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Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children

ABSTRACT. This Note analyzes a set of constitutional stories that has not been the subject of focused study – the constitutional stories we tell our schoolchildren in our most widely used high school textbooks. These stories help reinforce a constitutional culture that is largely deferential to the Supreme Court, limiting references to popular resistance to the Court and often linking such popular resistance to the actions of self-interested politicians, at best, and historical villains, at worst. Our textbooks are especially critical of blunt institutional checks on the Court (like judicial impeachment and “court-packing”), but are sometimes receptive to subtler, longer-term checks (like social mobilization and judicial nominations). If judicial supremacy does run rampant, as popular constitutionalists claim, it would appear as though our public schools are complicit in its entrenchment.

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INTRODUCTION

Constitutional law is, at least in part, about storytelling. Through the exercise of our collective constitutional imagination, vague words written centuries ago are given life. Broad rights are given specific applications. In the process, the American Constitution becomes *our* Constitution.¹ As Jack Balkin explains, this imaginative process focuses on constructing a “*constitutional story*—a constitutive narrative through which people imagine themselves as a people, with shared memories, goals, aspirations, values, duties, and ambitions.”² A generation earlier, Robert Cover poetically wrote, “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.”³

At any given moment, different communities are likely to craft different “constitutional stories.” Our constitutional tradition, with its concise text and malleable history, is susceptible to multiple interpretations. A segregationist Southerner may construct a narrative featuring states’ rights, focusing on the Tenth Amendment and statements from Thomas Jefferson,⁴ Andrew Jackson,⁵ and John C. Calhoun.⁶ A civil libertarian may create a narrative stressing the nation’s enduring commitment to free expression, connecting the First Amendment and the election of 1800 to *New York Times v. Sullivan*⁷ and *Texas*

1. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 463 (2007).
2. *Id.*
3. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (footnote omitted).
4. See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 52 (2006) (“[T]he several states who formed [the Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction . . .” (alterations in original) (quoting THE PORTABLE JEFFERSON 286 (Merrill D. Peterson ed., 1975))).
5. See, e.g., *id.* at 77 (“Nor is our Government to be maintained or our Union preserved by invasions of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves . . .” (quoting 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576-89 (James D. Richardson ed., Washington, D.C., Gov’t Printing Office 1897))).
6. See, e.g., Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT’L J. CONST. L. 553, 575-76 (2008) (noting that Calhoun believed that the Constitution is “a ‘compact between’ states rather than ‘a Constitution over them’”).
7. 376 U.S. 254 (1964).

v. Johnson.⁸ A race-conscious liberal may understand *Brown v. Board of Education*⁹ as realizing the earlier promise of the Reconstruction Amendments and Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*.¹⁰ It is through these stories that we come to understand the promises guaranteed by our Constitution as commitments realized over time—commitments to the proper scope of religious freedom, property rights, free expression, and equal protection, among others. As Bruce Ackerman notes, “[T]he Constitution is more than an idea. It is an evolving historical practice, constituted by generations of Americans as they mobilized, argued, resolved their ongoing disputes over the nation’s identity and destiny.”¹¹ It is through these imaginative acts and ongoing disputes that we become citizens of a constitutional tradition that extends through the centuries. It is through constructing these narratives that we truly become “*We the People*.”

Even so, our constitutional narratives are frequently contested. H. Jefferson Powell describes American constitutional law as “an historically extended tradition of argument.”¹² Through these arguments, we often wage the same battles, decade after decade. Nevertheless, over time we sometimes reach a new consensus on key issues—sometimes at gunpoint (slavery), other times by resounding electoral mandate (the commerce power). Regardless, these debates are the subject of countless articles and books—and so they should be. They shape our constitutional culture¹³ and the structure of our public discourse.

One important set of constitutional stories, however, has not been the subject of focused study. These stories subtly shape our constitutional culture but have received scant attention from legal scholars. They are often the product not of robust public debate, but of bureaucratic decisions shaped by

8. 491 U.S. 397 (1989).

9. 347 U.S. 483 (1954).

10. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

11. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34 (1991).

12. H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 6 (2002).

13. Robert Post defines “constitutional culture” as “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution.” Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). Reva Siegel adds, “[T]he term ‘constitutional culture’ . . . refer[s] to the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution’s meaning.” Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1325 (2006). I will draw heavily upon Post’s and Siegel’s conceptions of “constitutional culture” throughout this Note.

market forces and narrow interests. I am speaking of the constitutional stories we tell our schoolchildren. These stories are often derived from school curricula and textbooks shaped by a clandestine process that few parents (not to mention legal scholars) take the time to understand. Although important studies have been conducted on the portrayal of race and gender in our school curricula,¹⁴ little attention has been paid to the broader constitutional stories we tell our schoolchildren—stories that shape their early conception of the proper role of government in their lives and the relative balance of power between the constitutive branches.

In the case of the U.S. Supreme Court, in many ways the least publicly visible branch, these stories can be vitally important in shaping children's long-term views about the role of the Court in our constitutional system. Is the Court properly understood as *the* authoritative constitutional interpreter, or instead as merely a coequal voice in an ongoing debate? Do these stories frame judicial review as part of our dynamic system of checks and balances, or do they advocate outright acquiescence by Congress, the President, and the People in the face of an assertive Court? These questions are central to the current debate over judicial supremacy and popular constitutionalism—a debate focused on the proper scope of judicial interpretive authority and the overall state of contemporary constitutional culture.

In this Note, I explore one possible source of public support for an active Supreme Court—or, as popular constitutionalists call it, “judicial supremacy.” I examine the underappreciated role that political socialization, particularly civic education, may play in shaping the People's beliefs about the proper role of the Court in the American constitutional system. In particular, I focus on the consensus narratives presented in our high school textbooks—narratives that communicate powerful (but implicit) messages about the proper role of the Court in American society.

In Part I, I discuss popular constitutionalism, the rise of judicial supremacy, and the current state of our constitutional culture—mostly as understood by prominent popular constitutionalists, especially Larry Kramer. I then contrast Kramer's popular constitutionalism with a competing account offered by Robert Post and Reva Siegel, which they call “democratic constitutionalism.” To that end, I focus on various methods available to check an overly aggressive Court, contrasting blunt institutional checks (like jurisdiction-stripping and “court-packing”) with longer-term checks (like social mobilization and judicial

14. See, e.g., JAMES ALBERT BANKS, *A CONTENT ANALYSIS OF ELEMENTARY AMERICAN HISTORY TEXTBOOKS: THE TREATMENT OF THE NEGRO AND RACE RELATIONS* (1969); NATHAN GLAZER & REED UEDA, *ETHNIC GROUPS IN HISTORY TEXTBOOKS* (1983).

nominations). Part II outlines the mechanism that underlies public support for the Supreme Court, paying particular attention to the role of civic education.

