SOBER SECOND THOUGHTS

Evaluating the History of Horizontal Judicial Review by the U.S. Supreme Court

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ABSTRACT

Normative theorizing about judicial review often proceeds with minimal attention to the overall record of how the U.S. Supreme Court has actually exercised the power of judicial review. This article assesses how well the historical record of the Court's invalidation of federal policies can be justified using only a minimalist theory of judicial review. Although some of the Court's cases can be justified in this way, most of the Court's work would require a more substantively thick and necessarily controversial theory in order to justify it.

KEYWORDS: *Judicial Review, United States Supreme Court, Minimalist Theory, History*

THERE ARE MANY THEORIES designed to justify the practice of American-style judicial review. Regardless of the details of the particular theory, the preferred mode of theorizing proceeds from a handful of critical cases. For many years political liberals took their bearings on judicial review from the positive example of *Brown v. Board of Education* (1954). For many years political conservatives took their bearings on judicial review from the negative example of *Roe v. Wade* (1973). The

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challenge of constitutional theory has been to provide an overarching normative rationale that can account for a small set of canonical cases (*e.g.*, *Brown*; *West Coast Hotel v. Parrish* (1937)), while excluding a small set of anti-canonical cases (*e.g.*, *Dred Scott v. Sandford* (1857); *Lochner v. New York* (1905)).

What these theories rarely do, however, is grapple with the historical realities of how the institution of the U.S. Supreme Court has actually used the power of judicial review over time. If the Court in practice actually behaves in much the way that a normative theory would recommend, then that would be reassuring for the theory. On the other hand, if the Court rarely matches the ideal constructed by the normative theory, then we might further need to assess the implicit reform project that calls on the Court to behave in ways that would be historically unexpected. To what degree is a given normative theory concerned with justifying an actual institutional and political arrangement, and to what degree is it concerned with articulating a vision of a not-yet-realized arrangement and how realistic is the prospect of closing the gap between theory and practice?

In this article, I review the historical record of the Court in invalidating policies established by Congress. The article is particularly concerned with determining the extent to which the Court's decisions can be reasonably characterized as consistent with a minimalist theory of judicial review, that is whether they can in hindsight be regarded as substantively uncontroversial.[3] Whether considering the Court's actions across the long nineteenth century or its actions since it embraced a post-New Deal understanding of its institutional mission and the content of the constitutional rules, the Court's decisions striking down federal policies have only occasionally rested on judgments that can in hindsight be regarded as uncontroversial. The bulk of the Court's efforts might be of only marginal political or policy significance, but more often than not they advance contested and contestable constitutional and policy commitments. Justifying the Court's actual work would require a boldly countermajoritarian normative theory rather than a minimalist

3. A theory might be minimal or thin from a substantive normative perspective either because it relies on broadly shared substantive values and asks the Court to stick to enforcing those or it relies on primarily procedural values that are indifferent to the substantive content of the Court's decisions. This article primarily focuses on the first concern, though with obvious implications for a proceduralist theory of the type advocated by John Hart Ely (1980). It might be possible to reconcile the Court's track record with something like an originalist theory that is normatively focused on the procedures by which the constitutional rules have been adopted but agnostic about the substance of those constitutional rules, and this article does not attempt to assess how faithful the Court has been to that standard.

theory that empowers a friendly Court to dampen the passionate excesses of democratic politics.

A MINIMALIST THEORY OF JUDICIAL REVIEW

Most normative theories of judicial review also tend to be substantively controversial. That is, they rest the justification for the appropriate exercise of judicial review on a controversial set of substantive interests and values that the Court is supposed to advance. The more cases are taken to be canonical (or anti-canonical), the more contestable the normative judgement becomes. While there is widespread agreement that an appropriate practice of judicial review should be able to produce the results in *Brown*, the consensus quickly breaks down if *Roe* is added to the mix.

One approach to avoiding that problem is to reduce the ambitions of the theory. An ambitious theory that lays out an expansive agenda for the Court confronts a higher normative hurdle. But a minimalist theory might (at least preliminarily) seek to justify only a limited judicial portfolio and might face an easier argumentative task. Even here, however, there are challenges. Jeremy Waldron has unsettled the long-standing assumption that some form of judicial review must be justifiable. Instead, Waldron (1999, 102) has insisted that the Court should be understood to generally be operating within the "circumstances of politics," that is, to be intervening in matters of genuine and reasonable political disagreement. On that view, the Court can never be understood to be operating outside of politics, and judicial review should simply be understood as a practice that enables a small group of individuals to impose their policy preferences on society at large—or more starkly, to impose their will on the political majority.

