

We the People, They the People, and the Puzzle of Democratic Constitutionalism

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I. The Illusion of “We the People”

The Constitution, of course, announces that it has been “ordain[ed] and establish[ed]” by “We the People.”¹ The idea that the Constitution is somehow the work of “the people”—that it has a meaningful democratic pedigree—is very appealing. But in what sense is the Constitution we live under today the product of “we the people”?

There are several issues. One is that the individuals responsible for the original Constitution may not have been so representative of the people even of their time.² Then there is the familiar problem that, even assuming the text was the work of the people at some point, those people (leaving aside the most recent amendments) have not been around for a while. But we are still bound by their handiwork in some ways—which means we are talking about *they* the people, not *we* the people, and that does not sound very democratic.³ A third question concerns the ways in which we have departed from what the ratifying and amending generations wanted to do. That means we are arguably acting inconsistently with what we the people ordained and established. But maybe those departures make the Constitution more democratic; I will suggest that, potentially at least, they do. Finally, there is the question why it matters whether the Constitution is democratic. Or—maybe this is another way of asking the same question—what sense of “democratic” would make it a good thing for the Constitution to be democratic.

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1. U.S. CONST. pmbi.

2. See, e.g., Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1498 n.44, 1499–1500 & n.48 (1985) (estimating that, because only property-holding adult white males were enfranchised, and not all of them supported ratification, only 2.5% of the population of the United States at the time voted in favor of ratifying the Constitution).

3. Of course, the Constitution can be amended, see U.S. CONST. art. V, but a proposed amendment can be blocked even by a small minority—just over one-third of either House of Congress (unless two-thirds of the states call for a convention), or just over one-fourth of the states.

I will try to answer these questions for a system of common law constitutionalism. I believe that is our system; but even if it is not, or to the extent it is not, I think we can make headway with these questions by considering them in connection with such a system. The idea of common law constitutionalism is that we resolve controversial questions of constitutional law not by examining the text of the Constitution but on the basis of precedents, both judicial and non-judicial, combined with judgments of fairness and good policy—just as common law judges decide questions on those bases.⁴ For controversial constitutional issues, the text plays a limited role.

Any frequently litigated constitutional provision will serve as an example. The modal Supreme Court opinion quotes the language of the provision, but then, without any further attention to the language, says something like “We have interpreted this provision to mean” Then there follows an extended discussion of the precedents.⁵ If there is any room to maneuver, the Court shapes the law established by the precedents according to its ideas about what is fair or what makes sense.⁶ For lower courts, the emphasis on precedent is, if anything, even greater, because they are bound by the decisions of the Supreme Court and often of their circuit. Also, just as the common law was not concerned with judicial precedents alone—legislation, custom, and even general trends in society were all part of what common law judges considered⁷—so too common law constitutionalism is concerned with non-judicial, as well as judicial, precedent.⁸

4. For a description and defense of common law constitutionalism, see generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

5. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–19 (2011) (quoting the text of the Free Speech Clause of the First Amendment but then discussing numerous precedents without any further reference to the text).

6. See *id.* at 1220 (asserting that “hurtful speech on public issues” must be protected “to ensure that we do not stifle public debate”).

7. See BENJAMIN N. CARDOZO, *Adherence to Precedent: The Subconscious Element in the Judicial Process*, in *THE NATURE OF THE JUDICIAL PROCESS* 142 (1921). Judge Cardozo noted that:

[W]hen the law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have [the judge] declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct.

Id. at 142–43.

8. For an example of an argument based primarily on non-judicial precedent, see the opinions of the Office of Legal Counsel of the United States Department of Justice concluding that the President may make appointments under the Recess Appointments Clause during an intrasession recess of Congress. The most recent opinion, citing others, is *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. at 5–9 (Jan. 6, 2012), <http://justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>. This position was disapproved by the District of Columbia Circuit in *Noel Canning v. NLRB*, 705 F.3d 490, 499–507 (D.C. Cir. 2013). *Contra*, *Evans v. Stephens*, 387 F.3d 1220, 1224–26 (11th Cir. 2004) (holding

To be clear, the claim about common law constitutionalism is not that the text of the Constitution plays no role. It is a fixed point of our constitutional system that the text cannot be ignored.⁹ No one can claim that the Constitution requires or forbids something without citing a provision of the Constitution that supports the claim. It is also not acceptable to say that some provision of the Constitution is obsolete and so should be disregarded (in the way that a precedent might be outdated and should be overruled). Beyond that role, there are ways in which the text is very important, but in noncontroversial areas: the text can settle things that need to be settled, one way or another. It is important that we know when a President's term of office ends, for example. It could be very disruptive if we had to resolve that question on a case-by-case basis.

