Reconsidering Judicial Supremacy: From the Counter-Majoritarian Difficulty to Constitutional Transformations

Allison M. Martens

The counter-majoritarian difficulty has for many years framed constitutional scholarship for both law professors and political scientists studying judicial review. Unfortunately, shared attention has not led to shared insights, as these scholars have remained isolated in their respective academies. Recently scholars have begun targeting this disciplinary barrier, and questioning whether developing norms of judicial supremacy have importantly raised the stakes of determining the legitimacy of courts setting policy in a democracy. This article proposes a new approach to the study of judicial review aimed at understanding systemic change rather than institutional legitimacy, using recent concerns over the drift from judicial review to judicial supremacy as a point of departure for study. I recommend, to both normative and positive scholars, a new and integrated focus on the relationship between judicial policymaking and wider transformations of the constitutional order that have previously been obscured by orienting constitutional scholarship around the counter-majoritarian difficulty.

Academic discussion of judicial review has long been oriented around the counter-majoritarian difficulty. The counter-majoritarian difficulty questions whether the unique properties of judicial decision-making, which include constitutionally prescribed insulation from public influence, are consistent with America's democratic commitments. Unfortunately this academic discussion has rarely crossed the disciplinary divide between students of constitutional theory and students of constitutional politics. Two separate and almost entirely independent tracks of scholarship have been established to meet the challenge of the counter-majoritarian difficulty, resulting in distinct normative and positive investigations of whether judicial review offers sufficient benefits to offset its democratic deficiencies, or whether in its practice it actually leads to undemocratic policy choices.

In recent years, efforts have increased to infuse the study of law with politics and vice versa.[1] At the same time, new urgency has been brought to the study of the counter-majoritarian difficulty for many in the legal academy, who perceive an increase in judicial imperialism. The Supreme Court has lately ratcheted up the rhetoric of judicial supremacy and has widened the ambit of cases coming under its review. This article examines the intersection of this rising academic concern over judicial supremacy with the growing calls for interdisciplinary dialogue. Rather than treat recent concern over judicial imperialism as an amplification of the counter-majoritarian difficulty that simply raises the stakes of being lost in the thicket of interdisciplinary ignorance, I instead use this concern as a point of departure for contemplating systemic changes to the American constitutional order that are difficult to address from within the counter-majoritarian difficulty paradigm itself. This article is not meant to separate what is perception from what is reality in the concerns over judicial supremacy and imperialism on the part of the Supreme Court. Instead I will use judicial supremacy as a jumping off point for sketching an important area of constitutional inquiry that both moves scholars beyond the counter-majoritarian difficulty, and necessitates robust dialogue between the academies.

In the first part of this article, I review the scholarly terrain of the counter-majoritarian difficulty and its separate grip on law professors and political scientists. I then map out the questions and concerns over constitutional transformation, which are implicated by judicial supremacy yet obscured by the counter-majoritarian difficulty.

The Academic Fixation on the Counter-Majoritarian Difficulty

The counter-majoritarian difficulty, which highlights the problem created by a democracy lodging the power to reject public policy in the hands of unelected officials such

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as judges, serves as the guiding contemporary paradigm for analysis of judicial review. It has dominated the legal academy's constitutional theorizing since even before the coining of the term by Alexander Bickel in 1962.[2] Bickel conceived of judicial review, as exercised by unelected judges not subject to popular recall, as a "deviant institution in American democracy,"[3] since it ran counter to the primary characteristic of American government, which he saw as the expression of the popular will through elective representation. Unelected, life-tenured judges could veto the policy decisions of popularly elected officials, hence the difficulty for a self-proclaimed democracy. Ever since Bickel's landmark work, firm belief in this tension between judicial review as exercised by unelected judges and majoritarian governance has set the terms of scholarly debate over judicial review and its exercise. Constitutional scholarship by law professors has been so intensely fixated on the counter-majoritarian difficulty, that the paradigm has been alternately referred to as an "obsession," a "preoccupation," and even a "platitude,"[4] by others within the academy.

The counter-majoritarian difficulty paradigm structures inquiry into judicial review around two general and related issues: the process by which judges evaluate the public policy that reaches the bench, and the resulting choices that judges make about the constitutional validity of this public policy. To meet the challenge presented by the counter-majoritarian difficulty, scholars must determine whether judicial decision-making is indeed democratically deficient, and if it is, whether there are beneficial features of judicial decision-making that offset these democratic deficiencies. Similarly, scholars can also investigate whether judicial review actually leads to policy choices that are inconsistent with democratic preferences, because if it does not, then the counter-majoritarian difficulty is marginalized as a constitutional concern.

Much of the work done by legal scholars on judicial review has revolved around the nature and relative merits of judicial decision-making. For the opponents of judicial review, policy-making by unelected judges does not offer a sufficient counterbalance to the privileged values in our system of democracy and the popular will.[5] Such skepticism of judicial review has not been limited to certain factions of constitutional scholars within the legal academy, but has also brought philosophers into the debate.[6]

Proponents of judicial review have also oriented their analysis around the counter-majoritarian difficulty and the nature of legal decision-making, treating democracy as the great caveat to judicial review. Bickel himself was a supporter of judicial review despite the problems he had identified with it, because he believed the Supreme Court was nonetheless the most appropriate institution to aid in the development of political and moral values, which provide important offsetting benefits to less democracy. He urged, of course, that courts enforce values acceptable to the majority.[7] Other legal scholars, in the spirit of Footnote 4 of *Carolene Products,* view the Supreme Court as a necessary defender of human rights and a protector of minorities against the real possibility of majority tyranny in a democratic system, thus they welcome the practice of judicial review as a necessary corrective despite admitting to its deviance from the privileged democratic norm.[8]

Some constitutional theorists, however, have challenged the core tenet of the counter-majoritarian framework that invalidation of public policy by courts through judicial review is presumptively undemocratic. John Hart Ely famously argued that judicial review is critical to maintaining democratic processes through protection of participation by minorities, thus serving as an enhancement to, rather than a necessary qualification of, our democratic commitments.[9] Cass Sunstein strikes a similar chord with his argument in favor of judicial minimalism. Minimalist decision-making, according to Sunstein, necessarily stimulates democratic deliberation by and between the political branches and the people.[10] While the process of judicial review may arguably be democratically deficient, the results of judicial review nonetheless lead to wider democratic participation.