This concern is at the heart of what Alexander Bickel (1962, 16) influentially called the "counter-majoritarian difficulty." Courts, in exercising the power of judicial review, frustrate and obstruct the democratic will. Unlike Waldron, Bickel thought it was possible to evade the counter-majoritarian difficulty and escape the circumstances of politics. While the details of Bickel's proposed solution have been less influential than his framing of the problem, he offered one version of a prominent type of justification for judicial review, or indeed for constitutionalism generally.

We might call this a "sober second thought" style of argument for constitutional checks on legislative majorities. The long-serving Republican Senator George F. Hoar (1897, 142) was fond of saying that the virtue of the U.S. Senate within the American constitutional scheme was that it provided a "sober, second thought."

The second legislative chamber represented the "deliberate, permanent, settled desire" of the American people, not the "immediate passion and desire of the passing hour" that might be expressed in a "pure Democracy." Jon Elster's (2000) metaphor of Ulysses at the mast similarly appeals to the idea that constitutions broadly can serve as a constraint on polities in the "grip of passion." The goal of constitutionalism is less to impose an "absolute limitation of the will of the people but merely a subordination of immediate objectives to long-term ones," to appeal from Peter drunk to Peter sober (Hayek 1960, 180).

The appeal to the value of sober second thoughts might be of particular significance to judicial review. Alexander Hamilton (1961, 468) proffered this argument early on. He warned against "those ill humors" that could temporarily seize even the people themselves and that could be oppressive in the short run even if "they speedily give place to better information, and more deliberate reflection." An "independent judiciary" could "guard the Constitution and the rights of individuals" from such ill-considered and dangerous legislative "innovations." Even Woodrow Wilson (1908, 172), a champion of living constitutionalism, emphasized that judges should be able to "discriminate between the opinion of the moment and the opinion of the age," between "enlightened judgment" and "impulse and impatience," and even when acting as the Bull Moose Theodore Roosevelt (1911, 384) insisted that a good judge must be able to resist "what popular opinion at the moment, with or without reason, may desire" and stand firm "in the face of a gust of mob feeling." Similarly, as the Supreme Court was retreating in the face of the New Deal, soon-to-be Chief Justice Harlan Fiske Stone (1936, 25) explained that the value of judicial review lay in the responsibility of judges to "control government action" on behalf of "the sober second thought of the community, which is the firm base on which all law must ultimately rest."

The sober second thought to be accessed and enforced through judicial review might be operationalized in a variety of ways. From a dualist democracy perspective, evidence of the people sober might be found in their deliberative past pronouncements (Ackerman 1991; Whittington 1999). From a living constitution perspective, the people sober might be discovered in the ever evolving "opinion of the age." Alexander Bickel (1962, 58) himself suggested that the sober second thought might be prospective, such that judges should act in anticipation of the view that the people would soon come to deliberately embrace. By putting "principle" above "the expedient and the agreeable" the Court vindicates the "long view." But, Bickel (1962, 239) cautioned, the Court "labors under the obligation to succeed"—the Court's actions are appropriate only if its constitutional judgments speedily "gain general assent." Regardless of how the idea is operationalized, however, judicial review as

sober second thought should produce results that consonant with long-run understandings of constitutional commitments.

We might think of this as a minimalist theory of judicial review. This is not to say that a sober second thought should necessarily lead to a particularly restrained court. A court might be quite active in striking down laws if the legislature were to frequently depart from settled principles. Regardless of how active the court might be in striking down laws, however, the sober second thought conception of judicial review puts minimal pressure on controversial normative theories. Where a maximalist theory might lean heavily on a variety of controversial normative assumptions and arguments in order to establish what the court should do, the minimalist theory eschews judicial reliance on controversial normative values and commitments.

EXAMINING HORIZONTAL JUDICIAL REVIEW

The U.S. Supreme Court exercises two distinct types of judicial review that raise distinctive normative issues. When the Court exercises vertical judicial review, it evaluates subnational political actions against the standard of the federal Constitution. While such cases are often politically salient and highly controversial, they do not engage Bickel's counter-majoritarian difficulty in a particularly direct way. Vertical judicial review pits a national judiciary against local political majorities, and as a result is as likely to raise basic questions of federalism as it is likely to raise questions of democracy as such. The Court often acts hand-in-hand with national political officials "by imposing their shared constitutional agenda on recalcitrant state actors who hamper national political goals" (Whittington 2005, 586). Although the federal review of state laws also involves a judicial body setting aside the actions of a legislative body, Bickel (1962, 33), along with many others, thought the more salient point was that the "Court represents the national will against local particularism." The difficulty of untangling the national will from local particularism makes vertical judicial review a problematic workspace for thinking about how judicial review fits within a democratic framework.