Fixed aspects of the Constitution—provisions that are clear and not subject to serious dispute—raise their own interesting issues about democracy. You could certainly ask, to take a prominent example, in what sense the continued existence of the Senate is democratic.¹⁰ But at least as far as the courts are concerned, questions about the democratic nature of constitutionalism usually arise when there is a dispute about what the Constitution requires—instances in which, for example, the courts have struck down laws that have significant popular support.¹¹ The problem seems to be particularly acute for common law constitutionalism, because the common law, as it developed in England and the United States, was, generally speaking, subordinate to legislation. It could be objected that using a common law approach to constitutional law presents special problems of democratic legitimacy because—in contrast to the familiar uses of the common law—common law constitutionalism allows common law judging to override the work of elected legislatures.¹²

that the recess of the Senate, within the meaning of the Recess Appointments Clause, includes an intrasession recess).

9. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) (“The text of the Constitution is authoritative, but many of its provisions are treated as inherently open-textured.”); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195 (1987) (“Arguments from text play a universally accepted role in constitutional debate.”).

10. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 49–62 (2006) (noting the disproportionate power of small states in the Senate and concluding that “there is simply no defense for this other than the fact that equal representation of the states was thought necessary in 1787 to create a Constitution that would be ratified by the small states,” and that the current division of power in the Senate “has literally nothing to do with measuring national majority sentiment”).

11. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (invalidating part of the Bipartisan Campaign Reform Act on First Amendment grounds); *United States v. Morrison*, 529 U.S. 598, 602, 605 (2000) (striking down the federal civil remedies portion of the Violence Against Women Act); see also Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 105 (“Judged in any number of ways, *Citizens United* appears to be the most counter-majoritarian act of the Court in many decades.”).

12. For an objection along these lines, see, for example, JACK M. BALKIN, *LIVING ORIGINALISM* 54 (2011) (asserting that common law constitutionalism “offers no account of why judicial

I think this particular objection is based on an illusion, although that is not to deny that one can raise questions about whether common law constitutionalism is sufficiently democratic. The illusion derives from the allure of “we the people.” If constitutionalism includes judicial review—if judges who are not politically accountable can refuse to enforce laws enacted by elected representatives—then there is an issue about whether constitutionalism is undemocratic.¹³ That issue arises because judges, who are less accountable to the electorate, are undoing the work of representatives, who are more accountable.¹⁴ The issue about democracy is an artifact of judicial review, not of a common law approach to the Constitution. Why does it matter whether the unelected judges are enforcing commands put into place by the people who drafted the Constitution a century or more ago, or applying precedent, or for that matter just enforcing their own policy preferences? Unelected judges are thwarting elected officials. That raises the question about democracy.

The illusion is that a common law approach to the Constitution is more undemocratic than enforcing the text of the Constitution because the text of the Constitution is the product of we the people and therefore has a democratic pedigree.¹⁵ So when the courts enforce it, they are just enforcing the will of the people; they are not acting undemocratically. This kind of argument is familiar from Hamilton’s *Federalist No. 78*. Hamilton rejected the “imagination” that giving courts the power to strike down statutes “would imply a superiority of the judiciary to the legislative power.”¹⁶ Rather, Hamilton said, the power of judicial review was just a way of vindicating the principle that “the representatives of the people” cannot be “superior to the people themselves.”¹⁷ The courts “were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.”¹⁸ Giving this power to the courts does not “by any means suppose a superiority of the judicial to the legislative power.”¹⁹ Rather, Hamilton concluded that it “only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people,

decisionmaking . . . has any connection to popular sovereignty” because “[j]udges are professional elites, and the precedents of previous judges are the decisions of past elites”).

13. This is, of course, a persistent theme, but probably the best known discussion is ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (1962).

14. *Id.* at 16–17.

