Constitutional Dialogue in a Republic of Statutes

Glen Staszewski
Michigan State University College of Law, staszew2@law.msu.edu

Recommended Citation

Follow this and additional works at: http://digitalcommons.law.msu.edu/facpubs
Part of the Administrative Law Commons, Constitutional Law Commons, Legislation Commons, and the Other Law Commons

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.
CONSTITUTIONAL DIALOGUE
IN A REPUBLIC OF STATUTES

Glen Staszewski

2010 MICH. ST. L. REV. 837

TABLE OF CONTENTS

INTRODUCTION .......................................... 837
I. RECONSTRUCTING THE WILL OF THE PEOPLE ........................................ 840
II. CONSTITUTIONALISM IN THE MODERN REGULATORY STATE ............. 852
   A. Structure ............................................... 853
   B. Rights .................................................. 854
   C. Entrenchment ......................................... 855
   D. The Constitution’s Influence on Statutory and Administrative Law ........................................ 857
   E. Statutory and Administrative Law’s Influence on the Constitution ........................................ 862
   F. The Key Points of Convergence ........................................ 865
III. THE PROCESS OF AMERICAN CONSTITUTIONAL CHANGE ................... 867
IV. FORWARD PROGRESS ........................................ 870
CONCLUSION ..................................... .... 875

[O]ne cannot sensibly have in mind the thought that “the People” is some special sort of entity—whether comprising all citizens or only a majority of them—with a will of its own that is conceptually independent of and genetically antecedent to political institutions.

INTRODUCTION

Ever since the legal realist movement, it has been widely understood that most issues of constitutional law do not have a single correct answer. As a result, countless legal scholars have wrestled with the legitimacy of allowing unelected judges to invalidate the policy decisions of elected rep-

* A.J. Thomas Faculty Scholar, Associate Dean for Research, and Associate Professor of Law, Michigan State University College of Law. I am grateful to Barry Friedman and other participants in this Symposium for helpful comments on an earlier draft of this Essay. I would also like to thank Chaoyi Ding and Matt Martin for excellent research assistance.

** HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY 205 (2002).
resentatives on constitutional grounds. While legal scholars have been obsessed with the countermajoritarian difficulty that is allegedly posed by judicial review in a democracy,\(^1\) political scientists have sought to explain what motivates judicial decision making in the absence of meaningful legal constraints.\(^2\) The leading factors political scientists have identified include the political affiliations of the justices, their personal policy preferences, and occasional concerns about the institutional interests of the judiciary.\(^3\) Although such findings may not surprise legal scholars, the political influences on courts are difficult to square with traditional conceptions of the rule of law and seem to exacerbate the countermajoritarian difficulty in light of the life tenure and unelected status of the federal judiciary.

Professor Barry Friedman's tour de force of the history of the relationship between the United States Supreme Court and public opinion, *The Will of the People*, challenges important aspects of the conventional wisdom in law and political science.\(^4\) Friedman contends not only that the public supports the institution of judicial review, but also that "[o]ver time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values."\(^5\) If it is true that the Court's decisions ultimately reflect the will of the people, the democratic legitimacy of judicial review can no longer be so easily disparaged on the grounds that the practice is "counter-majoritarian." Moreover, if the justices are compelled to reach decisions that are consistent with the will of the people, they are subject to a meaningful constraint that may dissuade them from voting based solely on partisan or ideological grounds, even if "the law" does not provide definitive answers to constitutional questions. Friedman therefore ultimately concludes that the "threat" of judicial review to American democracy is routinely overstated, and that we should be more concerned about the Court's ability to fulfill its "hope" of protecting the fundamental rights of minorities: "What we ought to care deeply about, what we ought to be asking, is how much capacity the justices have to act independently of the public's views, how likely they are to do so, and in what situations."\(^6\)

While I tend to agree with this conclusion, my sense of the Court's interaction with public opinion is somewhat different. The thesis of this Es-

---

5. Id. at 367-68.
6. Id. at 373.
Constitutional Dialogue in a Republic of Statutes

say is that by integrating Professor Friedman's theory of constitutional dialogue with other recent scholarship on the constitutional functions that are performed by legislation and administrative law, we can develop a better understanding of the broader process of American constitutional change. The complete framework of American constitutional change that emerges from this exercise helps, in turn, to place Friedman's invaluable contribution to the enterprise in its most illuminating context.

Part I of the Essay explains my primary source of skepticism regarding Friedman's project, which stems from the conceptual difficulties and measurement problems associated with any effort to ascertain "the will of the people." In my view, his story demonstrates that the Court needs the support of powerful friends or allies to make bold or controversial decisions. Moreover, the societal reaction to judicial review is typically expressed through the work of other democratic institutions. Part II explains that Bill Eskridge, John Ferejohn, and other prominent scholars have begun to recognize that legislation and administrative law perform important constitutional functions in the modern regulatory state, and that legislation and administrative law and the Constitution have a reciprocal influence upon one another. Thus, constitutional norms have a significant impact on how statutes and regulations are interpreted and implemented, and public norms and practices that are initially embraced by statutes and regulations sometimes influence the meaning of the Constitution. Part III integrates the lessons of administrative constitutionalism and Friedman's theory of constitutional dialogue, and sets forth the novel framework for understanding the process of American constitutional change that emerges. Part IV identifies some of the key questions that are posed by this framework, and discusses a few of its implications. Perhaps most important, regulatory scholars, constitutional theorists, political scientists, political activists, and public officials are all engaged in the common enterprise of developing constitutional meaning on a daily basis. Accordingly, theories of representation and deliberative democracy should be of central relevance to normative theorizing.

about this enterprise. Such theories offer the best prospects for developing a Constitution that respects the rights and interests of everyone, and thereby fulfills the central hope that American society has traditionally placed in judicial review.

I. RECONSTRUCTING THE WILL OF THE PEOPLE

The Will of the People is an extremely well told story about the history of the Supreme Court and its relationship to the American people. The scope of the underlying research is remarkable, and the conceptual theme of each chapter persuasively captures the essence of a major period in the Court’s history. One could therefore learn a great deal about the history of the Supreme Court by reading this book without any prior knowledge of the scholarly debates regarding the Court’s democratic legitimacy or what motivates its decision making. Readers who are familiar with these academic debates, however, are likely to be struck by the book’s skillful combination of familiarity and novelty. For example, while every lawyer knows about Lochner and “the switch in time that saved nine,” the notion that the Court’s decisions ultimately reflect the will of the people poses important challenges to the conventional wisdom in legal scholarship and political science. Part of the persuasive power of the book may therefore stem precisely from the story’s familiarity, which naturally suggests that Professor Friedman’s conclusions about the close relationship between the Court’s decisions and public opinion are obviously correct. While I have no doubt that the Supreme Court takes its perceptions of the likely societal reaction into account in reaching some decisions, I am deeply skeptical of Friedman’s basic premise that we can accurately assess the extent to which judicial review reflects “the will of the people.” First, this concept raises difficult problems associated with ascertaining whose preferences should count. Second, to the extent that Friedman is referring to the preferences of a majority of Americans, it is not clear how they

---

8. See supra notes 1-6 and accompanying text.
9. Cf. Friedman, supra note 4, at 364 (pointing out that since the early stages of the Rehnquist Court, “a small band of political scientists and law professors questioned the common assumption that judicial review ran contrary to the popular will,” and explaining that “[t]hough the Court’s tendency to fall within the range of mainstream popular opinion] seemed obvious to these scholars, this view for the most part remained buried in the academy—hardly prominent even there”).
10. See Barry Friedman, Reply: The Will of the People and the Process of Constitutional Change, 78 Geo. Wash. L. Rev. 1232, 1232-33 (2010) (explaining that “the central premise of The Will of the People . . . is that judicial review does not require some special justification [because] when courts engage in it, they adhere to the will of the majority”); FRIEDMAN, supra note 4, at 17-18 (recognizing the challenges associated with capturing “the evolving views of the American public,” but claiming that “there is very good reason to have faith in the possibility of chronicling changes in public attitudes toward the idea and the
could accurately be measured, especially on the type of detailed legal and policy questions that regularly confront the Supreme Court. My sense is that Friedman's story could be reconstructed to stand for the proposition that in order to make bold or controversial decisions, the Court must have the support of powerful friends or allies. While this may be an important constraint, it cannot guarantee that judicial review will ultimately reflect the will of the people.

institution that is judicial review" because (1) "with the luxury of hindsight, it is possible to see what the issues were and which side prevailed"; (2) "the elites whose views [are reported in the book] were chosen or retained their places precisely because of their ability to give voice to the sentiments of their constituents and audiences"; and (3) "in some of the most crucial moments in the struggle over judicial review there was an extraordinary engagement of the American people"; infra note 16.

11. See Doni Gewirtzman, Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture, 93 GEO. L.J. 897, 928-30, 934 (2005) (reviewing social science literature on political knowledge and opinion formation and concluding that “the People do not serve as a particularly stable or reliable check on the Court’s interpretive power” because “[p]opular interpretive preferences, where they exist, are often made without much awareness about politics generally, or the Constitution and the Court in particular,” and “once a preference is ascertained, it often proves unstable and easily susceptible to elite influence, lending a distinctly dubious quality to popular communications across the law-politics divide”).

12. This reading of The Will of the People is compatible with some new institutional theories of public law and related separation of powers approaches. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term—Foreword: Law As Equilibrium, 108 HARV. L. REV. 26 (1994); see also Friedman, supra note 2, at 263, 273-74, 308-20 (describing political science literature on the interaction between courts and other governmental institutions); Keith E. Whittington, Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics, 25 LAW & SOC. INQUIRY 601, 631 (2000) (book review) (describing new institutional approaches to the study of courts and the law and recognizing that they have “encouraged the examination of connections, disjunctions, and interactions between the law, the courts, and other political and social institutions”); infra note 52. As Professor Friedman pointed out during the Symposium for which this paper was written, the framework for constitutional change that is set forth in this Essay also fits comfortably within legal process theory. See Eskridge & Frickey, supra, at 27-28 (describing legal process theory’s “emphasis on the creation of law by interacting institutions, the purposiveness of law and these institutions, and the mediating role of procedure,” and recognizing that “legal process theorizing about public law has enjoyed a renaissance”); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994). This Essay’s emphasis on the importance of deliberation also suggests the potential value of a move toward an institutional theory of deliberative democracy. In any event, Friedman recognizes that “[p]olitical scientists in particular tend to focus on the institutions of government, rather than the people at large,” but he claims that “[t]he Court has to be attuned to aroused public opinion because it is the public that can save a Court in trouble with political leaders and likewise can motivate political leaders against it.” FRIEDMAN, supra note 4, at 375. As explained above, I agree that an “aroused citizenry” is one constituency that can occasionally provide support for the Court’s decisions. See infra note 52 and accompanying text.
The notion of “the will of the people” requires a theory of whose preferences should count. This question could be answered by focusing on the work of elected officials within the institutions of government or by emphasizing the identifiable preferences of the general public. Moreover, a theory of popular sovereignty could emphasize the pre-political preferences of the relevant citizens or officials—or focus on the preferences that are expressed after a process of reasoned deliberation. A theory that focuses on the pre-political preferences of the general public is a direct democracy, whereas a theory that focuses on the preferences expressed by elected officials after a process of reasoned deliberation is a republican democracy. The precise nature of popular sovereignty in the United States is further complicated by the “dual sovereignty” established by federalism.

