

James Madison Has Left the Building

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*Constitutional Deliberation in Congress:
The Impact of Judicial Review in a Separated System,*
J. Mitchell Pickerill. Duke, 2004. Pp xiii, 187.

Judicial review is often thought to be an absolute veto, killing legislation with no hope of resurrection. The adoption of judicial review, therefore, is understood to be a potentially severe qualification to democratic government. It was this understanding that once drove American progressives such as Theodore Roosevelt to endorse the “judicial recall” that would have allowed “the people to rule” by overriding judicial constitutional doctrine;¹ that led Canada to include the “notwithstanding” clause in its Charter, shielding legislation from judicial nullification;² and that now spurs some to urge the remaining Westminster systems to resist pressures to curb parliamentary sovereignty with judicial review.³

But how warranted is this assumption? Creative and persistent legislators will try to reanimate these statutory corpses, and it is an open question whether judicial disapproval really lays the issue to rest. Congress is sometimes quick to try to resuscitate at the federal level what the Court strikes down at the state level. Often these legislative exertions are serious only as political theater. The Flag Protection Act of 1989⁴ and the Partial-Birth Abortion Ban Act of 2003⁵ come to

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¹ Theodore Roosevelt, *Progressive Principles: Selections from Addresses Made During the Presidential Campaign of 1912* 276–77 (Progressive National Service 1913).

² See Canada Constitution Act Part I § 33(1) (“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”).

³ See, for example, Jeremy Waldron, *Law and Disagreement* 209–312 (Oxford 1999) (arguing against judicial review because it occludes rather than overcomes political disagreement).

⁴ Pub L No 101-131, 103 Stat 777 (1989), codified at 18 USC § 700 (2000). The law sought to overturn *Texas v Johnson*, 491 US 397 (1989), and was invalidated by *United States v Eichman*, 496 US 310 (1990).

⁵ Pub L No 108-105, 117 Stat 1201, to be codified at 18 USC § 1531. The law seeks to overturn *Stenberg v Carhart*, 530 US 914 (2000), and is currently being litigated. See *National Abortion Federation v Ashcroft*, 2004 US Dist LEXIS 4249 (SD NY); *Carhart v Ashcroft*, 331 F Supp 2d 805 (D Neb 2004); *National Abortion Federation v Ashcroft*, 330 F Supp 2d 436 (SD NY

mind. Occasionally the effort seems more serious, even when it becomes a case study in “how not to challenge the Court,” as with the Religious Freedom Restoration Act of 1993⁶ (RFRA). But RFRA’s death at the Court’s hands only provoked Congress to pass the Religious Land Use and Institutionalized Persons Act of 2000,⁷ though that statute was far less ambitious than RFRA. In other instances, however, Congress has sought to cure a perceived constitutional defect with relatively little effort, such as by the 1994 addition of a jurisdictional hook to the Gun-Free School Zones Act of 1990.⁸ Unable to override the Court, Congress might still circumvent it.

In a thought-provoking addition to the *Constitutional Conflicts* series published by Duke University Press, Mitchell Pickerill investigates how Congress reacts to the judicial invalidation of federal statutes. Through a combination of close case studies and large-scale data analysis, he uncovers how Congress responds to both the presence and the absence of constitutional scrutiny by the courts. The results give us new insights into how (and whether) legislators think about the Constitution and a deeper appreciation for how the power of judicial review fits into and affects the broader political system. Focusing particularly on the Rehnquist Court’s federalism revival in the 1990s, Pickerill gives new evidence for valuing judicial safeguards of federalism. More broadly, however, his analysis of the relationship between Congress and the Court bears close study by those interested in either judicial review or the Constitution outside the courts, for he challenges basic assumptions held by those on all sides of those debates.

The book has two central tasks. One focuses on the fate of congressional policies struck down by the Supreme Court in the latter half of the twentieth century. The second examines the extent and nature of congressional deliberation on the Constitution. Each will be taken up in turn.

2004); *Planned Parenthood Federation of America v Ashcroft*, 320 F Supp 2d 957 (SD Cal 2004); *Planned Parenthood Federation of America v Ashcroft*, 2003 US Dist LEXIS 20105 (ND Cal).

⁶ Pub L No 103-141, 107 Stat 1488, codified at 42 USC § 2000bb (2000), invalidated by *City of Boerne v Flores*, 521 US 507 (1997). See Neal Devins, *How Not to Challenge the Court*, 39 Wm & Mary L Rev 645 (1998) (arguing that, by confronting the Court head-on instead of engaging in a conversation with the Court, Congress ensured that RFRA would be struck down).

⁷ Pub L No 106-274, 114 Stat 803, codified at 42 USC § 2000cc (2000).

⁸ Pub L No 101-647, 104 Stat 4844, codified as amended at 18 USC § 922(q)(1) (2000). The law was amended by Pub L No 103-322, 108 Stat 2125 (1994) (adding findings of fact as to how guns affect interstate commerce), but then invalidated by the Supreme Court in *United States v Lopez*, 514 US 549 (1995).

I. THE CONGRESSIONAL RESPONSE TO JUDICIAL REVIEW

There is a broad class of studies concerned with what happens after initial policy decisions are made by high-level policymakers. The burst of innovative legislation associated with the Great Society was soon followed by grave disappointment with how little seemed to have been accomplished and how often ambitious programs seemed to have gone awry. To some degree, these disappointments alerted scholars and policymakers to how little we knew about solving the difficult social problems of crime, economic inequality, environmental ills, and the like. But these experiences also suggested how little we knew about how government works in society. How, as one pioneering study put it, were “great expectations in Washington [] dashed in Oakland”?⁹ How, and to what extent, did those policy decisions change behavior on the ground? How, for example, are legislative policies actually implemented by “street-level bureaucrats”?¹⁰ Implementation was itself a political problem, requiring an understanding of how complex organizations operate and how low-level politics is conducted; in the 1970s a literature focused on problems of implementation developed within the field of public administration, primarily designed to understand how bureaucracies hindered and facilitated policymakers.¹¹

Perhaps because the courts are so self-evidently dependent on others to implement their decisions—they lack the sword, as Alexander Hamilton promised¹²—scholars of judicial politics recognized the need to study the politics of implementation earlier than did scholars of public policy and administration. These so-called “impact studies” have been concerned with describing and explaining what happens after a court renders a decision. The first of them appeared in the late 1950s, just as two developments were occurring—political scientists interested in law and courts began to separate themselves more dramatically from traditional legal scholarship and became more inter-

⁹ Jeffrey L. Pressman and Aaron B. Wildavsky, *Implementation: How Great Expectations in Washington Are Dashed in Oakland: Or, Why It's Amazing That Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes* (Berkeley 3d ed 1984).

¹⁰ Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage 1980) (examining the policy significance of the discretion necessarily exercised by very low-level government employees, such as teachers, police officers, and social workers).

