 1990s, the debate on judicial supremacy has been aroused by President Ronald Reagan’s call for a strong presidential interpretative independence, as well as the Rehnquist Court’s (1986-2005) adaptation of a strong version of judicial supremacy.

After pigeonholing the pros and cons of judicial supremacy and related claims, we sort out three subtypes: arguments for judicial supremacy, arguments for popular supremacy, and arguments between two ends of spectrum.

1. **Arguments for Judicial Supremacy**


120 See Michael Stokes Paulsen, *id.*, at 311-12. (describing that Justice Joseph Story embarked on his argument for judicial supremacy in his famous *Commentaries on the Constitution of the United States*).


123 358 U. S. 1, 18 (1958); The Court announced that “the federal judiciary is the supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system.”

124 369 U. S. 186, 211 (1962); The Court declared that the Supreme Court was the “ultimate interpreter of the Constitution.”


Traditionally, commentators defended the notion of judicial supremacy on bases of principles of separation of powers as well as checks and balances. With respect to theoretical origins, James Madison’s announcement “to give to each a constitutional control over the others”\textsuperscript{127} has been absorbed by many arguments as the rationale for judicial review and judicial supremacy. The paradigmatic mode of the argumentation would be demonstrated as follows: “Without the power of judicial review, what check would the federal judiciary have on the President or Congress? The answer is: none. As a consequence, judicial review is an inevitable component of the Constitution’s commitment to checks and balances.”\textsuperscript{128}

Since the 1990s, scholars advanced additional theoretical foundations to buttress the concept of judicial supremacy. Among those supremacists, three salient arguments merit depicting, including Alexander and Shauer’s “argument from preconstitutional norm and settlement,”\textsuperscript{129} Keith E. Whittington’s “argument from political foundations,”\textsuperscript{130} and Tom Donnelly’s “argument from political culture.”\textsuperscript{131} Overall

\textsuperscript{127} Federalist papers No. 48. See James Madison, Alexander Hamilton, and John Jay, supra note 22, at 308.

\textsuperscript{128} See Scott D. Gerber, supra note 122, at 1082. In addition, while Eisgruber defended judicial supremacy from a different perspective, his “argument from comparative institutional competence” basically relied on the principle of separation of powers. See Christopher L. Eisgruber, supra note 62.

\textsuperscript{129} See Larry Alexander and Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1359 (1997); Larry Alexander and Frederick Schauer, Defending Judicial Supremacy: A Reply, supra note 108, at 459, 460, 465, 473, 476, 477. Acknowledging that there was no constitutional mandate for establishing judicial review, Alexander and Schauer defended judicial supremacy on grounds of a preconstitutional norm and the settlement of contested issues. First, they referred preconstitutional norm to “acceptance as social fact,” contending that “the Constitution’s authority ultimately rests not on facts about the past, but on the Constitution’s acceptance as authoritative in the present,” “a constitution’s status as the constitution is dependent upon its (empirical) acceptance by a polity as their constitution.” In other words, if Americans accept the 1787 Constitution as the 2011 Constitution, it will be an authoritative Constitution in 2011. By the same token, judicial supremacy will become legitimate if American society at large accepts it. Second, Alexander and Schauer considered the settlement of contested issues as a crucial component of constitutionalism, and then they argued that this goal can be achieved only by granting an authoritative interpreter whose interpretations bind all others. They concluded that the Supreme Court can best serve this role.

\textsuperscript{130} See Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U. S. History 9, 288, 289 (2007). Whittington’s “argument from political foundations” was rested on American political reality. It was premised on the statement that “judicial supremacy is only meaningful if other powerful political actors acquiesce to that declaration.” Whittington portrayed the reality that the characteristics of American constitutional structure, such as federalism, separation of powers, party system, will encourage presidents to support the courts. Because recognizing and bolstering judicial supremacy can benefit incumbent presidents and party leaders. In sum, the real reason of judicial supremacy in America is that courts enjoy the robust political foundations.

\textsuperscript{131} See Tom Donnelly, Popular Constitutionalism, Civil Education, and the Stories We Tell Our Children, 118 Yale L. J. 948, 962, 979, 984 (2009). Donnelly argued for judicial supremacy by probing into American political culture. He found that most textbooks of civic education in public schools shape the Court as a remedy institution and the final interpreter of the Constitution. Besides, most textbooks cited the celebrated dictum of Justice Jackson that “We are not final because we are infallible, but we are infallible only because we are final.” (Brown v. Allen, 344 U.S. 443, 540 (1953)) Put simply, what American public schools present about the Court is an authoritative and mostly just
speaking, most American people accept judicial supremacy, even those who play the roles as critics confess the phenomenon, including Larry Kramer who strongly calls for a return to popular constitutionalism, Dawn E. Johnsen who attempts to bolster the concept of departmentalism, and others.

2. Arguments for Popular Supremacy

Conversely, some commentators resist judicial supremacy through the concept of popular sovereignty or the notion that democracy means people’s self-government. These “arguments for popular supremacy” assert that people themselves should be the masters or the final arbiters in enunciating the meaning of the Constitution and represent the antitheses to the arguments for judicial supremacy. Mark Tushnet’s “populist constitutionalism, or abolition of judicial review” and Larry Kramer’s “popular constitutionalism” fall within this category. It is worth noting that Larry

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132 Kramer confessed that “it seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course.” See Larry D. Kramer, supra note 35, at 6-7.