The point is simply that any effort to assess the relationship between judicial review and the will of the people raises complex issues of political theory that Friedman does not explicitly resolve. Many legal scholars and judges have an unfortunate tendency to equate the preferences of elected officials or the work of government institutions with the preferences of a majority of citizens. Friedman purports to avoid this mistake by suggesting that the Supreme Court can simultaneously invalidate legislative or executive action and remain faithful to the will of the people. Meanwhile, he

13. See Frederick Schauer, The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s, 120 HARV. L. REV. 4, 52 (2006) (recognizing that some plausible conceptions of democracy emphasize “active citizen involvement” and others emphasize “faith in elected representatives”).


15. See Printz v. United States, 521 U.S. 898, 918-19 (1997) (“It is incontestible that the Constitution established a system of ‘dual sovereignty.’ Although the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’”) (citations omitted).

16. For discussions of Friedman’s conception of “the will of the people,” see FRIEDMAN, supra note 4, at 369-72 (explaining that “both the hope and the threat of judicial review rest on a common supposition: that the judiciary even has the capacity of running contrary to the will of the majority,” and claiming that “[t]he people and their elected representatives have had the ability all along to assert pressure on the judges, and they have done so on numerous occasions”) (emphasis omitted); Friedman, supra note 10, at 1240-44 (elaborating on his conception of “the people”); see also supra note 10 and accompanying text. This problem is pervasive in the literature on popular constitutionalism. See Gewirtzman, supra note 11, at 900 (recognizing that “[t]he problem begins with ‘the People,’” a term popular constitutionalists invoke with some regularity but are reluctant to define,” and explaining that “[a]t different times, ‘the People’ inhabit the shoes of, among other entities, the electorate, prominent interest groups, identity-based social movements, the United States Congress, the President, political parties, state government institutions, or impact-litigation plaintiffs”).

17. See Glen Staszewski, Reason-Giving and Accountability, 93 MINN. L. REV. 1253, 1256-77 (2009) (describing the dominance of “the political accountability paradigm” in modern public law and claiming that its underlying assumptions are implausible).
suggests that the will of the people requires at least some degree of reasoned deliberation since he is ultimately interested in evaluating judicial review's capacity to reflect "the considered judgment of the American people" regarding the Constitution's meaning. He therefore appears to be operating under a hybrid theory of constitutional democracy, which equates the will of the people with the preferences of the general public after a period of reasoned deliberation.

This may be an attractive notion of constitutional democracy, but it relies upon a conception of the will of the people that is virtually impossible to measure. For example, any effort to assess the people's will regarding the constitutionality of the Public Company Accounting Oversight Board, which was established by Congress pursuant to the Sarbanes-Oxley Act, would require the general public to know about the relevant issues, have identifiable preferences about the appropriate outcome, and be capable of evaluating a judicial decision on the matter. We would also need a reliable mechanism for aggregating public preferences, and (if there is a requirement of reasoned deliberation) a means of ensuring that citizens have taken other interests and perspectives into account before formulating an opinion. It seems obvious that these criteria could only be satisfied in exceptional circumstances because (1) the general public knows very little about most of the specific legal and policy questions that are resolved by our government; (2) there is reason to doubt that the public has preexisting or fixed preferences about the public's role in the constitutional process; and (3) the normative role of judicial review requires that constitutional adjudication not be as immediately responsive to popular will as are other aspects of our system.

18. See Friedman, supra note 4, at 367-68 ("Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values."); see also Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596, 2599 (2003) (claiming that "judicial interpretations of the Constitution reflect popular will over time," but recognizing that the process is "mediated" by several notable aspects of the system, and claiming that "[t]he mediated nature of judicial review is a good thing, because the normative role of judicial review requires that constitutional adjudication not be as immediately responsive to popular will as are other aspects of our system").


20. See Gewirtzman, supra note 11, at 917-21 (describing social science literature on political knowledge and reporting that "[i]n general, large segments of the public are essentially ignorant about the Court and its work"); Jane S. Schacter, Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures, in The Least Examined Branch: The Role of Legislatures in the Constitutional State 45, 47 (Richard W. Bauman & Tsvi Kahana eds., 2006) ("It is an article of faith among political scientists that citizens are woefully uninformed about politics, and scholars have rarely resorted to understatement in characterizing the public's knowledge gaps."); Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 Iowa L. Rev. 1287, 1304 (2004) ("The most important point established in some five decades of political knowledge research is that the majority of American citizens lack even basic political knowledge."); Staszewski, supra note 17, at 1266-67 ("The fact that most citizens lack even basic political knowledge has been almost universally accepted by political scientists for decades."). For the leading work of political
preferences on many of the legal or policy questions that are brought to its attention; and most of the Supreme Court’s decisions are very complicated and of little interest to ordinary citizens. Not only is survey data on aggregated public opinion notoriously contingent and unreliable, but public opinion polls on legal and policy issues have only existed since the 1940s and '50s. While one might think that consistent or longstanding public opinion would reflect a modicum of reasoned deliberation, those are precisely the matters on which people may be most inclined to rely thoughtlessly on received tradition or conventional wisdom.

One might object that my chosen example is unfair because the constitutionality of the Public Company Accounting Oversight Board is a relative-

---

science on this subject, see Michael X. Delli Carpini & Scott Keeter, What Americans Know About Politics and Why It Matters (1996).

21. See Gewirtzman, supra note 11, at 928-30 (claiming that “high levels of ignorance often act to destabilize popular input into constitutional culture,” and explaining that “[l]ack of basic political knowledge creates a fertile opportunity for elites to manipulate public opinion or distort the interpretive messages sent through participatory acts”); Schacter, supra note 20, at 59-63 (recognizing the difficulty of reliably identifying “the content or strength of public attitudes on key issues,” and explaining that “public opinion may be a considerably more top-down affair, one in which politicians (among others) actively try to shape and sway public opinion”); see also Staszewski, supra note 17, at 1267-68.

22. See Friedman, supra note 18, at 2617-23, 2631-33 (reviewing social science literature on public information about the Court and reporting that “[s]cholars are uniform in their assessment that the salience of the output of courts is low”); Schauer, supra note 13, at 11 (comparing the Supreme Court’s agenda with the policy issues that are of greatest interest to the public, and concluding that the contrast “shows that the Court ... operates overwhelmingly in areas of low public salience, either because the Court is involved with rights-based side constraints on central policy decisions made by others, or because the Court deals with those second-order structural, procedural, and jurisdictional dimensions of policymaking which may have a substantial impact on the content of policy but which command little attention from the people or their representatives”); see also Jamal Greene, Selling Originalism, 97 Geo. L.J. 657, 702 (2009) (stating that Schauer’s conclusion “is beyond reasonable dispute,” and claiming that “[t]he set of issues that most people care about most of the time is radically different than, and indeed barely conversant with, those that the Court’s typical docket comprises”).


25. See Adrian Vermeule, Should We Have Lay Justices?, 59 Stan. L. Rev. 1569, 1576-77 (2007) (claiming that “those who rely upon tradition or longstanding practices as the basis for forming their own judgments do not contribute anything to the epistemic value of the practice, because they are not forming their own judgments independently”). Respondents to public opinion polls may also try to give answers that they think are consistent with existing societal norms. See Michael Margolis, Public Opinion, Polling, and Political Behavior, 472 Annals Am. Acad. Pol. & Soc. Sci. 61, 64 (1984) (“Publicly expressed opinions are often conventionalized versions of what people really think, conventionalized so as to conform to what they perceive to be societal norms.”).
ly obscure and technical question, but the reality is that most of the Supreme Court's constitutional decisions fall into the same categories. Moreover, several judges and scholars have pointed out that the case that was recently decided by the Supreme Court on this issue was potentially one of the most important separation-of-powers cases in many years involving the structure of administrative agencies. The Court sometimes addresses much higher profile issues, but those cases also tend to involve relatively contentious topics, which can make accurately assessing public opinion on the precise legal questions that are resolved by the Court quite difficult. As Friedman recognizes, the Court's decisions on these topics will also influence public opinion, which makes it difficult to tell if the Supreme Court is following the will of the people or leading the public's understanding of what the Constitution means. Finally, as Friedman also acknowledges, the extent to

26. See supra note 22 and accompanying text.
27. See, e.g., Richard H. Pildes, Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act, 5 N.Y.U. J. L. & Bus. 485, 485 (2009); see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); Kimberly N. Brown, Presidential Control of the Elite "Non-Agency", 88 N.C. L. REV. 71, 74 (2009). The Court held that the statute violated Article II because the members of the Board were unduly insulated from removal from office by the President. See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010). The Court's decision did not receive a great deal of media attention, partly because the majority issued a relatively narrow opinion that refrained from revisiting existing precedent or significantly disrupting the operation of the challenged statutory scheme. This example illustrates that the Court has a variety of means at its disposal to keep a low profile, even when it creates precedent that could have significant repercussions in future cases.

28. See Friedman, supra note 4, at 8 (recognizing that "when the issue is fraught, the American people typically disagree over what the Constitution means," which "is why judicial decisions interpreting the Constitution become so controversial"). In this regard, it is important to distinguish between public opinion on a general topic, and public opinion on the specific policy issues that are before the Court. Moreover, to the extent we are concerned with the public's understanding of the Constitution, it is important to distinguish between public opinion on the underlying policy issue and public opinion on the constitutional validity of a challenged practice. For example, one can be in favor of laws prohibiting flag-burning (as a policy matter), and still believe that flag-burning should be constitutionally protected. Nonetheless, it would seem very difficult as a practical matter to prevent these two distinct questions from becoming conflated in any effort to measure public opinion on the issues that are resolved by the Court. See Friedman, supra note 18, at 2601 (recognizing that "[t]he populace does not typically express its desires in terms of what the Constitution should mean, but what it wants at present," and explaining that "when present preferences collide with constitutional limitations, the tension between the two tends to distort the latter"). Frederick Schauer, who is attentive to these distinctions, contends that the constitutional issues that are resolved by the Court are not necessarily salient to the public, even when a case involves high-profile issues such as terrorism and crime. See Schauer, supra note 22, at 25-30.

