POPULAR CONSTITUTIONALISM, JUDICIAL SUPREMACY, AND THE COMPLETE LINCOLN-DOUGLAS DEBATES

MARK A. GRABER*

INTRODUCTION

Judicial supremacy was a central theme in the Lincoln-Douglas debates from their very beginning. Shortly before their first encounter took place, courts had handed down controversial decisions that purported to settle political issues that were dividing the electorate. Both major partisan coalitions mobilized in response to these assertions of judicial authority to determine constitutional meaning. One party claimed that any effort to interfere with the judiciary violated fundamental constitutional principles. The other party claimed that what the Constitution meant should ultimately be decided by the people themselves, that citizens have a right to challenge judicial rulings they believe are deeply wrong. All of this is well-known.

What is less well-known is that the first Lincoln-Douglas clash over the judiciary took place in 1840, that the forum was the state legislature of Illinois, that the judicial decisions in question were made by the Supreme Court of Illinois, that Douglas and his Jacksonian supporters championed popular constitutionalism, and that Lincoln and his Whig supporters defended judicial supremacy.[1] Lincoln, Douglas, and their respective political allies were battling over a measure, known as the "Douglas Bill," that would have doubled the size of the Supreme Court of Illinois, and would have allowed the additional judges to be appointed by a legislature controlled by the Democratic Party. Courts had become controversial in Illinois, as they had become in many states, because of a series of rulings that either favored more commercial interests at the expense of agrarian concerns or more generally favored Whigs at the expense of Jacksonian De-

* Professor of Government, University of Maryland, College Park, Professor of Law, University of Maryland School of Law. Much thanks to Larry Kramer for an exceptionally thoughtful piece of work and to the Chicago-Kent Law Review for their forbearance.

1. For a discussion of this controversy, see ROBERT W. JOHANNSEN, STEPHEN A. DOUGLAS 92–97 (1973). Johannsen suggests that Lincoln and Douglas may have previously clashed over Jacksonian banking policy, another matter on which Douglas would have supported popular constitutionalism and Lincoln would have advocated judicial supremacy. *See id.* at 29.

mocrats.[2] Douglas and his political allies insisted that the people could take the steps necessary to ensure that the state constitution was interpreted consistently with popular Jacksonian constitutional understandings. They celebrated "a court that will decide all questions of a political character upon that broad basis of liberality which suits, and conforms to, the principles we mutually entertain."[3] Lincoln and his political supporters vigorously opposed any measure that would increase legislative control over the judiciary. When the Douglas Bill became law, they issued a circular to the citizens of Illinois complaining that "[t]he change proposed in the judiciary was . . . destructive to the institutions of the country, and . . . entirely at war with the rights and liberties of the people." Lincoln asserted that, as a result of this bill, "the independence of the Judiciary has been destroyed, . . . that our rights of property and liberty of conscience can no longer be regarded as safe from the encroachments of unconstitutional legislation."[4]

These partisan attacks on and defenses of an independent judiciary were typical of those made by Whigs and Jacksonians during the 1830s and 1840s. Such prominent Whigs as Daniel Webster celebrated judicial power,[5] and the young Lincoln was an orthodox Whig.[6] Lincoln, as a state legislator and congressman, consistently championed judicial supremacy. An early speech in the Illinois state legislature asserted, "that the individuals composing our [state] Supreme Court have, in an official capacity, decided in favor of the constitutionality of the Bank, would, in my mind, seem a sufficient answer to" the claim that the state bank was unconstitutional; the state judiciary, Lincoln stated, is the "tribunal, by which and which alone, the constitutionality of the Bank can ever be settled."[7] Jacksonians before the Mexican War consistently "marginalized the judiciary"

2. *See id.* at 82–87; 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 (2004).

3. JOHANNSEN, *supra* note 1, at 95 (quoting Adam Snyder, a local Jacksonian Democrat).

4. Abraham Lincoln et al., Circular from Whig Committee Against the Judiciary Bill: Appeal to the People of the State of Illinois (Feb. 8, 1841) [hereinafter Lincoln, Circular], *in* 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 234, 236–37 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS].

5. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 176–78 (2004).

6. *See* DAVID HERBERT DONALD, LINCOLN 42, 52, 126–27 (1995).

7. Abraham Lincoln, Speech in the Illinois Legislature Concerning the State Bank (Jan 11, 1837), *in* 1 COLLECTED WORKS, *supra* note 4, at 61, 62–63; *see also id.* at 69; Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois: The Perpetuation of Our Political Institutions (Jan. 27, 1838), *in* 1 COLLECTED WORKS, *supra* note 4, at 108, 109, 112–13; Abraham Lincoln, Speech on the Sub-Treasury (Dec. 26, 1839), *in* 1 COLLECTED WORKS, *supra* note 4, at 159, 171; Lincoln, Circular, *supra* note 4, at 237; Abraham Lincoln, Whig Protest in Illinois Legislature Against the Reorganization of the Judiciary (Feb. 26, 1841), *in* 1 COLLECTED WORKS, *supra* note 4, at 244, 247–48.

and "reasserted popular control over constitutional development."[8] Douglas first cut his political teeth supporting Andrew Jackson's veto of the bill rechartering the Second Bank of the United States. That veto insisted that legislative precedents were at least as authoritative as judicial precedents for ascertaining constitutional meaning and asserted that presidents had a constitutional obligation to veto legislation they thought unconstitutional, even when courts had previously declared the exercise of federal power to be constitutional.[9] As Lincoln pointed out in their 1858 debates, Douglas during the bank wars of the 1830s strongly supported President Jackson's decision to reject *McCulloch v. Maryland*[10] as settling the constitutional status of a national bank.[11]

By the eve of the Civil War, Douglas, Lincoln, and many of their political supporters had switched positions on institutional authority over constitutional meaning. Douglas, during the more famous Lincoln-Douglas debates, vigorously defended judicial supremacy. Jacksonians, after the Mexican War, worked hard to secure a judicial ruling on the status of slavery in the territories,[12] and Douglas was determined that the *Dred Scott* decision[13] be the final word on that matter. He charged Lincoln with making "war on the decision of the Supreme Court in the case known as the *Dred Scott* case." "I wish to say to you, fellow-citizens," he stated,

> that I have no war to make on that decision, or any other ever rendered by the Supreme Court. I am content to take that decision as it stands delivered by the highest judicial tribunal on earth, a tribunal established by the Constitution of the United States for that purpose, and hence that decision becomes the law of the land, binding on you, on me, and on every other good citizen, whether we like it or not. Hence I do not choose to go into an argument to prove, before this audience, whether or not Chief Justice Taney understood the law better than Abraham Lincoln.[14]

8. KRAMER, *supra* note 5, at 205.

9. Veto Message from President Andrew Jackson to the U.S. Senate (July 10, 1832) [hereinafter Jackson Veto Message], *in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576, 581–82 (James D. Richardson ed., 1897) [hereinafter COMPILATION]. For Douglas's support for Jackson's bank policies, see JOHANNSEN, *supra* note 1, at 24–27.

10. 17 U.S. (4 Wheat.) 316 (1819).

11. *See* Abraham Lincoln & Stephen A. Douglas, First Debate with Steven A. Douglas at Ottawa, Illinois (Aug. 21, 1858) [hereinafter Lincoln & Douglas, First Debate], *in* 3 COLLECTED WORKS, *supra* note 4, at 1, 28; Abraham Lincoln, Speech at Chicago, Illinois (July 10, 1858), *in* 2 COLLECTED WORKS, *supra* note 4 at 484, 496.

12. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 152–208 (1978); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 46–50 (1993); Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 MINN. L. REV. 16 (1954).

13. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

14. Abraham Lincoln & Stephen A. Douglas, Third Debate with Stephen A. Douglas at Jonesboro, Illinois (Sept. 15, 1858), *in* 3 COLLECTED WORKS, *supra* note 4, at 102, 112.