133 Johnsen recognized that “judicial supremacy is unquestionably the dominant view in United States law, politics and society, including among lawyers, who study, teach, and practice law almost entirely from the perspective of judicial doctrine.” See Dawn E. Johnsen, supra note 126.

134 E.g., Todd E. Pettys, a legal scholar who recognized that “indeed, it often seems as if we are hardwired to defer to the courts on questions of constitutional meaning.” See Todd E. Pettys, Popular Constitutionalism and Relaxing the Dead Hand: Can the People be Trusted? 86 WASHINGTON U. L. REV. 313, 317 (2008).

135 Of course, among the opponents of judicial supremacy, some resort to actions, not just to reasoning, some of them strongly call for stopping judicial supremacy by the way that grassroots Americans should take initiative to force the Congress to enhance the constitution’s checks and balances on the Court. E.g., See PHYLIS SCHLAFLY, supra note 43, at 157-92.

136 See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 166, 172, 175, 181, 194 (1999). Tushnet rested his argument on an analysis of costs and benefits, concluding that Americans were generally losing more from judicial review than they were getting, and that “eliminating judicial review would not eliminate our ability to appeal to those principles in constitutional discourse outside the courts.” He radically called for a resolution that Americans should amend the Constitution to abolish the judicial review, and allow the people to “participate in shaping constitutional law more directly and openly.” Tushnet’s radical proposal gave rise to some refutations. Erwin Chemerinsky, for example, criticized that Tushnet not only minimized the benefits of judicial review but overestimated the costs of judicial review. Further, Chemerinsky refuted that Tushnet selectively chose examples to justify his reasoning. See Erwin Chemerinsky, Losing Faith: America without Judicial Review, 98 MICH. L. REV. 1416, 1423-32 (2000).

137 See Larry D. Kramer, Foreword: We the Court, supra note 35, at 27-28; Larry D. Kramer, Popular Constitutionalism, 92 CAL. L. REV. 959, 959 (2004); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 25-27, 208, 248 (2004). In the first place, Kramer situated popular constitutionalism on the notion that “the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law.” Second, he developed his argument based on the American history of popular constitutionalism, arguing that from colonial era to eighteenth century, the central means for constitution making had been right to vote, right to petition, right of free speech, pamphleteering, and mobbing. Significantly, these were launched by the public. Accordingly, the liberal Kramer, setting his target to the conservative Rehnquist Court, claimed that the public should be the final arbiter of the Constitution’s meaning. Without a doubt, Kramer’s “popular constitutionalism” has become the most provocative argument among American
Kramer’s argument attracts many supporters and critics and thus shapes a new trend of debate on the subject of judicial review.

3. Arguments between Two Ends of Spectrum

There are still some other scholars who refuse judicial supremacy but not oppose judicial review; their arguments can be positioned between “arguments for judicial supremacy” and “arguments for popular supremacy.” Put in other way, neither do they accept the notion of judicial supremacy, nor do they embrace popular supremacy without reservation. This article calls them mediated arguments and they may fall into three categories: (1) departmentalism; (2) democratic constitutionalism; and (3) living constitutionalism.

“Departmentalism” is premised on the concept that the authority of constitutional interpretation is shared by the three branches of government. Under this logic, no single branch of government has the exclusive interpretative authority or the final binding effect of the interpretation on other branches. Among those departmentalists, there are three eminent commentators: First, Michael Stokes Paulsen noted that “the power to interpret federal law is not a specifically-enumerated power of any particular branch of the national government. Rather, it is a power that arises by implication, as a necessary incident to the exercise of specifically delegated powers.” Second, Dawn E. Johnsen claimed that “all three branches of the federal government pay constitutional academics since the outset of the twenty-first century.


139 This article agrees with what Robert Post and Reva Siegel had observed that the pendulum (that is, the attitude toward judicial role) has swung too far, from excessive confidence in courts to excessive despair. See Robert Post and Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. C. R.-C.L. L. REV. 373, 374 (2007).

140 See Larry Alexander and Lawrence B. Solum, supra note 118, at 1609-15. Alexander and Solum divided arguments for departmentalism into two types: “divided departmentalism” and “overlapping departmentalism.”

141 See Michael Stokes Paulsen, supra note 48, at 241, 344. Relying on departmentalism, or he named it “model of coordinate review,” Paulsen concluded that “the model of coordinate review highlights the legitimacy of the inter-branch contest over the proper interpretation of the Constitution and laws of the United States.”
critical roles in rights protection that should be acknowledged and understood.”

As a departmentalist, George Thomas rested his argument on the so-called “Madisonian Constitution,” which “rejects both judicial supremacy and popular sovereignty as mechanisms for making the Constitution authoritatively binding.” and argued that the constitutional conflict between branches of the government may indeed be a virtue in sustaining the Constitution. In fact, Thomas considered it as the core of American constitutionalism.

The second mediated argument is “democratic constitutionalism,” which was proposed by Robert Post and Reva Siegel. Post and Siegel rest their argument on the interplay between judge-made constitutional law and democratic politics, emphasizing that “Americans have continuously struggled to shape the content of constitutional meaning,” and “through these struggles, Americans have consistently sought to embody their constitutional ideals within the domain of judicially enforceable constitutional law.”