15. *See, e.g.*, BALKIN, *supra* note 12 (asserting that judges who use a common law approach to the Constitution “are not engaged in constitutional construction that implements a written plan adopted by We the People; rather they are creating the Constitution through familiar common law methods”).

16. *THE FEDERALIST NO. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. *Id.* at 466.

18. *Id.*

19. *Id.*

declared in the Constitution, the judges ought to be governed by the latter rather than the former.”²⁰

If we were dealing with a recently adopted constitutional provision—one adopted by we the people, not they the people—then this argument would be plausible. The will of the people, expressed in a recent amendment, should prevail over the will of the legislature. Of course matters are not so simple, even with respect to recently adopted provisions. No one doubts that the Constitution prevails over ordinary statutes; the questions are always about the proper interpretation of the Constitution. But the main point is that the written Constitution we actually have, including the amendments that give rise to the most litigation, was, as I said, adopted by a long-dead generation. Hamilton’s people, at this point in history, are they the people, not we the people. So it is not clear why judicial review that is based on the text is more democratic than judicial review based on precedent.

II. How Common Law Constitutionalism Can Be Democratic

Assuming, though, that judicial review is to some degree undemocratic, we should still care about how undemocratic it is. It might still be a good thing for judicial enforcement of the Constitution to be able to claim some form of democratic legitimacy—of responsiveness to we the people. But what might democracy mean in this context?

Even if democracy just means some version of majority rule, there are difficult problems, of course. We have to decide how the views of the majority will be determined. If there is a system of representation, how are the representatives chosen—are they elected from districts or at large from the nation? If they are elected from districts, how are those districts identified? What are the representatives’ terms of office? There are also questions about how citizens’ votes are aggregated. Does the system use proportional representation, or “first past the post” voting, or a requirement of a majority vote, with a runoff if necessary? What roles do political parties play, in and outside the representative assembly? How is the agenda set in the representative assemblies? Are the assemblies unicameral or bicameral? Is the executive separate from the legislature? And then there are crucial questions about the process surrounding the voting: questions about, for example, the scope of free speech and regulation of the means of influencing votes, such as financial contributions and expenditures.

The multiplicity of these questions, and the difficulty of answering them, show that it is not obvious what constitutes a truly democratic system of government. That alone should cause us to hesitate about contrasting “democratic” elected government with “undemocratic” judicial review. Having said that, however, in a system with something like judicial review, there will be elements that are avowedly undemocratic in the sense that they

20. *Id.*

are not subject to the usual majoritarian processes. Judges are insulated from popular opinion: federal judges, at least, are appointed, not elected, and they “hold their Offices during good Behavior.”²¹ Conventional understandings, not spelled out in the Constitution, would condemn a judge who viewed herself simply as an agent of popular will.

Still, though, rather than describing judicial review as “counter-majoritarian”²²—as if it were the antithesis of democratic government—it might be better to say that there is a continuum. Life-tenured judges are different from elected representatives, of course, but if you think about a representative who has a safe seat, and whose chances of losing an election are therefore minimal, or a representative who does not plan to run for reelection, the differences with judges—as far as democratic credentials are concerned—are not so stark. Perhaps more important, all representatives are insulated to a degree; some of them (such as United States Senators) serve relatively long terms of office,²³ and there is no understanding that representatives must respond to every twist and turn of constituent opinion.²⁴ That suggests that a good constitutional order has elements that are highly responsive to popular opinion and elements that are designed to be less responsive.²⁵ In that sense, any plausible constitutional system is, to some degree, undemocratic.

When courts override the elected branches in the name of the Constitution—whether they use a common law approach or something else—they are doing something undemocratic in this sense. But because any plausible constitutional order has some undemocratic elements, that alone does not call judicial review into question. The important questions about constitutional interpretation and judicial review concern the nature and extent

21. U.S. CONST. art. III, § 1.

22. See BICKEL, *supra* note 13 (discussing the “root difficulty” of judicial review’s “counter-majoritarian” nature).

23. See LEVINSON, *supra* note 10, at 50 (“I suspect that the country has probably been reasonably well served by the six-year term. It encourages taking a more long-term view than do members of the House, who are constantly aware that they will face a new election literally within twenty-two months of taking their oaths of office.”); William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEXAS L. REV. 1273, 1281 (2009) (noting that “the Senate, with long terms and statewide districts, is expected to be a ‘select and stable’ body”).

