Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, & Judicial Supremacy*

Susan R. Burgess
University of Wisconsin at Milwaukee

Applications of the new institutionalism to the study of public law are often grounded in rational choice assumptions. This tends to reinforce a view of law and legal rhetoric as merely instrumental tools that foster certain institutional arrangements. This article proposes an alternative application of the new institutionalism that, the author argues, offers an alternative vision of law and legal discourse which can be used both to sustain and to critique the political order.

Susan R. Burgess is Assistant Professor of Political Science at the University of Wisconsin at Milwaukee. She is author of Contest for Constitutional Authority: The Abortion and War Powers Debates.

By most accounts, the currently dominant model of modern political science assumes that man is a power-maximizing, self-interested calculator, that politics consists of making decisions about how to allocate scarce resources, and that collective behavior is simply the aggregate of individual behavior.[1] According to this instrumental model, individual "preferences" are primary. Other factors including socialization, personality, or large-scale economic and technological changes may affect these preferences, but the latter remain the key unit to be analyzed and explained. Law has no meaning as such; political actors use law or legal rhetoric to manipulate political outcomes to their favor, to mystify the

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1. James March and Johan P. Olsen characterize these assumptions as utilitarian, instrumental, and reductionist, respectively. Since my focus is on the law and legal rhetoric, I will use "instrumental" as a short-hand term to refer to these assumptions. See March and Olsen, "The New Institutionalism: Organizational Factors in Political Life," *American Political Science Review,* 78 (1984): 735.

masses, and to mask overt value choices that cannot be justified on liberal grounds. According to the dominant view, legal rhetoric cannot foster or locate shared understanding in the community. All rhetoric is merely a "curtain that obscure[s] real politics" or an "instrument by which the clever and the powerful exploit the weak."[2]

In the public law subfield, this conception of politics found a home in "political jurisprudence," which proclaims that "courts [are] political agencies and judges [are] political actors."[3] Scholars following this model focus on predicting and explaining decisional outcomes, which are, at bottom, driven by judicial preferences.[4] Judicial behavior amounts to declaring the winner and loser in what appears to be a zero-sum contest and political science seeks to discover the determinants of those choices.[5] Law is understood narrowly, perhaps as a set of "decisional rules," if it is attended to at all. Legal rhetoric is nothing more than judicial mystification or manipulation of the law, offered to rationalize policy preferences. Within this model, as Rogers Smith observes, "judicial decision-making inevitably seems a tedious, crassly self-interested, and rather ineffectual game among programmed players."[6]

Of course, not everyone who embraces political jurisprudence accepts these assumptions wholeheartedly. A variety of approaches fit under the broad rubric of political jurisprudence.[7] Yet, despite this variety, most of these approaches embrace an instrumental conception of politics. I do not deny that courts are political, nor advocate a return to formal jurisprudence, but want simply to call attention to the fact that, despite some important and often noted *differences* in approach, most of the research in political jurisprudence *shares* an instrumental conception of politics, law, and legal rhetoric.

2. March and Olsen, "The New Institutionalism," pp. 738 and 741.

3. David O'Brien, "Reconsidering Whence and Whither Political Jurisprudence," *Western Political Quarterly,* 36 (1983): 561. O'Brien is quoting Martin Shapiro. O'Brien's piece is part of a larger work titled, "Whither Political Jurisprudence: A Symposium," which includes work by Harry Stumpf, Austin Sarat, Martin Shapiro, and David Danielski.

4. See, for example, James L. Gibson's widely cited piece on the current state of behavioral judicial theory, which asserts that "comprehensive modeling must begin with the individual decision maker as the unit of analysis." Gibson, "From Simplicity to Complexity: The Study of Theory in the Study of Judicial Behavior," *Political Behavior,* 5 (1983): 32.

5. Thus, Gibson begins by explaining that his "primary focus is on the major on-the-bench activity of judges—i.e., decision making." Ibid., p. 9.

6. Rogers M. Smith, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," *American Political Science Review,* 82 (1988): 96.