The meaning of the Constitution is embedded in the interplay or struggle between judge-made constitutional law and democratic politics in American history, and it has been shaped by norm contestations. Such contestations are demonstrated by two facts: Americans have historically mobilized for and against judicial efforts to enforce the Constitution, and in the meantime, courts have exercised their professional legal reasoning to resist and at times respond to the popular claims on the Constitution.

In a nutshell, democratic constitutionalism simultaneously affirms the role of the mobilized citizens and the representative government and the role of courts in interpreting the Constitution.

The third mediated argument is Jack M. Balkin’s “living constitutionalism.” Living constitutionalism is, in Balkin’s terms, a “process of permissible constitutional construction,” in which three branches of government, not simply the Court, coordinately respond to the popular will by managing to build institutions of

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142 See Dawn E. Johnsen, supra note 126, at 147 (claiming that “efforts at increasing the quality, accountability, and legitimacy in the public’s eye of political branch interpretation would better safeguard individual liberty and equality, as well as the fundamental features of the constitutional structure, than would dependence on one branch (namely, the Court) that has not consistently been at the forefront of the protection of individual rights”).


144 See Robert Post and Reva Siegel, supra note 139, at 395.

145 Id., at 379.

146 Id., at 380.

147 According to Post and Siegel, norm contestation is a pathway for seeking to transform the values that underlie judicial interpretations of the Constitution. The backlash toward judicial interpretation from the public and representative government is best considered as a norm contestation. See id., at 381, 382-83.

148 Id., at 375.

149 Id., at 379. According to Robert Post and Reva Siegel, democratic constitutionalism neither seeks to take the Constitution away from courts, nor adopts a juricentric stance.

government, enforce and apply the constitutional text and its underlying principles.\textsuperscript{151} According to this argument, Court’s interpretation of constitution is just one dimension of the system of constitutional construction. Strictly speaking, the argument of living constitutionalism does not purport to face the issue of judicial supremacy.

\textbf{IV. A PARADOX LOOMS LARGE: POPULAR ACCEPTANCE V. SCHOLAR SKEPTICISM}

Judging from the preceding debates about judicial review, the fact shows that some critics have been skeptical of the legitimate role which the institution of judicial review plays in American democracy. However, according to our definition of legitimacy in section II, the legitimacy of judicial review depends on Court’s ability to inspire Americans to recognize, identify, trust, or accept it as their Court.\textsuperscript{152} Do Americans accept the judicial review as their legitimate institution? If they do, then an intriguing paradox will loom large from the discrepancy between public acceptance and critics’ longstanding skepticism.

\textit{A. Evidences Show That Most Americans Firmly Accept the Judicial Review}

Whether Americans accept their Court and judicial review in particular is a question that can be determined empirically and normatively.\textsuperscript{153} Therefore, this article would like to examine, based on both quantitative and qualitative analysis (as we suggest in Part II), the extent to which how Americans accept the judicial review as a legitimate institution.

\textbf{1. Quantitative Analysis on Basis of Empirical Data}

Most frequently, American judicial review is characterized as undemocratic, because the Justices sit in the Court are unelected, and thus are unaccountable to the public. For this case, judicial decisions are presumably incompatible with the public opinion. Is that really true in practice? We scrutinize it on basis of the empirical data.

Obviously, as Table 2 indicates, the answer is definitely negative. Examining the empirical data of three-fourths century, namely from the origin of modern polling in the 1930s to the beginning of the new century (1930-2005), George Thomas found

\textsuperscript{151} Id., at 550.

\textsuperscript{152} Here, we are inspired by Robert Post and Reva Siegel when they claimed that “the authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s ability to inspire Americans to recognize it as their Constitution” and that “judicial authority to enforce the Constitution, like the authority of all government officials, ultimately depends on the confidence of citizens. If courts interpret the Constitution in terms of that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.” See Robert Post and Reva Siegel, \textit{supra} note 139, at 374.

\textsuperscript{153} In studying judicial politics, it may be advantageous to adopt both a quantitative and a qualitative analysis. Generally, social scientists used to adopt a positive (or empirical) rather than normative analysis, whereas legal scholars preferred the normative analysis. See Richard A. Posner, \textit{Foreword: A Political Court}, 119 HARV. L. REV. 31, 32-34 (2005).
that the decisions the Court made were stably consistent with the public opinion.\textsuperscript{154}  

Table 2: Supreme Court Agreement with Public Opinion, by Court, Excluding Instances of Unclear Polls\textsuperscript{155}

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>% consistent</td>
<td>73%</td>
<td>54%</td>
<td>68%</td>
<td>61%</td>
<td>62%</td>
</tr>
<tr>
<td>% inconsistent</td>
<td>27%</td>
<td>46%</td>
<td>32%</td>
<td>39%</td>
<td>38%</td>
</tr>
<tr>
<td>Percent of cases</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>Number of cases</td>
<td>(15)</td>
<td>(13)</td>
<td>(19)</td>
<td>(18)</td>
<td>(65)</td>
</tr>
</tbody>
</table>

Table 3: Public Trust in Judicial Branch, Headed by the U.S. Supreme Court (%).\textsuperscript{156}