The landmark work by Bruce Ackerman on constitutional moments also speaks importantly to the counter-majoritarian difficulty and the democratic results of judicial review. Ackerman distinguishes between normal lawmaking and higher lawmaking. While the maintenance of normal politics may not be particularly democratic, as the public tends to be politically disengaged on the whole, the public becomes quite engaged at moments of higher lawmaking or constitutional transformation, such as the Founding, Reconstruction, or the New Deal. In these constitutional moments, the courts do little more than ratify major democratic changes to the constitutional order.[11] Since these transformations represent shifts that have been publicly accepted, no counter-majoritarian difficulty arises when courts act to further them. Jack Balkin and Sanford Levinson offer similar analysis with their theory that partisan entrenchment explains constitutional revolutions. They argue that major shifts in judicial policy-making are explained by the accreted, democratic effects of presidential appointments and Senate confirmations on judicial personnel.[12] Ackerman, Balkin and Levinson have insightfully focused on transformations of the constitutional order, but their work remains contextualized by the counter-majoritarian difficulty by highlighting the legitimacy of the courts to play their role in the redirecting and, at times, re-envisioning of the American constitutional order.

Some scholars challenge even the presumption that judicial review relies on an undemocratic process for reaching policy choices. Christopher Eisgruber, for instance, contends that the Supreme Court is an institution that can lay claim to its very own democratic pedigree. According

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to his analysis, the counter-majoritarian difficulty mistakenly puts forth a theoretical tradeoff between democracy and whatever benefits flow from the exercise of judicial review. No such tradeoff is necessary for Eisgruber, as he views the Supreme Court as a democratic institution by virtue of the nature of the appointment process, which stamps a democratic imprint on the members of the bench, along with the dialogic nature of the deliberative process, which he argues, engages the public in Supreme Court decision-making, thereby giving the Court's choices a democratic gloss.[13]

Political scientists interested in public law have also long oriented their work around the counter-majoritarian difficulty. For decades, positive scholars have attempted to determine just how frequently courts make counter-majoritarian decisions. The results of this body of work suggest that the counter-majoritarian difficulty may be an overstated concern. Robert Dahl's public law classic, *Decision-Making in a Democracy,* was published in 1957, prior even to Bickel's baptism of the strengthening constitutional paradigm. Dahl contended that the Supreme Court was more policy-legitimator than policy-maker. Based on his findings, the Court had, and with only rare and short-lived exceptions following realigning elections, shared and reaffirmed the policy preferences of the reigning majority coalition or regime.[14] Courts simply do not act in a counter-majoritarian fashion very often, according to Dahl. Of course, Dahl was writing before the active reign of the Warren Court had begun in earnest. However, subsequent scholars who have empirically examined judicial decision-making to see if it comported with or contravened majoritarian preferences, as expressed through national or state policies, have largely agreed with Dahl's analysis that judicial independence of the majority coalition or regime is not regularly demonstrated, and thus counter-majoritarian concerns over judicial review may really be much ado about nothing.[15]

Positive inquiry into judicial review has not been limited to the cataloguing of judicial independence, but has also questioned the nature of judicial decision-making itself. Starting with Alexander Hamilton, observers have long heralded the special qualities of judicial decision-making, stemming in part from the democratically problematic insulation of judges from popular control, that have made the courts an important contributor to the American constitutional order. As Barry Friedman suggests, it would be difficult to overstate the power of the ideal of the separation of law from politics for constitutional theorists.[16] But political scientists interested in judicial behavior have zeroed in on this cherished belief in the apolitical nature of judicial review, attempting to demonstrate that judges are influenced by far more than just legal norms and precedent, particularly their own values and political preferences. The attitudinal model, which is usually associated with the work of Jeffrey Segal and Howard Spaeth, attempts to predict judicial votes based on a judge's ideology.[17] If judicial decision-making turns out to be contingent on a judge's own personal or political preferences, then faith in the legal model of decision-making and support for the unique properties of judicial review that justify its counter-majoritarian qualities both collapse.[18]

This empirical rebuff to the normative commitment to judicial review is not always clearly contextualized as part of the larger problem of the counter-majoritarian difficulty by political scientists, perhaps contributing to the width of the gap between the academies in studying courts and the Constitution.[19] To the limited degree that legal scholars are aware of the attitudinal model, they are typically as skeptical of the grasp of the legal model of decision-making by political scientists as political scientists are skeptical of the extent of the influence of legal norms on judges.[20] This detachment between the disciplines goes beyond differences over the fundamental understanding of judicial behavior. Legal scholars have little noticed the work of empiricists such as Dahl and those following in his footsteps, challenging assumptions about judicial independence that speaks to the relative concern that should be accorded to the counter-majoritarian difficulty.[21]

The time for challenging this disciplinary oblivion appears ripe given the effects of rising concerns about judicial supremacy on legal scholarship, which has re-energized the counter-majoritarian difficulty paradigm as a starting point for constitutional theory. Judicial supremacy differs from judicial review in that the practice requires that the Supreme Court not have just *a* say in determining the meaning of the Constitution, but instead the *final* say.[22] Judicial supremacy raises the stakes of the counter-majoritarian difficulty, because it can lead to an erosion of existing constitutional interpretation and judgment by the political branches of government. If control over determining the constitutionality of public policy pools in the courts, then the polity arguably drifts further away from its democratic commitments.