Lincoln responded by sharply distinguishing judicial supremacy from judicial review. Republicans were outraged by the *Dred Scott* decision, and Lincoln favored banning slavery in the territories despite that judicial ruling. "We do not propose that when Dred Scott has been decided to be a slave by the court," he declared,

> we, as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the States themselves. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.[15]

Part I of this article will show how this more complete history of the Lincoln-Douglas debates provides additional support for the main thesis of Larry Kramer's *The People Themselves*. The Lincoln-Douglas debates of 1840 are yet another instance when judicial power was contested in American history. As *The People Themselves* correctly points out, antebellum Americans who objected to the substance of judicial decisions in constitutional cases consistently challenged both the actual decisions that courts had made and the authority of courts over constitutional meaning. As was the case with the Douglas Bill in 1840 and the Republican Party platform of 1860, proponents of popular constitutionalism were often able to influence decisively the course of state and national constitutional development. What the working Constitution meant in the antebellum United States depended as much on popular understandings, elections, and legislative debate as on judicial decisions.[16] The frequency with which popular

15. Abraham Lincoln & Stephen A. Douglas, Sixth Debate with Stephen A. Douglas at Quincy, Illinois (Oct. 13, 1858) [hereinafter Lincoln & Douglas, Sixth Debate], *in* 3 COLLECTED WORKS, *supra* note 4, at 245, 255. Dean Kramer and other commentators commonly treat this speech and a similar passage in Lincoln's first inaugural address, Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861) [hereinafter Lincoln, First Inaugural Address], *in* 4 COLLECTED WORKS at 262, 268, as canonical expressions of popular constitutionalism. *See* KRAMER, *supra* note 5, at 211–12; Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965). Lincoln, however, may have been asserting only that certain aberrant judicial decisions should not be considered authoritative. This argument is developed in MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (forthcoming 2006).

16. This point is elaborated at length with respect to antebellum free speech theory in MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

movements successfully challenged judicial prerogative demonstrates that, at the very least, no consensus existed in the United States on judicial supremacy before the Civil War. Contemporary proponents of judicial power cannot justify judicial authority by pointing to an unbroken tradition beginning with *Marbury v. Madison*,[17] if not before, that regards the Supreme Court as the ultimate arbiter of constitutional controversies.

Part II of this article will explain how the Lincoln-Douglas debates of 1840 and 1858 also cast doubt on a subtheme of *The People Themselves* and raise questions about the way that work characterizes the relationships between the judiciary and the rest of the political system. Dean Kramer treats American constitutional history as an ongoing struggle between "aristocrats" who support judicial supremacy and "democrats" committed to a more popular constitutionalism.[18] The complete Lincoln-Douglas debates suggest that political struggles to control constitutional meaning have been more protean. Prominent political leaders who advocated judicial supremacy at some times and on some issues celebrated popular constitutionalism at other times and on other issues. Douglas was one of many ambitious politicians who rose to power championing popular constitutionalism, but after political allies established control over the courts, found judicial supremacy a useful means for stabilizing their political coalition, for exercising authority over resisting localities, and for entrenching their policy preferences.[19] As the pattern of judicial decisions shifts, so does partisan support for judicial power. Lincoln was one of many ambitious politicians who first defended courts as a bulwark against an insurgent political movement with an alternative constitutional vision, and then—after the insurgents had consolidated power and gained control over the judiciary—attacked courts when leading a different insurgent political movement with an alternative constitutional vision. The Lincoln-Douglas debates in both 1840 and 1858 were between two political leaders seeking control over official constitutional meanings, not between a representative of the people and a representative of the courts.

Part III will show how struggles over judicial power are struggles between political coalitions, each advancing a different constitutional vision and each with different institutional strengths and weaknesses. Constitutional politics consists of efforts to make distinctive constitutional visions the official law of the land by controlling governmental institutions, empowering those institutions already controlled by political supporters, and

17. 5 U.S. (1 Cranch) 137 (1803).
18. *See* KRAMER, *supra* note 5, at 246–47.
19. *See supra* notes 3, 14 and accompanying text.

weakening the authority of those institutions controlled by political rivals. This enduring fight for political power better explains the complete Lincoln-Douglas debates and other episodes in American history than a more narrow concern with judicial supremacy per se. Except during relatively rare transitional periods, courts are almost always integrated into the broader governing regime.[20] The Supreme Court of Illinois in 1840 was the primary organ for Whig constitutional principles. The Taney Court in 1858 was a working member of the Jacksonian coalition. Douglas in 1840 and Lincoln in 1858 were attacking institutions controlled by their political rivals and regarded appeals to popular constitutionalism as efforts to transfer constitutional authority to institutions they believed more favorably disposed to their constitutional vision. Lincoln in 1840 and Douglas in 1858 were defending institutions controlled by their political supporters and regarded appeals to popular constitutionalism as efforts to transfer constitutional authority to institutions they believed less favorably disposed to their constitutional vision.

Americans vote for and against these broader political coalitions. They choose between Jacksonians and Whigs or between Republicans and Democrats. Their choice is based on many factors, but approval of their favored coalition's more general constitutional vision is more likely to play a greater role in electoral decisions than concerns with judicial supremacy and popular constitutionalism. Persons who voted for a Democrat in 1840 may have voted to dismantle Whig-style judicial supremacy, but the same Democrats in 1858 appeared to have voted to maintain Jacksonian-style judicial supremacy. Most likely, they were voting for Jacksonian policies on national banking and slavery, with questions of judicial power being understood largely as means to secure those more important partisan goals. The Republican victory in 1860 was less a triumph of the people over the courts, than the triumph of Republican constitutional principles over Jacksonian constitutional principles.

Popular constitutionalism may be best conceived as describing the process by which Americans choose their governing constitutional vision. Judicial power is regarded largely as an instrumental means for securing that vision. "A broad generalization, inaccurate only at the margins," Mark Tushnet maintains,

> is that nearly every constitutional theorist urges minimal judicial review and vigorous democratic dialogue on issues on which the theorist believes her preferred position is likely to prevail in the democratic dia-

20. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 563, 580 (2001) (reprinted from 6 J. PUB. L. 279 (1957)).

> logue and more-than-minimal review on issues on which the theorist believes her preferred position is unlikely to prevail there.[21]

Citizens are little different. Surveys find that approval of judicial decisions is highly correlated with support for the underlying policy.[22] The nature of this debate over constitutional authority highlights how the choice between Lincoln and Douglas in 1840 and 1858 was not between democracy or aristocracy or between rule by the courts and rule by the people, but between rule by Jacksonians and rule by Whigs/Republicans.

I. JUDICIAL SUPREMACY IN THEORY AND IN PRACTICE

The People Themselves is directed at the common view that judicial supremacy was constitutionally inevitable and largely uncontested throughout American history. Contemporary Supreme Court justices representing the complete judicial spectrum have articulated this understanding in opinions that insist that judicial control over constitutional meaning has been the regime practice since at least 1803. *Marbury v. Madison*, the unanimous tribunal in *Cooper v. Aaron* asserted, "declared the basic principle that the federal judiciary is 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."[23] Forty years later, the Rehnquist Court similarly stated, "the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."[24] Distinguished constitutional commentators agree that American history has settled debate over institutional responsibility for determining constitutional meaning in favor of the federal judiciary. Professor Henry Hart of Harvard Law School insisted that the Supreme Court

> is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law.[25]

"Democracy does not insist on judges having the last word," Ronald Dworkin maintains, but "practice has now settled that courts do have a

21. Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 245 n.4 (1995).

22. *See* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989).

23. 358 U.S. 1, 18 (1958).

24. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

25. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

responsibility to declare and act on their best understanding of what the Constitution forbids."[26]

Dworkin's historical justification for judicial supremacy is particularly remarkable. He has famously asserted that constitutional interpretation requires citizens and justices to assess both the morality of the practice under constitutional attack and the extent to which that practice "fits" with previous precedents and other accepted practices. "No theory can count as an adequate justification of institutional history unless it provides a good fit with that history," *Taking Rights Seriously* declares, "but if two or more theories each provide an adequate fit, on that test, then the theory among these that is morally the strongest provides the best justification, even though it exposes more decisions as mistakes than another."[27] Many commentators complain that "goodness" does all the work in Dworkin's arguments, and "fit" almost none.[28] When discussing judicial supremacy, however, Dworkin insists that all the work is done by "fit" and none by "goodness." Debate over the jurisprudential merits of judicial supremacy and popular constitutionalism has been, in his view, firmly settled by "practice."[29]

The People Themselves and the complete Lincoln-Douglas debates devastate this claim that judicial supremacy can be justified, independent of the merits, by history, tradition, or practice. Americans in 1789, 1803, 1840, and 1858 did not self-consciously empower courts to determine for the entire political system what the Constitution meant, nor did they meekly acquiesce when justices asserted their authority to settle constitutional conflicts. The persons responsible for the Constitution regarded the large republic, representation, and the separation of powers as more effective means than "parchment barriers" and judicial review for protecting fundamental rights and preserving limitations on national power.[30] When some justices and their political supporters subsequently claimed that the federal judiciary had the final say on those constitutional disputes that excited the body politic, those assertions were consistently and powerfully

26. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7, 12 (1996).

27. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 340 (1978).

28. *See, e.g.*, Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, *in* INTEGRITY AND CONSCIENCE 218, 239–40 (Ian Shapiro & Robert Adams eds., 1998).

29. DWORKIN, *supra* note 26, at 12.

30. *See* THE FEDERALIST NOS. 31, 73, 84, at 196, 442, 514 (Alexander Hamilton), NOS. 41, 48, 57, at 255–56, 308–09, 313, 350 (James Madison) (Clinton Rossiter ed., 1961); *see also* Letter from Roger Sherman (Dec. 8, 1787), *in* 2 COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE 386, 387 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

challenged. Jefferson challenged judicial authority to declare the Alien and Sedition Acts constitutional.[31] Jackson challenged judicial authority to determine the constitutional status of the national bank.[32] When the Supreme Court of Illinois interpreted the state constitution as forbidding a Jacksonian governor from removing a Whig political appointee,[33] Douglas and other Democrats insisted that the people's representatives in the state legislature ought to determine the course of local constitutional development. When the Supreme Court in *Dred Scott* interpreted the federal Constitution as prohibiting Congress from banning slavery in the territories, Lincoln and other Republicans insisted that the people's representatives in the elected branches of the national government ought to determine the course of American constitutional development. Fearing such political challenges, antebellum justices often pulled their constitutional punches. The Supreme Court in *Marbury* declined to order the Jefferson administration to deliver a judicial commission in part for fear that the judicial order would be ignored.[34] The Marshall Court's maneuvers in *Worcester v. Georgia*[35] may be best explained by fears that President Jackson would not implement a more aggressive judicial decision.[36]

Federal and state justices during the first half of the nineteenth century at most gained the power to settle minor constitutional disputes. Prominent politicians did not challenge the judicial authority to tinker with the jurisdictional questions[37] or decide minor land disputes.[38] Much of the Supreme Court's docket before the Civil War was devoted to straightening out land titles in the West.[39] Although the cases sometimes raised constitutional issues, popular movements took little notice when the stakes were limited to which individual owned a particular tract of land. Justice John Catron highlighted the low public salience of most contemporaneous Supreme Court decisions when in 1845 he declared that *Pollard v. Hagan* is

31. *See* Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 140, 141–42 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899).

32. *See* Jackson Veto Message, *supra* note 9.

33. Field v. People *ex rel.* McClernand, 3 Ill. (2 Scam.) 79 (1839).

34. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 25–28 (Sanford Levinson rev., 4th ed. 2005).

35. 31 U.S. (6 Pet.) 515 (1832).

36. *See* Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229, 260–61 (1998).

37. William Michael Treanor, *Judicial Review before* Marbury, 58 STAN. L. REV. 455, 560–62 (2005).

38. *See* Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 114 (2000).

39. *See id.* at 116.

"deemed the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds."[40] The issue in *Pollard* concerned the ownership of riverbeds when a territory became a state.[41] Constitutional issues of more political consequence in Jacksonian America, such as the national bank, internal improvements, tariffs, and national expansion, were settled by elected officials with little if any judicial involvement.[42]

The controversy over the Douglas Bill in Illinois and imbroglio over judicial reorganization in Kentucky put in perspective the relative lack of debate over national judicial power between 1830 and 1855. Charles Warren suggested that the decline of political attacks on the federal judiciary after 1830 reflected an increasing acceptance of judicial power by persons on all sides of the political spectrum.[43] The more accurate conclusion may be that attacks on the Supreme Court of the United States waned because, from Nullification to the Mexican War, the justices did not take positions on the major controversies of the day. Jacksonians had no need to undermine their fellow Jacksonians who dominated the Supreme Court of the United States after 1835. They consistently pilloried, however, every local Whig judge who dared assert judicial authority in a state with a more majoritarian political culture. Radical democrats in Kentucky reorganized the state judicial system after the state supreme court declared unconstitutional a legislative effort to provide debtor relief.[44] Douglas and fellow Jacksonians in Illinois reorganized the state judicial system after the state supreme court took Whig positions on several controversies. Many local elected officials resisted or refused to implement state or federal court decisions they believed illegitimate.[45] This history belies any national consensus on judicial supremacy before the Civil War. Antebellum justices who attempted to settle heated constitutional controversies inevitably provoked powerful, often successful, attacks on their judicial authority.

Dean Kramer may overreach slightly when claiming that *Marbury v. Madison* does not support judicial supremacy. *The People Themselves* insists that Chief Justice Marshall in *Marbury* merely asserted "that courts had the same duty and the same obligation to enforce the Constitution as

40. 44 U.S. (3 How.) 212, 235 (1845) (Catron, J., dissenting).

41. *Id.* at 220–21 (majority opinion).

42. *See* Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485, 503–24 (2004).

43. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 206 (1947).

44. *See* Ruger, *supra* note 2, at 848–52.

45. *See* Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790–1860) and the European Community (1958–94)*, 11 STUD. AM. POL. DEV. 149, 155–56, 166, 185 (1997).

everyone else, both in and out of government."[46] This seems mistaken. Contrary to Dean Kramer's claim,[47] the passages on judicial power in the *Marbury* opinion are largely a cut-and-paste job from the speeches leading Federalists gave when defending a powerful judiciary during the debate over the Repeal Act of 1802. Marshall's emphasis on the writtenness of the Constitution was anticipated by Joseph Hemphill and others.[48] His analysis of limited government was anticipated by James Bayard and others.[49] James Tallmadge anticipated Marshall's assertion that the Constitution, emanating from the people, is higher law than ordinary statutes.[50] Marshall's parade of horribles in *Marbury* was nearly identical to those proposed by many Federalist champions of judicial supremacy.[51] As did Marshall in 1803, many Federalists mentioned the judicial oath to uphold the Constitution as further evidence of the judicial power to declare laws unconstitutional.[52] By comparison, Marshall in *Marbury* repeated no argument made by a Jeffersonian in 1802 who supported judicial review but not the judicial power to bind elected officials.[53] Fourteen years after *Marbury*, Marshall made a more explicit assertion of judicial supremacy. "On the Supreme Court of the United States has the constitution of our country to devolved this important duty," he declared in *McCulloch*, to settle disputes over the "constitution of our country, in its most interesting and vital parts."[54] The precise legal holding of *Marbury* may be debatable, but John Marshall clearly believed that the Supreme Court had the final say on what the Constitution meant.

Popular constitutionalism does not need to enlist this judicial support. What matters is political practice, not legal theory. When most people and

46. KRAMER, *supra* note 5, at 127.

47. *See id.* at 125.

48. *See* 11 ANNALS OF CONG. 536 (1802); *see also id.* at 163–64 (statement of Sen. Ross), 865–66 (statement of Rep. Cutler).

49. *See id.* at 645–48; *see also id.* at 56–58 (statement of Sen. Tracy), 131–32 (statement of Sen. Chipman), 175–76 (statement of Sen. Ogden), 574–76 (statement of Rep. Stanley), 841–42 (statement of Rep. Dennis).