29. See Friedman, supra note 18, at 2624-29, 2631-35 (reviewing social science literature on "the nature and obduracy of public reaction" to the Court's decisions, and recognizing that "the Supreme Court likely influences public opinion quite a bit, whether inten-
which the practice of judicial review is understood to comport with public opinion may vary depending on the level of generality with which one frames the question.\textsuperscript{30} The American people might therefore simultaneously believe, for example, that the Supreme Court should have the power of judicial review,\textsuperscript{31} that it was the most appropriate institution to resolve the contested presidential election of 2000,\textsuperscript{32} and that \textit{Bush v. Gore} was a politically motivated decision.\textsuperscript{33} They have little basis, however, to assess whether the decision properly interpreted the Constitution—which would seem to be the most highly relevant question.\textsuperscript{34}

Because of the difficulties associated with defining and measuring the will of the people, Friedman frequently relies upon the expressed preferences of elected officials and other elites, as well as the results of various elections, to ascertain the will of the people on particular questions.\textsuperscript{35} Yet,
the same dynamics that make it difficult to identify the will of the people on a specific legal or policy question also make it problematic to equate the results of an election, the preferences of an elected official, or the outcomes generated by political institutions with the preferences of the general public on a particular matter. Moreover, one of the most striking aspects of Friedman's story is how often the issues that confronted the Supreme Court divided significant constituencies within American society. To consider just a few examples, *Marbury v. Madison* pitted the Federalists against the Republicans; the Nullification Crisis pitted federal officials against the states (a recurring theme); *Dred Scott* pitted the North against the South (another recurring theme); post-Reconstruction decisions pitted corporate America and the Republican party against state governments and courts; and *Brown v. Board of Education* pitted the President and the North against Congress and the South. In each of these situations, any effort to ascertain the extent to which the decisions of the Court reflected "the will of the people" would be an extraordinarily difficult and speculative task.

Nonetheless, I believe that Friedman's story can be reconstructed to provide a somewhat different lesson about the relationship between the practice of judicial review and public opinion. What history really teaches, I think, is that the Supreme Court cannot make bold or controversial decisions without the support of powerful friends or allies. For example, Chief Justice Marshall's "deft move" in *Marbury v. Madison*, "the one applauded by many in years hence, was in announcing fundamental principles of constitutional government and claiming great authority for the judiciary to enforce them, all the while managing to avoid requiring anyone to honor that authority in any tangible way." In other words, because "Marshall could

---

36. See Staszewski, supra note 17, at 1266-71.
37. See FRIEDMAN, supra note 4, at 44-71 (describing "the partisan battles of the early 1800s" and the notion of judicial independence that emerged).
38. See id. at 72-104 (describing the states' defiance of the Supreme Court's authority and how national leaders eventually supported the federal judiciary).
39. See id. at 137-38, 150-66 (explaining that the Supreme Court achieved prominence in the generation following the Civil War, in part, by protecting corporate interests from state interference).
40. See id. at 242-48 (describing the defiance by officials in the South and the support of the Court by the North and President Eisenhower).
41. Id. at 62.
not order relief from the Republicans and hope to see his will followed. . . .
[,] the Court did the only thing it could: deliver a stout lecture on constitutional principles and the proper role of the judiciary and withdraw.”42 Similarly, in the Nullification Crisis of 1833, the states’ officially-sanctioned defiance of the Supreme Court’s decisions only faded after President Andrew Jackson “denied that states had a right to nullify federal law, threatened to use force to defend the Union, and affirmed the Supreme Court’s role in arbitrating constitutional questions.”43 Perhaps the clearest example of the Court’s reliance on powerful friends and allies is reflected in the generation following the Civil War, when “[t]he Court found its way to the center of the American stage by rendering decisions that catered to the needs of those who had power over it.”44 Thus, in addition to abandoning Reconstruction,45 the Court “went on a binge of striking down state laws to protect corporate interests and property rights.”46 These decisions “were the product of a deliberate effort by the country’s rulers to pander to the captains of industry.”47 Likewise, the decisions in Brown v. Board of Education were supported by the Truman and Eisenhower Administrations.48 When massive resistance to these decisions erupted in the South, “Eisenhower finally was forced—very much against his inclinations—to send federal troops into Little Rock, Arkansas, to restore order.”49 In the wake of these events, the Supreme Court issued what is frequently considered the “strongest statement of judicial supremacy in all of American history.”50 As Friedman puts it, “The Court was the Constitution, and the Constitution was the supreme law—at least so long as there was force backing it up.”51

I am not suggesting that the Court’s decisions in these cases were contrary to public opinion. Moreover, an “aroused citizenry” may be one constituency that can occasionally provide crucial support for the Court’s decisions. Most often, however, the Court’s decisions will require support from powerful elected officials or political institutions, and the views of the gen-

42. Id. at 63.
43. Id. at 73.
44. Id. at 137.
45. See id. at 138-49.
46. Id. at 160.
47. Id. at 138; see also id. at 155-66.
48. See id. at 245, 247-49.
49. Id. at 247.
50. Id. at 248 (citing Cooper v. Aaron, 358 U.S. 1 (1958)).
51. Id. Commentators have questioned the extent to which Brown effectively promoted social change. In response to Gerald Rosenberg’s famous book on this subject, The Hollow Hope, Friedman explains: “What Rosenberg documented (albeit not uncontroversially) is a point that history has proven time and again: courts make headway when other political actors support them; they fail when they are opposed.” See id. at 278 n.403.
eral public will not be directly relevant. The New Deal could, therefore, be understood as an example of a rare constitutional moment when the considered judgment of the American people resulted in an unwritten constitutional amendment, but it could also be understood as an example of where the Court was forced to change course because its prior understanding of the Constitution was no longer shared by powerful friends or allies. Most of the lines of cases Friedman discusses are entirely consistent with this reconstructed thesis, as depicted in the following chart:

<table>
<thead>
<tr>
<th>Line of Cases</th>
<th>Friends/Opponents</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) School Prayer</td>
<td>Friends: United Parents Association, Jews, Mainstream Protestant Leadership, President Kennedy Opponents: Majority of Public, New York Board</td>
<td>Some powerful friends; Brief controversy; Decisions stick (albeit with spotty compliance)</td>
</tr>
</tbody>
</table>

52. The notion that the Court’s decisions are influenced by other political institutions is supported by the literature on judicial politics. See, e.g., Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247 (2003); Lee Epstein et al., *The Supreme Court as a Strategic National Policy-maker*, 50 EMORY L.J. 583 (2001); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court’s Constitutional Rulings*, 1987–2000, 31 LEGIS. STUD. Q. 533 (2006); see also supra note 12. But see Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (finding that individual justices are unconstrained by the policy preferences of elected officials and vote their own policy preferences). The extent to which the Court is influenced directly by public opinion is less clear. See, e.g., Comment, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994) (providing competing views on whether public opinion directly influences the Court’s decisions); Friedman, supra note 2, at 320-29 (discussing the relevant literature). For a helpful summary of some of the most recent political science literature on these questions, see Anna Harvey, *The Will of Congress*, 2010 MICH. ST. L. REV. 729 (2010).


54. *Dred Scott* is perhaps best understood as a case where the Court unwisely intervened and raised the stakes of politics, see infra notes 145-51 and accompanying text (discussing this aspect of the Court’s decision making and its importance in a system of administrative constitutionalism), and then went along with the views of the wrong friends or allies.
| (3) Reapportioning the Legislatures  
| (pp. 267-70) | **Friends:** State Courts, Press, Kennedy Administration  
| **Opponents:** Congress, Assembly of the States | Some powerful friends; Decisions stick |
| (4) Criminal Procedure  
| a. Gideon  
| (pp. 273-74) | **Friends:** Most States (via state law and amicus briefs), Private Foundations, Mississippi Bar Association, Walter Mondale, Chief Justice of Arkansas, Governor of Florida  
| **Opponents:** Five Southern States | Lots of powerful friends; Decision sticks |
| (4) Criminal Procedure  
| b. Miranda  
| (pp. 274-77) | **Friend:** Hubert Humphrey  
| **Opponents:** Most States (via amicus briefs); Law Enforcement, Press (via editorials and political cartoons), Judge Warren Burger, George Wallace, Richard Nixon, Congress, Public Opinion | No powerful friends; Decision sticks; Undoing of Warren Court |
| (4) Criminal Procedure  
| c. The Death Penalty  
| (pp. 285-88) | **Friends:** NAACP Legal Defense Fund, ACLU  
| **Opponents:** California voters (via ballot initiative), Public Opinion, Thirty-Five States (via legislation), President Nixon, Congress, Solicitor General Robert Bork, Press, American Law Institute | Few powerful friends; Court Reverses Course |
## Constitutional Dialogue in a Republic of Statutes

| (5) Equal Protection for Women  
(pp. 289-95) | **Friends:**  
Women’s Rights Groups,  
Commission on the Status of Women,  
Kennedy Administration,  
Congress, Majority of States, Democratic Party,  
Republican Party,  
Mainstream Press, Public Opinion, ERA  
Opponents: None | **Lots of powerful friends; Decisions stick** |
| --- | --- | --- |
| (6) Right to an Abortion  
(pp. 295-99, 328-30, 352-53) | **Friends:**  
American Medical Association,  
American Public Health Association, ABA,  
Minority of States, Pro-Choice Advocates,  
Liberal Democrats  
Opponents: Majority of States, Pro-Life Advocates, Conservative Republicans | **Some powerful friends; Decision sticks, as modified** |
| (7) Affirmative Action  
(pp. 325-27, 361-62) | **Friends:**  
Clinton Administration,  
Republican Congress,  
Public Opinion, City of Houston (via initiative),  
65 Fortune 500 Companies, retired military commanders (and other amici)  
Opponents: Senator Phil Gramm, Bob Dole,  
Republican Congress,  
Public Opinion, California and Washington (via initiative), Bush Administration | **Some powerful friends; Decision sticks, as modified** |

The bottom line is that if the will of the people cannot accurately be measured, and the Court needs the support of powerful friends or allies, then the role of elected officials and other public institutions in influencing
constitutional meaning necessarily takes on increased importance. The Supreme Court's inability to go it alone imposes a modest "democratic" constraint on the range of viable constitutional meanings, and the Court's understanding of the Constitution will often be influenced by the public norms and practices that are embraced by other democratic institutions, including executives, legislatures, and administrative agencies. The next Part of this Essay explains that several prominent commentators have begun to explore the constitutional functions that are performed by statutory and administrative law in the modern regulatory state, and how these sources of law and the Constitution have a reciprocal influence upon one another.