The Rehnquist Court's decision in 1997 to strike down the Religious Freedom Restoration Act for offering a broader interpretation of the Free Exercise Clause than had been previously adopted by the Supreme Court certainly suggested a developing imperial attitude by some of the Justices.[23] Consider this extraordinary statement of the Court issued five years earlier conflating legitimate constitutional interpretation with judicial judgment:

> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then so would the country be in its very ability to see itself through its constitutional ideals.[24]

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Larry Kramer has coined the term "judicial sovereignty" as a replacement for judicial supremacy to characterize this type of imperialism.[25]

Seemingly staunch declarations of judicial supremacy by the Rehnquist Court, with no indication yet that the Roberts Court will change this course, have particularly alarmed many of the legal academy's more liberal members, who find themselves no longer offering rote apologies (or in some cases thanks) for the counter-majoritarian nature of judicial review, but now somewhat ironically seeking new (or rediscovered) theoretical justifications for limits on its exercise. Dale Carpenter recently mused that, "how one feels about judicial supremacy seems often to depend on whose ox is gored, or whose Gore is axed."[26] However, it is not merely the idea of judicial superiority and even exclusivity in constitutional construction that has alarmed academics, but also the widening reach of judicial review under this Supreme Court. Rachel Barkow has examined the recent erosion of the political question doctrine, an area that in theory should be least likely to be subject to superior judicial construction.[27] Robert Post and Reva Siegel have raised a similar alarm against the dilution of Congress's Fourteenth Amendment enforcement power by the Court.[28] And Mark Tushnet and Larry Kramer have advanced popular constitutionalism, which strikes right at the heart of the counter-majoritarian difficulty by favoring political supremacy rather than judicial supremacy in constitutional interpretation and policymaking.[29]

I do not mean in this article to test the validity of the perception of these legal academics that there is a brewing crisis that has been touched off by the current Court's apparent fondness for judicial supremacy. It is certainly true that the propriety of judicial review and also judicial supremacy have been frequently challenged in the past by an assortment of scholars including both political scientists and legal theorists.[30] Likewise, concern over dangerous concentrations of policymaking power in the judicial branch is hardly new and not limited to academia. Hamilton reassured us in Federalist # 78 that the courts were the least dangerous branch, Jefferson reeled at the adoption of judicial review in *Marbury,* Jackson vetoed the national bank despite *McCulloch,* Lincoln was aghast at *Dred Scott,* the courts were widely reviled for their runaway power during the *Lochner* era, culminating in Roosevelt's court-packing plan, and the Warren Court garnered more than its fair share of backlash. Yet somehow the democratic and institutional fervor sparked by these periods of heightened judicial policymaking has always managed to vent itself in the past.

That there can be such waxing and waning of judicial influence over policymaking points to a separate line of inquiry away from analyzing the democratic *bona fides* and special benefits of judicial review, that focuses instead on transformations of the American constitutional order as power shifts between its separate institutions. By questioning the possible entrenchment of strong norms of judicial supremacy, we can gain greater leverage on the form and function of the American political system under the rubric of constitutional transformations.

Judicial Supremacy and Constitutional Transformations

Instead of remaining tightly cabined in by the question of the desirability and suitability of judicial review in a democracy, scholars should also examine the systemic implications of relying on judicial review as a key feature of policymaking. The goal of researching judicial review from this perspective is not to determine whether democracy has been properly served, or acceptably limited for the sake of other legitimate values, but rather to examine if and how increased judicial policymaking (regardless of whether it approximates democratic preferences) reconfigures the constitutional order. Such a research agenda moves scholars away from a normative battle, which appears to be empirically moot, over how much popularly based constitutional interpretation is just right in our system. Instead scholars can examine how our political system actually works, given developing practices, and compare that empirical reality to our fundamental understanding of and aspirations for the operation of our constitutional order.

Such a research program should also make it easier to identify shifts, or migrations, of institutional responsibilities and capabilities between branches of government due to increased reliance on judicial policymaking power. Questions of this type have been overshadowed for theorists by a myopic focus on the requirement of democratic legitimacy in policymaking, and for empiricists by the comforting conclusion that courts do not contravene democratic majorities with any regularity.[31] Understanding where the constitutional voice in the American system rests should also allow for fuller analysis of the nature and vitality of American constitutionalism, and for the system's potential for expanding or constricting constitutional dialogue.

The outline of this revised research agenda, begins by looking at a 1993 article written by Mark Graber challenging the countermajoritarian difficulty paradigm.[32] Graber's observations point to the importance of studying systemic transformations, such as the evolution of judicial supremacy. Using historical case studies on abortion, the *Dred Scott* controversy, and anti-trust issues to study perceived incidents of judicial independence, he contends that scholars who seek to justify independent judicial policymaking, even in the face of believed democratic deficiencies, misunderstand and inaccurately represent the relationships between justices and elected officials. By looking at the dialogues between these parties it becomes apparent that judicial independence, when it actually occurs, is

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often exercised at the invitation of elected officials, and in the absence of any expressed majoritarian choice, in order to resolve political controversies that elected officials cannot or do not want to resolve themselves. Hence the counter-majoritarian difficulty can be more appropriately characterized as the "non-majoritarian difficulty."[33]