¹¹ For a review of the literature, see Susan M. Barrett, *Implementation Studies: Time for a Revival? Personal Reflections on 20 Years of Implementation Studies*, 82 *Pub Admin* 249 (2004); Laurence J. O'Toole, Jr., *Research on Policy Implementation: Assessment and Prospects*, 10 *J Pub Admin Rsrch & Theory* 263 (2000).

¹² See Federalist 78 (Hamilton), in *The Federalist* 521, 523 (Wesleyan 1961) (Jacob E. Cooke, ed).

ested in political behavior than in legal doctrine, and the Warren Court began to issue controversial decisions that were aimed at reforming established social and political practices, which encountered resistance.¹³ In the preface to perhaps the first study of its kind, Gordon Patric of the University of Illinois, in a symposium inspired by the decision in *Brown v Board of Education*, noted with amazement that “in all the vast literature on the high tribunal nothing significant appears which sets out in detail what impact a Court decision has.”¹⁴ In examining the aftermath of *McCullum v Board of Education*,¹⁵ which declared unconstitutional the voluntary religious instruction of public school children in Champaign, Illinois, Patric found that the Court’s ruling was “put into effect in diverse ways, and ‘obeyed’ to varying degrees, and that, in some states and communities, it was simply not put into effect at all.”¹⁶

This basic conclusion soon became commonplace. Jack Peltason’s landmark study of how federal district and circuit courts in the South struggled to implement school desegregation with little success and little assistance from the Supreme Court established the field.¹⁷ As the interdisciplinary law and society movement emerged in the 1960s, “gap studies” measuring the distance between the “law on the books” and the “law in action” became a staple of its research agenda.¹⁸ Like

¹³ See Gordon Patric, *The Impact of a Supreme Court Decision: Aftermath of the McCollum Case*, 6 J Pub L 455, 457 (1957) (describing how *McCullum v Board of Education*, 333 US 203 (1948), which invalidated Illinois’ practice of allowing private groups to provide religious instruction in public school classrooms during school hours, had the narrow result of eliminating or modifying only religious instruction that occurred both on school premises and during school hours); Patric, 6 J Pub L at 463 (noting how those who had advocated the practice struck down by *McCullum* were most influential in implementing compliance with *McCullum*); Frank J. Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 Am Polit Sci Rev 777 (1959) (providing evidence of noncompliance with *Zorach v Clauson*, 343 US 306 (1952), which held that it was constitutionally acceptable for New York schools to allow students to be released during the school day to attend religious classes off campus, because the public school neither gave religious instruction on school premises nor used public funding for such religious instruction); Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 Am Polit Sci Rev 1017 (1959) (arguing that the Supreme Court and lower courts engage in reactions and counterreactions, an interchange that might be a valuable check on judicial power).

¹⁴ Patric, 6 J Pub L at 455 (cited in note 13).

¹⁵ 333 US 203 (1948).

¹⁶ Patric, 6 J Pub L at 455 (cited in note 13).

¹⁷ J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (Harcourt, Brace 1961).

¹⁸ For a critique of the conceptualization and persistence of this research, see Richard L. Abel, *Redirecting Social Studies of Law*, 14 L & Socy Rev 805 (1980) (arguing that researchers should know in advance that reformist laws will do little to bring about social change, and that therefore their continued research distracts attention from the law’s relation to social stasis); Austin Sarat, *Legal Effectiveness and Social Studies of the Law: On the Unfortunate Persistence of a Research Agenda*, 9 Legal Stud F 23 (1985) (arguing that the abandonment of research into

the public administration literature on bureaucratic implementation, the judicial impact studies fed naturally into the study of the role of courts in the formulation and implementation of public policy.¹⁹ Scholars also branched out to consider the impact of Supreme Court decisions on a host of actors and institutions, including legislatures,²⁰ the executive branch,²¹ lower federal courts,²² state courts,²³ affected organi-

legal effectiveness might allow researchers to recognize that law is much more complex and powerful as a form of societal control than gap studies have acknowledged).

¹⁹ See, for example, Jack W. Peltason, *Federal Courts in the Political Process* (Random House 1955) (describing the role of Congress and the president in influencing the course of judicial decisionmaking and concluding that judges are not more isolated than other players in the political process); R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Brookings 1983) (analyzing the long-term effects of federal court decisions in shaping environmental policy and finding unforeseen consequences from this policymaking); Robert A. Katzmann, *Institutional Disability: The Saga of Transportation Policy for the Disabled* 152–87 (Brookings 1986) (analyzing the role of courts in interpreting transportation policy and showing that courts were less attached to a rights-based approach than either Congress or regulatory agencies); Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy* (Basic 1989) (arguing that active judicial oversight of regulatory agencies equates policy preferences with legal rights and, by privileging “the law” over considerations of policy or consequence, muddles the debate on substantive questions of policy with legal arguments).

²⁰ For empirical studies of how, if at all, Supreme Court decisions are implemented or challenged, see C. Herman Pritchett, *Congress versus the Supreme Court, 1957–1960* (Minnesota 1961); William M. Beaney and Edward N. Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J Pub L 475, 491–503 (1964); Roger A. Hanson and Robert E. Crew, Jr., *The Policy Impact of Reapportionment*, 8 L & Socy Rev 69 (1973); Roger Handberg and Harold F. Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress*, 14 L & Socy Rev 309 (1980); Janet S. Lindgren, *Beyond Cases: Reconsidering Judicial Review*, 1983 Wis L Rev 583; Stefanie A. Lindquist and David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 Judicature 60 (2001).

²¹ See, for example, Martin Shapiro, *The Supreme Court and Administrative Agencies* (Free Press 1968) (examining judicial-administrative politics and suggesting a model of mutual influence); James F. Spriggs, II, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 Polit Rsrch Q 567 (1997) (arguing that the absence of agency defiance of Court decisions is the result of interdependencies between the two bodies); Ruth Ann Watry, *Administrative Statutory Interpretation: The Aftermath of Chevron v. Natural Resources Defense Council* (LFB Scholarly 2002) (showing that, contrary to what many scholars believed, Supreme Court deference to agency decisions has increased since *Chevron*). For the effect on agencies of decisions by lower federal courts, see Robert M. Howard and David C. Nixon, *Regional Court Influence over Bureaucratic Policymaking: Courts, Ideological Preferences, and the Internal Revenue Service*, 55 Polit Rsrch Q 907 (2002); Brandice Canes-Wrone, *Bureaucratic Decisions and the Composition of Lower Courts*, 47 Am J Polit Sci 205 (2003).

²² For studies analyzing lower court compliance with Supreme Court decisions, particularly high profile decisions, see Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 Am J Polit Sci 792 (1979); Donald R. Songer and Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Courts of Appeals*, 43 W Polit Q 297 (1990); Glenn H. Reynolds and Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 Wis L Rev 369; Sara C. Benesh and Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J Polit 534 (2002).

