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Acontextual Judicial Review

Louis Michael Seidman*

Is constitutional judicial review a necessary component of a just polity? A striking feature of the current debate is its tendency to proceed as if the question could be answered in the same way always and everywhere. Defenders of constitutional review argue that is a conceptually necessary feature of constitutionalism,¹ the rule of law,² and the effective protection of individual rights.³ Critics claim that it is necessarily inconsistent with progressive politics⁴ and democratic engagement.⁵ Largely missing from the debate is a fairly obvious point: Like any other institution, constitutional review must be evaluated within a particular temporal, cultural, and political context.⁶

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¹ See, e.g., Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1005 (2003).

² See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1998).

³ See Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1735 (2008).

⁴ See Mark Tushnet, *Democracy versus Judicial Review*, DISSENT, Spring, 2005.

⁵ See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L. J. 1346 (2006).

⁶ In previous work, I argued that American judicial review, taken in its best light, has the potential to contribute to political justice. See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001). The argument assumes that American judicial review bears enough of a connection to the practice taken in its best light to make that potential meaningful. I made no claim, however, that contemporary American judicial review was fully meeting that potential, see *id.* at 11 much less that judicial review has met that potential in other times and places.

In part I, I lay the groundwork for my discussion by separating out several questions that are too often conflated. Specifically, I address the distinction between arguments for constitutionalism and for judicial review, between arguments for judicial review grounded in political and substantive justice, and among arguments for different types of judicial review. I claim that the embrace of constitutionalism, the choice between substantive or political justice, and the choice among different types of judicial review all depend upon context.

Given the conclusions in Part I, the argument in Part II will come as no surprise. The wisdom of providing for judicial review turns on the type of judicial review we are talking about and on the relationship between judicial power on the one hand and constitutionalism, political justice and substantive justice on the other. All of these factors are different in different times and places. It follows that judicial power to invalidate statutes and executive actions is a contingent good.

A brief coda discusses the implications of my argument for the discipline of comparative constitutional law.

Some preliminary words of explanation: First, although my claims are more general, I have illustrated them mostly with American examples. I have done so because I am most familiar with the American experience with judicial review. My choice of illustrative examples is consistent with my central point, which is that one needs to know a great deal about context before one can evaluate judicial review. This is the sort of knowledge that I have about the US, but not about other political systems.

Second, well informed readers will no doubt notice that large parts of my argument relate to some standard disputes in constitutional theory and analytic

jurisprudence. In this short article, I have nonetheless decided not to try to locate my own argument within this terrain. I hope that this choice reflects something more than mere laziness. My judgment is that in this setting, there is no need to rehearse yet again the well known arguments of, say, H.L.A. Hart, Joseph Raz, and Ronald Dworkin. I have found it difficult enough to explain and defend my own views without taking on the added burden of situating them with respect to the complex work of others.

I. Asking the Right Question

Before providing answers about acontextual judicial review, the questions must be better formulated. Arguments about the problem are confounded when advocates on different sides address different issues. Three issues in particular tend to be confused. Sometimes, advocates make arguments that purport to be about judicial review, when they are in fact about constitutionalism. Sometimes, their arguments purport to be rooted in political justice, when they are in fact rooted in substantive justice. And sometimes, their arguments purport to be about judicial review in general, when they in fact support only a particular form of judicial review.

A. Constitutionalism or Judicial Review?

Judicial review may or may not be a good method of enforcing constitutionalism, and constitutionalism itself may or may not be a good thing. It should at least be clear, however, that judicial review is not the same thing as constitutionalism. We can have no hope of sorting out the two concepts until we have working definitions of both of them. Coming up with these definitions is, itself, a difficult task.

1. *Constitutionalism.* What, precisely, does constitutionalism consist of? One might start by saying that constitutionalism embodies a commitment to a system of

government limited or controlled by a constitution. Unfortunately, though, this definition merely pushes the problem one layer deeper: What is a constitution?

We ordinarily think of constitutions as a set of requirements that “constitute” a polity by providing “rules of recognition” for the ordinary rules that the polity enacts. Constitutions provide a test that must be satisfied before other orders are treated as legally binding. These rules may be contained in a canonical document, but, importantly, they need not be. For example, countries like the United Kingdom and New Zealand have a system of constitutional law without a constitutional text.⁷

In the United States, it is often taken as axiomatic that the written document, as ratified in 1789 and duly amended since, provides these rules of recognition.⁸ But, this approach merely assumes what needs to be argued for. An argument-stopping assumption of this sort might perhaps be warranted if it were supported by unvarying and unchangeable social practice, but this assumption is not so supported. On the contrary, it is disconnected from social reality. As many others have shown, it is simply not possible to read American rules of recognition directly off the constitutional text.⁹ The text itself

⁷ See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 365-66 (2D ED. 2006) (“most British scholars would say that Great Britain has a constitution – but that it is unwritten”); Matthew S.R. Palmer, *New Zealand Constitutional Culture*, 22 N.Z.U.L.R. 565,589 ([New Zealand has] no single document labeled a ‘Constitution’ that we can hold in our hands or point at We have a collection of different legal instruments and customary understandings that, together ‘constitute’ the way in which New Zealand government works.”)

⁸ See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 3 (1971) (“Society consents to be ruled undemocratically within areas defined by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution”). Cf. David Strauss, *What Is Constitutional Theory*, 87 CALIF. L. REV. 581, 583 (1999) (“No one denies that the text of the Constitution matters, indeed matters a lot.”)

⁹ See, e.g., Richard Fallon, *How To Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 547 (1991) (“If the Constitution’s status as ultimate law depends on practices of acceptance, then the claim that the written Constitution is the only valid source for constitutional norms loses all pretense of self-evident validity”); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-8 (1982) (listing typologies of constitutional argument, of which textualism is only one),

is too ambiguous, and even when it is clear, too often disregarded or elaborated upon, for it, alone, to serve this function.

There are many examples, but here is one. The text of the American Constitution nowhere states that the police are required to secure a warrant before conducting a search or seizure,¹⁰ and the best evidence is that the framers of the text were opponents of warrants who wanted very few of them issued.¹¹ Yet for three quarters of a century, the Supreme Court has held as a central tenet of constitutional criminal procedure that the police must always secure a warrant unless the case comes within narrowly articulated exceptions,¹² themselves with no grounding in constitutional text,¹³ to the putative warrant requirement.

Although the text does not require the police to secure warrants, it does expressly provide that warrants shall not issue except upon a showing of individualized probable

¹⁰ U.S. Const., Amend. IV provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The amendment requires that searches be “reasonable” and that warrants be supported by probable cause, but not that searches be conducted with warrants.

¹¹ See, e.g., AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE – FIRST PRINCIPLES* 11 (1997) (arguing that the fourth amendment was designed to limit warrants); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 283 (1983-84) (“Historians of the fourth amendment agree that the immediate concern of the framers was not with warrantless searches and seizure sat all. The framers’ grievances were with searches and seizures conducted pursuant to general warrants.”)

¹² See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 575 (2004); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

¹³ The text says nothing about automobiles, school drug testing, highly regulated industries, or even searches incident to arrest, but the Court has read the text as creating exceptions in each of these situations. See *Carroll v. United States*, 267 U.S. 132 (1925) (automobiles); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (school drug tests); *New York v. Burger*, 482 U.S. 691 (1987) (highly regulated industries); *Chimel v. California*, 395 U.S. 752 (1969) (searches incident to arrest). In one of its most recent forays into fourth amendment doctrine, the Court has held that a search of an automobile can be justified by the arrest of an immobilized user of the automobile if, but only if, the search is for evidence of the offense of arrest and the police have “reason to believe” that they will find the evidence. *Arizona v. Gant*, 129 S. Ct. 1710 (2009). These requirements are ungrounded in the text of the fourth amendment, in practice at the time of its adoption, or in any evidence of the intent of the framers, and the Court does not pretend otherwise.

cause.¹⁴ This provision was enacted in order to prevent the police from securing “general warrants,” which the framers opposed.¹⁵ Yet in the case of administrative searches, the Supreme Court has *required* officials to secure “area warrants,” the modern analogue of general warrants, which are issued upon a showing that there is *not* individualized probable cause.¹⁶

Defenders of textualism will no doubt argue that these cases, and the many cases in many areas of constitutional law like them,¹⁷ are merely mistakes. If one starts by embracing textualism, then, of course, they are mistakes. But then textualists need an argument for why we should start there, and the existence of so many “mistakes” disqualifies an argument premised on mere social practice.

Instead of starting with an eminently contestable premise disconnected from actual practice, I suggest starting by asking what attributes constitutions must have to serve their functions. Once these attributes are identified, then they can be mapped onto our actual practices for identifying the source of constitutional rules.

As a functional matter, constitutional rules that serve to legitimate other rules need to have two characteristics. First, they must be moderately entrenched against ordinary rules. Second, they must provide a reason other than the mere existence of the constitutional rules themselves for why the ordinary rules should be obeyed.

Consider first entrenchment. If the constitutional rules were not sticky with respect to ordinary rules, they could not distinguish between legitimate and illegitimate

¹⁴ The Amendment unambiguously states that “no warrant shall issue but upon probable cause.” U.S. CONST. AMEND IV.

¹⁵ See note 11, *supra*.

¹⁶ See *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The Court has candidly recognized the anomalous nature of this requirement without, however, doing anything to correct it. See *Griffin v. Wisconsin*, 483 U.S. 868, 877 (1987).

¹⁷ For other examples, see TAN 42, TAN 52, TAN 67, & TAN 119, *infra*.

ordinary rules. This is so because, without entrenchment, the mere enactment of an ordinary rule would, ipso facto, modify or repeal the conflicting constitutional rule, thereby making all ordinary rules automatically legitimate.

At the same time, however, constitutional rules cannot serve their legitimating function if they are too sticky. Over time, rules that are never subject to change become disconnected from social reality and, so, discredited. The rules thereby lose their capacity to provide a reason why other rules should be obeyed.¹⁸

Perhaps surprisingly, one consequence of the moderate entrenchment requirement is that there will be no sharp line between constitutional and ordinary rules. Constitutional rules must be moderately entrenched, but within this broad requirement, there are many possibilities, which in turn, lead to the rules serving their legitimating function more or less successfully. “Constitutionalness” is a matter of degree, rather than of kind.

For example, in the United States, amendment to the formal, written constitution is exceedingly difficult.¹⁹ Although American practice is (perhaps barely) within the broad range of moderate entrenchment, it is at a polar extreme within that range. Paradoxically, the extraordinary stickiness of the constitutional text has led that text to be less “constitutional” in the sense that it serves less of a legitimating function than it

¹⁸ For a subtle exploration of this point, see Adam M. Samaha, *Originalism’s Expiration Date*, 30 Card. L. Rev. 1295 (2008).