Part III turns to the constitutional stories we tell our schoolchildren and what these stories communicate about the proper role of the Court in our constitutional system. My primary focus will be on the narratives that are presented in today's most widely used high school U.S. history textbooks, although I will also draw upon older textbooks to suggest trends over time.

Part IV focuses on the textbooks' portrayals of important public challenges to the Court's interpretive authority. I concentrate on their treatment of such blunt checks as President Jefferson's challenge to the judiciary in the early 1800s, President Jackson's repudiation of Chief Justice Marshall in *Worcester v. Georgia*,¹⁵ President Jackson's veto of the Second Bank, and President Franklin D. Roosevelt's attempt to pack the Court in the late 1930s, as well as such subtler checks as Abraham Lincoln's attack on *Dred Scott v. Sandford*¹⁶ during the Lincoln-Douglas debates, the southern response to *Brown*, Richard Nixon's "Southern Strategy," and President Ronald Reagan's judicial nominations. I will be sensitive throughout to the important distinction between the blunt institutional checks advocated by Kramer and the "persistent and nuanced" checks that are stressed by Post and Siegel.

Part IV concludes that contemporary high school textbooks offer little support for blunt institutional checks on the Court (and even less support than in the past), but offer some legitimacy to other public challenges to the Court. Indeed, all textbooks are open to non-Article V constitutional change through judicial nominations and accept key instances of norm contestation through public campaigns and social movements. This suggests that, although the textbooks are critical of blunter checks on the Court's interpretive authority, they subtly accept longer-term, alternative forms of constitutional contestation and change.

I. POPULAR CONSTITUTIONALISM, JUDICIAL SUPREMACY, AND CONTEMPORARY CONSTITUTIONAL CULTURE

There is a growing consensus among legal academics on both the left and the right that the Supreme Court has taken on an outsized role as the authoritative constitutional interpreter in the modern American constitutional system. Kramer argues that "we have for all practical purposes turned the

15. 31 U.S. (6 Pet.) 515 (1832).

16. 60 U.S. (19 How.) 393 (1857).

Constitution over to the Supreme Court.”¹⁷ He adds that “we—and by ‘we’ I mean not just members of the legal profession, but political leaders and the American public as well—assume that the Supreme Court is responsible for [the] final resolution” of constitutional controversies.¹⁸ In so doing, the People have acquiesced to “judicial supremacy.”

It is important to distinguish between judicial supremacy and judicial review.¹⁹ On the one hand, judicial review simply refers to the idea that courts, including the U.S. Supreme Court, have the authority, “in the context of deciding a particular case, to refuse to give force to an act of another governmental institution on the grounds that such an act is contrary to the requirements of the Constitution.”²⁰ Importantly, Keith Whittington notes, “Judges, in this reading, are the agents of the people, not merely of the legislature. As such, they have an independent responsibility to adhere to the mandates of the Constitution”²¹

Judicial supremacy, on the other hand, is associated with the belief that “[c]onstitutions require a single, authoritative interpreter, subject to neither

17. Larry D. Kramer, “*The Interest of the Man*”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAL. U. L. REV. 697, 697 (2006). But see Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4, 53 (2006) (“[T]he glimpse at the universe of what the Court does not even address shows not only that the vast majority of publicly salient decisions are being made by the people themselves . . . but also that the same holds true for decisions that have important policy consequences, regardless of their public salience.”).
18. Kramer, *supra* note 17, at 697.
19. As Keith Whittington explains, “Although judicial supremacy entails judicial review, judicial review need not entail judicial supremacy.” KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 5-6 (2007). Of course, judicial review can refer to a wide spectrum of checking devices. For a more extensive discussion of the various forms of judicial review, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353-59 (2006).
20. WHITTINGTON, *supra* note 19, at 6; see also Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 342-43 (2007) (explaining one understanding of “judicial supremacy” as “a practice . . . in which political actors accept the judgment of the Supreme Court as definitive of constitutional meaning”); Mark A. Graber, *The New Fiction: Dred Scott and the Language of Judicial Authority*, 82 CHI.-KENT L. REV. 177, 186 (2007) (defining “judicial supremacy” as “the judicial power to determine authoritatively what the Constitution means”); Edward Rubin, *Judicial Review and the Right To Resist*, 97 GEO. L.J. 61, 66 (2008) (“[P]roponents of . . . popular constitutionalism do not challenge the practice of judicial review, but only judicial supremacy. That is, they are willing to grant the Judiciary the authority to invalidate statutes on constitutional grounds, but they insist that other branches of government, and the people at large, possess this same authority and can ignore the courts in exercising it.”).
21. WHITTINGTON, *supra* note 19, at 6.

popular pressure nor electoral instability.”²² The term itself was first used in the early twentieth century, at the height of the *Lochner* era.²³ It tends to be justified by a variety of familiar arguments: that judicial supremacy “is essential to preserving the rule of law and preventing constitutional anarchy”;²⁴ that it “provide[s] substantively desirable legal outcomes”;²⁵ and that through it, the judiciary (particularly the U.S. Supreme Court) “functions as a countermajoritarian institution securing the liberties of individuals and political minorities.”²⁶ Whittington adds, “The bridge from constitutionalism to judicial supremacy has been built on the contention that the courts are preeminently the American ‘forum of principle,’ whereas the non-judicial arenas are characterized by a politics of power driven by conflicting interests and assertions of will”²⁷ – a “bridge depend[ing] more on caricatures drawn by academic lawyers than on the examination of historical political experience.”²⁸

In the context of the U.S. Supreme Court, the key symptom of “judicial supremacy” is “the all-but-complete disappearance of public challenges to the Justices’ supremacy over constitutional law. . . . regardless of what the Justices say, and regardless of the Court’s political complexion.”²⁹ Judicial supremacy “posits that the Court does not merely resolve particular disputes involving the litigants directly before them It also authoritatively interprets constitutional meaning.”³⁰ Whittington explains, “Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution”³¹ Judicial supremacy refers to “[t]he judiciary’s authority to set its opinions about the

22. *Id.* at 1.

23. *Id.* at 28; see, e.g., CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2d ed. 1932).

24. WHITTINGTON, *supra* note 19, at 8.

25. *Id.*

26. *Id.* at 8-9.

27. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 209 (1999).

28. *Id.*

29. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 228 (2004).