<table>
<thead>
<tr>
<th>Year/Month</th>
<th>Great deal %</th>
<th>Fair amount %</th>
<th>Not very much %</th>
<th>Not at all %</th>
<th>No opinion %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010/9</td>
<td>14</td>
<td>52</td>
<td>28</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>2009/8</td>
<td>18</td>
<td>58</td>
<td>18</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>2008/9</td>
<td>14</td>
<td>55</td>
<td>23</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>2007/9</td>
<td>15</td>
<td>54</td>
<td>23</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>2006/9</td>
<td>15</td>
<td>54</td>
<td>21</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>2005/9</td>
<td>13</td>
<td>55</td>
<td>25</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>2004/9</td>
<td>14</td>
<td>51</td>
<td>27</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>2003/9</td>
<td>13</td>
<td>54</td>
<td>27</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>2002/9</td>
<td>17</td>
<td>58</td>
<td>18</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>2001/9</td>
<td>17</td>
<td>57</td>
<td>20</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>2000/7</td>
<td>23</td>
<td>52</td>
<td>18</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>1999/2</td>
<td>29</td>
<td>51</td>
<td>13</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>1998/12</td>
<td>27</td>
<td>51</td>
<td>16</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>1997/5</td>
<td>19</td>
<td>52</td>
<td>22</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>1976/6</td>
<td>16</td>
<td>47</td>
<td>26</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>1974/4</td>
<td>17</td>
<td>54</td>
<td>20</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>1972/5</td>
<td>17</td>
<td>49</td>
<td>24</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Average</td>
<td>70</td>
<td>27</td>
<td>27</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

On the other hand, the extent to which an institution enjoys public confidence is an important and measurable indicator of legitimacy’s assessment. Using the data from

\textsuperscript{154} See THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 35-38, 153, 162 (2008); As David S. Law described that, “empirical studies suggest that the Court’s actions are at least as consistent with public opinion as those of the elected branches.” See David S. Law, supra note 115, at 730.

\textsuperscript{155} THOMAS R. MARSHALL, id., at 37.

\textsuperscript{156} Accessed at http://www.gallup.com/poll/4732/Supreme-Court.aspx, last visit on May 8, 2011.
the polling conducted by Gallup, this empirical analysis reveals that Americans generally trust the role of judiciary. Illustrated in Table 3, if we combine percent of “Great deal” and “Fair amount,” it is not difficult to find that the records of American confidence in the judiciary ranging from sixty-three percent (63%, in 1976) to eighty percent (80%, in 1999). And the long-term average shows that there have been seventy percent of Americans who affirm the role of judiciary and the performance of judges.

Further, the degree to which the judiciary holds legitimacy heavily depends on the public acceptance of judicial decisions, especially in contentious situations. Normally, an unpopular case would incur some extent of resistance. We single out the landmark and controversial case of Bush v. Gore in 2000, and use it as an illustration. As Table 4 shows, eighty-one percent of American voters in 2000 presidential election “accepted” the ruling, even if he or she did not agree with the reasoning of the Justices. Significantly, more than half of those who identified themselves as Gore voters accepted the result of Bush v. Gore, albeit they strongly disagreed with the Court’s argument.

Table 4: The Public Attitude to Court’s Ruling of Bush v. Gore

<table>
<thead>
<tr>
<th></th>
<th>Accept and agree</th>
<th>Accept but do not agree</th>
<th>Do not accept</th>
<th>No opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>National adults</td>
<td>49%</td>
<td>32%</td>
<td>17%</td>
<td>2%</td>
</tr>
<tr>
<td>Gore “voters”</td>
<td>13%</td>
<td>56%</td>
<td>30%</td>
<td>1%</td>
</tr>
<tr>
<td>Bush “voters”</td>
<td>91%</td>
<td>5%</td>
<td>3%</td>
<td>1%</td>
</tr>
</tbody>
</table>

The results of quantitative analysis based on the empirical data have shown that the U. S. Supreme Court keeps itself in line with public opinion and most Americans firmly accept judicial review as a legitimate institution.

2. Qualitative Analysis Based on Normative Studies

Recent qualitative analysis based on normative studies support the conclusion of the quantitative analysis showing the Court’s work is consistent with the public opinion. For example, David A. Strauss, who adopted a “modernizing approach of judicial review,” found that the Court’s decisions are usually in tune with the popular sentiment in the domains of cruel and unusual punishment (the Eighth

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157 See Frank Newport, President-Elect Bush Faces Politically Divided Nation, but Relatively Few Americans Are Angry or Bitter Over Election Overcome, 423 THE GALLUP MONTHLY 15, 17 (2000).
158 David A. Strauss thought that the modernizing approach to judicial review contains two components: (1) the courts will strike down a statute if it no longer reflects public opinion or if it the trends in popular opinion are running against it, and (2) a modernizing court must be ready to change its course if popular will has moved in a different direction from what the court anticipated. See David A. Strauss, The Modernizing Mission of Judicial Review, 76 THE U. OF CHI. L. REV. 859, 861 (2009).
Amendment), sex-based classification (the Fourteenth Amendment), and substantive due process.\textsuperscript{159} The results of Bruce J. Winick’s study of the Court’s death penalty jurisprudence implied a similar conclusion.\textsuperscript{160} In an earlier article, Barry Friedman proposed the idea of “mediated popular constitutionalism,” then he sought to prove two assumptions of the idea: first, judicial rulings are handed down in the range of acceptability to a majority of the people, and the second, even the public disagrees with some decisions, and it nonetheless supported the practice of judicial review. This implies that on the one hand, judicial output is not at odds with the public opinion, and on the other, the public accepts what courts have done.