¹⁹ The Constitution permits amendment only upon a proposal approved by two-thirds of both Houses of Congress or applications from the legislatures of two-thirds of the states for a constitutional convention. In both cases, the proposals must then be ratified by three-fourths of the states. U.S. CONST. ART. V. As Sanford Levinson points out, no other country and none of the fifty states makes it so difficult to amend their constitutions. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 160 (2005).

would if it were more easily amendable.²⁰ For just this reason, as I have already noted, the US Supreme Court frequently departs from text, at least as text is usually interpreted when it is not so old and inflexible.²¹

Conversely, constitutionalism also loses some of its legitimating potential in a system at the other polar extreme. Imagine a country where each succeeding regime rewrites the constitution from scratch and where there is frequent regime change. Because the constitutional rules are only mildly entrenched, they lose some of their distinctive quality and so, legitimate less effectively than stickier rules.²²

Matters are further complicated by the fact that the methods of entrenchment and change can vary both within and among polities. Written constitutions are not the only means by which metarules are entrenched. The rule requiring fresh parliamentary elections every five years in the United Kingdom takes the form of an ordinary statute,²³ yet it is deeply entrenched.²⁴ Similarly, in the United States, no provision in the written

²⁰ See, e.g., Richard Primus, *When Should Original Meaning Matter?*, 107 MICH L. REV. 165, 169 (2008) (“Paying attention to original meanings makes sense in cases construing provisions that were adopted recently enough that the dead-hand problem does not arise”); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L. J. 1765, 1815-20 (1997) (strength of originalist argument erodes over time); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L. J. 1717, 1752-54 (methods other than originalism appropriate when time passes). But cf. Adam M. Yamaha, note 17, *supra*, at 1355 (suggesting that following original meaning of old texts might serve desirable randomization function).

²¹ See pp xx, *supra*. But cf. Adam M. Yamaha, note 17, *supra*, at 1318-26 (finding no clear pattern regarding reliance on originalism in cases where there is short or long interpretive lag between passage of constitutional provision and first occasion when it is interpreted).

²² Cf. CITIZENS FOR THE CONSTITUTION, “GREAT AND EXTRAORDINARY OCCASIONS”: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 4-5 (1999) (“The Constitution’s unifying force would be destroyed if it came to be seen as embodying the views of any temporarily dominant group”).

²³ Since 1911, a statute has provided that “[a]ll Parliaments that shall at any time hereafter be called, assembled, or held, shall and may respectively have continuance for [five] years.” Parliament Act 1911 (c. 13), s. 7. For a discussion, see ROBERT BLACKBURN, *THE ELECTORAL SYSTEM IN BRITAIN* 18 (1995).

²⁴ Since 1911, no parliament has been in place for more than five years, with two exceptions: during the emergency surrounding the First World War, the parliamentary term was extended from 1910 until 1918. Because of the Second World War, there were no parliamentary elections from 1935 until 1945. *Id.* at 46. The election of 1964 came seven days after the five year period, but because Parliament had not been in session for a portion of the period, the statutory limit on the length of parliamentary sessions was satisfied. *Id.* at 22.

Constitution prohibits a state governor from serving simultaneously as a United States Senator or prevents the Chief Justice of the United States from also serving in the President's cabinet. In fact, there are historical examples of violations of both of these norms,²⁵ but many constitutional norms are not uniformly obeyed. Prohibitions of these practices are every bit as entrenched as, say, the free speech guarantee.²⁶

Constitutions also contain rules that are used to create sub rules that are themselves entrenched. Consider, for example, the rule that American judges serve during good behavior.²⁷ This rule is obviously constitutional, but what is less often recognized is that the rule also creates entrenched subrules. The subrules announced by judges are more entrenched against ordinary political decisions than they would be if judges served shorter terms or were more easily removed from office.

In the case of judicial tenure, subrules are entrenched by a rule of constitutional stature. In other cases, Congress, with varying degrees of success, has attempted to entrench certain outcomes through ordinary legislation.²⁸ The filibuster rules of the

²⁵ John Marshall served as both Secretary of State and Chief Justice of the United States from January 27, 1801 until March 4, 1801. See II ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL: POLITICIAN, DIPLOMATIST STATESMAN, 1789-1801* at 558-59 (1916). John Jay also held both offices for six months. See *id.*, at 559 n.1. At least as a formal matter, Huey Long remained governor of Louisiana when he assumed his United States Senate seat in 1932. See RICHARD D. WHITE, *KINGFISH: THE REIGN OF HUEY P. LONG* 140-41 (2006).

²⁶ Steven G. Calabresi and Joan L. Larsen note that although “[t]he Framers barred Members of Congress from holding federal executive or judicial officer, . . . the text they wrote allows joint office holding between . . . the Executive and judicial Departments. . . and . . . the federal government and the states.” Steven G. Calabresi and John L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORN. L. REV. 1045, 1047 (1994). They nonetheless argue that “[u]nwritten traditions disfavor plural office holding of any kind,” and that “[t]hese traditions . . . now form a vital part of America’s structural ‘Constitution.’” *Id.* at 1047-48.

²⁷ See U.S. CONST., ART. 3, §. 1.

²⁸ For doubts on the constitutionality of such efforts, see Julian Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 381; Paul Kahn, *Gramm-Rudman and the Capacity of Congress To Control the Future*, 13 HASTINGS CONST. L. Q. 185 (1986). But cf. Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1592 n. 67 (1988).

Senate²⁹ and “quasi-constitutional” statutes like the War Powers Resolution³⁰ or the now defunct Gramm-Rudman-Hollings Act³¹ attempt to bind Congress in advance in ways that are meant to be difficult to change.³²

Just as the substantive portions of a constitution do not exhaust the possibilities of constitutional entrenchment, so too, the substantive amendment provisions do not exhaust the possibilities for constitutional change. Scholars like Bruce Ackerman,³³ Akhil Amar,³⁴ and Riva Siegal³⁵ have insisted that constitutional change is possible without resort to the formal amendment process. Whether or not one accepts the details of their theories, it is beyond question that both judicial review and the changed perceptions of ordinary political actors regularly modify the scope of constitutional obligation. Without formal constitutional change, the status of laws that segregate based upon race or that purport to regulate interstate commerce or that vest administrative agencies with de facto lawmaking power has changed dramatically over the past century.

These forms of what might be called “ordinary” entrenchment and change threaten the coherence of our definition by raising questions about the distinctiveness of constitutional rules. Whether or not it has a formal constitution, every system of government has facets that are slowed by inertia when compared to other facets, and the extent of the inertia varies over time and circumstance. Legislators inevitably have more

²⁹ See RULES OF THE UNITED STATES SENATE, RULE XXII, available at <http://rules.senate.gov/public/index.cfm?p=RuleXXII> (site visited April 13, 2010).

³⁰ 50 U.S.C. §§ 1541-1548.

³¹ 2 USC § 900. Important elements of the Act were invalidated in *Bowsher v. Synar*, 478 U.S. 714 (1986).

³² See generally William N. Eskridge, Jr. & John Ferejohn, *Superstatutes*, 50 DUKE L. J. 1215 (2001).

³³ See BRUCE ACKERMAN, *WE THE PEOPLE* 44-49 (1991).

³⁴ See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

³⁵ See Riva B. Siegal, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

time to devote to revising some decisions than others. Moreover, the legislation that they write is always “entrenched” against change in the sense that a different method for enacting legislation – perhaps by submajorities or by more informal delegation of authority within the legislative body – might produce relatively more change.

Similarly, in every system, the kinds of changes that seem possible themselves change over time. Inertial forces that once seemed insurmountable suddenly become vulnerable in the face of new technological or material circumstances. Even as mundane a matter as adding legislative staff or revising committee jurisdiction can substantially reduce inertial forces.

All this creates the risk that our definition will end up subsuming everything. If we are to avoid this problem, we must distinguish between “constitutional” and “ordinary” entrenchment. What, besides entrenchment, is required for a rule to be constitutional? To be a constitutional rule, and not merely an entrenched ordinary rule, a provision must provide or reflect reasons, not grounded in the existence of the rule itself, why ordinary rules should be obeyed. Put differently, rules that constitute a polity are moderately entrenched not just because of inherent or inevitable inertial forces. Constitutional entrenchment, unlike ordinary entrenchment, is motivated by the belief that the entrenched rules embody conditions that must be satisfied if a person is to be bound in conscience to obey the outcomes that the rules produce. The rules are entrenched, in other words, because it is thought important to have in place and fix the conditions of obedience.³⁶

³⁶ Notice that subconstitutional rules need not meet this requirement. Once constitutional rules are in place, subconstitutional rules demand obedience because they are enacted pursuant to constitutional rules which, themselves, demand obedience. Put differently, the legitimacy of subconstitutional rules is parasitic on the legitimacy of other rules in a way that constitutional rules cannot be.

Before addressing the conditions of obedience, we need to consider why it is that those conditions cannot be grounded in the mere existence of the rule itself. Here, we confront the familiar problem of getting normativity off the ground. A rule standing alone cannot accomplish this task. No matter how firm the rule's own command that it must be obeyed, the command stands on no firmer ground than the rule itself.

To be sure, for a person who already has "the internal point of view," existence of the rule will be perceived as creating an obligation of obedience.³⁷ From an external point of view, we might observe as a sociological matter that people treat certain rules in this way. Indeed, we might even say that this sort of treatment of rules is what it means to have a legal, as opposed to a moral obligation to obey. The problem, though, is that neither definition nor sociological observation provides a reason for action. For someone trying to decide whether or not to have an internal point of view with respect to a rule, there must be something external to the rule itself that commands obedience to the rule.

What, then, is it about constitutional rules that make them worthy of obedience? There are two possibilities. Some rules should be obeyed because they either mandate substantive justice according to criteria for substantive justice located outside the rule itself or because they mandate procedures thought likely to create subrules that are substantively just according to these criteria. Rules like the free speech clause of the U.S. First Amendment or the equal protection clause of the Fourteenth Amendment prohibit some outcomes on the ground that they are substantively illegitimate according to some widely accepted substantive theory. Perhaps judicial review of legislation, although not itself demanded by justice, is a procedure likely to produce substantive

³⁷ See H. L. A. HART, *THE CONCEPT OF LAW* 86-88 (1990).

justice. These rules must be obeyed because they embody or encourage substantive principles that, themselves, must be obeyed.