7. See Stumpf, et al., "Whither Political Jurisprudence," *Western Political Quarterly,* 36 (1983).

I. The New Institutionalism on Politics and Legal Rhetoric

Several scholars have noted recently that the instrumental model of political science cannot account for some significant, empirically examinable political behavior,[8] and they have offered an alternative model called the "new institutionalism." March and Olsen contend that "it is plausible to argue that politics is filled with behavior that is difficult to fit" into the instrumental model, and that "what we observe in the world is inconsistent with the ways contemporary theories ask us to talk."[9] Similarly, Smith argues that modern political science's focus on man as a self-interested calculator and power maximizer emphasizes a "narrow subset of possible human standards."[10] Conceding that political behavior outside this narrow standard may be more rare, Smith nevertheless contends that such actions should not be "dismissed as trivial 'outliers' as they may be among the most decisive of political events."[11]

In theory, the new institutionalism may challenge the basic assumptions that drive the instrumental model of political science by offering a broader conception of politics. Without denying the importance of decisional outcomes, it suggests that politics "creates and confirms interpretations of life."[12] Individuals are understood to be rooted in and affected by community. Politics creates or locates meaning, which in turn affects the shape of the community and the individual.[13] March and Olsen argue that "through politics, individuals develop themselves, their communities, and the public good. Politics is a place for discovering, elaborating, and expressing meanings, establishing shared (or opposing) conceptions of experience, values, and the nature of existence."[14] In this framework, law and legal rhetoric are understood not simply as "devices of the powerful for confusing the weak, but [also as] instruments of interpretive order."[15]

8. For examples of such behavior, see March and Olsen, "The New Institutionalism," pp. 745-47; and Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (Lawrence: University Press of Kansas, 1992), pp. 46-48, 121-26.

9. March and Olsen, "The New Institutionalism," p. 742.

10. Smith, "Political Jurisprudence," p. 93.

11. Ibid., p. 100.

12. March and Olsen, "The New Institutionalism," p. 741.

13. March and Olsen contend that, within this understanding, "participation in civic life is the highest form of activity for civilized persons." (Ibid.) This connects the new institutionalism with the literature on participatory democracy and republican virtue. See for example, Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984); and Stephen Macedo, *Liberal Virtues* (Oxford: Oxford University Press, 1990).

14. March and Olsen, "The New Institutionalism," p. 741.

15. Ibid.

Finally, and perhaps most importantly, institutional arrangements affect the elaboration of meaning. Thus, March and Olsen conclude that "theoretical development reflective of an institutional perspective would include an examination of the ways in which symbolic behavior transforms mere instrumental behavior and is transformed by it."[16] Smith suggests that independent variables should be located from amongst "relatively enduring structures" or institutional arrangements.[17] He contends that, "in political life, many economic currents and even political actors' own purposeful commitments are affected by relatively enduring legacies of past political choices."[18] Thus, he concludes that political science should "explore how relatively enduring structures of human conduct have shaped the existing array of resources, rules, and values instead of simply taking that array as given."[19]

II. Recent Applications of the New Institutionalism: A Return to the Old Instrumentalism

Stated most simply, the new institutionalist argument is that institutional arrangements affect politics. At this level, the new institutionalism does not necessarily challenge or transcend the old instrumentalism. Men may still be understood as simple, self-interested power maximizers; politics may still be understood to be solely about decisional outcomes; law may still be described as flat decisional rules; legal rhetoric may still appear to be a mere smokescreen; and individual preferences (here aggregated) may still be primary. Thus, many recent applications of the new institutionalism in public law have found that various institutional arrangements affect the articulation of individual preferences and decisional outcomes. While these studies have produced findings that are important in their own right, they have remained firmly grounded in rational choice assumptions and thus have not directly challenged the key assumptions of the instrumental model of political science. Recent leading applications include the work of Melinda Hall and Paul Brace, who argue that the new institutionalism "embraces rational choice assumptions about human behavior," such as focusing on the "greatest personal payoffs, usually defined as achieving policy outcomes closest to one's personal values."[20] Individual preferences remain central; now, however, institu-