24. See Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 214 (2009) (remarking that “[n]o one expects there to be an exact correspondence” between the laws of a nation and the preferences of the citizens governed by them because citizens’ preferences are not coherent at “the individual [and] collective levels,” may not correspond to their “true interests,” and might be trumped by “more important principles” such as minority rights).

25. See Eskridge & Ferejohn, *supra* note 23 (arguing that “each part of the lawmaking process plays a different deliberative role,” with the House of Representatives being “most responsive to popular attitudes and demands” and the Senate “apply[ing] longer term considerations of ‘reason and justice’ to measures urgently sought by the House”); cf. James E. Fleming, *Toward a More Democratic Congress?*, 89 B.U. L. REV. 629, 640 (2009) (concluding “attempts to make Congress more democratic” would not fix the institution’s problems).

of these undemocratic elements. What is the role of these (relatively) undemocratic institutions? Should the courts intervene only on behalf of certain minorities? On behalf of some supposedly enduring national values or traditions? On behalf of principles supposedly encoded in the text of the Constitution? The interventions will, in a sense, be undemocratic, but that is not necessarily a problem. In fact, it may be a good thing.

I do not think we should stop there, though. There should be some way to show that constitutionalism, including judicial review, is democratic. That is, there should be some account of how the Constitution that is enforced against majoritarian institutions is the work of we the people. But the account should be a realistic one that does not pretend we are the same people we were 220 or 150 years ago.

Before I try to give such an account, it is worth addressing a theory that seems to solve this whole problem neatly. The theory is usually called dualist democracy.²⁶ The idea is that the Constitution is actually a product of a democratic process that is superior to ordinary day-to-day majoritarian processes.²⁷ The ordinary processes are more heavily influenced by interest groups or elites—not truly by the people, who are engaged more with their own lives and not so much with the business of government.²⁸ But from time to time, according to this theory, the people are mobilized, and that enables a superior democratic sensibility to prevail.²⁹ The Constitution, on this view, is

26. The best-known contemporary statements are in 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*], which differentiates between rare decisions made by the people—“higher lawmaking”—and decisions made more frequently by the government—“normal lawmaking”—and 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 5 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*], which describes higher lawmaking as taking place under a “heightened sense of democratic legitimacy” and normal lawmaking as the “countless decisions made in the absence of mobilized and politically self-conscious majority sentiment.” See also the discussion of the dualist nature of constitutional democracy in JOHN RAWLS, *POLITICAL LIBERALISM* 231–33 (expanded ed. 2005), which traces the central idea to John Locke’s *Two Treatises of Government*, and refers to “Locke’s distinction . . . between the people’s constituent power to establish a new regime and the ordinary power of officers of government and the electorate exercised in day-to-day politics.”

27. See ACKERMAN, *FOUNDATIONS*, *supra* note 26, at 6 (arguing that the Constitution “accords to decisions made by the People” only when an “extraordinary number” of citizens take a proposal seriously, opponents of the decision have “a fair opportunity to organize,” and a majority of Americans “support [the] initiative as its merits are discussed, time and again, in the deliberative fora provided for ‘higher lawmaking’”). For a somewhat similar account, see KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 110–59 (1999). See, e.g., *id.* at 151 (“The formation of the Constitution depended on popular deliberation, and it was drafted and ratified on the basis of the persuasion of the whole, not the assertion of a part.”).

28. See ACKERMAN, *FOUNDATIONS*, *supra* note 26, at 243–51 (identifying bureaucrats, public and private interest groups, the mass media, and political parties as the primary vehicles of normal politics).

29. See *id.* at 266–67 (describing a period of “mobilized popular deliberation” in which a “movement’s transformative proposals are tested time and again within the higher lawmaking system”).

the product of these periods.³⁰ Judges should treat as the Constitution the decisions that are the product of these heightened periods of popular political engagement, the so-called constitutional moments.³¹

In American history, the framing of the written Constitution was one such constitutional moment, but it was not the only one. The other usual candidates are the period after the Civil War and the New Deal.³² We need some criterion to determine when constitutional moments have occurred, and we need a way of identifying the decisions that are going to be attributed to these periods of heightened engagement. Then those decisions, being truly the decisions of we the people, can, according to the theory of dualist democracy, be enforced during normal times, against the less fully democratic decisions of the interest groups and the elites.³³

This theory solves the problem of the supposedly undemocratic nature of judicial review by echoing Hamilton's discussion in *Federalist No. 78*.³⁴ When judges enforce the Constitution, they are vindicating, not defeating, the true will of the people. That is because the true will of the people is expressed in the decisions made during constitutional moments, not in the day-to-day product of the political system. Judges invalidate the latter when it is inconsistent with the former.