Substantive legitimacy does not fully explain many other constitutional provisions like, say, the length of congressional terms of office set forth in Article I³⁸ or the particular method of electing the President set forth in Article II.³⁹ These provisions might nonetheless be constitutional because they are political “rules of the road” that rational people would accept on the ground that they provide a highly useful focal point eliminating endless bickering about matters that should be more or less permanently settled. They must be obeyed because the value of a clear and entrenched rule outweighs the possibility that the outcomes it produces might be substantively undesirable.

Now that we have determined the conditions for obedience, we can return to the role of constitutional text as a source for constitutional rules. To the extent that the rules are justified as embodying substantive justice, it is obvious that the role of text is contingent. Some rules – say the cruel and unusual punishment clause of the Eighth Amendment⁴⁰ – mandate substantive justice, while others – say the requirement in Article II that the President be “natural born citizen”⁴¹ -- do not.

It might nonetheless be thought that constitutional text should be the exclusive source of political rules of the road. In fact, though, the relationship between text and “rules of the road” is also contingent. Depending on social practice, text might provide a means of social coordination, but it might also obstruct such coordination.

³⁸ See U.S. CONST., ART I, §2, CL. 1 (members of House of Representatives chosen every second year); U.S. CONST., ART. I, §3, CL. 1 (members of Senate chosen every sixth year).

³⁹ See U.S. CONST. ART. II, §§2-4 (setting forth method of electing President)

⁴⁰ U.S. CONST., AMEND. VIII provides “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

⁴¹ U. S. CONST., ART. II, §. 1, CL. 5 provides “No person except a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution, shall be eligible to the Office of President.”

For example, consider again congressional terms of office. The U.S. written constitution pretty clearly mandates that when new states are added to the Union, both of the initial Senators serve a term of six years.⁴² Nonetheless, ever since Vermont joined the United States as the first new state in 1791, the provision has been ignored. One new Senator from a new state has always been assigned a term of less than six years in order to provide for staggered senatorial elections.⁴³ Given this history, an effort to return to constitutional text at this late date would cause rather than resolve conflict. Accordingly, I would say that the Article I and Seventeenth Amendment provisions governing Senate terms are not, in fact, constitutional. They neither embody an important principle of justice nor provide a focal point.

Conversely, I believe that the 1964 Civil Rights Act prohibiting racial discrimination in places of public accommodation⁴⁴ and 28 U.S.C. § 1, which sets the

⁴² U.S. CONST., ART I, § 3, CL. 1 provides “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years.” U.S. CONST, AMEND. XVII provides “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years.” To be sure, U.S. CONST. ARTICLE I, § 3, CL.2 contains an exception to this general rule for the first group of Senators, who were to be divided into three groups to serve two, four, and six years respectively. But the framers made no exception for Senators chosen after the first election. The presence of this one textual exception underlines the absence of an additional exception for newly added states.

⁴³ For summaries, see Classification of Senators, in GEORGE P. FURBER, PRECEDENTS RELATING TO THE PRIVILEGES OF THE SENATE OF THE UNITED STATES, S. DOC. NO. 52-68 at 191-203 (2D SESS. 1993); HENRY H. GILFRY, PROCEEDINGS OF THE SENATE RELATING TO THE CLASSIFICATION OF UNITED STATES SENATORS, S. DOC. NO. 62-334 (2D SESS. 1912); FLOYD M. RIDDICK, THE CLASSIFICATION OF UNITED STATES SENATORS, S. DOC. NO. 89-103 (2D SESS. 1966).

So far as I can determine, this procedure has been questioned only once. During the debate about selection of Senators from the new state of Alaska, Senator Butler complained that the “Constitution of the United States provides . . . that the Senate . . . shall be composed of Senators chosen for 6 years. Any attempt to elect a Senator for what is called a short term is clearly in direct violation of the Constitution.” 104 CONG. REC. 12317 (1958) (statement of Sen. Butler). But Butler’s primary concern seems to have been that Alaska, rather than the U.S. Senate, was attempting to determine the terms of Senators. See *id.* In any event, Senator Eastland quickly responded that the “rule [of classification] has been applied as long as there has been a United States,” *id.* at 12319 (statement of Sen. Eastland), and the Senate proceeded to allocate Senate terms to Alaska’s Senators in the traditional manner. See RIDDICK, *supra*, at 30.

⁴⁴ 42 U.S.C. § 2000a.

number of Supreme Court Justices at nine,⁴⁵ are constitutional rules, even though neither provision is contained in the written constitution. As a practical matter, both provisions are deeply entrenched,⁴⁶ and the former reflects a fundamental principle of justice, while the latter serves the important role of avoiding argument about the size of the Court every time a vacancy arises.⁴⁷

Of course, not everyone agrees that the specification of the Senate term in Article I and the Seventeenth Amendment is a nonconstitutional rule or that the 1964 Civil Rights Act and the statutory provisions about the size of the Supreme Court amount to constitutional law. These examples illustrate the fact that the content of a constitution at any given moment is contestable.

One might suppose that formal methods of constitutional amendment, like those contained in Article V of the American constitution, negate both these points. But Article V, itself is a constitutional rule only if it embodies fundamental principles of justice or if it provides a focal point. It is far from clear that the provision satisfies either requirement. Entrenchment of Article V may be inconsistent with fundamental justice because it obstructs the evolution of legal principles.⁴⁸ Moreover, we know that Article

⁴⁵ 28 U.S.C. § 1 provides “The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”

⁴⁶ Although there might be argument about the precise scope of the antidiscrimination provision, its core requirements are at least as entrenched as many provisions in the written constitution. At earlier points in our history, the size of the Supreme Court was subject to change. The Court initially consisted of six Justices. A seventh Justice was added in 1807, and two more Justices were added in 1837. In 1863, a tenth Justice was added, but in 1866, the size was reduced to six. In 1869, the size was increased again to nine, where it has remained. See GEOFFREY STONE, LOUIS MICHAEL SEIDMAN, CASS SUNSTEIN, MARK TUSHNET, & PAMELA KARLAN, *CONSTITUTIONAL LAW* lxxx-xc & nn * & ** (6th ed. 2009). Since the defeat of Franklin Roosevelt’s Court-packing plan, however, the Court’s size has become firmly entrenched.

⁴⁷ I do not mean to claim that the Supreme Court would or should necessarily invalidate a repeal of either provision. The upheaval in political conditions that would produce such repeals is of the sort that might be treated as amending the constitution.

⁴⁸ See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 160 (2005).

V is not a focal point – or at least not one that is required -- because, as we have already seen, measures that meet our definition of constitutional law have been created outside of the Article V process without doing serious damage to the polity.

Even if everyone agreed that a given provision is entrenched and that it embodies either a fundamental principle of justice or a focal point, people might continue to disagree about its meaning. The problem is most apparent when a constitutional text or practice is open textured like the American constitution’s guarantee to the states of a “republican form of government”⁴⁹ or the Supreme Court’s nontextual insistence on what it has called “Our Federalism.”⁵⁰ In the right social circumstances, though, even relatively narrow and clear text can become ambiguous. For example, Article I pretty clearly provides that members of the House of Representatives shall be chosen “by the People of the several States,”⁵¹ but well known constitutional scholars,⁵² majorities of both Houses of Congress,⁵³ and the President of the United States⁵⁴ have all concluded that one member can be chosen by the people of the District of Columbia, which is not a state.

One might of course claim that none of these provisions is “really” ambiguous – that if only all political actors committed themselves to be bound by the original public meaning of the words in question, there would be widespread agreement about meaning. But even if this claim is true (and I doubt that it is), from the standpoint of social

⁴⁹ U.S. CONST. ART. IV, § 4.

⁵⁰ See *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

⁵¹ U.S. CONST, ART. I, § 2, CL. 1.

⁵² See, e.g., *D.C. House Voting Rights Act of 2007; Hearing before the House Comm. on the Judiciary*, 110th Cong, Mar. 14, 2007 (statement of Professor Viet D. Dinh, Geo. U. L. Center) (CIS-No.: 2007-H521-16) (asserting that “Congress has ample constitutional authority to enact the District of Columbia House Voting Rights Act of 2007).

⁵³ See Jim Abrams, *Senate Agrees to Weigh D.C. Voting Rights Bill*, S.F. CHRON., Feb. 25, 2009, at A-6 (noting that the House had passed the legislation and that 57 members of the Senate voted for it).

⁵⁴ See *id.* (noting that President Obama supported the legislation).

coordination, it is irrelevant. When the concern is with useful focal points, it hardly matters whether people are “right” or “wrong.” What matters is whether they in fact agree about constitutional meaning, and it is simply a fact that people regularly disagree.

It follows, I think, that constitutionalism can never fully succeed in its ambition to legitimate ordinary rules. Because constitutionalism is a matter of degree, and because the content of constitutional law is itself contested, the legitimacy of the rules produced by a constitution is bound to be partial and contested as well. The same point made differently became the slogan of the Critical Legal Studies movement years ago: Law – even constitutional law -- is politics.

I believe that this partial failure of constitutionalism should be celebrated rather than mourned. Perhaps paradoxically, constitutionalism’s inability to fully shut down contestation provides a reason why disaffected groups might commit themselves to a political community.⁵⁵ It must nonetheless be conceded that constitutional politics has special dangers. It is a struggle not just about what is to be done, but also about the fundamental rules of legitimacy. For this reason, many people have thought that there is a special risk that constitutional politics will spin out of control and lead to violence and social disintegration.⁵⁶ We need only look to the struggles produced by the effort to entrench legitimation rules in Israel/Palestine, Iraq, and Northern Ireland among many other places to see that this is not a small risk.

⁵⁵ I have made this argument in much more detail in LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001).

⁵⁶ This concern has a long pedigree. See *FEDERALIST* NO. 49 AT 282 (CLINTON ROSSITER, ED. 1999) (James Madison) (arguing that “[t]he danger of disturbing the public tranquillity by interesting too strongly the public passions, is a . . . serious objection against a frequent reference of constitutional questions to the decision of the whole society”). For a modern restatement, see *CITIZENS FOR THE CONSTITUTION, “GREAT AND EXTRAORDINARY OCCASIONS,”: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE* 3 (1999).

2. *Judicial Review.* Can constitutional politics be constrained so as to avoid the risk of delegitimation? Many people have thought that this should be the ambition of judicial review.⁵⁷ Here again, though, we need to define our terms before determining whether it can achieve this ambition.

The kind of judicial review that I address here might be defined as the power of relatively independent government officials to invalidate acts performed by other government officials based upon provisions in a constitution. This definition makes it immediately apparent that judicial review is not the same thing as constitutionalism. Judicial review is one method by which constitutionalism might be enforced, but it is not constitutionalism itself.