According to Graber, where crosscutting issues divide a lawmaking majority an invitation is often tacitly but consciously issued to the Court by political elites to resolve the political controversy that they themselves are unwilling or unable to address, thereby "foisting disruptive political debates off on the Supreme Court."[34] Graber writes that "elected officials encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics."[35] Furthermore, political and electoral advantages can accrue by ducking these tough questions and sending them on to be settled by the Court. Graber explains that elites (including the executive) can benefit from passing the political buck to the Court in multiple ways. Party activists can be redirected to focus on legal action in the courts, thereby reducing pressure on mainstream politicians who wish to maintain a more politically viable moderate stance. Voters can be redirected to focus any ire they might have over policy outcomes on the Court. Politicians can take responsive positions on judicial decisions that may make for a good sound bite but really require no politically accountable action on their part. Finally, political compromise between the legislature and the executive might be had under the table of Court policymaking.[36] This is an impressive set of political benefits that can stem from a practice of judicial supremacy that creates a Court equipped with the interpretive authority and legitimacy to make controversial public policies. Graber's article, then, highlights the perversion of political accountability that can possibly occur where everyone in the system, the public included, accepts and expects interpretive authority to reside with the courts.

Some public choice scholars have sounded similar themes in studies of the separation of powers and the delegation of powers across various political systems. Stefan Voight and Eli M. Salzberger, building off earlier work by Salzberger, point out that legislators, as rational actors assumed to maximize their own utility, are motivated to delegate their decision-making capability to other political actors, such as courts, where there might be costs to making a decision themselves. Where costs can be passed on, the choice not to choose at all can be quite attractive.[37] Thus, even where courts may be acting independent of legislators' actions, they are not likely contravening any expressed democratic preferences. Strong echoes of Graber's work are found in Voight and Salzberger's catalogue of advantages to what they term the negative delegation (a failure to decide) of legislative power. Politicians can bolster their popularity and reelection prospects by avoiding controversial decisions. Legislative legitimacy can be maintained if courts are doing the heavy lifting for the legislature. Finally, politicians can demonstrate a credible commitment to promises made, as responsibility for those promises are forwarded on to other decision-making bodies.[38]

Punting to the courts to obtain these kinds of benefits would likely become more appealing in an environment of increasingly strong legislative deference to the interpretive authority of the Court. Legislators, presidents, and the public would all be conditioned under a strong version of judicial supremacy to view the Court as the proper authority, and perhaps even the infallible authority, to resolve policy questions that have constitutional implications. According to the imperial rhetoric of *Casey,* the country sees its constitutional ideals through the Court's lens. If such constitutional imperialism becomes widely accepted, then the slippery slope of abdication may be unavoidable. Voight and Salzberger refer to this cost of the practice of delegation as legitimacy drift, where the legislature may find it difficult to effectively regulate those issues over which they do choose to retain power.[39] If electoral and political benefits flow from policy abdication under conditions of judicial supremacy, as Graber, Voight, and Salzberger suggest they do, then legislative deferrals may begin to occur more frequently and on policy questions beyond the controversial crosscutting issues that Graber identifies. Such a specter of large-scale policymaking abdication by the legislature brings the potential effects of a strong norm of judicial supremacy into stark relief. Voight and Salzberger themselves refer to such delegations of power as amounting to nothing less than "a decision to modify an existing constitutional order."[40]

The work of Sotirios Barber on legislative abdications of power is instructive here. Barber is concerned about the integrity of constitutional supremacy when legislative policymaking power is deferred or delegated to other institutions, including the courts.[41] The Constitution is far more than just a document providing entrenched protection of rights and liberties. It is also an arrangement of offices and powers, a blueprint for governance, and what the Founders believed was good governance at that. Alterations to the arrangement of offices and powers that do not occur through constitutionally sanctioned means (amendment) necessarily represent *de facto* alterations of a constitution itself, which suggests that a constitution no longer stands supreme if it no longer dictates the means by which it is changed. Barber believes that a completely flexible or adaptive constitution is inconceivable.[42] He is concerned that abdications of powers assigned by the Constitution should not be permitted, since such abdications destroy the constitutional arrangement of offices and powers. The whole notion of a constitution is vitiated, for Barber, if you allow the means assigned by the constitution to be radically

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changed, regardless of the ends that may be furthered by that change.[43]

In discussing legislative abdications of constitutionally assigned powers, Barber is highlighting the same phenomenon discussed by Graber and Voight and Salzberger. According to Barber, delegations of authority that are deliberately designed to avoid responsibility for "salient" public policy choices would be more of an abdication of power in contravention of constitutional duty than an exercise of power.[44] Yet it is just these "salient" public policy choices, according to Graber, that Congress likes to foist off on the Court.[45] For Barber, these delegations of power by the legislature can be likened to constitutional crimes that turn out to have been inside jobs. While Voight and Salzberger would not speak in such normative terms, they too would agree that these delegations of power represent the establishment of new constitutional orders.

What then to make of these arguable abdications of constitutional responsibility by Congress when they repeatedly defer policy decisions to the ultimate constitutional interpreter? When institutions abdicate their powers by delegating them to another, constitutional powers then migrate from one institution or branch of government to another. Graber's non-majoritarian difficulty highlights this phenomenon as policymaking power is shifted to the courts, and increasingly on policy issues that go beyond traditional rights concerns that were thought at one time to be the natural purview of the Court, thereby representing a migration of powers to the judicial branch. Yet scholars do not tend to recognize or examine this significant shift in the dynamics of our constitutional system in these terms. Responsibilities for governance are arguably being fundamentally altered, and little attention is being paid to its effects on good governance. A research agenda that focuses on constitutional transformation should correct for this lack of attention.[46]