I do not think this theory works, for several reasons. There is the problem of identifying the periods of superior democratic engagement. It is not obvious that things like, for example, higher voting turnout or greater participation in political organizations should be enough to establish greater democratic legitimacy in the sense we need. The theory would have to identify, with specificity, the problems that afflict normal majoritarian processes and then show how those problems are overcome when certain conditions are present. That kind of demonstration presents serious normative and empirical difficulties—normative issues about what kind of citizen participation brings about the superior democratic deliberations and empirical issues about the circumstances that will produce that kind of

30. *See id.* at 267 (describing the final phase of higher lawmaking, legal codification, in which “the Supreme Court begins the task of translating constitutional politics into constitutional law, supplying the cogent doctrinal principles that will guide normal politics for many years to come”).

31. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984) (“Although constitutional politics is the highest kind of politics, it should be permitted to dominate the nation’s life only during rare periods of heightened political consciousness. During the long periods between these *constitutional moments*, a second form of activity—I shall call it normal politics—prevails.” (emphasis added)).

32. *See, e.g.*, ACKERMAN, FOUNDATIONS, *supra* note 26, at 58 (identifying the “three great turning points of constitutional history” as the Founding, Reconstruction, and the New Deal).

33. *See id.* at 6–7 (outlining “the basic idea” of a dualist democracy as one where normal lawmaking occasionally cedes to higher lawmaking by which a mobilized populace signals to their government “new marching orders,” finally “culminat[ing] in the proclamation of higher law in the name of We the People”).

34. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 16, at 466 (asserting that “the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority”).

participation. The circumstances that cause people to get highly engaged in politics might not be conducive to higher quality decision making.³⁵ In fact, the opposite might be true: periods of crisis might precipitate a lot of political engagement but also bring out the worst in people.

But even if it were possible to identify constitutional moments in the past when the authentic will of the people was expressed, dualist democracy would still not make judicial review democratic.³⁶ For one thing, unless the constitutional moments were in the recent past, it is still they the people, not we the people. The youngest person who voted for Franklin Roosevelt in 1936 is 98 years old today.³⁷ Being ruled by the decisions of the New Deal generation is not particularly democratic.

And even apart from that difficulty—and again assuming we have identified genuine constitutional moments—there is the problem of figuring out what decisions were made by “the people” during those periods. That problem is hard enough when the constitutional moment produces a full-blown written Constitution, together with extensive records of drafting and ratification debates. Even when we have those materials, there is often no consensus on what the people decided during the constitutional moment: we have the familiar debates about the original understandings. When the process is not that explicit—when no canonical text emerges from the constitutional moment—we have to determine what decisions to attribute to a people who were no doubt divided on many issues, had multifarious concerns, and probably did not realize that they were engaged in a form of constitution making. That determination will not be easy. It will have to be made by someone—a judge, for example. And that just reproduces the same problem about the democratic basis of judicial review.³⁸

Finally, dualist democracy is, I think, not an accurate description of our system. Many major constitutional developments did not emerge all at once as the product of something that could plausibly be described as a unified set of decisions by a politically engaged population. Those developments came about over time, often in fits and starts. It is not possible, for example, to identify a two- or three- or five- or even ten-year period in which racial equality emerged as a governing principle in American constitutional law;

35. See, e.g., Jon Elster, *The Optimal Design of a Constituent Assembly*, in COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 148, 149 (Hélène Landemore & Jon Elster eds., 2012) (“Actual constitution making is often a messy business, triggered by crises of one kind or another and rarely governed by the ‘calm, sedate medium of reason.’”).

36. See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 765 (1992) (book review) (arguing that a proponent of dualist democracy “cannot make a principled choice between the disinterested voice of a People long since dead and the voice of today’s living stand-ins”).