30. WHITTINGTON, *supra* note 19, at 6-7.

31. *Id.* at 7.

correct meaning of the Constitution above those of Congress, the president, or the electorate.”³²

A. *Reviving a Lost Tradition*

Embedded in this account of judicial supremacy is both a normative and a historical claim. Normatively, critics of the Court argue that the common sense of the American people is being consistently overturned by a handful of insulated, elite lawyers in robes, and that the American people (either consciously or unconsciously) have acquiesced to this practice. Historically, critics further argue that this was not always the case. For instance, David Currie notes that “[i]n the early Congress virtually everything became a constitutional question—from great controversies like those over the national bank and the president’s removal power to ephemera of exquisite obscurity.”³³ Kramer calls for a revival of this tradition. He affirms “popular constitutionalism” as a practice rooted in the early American constitutional tradition and carried on throughout American history by Presidents Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, and Franklin Roosevelt, among others.³⁴

Importantly, popular constitutionalists believe that “constitutional discourse ought not to be the exclusive province of judges and lawyers”³⁵ and should not be dominated by the U.S. Supreme Court. They observe that throughout American history the democratically elected branches and the People have often challenged the Court’s authority and asserted their right to interpret the Constitution. Presidents, in particular, have often played a key role in checking the Court. Whittington cites the President’s propensity for constitutional storytelling as a key reason for his potential strength as a constitutional counterweight to an aggressive Court: “The president ‘tells us stories about ourselves, and in so doing he tells us what sort of people we are, how we are constituted as a community. We take from him not only our

32. *Id.*

33. David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789-1861*, in CONGRESS AND THE CONSTITUTION 18, 21 (Neal Devins & Keith E. Whittington eds., 2005).

34. Kramer, *supra* note 17, at 698. For an extended discussion of presidential challenges to the Court, see WHITTINGTON, *supra* note 19, at 31-81.

35. Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 4 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

policies but our national self-identity.”³⁶ In Parts III and IV, I will focus on how textbooks characterize key “reconstructive” presidents like Thomas Jefferson, Andrew Jackson, and Franklin D. Roosevelt.

In the end, popular constitutionalists call for a return to a constitutional system in which final interpretive authority rests with the People and the Court is chastened by popular devices, such as jurisdiction stripping, budget cutting, court-size modification, and public challenges by political leaders. In such a system, “[p]roblems of fundamental law—what we would call questions of constitutional interpretation—[are] thought of as . . . problems that could be authoritatively settled only by ‘the people’ expressing themselves through [established] popular devices,”³⁷ “mainly through elections, but also, if necessary, by other extralegal means.”³⁸

B. A Friendly Amendment: “Democratic Constitutionalism”

Robert Post and Reva Siegel have offered a response to Kramer’s popular constitutionalism which they have called “democratic constitutionalism.”³⁹ Democratic constitutionalism can be understood as a middle way between judicial supremacy and popular constitutionalism, because it affirms both “the role of representative government and mobilized citizens in enforcing the Constitution” and also “the role of courts in using professional legal reason to interpret the Constitution.”⁴⁰ It is an attempt to “prize” both law and politics in light of the fact that “we rarely imagine law and politics as respectfully coexisting, as they often do.”⁴¹

Unlike Kramer, Post and Siegel do not “seek to take the Constitution away from courts,” as they “recognize[] the essential role of judicially enforced constitutional rights in the American polity.”⁴² They acknowledge that “there are many circumstances when constitutional law requires separation from

36. WHITTINGTON, *supra* note 19, at 19 (quoting MARY E. STUCKEY, *THE PRESIDENT AS INTERPRETER-IN-CHIEF* 1 (1991)).

37. KRAMER, *supra* note 29, at 31.

38. *Id.* at 58.

39. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 376-77 (2007).

40. *Id.* at 379.

41. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 20 (2003).

42. Post & Siegel, *supra* note 39, at 379.

politics.”⁴³ But they also “believe that a legitimate and vibrant system of constitutional law requires institutional structures that will ground it in the constitutional culture of the nation.”⁴⁴ Indeed, democratic constitutionalists “appreciate[] the essential role that public engagement plays in guiding and legitimating the institutions and practices of judicial review,” as “[c]onstitutional judgments based on professional legal reason can acquire democratic legitimacy only if professional reason is rooted in popular values and ideals.”⁴⁵ In this view, controversial constitutional issues are not “settled merely by judicial decree.”⁴⁶ Rather, “[w]hen the Court chooses to press a particular vision of the national ethos in the face of opposition, it is rendered vulnerable to political reprisal, which can take such various forms as civil disobedience, hostile Presidential appointments, or constitutional amendments.”⁴⁷ Like Kramer’s popular constitutionalism, the Post-Siegel account rejects the formal Article V amendment process as an unworkably time-consuming form of constitutional change, noting that “[m]ore persistent and nuanced forms of exchange are required to maintain the authority of those who enforce constitutional law in situations of aggravated dispute.”⁴⁸ Furthermore, although Post and Siegel note that the “appointment of Supreme Court Justices” is “[o]ne important avenue for influencing constitutional decisionmaking,” they criticize it as a “blunt and infrequent method[] of affecting the content of constitutional law.”⁴⁹

The key form of “persistent and nuanced” exchange in the system of democratic constitutionalism is “the practice of norm contestation, which seeks to transform the values that underlie judicial interpretations of the Constitution.”⁵⁰ One key form of “norm contestation” is social mobilization. Siegel notes, “Social movements change the ways Americans understand the Constitution.”⁵¹ She adds, “Social movement conflict, enabled and constrained

43. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1946 (2003).

44. *Id.*

45. Post & Siegel, *supra* note 39, at 379.

46. Post & Siegel, *supra* note 43, at 1982.

47. Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 *CAL. L. REV.* 429, 442 (1998).

48. Post & Siegel, *supra* note 39, at 380.

49. *Id.* at 381.

50. *Id.* Post and Siegel offer the Reagan Administration as a key example of norm contestation, as it “used litigation and presidential rhetoric to challenge and discredit the basic ideals that had generated Warren Court precedents.” *Id.*

51. Siegel, *supra* note 13, at 1323.

by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution’s rights guarantees.”⁵² Post and Siegel share Kramer’s fear that key constitutional dialogues are being threatened by the rise of an increasingly aggressive Court, especially in the context of Congress’s enforcement power under Section 5 of the Fourteenth Amendment.⁵³

C. *The Rise of Judicial Supremacy*

Far from an ongoing tradition of popular constitutionalism, Kramer sees a deepening constitutional crisis—namely, that “[s]ometime in the past generation or so . . . Americans came to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others.”⁵⁴ This underlying change in our constitutional culture has permitted the rise of judicial supremacy, as political leaders, legal elites, and the People themselves have yielded to a rhetorically and substantively aggressive Court. Kramer blames a wide variety of factors for this shift, including “heightened skepticism about popular democracy occasioned by twentieth-century totalitarianism; the historical anomaly of the liberal Warren Court; two generations of near consensus about judicial supremacy among intellectuals and opinion-makers on both the left and the right (not to mention among high school civics teachers).”⁵⁵ Although I will spend much of this Note discussing the relationship between judicial supremacy and civic education, in the remainder of this Part, I will trace the development of judicial supremacy in the twentieth century.