50. *See id.* at 948; *see also id.* at 727–28, 739, 741, 743 (statement of Rep. Goddard), 783 (statement of Rep. Griswold), 903–05, 920–32 (statement of Rep. Dana).

51. *See id.* at 163–67 (statement of Sen. Ross), 175–76 (statement of Sen. Ogden), 180–82 (statement of Sen. Morris), 529–30 (statement of Rep. Henderson), 574–76 (statement of Rep. Stanley), 645–48 (statement of Rep. Bayard), 689–91 (statement of Rep. Huger), 747–48, 754–56 759–60 (statement of Rep. Rutledge), 841–42 (statement of Rep. Dennis), 881, 884 (statement of Rep. Hastings).

52. *See id.* at 182 (statement of Sen. Morris), 542 (statement of Rep. Hemphill), 574–76 (statement of Rep. Stanley), 920 (statement of Rep. Dana).

53. *See id.* at 59, 61–63 (statement of Sen. Mason), 73–74 (statement of Sen. Stone), 115–16 (statement Sen. Wright), 557–58 (statement of Rep. Davis), 698–702 (statement of Rep. Smith), 982–83 (statement of Rep. Bacon).

54. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400, 401 (1819).

elected officials do not treat judicial decisions as binding, then the working Constitution does not regard those decisions as authoritative, no matter what language might be found in judicial opinions. Michael Kent Curtis detailed a popular political tradition in antebellum America that interpreted constitutional free-speech rights far more broadly than most antebellum courts. Abolitionists were legally free to speak in most northern states because northern state legislators were committed to libertarian readings of the expression rights protected in the federal and state constitutions. The constitutional law of free speech that structured political action, Curtis found, was much different than the constitutional law on free speech found in legal books.[55] Chief Justice Marshall may have asserted that courts were the appropriate institution for settling the constitutional status of the national bank, but Andrew Jackson disagreed. Both Jackson and President Tyler repeatedly vetoed on constitutional grounds bank bills that the Supreme Court had previously held to be constitutional.[56] Lincoln in his 1858 debates with Douglas stated that the constitutional status of the national bank had been settled by those Jacksonian presidential vetoes, and not by Marshall's judicial opinion in *McCulloch*.[57] If Lincoln was right that political practice from 1831 to 1858 had established that the federal government had no constitutional power to incorporate a national bank, then the same political practice had clearly established that elected officials had the power to settle constitutional controversies, even in the face of contrary judicial precedent.

Prominent politicians before the Civil War supported judicial decision making only when they favored the decisions the justices were making, had political reasons for wanting justices to make the policy choice in question, or did not care very much about the issues before the courts. When these three conditions were absent, justices often found reasons for avoiding controversial decisions. Marshall found a statutory excuse that enabled him to avoid striking down southern laws imprisoning free seamen of color whose ships docked in slave states. "[A]s I am not fond of butting against a

55. *See* CURTIS, *supra* note 16, at 3–4. Jon Gould observes that, at present, the popular constitutional understandings of hate speech that structure political action are far more restrictive than the constitutional law of hate speech handed down by the Supreme Court. *See* JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 5–8 (2005).

56. *See* Jackson Veto Message, *supra* note 9 (stating that Congress has no power to establish a national bank); Veto Messages from President John Tyler to the U.S. Senate (Aug. 16, 1841), *in* 4 COMPILATION, *supra* note 9, at 63–68 (same); Veto Messages from President John Tyler to the U.S. House of Representatives (Sept. 9, 1841), *in* 4 COMPILATION, *supra* note 9, at 68–72 (same).

57. *See* Lincoln & Douglas, Sixth Debate, *supra* note 15, at 268.

wall in sport," he told Story, "I escaped on the construction of the act."[58] When justices nevertheless attempted to settle heated political controversies, elected officials either reorganized the judicial system, as Douglas and his supporters did in 1840, or ignored the judicial ruling, as Lincoln did after taking office in 1861.[59] In antebellum America, popular constitutionalism was the political practice, even if judicial supremacy *may* have been the legal theory.

II. TRADITIONS VERSUS COALITIONS

In addition to debunking claims that more than 200 years of practice have established judicial supremacy, *The People Themselves* maintains that American constitutional politics has been characterized by an ongoing battle between two opposing traditions, judicial supremacy and popular constitutionalism. Dean Kramer asserts that "American politics have always been defined by a struggle between two great principles." The first, "aristocracy, . . . has always been concerned first and foremost with 'the excess of democracy.'" The second, "democracy," is championed by those with "greater faith in the capacity of their fellow citizens to govern responsibly."[60] This struggle between those with "differing sensibilities about popular government and the political trustworthiness of ordinary people," Dean Kramer contends, is "a very old conflict: one that started the moment Americans set their sights on creating a republic and that has scarcely ever flagged since then."[61] Kramer recognizes important differences between eighteenth-century Federalists and Jeffersonians on the one hand, and turn of the twenty-first century liberals and conservatives on the other. Nevertheless, *The People Themselves* concludes that "while the field of battle may have changed over time, it is still the same old war." Contemporary

58. Letter from John Marshall to Joseph Story (Sept. 26, 1823), *in* 9 THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS AND SELECTED JUDICIAL OPINIONS, JANUARY 1820–DECEMBER 1823, at 338 (Charles F. Hobson ed., 1998). Marshall probably engaged in similar statutory and treaty misconstruction in such cases as *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801), and *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), in order to avoid challenging Jeffersonian understandings of legal obligations engendered by the naval conflict against France, and in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), in order to avoid challenging Virginian understandings of state constitutional obligations. *See* Mark A. Graber, *Establishing Judicial Review?:* Schooner Peggy *and the Early Marshall Court*, 51 POL. RES. Q. 221 (1998); Mark A. Graber, *The Passive-Aggressive Virtues:* Cohens v. Virginia *and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67 (1995).

59. The Lincoln administration in 1862 declared that free blacks were American citizens, and Congress that year banned slavery in all American territories. *See* 10 Op. Att'y Gen. 382 (1862); *see also* Act of June 19, 1862, ch. 111, 12 Stat. 432 ("An Act to secure Freedom to all Persons within the Territories of the United States").

60. KRAMER, *supra* note 5, at 246–47.

61. *Id.* at 246.

"supporters of judicial supremacy are today's aristocrats." Contemporary popular constitutionalists count the following as their "intellectual forebears: Jefferson, Madison, and Van Buren."[62]

The complete Lincoln-Douglas debates belie this assertion. If Kramer is correct, then Lincoln in 1858 could have counted Douglas in 1840 as one of his "intellectual forebears," while Lincoln in 1840 was part of a tradition that included Douglas in 1858. A Republican coalition, three-fourths of whose members were former Whigs,[63] would have been the heirs to the Jacksonian tradition, while such committed Jacksonians as James Buchanan ought to have considered Daniel Webster a venerable ancestor. Neither Lincoln nor Douglas exhibited such a wholesale transformation in political orientation. Lincoln idolized Henry Clay throughout his career.[64] Douglas and other Democrats continually venerated the memory of Andrew Jackson.[65] Professor Joel Silbey's study of party politics during the nineteenth century concludes that "both the Democrats and their opponents remained true to their commitments" from 1838 until 1893.[66]

Lincoln, Douglas, Jacksonians, and Whigs were not the only American politicians or political parties whose attitudes toward institutional authority over constitutional meaning evolved in response to political events. Prominent Federalists and Jeffersonians switched sides in the political debates over judicial supremacy that took place during the last decade of the eighteenth century. New Deal liberals attacked judicial activism during the 1930s, learned to love judicial power during the 1950s and 1960s, but are having second thoughts at the turn of the twenty-first century. Some contemporary conservatives are becoming more enamored of judicial power, and are even calling for the judiciary to protect unenumerated constitutional rights. Kramer is correct to note the ongoing struggle over judicial power in American history, but the struggles have been between different political coalitions rather than between representatives of "aristocratic" and "democratic" political traditions.