By contrast, horizontal judicial review implicates democratic values more directly. In such cases, the Court reviews the actions of coordinate institutions, pitting its own authority specifically as a court against the authority of elected officials. It is in that context that the judiciary obstructs democratic decision-making as such. Horizontal judicial review strips away the side-issue of the extent to which the states should be brought in line with the policies of "the paramount government" and whether the federal courts are the best instrument for enforcing national commitments (Thayer 1893, 155). Horizontal judicial review puts the question squarely of

whether the Court should act simply as a "check against democracy" (Commager 1943, 27). The exercise of vertical judicial review has often raised the question of whether the Court is acting correctly, but the exercise of horizontal judicial review raises the question of whether the Court should be acting at all.

The U.S. Supreme Court has a rich history of exercising horizontal judicial review, and this history offers material with which to assess how well the actual practice of judicial review can be reasonably characterized as offering a sober second thought to tumultuous political missteps. It is relatively easy to identify particular cases where the Court seems to have played the role of the villain—or the role of the hero—and normative arguments about judicial review are often constructed from those examples. In order to assess the comparative institutional advantage of courts and judicial review, however, it would be more useful to think systematically about the Court's behavior (Tushnet 2000, 129–153).

One of the difficulties of rendering an institutional assessment of the Court is that it is hard to establish an uncontroversial normative perspective on the Court's work. That is, it is hard to get outside of Waldron's circumstances of politics, to find an external perspective from which to assess how the Court has resolved constitutional controversies. Establishing the core of the case for or against judicial review is easily bogged down in disagreements over what judicial invalidations would be a desirable.

The minimalist theory of the sober second thought would try to find such a perspective by identifying cases in which the Court's actions were, in hindsight, uncontroversial. Such an effort is easier said than done, however. The familiar cases are the ones about which there are controversy—and in part it is because they are controversial that we have heard of them. The "easy" cases get forgotten. The controversial cases get made into the canon.

There is, of course, a case in which the Court uncontroversially got it right: *Brown v. Board of Education* (1954). At least from the perspective of the twenty-first century, *Brown* is the quintessential case of a justified judicial invalidation of legislation. While *Brown* is also an instance of vertical judicial review, there is a horizontal analogue in *Bolling v. Sharpe* (1954), where the Court struck down the racial segregation of the public schools of the District of Columbia, which ultimately depended on the constitutional authority of Congress to authorize such a policy.

This raises the question of whether the Court had previously decided *any* cases that could be understood to fall within the same category as *Bolling*. For more than a century and a half prior to its decision in *Bolling*, the Court had heard cases raising doubts about the scope of congressional authority under the Constitution. In all

that time, had the Court rendered even a single decision that could similarly win the approval of a contemporary consensus?

ASSESSING THE HISTORICAL RECORD

The U.S. Supreme Court decided 157 cases between 1790 and 1953 that declared that a provision of a federal law exceeded the scope of the constitutional authority of Congress.[4] Surely there are at least some that would win the relatively unanimous support of the modern reader. At the outset, however, we should recognize that there is substantial reasonable disagreement among our own contemporaries about the substantive meaning of the Constitution. Given that ongoing disagreement, how much agreement might there be about the instances when the Court struck down a law as contrary to the Constitution? When the Court chose to intervene in the democratic process and obstruct the implementation of federal legislation, how often would we—even in hindsight—say that the Court was justified in doing so?

Reviewing every one of these cases in a short space is impractical, but some generalizations can be readily made that help make the task more manageable. First, we might distinguish among cases based on how important the policy in question was. Second, we might distinguish cases based on how the justices chose to confine the objectionable statutory provision. Third, we might distinguish cases based on the type of constitutional issue raised on the case.