The foundation of judicial supremacy is often traced back to Chief Justice John Marshall’s bold declaration in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁵⁶ Whittington notes, “Those who advocate judicial supremacy . . . tend

52. *Id.*

53. See generally Post & Siegel, *supra* note 43 (arguing that Section 5 fosters democratic legitimacy by linking the courts’ legal interpretations to those of the American people); Post & Siegel, *supra* note 41 (describing the Court’s decreasing deference to congressional judgments).

54. KRAMER, *supra* note 29, at 229.

55. *Id.* at 232.

56. 5 U.S. (1 Cranch) 137, 177 (1803). Several scholars have linked *Marbury* to claims about judicial supremacy. See, e.g., David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2583 (2003) (“The Supreme Court was able to reach the result it did in *Marbury* in part because it left the President with

to treat it as a matter of normative directive and accomplished fact,” rooted in the dictates of this historic case.⁵⁷ Following Whittington, I will refer to this origin story as the “*Marbury* myth.”⁵⁸ Whittington counters that this is merely “wishful thinking” on the part of judicial supremacists,⁵⁹ as “the modern Court, not the early Court . . . has been most aggressive in asserting the reality of judicial supremacy.”⁶⁰ As Akhil Amar observes, “[T]he Rehnquist Court [was] fond of sweeping assertions of judicial supremacy, regularly proclaiming itself the Constitution’s ‘ultimate’ interpreter, a self-description that nowhere appears in *Marbury* and never appeared in the *United States Reports* until the second half of the twentieth century.”⁶¹ Furthermore, our constitutional history “is littered with debates over judicial authority and constitutional meaning,” with “judicial authority . . . contested by important segments of the populace, from abolitionists to labor unions to segregationists to pro-life advocates.”⁶²

Whittington situates a key shift in the public’s acceptance of judicial supremacy in the mid-twentieth century—most memorably, when Chief Justice Earl Warren declared in *Cooper v. Aaron* that “the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”⁶³ From there, Whittington traces this strain of judicial supremacy to key passages in other important

nothing to defy, and thereby created the space to announce its doctrine of judicial supremacy.”); Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 367 (2003) (“[T]he mandamus holding in *Marbury* carried within it the seeds of practical, if not theoretical, judicial supremacy.”); Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923, 932-33 (2006) (“Dean Kramer may overreach slightly when claiming that *Marbury v. Madison* does not support judicial supremacy. . . . The precise legal holding of *Marbury* may be debatable, but John Marshall clearly believed that the Supreme Court had the final say on what the Constitution meant.”).

57. WHITTINGTON, *supra* note 19, at 4.
58. *Id.* at 9; see also Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1294 (2008) (“[T]he canard that Marshall’s opinion in *Marbury v. Madison* asserted judicial supremacy has been refuted by constitutional scholars dozens of times, yet the myth endures—constitutional law’s equivalent of the Creature from the Black Lagoon.”).
59. WHITTINGTON, *supra* note 19, at 4.
60. *Id.* at 10.
61. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 82-83 (2000); see also Post & Siegel, *supra* note 41, at 17 (“The juricentric Constitution does not follow from the Court’s holding in *Marbury v. Madison*.”).
62. WHITTINGTON, *supra* note 19, at 4.
63. 358 U.S. 1, 18 (1958).

cases.⁶⁴ For example, he references *Baker v. Carr*, in which the Warren Court insisted that the Supreme Court was the “ultimate interpreter of the Constitution,”⁶⁵ and *City of Boerne v. Flores*,⁶⁶ in which “[i]mplicit in [the Court’s] argument was the equation between the ‘Fourteenth Amendment’s meaning’ and the Court’s own recent interpretation of that text.”⁶⁷ Whittington concludes,

[S]ensible claims on behalf of the utility of judicial review . . . have been transmogrified into a demand for judicial supremacy. The ultimate exposition of constitutional meaning by the Supreme Court is deemed a necessary and sufficient condition for sustaining constitutionalism. All that remains is to determine how the Court should interpret the text. Constitutional maintenance becomes a bloodless and technical enterprise best conducted by the legal intelligentsia.⁶⁸

On this account, the People’s voice has been eliminated from contemporary constitutional discourse.

II. POLITICAL SOCIALIZATION, CIVIC EDUCATION, AND PUBLIC SUPPORT FOR THE SUPREME COURT

Popular constitutionalists lament the passivity of the American people. They argue that the People were once a powerful check on an overly assertive Court. Today, the People have acquiesced to judicial supremacy. On its face, there does appear to be some support for the popular constitutionalists’ central claim. In spite of its relative anonymity and questionable democratic pedigree, the Court has maintained a high (and stable) level of public support relative to the democratically elected branches of government. Furthermore, the Court has shown great resilience in the face of unpopular decisions. Some scholars contend that this resilience is the product of a deep “reservoir”⁶⁹ of support for

64. WHITTINGTON, *supra* note 19, at 3.

65. 369 U.S. 186, 211 (1962).

66. 521 U.S. 507, 529 (1997).

67. WHITTINGTON, *supra* note 19, at 3.

68. *Id.* at 25-26.

69. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658 (1992); see also David Easton, *An Approach to the Analysis of*

the Court, generated and regenerated over time. Part II is an attempt to understand more deeply the mechanism that underlies this “reservoir.” In particular, it will explore a largely underappreciated factor in the Court’s relative popularity and resilience – civic education.

A. Civic Education: A Source of Support for a Mysteriously Popular Court?

Our highest Court remains a largely anonymous institution.⁷⁰ The Court rarely finds itself on the front page of the *New York Times* or leading the nightly news, and only a handful of Americans (mostly lawyers) will ever actually read a Supreme Court opinion. When surveyed, Americans often struggle to name a single Justice.⁷¹ In the end, most Americans only have a vague sense of what the Court actually does and how it operates. And yet, in spite of its anonymity, the Court has remained popular, especially relative to Congress and the President.

This Note explores one possible explanation for the relatively high and stable support the Court receives from the People—civic education. Unlike other institutions, which are often the topic of public (and private) conversations, the only sustained exposure many citizens get to information about the Court and its role in our constitutional system is in our schools, through civic education. Even though this connection could prove essential in explaining the Court’s relative popularity, few scholars have focused explicitly on the link between civic education and overall public support for an active Court—let alone systematically studied what our civic educators are actually teaching our children. Before turning to the Court and my analysis of contemporary civic education, I will first consider recent research on the role civic education plays in the political socialization of American youths.