²³ For analysis of the responses of state supreme courts to U.S. Supreme Court decisions, see Bradley C. Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties*

zations such as schools and universities,²⁴ police departments,²⁵ and businesses,²⁶ and mass public opinion.²⁷ Gerald Rosenberg's *The Hollow Hope*²⁸ brought new attention to impact studies, perhaps at long last carrying the central message of such studies into the law schools, and it reignited controversies over how best to study the impact of court decisions and what questions we should ask about how law matters in society.²⁹

Decision, 8 L & Socy Rev 109 (1973); G. Alan Tarr, *Judicial Impact and State Supreme Courts* (Heath 1977); Donald R. Songer, *Alternate Approaches to the Study of Judicial Impact: Miranda in Five State Courts*, 16 Am Polit Q 425 (1988); Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 L & Soc Inq 73 (1999).

²⁴ For the limited reach of Supreme Court decisions on education, see Robert H. Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the Schempp Decision*, 10 Midwest J Polit Sci 304 (1966); Kenneth M. Dolbeare and Phillip E. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (Chicago 1971); John Gruhl and Susan Welch, *The Impact of the Bakke Decision on Black and Hispanic Enrollment in Medical and Law Schools*, 71 Soc Sci Q 458 (1990); Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 L & Socy Rev 345 (2001).

²⁵ For analysis of police department reaction to and implementation of Supreme Court decisions, see Richard J. Medalie, Leonard Zeitz, and Paul Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich L Rev 1347 (1968); Neal A. Milner, *The Court and Local Law Enforcement: The Impact of Miranda* (Sage 1971); James P. Levine, *Implementing Legal Policies Through Operant Conditioning: The Case of Police Practices*, 6 L & Socy Rev 195 (1971); Stephen Wasby, *Small Town Police and the Supreme Court: Hearing the Word* (Heath 1976); Jon B. Gould and Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 Criminology & Pub Policy 315 (2004).

²⁶ For the responses of businesses to particular Supreme Court decisions, see James P. Levine, *Constitutional Law and Obscene Literature: An Investigation of Bookseller Censorship Practices*, in Theodore L. Becker and Malcolm M. Feeley, eds, *The Impact of Supreme Court Decisions: Empirical Studies* 119 (Oxford 2d ed 1973); Jon R. Bond and Charles A. Johnson, *Implementing a Permissive Policy: Hospital Abortion Services After Roe v. Wade*, 26 Am J Polit Sci 1 (1982); Lauren Bowen, *Attorney Advertising in the Wake of Bates v. State Bar of Arizona (1977): A Study of Judicial Impact*, 23 Am Polit Q 461 (1995). For a more general examination of how businesses internalized the statutory and judicial civil rights mandates of the 1960s, see Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 Am J Soc 1401 (1990).

²⁷ For empirical evidence of the effect of Supreme Court decisions on public opinion, see Charles H. Franklin and Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 Am Polit Sci Rev 751 (1989); Roy B. Flemming, John Bohte, and B. Dan Wood, *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92*, 41 Am J Polit Sci 1224 (1997); Timothy R. Johnson and Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 Am Polit Sci Rev 299 (1998); Valerie J. Hoekstra, *Public Reaction to Supreme Court Decisions* (Cambridge 2003).

²⁸ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 1991) (examining the role of the Court in the political system, and arguing that the Court is largely ineffective in independently producing significant social reform).

²⁹ For a sample of the disagreements surrounding Rosenberg's book, see David A. Schultz, ed, *Leveraging the Law* (Peter Lang 1998); Bryant G. Garth and Austin Sarat, eds, *How Does Law Matter?* (Northwestern 1998). For a recent introduction to the literature on judicial impact, see Bradley C. Canon and Charles A. Johnson, *Judicial Policies: Implementation and Impact* (CQ 2d ed 1999).

As the subtitle of Pickerill's book indicates, one aspect of his study is to assess "the impact of judicial review in a separated system"—specifically, the impact on Congress. One expects judicial review to defeat the legislature's policy preferences. When the Court wields the judicial veto, Congress is stopped in its tracks. This assumption has driven a great deal of literature about judicial review. The primary starting point for normative theorizing about judicial review is that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now."³⁰ Theorists then turned to considering whether such an absolute veto was valuable and how it should best be used. Congress might seek to overturn the Court's decision by amending the Constitution, but the difficulty of successfully negotiating the Article V process is well known and so this possibility has been largely ignored.³¹ The difficulty of a constructive response might lead Congress down the grim path of legislative reprisals against the Court, and some scholars have examined this response empirically.³² But the Court usually weathers those storms, and

³⁰ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–17 (Bobbs-Merrill 1962).

³¹ But see Rafael Gely and Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 *Intl Rev L & Econ* 45 (1992) (arguing that the Supreme Court reversed course because the 1936 elections made possible a constitutional amendment). Congressional overrides of judicial interpretations of statutes also have received attention. See, for example, Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 *J Pub L* 377 (1965) (examining congressional proposals to reverse decisions between 1957 and 1961 and finding common factors for successful proposals); Rafael Gely and Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Decisions with Applications to the State Farm and Grove City Cases*, 6 *J L, Econ, & Org* 263 (1990) (offering a model which predicts that congressional inaction will follow Supreme Court decisions because the Court is already responsive to the electorate and takes into account changes in Congress and the executive branch); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L J* 331 (1991) (finding that for all its monitoring of the Court, Congress overrides only a few decisions, and arguing for increased congressional monitoring); Michael E. Solimine and James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 *Temple L Rev* 425 (1992) (concluding that Congress modifies Court decisions at a greater rate than previously understood but finding that there are few identifiable patterns in the types of decisions Congress overrules); Jeb Barnes, *Overruled?: Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations* (Stanford 2004) (analyzing the interaction between Congress and the Supreme Court and finding that most conflict occurs when issues affect the federal budget directly or when the issue has traditionally divided judges along partisan lines). At the state level, constitutions are easier to amend, and this is a more relevant option after the exercise of judicial review. See, for example, Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 *Rutgers L J* 871 (1999).

³² See Pritchett, *Congress versus the Supreme Court* (cited in note 20); Walter F. Murphy, *Congress and the Court: A Case Study in the American Political Process* (Chicago 1962) (detailing the causes and the course of the conflict between Congress and the Court in Warren-era decisions between 1954 and 1959); Stuart S. Nagel, *Court-Curbing Periods in American History*, 18

students of judicial politics have suggested that when confronted with a disagreeable statute the Court can simply “move into constitutional mode” and impose its will on Congress.³³

One of the central questions in *Constitutional Deliberation in Congress* is whether the judicial veto is really as absolute as it is often assumed to be. Pickerill concludes that “while judicial review can be a roadblock to legislation, it is often more of a speed bump or detour” (p 31). This is not a new suggestion, but it has most often taken the form of an argument that Congress can and does engage the Court in a “dialogue” about the proper content of constitutional law.³⁴ Of most direct relevance, in a large-scale statistical study, James Meernik and Joseph Ignagni concluded that “contrary to popular and scholarly opinion, the Congress can and does attempt to reverse Supreme Court rulings [invalidating federal law, state law, or executive orders]. Judicial review does not appear to be equivalent to judicial finality.”³⁵ Instead, “coordinate construction or something akin to it is alive and functioning in the United States government,”³⁶ with Congress frequently “reinterpre[ing] the Constitution after a High Court ruling” and “challeng[ing] the power of the High Court” by simple statute.³⁷ This was a remarkable conclusion, but the authors offered little detail about the bills that they coded as reversing judicial review and thus rewriting constitutional law.