Neither Lincoln nor Douglas adhered to fixed aristocratic or democratic understandings of judicial power throughout their political careers. Lincoln championed judicial supremacy when he was a Whig, but more

62. *Id.* at 247.

63. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 167 (1970) (describing the makeup of the coalition).

64. *See* Lincoln & Douglas, First Debate, *supra* note 11, at 29 (declaring "Henry Clay" was "my beau ideal of a statesman, the man for whom I fought all my humble life").

65. *See* JOHANNSEN, *supra* note 1, at 381.

66. JOEL H. SILBEY, THE AMERICAN POLITICAL NATION, 1838–1893, at 88 (1991).

aggressively challenged courts when he became a Republican.[67] Douglas supported Jacksonian attacks on courts during the 1830s and 1840s, and then endorsed Jacksonian efforts to make federal courts the final arbiter of slavery questions during the 1850s.[68] Their differing orientation toward courts does not appear to correspond to any change in their more general political principles or attitudes towards popular participation in politics. Douglas championed a limited federal economic role and national expansion throughout his career.[69] Lincoln left the Whig party only when he perceived that coalition no longer had the capacity to win elections, not because he had abandoned faith in the American System championed by Henry Clay.[70] Lincoln and Douglas advocated different positions on judicial power in 1858 than they did in 1840 partly because control over the judiciary had changed and partly because the issues being adjudicated by the judiciary had changed.

Lincoln, Douglas, Jacksonians, and Whigs during the 1830s and 1840s were debating the authority of state and federal judicial systems dominated by Whigs. Members of the Marshall Court had campaigned for John Quincy Adams in 1828.[71] Most state judges were identified with the more commercial wing of the fragmenting Jeffersonian coalition or with the opposition to rising Jacksonian coalition.[72] Jacksonians opposed and Whigs celebrated judicial power in this political environment, partly because judicial power was generally understood to be a means for advancing Whig constitutional visions. As Jacksonians consolidated their control over the federal judiciary, they soon found judicial supremacy useful as a means for advancing Jacksonian political goals and for holding together a decaying coalition.[73] Northern Whigs, who had been the most enthusiastic champions of the Marshall Court, proved less enamored with judicial power when exercised by the Southern-dominated Taney Court.[74]

The evolution of the Jacksonian-Whig debate over judicial power was anticipated by the evolution of the Federalist-Jeffersonian debate over judicial power. During the early 1790s, prominent Jeffersonians defended and prominent Federalists questioned the judicial power to declare federal laws

67. *See supra* notes 7, 15 and accompanying text.

68. *See supra* notes 3, 14 and accompanying text.

69. *See* Lincoln & Douglas, First Debate, *supra* note 11, at 1–2.

70. *See* DONALD, *supra* note 6, at 188–91.

71. Graber, *supra* note 36, at 263.

72. *See* Ruger, *supra* note 2, at 832–33, 867.

73. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (forthcoming 2007); Graber, *supra* note 12, 46–50.

74. *See* 2 WARREN, *supra* note 43, at 213–14.

unconstitutional. When the justices on circuit declared that Congress could not vest them with the power to determine whether Revolutionary War veterans were legally entitled to invalid pensions when judicial rulings were subject to review by a cabinet official,[75] James Madison writing to Henry Lee celebrated this effort to call "the attention of the Pu[b]lic to Legislative fallibility." "[P]erhaps they may be wrong in the exertion of their power," he stated, "but such an evidence of its existence gives inquietude to those who do not wish congress to be controuled or doubted . . . ."[76] The *National Gazette*, a Jeffersonian newspaper, was even more enthusiastic about this exercise of legal authority. The editor declared that a judicial decision holding a federal law "*unconstitutional*, must be a matter of high gratification to every republican and friend of liberty: since it assures the people of ample protection to their constitutional rights and privileges, against any attempt of legislative and executive oppression."[77] Federalists were less excited about the first federal decision declaring congressional legislation unconstitutional. Fisher Ames wrote Thomas Dwight that the "decision of the Judges, on the validity of our pension law, is generally censured as indiscreet and erroneous."[78]

A decade later, Federalists were championing judicial supremacy and Jeffersonians insisting the electoral branches of the national government had equal power to determine what the Constitution meant. The consistency with which federal courts sustained the Alien and Sedition Acts and other Federalist measures implemented during the undeclared war against France,[79] as well as the partisan composition of the federal judiciary, were the crucial events responsible for these altered political commitments.[80] When the Alien and Sedition Acts were initially passed, some Jeffersonians continued looking to the federal courts for relief against Congress.[81] Federalists became firmly committed to an expanded federal judiciary and Jef-

75. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

76. Letter from James Madison to Henry Lee (Apr. 15, 1792), *in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 50 (Maeva Marcus ed., 1998) [hereinafter DOCUMENTARY HISTORY].

77. NAT'L GAZETTE (Phila.), April 16, 1792, *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 76, at 52.

78. Letter from Fisher Ames to Thomas Dwight (April 25, 1792), *in* 6 DOCUMENTARY HISTORY, *supra* note 76, at 57.

79. *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 126–28, 214, 247–49, 253 (1995).

80. *See* Mark A. Graber, *The Problematic Establishment of Judicial Review*, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 28, 36 (Howard Gilman & Cornell Clayton eds., 1999).

81. *See* 8 ANNALS OF CONG. 1991, 2111 (1798) (statement of Rep. Harper); *id.* at 2152 (statement of Rep. Macon).

fersonians became firmly committed to popular constitutionalism only when events clarified which side the federal judiciary was on in the political struggles of the time. The Judiciary Act of 1801, which dramatically expanded the federal judiciary, and the Adams administration's decision to fill all of those judicial vacancies with prominent Federalists cemented the new partisan views on judicial power. Federalists, who seemed unsure about judicial power in 1792, in 1802 described the Supreme Court as "that fortress of the Constitution."[82] Jeffersonians, who had previously called on the Supreme Court to strike down Federalist measures, in 1802 described as "novel" the claim that "the nation is to look up to these immaculate judges to protect their liberties."[83]

American politics over the last hundred years similarly confounds any effort to place the proponents and opponents of judicial power into such neat conceptual categories as "aristocrats" and "democrats." During the first third of the twentieth century, progressives bitterly fought to reduce the power of federal courts and make courts more accountable to elected officials and popular opinion.[84] Prominent conservatives before the New Deal, such as President and later Chief Justice William Howard Taft, insisted that federal courts and judicial power were the best instruments for protecting property rights and preventing communism.[85] When New Dealers gained control of the federal court system by the end of the Franklin Roosevelt administration, many liberals lost their inhibitions about judicial power. Courts became another agent of democracy, protecting democratic processes and "discreet and insular minorities."[86] Conservatives during the heyday of the Warren Court complained about an "imperial judiciary" that was undermining American democracy.[87] When conservatives during the Reagan and George H. W. Bush administrations once again regained control of the federal court system, they did not institute a new regime of judicial restraint. Rather, a conservative Rehnquist Court majority has declared more federal laws unconstitutional than any other tribunal in American history.[88] Responding to these practices, many liberals are complaining about "an increasingly Imperial Court" that "does not feel bound by consti-

82. 11 ANNALS OF CONG. 91 (1802) (statement of Sen. Morris).

83. *Id.* at 75 (statement of Sen. Cocke).

84. *See generally* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937 (1994).

85. *See generally* Walter F. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159 (1961).

86. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

87. *See* Nathan Glazer, *Towards an Imperial Judiciary*, 41 PUB. INT. 104 (1975).

88. *See* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004).

tutional text, precedent, prudential restraint, . . . the votes of the populace, . . . the usual constraints of judicial craftsmanship," or "the messy processes of democracy . . . ."[89]

As was the case with Lincoln and Douglas, these changing attitudes towards judicial power throughout American history do not appear to correspond to changing attitudes on other issues. Republicans throughout the 1790s were more committed than Federalists to popular participation in politics, and they were always less committed to a strong national government. Time was needed for each coalition to determine whether the Supreme Court was likely to favor its distinctive constitutional vision. Progressives and liberals for the past fifty years have always been more committed to economic redistribution and racial egalitarianism than conservatives. What has changed is the extent to which the Supreme Court has been willing to support progressive or conservative goals.