Qualitative analysis is also applicable to study the reaction of political branches and political elites to the Court’s decisions.\textsuperscript{161} First, David M. O’Brien argued that in major confrontations, presidents generally yield to the Court.\textsuperscript{162} For example, Dwight D. Eisenhower (1890-1969) regarded the school desegregation decision of \textit{Brown}\textsuperscript{163} as “a hot potato handed to him by the judiciary,”\textsuperscript{164} and complained that “it was impossible to expect complete and instant reversal of conduct by mere decision of the Supreme Court.”\textsuperscript{165} Nevertheless, he eventually dispatched federal troops to enforce the decision in 1957.\textsuperscript{166} With regard to political elite’s behavior, two cases would be significant: one is Patrick Leahy. He was the former Democratic chairman of the Senate Judiciary Committee and an active critic of the Rehnquist Court. When commenting on the Court’s decision that he disliked, he steadily said that “as a member of the bar of the Court, as a U. S. Senator, [and] as an American…I, of course, respect the decisions of the Supreme Court as…the ultimate interpretation of our

\textsuperscript{159} Id., at 864-87. However, in the First Amendment cases, the Court made its decisions on basis of principle enforcement. David A. Strauss concluded that “a modernizing approach to judicial review can coexist with the enforcement of principles…in fact the two coexist in our system today.” See id., at 907.

\textsuperscript{160} While Bruce J. Winick suggested that the Court’s recent death penalty cases indicate that the Court may independently hand down the cases on basis of the principle of proportionality, he also stressed that “social attitudes have only begun to shift toward opposing the death penalty for those with severe mental illness at the time of the offense.” At the same time, Winick noted that “at least five leading professional associations have adopted policy statements that recommend prohibiting the execution of those with severe mental illness.” See Bruce J. Winick, \textit{The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier}, 50 BOSTON COLLEGE L. REV. 785, 785, 789 (2009).

\textsuperscript{161} See Barry Friedman, \textit{Mediated Popular Constitutionalism}, supra note 138, at 2606-08. Barry Friedman concluded that “mood swings in the general public are mirrored in the output of the Supreme Court.” Id., at 2608.

\textsuperscript{162} As James M. Boland noted that, because judicial review is not explicitly provided for in the Constitution, the legitimacy of such an interpretative method depends on: (1) public acceptance of Court’s decisions, and (2) acquiescence by the executive and legislative branches. See James M. Boland, \textit{Constitutional Legitimacy and the Cultural Wars: Rules of Law or Dictatorship of a Shifting Supreme Court Majority}? 36 CUMB. L. REV. 245, 246 (2006).

\textsuperscript{163} See DAVID M. O’BRIEN, STORM CENTER-THE SUPREME COURT IN AMERICAN POLITICS 355 (2005).


\textsuperscript{165} See DAVID M. O’BRIEN, supra note 163.

\textsuperscript{166} Id., at 356.

Constitution, whether I agree or disagree.” The other case is Albert Gore, a former vice president and the Democratic candidate of the U.S. presidential election of 2000. When the Court handed down the decision of *Bush v. Gore* and even though he led by more than fifty thousand popular votes, he announced that “Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court’s decision, I accept it.”

The quantitative or qualitative analysis illustrates that most Americans, including citizens, members of political branches, and political elites, firmly accept the judicial review. Returning to the definition of legitimacy in part II, we are without doubt convinced that American judicial review holds widespread support from the public and enjoys some degree of legitimacy.

**B. Sustained Debates Show That Critics Keep Querying the Judicial Review**

The public acceptance of judicial review sharply contrasts with the ubiquitous and longstanding academic debates on judicial review detailed in part III. Many academic pundits have been haunted by the fear of “government by judiciary” and “imperial judiciary,” and many scholars have conceived the ideas of “judicial review is a deviant institution in American democracy” as well as “judicial review is undemocratic or antidemocratic.” As a result, the challenges to judicial review’s legitimacy have never been diminished, as if they were hardwired in the American history.

Admittedly, judicial review is not a perfect institution in a democratic regime, especially in the United States. American judicial review, as it was and as it is, still depends on a Constitution that nowhere mentions the power of judicial review, and the unelected judges are still unaccountable to the public. Under these existing conditions, it seems that academic critics are bound to keep querying the same issues regarding the legitimacy of judicial review as they have done for more than two hundred years.