Not every statutory provision invalidated by the Court is intrinsically important. The most politically salient cases are the ones that generate the most attention, both from contemporaries of the Court's action and from later observers. But most statutes and statutory provisions are not so important from either a policy or political perspective, and as a result their obstruction by the Court poses less of a challenge to the democratic will (such as it is). Routine instances of judicial review in low-profile cases are politically different than the exceptional instances of judicial review in high-profile cases. But if low-profile cases of judicial invalidation pose less of a challenge to democratic values, they must also count for less in

4. The cases considered here are drawn from the Judicial Review of Congress database. Although the Congressional Research Service (2014) maintains a list of cases invalidating provisions of federal statutes, there is reason to believe that the CRS list is underinclusive of the actual historical exercise of judicial review. See, *e.g.*, Graber (2000); Graber (2007). The Judicial Review of Congress database offers a more comprehensive portrait of the actual exercise of judicial review by the U.S. Supreme Court, both of cases refusing to apply statutes and cases upholding statutes against constitutional challenge. The database is described in Whittington (2009).

the historical ledger in favor of the significance and value of the power of judicial review. For present purposes, we might distinguish between important provisions of landmark statutes, marginal provisions of landmark statutes, and provisions of less important statutes.[5] If the Court were to strike down a central provision of an important statute, it makes a large policy and political splash. If the Court were to strike down a provision of an unimportant statute, it makes barely a ripple in the stream of contemporary policymaking and politics.[6]

In deciding cases, the Court does not treat every constitutional objection in the same way. The Court sometimes strikes down a statute in whole and sometimes strikes it down in part or as applied. Those differences partly reflect a judicial choice about how expansive of an opinion to hand down. Deciding "one case at a time" might allow the justices to commit themselves less and leave more space open for future deliberation (Sunstein 2001). To some degree those differences reflect variation in the legal posture by which cases reach the Supreme Court and with how close a given application falls to the core of the policy established by a statute. To some degree, those differences reflect variation in statutory language and draftsmanship. Short, precisely written statutes may force decisions that invalidate the statute in whole. Long, complex, broadly worded statutes may give the justices more room to invalidate some interpretations and applications of the statute and to circumscribe the constitutional authority of Congress without necessarily vetoing all possible applications of the statute at hand.

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5. I take advantage of Stathis (2014) to operationalize these distinctions. Stathis provides an inventory of every "landmark" statute passed by Congress in every Congress through the 112th. Moreover, Stathis provides a brief abstract describing the important provisions of each statute. Cases are distinguished based on whether they involve a challenge to one of these provisions or one of these statutes. Stathis takes a fairly capacious approach to identifying the national legislature's "most significant accomplishments," ranging across such framework statutes as the Judiciary Act of 1789 and the Budget and Accounting Act of 1921 and such pivotal policy enactments as the Morrill Land Grant College Act and the Sherman Antitrust Act, across such controversial laws as the Federal Reserve Act and the Smoot-Hawley Tariff and such bipartisan measures as the Federal Aid Highway Act of 1956 and the GI Bill, across such politically explosive statutes as the McCarran Internal Security Act and such politically mundane bills as the Postal Act of 1851, such legally salient acts as the Military Commissions Act of 2006 and such legally inert laws as the Coinage Act of 1837.

6. I bracket the possibility that a judicial ruling might have outsized importance for future cases or policy decisions. Given the precedential quality of judicial decisions, it is possible that a decision in a case involving an unimportant policy could have substantial consequences for later cases or legislative decisions involving important policies. As a practical matter, legally important constitutional rulings seem likely to arise most often from the consideration of important statutes, but for present purposes I simply note the qualification.

Finally, the exercise of judicial review involves constitutional issues as well as statutory provisions. Congress might run afoul of a variety of different constitutional objections arising from different constitutional provisions, rules and principles. For present purposes, we can abstract from the details of those myriad constitutional rules and construct broader categories of constitutional objections. Constitutional decisions implicate three types of constitutional issues: civil rights and liberties, economic, and structural.[7] The Court's own agenda and understanding of the constitutional rules have changed over time, altering the mix of the types of constitutional issues involved in the judicial invalidations of statutes.

The Supreme Court cases invalidating provisions of federal law decided between 1790 and 1953 are organized along these three dimensions in Table 1. As Table 1 indicates, the bulk of these cases tend to fall on the more modest end of

TABLE 1. U.S. Supreme Court Cases Invalidating Federal Statutory Provisions, 1790–1953.

	Struck in whole		Struck as applied	
Important provision/landmark statute	17		18	
Marginal provision/landmark statute	12		32	
Provisions of less important legislation	30		48	

Note: Graph shows issue area of constitutional decisions in each category. Due process, substantive rights, and equality are at the top of the column, economic issues are the middle bloc, and structural issues are at bottom.