Political Systems, 9 *WORLD POL.* 383, 399 (1957) (referring to a “reservoir” of public support for the first time).

70. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 101 (1996) (noting that Judge Wapner, host of the television series *The People’s Court*, “was identified by more people than were Chief Justices Burger or Rehnquist”).
71. See, e.g., *id.* at 78 (“Less than half of those asked could identify Sandra Day O’Connor as a member of the Supreme Court during the Reagan years, recall the name of a single member of the Supreme Court beyond the chief justice during the Bush administration, or identify newly appointed Supreme Court Justice Ruth Bader Ginsburg during the Clinton administration.”).

1. *A (Very) Brief History of American Civic Education*

Insofar as “a child’s identity is created in the first instance through decidedly undemocratic means,” the normative commitments of American constitutional culture are “attributable to . . . acculturation.”⁷² Bruce Ackerman notes that “[b]efore [a child] can begin to participate in liberal dialogue, the child must develop an awesome series of cognitive, linguistic, and behavioral skills.”⁷³ In the end, the American commitment to “self-determination” is “historically contingent” and “arises because democracy happens to be embedded within a culture that desires to foster the end of self-government.”⁷⁴ As Robert Post notes, “Democratic public cultures emerge from a shared history, from good luck, from common norms and commitments.”⁷⁵ Paul Kahn adds, “We locate ourselves—really, we find ourselves—in communities that have a particular history and territory. That history is not universal history but rather the narrative of the successful overcoming of challenges by a particular community.”⁷⁶ As a result, Kahn observes, “not surprisingly, the locus of . . . battles [over our national story] is often the classroom, which must pass on a conception of citizenship.”⁷⁷

More than 75% of students in the United States take a course in civics or government during high school.⁷⁸ Although the course distribution varies by state, the standard civics curriculum today includes some combination of American history and government courses.⁷⁹ From the earliest years of American public education, one of its key goals has been to prepare young

72. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 189 (1995).

73. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 140 (1980).

74. POST, *supra* note 72, at 14.

75. Robert Post, *Between Philosophy and Law: Sovereignty and the Design of Democratic Institutions*, in *NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS* 209, 217 (Ian Shapiro & Stephen Macedo eds., 2000).

76. PAUL W. KAHN, *SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY* 100 (2008).

77. *Id.* at 112.

78. Carole L. Hahn, *Citizenship Education: An Empirical Study of Policy, Practices and Outcomes*, 25 *OXFORD REV. EDUC.* 231, 236 (1999).

79. See RICHARD G. NIEMI & JANE JUNN, *CIVIC EDUCATION: WHAT MAKES STUDENTS LEARN* 63-67 (1998). Throughout this Note, when I refer to “civic education,” I mean the integrated curriculum that features both history and government courses.

Americans for the duties and responsibilities of citizenship.⁸⁰ Our history and government courses have played an outsized role in working to achieve that goal. As Amy Gutmann argues, “Cultivating character is a legitimate—indeed, an inevitable—function of education. And there are many kinds of moral character—each consistent with conscious social reproduction—that a democratic state may legitimately cultivate.”⁸¹

In the late nineteenth century, before the birth of the modern civics curriculum, history courses were designed for the “purposes of transmitting culture and myth, patriotism, and good citizenship.”⁸² To that end, “[t]extbook[] writers wanted youths to ‘love, honor, and emulate’ a common group of heroes—Columbus and Pocahontas, Patrick Henry and Francis Scott Key, Robert Fulton and Benjamin Franklin, Daniel Webster and Daniel Boone, Abraham Lincoln and George Washington, among others.”⁸³ Following a landmark National Education Association report in 1916, there was a shift in the civics curriculum also to emphasize “current issues, social problems, and recent history,” focusing largely “on the needs and interests of students” and “fitting the child to the needs of society.”⁸⁴ These “needs,” however, were still centered on “citizenship education . . . aimed at indoctrinating students in ‘social virtues, or moral worths.’”⁸⁵

Debates about these patriotism-based and needs-based approaches have persisted throughout the twentieth century, with opposing parties competing for control over the shape and substance of our schools’ civics curricula.⁸⁶ Although the thematic emphases (and hegemonic ideologies) may have changed with the overall contours of American political culture and history, the broader goal of the civics curriculum has largely remained the same—

80. See DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 41 (2003); William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANN. REV. POL. SCI. 217, 231 (2001).

81. AMY GUTMANN, *DEMOCRATIC EDUCATION* 41 (1987).

82. RONALD W. EVANS, *THE SOCIAL STUDIES WARS: WHAT SHOULD WE TEACH THE CHILDREN?* 5 (2004).

83. TYACK, *supra* note 80, at 42.

84. EVANS, *supra* note 82, at 21. For the entire text of this landmark report, see U.S. BUREAU OF EDUC., *THE SOCIAL STUDIES IN SECONDARY EDUCATION: REPORT OF THE COMMITTEE ON SOCIAL STUDIES OF THE COMMISSION ON THE REORGANIZATION OF SECONDARY EDUCATION OF THE NATIONAL EDUCATION ASSOCIATION* (1916).

85. EVANS, *supra* note 82, at 23 (quoting David Snedden, *Teaching of History in Secondary Schools*, 5 HIST. TCHRS. MAG. 277, 279 (1914)).

86. For a fuller account of the development of the American social studies curriculum, see generally DAVID JENNESS, *MAKING SENSE OF SOCIAL STUDIES* (1990).

connecting young Americans to *our* Constitution, telling them *our* stories, teaching them about *our* institutions, and preparing them for *our* political system.

2. *The Role of Civic Education in Political Socialization*

In light of this history, one might expect a robust literature on the role of civic education in the political socialization of Americans, with targeted literature on the ways in which schools shape the People's views of various governmental institutions. Instead, political scientists concluded in the 1960s and 1970s that other factors outstripped the importance of civic education in shaping Americans' views about their government. What followed was a dormant period of scholarship on civic education and political socialization—a period that has only recently come to an end.⁸⁷

For years, political scientists did not believe that civic education played an important role in the political socialization of young people.⁸⁸ Although political scientists discovered years ago that education in general is a key factor in shaping political behavior, participation, and knowledge, they were unable to disentangle the effects of civic education from education in general. Political scientists were also unable to isolate the impact of civic education from the influence of the many other institutions, associations, and demographics that help to form (and re-form) us as citizens throughout our lives.⁸⁹

For these reasons, the conventional wisdom from the 1960s through the 1980s was that “formal civic education play[ed] an insignificant role in the overall process of civic formation.”⁹⁰ Furthermore, research of the 1960s and 1970s failed to “establish significant links between what young children think

87. See Molly W. Andolina et al., *Habits from Home, Lessons from School: Influences on Youth Civic Engagement*, 36 PS: POL. SCI. & POL. 275, 275 (2003); Galston, *supra* note 80, at 217; Judith Torney-Purta, *Links and Missing Links Between Education, Political Knowledge, and Citizenship*, 105 AM. J. EDUC. 446, 446 (1997).