**C. A Paradox Arises from the Discrepancy between Acceptance and Skepticism**

As far as the attitude to the judicial review is concerned, there is a discrepancy between popular acceptance and academic skepticism. American society at large accepts the judicial review, whereas many academic scholars are consistently

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169 Accessed at http://www.washingtonpost.com/wp-srv/onpolitics/elections/goretext121300.htm, last visit on January 1, 2006. Gore’s behavior was consistent with the general observation made by a liberal legal scholar Alan M. Dershowitz. He wrote a book to strongly criticize the conservative majority Justices in the wake of *Bush v. Gore*, and at the end of the book, he stressed that “the decision of the majority justices was final not because it was right, but because Americans obey Supreme Court decisions whether or not we agree with them.” See ALAN M. DERSHOWITZ, supra note 40, at 183.
reluctant to recognize the legitimacy of judicial review. This discrepancy between popular acceptance and academic skepticism gives rise to a paradox: If judicial review is illegitimate, why does it command widespread acceptance? If it is legitimate, why do so many scholars keep questioning the legitimacy of the institution?

Moreover, while American critics keep challenging the legitimacy of judicial review, the very institution has been accepted by over one hundred countries. If judicial review is illegitimate, how can it be so prevalent in the world?

V. AN ACADEMIC SYNDROME THAT MAY SHAPE THE PARADOX: TRIPLE PROBLEMS

The origin of this paradox lies in the definition of legitimacy. In a democratic republic, like America, popular sovereignty is considered to be the law of laws; both the public consent expressed in elections and the public acceptance expressed between elections are the foundations of various public policies, and they become the reservoir of the legitimacy of government powers. This view is compatible with the definition of legitimacy in part II. Thus, judicial review is legitimate in America because it garners a general acceptance from the American people.

Since American judicial review enjoys some extent of legitimacy in fact, the paradox of ongoing skepticism is attributable to an academic syndrome having three major problems: incommensurability, methodology, and ideological prejudgment.

A. The Problem of Incommensurability

It is well known that two things cannot be compared with each other without the same scale, because it engenders a problem of incommensurability. By the same token, it is insignificant to argue with each other on condition that there is incommensurability before them. Paradoxically, there are two incommensurable phenomena existing in American debates over the legitimacy of judicial review.

1. Incommensurability of Legitimacy’s Conception

Legitimacy is not just a matter of degree; it is also a matter of definition and category. The incommensurable problem of legitimacy’s conception in America manifests in two aspects: (1) legitimacy’s definition, and (2) legitimacy’s assessment.

Concerning with the first aspect, even if some scholars tried to define the term of legitimacy, there is hardly a consensual definition providing for debates. What is worse is that many articles written with the word “legitimacy” in their title lacked any definition of legitimacy. As we are apt to access, they are authored by Frank I.

See Ran Hirschl, supra note 1, at 721; Tom Ginsburg, supra note 1; RONALD DWORIN, JUSTICE IN ROBES, supra note 112, at 139; Allan C. Hutchinson, A ’Hard Core’ Case against Judicial Review, 121 HARV. L. REV. F. 57, 64 (2008).

The term “incommensurability” is generally employed by scholars in the philosophy of science. It means that theories can not be compared by people on the same scale to determine which is more accurate.
Michelman,172 James M. Boland,173 Eugene M. Van Loan III,174 William S. Dodge,175 Adrienne Stone,176 Tom S. Clark,177 Jamie Mayerfeld,178 Gillian Metzger,179 and so forth.180 Under these circumstances, those who attend to the forum of the legitimacy argument are likely to tell their own stories. In the aggregate, the definition of legitimacy is so divergent that it will lead to a problem of incommensurability.

The second problem of incommensurability is concerned with legitimacy’s assessment. In a constitutional democracy, everyone agrees that popular consent is the foundation of legitimacy. But there is no minimal consensus regarding what constitutes adequate consent.181 Furthermore, popular consent is obviously not the sole source of legitimacy. However, there is no agreement among scholars as to how many sources legitimacy may contain. In this case, assessing the extent of legitimacy will become an insurmountable mission.

2. Incommensurability of Democracy’s Perception

As we have mentioned in part III, most American debates over judicial review’s legitimacy focus on whether or not judicial review is reconcilable with democracy. However, as scholars have reminded us that the core of those debates depends on the nature of “democracy,”182 there has been a divergent perception of democracy among American commentators. This longstanding divergence led to some incommensurable problems.

The first incommensurability of democracy’s perception arises from the relationship between democracy and majority rule. As detailed in part III, some

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173 See James M. Boland, supra note 162.
180 We find that scholars have different connotations with the same pattern of legitimacy. For example, both Jack M. Balkin and Richard H. Fallon recognize the category of political legitimacy, but when Balkin referred political legitimacy to “a function of the trust and confidence that people have in their elected representatives,” Fallon asserted that there are multiple possible sources of political legitimacy, and implied that promoting human rights through judicial review is also the source of political legitimacy. See Jack M. Balkin, supra note 7, at 215; Richard H. Fallon Jr., The Core of an Uneasy Case for Judicial Review, supra note 6, at 1718, 1735.
181 See Michel Rosenfeld, supra note 3, at 1311.
commentators equate democracy with majority rule or majoritarianism, but others disagree. Since each side build its argument on a different ground, it is easy to reach opposing conclusions.

The second incommensurability of democracy’s perception results from the utterly distinct claim about the channel of popular consent, namely, direct versus indirect. Many critics attack the legitimacy of judicial review only because federal judges are not subject to public elections and therefore lack democratic accountability. However, under the concept of Madisionian republicanism, the judges who are appointed by the combined action of president and Senate are democratically accountable. James Madison explicitly stated that “we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.”