16. Ibid., p. 742.
17. Smith, "Political Jurisprudence," p. 96.
18. Ibid.
19. Ibid., p. 98.
20. Melinda Hall and Paul Brace, "Order in the Courts: A Neo-Institutional Approach to Judicial Consensus," *Western Political Quarterly,* 42 (1989): 393. See also Brace and

tional structures (understood mainly as decisional rules, or the costs and benefits that institutions assign to certain behaviors) affect the shape of those preferences. Although Lee Epstein, Thomas Walker, and William Dixon aspire to "combine the traditional scholar's interest in institutional factors with the behavioralist's emphasis on systematic explanation and prediction [to] contribute to knowledge about the relationship between institutions and behavior [and to] bridge the gap between traditional institutional analysis and attitudinal theory," they nevertheless locate their "theoretical propositions" in the "micro-research literature."[21] Consequently, their findings are shaped by and appear to confirm the instrumental model of political science.

Since the assumptions of the instrumental model of political science have driven these recent applications of the new institutionalism, it is not wholly surprising that some scholars have claimed that there is nothing really new about the new institutionalism. Martin Shapiro has asserted that "the kind of institutional analysis proclaimed by March and Olsen is the kind of analysis that many of those engaged in political jurisprudence have been doing all along anyway."[22] Since the recent applications of the new institutionalism to public law have been grounded in an instrumental conception of politics, Shapiro's skepticism is understandable. Yet, taking institutional arrangements seriously, *even from within an instrumental perspective,* might lead to new behavioral observations that the old instrumentalism cannot currently account for. As Thomas Kuhn has argued, although revolutions are inevitable for a community of researchers following the scientific method, such paradigm shifts do not simply occur at once. At the beginning of every revolution, scientists observe that the currently dominant paradigm fails to account for a range of behavior. At that point, the givenness of normal science becomes disrupted, and alternative models are developed, which either supplement or challenge the assumptions of the previous paradigm. An alternative model may become strong enough to supplant the old paradigm, at which point it becomes the new dominant framework.[23]

Hall, "Neo-Institutionalism and Dissent in State Supreme Courts," *Journal of Politics,* 52 (1990): 54-70.

21. Lee Epstein, Thomas Walker, and William Dixon, "The Supreme Court and Criminal Justice Disputes: A Neo-Institutional Perspective," *American Journal of Political Science,* 33 (1989): 825.

22. Martin Shapiro, "Political Jurisprudence, Public Law, and Post-Consequentialist Ethics: Comment on Professors Barber and Smith," *Studies in American Political Development,* 3 (1989): 89.

23. See Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).

Shapiro overlooks the possibility that the new institutionalism may lead to a fundamental challenge of the old instrumentalism. At its most fundamental level, the new institutionalism posits an understanding of man that moves beyond narrow self-interest, a conception of politics broader than mere decisional outcomes or aggregated preferences, and a conception of law and legal rhetoric that encompasses more than manipulation or mystification. Section IV of this paper provides an analysis of constitutional interpretation that reaches the most fundamental claims of the new institutionalism, with the hope of contributing to a transformation in the way that scholars and citizens conceive and experience politics, law, and legal rhetoric.

III. Reconceiving Legal Rhetoric

The new institutionalist move to reconceive politics and law is connected to other recent scholarly attempts to take the transformative power of legal rhetoric more seriously.[24] Celeste Condit has challenged the notion that rhetoric is simply manipulative or mystifying. Arguing that "rhetoric is essential to a democracy," she notes that "large scale forces" cannot be experienced directly by institutions or individuals.[25] Rather, she argues that shared understandings mediate large-scale forces and are transmitted through a shared public vocabulary. She concludes that "explanations of the path through which America has arrived at its current law, practices, and understandings must include the study of discursive force, because only through public discourse can material realities be expressed and ideas materialized."[26] Like scholars exploring the new institutionalism, Condit posits "discourse as a change agent in itself."[27]

Similarly, Mary Ann Glendon has recently suggested that law can be conceptualized as a branch of rhetoric that serves to constitute the community, in addition to its often noted role in resolving disputes. She argues that when the community discusses legal questions, it tries to

24. The relationship between legal rhetoric and the constitution of society has been addressed for some time now. See, for example, Plato's *Gorgias* and Aristotle's *Rhetoric.* Here I discuss only a few recent works of this type. For a broader review of the recent literature, see Christine B. Harrington and Barbara Yngvesson, "Interpretive Sociolegal Research," *Journal of the American Bar Foundation,* 15 (1990).