Pickerill’s analysis is straightforward, detailed, and persuasive. Starting with every federal statute struck down by the Supreme Court between 1953 and 1997, he looks for any law that “established,

Vand L Rev 925 (1965) (analyzing the factors correlated with the occurrence or nonoccurrence of Court-curbing bills); John R. Schmidhauser and Larry L. Berg, *The Supreme Court and Congress: Conflict and Interaction, 1945–1968* 134–84 (Free Press 1972) (finding that ideological considerations play an important role in congressional behavior toward the Court and suggesting that the rise of the anti–New Deal Conservative Coalition in Congress imperiled the Court). For studies on the Court’s anticipation of congressional reaction, see Handberg and Hill, 14 L & Socy Rev 309 (cited in note 20); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 Rev Polit 369 (1992); Lee Epstein and Jack Knight, *The Choices Justices Make* 139–45 (CQ 1998); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 Intl J Const L 446 (2003).

³³ Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 Am Polit Sci Rev 28, 42 (1997) (finding that the Court rarely adjusts to changes in the composition of Congress). See also William Lasser, *The Limits of Judicial Power: The Supreme Court in American Politics* (North Carolina 1988) (analyzing the history of the Court and arguing that it can weather political storms).

³⁴ See, for example, Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton 1988); Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J L & Polit 143 (1991).

³⁵ James Meernik and Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 41 Am J Polit Sci 447, 458 (1997).

³⁶ *Id* at 459.

³⁷ *Id* at 458.

amended, or repealed the provisions of the statute reviewed by the Court” and examines “whether the action represented a response to the Court, and if so, what sort of response” (p 39).³⁸ He then categorizes the congressional response to each invalidated statutory provision as either no response, a repeal, an amended statute, a repeal combined with the passage of a new law, or a constitutional amendment. Less systematically, Pickerill also characterizes the nature of such legislative responses to the exercise of judicial review. Thus, he is able to provide a comprehensive assessment of the impact of judicial review on federal law for the latter half of the twentieth century.

The details of his findings are worthy of note. The median time between the passage of a statute and its nullification by the Court was just under ten years, while Congress took a median of nearly four years to respond (when it did respond) to the judicial invalidation (pp 42–43). Given these lags, it is perhaps not surprising that most of the Rehnquist Court cases that invalidated federal laws did not elicit a congressional response within the time studied (p 43).³⁹ The Rehnquist Court may be extraordinarily effective in blocking congressional policies, but probably not to the degree that Pickerill’s numbers might at first glance suggest.⁴⁰ Overall, Congress neglected to respond or decided to simply repeal the affected policy in just over half the cases in the overall sample, but a majority of those failures to respond involved “as applied” challenges to federal actions where an executive adjustment might be more appropriate than a legislative one (pp 42, 46). Congress acted to “save” the underlying policy in 48 percent of the cases examined (p 42). Only once did this involve a constitutional amendment, the Twenty-Sixth in response to *Oregon v Mitchell*⁴¹ (pp 47–48). When the Court struck down a federal law, Congress’s most common response was simply to amend the statute to work around the constitutional obstacle (p 42).⁴²

³⁸ Pickerill’s assessment of statutory revisions runs through December 2000.

³⁹ Pickerill reports “no response” to 77.8 percent of the Rehnquist Court’s invalidations, compared to a relatively meager 22.7 percent for the Warren Court and 26.5 percent for the Burger Court (p 43).

⁴⁰ Even when leaving fairly clear paths available for a legislative response to its rulings, the Rehnquist Court’s invalidation of federal statutes has effectively disrupted some lawmaking coalitions. See, for example, John Dinan, *Congressional Responses to the Rehnquist Court’s Federalism Decisions*, 32 *Publius* 1 (Summer 2002).

⁴¹ 400 US 112 (1970) (striking down the Voting Rights Act of 1970 provision, which lowered the voting age from twenty-one to eighteen for state and local elections). See US Const Amend XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

⁴² Congress amended the statute in 36 percent of the cases. This is the most populated category next to “no response” (p 42).

While a congressional response to judicial review might suggest an active interbranch dialogue over the meaning of the Constitution, Pickerill concludes this is very rarely the right way to characterize congressional action. Instead, Congress amends “legislation in a manner that makes clear concessions to the Court’s decision” (p 49).

Congress rarely has an interest in challenging how the Court has understood the Constitution or in trying to influence the path of judicial doctrine. To the extent that congressional interests are affected by the Court’s action, legislators and lobbyists are most concerned with figuring out how to comply with the new constitutional environment and avoid further judicial entanglements. Thus, after a successful due process challenge to the eligibility requirements of Aid to Families with Dependent Children,⁴³ “Congress paid close attention to the language from the written opinions of the Court decision, and crafted a revision that appeared to satisfy the demands of the Court” (p 54).

Pickerill’s explanation for this dynamic is quite plausible—that Congress and the Court primarily care about and act on different “policy” dimensions (p 36). The justices on the Supreme Court may have preferences primarily on a “constitutional policy” dimension. They care directly about the scope of free speech, the structure of the separation of powers, the etiquette of federalism, and the procedures followed in the criminal justice process, and they act effectively to impose these policy preferences on other actors in the political system. Most politicians, by contrast, have preferences primarily on a “public policy” dimension (p 37). They may care little about free speech, separation of powers, or federalism per se, but they care a great deal about crime, federal spending, and welfare policy, as well as their associated electoral consequences. Most analyses of judicial review assume a zero-sum game—if the Court “wins” by invalidating a statute, then the legislature necessarily “loses.” Instead, Pickerill suggests that most of the Court’s review of federal statutes is better understood as “win-win,” with both the Court and Congress capable of getting what they want because they want different things. The Court is able to announce the constitutional law it wants, but Congress is usually able to work within those doctrinal constraints to achieve most of the public policy results it wants.

If this two-dimensional tango between Congress and the Court is in fact common, then this should have important implications for how we think about judicial review. It should give us a clue to why the po-

⁴³ See *United States Department of Agriculture v Murry*, 413 US 508 (1973) (striking down a provision that made a family ineligible for food stamp assistance if someone in the household was declared as a dependent on someone else’s tax return).

litical response to the judicial invalidation of federal statutes is often so tepid, and thus why judicial review has been politically sustainable. Most of the time, Pickerill's evidence suggests, judicial review does not really impinge upon important congressional interests.⁴⁴ This tango may also offer an explanation for why judicial invalidations sometimes do become politically salient, by directing our attention to those instances when the Court really does impede congressional policy interests or when Congress really does care about constitutional law. It highlights the ambiguity in the standard shorthand of the empirical judicial politics literature—that judges seek to advance their “policy preferences” (which in turn is thought to make judicial policymaking continuous with legislative policymaking).⁴⁵ At the same time, it gives reason to doubt the ready assumption in the normative literature that judicial review creates a countermajoritarian difficulty by obstructing and displacing the policy preferences of electoral and legislative majorities.