A strict definition of democracy that requires all institutions (and judges) be approved a majority of all persons in the country at the time would actually render the U.S. Constitution undemocratic and illegitimate, since the Constitution was only "approved by a majority of delegates to conventions in each state" and not by the population at large. By this inference, if disputants insist their respective premises before they enter the forum, then it is bound to become an illusive debate.

The third incommensurability of democracy’s perception is related to democracy’s essential characteristics. Some commentators partially conceive democracy as some procedural principles, but neglect the substantive values of democracy. In contrast, some scholars focus on democracy’s substantive values, but ignore its procedural principles. Actually, as Table 1 indicates, neither procedure nor substance can unilaterally constitute the integrity of a liberal democracy. Under the condition that there is no minimal consensus on democracy’s essential characteristics, most debates on democratic legitimacy of judicial review are apt to become meaningless.

B. The Problem of Methodology

Overall speaking, most debates on the legitimacy of judicial review in America, including pros and cons, can be methodologically characterized as following either a

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183 E. g., as we discussed in part III, Alexander M. Bickel, Robert A. Dahl, Lee Epstein et al., Cass R. Sunstein, and Jeremy Waldron.
184 E. g., as we discussed in part III, Bruce Ackerman, Jesse H. Choper, Ronald Dworkin, Christopher L. Eisgruber, Richard H. Fallon, and Barry Friedman.
185 See JAMES MADISON, ALEXANDER HAMILTON, AND JOHN JAY, supra note 22, at 255. (emphases added)
substance-based argument or a process-based argument. Paradoxically, however, completely different conclusions are made by those who employ the same approach.

1. The Problem of Substance-based Argument

A substance-based argument is calculated to prove whether the result of judicial review’s institutional operation is good for the public or not. Normally, adopting the same approach to assess the same judicial review in the same country, if it is employed, the results will be largely identical, or at best, with minor differences. However, American debates on judicial review’s legitimacy are quite different from this logic. For instance, using a substance-based argument, both Ronald Dworkin and Richard H. Fallon concluded that judicial review’s merits overweigh its demerits. But, employing the same approach, the outcome of Mark Tushnet’s argument is sharply different. The conclusion Tushnet made is that Americans were generally losing more from judicial review than they were getting.

2. The Problem of Process-based Argument

Likewise, the same scenario happened to those cases of process-based arguments. As we depicted in part III, for example, John H. Ely concluded that the power of judicial review is consistent with democracy, for it is capable of “clearing the channels of political change” and “facilitating the representation of minorities,” and therefore consistent with democracy. In contrast, Jeremy Waldron adopted the same approach, he made a conclusion that because courts embrace the counter-majoritarian nature, and the inevitable disagreements concerning rights issues should be left to the democratic process of legislative institutions. What Waldron’s conclusion reveals is that the counter-majoritarian judicial review is at odds with democracy. How can people who adopt the same method to delve the same object make the different answers?

C. The Problem of Critics’ Standpoints

The critical factor which shapes the paradox will be critics’ standpoints. This article tries to point out two aspects of academic syndrome in America.

1. The Problem of Ideological Fixation

American legal academia like political arena has been rife with ideological

\[187\] Different categorizations are adopted by scholars. Jeremy Waldron, for example, characterized as “outcome-related reasons” and “process-related reasons.” See Jeremy Waldron, supra note 96, at 1376, 1386; Scott M. Noveck called them “result-driven argument” and “procedure-driven argument.” See Scott M. Noveck, supra note 182, at 401, 403; Guha Krishnamurthi et al. called them “instrumentalist argument” and “non-instrumentalist argument.” See Guha Krishnamurthi, John Reidy, Michael J. Stephen, and Shane Pennington, An Elementary Defense of Judicial Majoritarianism, 88 TEXAS L. REV. SEE ALSO 33, 35 (2009).

\[188\] See Ronald Dworkin, supra note 112; Richard H. Fallon Jr., supra note 114.

\[189\] See MARK TUSHNET, supra note 136.

\[190\] See JOHN HART ELY, supra note 105.

\[191\] See Jeremy Waldron, supra note 96, at 1360.
differences. Liberal scholars do not consider the Supreme Court to be their ally,\footnote{192} because they think that the Court is conservative. They therefore emphasize the inconsistency between judicial review and democracy.\footnote{193} However, when the Court adopted a more liberal direction, conservative academics took their turn highlighting the incompatibility between judicial review and democracy. Past studies\footnote{194} showed that the conservative Bork, by writing his *The Tempting of America*,\footnote{195} attacked the liberal activism of the Warren (1954-1968) and Burger (1968-1986) Courts, whereas the liberal Kramer, by writing his *Harvard Law Review Foreword*\footnote{196} and *The People Themselves*,\footnote{197} criticized the conservative power-grabbing Rehnquist Court (1986-2005).\footnote{198} Mark Tushnet, a liberal legal scholar, even advocated abolishing the judicial review by amending the Constitution. Likewise, the same story is retold in the wake of *Bush v. Gore* in 2000. The liberal Dershowitz published a book titled *Supreme Injustice*,\footnote{199} in which he severely criticized the conservative five majority justices,\footnote{200} while the conservative Posner published a book titled *Breaking Deadlock*\footnote{201} in which he defended the conservative five.