One might have supposed that this point was obvious but for the fact that serious commentators regularly confuse the two concepts. For example, some American commentators refer to the rules contained in the constitution and the rules contained in Supreme Court decisions as if they were the same thing.⁵⁸ To be sure, they might be the same thing if judges correctly interpret the constitution. Even if they fail to do so, they might be the same thing if the constitution itself provides for judicial supremacy with respect to its interpretation. I will discuss this possibility at greater length below. But for our purposes, the important points are that judges sometimes make mistakes and that the

⁵⁷ See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1998) (arguing that judicial review is necessary for settlement and stability). But see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability* 83 VA. L. REV. 83 (1998) (arguing that “[f]or the Constitution to truly operate as a stabilizing force, it must be relevant to the lives of democratic government and the American people” and that “[j]udicial exclusivity cannot accomplish this task”).

⁵⁸ For a notorious statement along these lines, see THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 144 (D. DANIELSKY & J. TUCHIN EDS. 1973) (“We are under a Constitution, but the Constitution is what the judges say it is”). See also Letter from Leo Pfeffer, NY TIMES, P. A22, FEB. 16, 1978, quoted in Sanford Levinson, *The Constitution in American Civil Religion*, 1979 S. CT. REV. 123, 137-38 (equating constitutional obligation with the obligation to obey Supreme Court decisions interpreting the Constitution). Cf. *Cooper v. Aaron*, 358 U.S. 1 (1958) (asserting that Supreme Court decisions are “the supreme law of the land”).

judicial supremacy thesis is controversial. Unless judges were perfect, or unless the case for judicial supremacy is made out, it reflects no more than confusion to equate supreme court decisions with constitutional requirements.⁵⁹

The often repeated claim that judicial review is “countermajoritarian” rests on a similar confusion.⁶⁰ Because constitutional rules must be moderately entrenched, *constitutionalism* is moderately countermajoritarian, at least if it exists within a system where nonconstitutional rules are subject to easy democratic revision.

Importantly, though, the countermajoritarian thrust of constitutionalism would exist regardless of whether it was enforced by judicial review. If constitutional rules were not enforced by judges, they would have to be enforced in some other fashion and, so, would be equally countermajoritarian. Writers who claim that judicial review is countermajoritarian are comparing judicial review not to another system of enforcement, but to a system where constitutional rules are unenforced. But under such a system, the rules would not be entrenched and, so, would not be constitutional.

Just as the absence of judicial review does not preclude constitutional entrenchment, so too the presence of judicial review does not guarantee such entrenchment. It is easy to imagine a relative independent body with the power to countermand the orders of other government officials that made rules easier, rather than harder, to change. Indeed, the contemporary United States Supreme Court arguably is such a body. As already noted, the formal method for amendment provided for in Article V of the American constitution is extraordinarily cumbersome. On many occasions,

⁵⁹ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 211, 214-15 (1977) (asserting that “[w]e cannot assume. . . that the Constitution is always what the Supreme Court says it is”).

⁶⁰ For the source of the phrase, as well as the confusion, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1986).

judicial review has permitted change that could never have been accomplished through use of the formal process.⁶¹

This example makes clear that not only is judicial review not the same thing as constitutionalism; there is a sense in which the two are at war. Judicial review entails judicial power to countermand decisions by other government agents. But those other agents may themselves be acting pursuant to the constitution. Judges who have the power to countermand their actions may be enforcing constitutional commands, but they may also be flouting them.

What should we make of the gap between constitutionalism on the one hand and judicial review on the other? If, as I have suggested above, constitutionalism itself is a mixed blessing, then perhaps the gap should be celebrated. Entrenched conditions of obedience produce permanent political losers who, according to their own beliefs about substantive justice, have no reason to affiliate with a political community that has permanently ruled against them. To the extent that judicial review undermines those conditions, it might open up a political system in desirable ways.⁶² We cannot evaluate this potential, however, unless we first determine whether we are aiming for political or substantive justice.

B. Political or Substantive Justice?

Arguments about constitutionalism and judicial review are often confused by a tendency to conflate substantive with political justice. By substantive justice, I mean substantive principles from outside of constitutional law that define the category of just

⁶¹ For a detailed elaboration of this point with many examples, see David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

⁶² For a book-length elaboration of this point, see LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001).

outcomes. By political justice I mean a set of fair procedural principles for resolving disputes that people with different substantive conceptions should accept even when the outcomes so produced violate norms of substantive justice.⁶³

These two categories correspond to the two functions that constitutionalism serves – the entrenchment of fundamental principles of justice on the one hand and the entrenchment of focal points and procedures that avoid needless conflict on the other.⁶⁴ They also correspond to the two great goals specified by the framers of the US Constitution – to “promote the general Welfare, and secure the Blessings of Liberty”⁶⁵ – the protection of substantive justice – and to “insure domestic Tranquility”⁶⁶ – the protection of political justice.

Difficulties emerge because many people think that both political and substantive justice are desirable, but they are at war with each other, the content of each is appropriately contested, and it is easy to confuse the two.

1. *Substantive Justice.* At least two problems arise with respect to substantive justice. First, recall that for a rule to be a constitutional one, it must provide some reason, apart from the mere existence of the rule itself, why ordinary rules enacted in accordance with the constitutional rule should be obeyed. In the case of constitutional rules that embody principles of substantive justice, the reason for obedience is provided

⁶³ Although this sharp distinction is useful for the analysis that follows, it does elide an important ambiguity. Many versions of substantive justice build in a procedural component. For example, John Rawls derives his principles of (substantive) justice by utilizing the (procedural) device of imagining us behind a veil of ignorance. See JOHN RAWLS, A THEORY OF JUSTICE 15-18 (1999).

⁶⁴ This framework is complicated somewhat by the fact that sometimes procedures are justified because they are thought to encourage substantively just results. See P xx, *supra*. These procedural provisions are nonetheless “substantive” as I use the term here because their validity depends on acceptance of a substantive principle of justice. In contrast, procedures embodying political justice can be embraced by people who disagree about substantive principles.

⁶⁵ U.S. CONST. PREAMBLE.

⁶⁶ *Id.*

by the normative force of the principle of substantive justice. But this leaves unclear what work is done by the constitutional rule, as opposed to the principle of substantive justice that it embodies. After all, even if the constitutional rule did not exist, people who accepted the substantive requirement of justice would still be obligated to follow its dictates. Put differently, constitutional rules supported by substantive justice are not authoritative in the Razian sense. They fail to “pre-empt those reasons against the conduct they require that the authority was meant to take into account in deciding to issue its directives.”⁶⁷

If constitutional rules lack preemptive authority, then different people will reach different conclusions about whether to follow them, and this brings us to our second problem. Everyone – or nearly everyone -- does agree on *some* principles of substantive justice. There are few dissenters from the proposition that the law should protect human dignity or that wholly gratuitous pain is an evil. When the principles are stated at this level of abstraction, however, they fail to resolve real disputes. Unfortunately, when they are stated at a lower level of abstraction, they no longer command universal agreement.

When there is disagreement about substantive justice, its defenders necessarily support a particular and controversial version of justice rather than justice itself. But the constitutional rule then no longer provides a reason, apart from the rule itself, for why people who disagree with the substantive principle it embodies should follow subrules enacted in accordance with it.

Some defenders of constitutionalism respond to this problem by insisting that constitutions be treated as a whole on a take-it-or-leave-it basis. On this view, disagreement about substantive justice does not preclude an “overlapping consensus”

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JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 140 (2009).

favoring the present constitution. To be sure, everyone can point to certain constitutional provisions that they dislike, but, the argument goes, everyone – or almost everyone – can also agree that the constitution taken as a whole is better on substantive justice grounds than the likely alternative, especially when we take into account the risks and transaction costs required to put the likely alternative in place. If we begin tinkering with particular constitutional provisions we do not like, the entire deal may come unraveled.⁶⁸

At best, this argument only partially resolves the problem of substantive disagreement. It provides a reason to obey for people who think that a particular constitution, as a whole, produces more substantive justice than its likely alternative. It provides no such reason for people with other substantive conceptions that would better be advanced if we started over.

Moreover, even with respect to the former group, the argument rests on a questionable empirical premise. It is not always true that people must take the constitution as a whole. Sometimes it will be possible to disregard or change one element of a constitution while leaving intact other elements.⁶⁹ To take a particularly notorious example, many people believe that the Supreme Court egregiously disregarded the

⁶⁸ For example, this point is central to Randy Barnett's argument for originalism. Barnett writes that

[T]he act of putting written constraints on lawmakers had – and still has – enormous value apart from the wisdom of what a constitution says. Constitutional scholars neglect this value when they advocate methods of interpretation whose purpose is to improve upon the content of a written constitution, thereby undermining the function of its writtenness. How can a meaning be preserved or “locked in” and governors checked and restrained if the written words mean only what legislators or judges want them to mean today?

RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 104-05 (2004).

⁶⁹ David Strauss has powerfully elaborated on this point. As a descriptive matter, he points out that in American constitutional jurisprudence, courts often depart from constitutional text when the stakes are high, while respecting text when the stakes are lower but it is important to settle the matter. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 916 (1996).

constitution when it handed the presidency to George W. Bush in *Bush v. Gore*.⁷⁰ But this case of constitutional disobedience did not cause the entire bargain to unravel. Law and life went on. Put bluntly, the Court got away with it. Whether it is possible to get away with it in other circumstances will, of course, depend upon what the circumstances are.

2. *Political Justice*. If these arguments are correct, then constitutional law cannot both be authoritative and rest on substantive justice. Perhaps, then, constitutions rest on political justice. Certainly, much of contemporary constitutional theory assumes that the political justice is the central point of the endeavor. Advocates of this view agree with Justice Holmes when, in his famous dissent in *Lochner v. New York*, he wrote that a constitution “is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”⁷¹

My own opinion, concededly somewhat eccentric, is that the case for the acontextual embrace of political justice is weaker than commonly supposed. If we lived in a world where those in power shared my substantive view of justice, and if we could be relatively sure that those in power would remain in power, then I see no reason why a constitution ought not entrench my substantive principles. As Justice Holmes also wrote “If you have no doubt of your premises and your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition.”⁷² Of course, Holmes was right to warn that one *ought* to have doubt – that “time has upset

⁷⁰ *Bush v. Gore*, 531 U.S. 98 (2000).

⁷¹ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

⁷² *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

many fighting faiths.”⁷³ Still, with all the doubt, modesty and reflection that one can muster, a person in power must ultimately act, and how else should one act but upon one’s conceptions of substantive justice as one best understands them?