88. See NIEMI & JUNN, *supra* note 79, at 16–20; Galston, *supra* note 80, at 218.

89. See NIEMI & JUNN, *supra* note 79, at 13–16, 61–63; Thomas L. Dynneson & Richard E. Gross, *The Educational Perspective: Citizenship Education in American Society*, in SOCIAL SCIENCE PERSPECTIVES ON CITIZENSHIP EDUCATION 1, 10–11, 15–17 (Richard E. Gross & Thomas L. Dynneson eds., 1991).

90. Galston, *supra* note 80, at 219. This has led Stephen Caliendo to conclude that “adolescent political education is a particularly important predictor of political attitudes that are out of the mainstream of political discourse (such as latent support for political institutions, especially an institution as invisible as the Court).” STEPHEN M. CALIENDO, *TEACHERS MATTER: THE TROUBLE WITH LEAVING POLITICAL EDUCATION TO THE COACHES* 3 (2000).

about politics and their views as mature adults.”⁹¹ Only recently has the consensus changed,⁹² as political scientists have discovered “important links between basic civic information and civic attributes we have reason to care about.”⁹³ New evidence suggests that “political stances shaped during the mid-to-late teen years persist throughout adult life.”⁹⁴ Furthermore, “[i]ndividuals whose socialization experiences are most likely to encourage political engagement . . . are most likely to seek out information”⁹⁵ and “in the long run . . . develop a more general political knowledge,”⁹⁶ as “new information is processed in relation to old.”⁹⁷ The recent consensus is that civic education, if it follows recognized best practices, can increase student knowledge of government and politics, increase interest in these subjects, and lead to greater student involvement in the community and politics.⁹⁸ Textbook content, in particular, has also been shown to have a noticeable effect on students.⁹⁹ In short, curricular and instructional choices matter.

91. Galston, *supra* note 80, at 231.

92. *See id.* at 226.

93. *Id.* at 223. Civic education has been found to have a variety of positive effects. *See, e.g.*, CHRIS CHAPMAN, MARY JO NOLIN & KAREN KLINE, NAT’L CTR. FOR EDUC. STATISTICS, STATISTICS IN BRIEF: STUDENT INTEREST IN NATIONAL NEWS AND ITS RELATION TO SCHOOL COURSES (1997) (discussing the effect of civic education courses on student interest in politics and national news); Joseph Kahne & Ellen Middaugh, *High Quality Civic Education: What Is It and Who Gets It?*, 72 SOC. EDUC. 34 (2008) (developing a set of best practices for civic education programs and evaluating existing programs); Joseph E. Kahne & Susan E. Sporte, *Developing Citizens: The Impact of Civic Learning Opportunities on Students’ Commitment to Civic Participation*, 45 AM. EDUC. RES. J. 738 (2008) (noting the effect of civic education programs on levels of student interest and participation in politics and civic life); Josh Pasek et al., *Schools as Incubators of Democratic Participation: Building Long-Term Political Efficacy with Civic Education*, 12 APPLIED DEVELOPMENTAL SCI. 26 (2008) (evaluating an existing civic education program).

94. Galston, *supra* note 80, at 231.

95. DELLI CARPINI & KEETER, *supra* note 70, at 176-77.

96. *Id.* at 177.

97. *Id.* at 175.

98. *See, e.g.*, CARNEGIE CORP. OF N.Y. & CIRCLE: THE CTR. FOR INFO. & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, THE CIVIC MISSION OF SCHOOLS 14, 22-25 (2003); Lauren Feldman et al., *Identifying Best Practices in Civic Education: Lessons from the Student Voices Program*, 114 AM. J. EDUC. 75 (2007); Judith Torney-Purta, *The School’s Role in Developing Civic Engagement: A Study of Adolescents in Twenty-Eight Countries*, 6 APPLIED DEVELOPMENTAL SCI. 203 (2002).

99. *See* Marilyn Chambliss et al., *Improving Textbooks as a Way To Foster Civic Understanding and Engagement* (CIRCLE, Working Paper No. 54, 2007) (concluding that different ways of presenting the same textbook material had different effects on student interest and understanding of the material).

Political scientists have now concluded that “the main weight of the available evidence seems to point to the school as an important, if not the most important, source of political information for secondary school-age youth in the United States.”¹⁰⁰ This political “information” often serves as a relatively stable foundation for more dynamic political attitudes and behavior later in life.¹⁰¹ At the very least, the evidence suggests that schooling importantly shapes foundational civic knowledge¹⁰²—knowledge about the structure of our government, the animating values of our political system, and the canonical stories of our political tradition.

Political scientists do distinguish between political attitudes and basic civic knowledge. While our foundational understanding of key structural principles (like the system of checks and balances) was likely formed in secondary school, our immediate political preferences (like our support for health care reform) are often shaped by our day-to-day interactions, key public events, and transformative moments in our lives.¹⁰³ The frontier of this research now concerns the effect of education on “the origins and development of political attitudes.”¹⁰⁴

3. *The Persistence of Public Support for the Supreme Court*

While the average citizen may be likely to talk about the President’s decision to go to war or Congress’s recent tax cut, the Court largely remains outside of the public eye. A few times a year, the Court may find itself on the front page of the newspaper, particularly at the end of the Term, but Court decisions rarely register as either conversation worthy or life changing. As Frederick Schauer recently concluded, after studying recent public opinion data and the 2005 Supreme Court Term, “in reality neither constitutional

100. Lee H. Ehman, *The American School in the Political Socialization Process*, 50 REV. EDUC. RES. 99, 101 (1980).

101. *See id.* at 103.

102. *See* NIEMI & JUNN, *supra* note 79, at 70 (“[T]he evidence . . . suggests that civics courses do have an effect on student knowledge, an effect that is wide-ranging in terms of content and, as best we can tell from limited testing, that also appears to raise students’ capacity for reasoning and exposition about civic matters.”); Ehman, *supra* note 100, at 103.

103. *Cf.* CALIENDO, *supra* note 90, at 13 (“Political socialization is more important in explaining latent attitudes in adulthood (such as diffuse support for the Supreme Court) than attitudes toward more salient political institutions, actors, and issues. The reason is quite simple: adults will constantly have their attitudes about many aspects of political life challenged or reinforced throughout life as more and more information concerning those things comes forth.”).