Lincoln, Douglas, and other Americans also responded differently to different exercises of judicial power because their more general constitutional visions did not commit them to either judicial supremacy or popular constitutionalism on all the issues of the day. Contrary to Kramer's thesis, neither "democrat" nor "aristocrat" does justice to historical attitudes toward judicial power. Rather, Lincoln and Douglas had broader political and legal commitments that justified supporting Supreme Court policymaking in some instances and not others. The differences in their rhetoric of 1840 and 1858 were neither a consequence of pure politics nor principles entirely abstracted from politics, but an integration of political and principled considerations that is typical of American constitutionalism. Whigs and Jacksonians both championed general principles that could be used to defend and oppose judicial power. Which principles were invoked was partly a function of which political coalition controlled the judiciary. Nevertheless, constitutional argument was not purely instrumental. General principles both structured and limited partisan attacks on federal courts. Whigs and Jacksonians advocated different conditions under which justices were authorized to settle constitutional disputes. Lincoln and Douglas were more approving of judicial decisions when their fellow partisans were on the bench, partly because their partisans were likely to make the sort of judicial decisions they believed appropriately settled constitutional disputes. Nevertheless, both Lincoln and Douglas deferred to judicial decisions that met their conditions for finality, even when they disagreed with the judicial policy choice.

89. Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 701 (2002).

Lincoln's attack on *Dred Scott* was consistent with the Whig view that courts should be above the political fray. "[I]t . . . might be . . . factious, nay, even revolutionary, to not acquiesce in it as a precedent," he wrote in 1858, had *Dred Scott* "been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments in our history." Democrats had no business attacking courts in 1840, Lincoln believed, because the judicial decisions in question were made "without any apparent partisan bias, and in accordance with legal public expectation." The Taney Court did not settle the constitutional status of slavery in the territories because *Dred Scott* was "wanting in all these claims to the public confidence."[90] Consistent with his Whig commitment to judicial power, Lincoln on the campaign trail claimed that Republican political efforts were directed not at an executive overthrow of a judicial regime, but at having *Dred Scott* "reversed if we can, and a new judicial rule established upon this subject."[91]

Lincoln accepted proslavery judicial decisions that satisfied "these claims to the public confidence." His first inaugural address denied that "the policy of the government" on slavery in the territories could "be irrevocably fixed by decisions of the Supreme Court, the instant they are made,"[92] but implied that "the policy of the government" on fugitive slaves had been "irrevocably fixed" by a series of Supreme Court decisions. When discussing sectional controversies over the rendition process, Lincoln suggested, "it will be much safer for all, both in official and private stations, to conform to, and abide by, all those acts which stand unrepealed, than to violate any of them, trusting to find impunity in having them held to be unconstitutional." [93] He had previously informed Republican senators "[t]hat the fugitive slave clause of the Constitution ought to be enforced by a law of Congress, with efficient provisions for that object."[94] The difference between his position on slavery in the territories and the rendition of fugitive slaves may have been rooted in what Lincoln perceived as the difference between *Dred Scott* and *Prigg v. Pennsylvania*.[95] In sharp contrast to the former decision, *Prigg* was unanimous. Justices from the free and

90. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* 2 COLLECTED WORKS, *supra* note 4, at 398, 400–01.

91. Lincoln & Douglas, Sixth Debate, *supra* note 15, at 255.

92. Lincoln, First Inaugural Address, *supra* note 15, at 268.

93. *Id.* at 264.

94. Abraham Lincoln, Resolutions Drawn up for Republican Members of Senate Committee of Thirteen (Dec. 20, 1860) [hereinafter Lincoln, Resolutions], *in* 4 COLLECTED WORKS, *supra* note 4, at 156, 156–57.

95. 41 U.S. (16 Pet.) 539 (1842).

slave states, who were nominated by Whig and Jacksonian presidents, all agreed that Congress had the right to pass fugitive slave laws. Unlike *Dred Scott*, *Prigg* at the time of the first inaugural had been reaffirmed by federal courts.[96] While Lincoln clearly preferred that alleged fugitive slaves have more procedural safeguards,[97] he was less willing to challenge judicial decisions that met Whig standards for constitutional authority.[98]

Douglas's defense of *Dred Scott* in 1858 was consistent with his earlier Jacksonian opposition to judicial power. Jacksonians objected to judicial power unsanctioned by contemporary majorities. Judicial supremacy was justified, however, when popular majorities self-consciously empowered courts to settle particular constitutional disputes. Jurisdictional grants were a common means by which Jacksonians vested courts with the power to settle constitutional disputes. Democrats believed that Congress had complete control of the Supreme Court's appellate jurisdiction.[99] If the people through their representatives in the legislature had determined that a constitutional dispute was best settled by adjudication, then Jacksonians could reconcile popular constitutionalism and judicial supremacy.[100] From this perspective, Douglas's positions on judicial power in 1840 and 1858 were consistent. In sharp contrast to the behavior of the Illinois courts in the late 1830s, federal courts in the 1850s had been authorized to determine the constitutional status of slavery. As Jefferson Davis reminded his contemporaries, the Supreme Court was "the umpire selected as the referee in the controversy."[101] Having supported the legislative decision authorizing courts to decide the constitutional status of slavery in the territories, Douglas accepted the *Dred Scott* decision even though he favored popular sovereignty. Douglas later favored legislation empowering the Supreme Court to determine whether Congress was obligated to pass a slave code for the territories, even though he probably thought that the Supreme Court would hand down a decision that would further undermine popular sovereignty.[102] As was the case with Lincoln, Douglas was committed to neither popular

96. *See* Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1859); Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229 (1847).

97. *See* Lincoln, First Inaugural Address, *supra* note 15, at 264.

98. *See id.*; Lincoln, Resolutions, *supra* note 94, at 157.

99. *See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1608 (1986).

100. *See* Mark A. Graber, *Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 58 (Ronald Kahn & Kenneth Kersch eds., forthcoming 2006).

101. CONG. GLOBE, 36th Cong., 1st Sess. 1940 (1860).

102. *See* FEHRENBACHER, *supra* note 12, at 537–38.

constitutionalism nor to judicial supremacy, but to a set of conditions for determining when a judicial decision was authoritative.

Americans during the twentieth century have similarly been more committed to various sets of conditions for determining when judicial decisions are authoritative than to either popular constitutionalism or judicial supremacy in the abstract.[103] The primary liberal and progressive criticisms of early twentieth-century judicial activism were that courts lack the expertise and democratic pedigree necessary to make economic policy.[104] New Dealers did not abandon this position once they gained control of the judiciary. Many, most notably Felix Frankfurter, Learned Hand, and Raoul Berger, insisted throughout their lives that liberal judicial activism was no better than conservative judicial activism.[105] Other jurists on the political left began insisting that the democratic principles underlying previous liberal attacks on such decisions as *Lochner v. New York*[106] could be employed to justify judicial activism on behalf of the democratic process and persons of color.[107] Whether liberals would have developed these arguments had conservatives maintained control of the courts is doubtful. Nevertheless, liberal justifications for popular constitutionalism before the New Deal influenced liberal justifications for judicial supremacy after the New Deal. With rare exceptions,[108] progressive and liberal justices were very slow to develop arguments for protecting the fundamental rights to basic necessities, in part because such activism was more difficult to justify using the principles first developed to attack judicial policymaking on economic matters.[109]

Generational change may also better explain the course of political debate over judicial power than enduring democratic or aristocratic sensibilities. History provides some reason for thinking that many political actors throughout their lives emphasize those elements of their broader political principles that were activated by their first committed participation

103. The argument in this paragraph is elaborated at length in MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991).

104. *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). *See also* GRABER, *supra* note 103, at 69–74.