As defenders of political justice often remind us, such action may entail a fair amount of coercion. But opposition to coercion is itself, a controversial principle of substantive justice. To the extent that one shares such opposition, an anticoercion principle is already built into the substantive conception. To the extent that it is not, then, from the standpoint of substantive justice, the coercion is unproblematic.

There might nonetheless be circumstances where, even on my eccentric view, one should favor a political conception of justice. First, perhaps I and allies who share my substantive conception of justice are not currently in power. In a world where my opponents are in control, it makes sense to support procedures that provide a fair chance for my gaining control in the future. Second, perhaps my substantive conception is insufficiently entrenched, and I fear that I and my allies will lose power. It would then be in my interests to entrench a system that would hold a fair prospect of my regaining power if I should lose it.⁷⁴ Finally, even if my substantive conception does not include an anticoercion principle, I might have prudential grounds for wanting to reduce the costs that coercion imposes. If principles of political justice caused losers to accept their losses without invoking force, one might want to sacrifice something on the substantive side to achieve this end.

⁷³ Id. at 630.

⁷⁴ Cf. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 159 (2002) (economic and political elites in US and Germany may be compelled to accept judicial protection of rights “in order to get the judicial review needed to make a division of powers system work.”); J. MARK RAMSEYER & ERIC B. MASMUSEN, MEASURING JUDICIAL INDEPENDENCE 141 (2003) (arguing that politicians support judicial independence because of shifts in judicial power) [check]; Matthew C. Stephenson, “*When the Devil Turns . . . “: The Political Foundations of Independent Judicial Review*, 32 J. LEGALSTUD. 59, 84-85 (2003) (judicial review serves “insurance function for competitors”). [check]

For these reasons – and, I must add, because many people find political justice inherently appealing -- both constitutionalism and judicial review are often justified by appeals to political justice. The claim is often made that irrespective of one's views on, say, redistribution of income or protection of property rights, one is morally obligated to obey provisions of the constitution and judicial decisions interpreting those provisions.

A problem arises, though, because different principles of political justice are in play. People can agree on the need for a focal point, but not agree on the focal point itself. For example, as we have already seen, some people think that the focal point is the constitution (the content of which is, itself, controversial), while others think that it is the decisions of judges, even when those decisions depart from the constitution as properly understood, while still others think that legislators or the executive should have the last word. If there is widespread disagreement about the correct political principle, then political justice will not serve its purpose of settling substantive disagreement.

The problems go deeper. Once the fact of choice among political principles is recognized, then rightly or wrongly, advocates will be tempted to use principles of substantive justice to make the choice. There are many examples, but three will suffice. Akhil Amar has defended respect for constitutional text and attacked judicial elaboration on the text on the ground that the text better protects individual rights than the Court's nontextual decisions.⁷⁵ Conversely, Richard Fallon has defended judicial review on the theory that it is inherently rights protecting.⁷⁶ Finally, in his famous opinion in *United*

⁷⁵ See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000) ("What the American People have said and done in the Constitution is often more edifying, inspiring, and sensible than what the Justices have said and done in the case law.")

⁷⁶ See Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1735 (2008) ("the most persuasive case [for judicial review] maintains that [courts and legislatures] should be enlisted in the cause of rights protection because it is morally more troublesome for fundamental rights to be underenforced than overenforced")

States v. Curtiss-Wright Corporation, Justice George Sutherland argued that the executive decisions should be final with regard to foreign affairs because executive power best advanced the controversial version of American foreign policy that he favored.⁷⁷

It is hard to know what to make of these arguments. Perhaps Amar, Fallon, and Sutherland imagine that everyone agrees with their substantive conceptions of justice. But for reasons explained above, if everyone agrees, then constitutional law is doing no work; people will then simply obey the substantive principle they agreed with.

Moreover, in the real world, everyone does not agree. Perhaps, then, Amar, Fallon, and Sutherland are addressing their arguments to only that portion of their audience that shares their conception of substantive justice. But if so, then they are giving up on the goal of political justice. In other words, then their constitution is no longer authoritative because they are conceding that people are obliged to obey the constitutional principles that they favor only to the extent that their audience shares their substantive principles.

A third possibility is that people can be fooled into believing that a substantive choice of principle is purely political and that they are therefore obliged to swallow their substantive objections. The Supreme Court has regularly attempted this gambit. Half century ago, the Court insisted that people who thought *Brown v. Board of Education* was unconstitutional were nonetheless obliged to obey because Supreme Court decisions were a necessary focal point.⁷⁸ In our own time, a plurality of the Court has

⁷⁷ United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (“[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.”)

⁷⁸ See *Cooper v. Aaron*, 358 U.S. 1, 24 (1958) (“Our kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the

insisted that people who disagree about abortion are obligated to unilaterally disarm in the face of a Supreme Court decree.⁷⁹ In both cases, the Court claimed that despite substantive disagreement, everyone was under a political obligation to obey its judgments.

The extent to which the confounding of political with substantive justice actually worked in these particular cases is an open question. It is not clear that many people gave up their opposition to desegregation or to an abortion right just because the Supreme Court told them that they were obligated to do so. Moreover, if the trickery does work, its success raises its own questions of substantive justice. As I have already indicated, there is something to be said for achieving substantively just aims with as little coercion as possible. But, of course, there is also something to be said for honesty and respect for the autonomy of others. At least this much should be clear, though: If trickery of this sort is ever appropriate, it can be justified only when it is in the service of the correct substantive principles. And whether it is or not will vary depending upon the context.

C. What Kind of Judicial Review?

A third sort of confusion relates to the kind of judicial review one is defending. People often tacitly assume that judicial review is a unitary practice, but, of course, it is not. This fact, in turn, leads to an overstatement of the degree of consensus in favor of judicial review. Defenders of the practice may, in fact, be defending several different and incompatible practices.

duty of ascertaining and declaring what is ‘the supreme Law of the Land.’”) (quoting U.S. CONST. ART. VI, § 2).

⁷⁹ Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 67 (1992) (“to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”) (plurality opinion).

1. *Institutional design.* Judicial power can be exercised in a wide variety of settings which, in turn, have important implications for what judges actually do.

For example, the degree of judicial independence can vary along both the dimension of tenure and the dimension of finality. With regard to tenure, the possibilities range from judges appointed to life tenure by relatively nonpolitical processes at one extreme⁸⁰ to judges elected to short terms of office at the other.⁸¹ In between, are arrangements where judges are appointed to life or long terms but by political officials,⁸² where they are elected in “nonpartisan” or uncontested elections,⁸³ where they are precluded from reappointment or running for reelection,⁸⁴ where they are subject to recall

⁸⁰ Very few jurisdictions provide life appointment coupled with an appointment process that purports to be nonpolitical. The only example in the United States appears to be Rhode Island, where the governor appoints state supreme court justices for life from a list selected by a judicial nominating commission. See JUDICIARY OF RHODE ISLAND, <http://www.courts.ri.gov/supreme/defaultsupreme.htm> (site visited 7/27/10).

⁸¹ For example, Georgia judges are elected for only four year terms. See http://www.georgiacourts.gov/index.php?option=com_content&view=article&id=170%3Astate-court&catid=43%3Acourts&Itemid=28 (site visited 7/27/10). See also Center for Democratic Culture, *Judicial Selection and Evaluation*, 4 NEV. L.J. 61, 67 (2003) (indicating that some states have four year terms).

⁸² The United States is virtually unique in providing life tenure for its federal judges, see Steven G. Calabresi & James Lindgren, *Term Limits for The Supreme Court: Life Tenure Reconsidered*, 29 Harv. J. L. & Pub. Pol’y 769, 819 (“The American system of life tenure for Supreme Court Justices has been rejected by all other major democratic nations in setting up their highest constitutional courts”), but the American process has become increasingly politicized. See, e.g., STEVEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* ix (1994) (complaining that “[n]obody is interested in playing by a fair set of rules that supersede the cause of the moment; still less do many people seem to care how much right and left have come to resemble each other in the gleeful and reckless distortions that characterize the efforts to defeat challenged nominations.”)

⁸³ Twenty states now have nonpartisan judicial elections. See Roy Schotland, *2002 Judicial Elections and State Court Reforms*, in *THE BOOK OF THE STATES 2003*, 232, 235 (Council of State Governments, 2003). For a discussion of the forces pushing against the tradition of nonpartisanship, see Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILL. L. REV. 1397 (2003).

⁸⁴ In Massachusetts and New Jersey, for example, judges serve until age 70, but then cannot be reappointed or reelected. See http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_1196092850316.pdf (site visited 7/27/10).

or retention reviews either by the electorate or by specialized commissions,⁸⁵ and where they are subject to relatively easy removal through processes like impeachment.⁸⁶

With regard to finality, at one extreme, decisions might be all but untouchable by other actors. The court itself might have a rigid rule of stare decisis that would prevent future judges from reversing prior rulings,⁸⁷ and political officials might be precluded from changing decisions except by extraordinary means. At the other extreme, the judges themselves might frequently overrule prior decisions,⁸⁸ and those decisions might be no more than advisory with respect to the political branches.⁸⁹ Between these two poles, one can imagine and find in the real world systems with moderate entrenchment of judicial decisions, perhaps through a more flexible rule of stare decisis or reversal by ordinary majorities or moderate supermajorities of legislative chambers.⁹⁰

⁸⁵ For a list of jurisdictions using retention elections, see *id.* For a description of the District of Columbia Judicial Disabilities and Tenure Commission, which evaluates judges for reappointment at the conclusion of their term, see http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state= (site visited 7/27/10). For the procedures by which California judges can be recalled from office, see CAL. CONST. § 14(b).

⁸⁶ For a description of state judicial impeachment procedures, see http://www.ajs.org/ethics/eth_impeachment.asp (site visited 7/27/10).

⁸⁷ See *London Street Tramways Co. Ltd. v. London County Council* [1898] AC 375, 379 (H.L.) (declaring that once the British House of Lords resolves a point of law, it is “conclusive upon this House afterwards”).

⁸⁸ At least in theory, stare decisis does not exist in civil law systems. See Mary Ann Glendon, *Comparative Legal Traditions* 130-31 (2d ed. 1999). [check]

⁸⁹ For example, in the United Kingdom, courts are empowered to issue declarations of incompatibility with respect to statutes that are inconsistent with the European Convention of Human Rights. See Human Rights Act 1998 c. 42 § 4. However, such a declaration “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given,” *id.* at § 6(a) and “is not binding on the parties to the proceedings in which it is made.” *Id.* at § 6(b). For a description of how the declarations work in practice, see MARK V. TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 27-30 (2008).

