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Keynote Address

Politics and Judgment

*Suzanna Sherry*¹

Two hundred years after its most famous invocation in *Marbury v. Madison*,² judicial review has apparently lost its luster. Despite its global spread, it is in disrepute in its country of origin. The mainstream American academic attitude toward judicial review as practiced by the modern Supreme Court ranges from open hostility to a position similar to Winston Churchill's on democracy: It is the worst way to implement a Constitution, except for all the rest.

In this essay, I want to explain the source of the hostility, defend judicial review against its critics, and make a few suggestions for improvement.

First a word on what I mean by judicial review. In some versions, judicial review describes only a limited power to interpret a constitution or other guiding document, but no binding authority. In Canada and the United Kingdom, for example, the courts can declare a statute inconsistent with – respectively – the Canadian Constitution or the European Convention on Human Rights, but cannot enforce that declaration. The offending statute either remains effective until repealed by the legislature or can be made effective by re-enactment.³

I will focus instead on the modern American form of judicial review, under which judicial declarations interpreting the Constitution are binding on all other governmental actors. The judiciary has the final word in the sense that if it declares a statute unconstitutional, the statute is ineffective and unenforceable, even if it remains on the books. We should note, of course, that the judiciary's decision is *not* final if it decides that a particular course of action is *consistent* with the Constitution. In that case, other governmental actors can still exercise independent judgment and decline to follow the course of action if they believe that it is unconstitutional or even simply unwise. To speak of judicial *supremacy* then, is a bit misleading. The judiciary is no more supreme than any other

1. Cal Turner Professor of Law and Leadership, Vanderbilt University Law School. This essay was originally presented as the Earl F. Nelson Memorial Lecture at the University of Missouri-Columbia School of Law. Other than the addition of footnotes, it remains largely unchanged from the oral version. Portions of the essay draw on a forthcoming book with Daniel Farber. © Suzanna Sherry and Daniel Farber.

2. 5 U.S. (1 Cranch) 137 (1803).

3. See Can. Const. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), § 33; Human Rights Act, 1998, c. 42 (Eng.); see also Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOREST L. REV. 451 (2003).

branch of government, but no action can be taken, no law enacted and enforced, unless all three branches of government agree that it is constitutional.

Described in this innocuous way – that judicial review simply ensures that no law is effective unless all three branches of government concur that it is constitutional – judicial review should be uncontroversial. And, indeed, until the past forty years or so, it was. *Marbury* itself was not novel, and generated virtually no opposition to its invocation of the Court's power to invalidate congressional statutes.⁴ Eighteenth- and early nineteenth-century Americans mistrusted concentrations of power, and thus were unwilling to confer on legislatures – including Congress – the final authority to judge the constitutionality of the laws they enacted.⁵ Nor did the executive branch, which was even more distrusted because of the American rejection of monarchy, offer a viable alternative as the ultimate arbiter of the Constitution.⁶ Judicial review was therefore the obvious way to keep the legislature and the executive from exceeding their constitutionally delineated powers.

Historically, the larger battle over judicial review was a debate about federalism rather than about separation of powers. Judicial invalidation of *federal* statutes was one thing; *federal* judicial invalidation of *state* statutes was quite another. But this was not really a dispute about the power of the judiciary, but instead about the power of the federal government in general. Few objected to state courts invalidating state statutes that were inconsistent with state constitutions.⁷ And federal legislative power was every bit as controversial as federal judicial power.⁸ So nineteenth-century disputes about judicial review were very different from today's disputes.

In this nineteenth-century battle between the states and the federal government, especially the judiciary, the states never really had a chance. What

4. See, e.g., 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 248 (1923); ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 102 (1989); CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 58-64 (1996); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

5. See, e.g., FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 291 (1985); Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, 442-44 (2003); FEDERALIST NO. 51 (James Madison).

6. See, e.g., McDONALD, *supra* note 5, at 86.

7. See, e.g., Sherry, *supra* note 4; cf. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 173-74 (1996) (founders wanted state courts to invalidate state statutes that were inconsistent with Federal Constitution).