Pickerill does not explore this implication of his research or elaborate on the two-dimensional quality of the judicial-legislative interaction in great detail, but his work provides good reason for taking seriously the possibility of “win-win” outcomes. Pickerill has left it for future researchers to look more closely at how much of its policy preference Congress is ultimately able to salvage after the exercise of judicial review. It may well be the case that “legislative sequels” “enable[] the legislative purpose to be substantially carried out, albeit by somewhat different means,” as one study of Charter dialogue between courts and legislatures in Canada has suggested.⁴⁶ The fact that mere statutory amendment is the most frequent active response to judicial invalidation may suggest that this is the case (p 42). But statutory amendments may significantly alter the policy Congress is able to pur-

⁴⁴ This might be true for other reasons as well, such as when the Court reviews minor statutory provisions or those with little current legislative support. See, for example, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J Pub L 279, 286–91 (1957) (finding that Congress and the president generally succeed in overcoming a hostile Court on major policy issues, and that the Court has mostly struck down minor or old policies); Mark A. Graber, *The Non-Majoritarian Problem: Legislative Deference to the Judiciary*, 7 Stud in Am Polit Dev 35, 36 (1993) (arguing that judicial review is most often exercised when the “dominant national coalition is unable or unwilling to settle some public dispute”). For scholarship that suggests judicial review does not conflict with the will of the legislative majority, see Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 Stud in Am Polit Dev 229 (1998); Keith E. Whittington, *Congress Before the Lochner Court*, 85 BU L Rev (forthcoming 2005).

⁴⁵ For the standard account from this perspective, see Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge 2002).

⁴⁶ Peter W. Hogg and Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 Osgoode Hall L J 75, 80–82 (1997).

sue, and in some instances, such as the Religious Land Use and Institutionalized Persons Act,⁴⁷ the legislative sequel may be a pale imitation of the original.

II. CONGRESSIONAL DELIBERATION ON THE CONSTITUTION

The second task is emphasized in the title—*Constitutional Deliberation in Congress*. These two tasks—the impact of judicial review and congressional deliberation on the Constitution—are related by a key causal hypothesis that Pickerill advances in this study: judicial review provokes constitutional deliberation in Congress. This is an important claim, and I will return to it shortly. But first it is worth noting that Pickerill’s detailed account of constitutional debates in Congress in the 1990s is quite valuable on its own.

Constitutional politics, the “Constitution outside the courts,” and extrajudicial constitutional interpretation have received increasing attention in recent years from both political scientists and law professors. Louis Fisher of the Congressional Research Service has long been a leading figure in detailing the ways in which constitutional law is shaped not by the courts alone but by “the constant, creative interplay between the judiciary and the political system.”⁴⁸ Congress participates as both a stimulus to constitutional innovation and thinking and as an author of fundamental legal rules. Likewise, a group of scholars loosely associated with Princeton University has pursued a variety of questions associated with constitutional politics and “departmentalism,” or the equal authority and obligation of each branch of government to interpret the Constitution.⁴⁹ Scholars interested in the relationship between the Constitution, the courts, and American political development and change, as well as republican political theory, have given further impetus to the study of constitutional politics and the ways in which constitutional meaning and practices were developed outside, as well as inside, the judiciary.⁵⁰

⁴⁷ 42 USC § 2000cc.

⁴⁸ Fisher, *Constitutional Dialogues* at 4 (cited in note 34). Pickerill expressly notes that he is building on Fisher’s work (pp 4, 231–74). For an appreciation and bibliography of Fisher’s work up to that point, see Robert J. Spitzer, ed, *Politics and Constitutionalism* (SUNY 2000).

⁴⁹ See Edward S. Corwin, *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government* 6–7 (Peter Smith 1957) (first published by Princeton in 1938). For a collection of essays reflecting the recent concerns of this group, see Sotirios A. Barber and Robert P. George, eds, *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton 2001).

⁵⁰ See, for example, Symposium, *The Republican Civic Tradition*, 97 Yale L J 1493 (1988) (examining the claims of those who would reconsider the Constitution in light of the civic republican strain of the founding era and its majoritarian implications for constitutional interpretation); Bruce Ackerman, 1 *We the People: Foundations* (Belknap 1991) (arguing for a dualist

The Supreme Court itself has helped make the study of extrajudicial constitutional interpretation, and particularly the question of judicial supremacy, a boom industry since the late 1990s. From different ends of the ideological spectrum, the Court recently has been emphatic in asserting the supremacy of its authority to interpret the Constitution and the primacy of its own understandings of that document's requirements. Of course, this has been characteristic of the Supreme Court in the second half of the twentieth century. Encouraged by President Dwight Eisenhower's repeated declarations of judicial supremacy and backed by his willingness to deploy federal troops on its behalf, the Court gave a new gloss on *Marbury v Madison* as establishing that "the federal judiciary is supreme in the exposition of the law of the Constitution" and that the enunciations of the Court are equivalent to the Constitution itself.⁵¹ The Court soon found reason to emphasize its status as the "ultimate interpreter of the Constitution" not only to the states,⁵² but also to Congress⁵³ and the president.⁵⁴ In *Planned Parenthood of Southeastern Pennsylvania v Casey*,⁵⁵ the Court instructed the critics of *Roe v Wade* that it must "speak before all others for their constitutional ideals"⁵⁶ in order to call "the contending sides in a national controversy to end their national division."⁵⁷ In its federalism decisions the justices have more directly insisted that the Court must be "the ultimate expositor of the constitutional text."⁵⁸ Some scholars have responded by elaborating on the argument for

democracy in which the Constitution may be amended through political action other than Article V processes); Graber, 7 *Stud in Am Polit Dev* 35 (cited in note 44); Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton 1996); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard 1999) (distinguishing the political Constitution from the legal one and presenting a conception of the Constitution as dependent on political actors).

⁵¹ *Cooper v Aaron*, 358 US 1, 18 (1958) (holding that Little Rock could not delay in implementing the desegregation mandate). On the political context for this pronouncement, see Keith E. Whittington, *The Court as the Final Arbiter of the Constitution: Cooper v. Aaron (1958)*, in Gregg Ivers and Kevin T. McGuire, eds, *Creating Constitutional Change* 9 (Virginia 2004).

⁵² *Baker v Carr*, 369 US 186, 211 (1962) (holding that vote dilution claims were justiciable under the Fourteenth Amendment).