7. Civil rights and liberties include claims involving substantive and procedural protections of personal liberty and requirements of equal treatment. Economic involve limitations on government imposition on economic affairs, including taxation, takings, and contracts. Structural issues include constitutional rules based on either federalism or the separation of powers.

the spectrum. A large majority of the cases struck statutory provisions only in part and as applied rather than in whole. Moreover, half of the cases involve relatively unimportant statutes, and less than a quarter involve a relatively important legislative provision. This suggests a Court more likely to be working on the margins of American politics than within its central core.

If any of the Court's cases invalidating federal laws were to gain our retrospective approval, they would be more likely found among those cases dealing with relatively unimportant federal policies. The Court's decisions striking down important federal policies are especially unlikely to win unanimous support now. The judicial nullification of major policies ranging from the ban on slavery in the territories, to wartime legal tender, to Reconstruction-era civil rights statutes, to the federal income tax, to the prohibition on child labor, to central components of the first New Deal were controversial at the time they were decided and have failed to gain much additional support from subsequent generations. If anything, such decisions are likely to look even worse in hindsight than they did to political leaders at the time.[8] From the perspective of the present, the Court was far more likely to get it wrong than to get it right when striking down an important federal policy and the power of judicial review would seem to have been more of a liability than an asset.

The constitutional issues that dominated the Court's docket in these cases also tend to work against a favorable historical reassessment of the Court's handiwork in its first century and a half of reviewing federal statutes. The Court's docket was crowded with cases challenging federal statutes on the grounds that Congress had violated structural features of the Constitution (primarily federalism) or limitations on its power to intervene in economic affairs. From a post-New Deal perspective, most of the Court's efforts to enforce structural or economic limits on congressional power are in bad odor. The Court spent the bulk of its time enforcing constitutional rules that have since been repudiated. Rather than defending widely accepted constitutional values against temporary political departures, the Court was more often advancing contested political values that have lost rather than gained support over time.

The corner of the Court's historical docket that was more likely to invoke enduring constitutional principles involved matters of legal procedure. Such cases were generally unlikely to involve challenges to important statutory provisions, however. Perhaps the sole exception came in *Ng Fung Ho v. White* (1922). *Ng Fung Ho*

8. The single exception, noted below, is *Ng Fung Ho v. White* (1922).

involved a challenge to a core provision of the General Immigration Act of 1917. Congress authorized the deportation of aliens by executive order, but Gin Sang Get claimed to be the child of a U.S. citizen and was therefore entitled under the Fifth Amendment to a judicial hearing before being subjected to deportation. Writing for a unanimous Court, Justice Brandeis agreed. Similarly, in *Wong Wing v. United States* (1896), the Court took up a more marginal provision of an earlier statute which authorized the sentencing of Chinese aliens found on American soil to imprisonment and hard labor after a summary hearing. The justices thought that imposition of such criminal punishment required a jury trial. Those decisions marked rare instances of the Court obstructing important policy decisions in the name of constitutional principles that remain vibrant today.

Other cases asserting procedural values tended to nibble at the margins of congressional statutes. When Congress declared that the inhabitants of the newly acquired Alaskan territory were not entitled to traditional jury trials, the Court objected in *Rasmussen v. United States* (1905). When Congress determined that the expediency of collecting taxes necessitated imposing time limits on trials to dispute tax assessments, the Court insisted in *United States v. Phelps* (1834) that the legislature could not interfere with continuances that judges thought might be necessary to insure a fair trial. Upon revising the internal duties on tobacco, Congress announced that only those who had already paid taxes under the old rate were exempt. When a Virginia tobacco trader objected to being fined for paying only the old duty rate on product that had already been stamped at the time that the law went into effect, the Court agreed that Congress had in effect adopted an *ex post facto* law that punished those who were in a state of compliance with the relevant laws at the time of the new statute's enactment (*Burgess v. Salmon* 1878).

Such marginal cases might also point to the instances in which the Court advanced protections for property and economic activities in ways that might still seem appealing. In several cases, the Court bridged between broader procedural concerns and specifically economic interests. At the end of the nineteenth century, for example, the Court insisted that Congress could not claim for itself the right to determine what constituted just compensation when the federal government seized private property. Congress could determine when private property was needed for a public purpose, but only a court could ascertain what the constitutionally required level of compensation should be (*Monongahela Navigation Co. v. United States* 1893). When the Marshall Court was asked to apply a federal statute that purported to resolve a disputed boundary line between territory controlled by Virginia and the United States government (in favor of land titles acquired from the

federal government), the Court observed that Congress could not constitutionally "adjudicate in the form of legislation" and as a consequence Congress could not be understood to have attempted such an impermissible action (*Reynolds v. M'Arthur* 1829, 435).