8. For some controversies about the reach of federal power, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and the state responses to the federal Alien and Sedition Acts. For accounts of the latter dispute, see, for example, MURRAY DRY, *CIVIL PEACE AND THE QUEST FOR TRUTH* 65-69 (2004); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 719-20 (1993).

the states were demanding – in cases like *Martin v. Hunter's Lessee*⁹ and *McCulloch v. Maryland*¹⁰ – was essentially a system of polycentric constitutionalism. In other words, let the Supreme Court be the judge of the constitutionality of *federal* statutes or executive decisions, but let the states themselves have the final word on the constitutionality of *state* conduct.

That sort of polycentric constitutional interpretation was doomed to failure for two reasons. First, while multiple interpretations with no authoritative final arbiter are possible, such interpretations carry an unacceptably high risk of instability. Indeed, the American Civil War can be viewed partly as an illustration of the consequences of a failure to agree on an authoritative arbiter. Thus, polycentric interpretation is not an attractive option in the abstract.

The inevitable instability of multiple interpretations was exacerbated in the early United States by the nature of the fundamental underlying disagreement between the states and the federal judiciary, especially as represented by John Marshall. That disagreement was essentially over whether the United States was a nation or a confederation of states, and was encapsulated in a linguistic dispute. Unimaginable as it is today, eighteenth- and nineteenth-century Americans argued about the appropriate verb to be used for the United States: the United States *is* or the United States *are*?¹¹ While the modern concern about judicial review stems largely from its countermajoritarian aspects, the antebellum dispute about judicial review was less about democracy than about nationhood. That question was ultimately resolved not in a courthouse, but on the courthouse steps at Appomattox.

Viewed in this light, judicial review seems both inevitable and beneficial. It serves as a check on Congress and the president, ensures that states adhere to the Federal Constitution, and reduces the potential for political instability and internecine warfare by providing a final, authoritative source of constitutional interpretation.

So why is it under attack?

I believe the current hostility to judicial review stems from a misconception about what judges actually do – and should do – in constitutional cases. More and more, the conventional wisdom seems to be that constitutional adjudication is simply politics by another name. And politics, the thinking goes, should be the province of the people and the legislature, not of unelected federal judges with life tenure.

In this essay, I argue that conflating law and politics, as the critics do, is not only the wrong way to think about what judges do – it is also dangerous. To the extent that the misconception seeps into public and political con-

9. 14 U.S. (1 Wheat.) 304 (1816).

10. 17 U.S. (4 Wheat.) 316.

11. See, e.g., JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION viii (1991); John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1, 16 n.65 (1999). For a general overview of the debate about nationhood, see RAKOVE, *supra* note 7, at 161-202.

sciousness, it invidiously begins to influence judges and thus becomes a self-fulfilling prophecy. The judiciary is not yet fully politicized, but the process seems to have started.

Evidence of the contemporary equating of judging and politics comes in many forms. The evidence most familiar to law students and faculty is probably the academic literature. Political scientists have argued for years that judicial decisions are determined primarily by the judge's politics.¹² Law professors used to take issue with that claim, but many have lately been explicitly or implicitly accepting it.

In this context, consider the "countermajoritarian dilemma." The term was coined by Alexander Bickel in the 1960s to describe the tension that exists when unelected judges can declare invalid acts of the popularly elected branches.¹³ For Bickel, the resolution of the dilemma lay in the recognition that judges and legislatures perform different functions – in other words, that judging was *not* simply politics.

More recently, however, prominent constitutional scholars have appealed to the countermajoritarian nature of judicial review to criticize both judicial review and the Supreme Court. They suggest that in striking down state and federal statutes, the courts are usurping the rights of the people and their elected representatives to interpret the Constitution. Instead of an "activist" or "arrogant" Supreme Court, these scholars urge, we should have "popular constitutionalism." This popular constitutionalism comes in many flavors, from mild exhortations, to proposals for reining in judicial discretion, to arguments that the states and the other branches of the federal government may ignore the Supreme Court's decisions.¹⁴ All are based on the theory that judicial review, at least as currently practiced by American courts – especially the Supreme Court – is anti-democratic and therefore inconsistent with the American constitutional regime.