Ensuring the democratic legitimacy of policymaking is but one aspect of good governance in a mature democracy, and it is attention to this aspect of good governance that has monopolized the efforts of constitutional scholars in both academies. However, the governmental objectives of the Founders not only included the reflection of the popular will, but also included the preservation of rights and the self-preservation and efficient operation of the polity itself. These objectives are naturally in tension with each other, and the separation of powers into different institutions represented a way of accommodating those tensions to produce a healthy and viable democratic polity.[47] Each institution of government offers a different vantage point on these competing objectives of good government. For instance, Congress may be best suited to identify and reflect the popular will given its proximity to the people. The executive, however, given its unitary character, may best be able to attend to matters of self-preservation and efficiency. Finally, the Court, in its relative isolation, may be most readily able to exercise the unfettered judgment necessary to preserve popular rights.[48] Migration of powers between these institutions may disturb this balance and no longer maximize the advantages of these special vantage points and capabilities offered by each institution of government in the most beneficial way. Incidentally, a migration of powers between institutions may not just occur in the direction of the courts with the hardening of judicial supremacy, but may also occur between other institutions and in other political systems. Reflection and analysis of this character has been largely absent from both the burgeoning judicial supremacy literature and the public law literature. A new research program, sensitive to a sophisticated model of separation of powers, and focused on the systemic effects of the accumulation of constitutional policymaking power in the judicial branch or any other institution can provide such needed analysis.

A further consequence of shifting institutional responsibilities, such as with legislative deferrals or abdications of policymaking powers to courts, is that these responsibilities may not be so easily shifted back to their original controlling institution. Voight and Salzberger mention path-dependence in suggesting that revocation or amendment of a *de facto*-constitution put in place by delegations of power may be difficult.[49] It is also likely that institutional capabilities will decay when they are not exercised. In other words, migrations of power may be difficult to reverse and institutions may have difficulty reasserting control over their traditional responsibilities due to a loss of institutional memory.[50] Paul Brest points out that Congress can and perhaps should assert its own interpretive authority, but that it has not developed the capacity to do so, because it does not have trustworthy and systematic procedures for constitutional decision-making. It needs, he argues, a tutorial.[51] It would also be unfair of me not to mention that many of the constitutional theorists already at work on the perceived perils of judicial supremacy have made similar observations. Robert Post and Reva Siegel, for instance, warn that once Congress cedes substantive enforcement power of the Fourteenth Amendment to the courts, they might be hard pressed to recapture such authority.[52] Costs of shifting institutional responsibilities, like loss of institutional memory or capacity, should be recognized and accounted for in evaluations of the rise of judicial supremacy. Some empirical work has been done in this area, but further evaluation of institutional capacities to carry out constitutional powers would help clarify the effects of judicial supremacy on our political system and the manner of operation of any new constitutional order. This would be particularly the case if that scholarly work is undertaken with the normative purpose of urging the return of migrated powers to their original institution. Time, in such a case, would be of the essence.

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The migration of powers between branches of government, if it does occur, might prove to be a neutral or even positive phenomenon for our polity.[53] Barber's concerns over constitutional supremacy notwithstanding, some institutions may prove to be better suited to carry out constitutional responsibilities originally assigned elsewhere, and I do not wish to pass judgment on that point. After all, the Founders certainly expected a great deal of dynamism and institutional fluidity to accompany the separation of powers design, so developments such as judicial supremacy may be better characterized as illustrations of the natural and healthy give in our system, than as *de facto* constitutional revolutions. Either way, as scholars we should be attentive to incidents of systemic change and their implications.

Of course, transformations of the constitutional order will not just affect the means by which we interpret the Constitution to arrive at policy choices, but will also likely impact the manner in which we discuss the Constitution and present alternative interpretations. Strong norms of judicial supremacy arguably lead to a constriction in constitutional dialogue, as everyone turns to the wisdom of the ultimate interpreter. Robert Nagel has pointed out that "heavy reliance on the judiciary—in various ideological directions—is fast becoming an integral part of the American system; already it is difficult for many, whether in or out of the academy, even to imagine any alternative."[54] And Nagel was speaking in 1989, before the Rehnquist Court's supremacy rhetoric had reached such a high pitch. When no other interpreter of the Constitution besides the Court can be readily imagined or acknowledged, then alternative understandings of the Constitution and its meaning may no longer be presented or valued. Constitutional debate may become constricted, as focus turns instead to the interpreter itself, the Supreme Court, and its role in American politics. Judicial authority may subsume constitutional authority under conditions of strong judicial supremacy. As Departmentalists have long argued, this would allow for the possibility that constitutional authority will erode unnoticed.[55] The challenge for empiricists is to test whether other potential constitutional interpreters, such as the legislative and executive branches of government or social movements and other public actors, are indeed cowed by proclamations of judicial supremacy, and whether the generation of alternative understandings of the Constitution declines under conditions of judicial supremacy, particularly strong conditions of judicial supremacy such as arguably exist currently.[56]

While empirical work on these types of questions is limited, that is starting to change. Bruce Peabody has recently published a survey study, which he himself calls preliminary, that probes Congress' own evolving conception of its role and capacities as a constitutional interpreter. The results, though provisional, suggest that Congress still perceives a role for itself on the constitutional stage, though that role is subservient to the courts.[57] This is an encouraging early exemplar of scholarship in keeping with a new research agenda focused on determining the effects, if any, of constricted constitutional authority due to norms of judicial supremacy. Further empirical work may not only establish whether judicial supremacy is problematic for other constitutional interpreters, but also highlight where and under what conditions non-judicial constitutional interpretation continues to take place.[58] Furthermore, empirically testing the rational choice hypotheses of Voight and Salzberger may better reveal the scope and tenor of legislative delegations of power, providing a better sense of whether what they term "post-constitutional constitutional choice"[59] is taking place more or less openly.