II. CONSTITUTIONALISM IN THE MODERN REGULATORY STATE

The U.S. Constitution says little or nothing about many important matters of governance. It does establish the basic structure of our democracy, recognize certain fundamental rights, and entrench those institutions and norms against subsequent change through the ordinary political process. But if one were seeking a full and accurate picture of the structure of American democracy and the public norms that are considered fundamental, the information conveyed by reading the Constitution would be radically incomplete.

In this regard, several prominent scholars, including Bill Eskridge, John Ferejohn, Gillian Metzger, and Ernest Young, have recently claimed that legislation and administrative law perform important constitutional functions in the modern regulatory state. For example, statutes and their implementing regulations create governmental institutions and define the limits of their authority. Meanwhile, these sources of law have been known to establish individual rights of tremendous importance. While statutes and regulations are not as impervious to change as the U.S. Constitution, the practices and norms they establish can become very well-entrenched as both a legal and a practical matter. Accordingly, these scholars point out that many of the legal rules and norms in our society that perform constitutional functions are a creature of statutory or administrative law.

55. See Young, supra note 7, at 417-28 (describing the basic functions of a Constitution).
56. See Eskridge, supra note 7, at 5-22 (explaining that "super-statutes" are responsible for establishing institutions of American government, electoral and political rules, and private rights and public norms).
57. See supra note 7 (collecting sources).
A. Structure

One basic function of a constitution is to "constitute" the government.\textsuperscript{58} The American Constitution establishes three branches of government with limited and enumerated powers and a variety of checks and balances, but it does not address some of the most important aspects of the structure of the federal government.\textsuperscript{59} For example, Congress's operative procedures, including such well-established and influential elements as the committee system and the filibuster, were established by the internal rules of the House and Senate because Article I of the Constitution provides that "[e]ach House may determine the Rules of its Proceedings."\textsuperscript{60} The existence of federal district courts and circuit courts of appeal, and their jurisdiction to resolve issues that arise under the Constitution and laws of the United States, is a function of statutory law because Article III merely provides that "[t]he judicial Power . . . shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish."\textsuperscript{61} The president's practice of requiring executive agencies to provide analyses of the costs and benefits of major proposed regulations to the Office of Management and Budget for regulatory review by the Office of Information and Regulatory Affairs has been imposed by a series of executive orders.\textsuperscript{62} Not only does Article II fail to provide any explicit guidance on the validity of this practice, but the Constitution says almost nothing about the administrative state in general.\textsuperscript{63} Nonetheless, the modern regulatory state was established and has operated since the New Deal pursuant to the Administrative Procedure Act (APA) and a host of other statutes, executive orders, regulations, and administrative common law principles. The states have, of course, adopted their own internal structures of governance (which include such divergent practices as elected judges and direct democracy), in addition to sharing authority with Congress to establish most of the rules for

\textsuperscript{58} See Young, supra note 7, at 415.
\textsuperscript{59} See Eskridge, supra note 7, at 7-12 (describing gaps in Articles I-III that have been filled by statutory and administrative law).
\textsuperscript{63} See Eskridge & Ferejohn, supra note 7, at 10 (claiming that "[t]he biggest change in the Constitutional structure has been the creation of the modern administrative state," and explaining that while scholars debate whether administrative agencies and their delegated statutory authority are Constitutional, "almost no one seriously denies that both phenomena are here to stay and have the effect of altering the structure of power in our national government, against as well as beyond the expectations of the Constitution's framers").
how federal elections are conducted. Accordingly, it seems undeniable that the structure of the modern regulatory state in the United States is primarily a function of statutory and administrative law (and other forms of "sub-constitutional" public law—or small-c constitutional law), rather than the provisions of the Constitution.

B. Rights

A second basic function of a constitution is to "confer certain rights on individuals." The American Constitution contains a Bill of Rights and a few important amendments, which impose limits on governmental authority and identify some fundamental rights. Because many of these provisions are open-textured, the Supreme Court has elaborated upon their meaning over time through the process of judicial review, in addition to recognizing a handful of unenumerated rights. Regardless of the Court’s performance, American citizens have numerous rights that are recognized or protected by statutory and administrative law, even if they are not protected by the Constitution. Some of these rights and norms have become sufficiently well-established in our society that they could easily be regarded as fundamental. For example, citizens have a right to be free from invidious discrimination on the basis of age or disability. Moreover, the government has at least some affirmative obligation to protect the environment.

64. See Eskridge, supra note 7, at 14 ("Articles I and II of the Constitution leave the details of election rules and process to Congress and the states.").


66. See Young, supra note 7, at 416.


68. See Eskridge & Ferejohn, supra note 7, at 5 ("Americans have created statutory and administrative rights and liberties that are both less dramatic and much broader than Large "C" Constitutional rights.").

69. See, e.g., id. at 33 (claiming that "administrative constitutionalism, including but not limited to Constitutional analysis by executive and legislative officials, is the dominant governmental mechanism for the evolution of America’s fundamental normative commitments"); Young, supra note 7, at 424 (claiming that "many rights that are fundamental for individuals in modern America are entirely creatures of statute").

70. See Eskridge, supra note 7, at 18 (explaining that "federal statutes have extended the anti-discrimination norm to include disabled persons, older persons, and, potentially, lesbian, gay, bisexual, and transgendered people," and that "[t]he purpose of these statutes is to extend Brown's anti-discrimination principle to groups the Supreme Court has not protected under the aegis of the Equal Protection Clause").

71. See Eskridge & Ferejohn, supra note 7, at 254, 263 (describing "the green constitution," and claiming that "the effective debate between green and libertarian understandings of property has, for most practical purposes, been carried out at the small ‘c’ constitutional level, and at that level it has been foundationally important").
citizens with an adequate education, social security, Medicare, and protection from threats to our national security. Unlike rights that are formally established by the Constitution, the rights that are recognized by statutes and regulations frequently impose affirmative obligations on government and limitations on the autonomy of private citizens. As a result, the “administrative constitution” is capable of embracing positive rights and unencumbered by the state action doctrine. It may therefore be as important as the Constitution in recognizing and protecting fundamental rights in American society.

C. Entrenchment

The third basic function of a constitution is to entrench institutional structures and rights against change through the ordinary political process. Thus, Article V requires a supermajority of both chambers of Congress to propose a constitutional amendment, which must be ratified by three-quarters of the states. This procedure has proven impossible to satisfy on any significant topic in recent years, and the American Constitution has only been amended twenty-seven times in history. The difficulty of formally amending the Constitution is frequently offered as both an explanation and a justification for treating the Constitution as a living document in the course of judicial review. The relative ease of amending statutes and regulations (as well as executive orders and congressional rules), therefore, arguably distinguishes the Constitution from other sources of institutional structures and rights.

72. See id. at 12 (pointing out that “[t]he Constitution of 1789 says little or nothing about the right to a solid education . . . [or] rights to compete in a free and fair market, to decent housing and adequate medical care, or to security against old age, sickness, accident, and unemployment,” and “[t]o the extent these securities are guaranteed by law, it is through federal statutes and state law”); see also id. at 171-208 (“The Safety Net Constitution and the Politics of Entrenchment”); id. at 387-430 (“The National Security Constitution”); Young, supra note 7, at 412 (“Many of our most important individual rights—rights against discrimination based on age or disability, rights to welfare, medical care, and social security—stem from statutes rather than the Constitution.”).

73. See ESKRIDGE & FEREJOHN, supra note 7, at 5 (claiming that “statutes commonly provide positive rights to people, providing them with legal means to combat oppression and discrimination”).

74. See id. at 7; Young, supra note 7, at 426 (“A third function of many – but not all – constitutions is to entrench certain legal arrangements against change.”).

75. U.S. CONST. art. V.

76. See ESKRIDGE & FEREJOHN, supra note 7, at 49.

77. See Eskridge & Ferejohn, supra note 7, at 1267-68 (recognizing that “resolution by the Court has proven easier for our system than the bulky process of formal constitutional amendment entailed by Article V”).

78. See Young, supra note 7, at 426 (“[I]f I am right that the constitutive and rights-creating functions of the Constitution are shared pervasively by all manner of other legal
Nonetheless, it is only relatively easy to amend a statute or regulation; doing so can be both very difficult as a formal matter and virtually impossible as a practical matter in many circumstances. For example, the enactment of a statute requires Congress to overcome the hurdles of bicameralism and presentment, as well as other vetogates that have been established pursuant to congressional rules and practices.\textsuperscript{79} Congress can therefore only rarely enact statutes over the president’s objection.\textsuperscript{80} Similarly, administrative agencies use notice-and-comment procedures to promulgate legislative rules, and their final decisions must subsequently withstand hard-look judicial review.\textsuperscript{81} A number of scholars have criticized this standard of judicial review on the grounds that it is too demanding, and therefore has an unfortunate tendency to “ossify” the rulemaking process.\textsuperscript{82} Regardless of the merits of this complaint, enacting a statute or regulation can often be quite difficult, even when the proposal is supported by a majority of the participants in the lawmaking process. When a proposed statute or regulation seeks to change institutional structures or legal rights that have become deeply embedded in law and society as a normative matter, the task only becomes more difficult, and may sometimes be impossible.\textsuperscript{83} Ernest Young has therefore persuasively argued that “entrenchment is more multifarious than binary and that ordinary legislation performs important entrenching functions.”\textsuperscript{84} Similarly, Eskridge and Ferejohn have recognized that some statutes “successfully penetrate public normative and institutional culture in a deep way,” and they have referred to such laws as “super-statutes.”\textsuperscript{85}

---

\textsuperscript{79} See U.S. Const. art. I, § 7, cl. 2-3; William N. Eskridge, Jr. et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 60-68 (4th ed. 2007) (discussing the procedural hurdles that bills must surmount before becoming law).

\textsuperscript{80} See William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 531 (1992) (modeling this situation and claiming that “the Framers anticipated this possibility, approvingly, for they placed the executive veto in Article I, Section 7 to prevent abrupt shifts in policy even when both chambers of Congress desired it”).