Let us leave to one side the fact that the Constitution does not, and was not designed to, create a pure democracy. Also put aside the critics' exaggeration of both the representativeness and accountability of the elected branches and the countermajoritarian nature of the judiciary. Instead, let us consider a premise that is implicit in both the countermajoritarian critique of judicial

12. See, e.g., JEFFREY A. SEGAL AND HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

13. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

14. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359 (1997); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

review and the calls for popular constitutionalism: that the Court's constitutional decisions – like legislative enactments – are political acts and should therefore reflect the political wishes of the majority.

This implicit premise becomes clearer if we contrast the criticisms of the judiciary's constitutional decision-making with the attitude towards its non-constitutional decisions. No one complains that judges are acting contrary to the wishes of the people when they rule on legal questions, such as whether testimony is admissible, or whether it is an antitrust violation for a company to conspire with its officers, or when common law preclusion doctrines bar a subsequent suit, or how the burdens of production are allocated in an employment discrimination case. Those are *legal* questions, and we leave them to legal experts – to judges, in other words. Congress may set the framework by enacting legislation, but we instinctively separate that initial political decision from the myriad legal decisions that must be made in the course of implementing the legislation.

Contemporary critics of judicial review, however, view constitutional questions not as legal questions but as political ones. They think that the courts are doing something different – and suspect – when they interpret the Constitution than when they interpret a statute or a common law precedent or a rule of civil procedure.

This widely-held implicit belief that constitutional law is not really law at all, but politics, is also becoming more explicit in the work of some constitutional scholars. Recent articles claim that it is not *possible* to separate constitutional law from politics, or that Supreme Court decisions – whether for good or ill – simply mirror popular opinion.¹⁵ Two respected law professors are circulating a proposal for what amounts to term limits for Supreme Court Justices, and they have the support of over a dozen prominent liberal *and* conservative legal scholars.¹⁶ What all these arguments and proposals have in common is the rejection of any distinction between what judges do in constitutional cases and what legislatures do generally.

To be fair, this conflating of law and politics is not all the fault of academics. The judicial appointment process is now based almost entirely on the assumption that a nominee's political views matter more than his or her legal acuity or judicial temperament.

This emphasis on political views has not always existed. Until the late 1980s or so, lawyers were nominated to the federal bench – including the Supreme Court – because they were prominent and respected, as well as usually being stalwart members of the president's party. But party affiliation is

15. See, e.g., Neal Devins, *Better Lucky Than Good*, 8 GREEN BAG 2d 33 (2004); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347 (2003); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1282-84 (2004); Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

16. See Linda Greenhouse, *How Long Is Too Long for the Court's Justices?*, N.Y. TIMES, January 16, 2005, § 4, at 5.

not the same as political ideology; in the past, moderate members of the president's party were more likely to be respected by the bench and bar – and therefore more likely to be nominated and confirmed – than were those on the left or right fringes of the party.

Justice Blackmun, for example, made a name for himself by quietly practicing law for sixteen years before he was nominated to the Eighth Circuit by President Eisenhower.¹⁷ Justice Blackmun was a moderate Republican who had supported Democrat Hubert Humphrey's Senate campaign. In his eleven years on the Court of Appeals, Justice Blackmun earned a reputation as a careful, hardworking, and moderate judge. His Court of Appeals opinions are not particularly ideological, and his nomination to the Supreme Court was probably prompted as much by his longstanding friendship with Chief Justice Warren Burger as by his obvious competence.¹⁸

Another example of how the nomination process used to work is the federal district judge whose open and repeated downward departures from the federal Sentencing Guidelines in some types of drug cases led to a congressional investigation, Republican lambasting of soft-on-crime judges, and eventually a statute limiting judges' authority to depart downward.¹⁹ How did this obviously partisan judge get to the bench? He was a respected local lawyer who managed the election campaign of a successful congressional candidate, which led to his appointment as U.S. Attorney, which in turn led to his nomination to the federal bench. And before you jump to any conclusions: the congressional candidate was a Republican, and the supposedly soft-on-crime judge in question was appointed to both the U.S. Attorney position and the federal judgeship by President Ronald Reagan.²⁰

Changes in the appointments process have virtually put an end to stories like these. From among the many qualified candidates for the federal bench who also happen to be members of the president's party, presidents now tend to nominate not the most respected but the most rabidly ideological. The Senate, which used to go along with all but the least qualified or most controversial nominees, now responds with ideological fervor of its own. Sometimes this

17. These biographical details about Justice Blackmun may be found in a number of sources, including TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 388-91 (2001), and Duane Benton & Barrett J. Vahle, *The Burger-Blackmun Relationship: Lessons for Collegiality from the Blackmun Papers*, 70 MO. L. REV. 995 (2005).