37. Interview by Ray Suarez with Elzena Johnson, Delegate to the 2012 Democratic Nat’l Convention, in Charlotte, N.C. (Sept. 6, 2012), available at http://www.pbs.org/newshour/bb/politics/july-dec12/elzena_09-06.html.

38. See, e.g., Klarman, *supra* note 36, at 770 (“Even having established that a constitutional moment had occurred, courts . . . would still need to ascertain its content.”).

there were important antecedents to the 1954 decision in *Brown v. Board of Education*³⁹ (including the post-Civil War period, of course, as well as events in the twentieth century), and the Civil Rights Act of 1964 hardly marked the end of the process.⁴⁰ The same is true of freedom of speech,⁴¹ women's equality,⁴² the growth of the administrative state,⁴³ the expansion of federal power over the national economy,⁴⁴ and the emergence of presidential dominance in national security affairs.⁴⁵ It is not realistic to attribute these developments to a single decisive act (or a closely related set of decisive acts) by the electorate. These constitutional developments were the product of a much more evolutionary process.

Is there, then, a meaningful way in which a constitution that is enforced against majoritarian decisions can be called democratic? As I said, I will consider a common law constitutional system, although I think the argument has application beyond that. For the sake of exposition, I will consider a simple model that seems relatively undemocratic: constitutional principles are developed through judicial precedent alone and then used, by federal judges, to invalidate laws enacted by Congress and state legislatures. I should emphasize that this is not the whole of common law constitutionalism. Other actors besides judges—legislators, executive branch officials, and citizens—rely on precedent too. And judges (as well as these other actors) invoke non-judicial precedent, not just the work of judges. But common law constitutionalism is at its most undemocratic when judges rely on judicial precedent alone. So if that kind of system is sufficiently democratic, it follows *a fortiori* that common law constitutionalism as a whole is adequately democratic.

39. 347 U.S. 483 (1954).

40. See STRAUSS, *supra* note 4, at 85–92 (discussing how earlier events influenced the Court's decision in *Brown*); see generally Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1 (2009) (describing events and landmark Supreme Court cases concerning racial equality from the mid-1800s to present).

41. See David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (attributing the current state of free speech law to an evolution arising from "judicial decisions and extrajudicial developments").

42. See, e.g., Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (grounding ratification of the Nineteenth Amendment in a history that began with the drafting of the Fourteenth Amendment).

43. See generally STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920* (1982) (describing the creation and growth of federal administrative agencies).

44. See, e.g., Larry Kramer, *What's a Constitution For Anyway? Of History and Theory*, Bruce Ackerman and *The New Deal*, 46 CASE W. RES. L. REV. 885, 921 (1996) ("The New Deal called for a significant expansion of federal authority, to be sure, but from a constitutional perspective, the increase was quantitative rather than qualitative.").

45. For a comprehensive discussion, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

There are at least three ways in which such a judge-centric system, contrary to appearances, is democratic.⁴⁶ The first—probably the most obvious—is that although federal judges do not run for office and cannot easily be turned out of office, they are embedded in a democratic system. They are selected and confirmed by elected officials. Judicial appointments can, of course, be used to try to entrench the views of a governing coalition for some time after the coalition has lost power.⁴⁷ But at least at the time of their appointment, most judges will have views that are roughly in line with popular sentiment.⁴⁸ In their general outlook and sensibilities, they are likely to be mainstream figures⁴⁹ (which may be good or bad, but is more democratic than the conventional view of judges as “countermajoritarian” actors would suggest). And even the views of a defunct coalition will probably still have many adherents.

Also, the judiciary is a multi-member institution; that reduces the chance that any outliers with truly idiosyncratic views who slip through the majoritarian appointment process will have a lot of influence. And judges do not serve forever. They will at least be within a generation or two of the people who are immediately affected by their decisions—which is more than can be said about the people who drafted and ratified most of the written Constitution or participated in the leading candidates for constitutional moments.