⁹⁰ For example, Canada’s Charter of Rights and Freedoms permits Parliament to declare that an act will continue in force notwithstanding its violation of the Charter’s guarantee of rights and fundamental freedoms. See Canadian Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, being Schedule B to the Canada Act, 1982, c 11 § 33(1). “Notwithstanding” declarations cease to have effect after five years unless the declaration specifies an earlier date, see *id.*, at § 33(3), but may be renewed for additional five year periods. See *id.* at § 33(4).

The possibilities of different institutional designs along other dimensions are endless. Courts can vary in size, in the type of judges who populate them, in whether they sit “en banc” or in panels, and in the size of the majorities necessary to invalidate legislation or executive action.

Importantly, these formal differences in structure do not tell the whole story. Regardless of formal structure, courts will operate in different ways within different political and cultural contexts. One might not guess from examining formal structure that the Japanese supreme court virtually never invalidates statutes on constitutional grounds⁹¹ or that even though the United Kingdom formally insists on Parliamentary supremacy, ultra vires review sometimes serves as something close to the functional equivalent of constitutional adjudication.⁹² In order to evaluate judicial review, one needs to know not just its formal structure, but also how it actually interacts with the system within which it is embedded.

2. *Substantive Role.* Judicial systems also vary widely in the ways in which judges envision their responsibilities. At its simplest level, judicial review protects an original bargain from subsequent defection. This is the sort of judicial review that Chief Justice John Marshall defended in *Marbury v. Madison*.⁹³ The basic idea is that contending forces within a society have entered a contract to behave in a certain way, that

⁹¹ Since its founding in 1947, the Japanese Supreme Court has struck down only eight statutes on constitutional grounds. Virtually all of these statutes were of trivial importance. The Court did reject a legislative apportionment scheme on constitutional grounds, but refused to order a remedy. See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1547 (2009).

⁹² See, e.g., Laura K. Donohue, *The Perilous Dialogue*, 97 CAL. L. REV. 357, 386 (2009).

⁹³ *Marbury v. Madison*, 5 U.S. (1Cranch) 137, 176 (1803) (“That the people have an original right to establish, for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected.”)

the contract (for reasons that must be external to the contract itself) is legitimate, and that therefore the terms must be enforced.

Even with regard to this simple model, things are bound to be more complicated. For example, we need to get straight whether we are bound by the text (as understood by whom?) or by the intent of the framers (which ones?). However we decide this question, gaps and ambiguities are sure to emerge, especially as the document ages. Chief Justice Marshall pretended that the result in *Marbury* could be read directly off the constitutional text, but even in this case, where the language was more or less straightforward and was written within Marshall's lifetime, the outcome was far from clear.⁹⁴ How are text and intent to be determined when the language is deeply ambiguous or the social and technological substrate for a constitutional opinion has radically changed?

Consider, for example, the constitutional guarantee of "freedom of speech." Does it protect internet chat rooms, television broadcasts, video games, or the use of sex toys? The "public meaning" of "freedom of speech" at the time of the framing included none of these activities, but neither did it include publications that are written on computer keyboards, or duplicated by photocopying machines, which surely are covered. The framers had no intent with regard to these activities because they did not know that they existed. We could try to imagine what their intent would be, but this activity is, essentially, creative rather than interpretive.

It seems inevitable that these gaps must be filled with techniques that lie outside the original bargain, and, not surprisingly, advocates of judicial review that enforces the bargain disagree about how the gaps should be filled. For example, some people rely on

⁹⁴ See, e.g., William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1, 6-10, 14-16.

a background assumption of democracy to claim that, in the absence of clear text, outcomes that are democratic (by whose definition?) should be respected.⁹⁵ Others, operating from different starting premises, would begin with a background assumption of personal liberty or of natural rights (again, defined by whom?).⁹⁶ Still others claim that we should understand text in the way that makes it conform to the best moral theory that the meaning will bear.⁹⁷

All of this disagreement is within the category of people who think that judges should enforce the original bargain. But that category does not exhaust the universe of people who favor judicial review. Other defenders of judicial power are perhaps prepared to defer to varying degrees to original language and intention, but also think that judges should do something else. Advocates of judicial review argue, variously, that judges should enforce contemporary moral assessments against outliers,⁹⁸ that they should act pragmatically to advance the common good,⁹⁹ that they should make considered judgments about deep moral principles,¹⁰⁰ that they should protect vulnerable

⁹⁵ See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* 246 (1991) (“when the Court, without warrant in the Constitution, strikes down a democratically produced statute, that act substitutes the will of a majority of nine lawyers for the will of the people.”)

⁹⁶ See, e.g., RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 5 (2004) (arguing that we can restore the “lost constitution” by presuming “that any restriction on the rightful exercise of liberty is unconstitutional unless and until the government convinces a hierarchy of judges that such restrictions are both necessary and proper”)

⁹⁷ See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 225 (1986) (“propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”)

⁹⁸ See, e.g., Harry H. Wellington, *History and Morals in Constitutional Adjudication*, 97 HARV. L. REV. 326, 334-35 (1983) (describing “conventional moral obligations and aspirations” of community as source for constitutional law).

⁹⁹ See, e.g., RICHARD POSNER, *LAW, PRAGMATICS, AND DEMOCRACY* XX (2003) [CHECK]

¹⁰⁰ See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS* 24-26 (1986) (arguing that judges “[sort] out the enduring values of a society.”)

minorities,¹⁰¹ or that they should use good judgment and common law methods to develop law incrementally.¹⁰²

Finally, and perhaps most significantly, there is disagreement about the attitude with which judges should and do go about their work. On one approach, judges are supposed to shut down explosive and destabilizing argument. This was the hope that Chief Justice Roger Taney entertained when he wrote the infamous Dred Scott decision,¹⁰³ which was designed to rescue the Democratic Party from its agonizing disagreement over slavery.¹⁰⁴ It was the ambition as well of the modern Supreme Court when it wrote that opponents of the abortion right were obligated to give up the fight after the Court had resolved the question.¹⁰⁵

On another view, judicial review is appropriate precisely because judges encourage contestation. On this view judges should promote democratic dialogue.¹⁰⁶ Settlements that implicate substantive justice produce losers who are not likely to quickly give up their grievances. Judges might therefore exploit rather than minimize the gap between constitutionalism and judicial review so as to legitimate disagreement and ongoing argument.¹⁰⁷

It goes without saying that each of the approaches outlined here has deep problems. My purpose is not to go over this well-trod ground in any detail, but simply to

¹⁰¹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 149-157(2002) (discussing judicial review as method for facilitating representation of minorities).

¹⁰² See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U.CHI. L. REV. 877 (1996).

¹⁰³ 60 U.S. 393 (1859).

¹⁰⁴ See DON EDWARD FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* 101-102 (1981) (describing how the peculiar needs of the Democratic Party pushed toward judicial resolution of the slavery issue and how the Court responded to this pressure).

¹⁰⁵ See *Planned Parenthood v. Casey*, 505 U.S. 833, 866-67 (1992) (describing Court as “call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”)

¹⁰⁶ See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

¹⁰⁷ See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

point out that before we can talk seriously about the desirability of judicial review, we must agree on what we are talking about. Moreover, what we are talking about is bound to differ depending on the time when and place where we are doing the talking.

II. Context and Judicial Review

As is often the case, once the question is clarified, the answers follow more or less automatically. For that reason, the conclusions I reach in this section may seem anticlimactic: In different contexts, judicial review will have a different relationship with constitutionalism and with substantive and political justice. In different contexts, constitutionalism itself will be a more or less worthy project. And in different contexts, the pursuit of substantive or political justice will be appropriately paramount. Accordingly, an acontextual case for or against judicial review is bound to fail.

Sorting out all these variables in the many situations where they arise would be a truly daunting task. Here, I provide no more than an outline and a few examples.

A. Substantive Justice

The short answer to whether judicial review advances the cause of substantive justice is that it depends on who the judges are. The longer answer is that the project of judicial review is associated in different times and places with different social movements that may be advancing or retarding the quest for substantive justice. And, of course, whether one thinks that a social movement is doing one or the other will depend on one's conception of substantive justice.

To start with American examples, the canonical statement in support of American judicial review came in the context of a struggle between the newly empowered Republican party and the recently displaced Federalists. As it happened, argument about

the appropriate role for judges played a role in the Republican election victory, but the stakes in the struggle between the two groups extended far beyond judicial review and implicated rival claims about substantive justice.¹⁰⁸

Similarly, other great American struggles over judicial power were directly linked to the fate of particular political and social movements that took contestable substantive justice positions. The Taney Court sought to preserve union and the fractured Democratic Party on terms that southern slaveholders could accept.¹⁰⁹ The battle between President Roosevelt and the “Old Court” was primarily a struggle over the emergence of the administrative state and of government economic regulation and redistribution.¹¹⁰ The Warren Court’s great project was the completion of Reconstruction and the reintegration of the South into the national political culture.¹¹¹

Unsurprisingly, contemporary systems of judicial review throughout the world are also tied to political struggles within the countries where they operate. In Pakistan, the movement for an independent judiciary has been a focal point for struggle against dictatorship.¹¹² In Japan, constitutional review supports and legitimates the ruling

¹⁰⁸ See, e.g., JOHN E. FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800*, at 209 (2004) (arguing that while the phrase “revolution of 1800” was an exaggeration, the shift to Republican government “came with a new tone, a new style, and a new ideology that enabled the nation to move piecemeal from the habits of 1800, laced as they yet were with restrictive customs that had persisted from colonial days, toward egalitarianism and democratization.”)

¹⁰⁹ See, e.g., MARK A GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 30-33 (2006).

¹¹⁰ See, e.g., William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L. J. 165, 176 (2001) (“The New Deal constitutional moment legitimated the powers of the national regulatory and welfare state.”)

¹¹¹ See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 490-494 (2000).

¹¹² See generally Note: *The Pakistani Lawyers’ Movement and the Popular Currency of Judicial Power*, 123 HARV. L. REV. 1705 (2010).

regime.¹¹³ In Egypt, judicial review has been supported by the emerging westernized commercial class.¹¹⁴

If one were considering what position to take regarding judicial power, one would surely want to know something about these sorts of ties between the argument for judicial review on the one hand and broader political and social forces at work in a given society on the other. But as these examples demonstrate, it is very hard to generalize on this subject. Sometimes, judges and their allies stand for progress, sometimes they stand for reaction, and sometimes they stand for something in between. Moreover, even if generalizations were possible, it is far from clear that they are useful. It hardly matters that judicial review *generally* favors a particular substantive conception of justice if in a given context the generalization does not hold.