25. Celeste Condit, *Decoding Abortion Rhetoric* (Urbana, IL: University of Illinois Press, 1990), p. 1.

26. Ibid., p. 3.

27. Ibid.

make sense of the life that the law suggests the community shares. Drawing on Clifford Geertz, Glendon argues that law and legal discourse allow the community to "imagine the real."[28] Lief Carter has also maintained that constitutional interpretation binds members of the community together. He argues that legal discourse "serves as a starting place for leaders to justify decisions and thus influence ways community members think and act. The process sustains the members' commitment to the community, even when they disagree about a particular interpretation."[29] Similarly, Sanford Levinson has explored whether "constitutional faith" bonds Americans "into a coherent political community."[30] While this legal rhetoric approach emphasizes the role of discourse in locating and fostering a broader understanding and practice of politics and law, the new institutionalist approach emphasizes the role of institutional arrangements. By encompassing a broader conception of politics and legal rhetoric, these approaches supplement the instrumental model, and consequently account for a broader range of behavior.

The remainder of this article attempts to link the insights of these two approaches, in order to move toward an alternative conception of law and politics that is rooted in current political practice. Although a full elaboration is beyond the scope of this essay, I briefly explore an institutional arrangement that is often accepted as simply given—judicial supremacy—and suggest that unself-conscious acceptance of judicial supremacy reinforces a rhetoric of narrow self-interest in both academic and public discourse, and thus constricts the community's understanding of law and politics.

IV. The New Institutionalism, Legal Rhetoric, and Judicial Supremacy

Judicial supremacy is an institutional arrangement that gives the federal judiciary final and indisputable say in constitutional interpretation. While judicial review grants the Court the authority to strike down legislative and executive acts, judicial supremacy, as Walter Murphy notes, further obliges the elected branches "not only to obey that ruling [in the specific case at hand], but to follow its reasoning in future delibera-

28. Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge, MA: Harvard University Press, 1987), p. 8.

29. Lief Carter, *Introduction to Constitutional Interpretation* (White Plains, NY: Longman, 1991), p. 4.

30. Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988), p. 6. Also see James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990).

tions."[31] Under judicial supremacy, once the Court interprets the Constitution, its word is final and cannot be questioned by the other branches.

Perhaps not surprisingly, the judiciary itself has propagated the notion that the Court is the ultimate interpreter of the Constitution. Often overlooked, however, is the fact that the Court did not explicitly declare itself supreme until 1958 in *Cooper v. Aaron.*[32] In *Cooper,* the Court asserted that the principle that "the federal judiciary is *supreme* in the exposition of the law of the Constitution" is a "*permanent and indispensable* feature of our constitutional system."[33]

The Court did not specifically declare itself the ultimate interpreter of the Constitution until *Baker v. Carr,* the 1962 case which declared that issues of legislative apportionment and districting were justiciable, rather than political questions: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this court as *ultimate interpreter* of the Constitution."[34] In 1969, the Court reaffirmed its adherence to judicial finality in *Powell v. McCormack,* a case that declared that the Court, not Congress, would have the final say about qualifications for membership in the House. In *Powell,* the Court once again asserted that "it is the responsibility of this Court to act as the *ultimate interpreter* of the Constitution."[35] In *U.S. v. Nixon,* the Court declared itself supreme over the executive branch, citing both *Powell* and *Baker* as precedent to support the claim that the Court is the ultimate constitutional interpreter.[36] Taken together, in *Cooper, Baker, Powell,* and *Nixon* the Court explicit-

31. Walter Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," *Review of Politics,* 48 (1986): 406-07.

32. 358 U.S. 1 (1958).