⁵³ See *Powell v McCormack*, 395 US 486 (1969) (holding that the House of Representatives has no authority to deny membership to any person duly elected by his constituents).

⁵⁴ See *United States v Nixon*, 418 US 683 (1974) (holding that the president does not have an absolute, unqualified privilege of immunity from judicial processes under all circumstances).

⁵⁵ 505 US 833 (1992).

⁵⁶ *Id* at 868 (majority).

⁵⁷ *Id* at 867.

⁵⁸ *United States v Morrison*, 529 US 598, 616 n 7 (2000) (striking down a law that created a civil remedy for victims of gender-motivated violence because it did not involve economic activity or interstate commerce or state action).

judicial supremacy.⁵⁹ Others have responded by calling for some form of “popular constitutionalism,”⁶⁰ for “legislative” and “policecentric” constitutionalism,⁶¹ or even for “taking the Constitution away from the courts” completely.⁶²

In his book, Pickerill provides a close study of the extent and quality of congressional deliberation on the constitutional issues raised by statutes that stretched federal authority. Pickerill provides four brief case studies from the 1990s, drawing on the public record and on the statements of more than forty interviewees (mostly congressional staffers, but also members of Congress, lobbyists, journalists, executive branch officials, and a federal judge) who were involved in those deliberations. The case studies are the Gun-Free School Zones Act of 1990,⁶³ the Brady Bill in 1993,⁶⁴ the Violence Against Women Act in 1994,⁶⁵ and the Hate Crimes Bill⁶⁶ from the late 1990s. Of course, the statutes at the center of three of these case studies would eventually run afoul of the Rehnquist Court’s federalism offensive;⁶⁷ the Hate Crimes Bill was never passed into law.

Federalism holds a particular attraction for Pickerill because it provides an opportunity to observe congressional deliberation in the

⁵⁹ See, for example, Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv L Rev 1359 (1997) (defending judicial supremacy on the ground that settlement of contested issues can only be achieved by having an authoritative interpreter whose interpretations bind all others).

⁶⁰ See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2004) (arguing for a theory of constitutional interpretation which preserves the active sovereignty of the people over the Constitution).

⁶¹ See Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L J 1943 (2003) (proposing a model of constitutional interpretation which attributes equal interpretive power to Congress and the Court).

⁶² See Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton 1999) (suggesting a populist constitutional law that would deny the Court any role in constitutional interpretation).

⁶³ Pub L No 101-647, 104 Stat 4844, codified at 18 USC § 922(q) (2000), amended by Pub L No 104-208, 110 Stat 3009–368 (1996).

⁶⁴ Brady Handgun Violence Prevention Act, Pub L No 103-159, 107 Stat 1541 (1993), codified at 18 USC § 922(s) (2000).

⁶⁵ Pub L No 103-322, 108 Stat 1941, codified at 42 USC § 13981 (2000).

⁶⁶ The legislation was introduced in response to the murder of James Byrd by white supremacists in Texas. The House Judiciary Committee held hearings on HR 3081 on July 22, 1998, see Hate Crimes Prevention Act of 1997, Hearings on HR 3081 Before the House Committee on the Judiciary, 105th Cong, 2d Sess 1 (1998), and the Senate Judiciary Committee held hearings on S 1529 on July 8, 1998, see Hate Crimes Prevention Act of 1998, Hearing on S 1529 Before the Senate Committee on the Judiciary, 105th Cong, 2d Sess 1 (1998), but there is no bill at the time Pickerill writes (p 171 n 2).

⁶⁷ See *United States v Lopez*, 514 US 549 (1995) (invalidating the Gun-Free School Zones Act); *Printz v United States*, 521 US 898 (1997) (invalidating a provision of the Brady Bill); *Morrison*, 529 US 598 (striking down the Violence Against Women Act).

presence and in the absence of judicial scrutiny. Before getting to the 1990s, Pickerill looks at congressional deliberation in “the shadows of uncertain scrutiny” earlier in American history (ch 3). Here he looks particularly at the debate over the Child Labor Act⁶⁸ in the early twentieth century, a time when the Court was fairly active in enforcing limits on federal power, and compares it to the debate surrounding the Civil Rights Act of 1964,⁶⁹ when the Court was presumably more deferential (pp 73–94). The 1990s then provide an opportunity to consider congressional deliberation “in the darkness of judicial deference” (ch 4), though by the late 1990s the Court appears to be rather active again (p 95). Pickerill posits that congressional deliberation on constitutional issues will be more likely when the Court is relatively active in reviewing the legislature’s handiwork and when the bill at issue is controversial enough that there will be a mobilized opposition to raise constitutional objections (pp 64–67). Given the incentives facing legislators, “constitutional issues are not an automatic item on the legislator’s checklist when drafting and considering bills” (p 67). For low-salience bills that generate little controversy, no one on Capitol Hill is likely to take the time to vet their constitutionality. As with so much in Congress, members rely on those who might be hurt by a legislative proposal to raise the alarm. Legislators can reasonably assume that serious problems that will negatively affect their constituents will be called to their attention; they have neither the time nor the interest to go looking for problems.⁷⁰ As Pickerill observes, “Supreme Court case-law or doctrine can create a ‘constitutional context’ for debate and deliberation over proposed legislation” (p 67). Political controversy creates incentives for opponents of legislation to exploit that context to initiate a constitutional debate.

The Court itself, when abandoning judicial enforcement, offered assurances that the “political safeguards of federalism” would be sufficient to ensure that legislators were appropriately conscientious of their constitutional obligations in that area.⁷¹ Pickerill suggests that,

⁶⁸ Child Labor Act of 1916, Pub L No 64-249, 39 Stat 675, invalidated by *Hammer v Dagenhart*, 247 US 251 (1918).

⁶⁹ Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 1971 (2000), upheld by *Katzenbach v McClung*, 379 US 294 (1964), and *Heart of Atlanta Motel, Inc v United States*, 379 US 241 (1964).

⁷⁰ For an early analysis of this dynamic in the context of congressional oversight, see Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am J Polit Sci 165 (1984). For a proposal for congressional reform to address this problem with regard to constitutional issues, see Elizabeth Garrett and Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke L J 1277 (2001).

⁷¹ For a case in which the Court offered such assurances, see *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 551–52 (1985) (holding that the Fair Labor Standards Act appropriately applied to state and local governmental entities). See also Herbert Wechsler, *The*

whatever merits that argument might have, it ignores the critical role that judicial review itself played in making those safeguards effective. Defenders of federalism need both the authority of the Court to lend legitimacy to their concerns and the stick of judicial review to force legislators to take their concerns seriously. Unlike with many modern constitutional constraints, such as free speech, the Court gave Congress a green light to ignore federalism concerns for several decades—before suddenly signaling that more caution was required. The resurgence of interest on the Court in the enforcement of federalism in the 1990s provides a natural experiment by varying the constitutional context that is thought to condition congressional deliberation.⁷²

Pickerill's case studies generally support his claim that the threat of judicial review is a necessary condition for serious constitutional deliberation in Congress. Constitutional argumentation in Congress over the Child Labor Act was intense, but it was virtually absent from deliberations on the Gun-Free Schools Zones Act, the Brady Bill, and the Violence Against Women Act, even though these proposals attracted political controversy (pp 93, 126). In the wake of the Rehnquist Court decisions of the mid-1990s, however, the Hate Crimes Bill did run into federalism-based objections, among other complaints (pp 123–25). The post–New Deal Civil Rights Act was a mixed case, but even proponents of the legislation were concerned about how the Court might view the law and thus tried to square it with established constitutional doctrine (pp 84–91).