Since the legitimacy of the Court to determine constitutional meaning is a given, and there can be only one legitimate interpretation of the Constitution under conditions of strong judicial supremacy, then focus inevitably turns under these conditions to the legitimacy of interpretive methods used by the Court rather than on what the Constitution itself means. We become more concerned with how the courts interpret the Constitution rather than with the interpretations themselves.[60] Similarly, attention might be paid to the personal political preferences of the justices, as we seek to understand how decisions are made and if they are made on "legitimate" bases, rather than forwarding and debating contesting constitutional interpretations. Where judicial politics trumps constitutional politics in perceived importance, attacks on judicial institutions and judicial review may be the only way to vent disagreements that are really over constitutional meaning.[61] Evaluation of any shifts in the tenor of debate by political actors over constitutional interpretations by the courts could usefully contribute to answering the question of whether conditions of judicial supremacy recalibrate attacks on judicial institutions to matters more of style than of substance.

As to the style or mode of decision-making serving as a focus for scholarship or debate, given the current popularity and contentiousness of the study of judicial behavior in the public law field, attention to constitutional transformations may assist in demonstrating the broader context and impact of such work to scholars reaching both across the political science discipline and into the legal academy.[62] By grounding behavioral research in the observation that the constitutional order is subject to transformations, including the waxing and waning of judicial control over constitutional policymaking, new urgency can be brought to the need to understand the decision-making processes of judges. This insight may also catch the eye of institutionalists who seek out instances of purposeful political action by institutions to defend or to enhance their base of power. Judicial imperialism, then, may be an important attitude to add to the calculus of judicial behavior.

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A new research program focused on transformations would also be consistent with ongoing calls from public law scholars for research that is more broadly accessible across the field of American politics.[63] On this point, an important nexus between the study of constitutional transformations and American political development (APD) might also be exploited to spur constructive intradisciplinary dialogue and inspiration. APD scholarship focuses on identifying and understanding durable shifts in governing authority over the course of American history.[64] Refocusing the study of constitutional politics on the ebb and flow of judicial power and the implications of such fluctuations highlights just the sort of changes that intrigue APD scholars.[65] Furthermore, the openness of APD to a capacious understanding of politics and to capturing as wide a view of the polity as possible is well suited to studying transformations. In fact, much recent work on constitutional politics has been aimed at broadening the view of constitutional authority by studying the interdependency of various institutions, such as states, Congress, and the executive in producing authoritative constitutional interpretations.[66] Scholars are already hard at work disputing the idea that the courts ever held the last word on the Constitution.[67] Broadening the scope of such work to examine transformations would clarify the developmental aspect of this institutional interdependency, pushing scholars to not only consider what factors (legal, strategic, political etc.) influence judicial decisions, but also how changes in the volume or nature of judicial policymaking reverberates back to other institutions and political processes. Judicial supremacy is, of course, but one possible transformation of the constitutional order and of the wider American political system. Transformations to institutions and their relationships to other political actors are occurring all the time and over time, and a constitutional transformations rubric might assist other scholars beyond public law or APD in gaining theoretical leverage on their own research questions.

Returning to the interests of students of constitutional politics, by embracing a new research agenda that features a sophisticated understanding of separation of powers and recognizes that changing conditions of judicial authority and legitimacy alters the operation of the political system itself, political scientists can fill the vacuum in constitutional understanding created by prior strong allegiance to the counter-majoritarian difficulty paradigm. There is no guarantee that legal scholars will be suddenly responsive to the efforts of political scientists to better explore the changing systemic impact of courts under conditions of judicial supremacy, but new agitation from those quarters over escalating pronouncements of judicial supremacy and growing recognition of popular or political instances of constitutional interpretation may present an opportunity for much-needed interdisciplinary dialogue and the refinement of a set of normative questions for empirical study. Even if the separate academies are not meant to be aligned, recognition of this new focus on transformations in the study of constitutional politics by political scientists working in public law can draw wider interest from other American politics scholars and better meet the calls of Martin Shapiro and others for more integration with and relevance to the larger field. Ultimately, the possibility of misunderstanding the nature and operation of the evolving constitutional order should be motivation enough for scholars to recognize that, though the counter-majoritarian difficulty may be empirically moot, there remain tough questions regarding the judicial exercise of constitutional policymaking power worthy of testing.

Notes

1 Barry Friedman has recently put out mirrored pleas to both legal scholars and political scientists to take better heed of each other's work. His articles provide an excellent discussion of the current state of scholarship organized under the counter-majoritarian difficulty paradigm. See Friedman 2005, 2006.

2 Bickel 1962, 16. Barry Friedman explains that judicial review has been criticized on and off since at least 1800 for being in tension with the expression of popular will, but that it was not until after the New Deal era that the counter-majoritarian difficulty became an academic obsession. He suggests that this was due to a collection of historical, professional, and intellectual forces, as political liberals struggled with their newfound position as defenders rather than detractors of judicial review with the rise of the Warren Court out of the ashes of the *Lochner* Court. Having been trained by their great legal mentors, like Frankfurter, Hand, and Holmes, to privilege democratic government, these academics struggled to resolve this tension in their own way of thinking. Hence, Bickel's characterization of the counter-majoritarian difficulty and its subsequent wholesale adoption and staying power in the field. See Friedman 2002.

3 Bickel 1962, 16–8. Bickel referred to federal judges who are staffed by appointment and serve for life and so will I throughout this article. The counter-majoritarian difficulty does not apply to the same degree in varied state judicial systems that employ judicial elections.

4 Ackerman 1984, 1046; Amar 1994, 495; Winter 1990, 1521.

5 Conservative theorists and law professors have long been associated with disapproval of judicial review. See Paulsen 1994, Calabresi 1999. Liberal academics have tended to be more welcoming of judicial review and its policy outcomes; however, some liberal academics have always questioned the propriety of

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judicial review, particularly when aggressively employed, in a democracy. See Levinson 1988, 1994.