33. 358 U.S. 1, 17 (1958), emphasis added. Perhaps not coincidentally, *Cooper* was decided in the same era that survey researchers such as Samuel Stouffer were declaring that the public was intolerant, and thus incapable of properly understanding the Constitution and its guarantees of civil liberties. Accordingly, this research called for aggrandizing the power of elite institutions, such as the Court, and further marginalizing democratic sources of constitutional interpretation. For a more detailed elaboration of the development of this research, and an alternative form of survey construction, see, respectively, John Brigham, "Bad Attitudes: The Consequences of Survey Research for Constitutional Practice," *Review of Politics,* 52 (1990), and Susan R. Burgess, Daniel J. Reagan, and Donald L. Davison, "Reclaiming a Democratic Constitutional Politics: Survey Construction and Public Knowledge," *Review of Politics,* 54 (1992): 399-415.

34. 369 U.S. 186, 208 (1962), emphasis added.

35. 395 U.S. 486, 549 (1969), emphasis added.

36. 418 U.S. 683, 703 (1974).

ly declared supremacy over the states, Congress, and the Executive.[37]

Many scholars and public officials assume that *Marbury v. Madison,* the famous case in which the Court first exercised judicial review in 1803, established the same sort of judicial supremacy that is evident in *Cooper, Powell, Baker,* and *Nixon.* Indeed, the Court later cited *Marbury* as precedent each time it claimed to be the ultimate constitutional interpreter in *Cooper, Powell, Baker,* and *Nixon.* This may explain why scholars and public officials assume that *Marbury* established not only judicial review, but also judicial supremacy. Yet, *Marbury* itself did not claim supremacy, and supremacy certainly was not an accepted practice at that time.[38] The *Marbury* Court did assert that it had the authority to interpret the law when it claimed that "it is emphatically the province and the duty of the judicial department to say what the law is."[39] Coupling that assertion with the establishment of judicial review may very well have made it possible for the Court to claim, at a later date, that judicial constitutional interpretation is final and unchallengeable.[40] Creating the opportunity for judicial review to become inextricably linked with judicial supremacy is not, however, the same as establishing a widely accepted practice.[41]

When this examination is extended beyond judicial materials, support for judicial supremacy in American political development decreases further. Several presidents including Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Ronald Reagan, as well as several Members of Congress have rejected the ultimate interpreter reading by challenging

37. A *Westlaw* search indicates that the Court has not made this explicit declaration very often. Besides the aforementioned cases, the search revealed *Colorado v. Connelly* 474 U.S. 1050, 1053 (1986); *Northern Pipeline Construction Co. v. Marathon Pipe Line Company* and *U.S. v. Marathon Pipeline Co.* 458 U.S. 50, 62 (1982); and *Nixon v. Administrator of General Services* 433 U.S. 425, 503 (1977).

38. Indeed, even judges themselves did not universally accept the *Marbury* ruling. See *Eakin v. Raub* 12 Sergeant & Rawle (1825), J. Gibson, dissenting opinion.

39. 1 Cranch 137 (1803).

40. Some scholars also claim that *Cohens v. Virginia* [6 Wheaton 264 (1821)] established judicial supremacy, at least in matters relating to the states. That case, however, declares *national* supremacy in instances of conflict with the states in matters of constitutional interpretation, not *judicial* supremacy *per se.* Further, recurrent debates about the states' nullification power in the nineteenth century suggest that even national supremacy was not as widely accepted a practice as judicial supremacy seems to be today.

41. On this point see John Brigham, *Cult of the Court* (Philadelphia: Temple University Press, 1987), pp. 16, 35, and 221; Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven, CT: Yale University Press, 1990), pp. viii, 176, and 195; and Murphy, "Who Shall Interpret?" pp. 406-07. More generally, see Robert Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989).

the constitutionality of particular judicial decisions. They have all challenged judicial supremacy on the theoretical grounds that it threatens to allow judicial authority to subsume both constitutional and democratic authority in the polity. They argue that the Constitution cannot retain independent authority if it means only what the judges say it means. Additionally, if the Court's word is final, democratic sources of constitutional interpretation are marginalized from the interpretive process.