18. HALL, *supra* note 17, at 388-91.

19. This statute limiting judicial departure from federal Sentencing Guidelines was recently overturned by the Supreme Court in *United States v. Booker*, 125 S. Ct. 738 (2005).

20. The Sentencing Guidelines statute is 18 U.S.C. § 3553(b)(1) (2000 & Supp. 2004). For further information on the rest of this paragraph, see Rob Hotakainen & Pam Louwagie, *State's Chief U.S. Judge Might Face Subpoena*, STAR TRIB., March 13, 2003, at 1A; Edward Walsh & Dan Eggen, *Ashcroft Orders Tally of Lighter Sentences*, WASH. POST, August 7, 2003, at A1.

leads to the nomination of a “stealth” candidate, who has said and done nothing of note, and sometimes it means instead a nasty public confirmation fight, which convinces even more people that law and politics are equivalent. Meanwhile, the elevation of ideology over competence makes the federal bench itself more political: as the opposition party picks its battles, concentrating on the Supreme Court and a few high-profile lower court nominees, it necessarily allows confirmation of most of the president’s ideological choices.

All of these factors have an insidious effect on how the public views the judiciary. So now we see such anomalies as an opinion poll asking the public whom they think should be the next Chief Justice of the United States.²¹ Such a poll is analogous to taking an opinion poll on whether the president needs surgery or the Fed should raise interest rates. Members of the general public simply do not have enough legal expertise to have an informed opinion, any more than they know enough about medicine or economics to respond to these hypothetical polls. Incidentally, the poll results at least partially bear this out: although Justice O’Connor (who had not yet announced her resignation) was the top pick – a reasonable if not particularly imaginative choice – former New York City Mayor Rudy Giuliani came in second. It is difficult to see how any member of the public knows whether Giuliani is a good lawyer or would be a good judge. But the public apparently likes his politics, and if Supreme Court Justices are simply legislators in black robes the average citizen has as much relevant knowledge as anybody else.

Finally, the Supreme Court is not helping matters. As I will explain in a moment, I believe that most judges, including Supreme Court Justices, *do* separate law and politics, at least most of the time. But sometimes they do a poor job of explaining the difference. Cases like *Bush v. Gore*²² and *Grutter v. Bollinger*²³ mangle precedent so badly that it is unsurprising that both the public and academic observers accuse the Court of playing politics with the Constitution.

By now, I am sure that most of you are thinking that I must be the most naive law professor on the planet. How can I possibly believe that constitutional interpretation is anything *other* than a political act? Didn’t the Legal Realists teach us *anything*? The short answers are: No, I am not naive; yes, constitutional interpretation is vulnerable to political hijacking but it need not be; and yes, the Legal Realists taught us to be cautious. The longer answers will take some time.

If constitutional law is not politics, what is it? It is, like the rest of law, an exercise in judgment. That is, after all, why we call them judges. Few difficult or controversial legal questions have a single obviously right answer,

21. See Zogby International, *O’Connor Top Choice for Chief Justice; Giuliani Second Overall; Thomas Top Pick on Right, New Zogby Poll Reveals*, available at <http://www.zogby.com/news/ReadNews.dbm?ID=955> (last visited Nov. 8, 2005) (poll released January 26, 2005).

22. 531 U.S. 98 (2000).

23. 539 U.S. 306 (2003).

and it is the job of the judge to choose from among the plausible right answers the one that seems best in the circumstances. If we step back from the current belief that constitutional law is merely politics in disguise, we might see that our entire legal culture – including the institutional structure of the judiciary – encourages judges to set aside their personal politics and exercise this sort of judgment.

We might begin with a query about the centuries-old tradition of common law judging, which provides the framework for all of American law. Judges have even more discretion in common law cases than in constitutional cases because there is not even a textual starting place. What keeps them from simply enacting their own politics in *those* cases? The answer is that constraints are built into most judges' deeply internalized views of their role. The key constraints in this context are fidelity to the rule of law and a preference for incremental rather than radical change, and both constraints serve the same function in constitutional cases as they do in common law cases.