105. *See* Dennis v. United States, 341 U.S. 494, 525–26 (1951) (Frankfurter, J., concurring); LEARNED HAND, THE BILL OF RIGHTS (Atheneum 1965) (1958); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

106. 198 U.S. 45 (1905).

107. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 361 (Harvard Univ. Press 1967) (1941); Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L. J. 1 (1943).

108. *See, e.g.*, Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

109. *See* GRABER, *supra* note 103, at 184–215; ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997).

in debates over judicial power. Neither Lincoln nor Douglas played any prominent role in the heated political debates over the proposed repeal of section 25 of the Judiciary Act that occupied politicians during the first third of the nineteenth century.[110] Not having committed themselves in their political youth to a fixed position on judicial power, each was politically and intellectually freer than their political elders to adopt Jacksonian or Whig/Republican principles to the political debates that most concerned their political generation. Not surprisingly, therefore, the generation that regarded *Dred Scott* as the quintessential example of judicial power analyzed institutional authority differently than the generation that began its analysis thinking about *McCulloch*.

Americans witnessed the similar impact of generational change after the New Deal. Most prominent academics who came of age during the 1930s had difficulty accepting judicial activism, even when the justices were making policies they supported.[111] By contrast, such liberal scholars as Ronald Dworkin and Lawrence Tribe, who came of age during the heyday of the Warren Court, have supported judicial supremacy, even in the face of Burger and Rehnquist Court decisions that increasingly wield judicial power for conservative causes. Contemporary proponents of popular constitutionalism or the Constitution outside of the courts are either the few members of an older generation who raised questions about judicial power before the advent of the Rehnquist Court,[112] or scholars, such as Larry Kramer, who came of age long after the Warren Court ended. The leading academic proponents of conservative judicial activism at present are younger scholars who barely remember the Burger, much less the Warren Court. The originalist rhetoric that presently underlies much conservative judicial activism was first wielded by an earlier generation of conservatives to oppose liberal judicial activism.[113]

Attitudes towards judicial supremacy also reflect the life cycle of political coalitions. Keith Whittington brilliantly documents in a forthcoming book[114] how presidential understandings of judicial authority have de-

110. *See generally* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 161 (1913).

111. *See* Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 218, 236–38 (Vincent Blasi ed., 1983).

112. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

113. *See* KECK, *supra* note 88, at 4–8.

114. *See* WHITTINGTON, *supra* note 73. The following paragraph relies heavily on Professor Whittington's pathbreaking research.

pended on the place of the presidency in "political time."[115] Reconstructive presidents who come to power with a license to overturn the constitutional commitments of a previous political regime almost always advocate some version of popular constitutionalism or departmentalism. Jackson, Lincoln, and Franklin Roosevelt sought to weaken the authority of courts that they regarded as the last outpost of a deposed coalition.[116] Affiliated and disjunctive presidents whose main task is keeping together their fraying political coalitions typically support judicial power as a means for overcoming the increased fragmentation of the polity they govern. John Quincy Adams, James Buchanan, and Herbert Hoover were judicial supremacists in part because they regarded courts as a bulwark against the political forces that were causing their partisan regime to disintegrate.[117] That weakened coalitions increasingly employ courts as means for preserving political power complicates Kramer's assertion that "[w]hat is certain is that popular constitutionalism was the clear victor each time matters came to a head."[118] Increased reliance on courts is more often a consequence than the cause of political vulnerability. A Jacksonian coalition strong enough to withstand Lincoln in 1860 probably would have been strong enough to pass its program legislatively rather than rely on courts to protect slavery in the territories.

Dean Kramer recognizes how debates over judicial supremacy have historically evolved when he observes, "Rather than discuss faction, as Federalists had done in the 1790s, [Joseph] Story focused on nullification and the claim that every state could interpret the Constitution for itself."[119] Rather than ask whether this might reflect fundamental differences in Federalist and Whig orientations to politics, however, *The People Themselves* treats the need for uniformity as a variation on the enduring aristocratic distrust of popular politics.[120] The better view is that every political coalition that has contested elections for more than a generation has articulated general principles that may be employed to defend both popular constitutionalism and judicial supremacy. Douglas in 1858 demonstrated how the Jacksonian principles he articulated in 1840 when defending popular con-

115. For the concept of "political time," see STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 49–52 (1993). Professor Skowronek also developed the concept of reconstructive, affiliated, and disjunctive presidencies discussed in this paragraph. *See id.* at 34–45.

116. *See* WHITTINGTON, *supra* note 73. Chapter 2 in Whittington's forthcoming book is of particular relevance.

117. *See id.* Chapter 3 is relevant to this point.

118. KRAMER, *supra* note 5, at 207.

119. *Id.* at 184.

120. *See id.* at 187–89.

stitutionalism could be used to justify judicial supremacy. Lincoln in 1858 demonstrated how the Whig principles he articulated in 1840 when defending judicial supremacy could be used to justify popular constitutionalism. The relative merits of their arguments about institutional authority lie in the relative merits of Whig and Jacksonian constitutional principles, not in the relative merits of democracy and aristocracy.

III. THE PEOPLE VERSUS THE PEOPLE

American constitutional politics is best characterized as an ongoing struggle between people who want to empower courts to make certain public policies and people who believe those policies should be made by other institutions. Most Jacksonian Democrats during the 1830s and early 1840s sought to reduce the power of the judiciary. Most Whigs during that time period favored a powerful court system. Both coalitions were supported by approximately half the voting age population. While Whigs enjoyed greater support among the commercial classes, each coalition enjoyed substantial support from elites and each had a deep mass base.[121] A similar story can be told about contemporary constitutional politics. As Chief Justice Rehnquist noted in his *Planned Parenthood of Southeastern Pennsylvania v. Casey* opinion, both proponents and opponents of judicial protection for abortion rights enjoy the popular support necessary to generate mass demonstrations.[122] Pro-choice people march in favor of judicial authority over reproductive choice. Pro-life people presently demonstrate for legislative authority. Both political movements are more interested in securing their constitutional vision than in the precise allocation of institutional authority. Justices deciding whether to reaffirm *Roe v. Wade*[123] choose between these different coalitions of people, not between an abstracted "people" and the courts.

The prominent politicians and political movements involved in these political struggles over institutional authority have not remained fixed or exhibited fixed characteristics throughout American history. Madison was only the first of the many prominent American constitutional thinkers whose attitude towards judicial power changed with the times. Douglas and other northern Jacksonians became more sympathetic to judicial power during the 1850s. Lincoln and other northern Whigs, now calling them-

121. *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 213–18 (1999).

122. 505 U.S. 833, 963 (1992).

123. 410 U.S. 113 (1973).

selves Republicans,[124] became less sympathetic. Liberals during the 1930s complained about "government by judiciary."[125] The next generation of liberals celebrated the federal courts as "the forum of principle."[126] The next liberal generation is elaborating a more popular constitutionalism.[127] Senior conservatives who fulminated against judicial activism[128] are being replaced by younger conservatives who advance different versions of a "Constitution-in-exile" when advocating substantial judicial activism on behalf of property rights and federalism.[129]

The arguments for judicial supremacy have also evolved over time. Whigs emphasized that judicial supremacy was necessary to ensure a unified national economy.[130] Jacksonians during the 1850s insisted that judicial supremacy was necessary to prevent sectional issues from disrupting the Union.[131] Conservatives at the turn of the twentieth century maintained that judicial supremacy was necessary to protect property rights,[132] while liberals during the middle twentieth century maintained that judicial supremacy was necessary to protect minority rights.[133] These different justifications for judicial power influenced how judicial power was exercised. Jacksonians wanted courts to impose national solutions for slavery problems, but were more inclined to leave other economic issues to the states. Liberals after the New Deal called on Supreme Court justices to protect free-speech rights, but not economic rights, even those economic rights they believed were central to a truly functioning system of free speech.[134]

The People Themselves tells a more a monolithic story, one suspects, because Kramer remains under the influence of the counter-majoritarianism difficulty. Alexander Bickel, who coined the phrase, indicated that consti-

124. *See* FONER *supra* note 63, at 167.