Suppose, though, that we stipulate that a particular constitutional regime is just. Does it follow that judicial review to enforce the norms of that regime is just as well? Some people have claimed that judicial review is a conceptually necessary adjunct to constitutionalism. This claim, if correct, would mean that the case for judicial review is indeed acontextual, at least if we take constitutionalism as a given. But, for reasons outlined below, the claim is not correct.

The argument for the conceptual necessity of judicial review has roots in *Marbury v. Madison*, and has been developed with great sophistication in our own time by Matthew Adler and Michael Dorf.¹¹⁵ In stripped down form, it goes something like this:

¹¹³ See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1546 (2009) (organization of and structure of Supreme Court of Japan “render it highly unlikely to depart from the wishes of the government for any meaningful period of time.”)

¹¹⁴ See generally, Lama Abu-Odeh, *On Law and the Transition to Market: The Case of Egypt* (unpublished manuscript on file with author).

¹¹⁵ See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1005 (2003). But cf. Matthew D. Adler, *Popular Constitutionalism and the Rule of*

Whenever a court decides a case, it must apply some body of law. This application, in turn, forces a court to determine the existence conditions for law.¹¹⁶ No American court would enforce a “law” passed by the French parliament, much less something that declared itself to be law but that was signed only by, say, Madonna. Judicial officers must therefore have the power to invalidate supposed statutes, and, by extension, executive acts, because the possibility of invalidation is built into the determination whether the existence conditions have been satisfied.

An immediate problem for this claim is that courts regularly disregard some existence conditions for law. For example, the American political question doctrine and the state secrets privilege prevent courts from enforcing some of the constitutional limits on law making power.¹¹⁷ More broadly, doctrines of deference like rational basis review or the assumption of constitutionality lead to underenforcement of existence conditions.¹¹⁸ And, as a practical matter, the bureaucratization of the lower courts and the failure of the Supreme Court to hear more than a handful of cases mean that the presence of existence conditions is often assumed rather than demonstrated.

Adler and Dorf acknowledge this problem, but claim that when the court defers to another entity in determining existence conditions, it must do so only if the other body is

Recognition: Whose Practices Ground U.S. Law, 100 N.W.L. REV. 719 (2006) (arguing that there is no way to determine the legal status of “deep popular constitutionalism” because propositions of U.S. constitutional law are true or false only relative to the practices of a stipulated group).

¹¹⁶ Adler and Dorf distinguish between “existence conditions” and “application conditions.” On their definition, a constitutional provision is an “existence condition” if it states a necessary condition for a proposition to fall within some category of law. It is an “application condition” if the provision limits the legal force of something that is a law. *Id.*, at 1119. They argue that there is nothing especially problematic about judicial nonenforcement of application conditions, but that nonenforcement of existence conditions raises conceptual difficulties. *Id.*, at 1109.

¹¹⁷ See, e.g., *Walter Nixon v. United States*, 506 U.S. 224 (1993) (political question doctrine); *United States v. Reynolds*, 345 U.S. 1 (1953) (state secrets privilege).

¹¹⁸ See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

authentically more expert or if the constitution itself mandates this deference.¹¹⁹ Even if this point is correct, it remains at least conceptually possible that many, or even all, constitutional questions fall into these categories. Perhaps one might still insist that courts either explicitly or implicitly make *some* decision about existence conditions before deciding a case. However truncated or partial the inquiry, a court must make some sort of determination that it is a duly enacted law and not something else that it is enforcing. Even on this view, though, it hardly follows that there is a necessary link between judicial review and constitutionalism.

The argument for such a link rests on the undefended assumption that the judicially enforced existence conditions are themselves constitutional – that is, that they are moderately entrenched and either required by fundamental principles of justice or provide a highly useful focal point. Of course, a court might insist on such conditions, but it might also apply existence conditions that are nonconstitutional, and it might fail to apply existence conditions that are constitutional. A court that followed either of these courses would be at war with constitutionalism rather than a necessary adjunct to it.

Consider, for example, the modern Supreme Court's position on affirmative action. The Court has held that the existence conditions for a law that mandates affirmative action are not satisfied unless the law meets the requirements of strict scrutiny.¹²⁰ If barriers to affirmative action were embedded in constitutional text, and if one thought that constitutional text provides a highly useful focal point, then this holding might enforce constitutionalism. But the constitutional text does not speak to affirmative action, at least in any clear way, and the Justices have not really argued to the contrary.

¹¹⁹ See Adler & Dorf, note 112, *supra*, at 1172-1201.

¹²⁰ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

Nor have they argued that special disfavor of affirmative action measures is a necessary, nontextual rule-of-the-road. Instead, their arguments against affirmative action have been rooted in their notions of substantive justice.¹²¹ There is surely something to these arguments, but there is also much to be said against them, and if one concludes that affirmative action is consistent with substantive justice or even necessitated by it, then the imposition of these existence conditions is anticonstitutional.

This potential for conflict between constitutionalism and judicial review is aggravated by the paradox of judicial independence. On the one hand, independence is built into our working definition of judicial review. Independence is what separates judges from ordinary political actors. Judges who were not independent would *be* such actors and therefore could hardly enforce constitutional norms against them. But on the other hand, it is precisely this independence that permits judges to act in anticonstitutional fashion. There is no guarantee that judges who are immune from discipline and whose decisions are unreviewable will not substitute their own desires for the rules that are either fundamental components of justice or highly useful focal points. Judicial independence might permit judges to enforce the constitution, but it might also free judges from constitutional constraint.

Of course, no judge in the real world is perfectly independent. For example, Article III judges in the United States are considered among the most independent anywhere, but as a formal matter federal judges are subject to discipline by impeachment and their decisions are subject to review by constitutional amendment. As an informal

¹²¹ See, e.g., *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 510 (2006) (Roberts, C.J., concurring in part and dissenting in part) (“It is a sordid business, this divvying us up by race”); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) (“racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”))

matter, political control is much more extensive. Judges must worry about the willingness of others to obey their commands, about the new appointments that might be made in reaction to their decisions, and about congressional and executive retaliation in various forms.¹²² Moreover, many American constitutional disputes are finally resolved by judges who lack Article III protection and who are much more vulnerable to electoral or bureaucratic retaliation.

For these reasons, the supposed conflict between judicial independence and constitutionalism is somewhat overstated.¹²³ But precisely to the extent that judges are not independent, they are subject to political pressure and are thereby disabled from insisting upon constitutional rules that countermand political outcomes.

Perhaps a given system of constitutional law – perhaps the American system of constitutional law – perfectly balances the competing demands of independence and responsibility. Judges under such a system would be constrained enough and in the right way to be constitutionally responsible but independent enough and in the right way to stand up to the political branches. In such a system, judicial review might be well suited to enforce constitutional rules. But there is nothing inherent about judicial review that guarantees this balance. Whether the balance exists will be a matter of context rather than necessity.

For these reasons, it is a mistake to think that constitutionalism necessarily entails judicial review. What, though, if a given constitution provides for judicial review?¹²⁴ In

¹²² See generally, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

¹²³ See *id.*

¹²⁴ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 15 (2d ed. 1986) (arguing that the framers of the American constitution “specifically, if tacitly, expected that the federal courts would assume a power – of whatever exact dimensions – to pass on the constitutionality of actions of the Congress and the President, as well as of the several states.”)

this case, by definition, judicial review cannot possibly be in conflict with enforcement of the constitution. One might therefore suppose that, at least in this instance, an acontextual case for judicial review has been made out. In fact, however, adding constitutional obligation to the analysis really adds nothing at all, at least if the argument I have made in Part I is correct.

Recall that what constitutions consist of in the first place is moderately entrenched rules that either serve the ends of substantive justice or provide a political focal point. Suppose we put to one side for the moment the political case for judicial review, which I take up below. Then, whether or not judicial review was provided for in a constitutional text, the practice would be constitutionally compelled only if it served the ends of substantive justice. But this is just the same thing as asking whether those arguing for judicial power happen to be allied with those arguing for substantive justice. Whether they are or not will depend upon context.

It follows, I think, that the substantive justice case for judicial review will vary along two separate dimensions. First, as we have just seen, the constitutionality of judicial review will depend on whether it advances the cause of justice. In different times and places, the answer to this question will be different. Second, even in the same time and place, different people will have different opinions about what advances the cause of justice. They will therefore also have different opinions about whether judicial review is constitutionally compelled.

B. Political Justice

Many people advocate the pursuit of political justice as a means for resolving these differences of opinion. But instead of simplifying matters, a focus on political justice makes them much more complex.

We are met at the threshold with the problem of when and whether political justice should trump substantive justice. Assuming that political justice prevails, we must then come to grips with the problem of what kind of constitutionalism supports political justice. Only then can we ask the question whether a particular form of judicial review supports that type of constitutionalism.

Suppose that we begin with a core case that simplifies these various dilemmas. Imagine a country that has been ravaged for years by a punishing civil war. Exhausted by the carnage, the contending parties eventually enter into negotiations and produce a compromise, written constitution. From the standpoint of substantive justice, the constitution is not perfect; it is, after all, a compromise. Still, the constitution is not radically unjust and the alternative to it is endless violence. Imagine as well that the constitution establishes an independent judiciary, composed of wise individuals who were neutral during the long struggle and who are charged with enforcing the bargain that ended it.¹²⁵

Under these highly stylized circumstances, a political case for judicial review might be made out. Even here, one needs to know more about context. In some environments, structural protections like guaranteed or proportional representation or supermajority requirements might enforce peace better than judicial oversight. Respect for a widely revered political figure or military force might provide for more stability

¹²⁵ No actual situation precisely mirrors this ideal case, but one might take the process of drafting the South African constitution as a real world model. *See generally* NEGOTIATING JUSTICE: A NEW CONSTITUTION FOR SOUTH AFRICA (MERVYN BENNUN & MALYN D.D. NEWILL, EDS. 1995) [CHECK]

than a written constitution or judges enforcing a written constitution. And, depending on the substantive reasons for the conflict and the chances of one's side ultimately prevailing, continued war might be preferable to peace and stability. Still, it is easy to see how a bargain might benefit both sides and how an independent judiciary might enforce the bargain.

As we move away from this idealized situation, however, the case for political justice, and for judicial review as a method of enforcing political justice, begins to fray. Consider, first, how changes in context can change the force of an argument grounded in political justice. Suppose that over time, the balance of power shifts so that unmediated conflict will no longer produce stalemate. With victory at hand, why should the stronger party settle for mere political justice if it has substantive justice on its side?

One might, of course, claim that the agreement itself has independent moral force. But the shape of the initial bargain reflects the power balance at the time when it was struck. If that balance was, itself, unjust – and so it will seem to a party that had to compromise on principles of substantive justice -- then there can be no reason rooted in justice for adhering to the agreement it produced. Liberated France had no reason to respect agreements imposed upon it by the German Third Reich.