Despite these theoretical similarities, the *scope* of challenges to judicial supremacy has often differed in practice. Jefferson and Jackson, for example, expressed disagreement with the federal judiciary's interpretation by exercising uncontroverted presidential powers. Neither attacked the Court directly, nor challenged the Court's use of judicial review. Jefferson pardoned individuals who had been convicted under the Alien and Sedition Acts on the grounds that the acts were unconstitutional,[42] and Jackson vetoed Congress's decision to recharter the Bank of the United States on the grounds that it was unconstitutional.[43] Lincoln's challenge to judicial supremacy was broader in scope; he declared that *Dred Scott v. Sandford* had been wrongly decided, and urged Congress to pass legislation that would overturn it.[44] At no point, however, did Lincoln declare that the Court had no business addressing the constitutionality of slavery or that the issue was solely a legislative matter. Reagan's challenge to judicial supremacy over the constitutionality of abortion was broader still. Like Lincoln, he based his disagreement with the Court on his interpretation of judicial and legislative power. Reagan, however, also attacked judicial review directly by claiming that the activist, *Roe* Court had unconstitutionally usurped legislative power. Accordingly, Reagan urged Congress to overturn *Roe* by passing the Human Life Bill, thereby reclaiming the legislature's rightful authority to resolve the abortion issue finally.[45]

In sum, judicial supremacy rests on tenuous grounds, both logically and historically. Despite tenuous logical and historical support for judicial supremacy, scholars of both the political right and left widely support the ultimate interpreter reading as simply given. Robert Nagel

42. See Louis Fisher, *American Constitutional Law* (New York: McGraw-Hill, 1990), pp. 641-43. Congress later indicated support for Jefferson's position and eventually even the Supreme Court admitted that the Act had been struck down by "the court of history" in *N.Y.T. v. Sullivan* U.S. 254, 276 (1964).

43. See James Richardson, ed., *Compilation of Messages and Papers of the President,* v. 2 (Washington, DC: GPO, 1899), pp. 581-82. Jackson found some support for this view in Congress. See Fisher, *American Constitutional Law,* p. 82.

44. See Fisher, *American Constitutional Law,* p. 977.

45. *Compilation of Presidential Documents* (Washington, DC: GPO, 1982), p. 885.

states 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."[46] Leading scholars as disparate as Raoul Berger, Ronald Dworkin, Robert Bork, John Hart Ely, and Michael Perry disagree about what the Court should say when it speaks, but they agree that once spoken, the Court's words are final.

Perhaps surprisingly, several leading advocates of judicial restraint support judicial finality. They may support a narrower range of judicial power than the judicial activists; however, the restraintists nevertheless accept that judicial power is absolute and unchallengeable within that carefully circumscribed range. For example, despite his apparent opposition to judicial power and his ardent support of judicial restraint, Raoul Berger nevertheless argues that judicial constitutional interpretation is final and can only be challenged by changing the Constitution itself. He contends that "decisions of constitutional question cannot, however, be overruled by the legislature; resort must be had to the 'cumbersome' amendment process."[47] Berger does not see the contradiction between his adherence to judicial finality and his alleged fidelity to constitutional supremacy. Although he asserts that "we must reject Charles Evans Hughes' dictum that 'the Constitution is what the Supreme Court says it is,' " he nevertheless maintains that the other branches and the states cannot challenge judicial constitutional interpretation.[48] Although Berger would like to separate judicial from constitutional authority, he embraces the very position that logically prevents him from effectively doing so. Robert Bork, another leading opponent of judicial activism, attempts to distinguish constitutional meaning from constitutional law, i.e., judicial constitutional interpretation, and thus seems to allow for the possibility of errant judicial constitutional interpretation. Yet, he too embraces judicial supremacy. Thus, he claims that "the judges decide what the Constitution means. When the Supreme Court invokes the Constitution, *whether legitimately or not,* as to that issue *the democratic process is at an end.*"[49]

Perhaps less surprisingly, judicial activists also support judicial

46. Robert Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley: University of California Press, 1989), p. 2.

47. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977), pp. 320-21.