Pickerill's case is not airtight. One might reasonably think that unobserved forces move both judges and legislators either to take seriously or to dismiss concerns about the scope of national power, or even that the causal arrows run in the other direction such that the Supreme Court's interest in federalism is conditioned on prior politi-

Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government, 54 Colum L Rev 543 (1954) (arguing that it is Congress and not the Court that is vested with the ultimate authority for managing federalism); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum L Rev 215 (2000) (arguing that the political system has protected federalism and that the Court's foray into federalism is unnecessary and misguided).

⁷² If Pickerill is correct, however, it should be possible to observe differences in the level of constitutional deliberation in Congress on issues of constant judicial concern, such as free speech, depending on the level of controversy surrounding the legislation. In theory, uncontroversial legislation might slide through Congress (or be buried in committee) without salient free speech considerations ever being raised, even if the courts have provided the doctrinal arsenal for raising such objections. In practice, given the mobilized lobby around such issues at the national level, the very existence of constitutional problems may be sufficient to render a bill controversial. Pickerill does not effectively test the relative controversy dimension of his theory since nearly all of his case studies involve fairly high-profile and contested proposals.

cal interest in the issue.⁷³ Politicians in the nineteenth and early twentieth centuries seem to have raised the issues of federalism and states' rights independent of the threat of judicial review, but it is admittedly hard to know given that the threat was often there. In an earlier study of constitutional deliberation in Congress, Donald Morgan argued that Congress as an institution changed around the time of the New Deal.⁷⁴ Where politicians once accepted the Jeffersonian "view that legislatures have a strong responsibility for the independent decision of constitutional questions,"⁷⁵ they had since given in to Marshall's view that such questions were to be resolved by the courts and the legislators should "lean on the courts and neglect an independent inquiry" into the Constitution.⁷⁶ For the contemporary period, Pickerill himself has elsewhere detailed how the "Rehnquist Court's foray into federalism" was prefigured by Republican party politics.⁷⁷ Too close attention to the debates surrounding these particular statutes may obscure legislative and political attention to federalism taking place in the background.⁷⁸

Nonetheless, Pickerill is surely right that the Supreme Court's case law reduced the salience of federalism considerations when Congress took up proposals such as the Gun-Free School Zones Act, and his detailed case studies show the low level of consideration Congress gave to those issues and explain why. For such measures, objections—constitutional or otherwise—were overwhelmed by the political symbolism of the vote. When a senator was holding up the bill, committee staff simply responded, "okay fine, go down to the floor and vote against it—we're going to force a vote" (p 99), which cleared the way for its incorporation without a recorded vote into the larger crime control bill. In these case studies, even opponents of the bills looked

⁷³ See Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 *Hastings Const L Q* 483 (1998) (detailing the changing ideological and socioeconomic supports for federalism in the nineteenth and twentieth centuries); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 *Duke L J* 477 (2001) (relating the Rehnquist Court's increasing activity on federalism to the favorable political conditions for such activism).

⁷⁴ Donald G. Morgan, *Congress and the Constitution: A Study of Responsibility* (Belknap 1966).

⁷⁵ *Id.* at 332.

⁷⁶ *Id.* at 333. This narrative has been recently revived by Larry Kramer. See Kramer, *The People Themselves* (cited in note 60).

⁷⁷ J. Mitchell Pickerill and Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 *Perspectives on Polit* 233 (2004) (arguing that competing jurisprudential theories over the role of the Court illustrate divisions within the current political regime).

⁷⁸ See, for example, Keith E. Whittington, *Hearing About the Constitution in Congressional Committee*, in Neal Devins and Keith E. Whittington, eds, *Congress and the Constitution* (Duke forthcoming 2005) (examining congressional committees through the lens of public hearings and finding that congressional deliberation on constitutional issues is fairly routine).

elsewhere for persuasive arguments to marshal against them. For while some legislators might have been “adamant about a sort of philosophical federalism based opposition” (p 122), most were more impressed by the fact that “historically the Court had been deferential to Congress on these issues” (p 122), and that was enough to minimize the salience of constitutional arguments.⁷⁹

Pickerill’s exploration of the negotiations behind the federal commandeering of local law enforcement to conduct background checks on gun buyers, rejected by the Court in *Printz v United States*,⁸⁰ exposes yet another intriguing dynamic. The primary opponents of the Brady Bill were more focused on the individual rights issues associated with gun ownership than on federalism. Indeed, the provision struck down in *Printz* was the work of the National Rifle Association and its allies, who came up with it as a way to head off a long waiting period for prospective gun buyers that seemed destined for passage (pp 108–09). Once the political coalition behind the bill was put in place and the necessary compromises made, no one was interested in destabilizing the deal by raising new constitutional problems. Even after some initial rumblings from the courts, Congress tended to see itself as “dealing within the bounds of stuff that Congress has already done” (p 135) and thus not dealing with issues that required serious constitutional deliberation.

In the workaday world of passing legislation, constitutional deliberation is not high on the agenda. As one senator noted in ranking the considerations for moving bills through the legislative process, “Policy issues first, how do you get a consensus to pass the bill, six other things, then constitutionality” (p 134). Or as one congressman observed, “When I go home and talk to my constituents, they ask me to help solve problems in Congress. They don’t ask if it’s constitutional. They want common sense” (p 134). From the Supreme Court’s perspective, this is precisely the problem, and exactly the reason Congress deserves little deference when the Court reviews the constitutionality of its policies. Many legislators are likely to agree, expecting the courts to focus on the technicalities of constitutional fidelity and to correct any errors that the policymakers might have made (pp 135–36).⁸¹

⁷⁹ Congressional staff working on the Brady Bill did not know what to make of the Court’s renewed interest in federalism. As one staffer was quoted, “[T]here hadn’t been any Tenth Amendment jurisprudence in two hundred years. Now there’s this case [*New York v United States*], this is just likely to be a blip, you know, an anomaly” (p 114).

⁸⁰ 521 US 898 (1997).

⁸¹ See also Bruce Peabody, *Congressional Attitudes Toward Constitutional Interpretation*, in Devins and Whittington, eds, *Congress and the Constitution* (cited in note 78) (reporting the results of a survey of attitudes of congressmen to the relative roles of the Court and Congress in interpreting the Constitution).