The rule of law demands that judges decide cases on the basis of generalizable principles rather than particularized results, take into account existing principles (otherwise known as precedent) and give reasons – in the form of opinions – for their decisions.

These concepts are so ingrained in our legal culture that we teach them to beginning law students. For much of the first year of law school, we immerse students in judicial opinions to help them learn to extract principles and apply precedent. We teach them to make arguments on both sides of an issue to help them separate principled legal argument from politics or personal preference. When law students become lawyers, this separation is reinforced by the need to represent clients whose interests may not align with the lawyers' personal beliefs.

When lawyers become judges, the pressure to remain faithful to the rule of law becomes stronger still. There are rules designed to ensure impartiality and to limit the role of the judge, and rituals that impress upon judges the seriousness of their responsibilities. The adversary system attempts to provide judges with the best information and the best arguments on both sides. In all but the easiest cases, judges write opinions, exposing their reasoning about principle and precedent to public scrutiny and criticism. In addition, the act of writing an opinion forces a judge to measure her decision against the demands of precedent and principle. A judge might reach a preliminary conclusion, only to find that the opinion “won't write.”²⁴ According to Justice Blackmun's papers, Justice Kennedy switched his vote – and thereby changed

24. See, e.g., Paul A. Freund, *An Analysis of Judicial Reasoning*, in LAW AND PHIL. 282, 288 (Sidney Hook ed., 1984); Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957). My own conversations with judges confirm that this phenomenon continues today.

the outcome – in an important Establishment Clause case because his original draft opinion “looked quite wrong.”²⁵

Another, less-noticed, constraint on judges’ decision-making lies in the fact that the American judicial system is both collegial and hierarchical. Appellate judges always sit on panels, and are almost always subject to review by a higher court. This means that judges – who are appointed at different times by different presidents with different political views – must base their decisions on something other than idiosyncratic preferences. The only commonality is judges’ mutual faith in the rule of law and their sworn oath to uphold it. The rule of law must be strong enough to hold a collegial court together.

The collegial nature of the American judiciary means that judges almost always deliberate with other judges before issuing a decision. Deliberation has a number of beneficial effects in cases in which the right answer is not obvious – the kind of cases in which we most fear that politics plays a large role. The range of views among judges helps to ensure that different viewpoints are aired, and that poor or extra-legal arguments are identified. Departures from precedent and weak reasoning are similarly subject to expert scrutiny from other judges. If a colleague points out a flaw in one’s reasoning, it is (or should be) more difficult to remain wedded to that reasoning. All law, even constitutional law, is a group project.²⁶

Deliberation also means that judges have an opportunity to think through their conclusions, with the help of their colleagues, before their views are made public. As Justice Souter remarked during his confirmation hearings, in explaining his refusal to express any opinion on matters that might come before the Court, “it is much easier to modify an opinion if one has not already stated it convincingly to someone else.”²⁷ It is even harder to modify a view that has been formalized into a written public document. The deliberation that takes place among judges *before* an opinion is issued tempers a judge’s views when they are most susceptible to alteration. Moreover, both the act of attempting to persuade and the receipt of a colleague’s views serve to clarify disagreements, narrow disputes, and sharpen and strengthen the legal basis for the decision.

25. See Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1 (discussing *Lee v. Weisman*, 505 U.S. 577 (1992), which held clergy-led prayers at public school graduations unconstitutional). For other examples of judicial mind-changing, see Tony Mauro, *Lifting the Veil: Justice Blackmun’s Papers and the Public Perception of the Supreme Court*, 70 MO. L. REV. 1037 (2005), and Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209 (2005).

26. Professor Kobylka makes this point eloquently. Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun’s Judicial Legacy*, 70 MO. L. REV. 1075 (2005).

27. *Confirmation Hearings of Judge David Souter to the Supreme Court Before the Senate Judiciary Comm.*, 101st Cong. J-101-95 at 194 (1990).