48. Ibid., p. 296.

49. Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), p. 3, emphasis added. Also see pp. 6, 7, 153, 160.

supremacy. John Hart Ely, who attempts to ground a moderately active use of judicial review on the basis of democratic proceduralism, argues: "When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling [the legislature's] judgment, and normally doing so in a way that is not subject to 'correction' by the ordinary lawmaking process."[50]

Supporters of a broader form of judicial activism, such as Ronald Dworkin, David A. J. Richards, and Michael Perry, also support judicial supremacy. According to Dworkin, "the courts in general and the Supreme Court in the last analysis have the power to decide for the government as a whole what the Constitution means."[51] This principle, which he contends was established in *Marbury,* is now "beyond challenge as a proposition of law, and the constitutional wars are now fought on the territory it defines. The capital question now is not what power the Court has [as to finality], but how its vast power should be exercised."[52] Furthermore, Dworkin argues that the Court has a greater competence for discerning constitutional principles, and thus for protecting rights. He asserts: "The United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions."[53] Despite favoring a very broad sphere of judicial supremacy, Dworkin does advocate civil disobedience for individual citizens who disagree with the law. It is difficult, however, to see how citizens, except perhaps for the sturdiest of souls, could base their civil disobedience on an alternative constitutional reading, if the Court utterly dominates the polity's discussion of constitutional meaning.

According to David A. J. Richards, judicial review or judicial constitutional interpretation "would be nugatory" without "judicial supremacy."[54] Overlooking the possibility that judicial supremacy has eroded constitutional authority, Richards concludes that "overall such judicial supremacy will tend to secure a greater balance of fidelity to enduring constitutional values."[55] Richards does concede that public examination and debate about judicial decisions characterize a healthy polity. He claims that "the tension between judicial supremacy and public argu-

50. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), p. 4.

51. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986), p. 356.

52. Ibid., p. 357.

53. Ibid., p. 356.

54. David A. J. Richards, *Toleration and the Constitution* (Oxford: Oxford University Press, 1986), p. 291.

55. Ibid., p. 292.

ments of judicial mistake is fundamental to the integrity of democratic constitutionalism. Judicial supremacy is thus working correctly when overall it tends to vindicate the best arguments of princple."[56] Noting that congressional challenges to judicial supremacy would amount to giving Congress the power to reverse judicial decisions, Michael Perry contends that such initiatives should be rejected, and that the polity should continue to adhere to judicial supremacy lest the Court and the power of judicial review be rendered meaningless.[57]

In sum, judicial restraintists and activists of various stripes agree that the people's representatives should not challenge judicial supremacy. They may disagree about the proper range of judicial power, but they all agree that judicial power is absolute and unchallengeable within that range. This point raises an important puzzle: why did judicial supremacy come to be widely embraced, given tenuous logical and historical support? Although a full explanation is well beyond the scope of this article, I offer the following tentative suggestions. Following *Brown,* many scholars and public officials, both liberal and conservative, became convinced that the Court could singlehandedly effect social change.[58] Those liberals who trusted the Court to use the power of judicial review for benevolent ends, i.e., to protect human rights from majority abridgements, did not hesitate to accept the Court's declaration of supremacy in *Cooper* and subsequent cases. Why conservatives came to embrace judicial supremacy, albeit within a more narrowly defined range of judicial power, is more puzzling. Glendon suggests that the post-World War II focus on human rights transformed almost every political question into a legal one, or what she calls "rights talk." Although liberals and conservatives may disagree about what counts as a real right, they both largely assume that the Court is the most competent and expert branch in addressing rights-related issues. Thus, Glendon suggests that transforming issues into the language of rights, even though contention remained about what rights were, vastly increased the Court's monopoly on political discourse.[59]

In any case, widespread acceptance of judicial supremacy has vastly

56. Ibid.

57. Michael Perry, *The Constitution, the Courts, and Human Rights* (New Haven, CT: Yale University Press, 1982), pp. 135-36.

58. For evidence which suggests that the Court cannot unilaterally effect social change see Gerald Rosenberg, *The Hollow Hope* (Chicago: University Press of Chicago, 1991).