\textsuperscript{83} See Young, supra note 7, at 427.

\textsuperscript{84} Id. at 415; see also id. at 459-61 (elaborating on this point).

\textsuperscript{85} Eskridge and Ferejohn define a super-statute as follows:

A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute. . . . The law must also prove robust as a solution, a standard, or a
While these scholars differ on some of the details, they all agree that entrenchment is a relative matter and that "[e]ven constitutional change through the Article V gauntlet may, in some circumstances, be politically easier than eliminating or revising a longstanding statutory scheme backed by powerful constituencies."  

D. The Constitution’s Influence on Statutory and Administrative Law

It is one thing to say that legislation and administrative law often perform the same functions as the Constitution and that the structures and rights they establish can become deeply entrenched, but what is most important for present purposes is that the Constitution and the practices and norms that are established by statutory and administrative law have a reciprocal relationship. This section explains that constitutional norms have a significant impact on how statutes are interpreted and implemented. The next section explains that practices and norms that are initially established through statutory and administrative law sometimes influence the meaning of the Constitution.

The clearest example of how constitutional norms can influence the interpretation of statutes is provided by the substantive canons. The rule of lenity provides that ambiguous criminal statutes should be interpreted narrowly in favor of the accused based on constitutional principles of fair notice and a desire to limit the scope of discretionary authority that is delegated to prosecutors and judges. There is also a familiar rule of statutory interpretation that "a serious constitutional challenge to a statute should be avoided if the statute can plausibly be construed in a manner that makes the constitutional question disappear." The avoidance canon has proven controversial because it has the potential to warp both Congress’s intent with respect to the statute at issue and the prevailing understanding of the Constitution. Nonetheless, the canon has been persuasively defended on the

---

norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture.

Eskridge & Ferejohn, supra note 7, at 1216.

86. Young, supra note 7, at 427; see also Eskridge & Ferejohn, supra note 7, at 7-8 (claiming that "[l]egislative and administrative deliberation over time can create entrenched governance structures and norms" (emphasis omitted)).

87. See Eskridge et al., supra note 79, at 884-88 (describing the rule of lenity and its purposes).

88. Frickey, supra note 7, at 399.

89. See William K. Kelley, Avoiding Constitutional Questions as a Three-Branch Problem, 86 Cornell L. Rev. 831, 832 (2001) (“In practice, the avoidance canon is in tension with legislative supremacy because it frequently results in questionable statutory interpretations and because it places the burden on Congress to act explicitly before a court will interpret a law as coming close to the constitutional line—even though the enacting legislature might have intended to pass a constitutionally questionable statute and even though such
grounds that it (1) encourages Congress to engage in focused deliberation when it pushes the constitutional envelope; (2) avoids a direct confrontation with the legislature and therefore promotes the institutional interests of the judiciary; and (3) has the capacity to promote judicially under-enforced constitutional norms.\footnote{Similar functions are arguably performed by the Court’s more recently adopted “federalism canons,”\footnote{See Frickey, supra note 7, at 446-55 (articulating the descriptive and normative justifications for the avoidance canon).} as well as by the venerable doctrine whereby courts will interpret statutes contrary to their plain meaning to avoid absurd results.\footnote{See, e.g., Gregory v. Ashcroft, 501 U.S. 452 (1991) (applying the federalism canon to hold that the Age Discrimination in Employment Act did not prohibit the operation of a provision of the Missouri Constitution that required most state judges to retire at the age of seventy).} All of these doctrines resolve statutory ambiguity or reject what might otherwise be the most natural reading of a statute based, in large part, on the judiciary’s desire to promote constitutional norms without directly engaging in judicial review.\footnote{See Glen Staszewski, Avoiding Absurdity, 81 Ind. L.J. 1001 (2006) (describing the constitutional underpinnings of the absurdity doctrine in statutory interpretation).}

Moreover, broader debates about the appropriate interpretive methodologies in statutory interpretation are frequently the result of fundamental disagreements about the nature of the constitutional structure and principles of separated powers.\footnote{See William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593 (1992).} For example, textualists tend to view bicameralism and presentment as an effort to facilitate compromise.\footnote{See, e.g., John F. Manning, Constitutional Structure and Statutory Formalism, 66 U. Chi. L. Rev. 685, 686 (1999) (claiming that “structural constitutional analysis must, or at least should, provide the starting point for evaluating the basic interpretive commitments of formalism and antiformalism”).} Meanwhile, they understand judicial independence and the separation of legislative and judicial functions as mechanisms to encourage Congress to enact bright-line rules and enable citizens to hold the legislature accountable for its policy decisions.\footnote{See, e.g., Manning, supra note 95, at 2437-38 (2003); Manning, supra note 94, at 74-78.} As a result, they tend to believe that any deviation from the

\footnote{See, e.g., Manning, supra note 95, at 2434-37 (claiming that “the absurdity doctrine” in statutory interpretation conflicts with this aspect of the American constitutional structure); Manning, supra note 94, at 56-70 (claiming that this aspect of the American constitutional structure precludes the common law practice of using interpretive authority to}
“plain meaning” of statutes will undermine the deals that were enacted by
the legislature and the goals of the constitutional structure.97 In contrast,
purposivists tend to view bicameralism and presentment as a mechanism to
facilitate reasoned deliberation and achieve a broad consensus on ways of
promoting the public good that take the views and interests of minorities
into account.98 Accordingly, they tend to view the judiciary as a cooperative
partner in an effort to achieve the goals established by the legislature, par-
ticularly when circumstances change or unanticipated problems are pre-

tised.99 The point, however, is that both textualism and purposivism are
based on distinctive understandings of the constitutional structure.100

Constitutional norms plainly influence how statutes are interpreted
by the federal judiciary, but they also influence the law that governs how sta-
tutes are implemented by administrative agencies. Gillian Metzger has
helpfully identified three different ways in which constitutional principles

can be manifested in administrative law.101 First, some principles of admin-
istrative law are understood to be required by the Constitution or necessary
to avoid a constitutional violation.102 The rules of procedural due process
and constitutional standing are prominent examples of administrative law

promote the equity of the statute); see also Staszewski, supra note 92, at 1022-28 (discussing
and critiquing these arguments).

97. See Manning, supra note 95, at 2390-91 (explaining that textualists believe “the
only safe course for a faithful agent is to enforce the clear terms of the statutes” that have
emerged from the legislative process because “the precise lines drawn by any statute may
reflect unrecorded compromises among interest groups, unknowable strategic behavior, or
even an implicit legislative decision to forego costly bargaining over greater textual preci-
sion”); Manning, supra note 94, at 18 (“Because statutory details may reflect only what
competing groups could agree upon, legislation cannot be expected to pursue its purposes to
their logical ends; accordingly, departing from a precise statutory text may do no more than
disturb a carefully wrought legislative compromise.”).

98. See Staszewski, supra note 92, at 1021.

99. See Abbe R. Gluck, The States as Laboratories of Statutory Interpretation:
Methodological Consensus and the New Modified Textualism, 119 YALE L.J. 1750, 1764
(2010) (“In contrast to textualists, many purposivists urge a more expansive judicial role in
statutory interpretation, in which courts act in partnership with the legislature in the elabora-
tion of statutory meaning.”); see also Staszewski, supra note 17, at 1308-11 (describing the
major differences between textualism and purposivism, and advocating an approach that
“would allow the judiciary to exercise the equitable discretion that is needed to avoid absurd
results and other highly problematic outcomes that were not anticipated by the legislature
and to serve as a ‘cooperative partner’ in the ongoing elaboration of the law when elected
representatives have not explicitly resolved a particular question”).

100. Different theories of statutory interpretation also tend to reflect fundamentally
different conceptions of democratic theory. See generally Jane S. Schacter, Meta

101. See Metzger, supra note 7, at 487-505.

102. See id. at 487-90.
doctrines that fall within this category. Second, a number of administrative law principles and practices are inspired by constitutional norms, even if they are not necessarily required by the Constitution. For example, even though hard-look judicial review and the requirement that agencies provide a reasoned explanation for their policy decisions arguably conflict with the APA, federal courts have established these requirements in an effort to replicate a well-functioning legislative process, avoid arbitrary decision making, and thereby counteract the constitutionally suspect nature of broad delegations of lawmaking authority to unelected and otherwise unaccountable administrative agencies. Similarly, the Court’s usual reluctance to review agency inaction is based, in part, on a belief that judicial review of an agency’s failure to act would interfere with the president’s constitutional duty to faithfully execute the laws and therefore raise separation of powers concerns. Third, both courts and political officials sometimes create incentives or establish requirements to encourage agencies to take constitutional norms seriously in their own decision-making.

103. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 266-69 (1970) (holding that procedural due process requires notice and an opportunity to be heard before welfare benefits may be terminated); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-63 (1992) (describing the irreducible constitutional requirements of standing and holding that the Citizen Suit Provision of the Endangered Species Act was unconstitutional as applied because plaintiffs had not established a cognizable injury in fact); see also Metzger, supra note 7, at 487 (offering procedural due process as an example).

104. See Metzger, supra note 7, at 490-97.


106. See Metzger, supra note 7, at 490 (identifying hard-look review as a primary example of “the ways that constitutional concerns have shaped development of ordinary administrative law doctrines”); Glen Staszewski, Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy, 56 VAND. L. REV. 395, 440-47 (2003) (“The net result of APA procedures and ‘hard-look’ judicial review under State Farm is to encourage and enforce republican ideals of deliberation and reasoned decisionmaking in the administrative lawmaking process.”); see also Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1511, 1560 (1992) (explaining that “the paradigmatic process for agency formulation of policy—informal rulemaking—is specifically geared to advance the requirements of civic republican theory”); Sunstein, supra note 7, at 56-68 (explaining that “[m]uch of modern administrative law is a means of serving the original purposes of the nondelegation doctrine, and of promoting Madisonian goals, without invalidating regulatory statutes,” and claiming that hard-look judicial review and other administrative law doctrines are “classically republican” because of their requirements of “deliberation” and “reasoned analysis”).

107. See, e.g., Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (holding that judicial review of an agency’s “failure to act” under section 706(1) of the APA “can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take”); Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding that administrative decisions declining to take enforcement action are presumptively immune from judicial review under the APA).
Constitutional Dialogue in a Republic of Statutes

For example, the Supreme Court has periodically suggested that administrative procedures and decisions have a better chance of being upheld against constitutional challenge if the relevant agency has carefully considered and perhaps made accommodations to avoid potential constitutional problems. Similarly, the political branches have issued directives to agencies to protect federalism values, anti-discrimination norms, and other public values in implementing their statutory authority. As explained below, several scholars have recently noted that even in the absence of externally-created incentives to engage in serious constitutional dialogue, regulatory agencies have sometimes played the leading role in developing important constitutional norms through their own initiative.