125. *See* LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (Wm. W. Gaunt & Sons, Inc. 1993) (1932).

126. *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 516–18 (1981).

127. *See* KRAMER, *supra* note 5; TUSHNET, *supra* note 112.

128. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

129. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83 (1995) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)).

130. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340 (1816).

131. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 455 (1857) (Wayne, J., concurring) ("[T]he peace and harmony of the country required the settlement [of the status of slavery in the territories] by judicial decision.").

132. *See* William Howard Taft, *Mr. Wilson and the Campaign*, 10 YALE REV. 1 (1920).

133. *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1295 (1982).

134. *See* GRABER, *supra* note 103, at 159–64.

tutional politics was a struggle between the people and the courts. "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive," Bickel maintained, "it thwarts the will of the representatives of the actual people of the here and now."[135] Seen from this perspective, Kramer's work is both revolutionary and very traditional. Unlike many proponents of grand constitutional theory, Kramer sides with the people in their struggles against the courts. Like the proponents of grand constitutional theory, Kramer regards these struggles as contests between the people and the courts.

Contemporary political science is offering a new interpretation of political struggles over the institutional power to settle constitutional meaning. Judicial review, students of public law declare, is "politically constructed"[136] or has "political foundations."[137] Justices declare federal and state laws unconstitutional, in this view, only when they are explicitly or implicitly invited to do so by members of the dominant political coalition, or when there is good reason to believe that at least some members of the dominant political coalition will support that exercise of judicial power. Elected officials have historically supported judicial power and judicial supremacy because they wish to avoid responsibility for settling particularly contentious and cross-cutting social issues,[138] because the judiciary may be seen as an ally against other institutions controlled by different coalitions,[139] or because they wish to entrench themselves against the possibility of electoral defeat.[140] Elected officials empower courts by expanding their jurisdiction, passing vague laws that require justices to make policy in the guise of interpretation, supporting litigation aimed at declaring laws unconstitutional, appointing known proponents of judicial power to the bench, and otherwise signaling to the courts that they favor—or at least do not oppose—certain aggressive uses of judicial power.[141]

135. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962).

136. *See* Keith E. Whittington, *The Political Foundations of Judicial Supremacy*, *in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 261, 262 (Sotirios A. Barber & Robert P. George eds., 2001).

137. Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005).

138. *See* Graber, *supra* note 12; GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003).

139. *See* Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 591–93; KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004).

140. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Howard Gillman, *How Political Parties Can Use the Courts to Advance their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002).

141. *See* Graber, *supra* note 137, at 426–27.

Politically constructed judicial review does not present the classic counter-majoritarian difficulty. When justices declare laws unconstitutional, they thwart the will of some elected officials, but are supported by other elected representatives of the people of the here and now. Many elected officials who support particular instances of judicial power play prominent roles in the dominant majority coalition. President James Buchanan enthusiastically supported the judicial decision in the *Dred Scott* case.[142] The Supreme Court's new federalism offensive is quite consistent with the more limited federal role in certain domestic policies championed by prominent Republicans.[143]

Judicial review more often than not presents clashing majoritarian problems or non-majoritarian problems.[144] Clashing majoritarian problems occur when majorities in one branch of government or one governmental institution disagree with majorities in another branch or institution, each with a plausible claim to speak for the people. Good examples include abortion during the 1980s, which pitted a pro-life executive against a pro-choice congressional majority, and *Brown v. Board of Education*,[145] which pitted an antisegregation executive branch against prosegregation southern states. Non-majoritarian problems occur when no majority has formed in favor of any specific policy. Good examples include slavery during the 1850s and campaign finance reform during the 1970s. Clashing majoritarian and non-majoritarian problems present issues for democratic theory, but those issues cannot be framed as judicial review versus democracy or as democracy versus aristocracy. As I have written elsewhere,

> The merits of judicial review lie in the extent to which that practice serves values internal to democracy, rather than in the choice between democratic and some other values. All democratic institutions privilege some people at the expense of others. Whether judicial review is desirable depends on the interests democracies should privilege and whether judicial review privileges those interests in a democratically appropriate matter.[146]

142. *See* Third Annual Message from President James Buchanan to the U.S. Senate and House of Representatives (Dec. 19, 1859), *in* 5 COMPILATION, *supra* note 9, at 3083, 3085; JEREMIAH SULLIVAN BLACK, OBSERVATIONS ON SENATOR DOUGLAS'S VIEWS OF POPULAR SOVEREIGNTY AS EXPRESSED IN HARPER'S MAGAZINE, FOR SEPTEMBER, 1859 (Washington, Thomas McGill 1859).

143. *See* J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233 (2004); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001).

144. For a more general discussion of the clashing and non-majoritarian problems discussed in this paragraph, see Graber, *supra* note 12, at 37, 61–65.

145. 347 U.S. 483 (1954).

146. Graber, *supra* note 137, at 447.

Judicial supremacy in a world where judicial power is politically constructed is both an alternative to and a consequence of popular constitutionalism. Some proponents of judicial supremacy maintain that the people cannot be trusted with constitutional meaning.[147] Others have favored judicial supremacy on some issues because they prefer rule by national majorities to rule by local majorities, because they prefer popular constitutionalism on other issues, or because they believe the Supreme Court is likely to side with the elected branch of the national government controlled by their partisans when that branch disagrees with the elected branch of the national government controlled by their political opponents.[148] Both "aristocratic" and more "democratic" proponents of judicial supremacy seek to secure their constitutional vision by persuading their fellow citizens and elected officials that their institutional vision should become the law of the land. Sustained periods of judicial policymaking have occurred historically only when proponents of a strong judiciary have secured at least partial control over at least one elected branch of government. Judicial review takes place with the permission of these elected officials and, at most, "thwarts the will" of elected officials in other governing institutions. This seems consistent with popular constitutionalism. If the people should ultimately decide what the Constitution means, then the people decide the allocation of constitutional authority as well as how constitutional provisions concerning the powers of government and individual rights should be interpreted. Douglas in 1858 was as much speaking for the people when, affirming judicial power to decide the status of slavery in the territories, he defeated Lincoln in the Illinois Senate election as Lincoln was in 1860 when, challenging that judicial authority, he defeated Douglas for the presidency.

CONCLUSION

Popular constitutionalists who recognize that judicial power is politically constructed nevertheless have reasons for supporting Dean Kramer's criticisms of the Rehnquist Court. Judicial supremacy in the past was defended on its merits and was partly a consequence of electoral victories by coalitions that articulated their understanding of judicial power on the campaign trail. Democrats during the 1852 and 1856 election campaigns openly declared that they believed the Supreme Court was the proper institution to settle divisive debates over slavery.[149] Lyndon Johnson in 1964 proudly

147. *See* KRAMER, *supra* note 5, at 131–32.
148. *See* Graber, *supra* note 137, at 426–27, 446.
149. *See* Mendelson, *supra* note 12.

burnished his support for the Warren Court.[150] Their electoral victories provided *Dred Scott* and *Brown* with democratic foundations. The reigning Republican majority, by comparison, campaigns against judicial power. President Bush repeatedly condemns "activist judges."[151] Republican judicial appointees offer no justification of judicial supremacy other than that the Supreme Court has always been the final arbiter of constitutional meaning.[152] Dean Kramer demonstrates that their historical analysis is mistaken. Judicial power has been contested throughout American history. As often as not, officials outside the judiciary have had as much to say about official constitutional meanings as judicial actors. If the contemporary Republican majority intends for the judiciary to institute some version of the "Constitution-in-exile,"[153] *The People Themselves* demands and the people themselves ought to demand that the Bush administration publicly announce their general constitutional vision and explain why justices are best qualified to implement those principles.

150. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 237–38 (2000).

151. *See* Robin Toner & Robert Pear, *Ban on Gay Marriages Leads List of Proposals*, N.Y. TIMES, Jan. 21, 2004, at A17.

152. *See* United States v. Morrison, 529 U.S. 598, 616 (2000); City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

153. *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005).