In a myriad of tax cases, the Court was called upon to determine whether Congress had accidentally (or perhaps not so accidentally) stumbled across a constitutional line. The principles at stake in those cases are unlikely to be of much greater political salience to us today than they were at the time, but the Court's effort to preserve them probably remain unobjectionable. The War Revenue Act of 1898, for example, generated a lengthy stream of constitutional litigation. In *Fairbank v. United States* (1901, 312), the Court pointed out that a stamp tax on a foreign bill of lading is "in substance and effect equivalent to a tax on the articles included in the bill of lading, and therefore a tax or duty on exports, and in conflict with the constitutional prohibition." Similarly, the Court applied the same prohibition to bar taxes on charters to foreign ports, taxes on marine insurance on cargo for export, and taxes on sales that were simply steps in the export process (*United States v. Hvoslef* 1915; *Thames & Mersey Marine Ins. Co., Ltd. v. United States* 1915; *A.G. Spalding & Bros. v. Edwards* 1923). Similarly, the Court held that Congress could not impose a gift tax on gifts that had already been fully consummated or an estate tax on land that had already been transferred (*Blodgett v. Holden* 1927; *Nichols v. Coolidge* 1927).

While the Court's decisions on structural issues generally ran against the grain of post-New Deal constitutional jurisprudence, there are some potential exceptions. The congressional struggle to identify how best to handle the transition from territorial to federal courts upon statehood is not of substantial modern significance. Even to those who more regularly made decisions on statehood, such issues were of minimal political significance. Perhaps as a consequence, the Court's determination that Congress could not authorize the U.S. Supreme Court to continue to hear cases on appeal from the Florida territorial court after Florida had become a state caused little more than embarrassment in the legislature (*Benner v. Porter* 1850). The problem of the judicial transition from territorial to state and federal courts was largely a matter of neglect. The congressional effort to specify that the capital of the state of Oklahoma could not be moved by the government or people of the state for several years after statehood cannot be chalked up to mere neglect. The Court's conclusion that this statutory provision violated the "constitutional equality of the States" is as persuasive now as it was at then (*Coyle v. Smith* 1911, 580).

IT GETS BETTER?

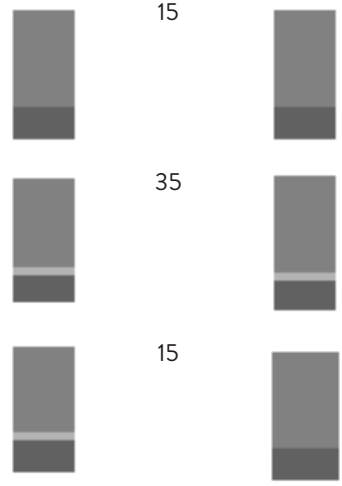
But perhaps *Bolling* is a critical break in the Court's practice. We might imagine the first century and a half of the Court's existence as an extended adolescence, in which the justices were still trying to figure out what kind of power they had and how it should be used. Perhaps in the post-New Deal era, the Court finally and for the first time got it right. *United States v. Carolene Products* (1938) marked a new age for the Court, promising that the Court would no longer make the mistakes of the past and in the future would focus its attention on a more normatively worthy project. While the initial thrust of *Carolene Products* was to emphasize judicial deference to congressional wishes, *Bolling* might mark the beginning of a period in which the Court moved more aggressively to police the national legislature. As important for present purposes, this new mission might also be embraced as politically uncontroversial and theoretically thin, carefully neutral to contested political programs and substantive values (Ely 1980).

There is some reason to be doubtful that the Court's history would end with such a happy conclusion. Dahlian theories of the U.S. Supreme Court as a partner and ally of national political leaders would counsel some skepticism of the view that the Court had changed its stripes in fundamental ways (Dahl 1957; Graber 1993). Justice Harlan Fiske Stone's Footnote Four in *Carolene Products* pointed the Court toward a new mission of protecting "discrete and insular minorities" and securing the workings of the political process. This mission might be most fully realized in the Court's review of state policies, perhaps because the states are more likely to abuse minorities in ways that James Madison would have expected but perhaps also because the justices are unlikely to disagree with federal policies that encroach upon minorities or the political process (Powe 1994). Moreover, the briefest consideration of the modern Court points out the fact that the Court is more likely to wade into controversy when striking down laws than remind the people of their deepest consensus values. Paper-thin majorities on a deeply divided Court might be reaching normatively desirable results, but they are poor indicators of judicial minimalism.