Finally, there are some important areas where constitutional norms simultaneously influence both how the judiciary interprets statutes and the resulting contents of administrative law. For example, while the *Chevron* doctrine is purportedly based on Congress’s intent for courts to defer to reasonable interpretations of ambiguous statutory provisions by agencies, the Court has also justified this doctrine based on the president’s superior

---

108. See Metzger, supra note 7, at 497-501.

109. See id. at 497-502 (providing examples from recent case law); cf. William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 Tex. L. Rev. 1273, 1275 (2009) (claiming that “judicial review should avoid closing off democratic deliberation, should respect the products of such deliberation, and should create constitutional floors only when supported by deliberation among a wide array of represented interests”).


111. See Metzger, supra note 7, at 504 (“Scholars are beginning to document a number of instances in which ... administrative agencies were at the forefront of developing new understandings of constitutional rights.”); see, e.g., Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 Stan. L. Rev. 553, 594 (2007) (claiming that “it was through the post office, not the Constitution or the Bill of Rights, that the early Americans first established [the principle of communications privacy as fundamental to the Fourth Amendment]”); Eskridge & Ferejohn, supra note 7, at 25-74 (developing their theory of administrative constitutionalism and providing the Pregnancy Discrimination Act and the Family and Medical Leave Act as examples of statutes that established new constitutional rights through this process); Sophia Z. Lee, *Race and Rulemaking: Civil Rights in the Administrative State, 1964-1977* (on file with author).

political accountability for policy choices. While the Court has also described the limits of *Chevron* deference by reference to Congress’s intent, the emphasis that *Mead* and *Skidmore* placed on the value of procedural safeguards and reasoned decision making suggest that those decisions may have been inspired by the same constitutional values as hard-look judicial review. The Court has not invalidated a statute for violating the nondelegation doctrine since the New Deal, but it has narrowly construed broad grants of authority to agencies through the process of statutory interpretation and thereby promoted the constitutional principle that law must be made by Congress rather than the executive branch. Accordingly, it seems clear that constitutional norms frequently influence both how statutes are interpreted by federal courts and how they are implemented by administrative agencies, as well as the level of deference that federal courts will accord to agency decision making.

E. Statutory and Administrative Law’s Influence on the Constitution

The Constitution’s influence on legislation and administrative law is not a one-way street. Rather, statutory and administrative law can also have a significant impact on the formal and functional meaning of the Constitution. In their important new book, *A Republic of Statutes*, Bill Eskridge and

113. *See id.* at 865-66 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

114. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”).

115. *See id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (recognizing that the rulings, interpretations, and opinions of an administrator “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,” and stating that “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”); *see also supra* note 106 and accompanying text (describing the constitutional values that are promoted by a reasoned decision making requirement and hard-look judicial review).

116. *See Cass R. Sunstein, Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 316 (2000) (“Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.”).
John Ferejohn claim that "[i]n America’s republic of statutes, republican deliberation over fundamental national commitments has migrated, relatively speaking, away from Constitutionalism and toward legislative and administrative constitutionalism." A major theme of their book is that "America enjoys a constitution of statutes supplementing and often supplanting its written Constitution as to the most fundamental features of governance."

Because the Constitution leaves many important issues of democratic governance open, statutory and administrative law will necessarily establish institutional practices and public norms that go beyond those required by the Constitution and thereby play a supplemental role in developing constitutional meaning. Eskridge and Ferejohn emphasize that this supplemental role is bolstered by the fact that the Constitution contains norms that are under-enforced by the judiciary for institutional reasons; for example, the Constitution has been interpreted not to govern the behavior of private parties or to create positive rights. They therefore explain that most of the positive rights that have become entrenched in our society—from the right to family medical leave, a free market, and old-age pensions—do not clearly rest on the text or structure of the Constitution.

Eskridge and Ferejohn also contend that the practices and norms that are established by statutory and administrative law have the capacity to "transform Constitutional baselines." For example, they claim that Brown v. Board of Education’s initial prohibition of de jure segregation was transformed into an obligation to eliminate or justify de facto segregation and thereby integrate the public schools primarily as a result of "administrative constitutionalism." In this regard, they point out that the Civil Rights Act of 1964 withheld federal funds from public programs that discriminated on the basis of race, and that the Elementary and Secondary Education Amendments of 1965 substantially expanded the amount of federal funds available to local schools. Because these statutes were aggressively enforced by federal agencies, such as the Department of Health, Education, and Welfare, to require local school districts to justify de facto segregation, Eskridge and Ferejohn claim that "public school integration occurred all

---

117. See ESKRIDGE & FEREJOHN, supra note 7, at 16.
118. Id. at 12-13.
119. Id. at 4-5; see also id. at 53 ("It is primarily for institutional reasons that the Supreme Court has declined to announce or enforce affirmative obligations and has focused on enforcing limits and negative rights."); see generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212 (1978).
120. ESKRIDGE & FEREJOHN, supra note 7, at 6 (internal citations omitted).
121. Id.
122. See id. ("The Constitutional status quo was shattered and the Brown norm was transformed by legislation.").
123. See id.
over the country, especially in the South.”

Moreover, these statutory and regulatory initiatives preceded the Supreme Court’s decision in Brown II, which held that segregated school districts had an obligation to transition to a unitary school system.

While one can easily question whether this effort to integrate public schools has worked, there is little doubt that the “anti-discrimination” norm that emerged from these efforts has stuck. Eskridge and Ferejohn therefore provide the Civil Rights Act as a prime example of how super-statutes can produce institutional structures and public norms that become entrenched in law and society over time. They point out that unlike the norms that are recognized by the Constitution and enforced pursuant to constitutional law, the Civil Rights Act prohibited invidious discrimination by private entities, including many employers. Moreover, the statute was implemented and interpreted by federal agencies and courts in a manner that “created an affirmative obligation for state officials to eliminate illegal discrimination,” and provided powerful incentives for covered entities to achieve “actual integration, not just nonsegregation.”

Eskridge and Ferejohn contend that the Civil Rights Act exhibits all of the features that are necessary for a super-statute to create and entrench public institutions or norms. First, it was a product of “public deliberation . . . [by] several institutions cooperating together as well as protecting their own authority,” including social movements and the private sector, as well as executive officials, legislatures, “and, to a lesser extent, judges.” Second, this public deliberation occurred over a long period of time, and the resulting anti-discrimination norm did not stick in our public culture until former opponents agreed that “the norm [was] a good one (or at least an acceptable idea).” Because a social consensus has developed that an anti-

124. Id.
125. See id. ("It was not until 1968, right after the 1964-65 statutes, that the Supreme Court even ruled that segregated school districts had an obligation to transition to a unitary school system, where there were no discernible black schools and white schools.").
126. See id. at 7; Eskridge & Ferejohn, supra note 7, at 1237-42 (describing how the Civil Rights Act has been interpreted by courts and implemented by agencies to effectively entrench its anti-discrimination norm).
127. See ESKRIDGE & FEREJOHN, supra note 7, at 7 (describing how the Civil Rights Act of 1964 extended Brown’s anti-discrimination norm and “applied [it] to private as well as public institutions”).
128. Id.
129. See id.; Eskridge & Ferejohn, supra note 7, at 1237 ("[T]he Civil Rights Act is a proven super-statute because it embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life, and has pervasively affected federal statutes and constitutional law").
130. ESKRIDGE & FEREJOHN, supra note 7, at 7.
131. Id.
discrimination norm should be followed (for reasons apart from its legality), the Civil Rights Act has "generated strong social entrenchment" that has not only made it "resistant to change," but has also given it "a power beyond [its] formal legal ambit."\(^3\) Simply put, most people have come to agree that discrimination is fundamentally wrong, and that our law and society should not countenance it. Moreover, the prevailing understanding of discrimination has evolved, and the anti-discrimination norm has been extended to other "suspect classifications," including sex, pregnancy, age, disability, national origin, religion, and sexual orientation—largely through the process of administrative constitutionalism.\(^2\) Eskridge and Ferejohn claim that many other institutional practices and public norms have become entrenched in American law and society as a result of super-statutes, including the responsibility of the workplace to accommodate women; the establishment and protection of voting rights; the responsibility of states to maintain free markets; the funding and management of old-age assistance programs; the regulation of the family; the nondegradation of the environment; the establishment of a national monetary policy; the treatment of sexual and gender minorities; and the provision of national security.\(^3\)

Eskridge and Ferejohn ultimately contend that the American Constitution has evolved as a result of administrative constitutionalism, and that this method of updating the Constitution is normatively desirable.\(^4\) Much of their book is devoted to describing "the ongoing deliberative process by which small 'c' constitutional norms and institutions become entrenched in our polity."\(^5\) Contrary to the conventional wisdom, Eskridge and Ferejohn conclude that in "a republic of statutes[,] . . . normative commitments are announced and entrenched not through a process of Constitutional amendments or Supreme Court pronouncements but instead through the more gradual process of legislation, administrative implementation, public feedback, and legislative reaffirmation and elaboration."\(^6\)

F. The Key Points of Convergence

I want to suggest that Eskridge and Ferejohn and Friedman essentially agree on the most fundamental aspects of the process of American constitutional change. First, they agree that constitutional meaning is the result of an ongoing dialogue between and among governmental officials and inter-

\(^{132}\) Id. at 8.
\(^{133}\) See id. at 12.
\(^{134}\) See id. at 18 (listing the case studies of administrative constitutionalism that are developed in the book, along with their respective chapters).
\(^{135}\) See id. at 8-9.
\(^{136}\) Id. at 13 (emphasis omitted).
\(^{137}\) Id. at 14 (emphasis omitted).
ested members of the public. Eskridge and Ferejohn therefore emphasize that "[t]he dialogic feature of republican deliberation" that characterizes their theory of administrative constitutionalism requires differently situated participants and institutions to provide inputs that reflect their comparative advantages: agencies provide information about the problem, including social and economic structures framing the problem and affecting solutions; legislators balance incommensurable values and create compromises as well as new governmental structures and programs to deal with the matter; judges fit and sometimes evaluate legislative directives and agency rules in light of the nation's larger body of law.138