6 Jeremy Waldron is particularly vocal in his philosophical challenges of judicial review. See Waldron 1999.

7 Bickel 1962. Philip Bobbitt (1991) has sounded a similar theme about what he admits is the counter-majoritarian institution of judicial review, suggesting that it is through making judicial choices that the United States can become a moral and just society.

8 In footnote 4 of the majority opinion in *United States v. Carolene Products,* 304 U.S. 144 (1938), Justice Harlan Stone suggests that legislation aimed at "discrete and insular minorities" might be subject to greater constitutional scrutiny. This footnote would later influence the Warren Court and the development of equal protection jurisprudence. Many scholars would explore this protective justification of judicial review. Michael Perry (1982) accepts judicial review within a democratic system to secure the protection of fundamental human rights. Jesse Choper (1980) suggests that, while questions of federalism and separation of powers should be left to the political process by the Court, judicial review—despite its defects—is necessary to defend individual liberties. Other justifications for judicial review that do not revolve around questions of rights and justice have also been put forth, such as the ability to uphold original constitutional understandings. See Bork 1990. Even political scientists have gotten into the act, as some public choice scholars have conceived of antidemocratic judicial review as a necessary protection of individuals and groups against flaws in our system of majority rule. See Riker and Weingast 1988.

9 Ely 1980.

10 Sunstein 1999. Barry Friedman (1993) has also pointed out how judicial review stimulates constitutional dialogue.

11 Ackerman 1991, 2000.

12 Balkin and Levinson 2001.

13 Eisgruber 2001.

14 Dahl 1957.

15 Jonathan Casper (1976) agrees that the Supreme Court does not act in a counter-majoritarian fashion very often. Richard Funston (1975) suggests that the Supreme Court follows elections, with the exception of realigning periods where the justices may be out of step with new policy majorities due to life tenure. David Barnum (1985) concurs, suggesting that the Court is rarely out of step with public opinion. Gerald Rosenberg (1992) has found limited incidents of the exercise of judicial independence in the face of political pressure, even where independence might be expected to be more likely. Of course, Robert McCloskey (1960) had long observed that the Supreme Court could rarely maintain judicial independence in the face of strong majorities. Empirical work on judicial impact also suggests that normative concerns over court policymaking are overstated, given the limited and diluted effect judicial decisions actually have on political change. See Rosenberg 1991, Klarman 2004.

16 Friedman 2005, 258.

17 See Segal and Spaeth 2002. Scholars have built off the attitudinal model to also place strategic considerations in the behavioral calculus of judges. See Cross and Nelson 2001.

18 Not all political scientists working in the public law field are enamored with the attitudinal model. Many scholars working at the intersection of public law and American political development recognize the unique qualities of judicial decision-making while still retaining a healthy skepticism of the legal model. Ronald Kahn and Ken I. Kersch urge greater attention to the internal and external influences on courts to determine how courts, which play such a significant role in constructing the American political and constitutional order, manage at times to resist robust political pressures. Kahn and Kersch 2006, 18–9. See also Whittington 2000.

19 Barry Friedman refers to this need to better contextualize positive scholarship on courts as the need for greater attention to "normative bite." See Friedman 2006, 262–5.

20 See Cross 1997, Friedman 2005.

21 Keith Whittington points out that "our own work as political scientists would be better if it were informed by relevant scholarship produced in cognate disciplines, and one imagines the same would be true for scholarship produced in law schools." Whittington 2004, 5. Whittington provides an accounting of the paucity of citations to public law faculty in law reviews. See also Graber 2002, Whittington 2002.

22 For a full discussion of the distinctions between judicial review and judicial supremacy see Whittington 2002. Judicial supremacy was first clearly asserted in 1958, as the Supreme Court declared itself "supreme in the exposition of the Constitution." *Cooper v. Aaron,* 358 U.S. 1, 17. This declaration was followed by the Supreme Court's self-description as the "ultimate interpreter" of the Constitution. *Baker v. Carr,* 369 U.S. 186, 208 (1962). Supremacy rhetoric was fairly sparse from this period until the advent of the Rehnquist Court. For a full discussion of how judicial supremacy came to be popularly (mis)understood as part of the *Marbury* precedent for judicial review, see Devins and Fisher 2004.

23 *City of Boerne v. Flores,* 521 U.S. 507 (1997).

24 *Planned Parenthood v. Casey,* 505 U.S. 833, 868 (1992)