Another way to observe the ideology of the academics at play is to contrast the actual alignment between the Court, the public opinion and the allegation of its critics. Friedman\footnote{202} noted that the legal academics have contradicted the public opinion in the 1960s. For example, academics criticized the Court’s decisions on reapportionment, arguing that judges should not trump the popular will, when those decisions in fact had general support in the 1960s. On the contrary, when the Court actually interfered with popular preferences, such as when it handed down *Miranda v. Arizona*,\footnote{203} among other criminal procedure cases, the legal academics defended those decisions. It seems that when legal academics debate the legitimacy of judicial review, they do so with a fixation on the ideological background of the Court and its decisions.\footnote{204}

\footnote{192}As Barry Friedman described that for much of the Court’s history, its attackers have been liberals, the defenders conservatives. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, Part Five, supra note 27, at 159.
\footnote{193}Id., at 155.
\footnote{196}See Larry D. Kramer, supra note 35.
\footnote{198}See Larry D. Kramer, supra note 35, at 169.
\footnote{200}These five Justices are Rehnquist, Scalia, Thomas, Kennedy, and O’Connor.
\footnote{203}384 U. S. 436 (1966).
\footnote{204}Some other cases may further prove what this article depicts. For example, Erwin Chemerinsky
2. The Problem of Academic Obsession

Perhaps the most critical factor that may shape the paradox in America is the problem of academic obsession. Barry Friedman’s serial studies, concentrated on American constitutional history of countermajoritarian difficulty, concluded that the countermajoritarian Court is in fact an imaginative need for liberal academics, that the countermajoritarian problem has been a tool for liberal academics to characterize judicial review as an inherently undemocratic institution, and that the countermajoritarian problem has been an old way of thinking to maintain and perpetrate the liberal academic hegemony. Under these circumstances, even if judicial review in practice has been consistent with mainstream public opinion and thus enjoys some legitimacy as described in part IV, American debates over the legitimacy of judicial review, especially issues relating to the countermajoritarian difficulty remain on academic agenda.

VI. Conclusion

The longstanding debates over the legitimacy of American judicial review have fostered an academic industry in which many scholars argue with each other and publish lots of articles and books. In this case, it is good for the development of American constitutional academics. However, arguing for or against the legitimacy of judicial review without some consensus definition of the critical term “legitimacy” is apt to miss the marks and thus make those arguments insignificant.

We are interested in the contents of these longstanding debates and the legitimacy that American judicial review enjoys in actuality. To attain these goals, this article tries to understand the concept of legitimacy by defining the term in light of some selective prominent studies, characterizing the concept of legitimacy, and explaining the assessing methods of legitimacy. Building on this understanding, we sketch the tripartite debate on the one hand, and adopt both a qualitative and a quantitative method to examine the extent of legitimacy that the U. S. Supreme Court enjoys on the other hand.

Our examination reveals a discrepancy between popular acceptance and academic skepticism. Empirical data and qualitative analysis show that most Americans firmly accept the legitimacy of judicial review, while many scholars keep criticized Mark Tushnet for selectively choosing examples to justify his reasoning. See Erwin Chemerinsky, supra note 136; Larry Kramer’s celebrated book, The People Themselves, was considered as a tool to “provide the historical evidence for the policy arguments of Leftist scholars who wish to limit or eliminate the federal judiciary’s role in constitutional interpretation.” See Scott D. Gerber, supra note 122, at 1078.

205 See supra note 27.
207 Id., at 160.
challenging the legitimacy of American judicial review. This discrepancy gives rise to a paradox.

We attribute the cause of the paradox to an American academic syndrome which suffers from three main problems: (1) the problem of incommensurability arising from a lack of a minimal consensus on the concept of legitimacy and democracy; (2) the problem of methodology resulting from using the same method but getting opposing answers; and (3) the problem of critics’ standpoints deriving from their ideological fixation and academic obsession.

From the perspective of American constitutional history, judicial review is a constitutional institution which spontaneously arose from the historical process in which causation is complex, and factors weave together.  

It is worth noting that the legitimacy of American judicial review in practice is derived from the persuasive reasoning in rulings, institutional prestige, the cooperation of political branches and political elites, and, most critically, the general public opinion. In other words, the institution of judicial review has withstood the test of American history. Thus, even if the institution of judicial review has been under serious and sustained challenge, the survival of judicial review is undoubtedly a success story in the modern world. Viewed from the fact that more and more countries around the world have adopted and accepted the institution of judicial review, the very institution has become a brilliant heritage of American society at large.

Admittedly, debate is the engine of a liberal democracy. Contesting an imperfect constitutional institution, such as American judicial review, is valuable in a pluralistic and democratic society. Meaningful debates are necessary for institutional development, and we do not think that critics of American judicial review make much ado about nothing. However, the problems of American academic syndrome ought to be overcome in order to promote the quality of debates. How? This article proposes the idea of academic minimalism. First, critics should minimize their ideological fixation and academic obsession. Second, a minimal consensus on the core concepts like legitimacy (including the definition, patterns, and assessment, and the nature of democracy) and democracy should be established. By doing so, the paradox may become surmountable, and the academics may embark on meaningful debates.

\[208\] See Shugerman, supra note 58, at 1119.
\[209\] See O’BRIEN, supra note 163, at 358.