Despite all this, some will no doubt insist on the primacy of a reciprocity norm. If we expect and depend upon the other side to respect the agreement, then don't we have to respect it ourselves? My own view is that we ought to reject this sort of moral equivalence. There is an important difference between the two sides: one side is supported by substantive justice, while the other is not.

Suppose, though, that for the sake of argument we stipulate a norm of reciprocity. The difficulty remains that our side's adherence to the agreement will not guarantee the other side's adherence. The other side will be subject to all the temptations to depart from the bargain that I have already mentioned. How can we know that they will remain faithful to the deal? And if they do not, we will then have not reciprocity of obligation, but unilateral disarmament.

For all these reasons, it is doubtful whether the pursuit of political justice makes sense. Moreover, even within the domain of political justice, problems are likely to develop over time. Suppose for example, that the first set of judges faithfully enforces the initial bargain, but that later generations of judges depart from it.

Notice that these departures are not necessarily unconstitutional, at least as that term is defined above. The departures themselves might be moderately entrenched and provide a highly useful focal point. Indeed, as the initial agreement ages and interests shift, it is entirely possible that it will be insistence on the agreement, rather than departures from it, that are unconstitutional. As we have already seen, old agreements that are disconnected from social reality tend to lose their normative force, and, therefore, their utility in resolving conflict. And even if this were not the case, old agreements will inevitably have more interpretive slack when they are applied to new and unforeseen circumstances. Judges who wisely exercise the freedom provided by interpretive slack are promoting, rather than undermining constitutionalism.¹²⁶

These observations are tied to questions about the kind of judicial review we are talking about. In our initial, highly simplified context where the bargain is new and it is

¹²⁶

Cf. Adam M. Samaha, *Originalism's Expiration Date*, 30 Card. L. Rev. 1295 (2008).

in the interests of all sides to enforce it, a politically neutral and independent judiciary rigidly interpreting a constitutional text might serve as the best means of enforcement. But as the agreement ages and as it becomes less relevant to the goal of political accommodation, judges who are more tied to ongoing political disputes and less loyal to text – who have shorter tenures in office or are subject to more robust political checks -- might be better situated to forge the kinds of compromises that will keep the peace.

The hope is that judges of this sort will use their power to advance the cause of constitutionalism, but it is important to understand that there is no guarantee that they will do so. Departures from, or glossing of, the original agreement may promote stability, but they may also undermine it. As we have already seen, interpretive freedom provides a persistent temptation to substitute a particular conception of substantive justice for political justice. If it is widely perceived that this is what has happened, then a party to the initial bargain with a different conception of substantive justice is bound to feel betrayed. The party will point to the gap between the “constitution” and judicial decisions that are contrary to the constitution. The resulting controversy could leave neither the original agreement nor judicial decisions interpreting it as a useful focal point.

These predictable problems with a conception of judicial review as a means of enforcing an initial agreement point in a different direction. As I have argued above, and at greater length in other work,¹²⁷ they suggest that political justice might best be achieved if judges saw their role as promoting rather than avoiding conflict. Rigid enforcement of another generation’s grand bargain is sure to produce permanent winners

¹²⁷ See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 8-9 (2001).

and losers. From the loser's perspective, the agreement will appear to have deviated sharply from substantive justice. Why, then, are they obligated to follow it?

Losers might be enticed into a continuing conversation, just on their own terms, if courts emphasized the open texture of constitutional law. Losers might then come to see that their loss need not be permanent, that they too can claim ownership of the original agreement and use it for their purposes. At least in the US, where the key building blocks for constitutional doctrine are radically indeterminate, judges have plenty of opportunity to conceptualize their job in this way.

Of course, it does not follow that judges *will* act in this fashion, even in the US, where our legal tradition lends itself to this conception of judicial review. In other legal traditions, where constitutional review is more formal and inflexible, the conception may not even be available.

In circumstances like these, judicial review is likely to defeat political justice, especially if judges insist on having the final word. Advocates of settlement theories of constitutional law have argued for judicial supremacy on the ground that, without it, the gap between the constitution and judicial interpretations of the constitution is bound to destabilize outcomes. But if destabilization is the very thing that we seek, then this argument faces in the other direction. The possibility of multiple and conflicting authoritative voices that leave the outcome unsettled might promote political justice. Of course, such a possibility could also produce disintegration and disaster. As usual, it all depends.

III. Conclusion

It turns out, then, that neither substantive nor political justice provides an acontextual argument for judicial review. Judges sometimes enforce constitutional law, but sometimes they don't, and constitutional law, itself, may or may not be substantively just. There is therefore no inherent or inevitable link between judicial review and substantive justice. Similarly, there is no guarantee that judges will promote the just peace that is at the core of political justice. Their decisions may provide a useful focal point that people with different substantive principles can accept, but judicial decisions can also be disruptive and, from the standpoint of political justice, unfair.

What tools, then, should scholars use to evaluate judicial review? Instead of high theory, they need to think about facts on the ground. Questions about judicial review in the abstract or in general tell us nothing about whether we should favor it in the here and now. Even more particularized questions about how it functions in a given society are overbroad and premature. They are overbroad because the role played by judges within a given culture may change over time. They are premature because one needs to work out the principles of substantive and political justice that one favors before one can talk meaningfully about whether real judges in real places are advancing or retarding those principles.

All of this, in turn, provides some cautionary lessons for the emerging field of comparative constitutional law. A great deal of this work is useful and illuminating. For example, detailed anthropological study of how judicial review functions in a particular culture is worthwhile for its own sake. Unfortunately, however, current standards of academic respectability result in pressures that are strongly counterproductive. In modern academia, an emerging field needs to provide a vocabulary and conceptual

apparatus that supports generalization and model building. Only then can practitioners of “ordinary science” go about the business of applying the model to various particular situations. An emerging field must also must avoid the charge of partiality or special pleading. Only then can it claim the mantel of academic objectivity.

In the case of comparative studies of judicial review, both of these imperatives push in the wrong direction. If my argument above is correct, the payoff from scholarly work that builds abstract models of judging is likely to be exceedingly modest. Nor can we evaluate even particular examples of judicial review in the absence of inevitably controversial conceptions of substantive and political justice that provide a normative metric.

We need to recognize as well that the emergence of comparative constitutional law in general and of acontextual arguments for or against judicial review in particular are themselves embedded in a political and social context. We cannot simply ignore the fact that this emergence came at the very moment when the Soviet Union failed and the United States became a truly hegemonic power. Like the institutions that it describes, the project of comparative constitutional law is contingently connected to social movements that have a particular relation to principles of substantive justice. In at least some cases, comparative constitutional law is part of a broader effort to establish American cultural and political dominance across the globe.¹²⁸

The most sophisticated advocates of comparative constitutional law do not fall into this trap and rarely argue for simple transplantation of American legal institutions.¹²⁹

¹²⁸ On the pressures pushing toward world-wide convergence of constitutional systems, see Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 U. VA. J. INT. L. 985 (2009).

¹²⁹ For an example, see the plea for engagement with transnational materials in VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010).

Instead, they see comparative studies as a source of new ideas and possibilities. On this view, comparative constitutional law has the potential to unfreeze current reality by showing us that there are different ways of organizing a society. Instead of enforcing American hegemony, comparative constitutional law can undermine it by demonstrating how non-US institutions achieve substantive and political justice.¹³⁰ For example, an insistence that American judicial review is the only way that judges can operate reflects inexcusable ignorance. By looking at how others have conceptualized this institution, we can see that our own version of it is not natural and inevitable.

No one should object to this goal in principle. Progress depends upon imagining new possibilities and, sometimes, when our imagination fails us, real alternatives can serve as a useful substitute. Still, there are problems with even this more subtle and defensible version of comparative constitutionalism.

First, we need to think again about political context. The effort to unfreeze American institutions by studying foreign examples comes at a moment of widespread unease about the effects of globalization. The free movement of goods and people has evoked deep fears of invasion by the other and of a washing out of cultural distinctiveness. The current argument over citation to foreign law in American Supreme Court opinions is but one symptom of this unease. In an environment like this, suggesting that Americans should change their system of judicial review because, say, the Germans do things differently can be profoundly counterproductive. As the flap over foreign citations demonstrates, resort to comparative examples elicits a reflexive defense of local ways of doing things rather than a willingness to try something new. Oddly,

¹³⁰ This is the way that Mark Tushnet conceptualizes comparative constitutional law in Mark Tushnet, *The Possibility of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999).

then, an argument drawn on a purely imagined alternative to our practices might be more effective.

Second, imagining new possibilities is useful only if the imagined alternatives really are possible. The problem of contextuality suggests that sometimes these supposed possibilities are actually illusory. A system of judicial review that produces just results in one community may be impossible to replicate in another or, worse yet, may be replicated with strikingly different outcomes. It is therefore at best an open question whether comparative analysis widens or horizons, as practitioners claim, or whether it instead distracts us from the attention we need to pay to our local situation.

Trying to answer this question, in turn, requires an extraordinary set of skills that few scholars possess.¹³¹ To learn from others means really understanding others in a way that is often difficult or impossible for outsiders, and the claim to understand often involves oversimplifying and even caricaturing the other.¹³² Judicial review in any given society is an immensely complicated practice. As I have tried to show, a serious evaluation of its merits requires very careful study of the politics and culture of the society in which the practice is located.

¹³¹ I do not mean to suggest that comparative constitutional law, alone, faces these difficulties. The past is, famously, a foreign country, and it may in fact be more difficult for a scholar to understand eighteenth century America than, say, contemporary France. For just this reason, practitioners of originalist methodology in constitutional interpretation should be similarly cautious.

¹³² As Mark Tushnet has written:

Learning about other constitutional systems is costly. Sometimes one needs to learn another language. Even if materials are available in a language with which one is familiar, one must worry about the degree to which the available information actually captures the underlying reality of the other nation's constitutional culture. And, of course, constitutional systems are *systems*, so that even if one has a good grasp on the way another constitutional system deals with a particular problem, one might not fully understand the way in which that solution fits together with other aspects of the constitutional system.

Mark Tushnet, *Interpreting the Constitution Comparatively: Some Cautionary Notes, with reference to Affirmative Action*, 26 CONN. L. REV. 649, 662-63 (2006).

There are a few remarkable scholars willing and able to undertake such a study, but even their work's payoff is likely to be quite limited if their ambition is to provide insights useful to other societies. Certainly for the rest of us, it will be work enough to understand and evaluate the role that judges play in our own back yards.