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25 Kramer 2001, 163 See also Kramer 2004. Other Rehnquist Court cases that illustrate an increasingly hierarchical understanding of constitutional interpretation and responsibility include: *United States v. Morrison,* 529 U.S. 598 (2000) (limiting Congress' Commerce Clause powers), *Dickerson v. United States,* 530 U.S. 428 (2000) (holding that due process rights upheld by the Court may not be limited by Congress), and *Bush v. Gore,* 531 U.S. 98 (2000) (settling disputed presidential election).
26 Carpenter 2003, 420.
27 Barkow 2002.
28 Post and Siegel 2003.
29 Tushnet 1999, Kramer 2004. In fact, one of the encouraging features for inter-disciplinary dialogue of the popular constitutionalism literature is a strong recognition by these scholars of the links between politics and constitutional decision-making. The courts are not treated as a hermetically sealed entity. For instance, Kramer documents a long history of constitutional interpretation that has occurred beyond and in reaction to the courts. For a brief and informal discussion of the evolving popular constitutionalism literature, see Strauss 2005.
30 Departmentalists, who believe that each branch of government has a right and a responsibility to engage in constitutional interpretation, have long criticized the drift of judicial review toward judicial supremacy. These scholars include Susan Burgess (1992), Neal Devins and Louis Fisher (2004), Sanford Levinson (1994) and Walter Murphy (1986). For a review of the history of academic criticism of judicial supremacy, which originated with the pronouncement of the Court in *Cooper v. Aaron* and flared up again briefly around the controversial comments of Edwin Meese in the 1980's regarding the non-binding nature of judicial review, see Kramer 2001.
31 An important caveat to moving beyond the counter-majoritarian difficulty in studying judicial supremacy is the need to keep an empirical eye on the transformative effects of judicial supremacy on judicial independence of majority preferences. It is possible that strong norms of judicial supremacy could attenuate the political tether that has always bound judicial decisions to democratic indicators. Thus attention to the counter-majoritarian difficulty may become an important subset of empirical and normative scholarship that address constitutional transformations.
32 Graber 1993.
33 Ibid, 36–7. Legislative deferrals to the Court have also recently been studied by George Lovell. See Lovell 2003.
34 Graber 1993, 36–7.
35 Ibid, 37.
36 Ibid, 42–3
37 Voight and Salzberger 2002, 289–90. See also Salzberger 1993.
38 Voight and Salzberger 2002, 293–8.
39 Ibid, 299.
40 Ibid, 291.
41 Barber 1975
42 Ibid, 16.
43 Ibid, 17.
44 Ibid, 7.
45 Congress has been hit hard in recent years for its arguably new deferential posture to not just the Supreme Court, but the executive as well, on a number of fronts including budgets, foreign policy and war. See Weissman 1995, Fisher 2000. This is also a growing topic of research in other political systems, with increased delegations of power, particularly to international organizations, such as with the EU. See Salzberger 1993.
46 I have emphasized the potential drift of constitutional authority to the courts through judicial supremacy in this piece, but that is merely one example of a possible migration of institutional powers that would be worthy of study under a transformations rubric. For instance, the Federal Reserve System has, over time, come to possess profound economic authority that was originally lodged elsewhere under our Constitution. Examples need not be limited to the American context. Many scholars are interested in the developing reliance by governments on transnational compacts and institutions to govern issues such as civil rights. See Voight and Salzberger 2002. In scrutinizing these shifts in institutional authority or sovereignty, scholars should question not only the legitimacy of these shifts, but also the impact of these shifts on the nature and quality of governance.
47 Tulis 1987, 41–3.
48 Ibid.
49 Voight and Salzberger 2002, 292.
50 Jeffrey Tulis (1997) discusses just such a loss of institutional memory in his study of Supreme Court appointments, as he finds that in the twentieth century Congress began to defer to the president on judicial appointments and had trouble recognizing their own independent role to play in vetting candidates on grounds of Constitutional politics. Subsequently reasserting authority was difficult, as Senators had lost much of their capacity to function as effectively in that role.
51 Brest 1986, 103–4. It is not foolish to think that Congress could develop, if it does not already possess, such capacity for responsibly exercising interpretive authority. Louis Fisher takes this more optimistic view. See Fisher 1985. Bruce Peabody's

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recent study on attitudes of members of Congress toward constitutional decision-making suggests some desire on the part of Congress to exercise interpretive authority, even if it is not a well-formed or strongly manifested desire. See Peabody 2004. Other legislatures have demonstrated a well-developed and productive capacity for asserting interpretive authority. Australia, for instance, has a Senate committee (Standing Committee for the Scrutiny of Bills) devoted to the vetting of legislation for potential rights violations thereby actively interpreting their constitution (though they possess no bill of rights), common law tradition and commitments to international human rights charters.

52 Post and Siegel 2003. See also Kramer 2004.

53 Judicial supremacy does have its supporters. Larry Alexander and Frederick Schauer (1997), for instance, argue that judicial supremacy provides a beneficial settlement function, as system actors can be certain of constitutional interpretations and likely outcomes once there is an authoritative ruling by the courts on an issue.

54 Nagel 1989, 2.

55 Burgess 1992, 9–11.

56 Certainly the legislative and executive branches do not represent the only other important potential interpreters of the Constitution. For discussion of social movements as significant interpreters of the Constitution, see Siegel 2001, Kramer 2004. But see the arguments of Cass Sunstein (1999) and Barry Friedman (1993) that judicial review can stimulate constitutional dialogue and decision-making by other institutions.

57 Peabody 2004.

58 Recent controversy over the aggressiveness of the Bush Administration in forwarding its own constitutional interpretations, as with presidential signing statements, against both the courts and Congress should provide interesting fodder for this type of scholarship.

59 Voight and Salzberger 2002, 291.

60 Critics of the counter-majoritarian difficulty paradigm have noticed a similar phenomenon as that conception of judicial review also led to a focus on decision rules or interpretive methods rather than constitutional meaning. Consider Bickel (1962) and his passive virtues, Bobbitt (1991) and his modalities, and Wechsler (1959) and his neutral principles. See also Graber 2002.

61 Burgess 1992, 13–6. This is also the thrust of Levinson's Constitutional Protestantism. See Levinson 1994.

62 Constitutional transformations may provide the "normative bite" positive scholarship needs. See Friedman 2006.

63 See Shapiro 1993. See also Smith 1988, Gillman 2004.

64 Orren and Skowronek 2004, 123.

65 It may be that the recent focus on judicial supremacy proves to be a reaction to the same sort of concentration of judicial policymaking power that has been witnessed before in American history, such as with the *Lochner* Court. If this is the case, the identification of patterned change, (another favorite of APD scholarship) may prove to be an important source of public law inquiry. Bruce Ackerman (1991, 2000) has already undertaken just such an inquiry with his study of episodes of constitutional reconstruction.

66 See generally Kahn and Kersch 2006.

67 Fisher 1988, Griffin 1996, Whittington 1999, Devins and Fisher 2004.

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