104. NIEMI & JUNN, *supra* note 79, at 157.

decisionmaking nor Supreme Court adjudication occupies a substantial portion of the nation's policy agenda or the public's interest."¹⁰⁵ A recent study on public opinion and the Court spearheaded by Nathaniel Persily suggests that "in the vast majority of the cases reviewed . . . Supreme Court decisions had no effect on the overall distribution of public opinion."¹⁰⁶ "For the most part, the decisions of the Supreme Court and other courts go unnoticed by the American public."¹⁰⁷ This observation mirrors the pioneering work of Thomas Marshall almost two decades ago, which concluded that there was "no evidence" that "Supreme Court rulings typically influence mass public opinion over the short term" or the "long term."¹⁰⁸

These findings are particularly important in justifying a focus on civic education. Because the People rarely focus on the Court, they are often left with the perceptions that were formed during (perhaps) the only time in their lives when they gave much sustained thought to the Court—during their school years.¹⁰⁹ Furthermore, these results suggest that our attitudes about the Court are likely to remain relatively stable, more closely resembling civic "knowledge" than political "attitudes." If this is true, people may treat judicial supremacy as a fact and not an opinion—a key structural element of our constitutional system and not a contestable view about judicial power.

4. *The Key Factors Altering Previous Beliefs*

Political scientists have posited five conditions that must be met before "new information . . . modifies relevant beliefs": "[T]he information is (1) actually received, (2) understood, (3) clearly relevant to evaluating policies, (4) discrepant with past beliefs, and (5) credible."¹¹⁰ This mechanism can help explain the relatively high and stable support the Court has received over time. First, "[s]cholars are uniform in their assessment that the salience of the output of courts is low,"¹¹¹ as "widely publicized, extensive media coverage of . . . court

105. Schauer, *supra* note 17, at 9. Schauer is quick to add, however, that "this gap between the Court's agenda and the nation's does not make the Court's work less consequential." *Id.*

106. Persily, *supra* note 35, at 8.

107. *Id.* at 9.

108. THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 189 (1989).

109. See CALIENDO, *supra* note 90, at 18-19.

110. Benjamin I. Page, Robert Y. Shapiro & Glenn R. Dempsey, *What Moves Public Opinion?*, 81 *AM. POL. SCI. REV.* 23, 24 (1987).

111. Barry Friedman, *Mediated Popular Constitutionalism*, 101 *MICH. L. REV.* 2596, 2620 (2003).

decisions is rare and seldom sustained."¹¹² It should come as little surprise, then, that "only a small fraction of Supreme Court decisions are likely to make it into the public consciousness"¹¹³ and that the Court is "unlikely to be considered by most Americans on a regular basis."¹¹⁴ As a consequence, information about the Court is "actually received" by the People only rarely. Therefore, the Court's immediate activities very infrequently alter the public's perception of the Court.

Furthermore, even the cases that are reported and "actually received" by the People may not be "understood" or "clearly relevant to evaluating politics."¹¹⁵ This is largely because "[m]ost issues courts deal with . . . are overly complex."¹¹⁶ Finally, even if the Court manages to satisfy the three key conditions of having the substance of its decision "actually received," "understood," and "clearly relevant to evaluating politics," the decision itself may not be "discrepant with past beliefs" and, therefore, may still avoid altering the People's perceptions of the Court. As Barry Friedman notes, the Court usually makes decisions "within a range of acceptability to a majority of the people."¹¹⁷ Marshall went even further in concluding that "the evidence suggests that the modern Court has been an essentially majoritarian institution" and has "reflect[ed] mass public opinion as often as do popularly elected officeholders."¹¹⁸

Finally, even if unpopular decisions cut through the clutter, receive extensive media coverage, and engender an intense initial reaction, the academic literature suggests that "negative feelings [about the Court] have a fairly short half-life."¹¹⁹ In surveying a broad array of polling data, Persily concludes that "[u]nder conditions of the greatest stress—integrating schools, protecting criminals' rights, interjecting itself into all types of life-and-death questions, and even deciding a presidential election—the aggregate level of public confidence in the Court has remained largely unchanged."¹²⁰ Jeffrey Mondak and Shannon Ishiyama Smithey add that "an active and even

112. Persily, *supra* note 35, at 6.

113. Friedman, *supra* note 111, at 2622.

114. CALENDO, *supra* note 90, at 13.

115. Page et al., *supra* 110, at 24.

116. Persily, *supra* note 35, at 9.

117. Friedman, *supra* note 111, at 2606.

118. MARSHALL, *supra* note 108, at 192.

119. Friedman, *supra* note 111, at 2626.

120. Persily, *supra* note 35, at 14.

controversial Court can enjoy strong, stable aggregate support.”¹²¹ The Court’s public support “consistently exceeds support for the other institutions.”¹²² Mondak and Smithey attribute this relatively high and stable support to a mechanism of “value-based regeneration,” where “lost support is recovered over time due to public perception of a link between the Supreme Court and basic democratic values.”¹²³ Mondak adds, “[T]he Supreme Court’s institutional legitimacy enables the Court to elicit some degree of public acceptance of otherwise unpopular policy actions.”¹²⁴

Some scholars have analyzed this phenomenon by distinguishing between the public’s “specific” and “diffuse” support for the Court. On the one hand, the Court receives “specific” support, meaning support “driven by agreement with particular policies.”¹²⁵ On the other hand, the Court receives “diffuse” support, meaning a “reservoir of favorable attitudes of good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants.”¹²⁶ Scholars have found a “reservoir of support” for the Court that “transcend[s] sentiment about the specific job that the Court was doing.”¹²⁷ Friedman concludes, “On balance then, what seems to be the case, is that over time the Court somehow builds up a store of diffuse support, which is not easily eliminated by negative reaction to individual decisions.”¹²⁸ Importantly, Friedman adds, “How this is so is not entirely clear.”¹²⁹

Schauer contends that one factor must be “the Court’s own fostering of its trappings of neutrality and political disinterest. Robes. A grandiose building. Highly formal ritualized proceedings. Opinions written as if the results were the product of largely nonpolitical consultation of highly specialized knowledge not accessible to ordinary folk.”¹³⁰ Mondak and Smithey conclude that “the Supreme Court benefits from a link to basic democratic values,” which is

121. Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1115 (1997).

122. *Id.* at 1119.

123. *Id.* at 1124.

124. Jeffrey J. Mondak, *Institutional Legitimacy and Procedural Justice: Reexamining the Question of Causality*, 27 LAW & SOC’Y REV. 599, 608 (1993).

125. Friedman, *supra* note 111, at 2615.

126. *Id.*

127. *Id.* at 2617.