Thus a judge, in deliberation with colleagues, may find that her initial instincts are inconsistent with the rule of law and change her mind. And it is this willingness to change one's mind that is the hallmark of a judge who has the courage to risk being wrong and the humility to admit it – in other words, a judge engaged in an exercise of judgment. Justice Blackmun was such a judge, famously willing to change his mind. He changed his mind about the breadth of congressional power, writing the majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*²⁸ and overruling a case in which he had been in the majority nine years before.²⁹ And toward the end of his tenure on the Court, he changed his mind about the death penalty. Having previously supported it, he wrote in 1994 that he felt “morally and intellectually obligated simply to concede that the death penalty experiment has failed.”³⁰ His judgment, informed by deliberations with his colleagues, the path of precedent, and the unfolding history of the death penalty, had changed.

It took years for Justice Blackmun to change his views on federalism and on the death penalty, as well it should. For in addition to fidelity to the rule of law, our legal system encourages in judges a preference for incrementalism rather than sudden change. Again, it begins with law school: we bury students in the common law, with its slow and incremental development. Once out of law school, lawyers who want to change the law nevertheless keep their arguments within stretching distance of prior precedent; arguing for the overruling of precedent is a last, rather than a first, line of attack.

And again, judges, having lived in the law long enough to absorb this preference for incrementalism, are further encouraged in their caution by the judicial role. The judiciary is, by nature and by design, the most conservative part of the government. The judiciary's task is to look back on past traditions and simultaneously preserve them and change them to meet the challenges of the present and future. Radical or revolutionary reform is inconsistent with this role. In both common law and constitutional adjudication, incrementalism and adherence to precedent work hand-in-hand to ensure that the law will change slowly, through accretion and subtle revision rather than through sudden or fundamental shifts in policy. Judgment has more influence than politics.

The most famous example of constitutional incrementalism is the story of *Brown v. Board of Education*,³¹ the case that held racially segregated schools unconstitutional. The Court acted gradually – some would say too gradually – both in declaring segregation unconstitutional and in implementing its decision. For almost two decades before *Brown*, the Court gradually eroded the prevailing doctrine that permitted “separate but equal” schools. In a series of cases largely orchestrated by NAACP attorneys (including Thurgood Marshall, later appointed to the Court by President Lyndon Johnson),

28. 469 U.S. 528 (1985).

29. See *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

30. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

31. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown I*].

the Court found various segregated educational facilities to be unequal and therefore unconstitutional.³² The incremental nature of the change is illustrated by the fact that the Court (helped along by the attorneys' choice of cases) began with the most egregious inequalities and the least sensitive education settings – graduate and professional schools rather than elementary schools. By 1954, when the Court in *Brown* finally declared that even “equal” segregated schools, at the elementary and high school level, violated the Constitution, much of the nation was ready to accept the decision as the next step.³³

The *Brown* Court further diluted the radicalism of its holding by signaling a willingness to tolerate delay in implementing it. The original decision contained no order to take any particular action, instead requiring the parties to reargue the question of appropriate remedies.³⁴ A year later, the Court ordered that schools be desegregated “with all deliberate speed.”³⁵ Although the Court’s cautiousness unfortunately encouraged the segregated states to defy the Court, it is not clear whether a more immediate remedial order would have been any more effective; there was not much progress until Congress and the president, in addition to the Court, supported integration. In the meantime, however, the Court quietly went about ordering the desegregation of other public facilities, slowly changing the nation’s views on race and perhaps leading the popular branches to their more enlightened views.³⁶

Brown is instructive on several levels. First, despite southern opposition to integration, the Court’s incremental approach had its advantages. In 1938, when the Court first found unequal education facilities unconstitutional,³⁷ most citizens were unprepared to accept integration. Had the Supreme Court tried to outlaw segregation in 1938, the decision would have been met with massive resistance – and not only in the south. Most northern cities were residentially segregated as well. A 1939 poll found that only 19% of those polled in New England and the middle Atlantic states, and 12% of those in the midwest, agreed that blacks should be “allowed to live wherever they want to live.”³⁸ As late as 1952, 56% of whites polled in Detroit advocated residential

32. *E.g.*, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (segregated graduate school unconstitutional); *Sweatt v. Painter*, 339 U.S. 629 (1950) (segregated law school unconstitutional); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

33. For the history of *Brown*, see RICHARD KLUGER, *SIMPLE JUSTICE* (1976).

34. *Brown I*, 347 U.S. at 495.

35. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (hereinafter *Brown II*).

36. *See, e.g.*, *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (mem.) (per curiam) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (mem.) (per curiam) (buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (mem.) (per curiam) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (mem.) (per curiam) (beaches).

37. *See Gaines*, 305 U.S. 337.

38. Eugene L. Horowitz, “Race” Attitudes, in *CHARACTERISTICS OF THE AMERICAN NEGRO* 203-04 (Otto Klineberg ed., 1944).

segregation.³⁹ As blacks began to move into previously white, working-class neighborhoods in the 1940s and 1950s, there were racially motivated attacks and even race riots in Detroit, Chicago, Philadelphia, Newark, and Cincinnati.⁴⁰ Although northern schools were not segregated by law, these residential patterns ensured that blacks and whites rarely went to the same schools.⁴¹ In both the north and the south, many workplaces and occupations were segregated.⁴² The armed forces remained segregated until 1949; all professional sports were segregated until the mid-1940s.⁴³ Attitudes changed slowly, but they did change. President Truman integrated the armed forces in 1949; the first federal voting rights act was passed in 1957. While I am not suggesting that the Court should take full credit for the changing attitudes, I do believe both that it had some influence and that any attempt at radical reform by the Court would have been a dismal failure.

The history of the Court's decades-long struggle with segregated schools also illustrates how the combination of adherence to precedent and a preference for incremental change serves to constrain judges. We see with hindsight that immediate integration – both before and after *Brown* – was a political impossibility. But that fact alone could not have stopped a determined, independent, unelected Court from imposing its will, had it been so inclined. That the Court was *not* so inclined is a testament to the inherently conservative and non-political nature of constitutional adjudication. Even judges who might have wished to proceed more quickly did not do so, restrained by a judicial temperament and incrementalist colleagues.

Finally, *Brown* teaches us that incrementalism has its costs: segregation remained in place much longer than it should have. Painful as that cost may be, it is also reassuring. The willingness to incur real costs demonstrates the effectiveness of the constraints on discretion. A constraint that never hurts is a constraint without bite.

I began this essay by pointing out some disturbing signs that more and more Americans, lawyers and non-lawyers alike, believe that constitutional law is nothing more than politics. I hope I have at least begun to convince you that judges should, and usually do, decide even the most controversial constitutional cases on the basis of judgment rather than politics. If the contrary belief is not to become a self-fulfilling prophecy, however, there is much more to do. A few institutional changes might help keep judgment above politics.

39. Thomas J. Sugrue, *Crabgrass-Roots Politics: Race, Rights, and the Reaction against Liberalism in the Urban North, 1940-1964*, 82 J. AM. HIST. 551, 556 (1995).

40. *Id.* at 553; see also ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960* (1983).

41. See, e.g., Will Maslow, *De Facto Public School Segregation*, 6 VILL. L. REV. 353 (1961).

42. See, e.g., William A. Sundstrom, *The Color Line: Racial Norms and Discrimination in Urban Labor Markets, 1910-1950*, 54 J. ECON. HIST. 382 (1994).

43. See, e.g., STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 94 (1997).

First, we *have* to stop putting legal academics on the federal bench – by and large they make terrible judges. Unlike the practice of law, a life spent in academia provides all the wrong incentives for developing good judgment. Academia actively discourages incrementalism: novelty is rewarded much more than judgment or common sense.⁴⁴ The more radical the idea the more likely the work is to be published by top law reviews, cited by other scholars, and quoted by the media. The most judicious work, which builds on what went before and contributes only marginally new ideas, is considered pedestrian. Unlike legal work in practice, academic work is also a solo project, not a group project. And academia further discourages the development of judgment by insulating professors from challenge. Law professors are talkers, not listeners.⁴⁵ Most intellectual exchanges are abstract and sterile, conducted on stylized panels or in the pages of law reviews. It becomes too easy not to listen, and to dismiss one's critics as simply mistaken. Lawyers who cannot listen or learn from criticism, on the other hand, will not be very successful. So lawyers usually make much better judges than academics do, because they are forced to engage and cooperate with their colleagues and because they have learned to temper brilliance with judgment.