59. See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991). Also see Martin Shapiro, *Who Guards the Guardians: Judicial Control of Administration* (Athens: University of Georgia Press, 1988).

constricted the contemporary constitutional debate. Many scholars and public officials continue to emphasize the tension between judicial review and democracy. They forego a broader discussion of constitutional meaning, in favor of a discussion about the "role of the Court." This debate over activism v. restraint has been recast into several different discourses, currently the most prominent of which are those between interpretivists and noninterpretivists and between originalists and nonoriginalists.[60] These terms serve to distinguish the subtle *differences* between leading scholars engaged in the current debate; however, like the activism v. restraint debate that they reconstruct, the interpretivist v. noninterpretivist and originalist v. nonoriginalist debates overlook or obscure that which nearly all the interlocutors *share,* namely, an adherence to judicial supremacy. Since judicial supremacy is widely regarded as given or natural, its influence on the shape of the contemporary constitutional debate remains largely undiscussed. In the context of a broad acceptance of judicial supremacy, many scholars have also argued that the people and the people's representatives have become less informed about constitutional meaning and, therefore, less able to follow or to participate meaningfully in constitutional debates. Most scholars assert, *without any mention of the influence of institutional arrangements such as judicial supremacy,* that the people and the people's representatives are simply less able to interpret the Constitution than the judiciary.[61]

60. For an introduction to these debates see, respectively, the following seminal articles: Thomas C. Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 27 (1975): 703; and Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980): 214.

61. In a recent development, a number of scholars have begun to argue, at the level of theory, that challenging judicial supremacy may improve the quality of congressional and popular constitutional interpretation. See, for example, John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca, NY: Cornell University Press, 1980); John Brigham, *Cult of the Court* (Philadelphia: Temple University Press, 1987); Susan Burgess, *Contest for Constitutional Authority*; Paul Dimond, *The Supreme Court and Judicial Choice* (Ann Arbor, MI: University of Michigan Press, 1989); Louis Fisher, *Constitutional Dialogues: Interpretation as a Political Process* (Princeton, NJ: Princeton University Press, 1987); Gary J. Jacobson, *The Supreme Court and the Decline of Constitutional Aspiration* (Totowa, NJ: Rowman and Littlefield Press, 1986); Sanford Levinson, *Constitutional Faith*; Stephen Macedo, *Liberal Virtues*; Albert Melone, "Legalism, Constitutional Interpretation, and the Role for Non-Jurists in Responsible Government," *Papers in Comparative Political Science* (Barcelona: Catedra de Historia del Derecho y de las Instituciones, 1990): 4683-95; and Robert Nagel, *Constitutional Cultures.*

V. Conclusions

If judicial supremacy continues to be widely accepted as given, judicial authority will continue to subsume constitutional authority.[62] Constitutional authority will continue to erode, and a resource for bonding the community and critiquing the state will have been lost. By accepting judicial supremacy, public officials and scholars lend support to constricting discourse, marginalizing alternative political visions, and obstructing political transformation. It is much easier to maintain the current political order when the Constitution is not available to the people or the people's representatives as a resource to challenge the interpretation in vogue at the moment—be it liberal or conservative. Nevertheless, judicial supremacy is not, and has never been, a wholly unchallenged institutional arrangement, notwithstanding scholarly and judicial opinion. The Constitution is available to critique the current political order when judicial supremacy is challengeable and when alternative interpretive arrangements are deemed acceptable and usable. Of course, the critique of the current order that can be offered in constitutional language will always be more limited than some radicals may envision, despite their proclivity toward change, and more expansive than some conservatives will embrace, despite their desire to broaden constitutional authority. For radicals, the law will always appear as mere manipulation, despite relatively broader forms of legal discourse. Yet, even radicals must work for change from concrete, material realities, and from within the common language that the community shares, particularly if they do not wish to concede the constitutional sphere to conservatives. Radicals stand a greater chance of success when the common language that binds the community is not hegemonic. For conservatives, multiple interpretations of the law will always threaten to disrupt the community's fragile attachment to the Constitution. Yet, conservatives cannot deny that judicial supremacy broadens judicial authority, corrodes constitutional authority, and may threaten to entrench a political order contrary to conservative values.

62. For a more detailed argument to this effect, see Burgess, *Contest for Constitutional Authority,* pp. 109-26.