Table 2 repeats the categorization of cases found in Table 1, but shifts the time frame to the period after the *Bolling* decision. As a comparison between the two tables shows, the Court's exercise of judicial review has shifted significantly since the mid-twentieth century. The Court invalidated federal laws in roughly the same number of cases decided in the past six decades as it did in the prior sixteen, and the Court has become much more likely to strike down statutory provisions in their

TABLE 2. U.S. Supreme Court Cases Invalidating Federal Statutory Provisions, 1954–2015.

	Struck in whole	Struck as applied
Important provision/landmark statute	15	15
Marginal provision/landmark statute	32	35
Provisions of less important legislation	42	15



Note: Graph shows issue area of constitutional decisions in each category. Due process, substantive rights, and equality are at the top of the column, economic issues are the middle bloc, and structural issues are at bottom.

entirety rather than in part or as applied. The Court has also become less likely to strike down provisions of unimportant statutes; such cases were once half of the cases invalidating statutes, but they have been just over a third of the cases decided since mid-century. That does not necessarily mean that the Court has been focused on far more important policies, however, since the Court has mostly shifted its attention to less important provisions of landmark statutes but has seen little change in how often it strikes down core provisions of important statutes.

More striking than the shift in the importance of the policies nullified by the Court is the shift in the constitutional issues at stake in those cases. While the Court's work prior to *Bolling* was almost equally divided between civil rights and liberties, economic issues, and structural issues (though leaning toward the latter), the Court since mid-century has directed the bulk of its attention to the first class of issues. Economic issues have nearly disappeared from the Court's more recent agenda and federalism cases have been cut in half, while the number of civil rights and civil liberties cases has more than doubled. The shift away from economic and federalism issues and toward civil rights and liberties has been even more dramatic in the set of cases involving landmark statutes; when the Court invalidates statutory provisions

on federalism or economic grounds since the mid-twentieth century, those statutes are likely to be unimportant ones.

This shift in the Court's constitutional agenda might be a good sign for a minimalist theory of judicial review. To the extent that judicial review based on economic issues and federalism is unlikely to win much favor from modern commentators, then the Court might be avoiding some controversy by avoiding such issues. Unfortunately for a minimalist theory of judicial review, the types of civil rights and civil liberties issues that have absorbed the Court's attention in recent decades are themselves likely to be controversial, perhaps particularly when marshalled in the context of federal statutes.

Whether involving due process, substantive liberties, or civil rights, the Court's invalidations of federal policies in cases addressing these issues are frequently controversial. Probably leading the list of such controversial rulings would be the line of campaign finance cases that began with *Buckley v. Valeo* (1976). Although *United States v. Windsor* (2013) might eventually win consensus approval as public opinion continues to shift in support of same-sex marriage, we are clearly not yet to that point. The Court's invalidation of congressional funding restrictions on the Legal Services Corporation is probably just as controversial today as when it was decided (*Legal Services Corp. v. Velazquez* 2001). It seems likely that the Court's procedural objection to the use of dependent child income tax deductions to determine eligibility for food stamps would continue to attract dissents (*United States Dept. of Agriculture v. Murry* 1973). The Court's objection to warrantless OSHA inspections is likely still controversial (*Marshall v. Barlow's* 1978), and the Court's invalidation of a federal program to send public school teachers to provide remedial education services in parochial schools has been formally overruled (*Aguilar v. Felton* 1985). *Boumediene*'s objection to the Military Commissions Act of 2006 has been accommodated but hardly embraced (*Boumediene v. Bush* 2008). This, of course, says nothing about the controversies surrounding the Court's modern federalism and separation of powers decisions, from *INS v. Chadha* (1983) to *Clinton v. New York City* (1998) to *Shelby County v. Holder* (2013).