Second, we must encourage good habits and good character in judges. Focusing on judicial character at the nomination stage would be a start. Consider the advice of former Attorney General Nicholas Katzenbach to the Senate Judiciary Committee deliberating on the nomination of Robert Bork to the United States Supreme Court:

Were I in your position . . . the central question I would be asking is this. Is Judge Bork a man of judgment? Not intellect, not reasoning, not lawyering skills, not ideology, not philosophy – simply, judgment. Is he a wise person?⁴⁶

And Katzenbach's remarks are equally applicable to a president thinking about nominating a particular individual to the bench. Look for those who have exhibited good judgment – which, incidentally, is likely to exclude both

44. See, e.g., Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987); Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986); Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13 (2001); Suzanna Sherry, *Too Clever by Half: The Problem With Novelty in Constitutional Law*, 95 NW. U. L. REV. 921 (2001). The incompatibility between an academic career and a judicial temperament is a recent development; academics used to make good judges. See ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 69-70 (1978).

45. See Lawrence S. Wrightsman & Justin R. La Mort, *Why Do Supreme Court Justices Succeed or Fail? Harry Blackmun as an Example*, 70 MO. L. REV. 1261 (2005).

46. Anthony Lewis, *Abroad At Home: Question of Judgment*, N.Y. TIMES, Sept. 27, 1987, at D23.

high-profile individuals who have spent their careers “running” for the Supreme Court, and, as suggested earlier, law professors. I am suggesting instead a different sort of “stealth” candidate: one the public may never have heard of, but who has an available track record of good lawyering and good judgment.

A variety of structural changes might also encourage judges to rely more on judgment and less on politics. The gradual turn toward politics in constitutional law – which is much slower and less pronounced among judges than among politicians, but still worrisome – has coincided with three changes in Supreme Court procedures. First, the Court’s mandatory jurisdiction has all but disappeared, leaving the Court with almost complete control over its docket. Second, eight out of the nine Justices are now in a “cert. pool,” so that law clerks – fresh out of a prestigious law school and usually most interested in hot constitutional topics – have greater influence on the choice of cases heard by the Court. Third, over the past several decades the Supreme Court has been deciding fewer and fewer cases, down from about 150 a year in the 1970s to about 80 a year since the mid-1990s.⁴⁷ One consequence of these developments is that it makes it more likely that the Court’s docket will include a larger percentage of major constitutional controversies. This in turn can encourage Justices – unlike lower court judges, who see a full range of legal questions – to view themselves as specialized constitutional arbiters rather than as experts on legal questions. Such an attitude could infect their decision-making process, skewing it towards politics and away from judgment.

Two possible responses might help mitigate this tendency toward constitutional specialization by exposing Justices to more run-of-the mill – even if difficult – legal questions. Both are a return to previous procedural devices. Congress might re-enact earlier jurisdictional rules and enlarge the Court’s mandatory jurisdiction, taking away some of its ability to control its own docket. Require the Court to hear any question of federal law on which there is an identified circuit split, for example. Instead or in addition, Congress might reinstate a practice that was abolished in the late nineteenth century: circuit-riding. Justices used to travel around the country sitting with district or appellate court judges, deciding whatever cases came before them. Having a “circuit Justice” – who rules on requests for emergency stays and the like – is a remnant of this practice.⁴⁸ During the nineteenth century, circuit-riding was an arduous job, detested by Justices, largely because of the difficulties involved in travel. It would be much easier today, and it might be enlightening for the Justices to see more ordinary legal cases on a regular basis.

In making these suggestions, I do not mean to diminish the importance of those within and closely related to the legal profession in assisting with

47. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 224-25 (3d ed. 2003).

48. Justice Blackmun was for a long time the Justice for the Eighth Circuit; it is now Justice Thomas.

maintaining the separation of law and politics. As law students, lawyers, legal academics, and journalists, we should be careful in both our description and our criticism of court decisions. Rather than labeling a decision we dislike as “political” or “activist” or “legislative” or “autocratic,” we should explain why it is bad law. Nor should we spare decisions whose outcomes we agree with. Instead, we should point out poor reasoning or other abuses wherever we find them. It is all too easy to fall into the trap of applauding or deploring a decision based on its outcome rather than its legal analysis, but as experts in the law we have an obligation to avoid perpetuating the popular myth that law and politics are equivalent.