For many of those interested in constitutional deliberation in Congress, Pickerill's conclusions may be disheartening. The modern Congress portrayed in these pages is certainly not the one that once included James Madison and heard the first great debates over the meaning of the U.S. Constitution. In Pickerill's account, the legislative interest in constitutional issues is narrow and largely strategic. If legislators are concerned about their handiwork surviving judicial scrutiny, then they will have an interest in anticipating what judges will want and in satisfying those expectations.⁸² Active judicial review might encourage Congress to deliberate on the constitutionality of its legislation. This will at least lead Congress to be somewhat careful about constitutional requirements and will reduce the problem of Congress thoughtlessly violating the Constitution. This will not, however, lead Congress to think about the meaning of the Constitution independently; it will not force Congress to develop understandings different from those promulgated by the judges. Constitutional deliberation in Congress will not be populist and aggressive, but technical and deferential—an echo of the courts, not an alternative center of legislative constitutionalism. Congress, in Pickerill's account, is not so much interested in getting the Constitution right as in anticipating what the judges will do. When it comes to constitutional law, legislators are Oliver Wendell Holmes's paradigmatic "bad man."⁸³

Pickerill finds that Congress might be attentive to the Constitution under some conditions, but he finds little evidence that Congress actually does deliberate on constitutional meaning. Even when legislators address constitutional issues in these case studies, they rarely argue about constitutional values, attempt to develop new constitutional understandings, or mobilize behind innovative constitutional claims. For purposes of the study, Pickerill identifies "deliberation" with "reflection and debate over the scope of federal powers under the Constitution in the context of legislation" (p 11), though even "reflection"

⁸² In some circumstances, legislators might not care whether their legislation survives judicial review, in which case even the threat of judicial review will not lead to serious judicial deliberation. One of Pickerill's lobbyists takes this view: "What they want is to be able to tell their constituents that they got a bill passed. . . . When legislation is struck down by the courts, it does not hurt the politician politically. [The politician can say] the *courts* did that. It's too bad, but that's the way it goes" (p 136). On this dynamic, see also Whittington, 51 *Duke L J* at 512–15 (cited in note 73).

⁸³ Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv L Rev* 457, 460–61 (1897):

What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact.

and “debate” seem a bit strong given the evidence presented. In an earlier study of constitutional deliberation in Congress, Susan Burgess identified multiple levels of “constitutional consciousness” measuring how engaged Congress might be with constitutional meaning and how much it distinguishes between judicial interpretations of the Constitution and the Constitution itself.⁸⁴ In her terms, Pickerill’s legislators are operating at the lowest levels of constitutional consciousness, at best recognizing and deferring to what they take to be the authoritative interpretations of the Supreme Court. A similar dynamic has developed in other democracies that have adopted judicial review. Where constitutional review is active and available, parliaments will “engage in structured deliberations of the constitutionality of legislative proposals,” but only in order to avoid a judicial veto and with the effect of institutionalizing judicial supremacy in the articulation of constitutional meaning.⁸⁵ Rather than a genuine political dialogue about constitutional meaning emerging, the legislature simply “subordinate[s] its understanding of constitutionally permissible policy to that articulated by a court.”⁸⁶ By contrast, Pickerill would suggest that at least the judiciary and legislature manage together to produce “a more careful consideration and articulation of the reasons that justify the statutory policy” than they would without judicial review (pp 58–61).

This conclusion about extrajudicial constitutional interpretation generally may be too pessimistic. Pickerill’s selection of case studies from the 1990s is driven by what interested the Court, not what interested Congress. They are, in a sense, cases of congressional failure, where Congress failed to anticipate the Court and failed to identify and correct potential constitutional defects in its legislation. There are certainly other instances in which legislators have a positive desire to raise and debate constitutional issues. Some of those debates take place in the shadow of active judicial review, such as abortion, affirmative action, or same-sex marriage. Others take place in the absence of any expectation of judicial review, such as war powers or impeachment. It seems likely that congressional deliberation would have looked different if Pickerill had focused on individual rights, because those constitutional questions can have a political immediacy that may be absent in second-order issues of structure and process such as federalism.

⁸⁴ Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* 24 (Kansas 1992).

⁸⁵ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* 73 (Oxford 2000).

⁸⁶ Christopher P. Manfredi and James B. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 *Osgoode Hall L J* 513, 522 (1999).

Even federalism, however, may be the subject of congressional discussion, if not necessarily in the specific context of these statutes. Pickerill presents, for example, a suggestive chart of an increasing number of federalism references in the *Congressional Record* over the course of the 1990s (p 120). He conjectures that the increase is attributable to the Court's decisions on federalism, and his case study reveals that *United States v Lopez*⁸⁷ clearly influenced the drafting and debating of the Hate Crimes Bill (pp 119, 123–24). However, if his case studies show that there was little consideration of federalism when statutes such as the Gun-Free School Zones Act were being drafted, his chart shows that there were nonetheless hundreds of references to federalism in the *Congressional Record* that must have been occurring elsewhere. Moreover, while the Rehnquist Court's decisions might have contributed to the increased attention to federalism in congressional deliberations in the late 1990s, the initial large jump in such discussions took place in the 104th Congress—before decisions such as *Lopez* were handed down.⁸⁸

If federalism was in the air in Congress in the 1990s, an important question is why it did not have more of an effect on the consideration of such bills as the Gun-Free School Zones Act and the Brady Bill. It is possible, for example, that while Congress talks a good game about federalism, and some legislators may care about federalism values in the abstract, when it comes to passing legislation it truly is politics, policy, “six other things, then constitutionality” (p 134). In such circumstances, extrajudicial constitutional interpretation may be aimed in part at creating the conditions under which the courts might take an active role in defending the values that legislators find themselves unable to uphold when tempted by politically attractive legislation.

Pickerill's study emphasizes the need for thinking about judicial review not as a theoretical abstraction but as a concrete reality of the political process. In showing how Congress anticipates and responds to the actions of the Court, he illuminates the importance and consequence of judicial review as well as the politics of the legislative branch. Somewhat surprisingly, he shows how judicial supremacy (or, in Pickerill's words, “judicial primacy”) in constitutional interpretation may sit comfortably with substantial legislative discretion in policy-making, and how an active judiciary may be useful not only in getting politicians to adhere to constitutional requirements, but also in prod-

⁸⁷ 514 US 549 (1995).

⁸⁸ See Whittington, *Hearing About the Constitution* (cited in note 78). Barry Friedman and Anna Harvey contend that it was the Republican victory in 1994 that sparked the Court to begin striking down congressional statutes at such a torrid pace in the late 1990s. See Barry Friedman and Anna L. Harvey, *Electing the Supreme Court*, 78 *Ind L J* 123 (2003).

ding them to consider the Constitution. Pickerill calls our attention not to the great political debates over the Constitution that are recounted in the history books but to the more routine legislative decisions that implicate constitutional law; not to the floor orations of legislative leaders, but to the negotiations of lobbyists and congressional staff. It is the constitutional deliberation in the warrens of power.