But perhaps there are still candidates for modern cases that in hindsight would win widespread support. In *Reno v. American Civil Liberties Union* (1997), a unanimous Court struck down a provision of the Communications Decency Act. Although the President Bill Clinton publicly bewailed the Court's action, administration officials privately recognized that the act was unconstitutional (Whittington 1999, 208–210). The same might be said for the invalidation of the Flag Protection Act of 1989, though it is not clear that mass opinion would readily align with elite opinion on the scope of constitutional protections to flag burners (*United States v.*

Eichman 1990). Similarly, the Court's unanimous decision to carve out a ministerial exception in the Americans with Disabilities Act is probably coherent with contemporary norms and might be regarded by Congress as a friendly amendment to the statute (*Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* 2012). The once controversial early gender equity cases like *Califano v. Goldfarb* (1977) and some equality cases like *Jimenez v. Weinberger* (1974) would undoubtedly now win unanimous support. Timothy Leary's unanimous victory against the 1937 Marihuana Tax Act likely stands the test of time (*Leary v. United States* 1969). Despite the dissent of Justice Alito, the Court's decision striking down the initial effort by Congress at regulating depictions of animal cruelty might command general acceptance (*United States v. Stevens* 2010), as would the unanimous decision objecting to the effort to censor the federal mails (*Blount v. Rizzo* 1971) and the unanimous decision to extend First Amendment protections to protestors making use of public streets that run through an open military base (*Flower v. United States* 1972). The once controversial case of *Trop v. Dulles* (1958) determining that Congress could not use the revocation of U.S. citizenship as a criminal punishment is probably now beyond controversy, though it is hard to say whether the general public would uniformly line up behind that principle if the issue were to once again be made politically salient.

CONCLUSION

Whether from the political right or the political left, the Court's decisions invalidating federal policies routinely generate controversy. Even in hindsight, those decisions have often seemed misguided to large sectors of the political elites and of the mass public. Rather than providing a sober second thought, the Court is more likely to act as yet another partisan participant in the policy-making process, wielding a veto power to strike down policies that many would have preferred to leave in place in the name of constitutional values that many would reject. For much of its history, the Court regularly acted on constitutional principles that are now regarded as defunct. But even in the modern period, the Court routinely strikes down laws that it regards to be in conflict with principles that remain deeply controversial.

Even so, there are at least some instances in which the Court has acted in a way that would, at least in hindsight, win plaudits rather than denunciations. This is perhaps most true when dealing with cases involving largely procedural protections, whether narrowly within the scope of due process or more broadly involving free speech. Such values have proven to be particularly enduring, but they have come under pressure from precisely the kind of passionate politics that has often worried

democratic theorists. Specifically American-style judicial review might also be particularly useful in enforcing those principles since they often arise in the context of specific applications of broadly worded statutes. The Court has often stepped in to carve out exceptions to policies that were perhaps more broad-reaching than even the legislators themselves would have preferred. Being down in the trenches of legal applications allow judges to see the specific examples where policy and principle might come into conflict.

The historical record also suggests a possible addendum to the minimalist theory of judicial review. The sober second thought scenario emphasizes the possibility that a relatively insulated and detached judiciary can rise above tumultuous democratic passions and preserve enduring principles. But these instances of horizontal judicial review by the U.S. Supreme Court only occasionally evince either democratic turbulence or judicial steadfastness. The record does suggest a further possibility of how judicial review might be useful without having to appeal to thick and controversial normative theories, however. Often what the justices bring to the table of American politics appears to be less Bickelian principle than technical expertise about complicated but relatively uncontroversial constitutional rules. While we might imagine the possibility that the legislative branch could develop a comparable expertise so as to avoid constitutional errors, legislators might reasonably prefer to delegate that task to the courts and rely on friendly judges to correct their mistakes (Rogers 2001; Whittington 2003, 451–454). At the same time, legislators have repeatedly shown that other imperatives—such as extracting revenue—often take priority, making constitutional errors a systematic feature of the American governance. A judiciary that leans in favor of liberty just as much as the legislature leans in favor of national security, public morality, or material enrichment might serve a useful countervailing role without necessarily being broadly countermajoritarian.

On the whole, a minimalist theory of judicial review would have a difficult time accounting for most of the Court's actual work in exercising the power of horizontal judicial review. The Court on occasion intervenes in the political process in ways that would win widespread support. Far more often, however, the Court's actions are controversial, not only in the moment of decision but in hindsight as well. In order to justify the historical record of how the Court has used the power of judicial review, we would have to turn to a thicker—and more controversial—set of normative arguments. We would need to be able to justify a Court that was countermajoritarian in a deeper sense—a Court that does not merely formally obstruct the expressed legislative will, but a Court that blocks the substantive realization of democratic policy preferences as such.

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