Meanwhile, Friedman claims that

[w]hat matters most about judicial review . . . is not the Supreme Court's role in the process, but how the public reacts to those decisions. This is the most important lesson that history teaches. Almost everything consequential about judicial review occurs after the judges rule, not when they do. Judges do not decide finally on the meaning of the Constitution. Rather, it is through the dialogic process of 'judicial decision—popular response—judicial re-decision' that the Constitution takes on the meaning it has.139

Second, Eskridge and Ferejohn and Friedman agree that the ultimate responsibility for constitutional meaning rests with "the people," rather than with the Framers or the Supreme Court. Eskridge and Ferejohn self-consciously assign a relatively modest role to the Constitution and the Court, but they claim that their theory "is also more demanding of ordinary citizens, for it suggests that there is no 'Great Guarantor' of our liberties and insists that, ultimately, the creation and preservation of our freedoms is a never-ending project and a burden that falls on us all."140 Likewise, Friedman contends that "[t]he Constitution is central to American political discourse," and that "we have nothing but ourselves to fall back on."141 He concludes by proclaiming that

[j]udicial review is our invention; we created it and have chosen to retain it. Judicial review has served as a means of forcing us to think about, and interpret, our Constitution ourselves. In the final analysis, when it comes to the Constitution, we are the highest court in the land.142

138. Id. at 15. Eskridge and Ferejohn refer favorably to Friedman's theory of constitutional dialogue in a discussion of the relationship between their project and the broader movement towards "popular constitutionalism" in constitutional theory. See id. at 69-70. They also recognize that the theory of "[d]eliberation-respecting judicial review" that is set forth in their conclusion is "most consistent with theories of judicial review that emphasize institutional dialogue," including Barry Friedman's work. Id. at 436.
139. FRIEDMAN, supra note 4, at 381-82.
140. ESKRIDGE & FEREJOHN, supra note 7, at 9.
141. FRIEDMAN, supra note 4, at 385.
142. Id.
Despite their agreement on these fundamental aspects of the process of constitutional change, Eskridge and Ferejohn and Friedman explicitly focus on different stages of a much broader process. Eskridge and Ferejohn focus primarily on the development and implementation of constitutional norms by legislatures and administrative agencies, which is supplemented (and sometimes short-circuited) by subsequent sub-constitutional and Constitutional decisions by state and federal courts. Meanwhile, Friedman thoroughly examines the Supreme Court’s constitutional decisions and how they are received by government officials and other members of society, as well as how the Court subsequently reacts to its assessment of “public opinion.”

The next Part demonstrates that by integrating their respective analyses, we can begin to understand the complete picture of constitutional dialogue in a republic of statutes.

III. THE PROCESS OF AMERICAN CONSTITUTIONAL CHANGE

By integrating Professor Friedman’s theory of constitutional dialogue with the lessons of “administrative constitutionalism,” we can develop a better understanding of the entire process of constitutional change. American constitutional change is obviously not solely a function of the amendments adopted pursuant to Article V. Nor is it just a function of judicial review. Rather, as Friedman suggests, constitutional change is also a function of how society responds to the Court’s decisions, and how the Court tailors its decisions to prior and anticipated reactions to its work. Moreover, as scholars of regulatory constitutionalism suggest, constitutional change is also a function of the structures and norms established by legislatures, administrative agencies, and the attentive public that influences their work. The meaning of the American Constitution at any particular moment in time is the result of an ongoing deliberative process (or dialogue) that includes the Court, as well as other governmental institutions and politically engaged members of the public.

The first step of this broader process of constitutional change was the ratification of the Constitution, along with the Bill of Rights and a few subsequent, important Article V amendments. The second step of the process consists of the administrative constitutionalism that has been the focus of recent work by Eskridge, Ferejohn, and other prominent public law scholars. During this stage, Congress, the executive branch, state legislatures,

143. Friedman has recently explained that his book’s focus on the process of constitutional change was an accidental by-product of his interest in the relationship between popular opinion and judicial review. See Friedman, supra note 10, at 1235 (recognizing that “The Will of the People depicts the process of constitutional change,” and explaining that while this was not the book’s purpose, “it bubbled up as [the] narrative developed, emerging inescapably from the interrelationship of popular opinion and judicial review”).
and administrative agencies establish institutions of government, develop their operative procedures, and set limitations on governmental authority, in addition to establishing substantive rules, policies, and rights. These institutions and norms—and how they and their work are interpreted and reviewed by courts in “ordinary” cases—are heavily influenced by the Constitution, and they can become deeply entrenched in law and society as a functional matter. At the same time, the institutions and norms that are established at this stage of the process can potentially influence how the Constitution is subsequently understood as well. In other words, statutory and administrative law (as well as state constitutionalism) can result in the creation of new (or different) constitutional norms in law and society. Moreover, this can occur as a functional matter even if the institutions and norms that are established pursuant to administrative constitutionalism are never subject to judicial review.

The third step of the process of constitutional change occurs when the institutions or norms that are established by the regulatory state are subject to judicial review to assess their compatibility with the Constitution (what Eskridge and Ferejohn might call “Large-C constitutional challenges”). The Supreme Court has substantial discretion to decide when, if ever, it will hear a large-C constitutional challenge on a particular topic, which substantially raises the stakes of the underlying issues by potentially increasing the extent to which a particular position becomes legally entrenched. Nonetheless, when the Court makes a constitutional decision, it can either remand the matter back to the political process by invoking one or more of the “passive virtues,” invalidate the challenged legislative or administrative decisions, or solidify and further entrench those decisions by upholding their constitutionality or concluding that certain legislative or administrative solutions are constitutionally required. As Friedman suggests, when the Court makes its decisions at this stage of the process, it will often consider the likely societal reaction, and, in particular, whether there are powerful constituencies who will support what the Court is planning to do.

The fourth stage of the process of constitutional change is what I will refer to as Friedmanesque dialogue. As Professor Friedman demonstrates, when the Court makes constitutional decisions, members of society will often react and provide feedback to the Court regarding the validity and implications of its particular holdings and its broader understanding of the Constitution. This feedback can range from criticism by scholars and elected officials, to efforts to amend the Constitution, strip the Court’s jurisdiction, impeach the justices, refuse to enforce the Court’s orders, and pack the Court. The societal reaction to the Court’s decisions can ultimately lead

to more sustained political movements that seek to use the Court’s most controversial decisions to achieve other political goals, change the composition of the Court, and eventually convince the Court to change its mind. Even if the Court was oblivious to all of this feedback, its decisions routinely lead to responses by legislatures, administrative agencies, and other public officials, who can internalize the Court’s understanding of the Constitution, engage in efforts to get around the Court’s decisions, or try significantly different approaches to the underlying problems (and here we are, once again, back in the second stage of this ongoing process). In any event, elected officials and administrators will also pursue other initiatives that will eventually implicate and shed further light upon the underlying constitutional norms.

The complete process of American constitutional change that emerges from this integrated analysis can therefore be depicted as follows:

The Process of American Constitutional Change

I want to emphasize three aspects of this framework for understanding constitutional change. First, this framework helps to place Professor Friedman’s tremendous contribution to the literature on American constitutionalism in its proper context. In essence, he has provided a great deal of insight on how the third step of the process—constitutional decision making by the Supreme Court—has actually worked in practice, and he has also provided the comprehensive historical treatment of the fourth step of the process (which, thus, merits the name, Friedmanesque dialogue). Second, this
broader framework suggests that the ratification of the Constitution by the Framers will predictably play a relatively marginal role in the development of constitutional meaning because it is the only static part, and it is also the most general and abstract part, of the entire process. Indeed, most of the institutional avenues for influencing the development of constitutional meaning over time are neither mandated nor explicitly governed by the Constitution. Third, and relatedly, this framework suggests that constitutional meaning is the result of an ongoing, deliberative process (or dialogue) that is influenced not only by the original meaning of the document, but also by the subsequent views of presidents, legislators, and administrators, as well as by judges and ordinary citizens. The final Part of this Essay identifies the key questions that are posed by this framework, and discusses a few of its implications.

IV. FORWARD PROGRESS

The process of American constitutional change that emerges from integrating Professor Friedman's work with the lessons of administrative constitutionalism suggests that judicial review cannot fairly be characterized as anti-democratic, even if we are unable to assess the extent to which the Supreme Court's decisions comport with "the will of the people." Rather, judicial review is simply one important aspect of a broader constitutional dialogue that takes place within and among a variety of democratic institutions. There are, moreover, many ways for elected officials and ordinary citizens to participate in the process and potentially to influence both the formal and functional meaning of the Constitution. The key questions that emerge from this framework are therefore not whether judicial review can be squared with constitutional democracy, but rather when judicial review should be exercised and how the various stages of the broader process ideally should and do work.

The timing of judicial review is vitally important on a couple of different levels. As noted above, the Supreme Court has substantial control over its docket and can therefore generally decide when, if ever, it wants to confront any particular issue. If the Court declines to exercise judicial review, the issue will typically be addressed and initially resolved by public officials and engaged citizens pursuant to the processes of administrative

145. See Charles Tiefer, The Flag-Burning Controversy 1989-1990: Congress' Valid Role in Constitutional Dialogue, 29 HARV. J. ON LEGIS. 357, 382-88 (1992) (discussing the process of agenda-setting in the Supreme Court and claiming that "as the Justices exercise their agenda-setting discretion, they do so with a degree of personal power and unaccountability that is breathtaking when contemplating the consequences of that exercise"). For a discussion of possible abuses of this discretion, see Matthew L.M. Fletcher, Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes, 51 ARIZ. L. REV. 993 (2009).
Constitutional Dialogue in a Republic of Statutes. The resulting solutions will be formally subject to change at any time pursuant to the ordinary political process, but the institutional structures and legal rights that are established in this manner may become deeply entrenched as a functional matter. If the Court exercises judicial review, it typically raises the stakes of the underlying issues by invalidating prior legislative or administrative decisions (which may themselves have become deeply entrenched) or by solidifying and further entrenching those decisions by upholding their validity or declaring that certain legislative or administrative solutions are constitutionally required.