Second, precedent reflects popular sentiment to a degree. That is easy to see if we consider non-judicial “precedent” that includes developments in the society as a whole. For example, the decisions interpreting the Constitution to forbid many forms of discrimination against women could, on a common law view, legitimately derive support from trends in the larger society that pointed toward women’s equality—changes in nonconstitutional law, and changes in the economy and the society as well. But even strictly judicial precedent will have a more difficult time surviving if it is too far out of touch with popular sentiment. Elected officials will resist precedents that are highly unpopular—that is, even if the officials obey specific orders from the courts, they may refuse to recognize some decisions as proper interpretations of the Constitution unless they are specifically ordered to do

46. Many others have suggested, in various ways, that judicial review is less countermajoritarian than it appears. See, for example, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 229–40 (2009); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); and Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 *GEO. L.J.* 113 (2012).

47. See, e.g., Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 138, 138–61 (Ronald Kahn & Ken I. Kirsh eds., 2006).

48. See *id.* at 142–43 (“[J]udges . . . tend to represent the political agenda that was most salient at the time of their appointment.”).

49. See Lain, *supra* note 46, at 164 (“Like the rest of us, Supreme Court Justices are a product of their time.”).

so.⁵⁰ In addition, unpopular precedents will come under pressure from new judicial appointees, including judges on lower courts who will implement them grudgingly. Citizens may also resist them, if they have the opportunity. All of these forces will tend to keep precedent from drifting too far from public opinion.

Finally, judicial review itself will become vulnerable if the courts deviate from public opinion too much and too often. In a generally democratic system, institutions that are unacceptable to large numbers of people will have trouble surviving in fact, if not in name. The long-term general acceptance of judicial review—which, if I am right, operates by means of a common law-like approach—is a sign that that approach is, at least, not too objectionable to too many people. Of course, none of these things demonstrates that a majority of the people always supports judicial review, or common law constitutionalism, no matter what the courts do. But majority support is not the point; if it were, judges would be elected the way legislators and chief executives are. The point is just that there is a meaningful sense in which common law constitutionalism is democratic.

This last point applies not just to judicial review but to other aspects of the system—arguably undemocratic elements, like the Senate,⁵¹ or elements that are hard to classify as democratic or not, such as the requirement that presidential elections be held every four years instead of at some other interval.⁵² If the system as a whole is broadly responsive to popular sentiment, then particular elements of the system will not be able to survive if they encounter massive popular disapproval. Obviously this does not mean they are ideally democratic, on the assumption that we know what “ideally democratic” means. But it does put a floor under them; it limits how undemocratic these institutions can become.

Of course, it is still true that the system can be improved. The improvements might be done in the name of some specific normative view about what a well-functioning democracy looks like. So one might argue for the popular election of the President, for example, in preference to the Electoral College. In the case of judicial review, the argument would be that the best conception of democracy requires that the courts defer more to certain legislative and executive decisions than to others. This kind of argument prevailed in the mid-1930s, when the Court abandoned economic due process and began following the approach to the Constitution described

50. See, e.g., BICKEL, *supra* note 13, at 258–64 (describing reactions of Presidents Jackson, Lincoln, and Franklin Roosevelt to decisions they disapproved).

51. See LEVINSON, *supra* note 10 (criticizing the “[i]llegitimate Senate” for its system of unequal representation and the resultant redistribution of resources from large states to small states).

52. See *id.* at 116–18 (suggesting that the rigidity of the President’s term of office may be undemocratic in light of the inability of fixed terms to guarantee good policy or serve as a measure of political stability).

in the *Carolene Products* footnote.⁵³ The claim, at the time, was that the appropriate judicial role in a democracy is the one described in the footnote; by implication, the approach the Court had been taking before was insufficiently democratic. To some extent, this revision in the role of the courts was probably prompted by elite opinion, but the Supreme Court, at least, also responded to some of the democratic forces I described.⁵⁴ It came under pressure from popular opinion, and its membership changed; the new appointees were chosen by a popular president who wanted to recast the Court's role.

There is no single theory of democracy that is obviously right, and, for that reason, among others, no single way of establishing, beyond dispute, the democratic credentials of judicial review and common law constitutionalism. But those credentials exist. The Constitution that is in the National Archives was the work of they the people. But the Constitution we actually have—an evolutionary one, not one that is under glass—actually is, in important ways, the work of we the people.

53. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (proposing a heightened standard of judicial review, among other things, for legislation aimed at “discrete and insular minorities”).

54. For a historical discussion of the significant events preceding *Carolene Products* and the impact of these events on the Court's jurisprudence, see FRIEDMAN, *supra* note 46.