When the Court intervenes too early, it may foreclose the development of “more democratic” solutions pursuant to the processes of administrative constitutionalism. If the Court waits too long to intervene, it may increase the political costs of judicial review by increasing the likelihood that the Court will invalidate politically entrenched institutions or norms. If the Court refuses to intervene, it may be allowing institutions or norms that violate its conception of the Constitution to stand. Professor Friedman’s work suggests that the Court’s decisions regarding if and when to exercise

---

146. A couple of recent decisions have vividly demonstrated the potential importance of the lower federal courts in this process. See Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding that California’s Proposition 8 is unconstitutional under the 14th Amendment to the U.S. Constitution); United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (granting a preliminary injunction to enjoin enforcement of significant portions of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act based on federal law). While a detailed discussion of this issue is beyond the scope of this Essay, the precise role of the lower federal courts in the process of American constitutional change is a topic that warrants greater scholarly attention. See Friedman, supra note 2, at 295-308, 335-36 (discussing the existing literature on the impact of lower courts on the Supreme Court and noting that “[n]ormative theory has failed to develop a satisfactory (or almost any) account of the lower courts’ role in the development of constitutional meaning”).

147. See supra notes 74-86 and accompanying text.

148. See FRIEDMAN, supra note 4, at 383 (recognizing that “one of the most important features of Supreme Court decisions . . . is that they are ‘sticky,’ which is to say that they are difficult to change or get around,” and explaining that “[w]hen a decision is put on constitutional grounds, it takes greater mobilization, and often more time, to develop the political will to change it”).

149. See William N. Eskridge, Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 YALE L.J. 1279, 1310 (2005) (claiming that judicial review can undermine democracy and “raise the stakes of politics by taking issues away from the political system prematurely”); see also Eskridge & Ferejohn, supra note 109, at 1275-86 (claiming that “judicial review should avoid closing off democratic deliberation, should respect the products of such deliberation, and should create constitutional floors only when supported by deliberation among a wide array of represented interests”).

150. See John H. Blume et al., Education and Interrogation: Comparing Brown and Miranda, 90 CORNELL L. REV. 321, 332-34 (2005) (claiming that Brown and Miranda both generated a “vociferous backlash” when they were decided because both decisions addressed “entrenched, institutional racism in America,” and “were viewed (correctly) as threats to the power structure existing in the United States”).
the power of judicial review will often have complicated and uncertain effects on both the political process and public perceptions of the Court’s legitimacy. While Friedman arguably shows that the Court needs powerful friends or allies to make bold or controversial decisions, the Court will often retain substantial discretion regarding when it can or should intervene. The manner in which the Court exercises this discretion will, in turn, have a major impact on the eventual shape of the Constitution’s meaning.

The operation of each of the three dynamic stages of the process of American constitutional change will also have a significant impact on the formal and functional meaning of the Constitution. First, the legislative and administrative processes will have a tremendous impact on which institutional structures and public norms are adopted and subsequently entrenched pursuant to the mechanisms of administrative constitutionalism. Second, the manner in which the Court exercises the power of judicial review will obviously have a major impact on the meaning of the Constitution. Third, as Friedman demonstrates, the way in which public officials and the attentive public respond to the Court’s decisions will influence subsequent exercises of judicial review and what occurs in the legislative and administrative processes—and thereby also influence the Constitution’s meaning. Professor Friedman has taught us a great deal about the operation of the latter two stages of the process of American constitutional change, but we still need to learn more about the operation of all three stages of the process and how they interact with one another, as well as to develop normative theories that incorporate administrative constitutionalism, judicial review, and constitutional dialogue. In other words, we still need to learn and think more about how the entire process of American constitutional change really does and ideally should work.

The process of American constitutional change that emerges from integrating Professor Friedman’s work with the lessons of administrative constitutionalism has several important implications for constitutional theory. First, it suggests that the contemporary distinction between constitutional law and legislation and administrative law is widely overdrawn and largely misplaced. These are not, in reality, separate fields of study, but they are instead closely related and frequently overlapping components of a larger

151. See Friedman, supra note 4, at 304-15, 346-48, 350-53, 362-63, 383-85 (describing how political activists use controversial decisions by the Court to serve a broad range of partisan goals).

152. See Eskridge & Ferejohn, supra note 7, at 20 (claiming that “[t]he sharp differences between Constitutional and statutory interpretation ought to be questioned in the light of [their account of] civil rights, voting, social security, finance, antitrust, environmental, and national security statutes,” and arguing that “statutory interpretation involving legislative or administrative efforts to entrench new norms that have big consequences for society ought to consider the broader matters typically consigned to theories of Constitutional interpretation”).
Constitutional Dialogue in a Republic of Statutes

system for establishing and potentially entrenching democratic institutions and public norms. Thus, for example, in litigation, private parties routinely challenge the validity of governmental action on constitutional, statutory, and administrative law grounds. The tendency of legal scholars to focus on one aspect of the process to the exclusion or detriment of others will therefore predictably lead to analyses that are incomplete and potentially misleading. Given the open-texture of the Constitution, the ubiquity of administrative constitutionalism, and the relative infrequency of judicial review, there is certainly no warrant for believing that the study of legislation or administrative law is less important than traditional constitutional law scholarship. On the contrary, a more accurate understanding of the entire process of American constitutional change demonstrates the importance of research on legislation and administrative law for the larger project of constitutionalism.

A second implication of this more complete framework of American constitutional change is that theories of representation and deliberative democracy should be of central relevance to normative theorizing about the development of constitutional meaning. If constitutional meaning is influenced by considerations beyond the original meaning of the text and the decisions rendered in judicial review, then the workings of administrative constitutionalism and Friedmannesque dialogue will be of tremendous significance to the enterprise. Moreover, ordinary citizens do have meaningful opportunities to participate in these stages of the process in a republican democracy because they can elect certain representatives and seek to influence the legislative and administrative processes more directly as individuals and members of interest groups. On the other hand, for reasons explained above, we cannot plausibly assume that the results of the legislative and administrative processes or constitutional dialogue will typically reflect “the will of the people.” Rather, they will reflect discretionary choices that are made by elected representatives and other public officials pursuant to deliberative processes within and among various democratic institutions. Constitutional scholars therefore need to develop theories regarding how this discretionary authority should be exercised, as both a substantive and a procedural matter. Should representatives follow their constituents’ prepolitical preferences or exercise their own independent judgment? How

should elected representatives and other public officials ascertain public opinion or formulate their own policy views? What obligations, if any, do public officials have to consider and respect the interests and perspectives of minorities or to justify their decisions with public-regarding reasons? The answers to these questions will turn on theories of representation and deliberative democracy, and such theories should therefore be of central relevance to our thinking about constitutionalism. In my view, those theories also offer the best prospects for developing a Constitution that respects the rights and interests of everyone, and thereby fulfills the central hope that American society has traditionally placed in judicial review. In reference to judicial review, Professor Friedman claimed that "[w]hat we ought to care deeply about, what we ought to be asking, is how much capacity the justices have to act independently of the public's views, how likely they are to do so, and in what situations." He also emphasized the importance of properly evaluating the "threat" that judicial review poses for democracy, along with its capacity to fulfill the "hope" of protecting the fundamental rights of minorities. These are precisely the types of questions that we should be asking about every public official in every democratic institution because the reconciliation of majoritarian preferences and minority interests is ultimately central to theories of constitutional democracy more generally.

Finally, the process of American constitutional change that emerges from integrating Professor Friedman's work with the lessons of administrative constitutionalism demonstrates a couple of salient facts about the nature of our constitutional system which are sometimes contested. Specifically, the Constitution's meaning was not fixed when the document was ratified.

154. Eskridge's and Ferejohn's book presents a theory of "deliberation-respecting judicial review" that places heavy emphasis on the need to encourage and respect democratic deliberation. See Eskridge & Ferejohn, supra note 7, at 431-68; see also Eskridge & Ferejohn, supra note 109. While I agree with much of their analysis and believe that their theory is on the right track, a detailed evaluation of their theory of judicial review is beyond the scope of this Essay. For excellent examples of influential discussions of deliberative democracy more generally, see Joseph M. Bessette, Deliberative Democracy: The Majority Principle in Republican Government, in How Democratic Is the Constitution? 102 (Robert A. Goldwin & William A. Schambra, eds., 1980); Joshua Cohen, Deliberation and Democratic Legitimacy, in The Good Polity: Normative Analysis of the State 17 (Alan Hamlin & Philip Pettit, eds., 1989); Deliberative Democracy (Jon Elster ed., 1988); Gutmann & Thompson, supra note 14; Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996); Philip Pettit, Republicanism: A Theory of Freedom and Government (1997); Henry S. Richardson, Democratic Autonomy: Public Reasoning About the Ends of Policy (2002).

155. Friedman, supra note 4, at 373 (emphasis added).

156. Id. at 370; see also Friedman, supra note 2, at 309-11 (describing the "threat" and "hope" of judicial review, and explaining that "positive scholars have long doubted the descriptive accuracy of both normative stories about judicial review, largely because they doubt the premise that judges have the capacity to interfere regularly with the work of the other branches").
Rather, the participants in the processes of administrative constitutionalism and Friedmanesque dialogue—including regulatory scholars, constitutional theorists, political scientists, political activists, and public officials—are all engaged in the common enterprise of developing constitutional meaning on a daily basis. While existing inequalities and structural flaws in the process arguably make it an overstatement to say that “we are the highest court in the land,” it would be difficult to dispute that the United States does have a living Constitution after all.

CONCLUSION

The Will of the People is a majestic story about the history of the relationship between the Supreme Court and public opinion. In my view, however, the very idea of “the will of the people” poses overwhelming conceptual difficulties and measurement problems that undermine any effort to assess the extent to which the power of judicial review and the Court’s particular decisions “reflect the considered judgment of the American people regarding their most fundamental values.” That said, it is undoubtedly true that society reacts to the Court’s decisions, and that the Court often takes both actual and anticipated societal reactions into account in making its decisions. Those reactions, however, are typically driven by the views of influential individuals and groups within society, and they are typically expressed through the work of other democratic institutions. Consistent with this perspective, several prominent scholars have recently pointed out that statutory and administrative law frequently perform constitutional functions in the modern regulatory state, and that the work of legislatures and agencies has a reciprocal relationship with the Constitution.

This Essay has claimed that by integrating Professor Friedman’s theory of constitutional dialogue with the recent literature on administrative constitutionalism, we can develop a better understanding of the entire process of American constitutional change. The novel framework that I have set forth also places Friedman’s invaluable contribution to the enterprise in its proper context. This framework demonstrates the importance of legislation and administrative law to the ongoing development of constitutional meaning, and it suggests that theories of representation and deliberative democracy should be central to normative constitutional theory. It also suggests—as Barry Friedman has taught so many of us in his inspiring fashion over the years—that “the people” do have a prominent role to play in continuing to develop the meaning of the Constitution.

157. FRIEDMAN, supra note 4, at 385 (emphasis added).
158. Id. at 368.