128. *Id.* at 2627.

129. *Id.*

130. Schauer, *supra* note 17, at 57.

“influenced by the tendency to view the Court as protector of the Constitution and champion of justice and civil liberties.”¹³¹ They add that “this phenomenon can be attributed, at least in part, to the strength of childhood political socialization.”¹³² Although this is a reasonable hypothesis, little has been done to empirically test what our high schools are actually teaching our children about the Court.¹³³ This Note begins such an analysis. Before turning to the high school textbooks themselves, I outline the key reasons why textbooks remain a suitable proxy for what is being taught in today’s public high school classrooms.

B. The Enduring Role of Textbooks in American Public Education

The content of civic education can be difficult to measure. The optimal test would be to examine representative messages that students actually receive in the classroom. The next best measure would be to study what students are actually taught. For a variety of reasons, the content of textbooks is widely considered the best proxy for actual classroom instruction. Among education scholars, it is a standard method for determining the content of classroom instruction.¹³⁴ In this Note, textbooks will serve as a proxy for the substance of high school instruction about the Court.

There are a variety of reasons why textbook analysis remains a common method among education scholars. The key reason, quite simply, is that high school teachers still rely heavily upon textbooks for both homework assignments and the content of their classroom instruction.¹³⁵ David Tyack argues that history textbooks “reveal what adults thought children should learn about the past and are probably the best index of what teachers tried to teach young Americans.”¹³⁶ The crucial importance of textbooks can be seen in the textbook adoption battles in several states throughout the last century. As Tyack notes,

131. Mondak & Smithy, *supra* note 121, at 1123.

132. *Id.* This observation mirrors Kramer’s claim that “high school civics teachers” are partly to blame for the rise of judicial supremacy. KRAMER, *supra* note 29, at 232.

133. See CALIENDO, *supra* note 90, at 6-7.

134. See, e.g., Richard C. Remy, *Treatment of the Constitution in Civics and Government Textbooks*, in *TEACHING ABOUT THE CONSTITUTION IN AMERICAN SECONDARY SCHOOLS* 107, 107 (Howard D. Mehlinger ed., 1981).

135. See *id.*

136. TYACK, *supra* note 80, at 40.

Even though history textbooks have been, by most accounts, very dull, they have also been highly controversial. People have wanted history texts to tell the official truth about the past. . . . Textbooks resemble stone monuments. Designed to commemorate and *re-present* emblematic figures, events and ideas—and thus to create common civic bonds—they have also aroused vigorous dissent.¹³⁷

This has led Robert Lerner, Althea Nagai, and Stanley Rothman to conclude, “If American history and civics textbooks have become a battleground, it is because they now serve as the prayer-books of the United States’s civil religion.”¹³⁸ Indeed, “[s]pecial interest groups of the right and left pressure publishers to include or drop topics, especially in big states such as California or Texas.”¹³⁹

While textbook content is often dictated by the government in other countries, the American process is more complicated. On the one hand, “private agencies—publishing companies—create and sell textbooks” in the United States.¹⁴⁰ As a result, “commerce plays an important part in deciding which historical truths shall be official.”¹⁴¹ On the other hand, textbook content is shaped by local and state governments through their respective textbook adoption processes. Roughly half the states adopt textbooks at the state level, while the balance of the states leave those decisions to local school districts.¹⁴² The textbook adoption process itself, driven by a hodgepodge of local and state agencies (and often disrupted by unhappy citizen protesters), is “somewhat unpredictable,”¹⁴³ with Texas and California (the two largest statewide adoption states) mostly dictating the content of textbooks throughout the country.¹⁴⁴ Diane Ravitch explains, “Publishers whose textbooks do not get adopted in one of these states sustain an economic blow and must struggle to

137. *Id.* For a comprehensive account of the changes in American history textbooks through the 1970s, see generally FRANCES FITZGERALD, *AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY* (1979).

138. ROBERT LERNER, ALTHEA K. NAGAI & STANLEY ROTHMAN, *MOLDING THE GOOD CITIZEN: THE POLITICS OF HIGH SCHOOL HISTORY TEXTS 1* (1995).

139. TYACK, *supra* note 80, at 59.

140. *Id.*

141. *Id.* at 59–60.

142. *Id.* at 60.

143. *Id.*

144. See DIANE RAVITCH, *THE LANGUAGE POLICE: HOW PRESSURE GROUPS RESTRICT WHAT STUDENTS LEARN* 98 (2003).

sell their books to smaller states and individual districts."¹⁴⁵ The development of new textbooks is thus a high-risk enterprise because the costs associated with researching, drafting, and printing are quite high.¹⁴⁶

The textbook adoption process is controversial because "the hardbound textbook is *the* dominant instructional tool."¹⁴⁷ The single, state- or district-approved textbook remains "the central instrument of . . . classroom instruction and . . . a key source of knowledge" for teachers.¹⁴⁸ Ravitch notes, "[F]or many teachers, the textbook constitutes both course and curriculum"¹⁴⁹ because most school textbooks are the basis of "curriculum planning, course organization and day-to-day lesson planning."¹⁵⁰ In the context of history courses, the reason for this is simple: "[F]ew history teachers ever learned much history themselves."¹⁵¹ Fewer than half of high school history teachers majored or minored in history.¹⁵² The result is that these poorly trained instructors must lean heavily on the textbook—especially as novices. All told, textbooks are used for roughly 70% of class time.¹⁵³

These findings suggest that textbooks play a central role in the education of American high school students. They remain, perhaps, the most important input into the educational process.

III. WHAT IS BEING TAUGHT TODAY?

Public schools remain among the most coercive institutions of the state. From an early age, most students are required to sit in predetermined classrooms, read state-approved texts,¹⁵⁴ listen to state-certified teachers,¹⁵⁵ and take state-sanctioned exams.¹⁵⁶ The results of these state-run trials will largely

145. *Id.*

146. *See id.* at 97.

147. Remy, *supra* note 134, at 107.

148. *Id.*

149. DIANE RAVITCH, THOMAS B. FORDHAM INST., A CONSUMER'S GUIDE TO HIGH SCHOOL HISTORY TEXTBOOKS 13 (2004), available at [http://www.edexcellence.net/doc/Historytextbooks\[02-06-04\].pdf](http://www.edexcellence.net/doc/Historytextbooks[02-06-04].pdf).

150. Remy, *supra* note 134, at 107.

151. Chester E. Finn, Jr., *Foreword* to RAVITCH, *supra* note 149, at 6.

152. RAVITCH, *supra* note 149, at 13.

153. TYACK, *supra* note 80, at 61.

154. *See, e.g.*, TEX. EDUC. CODE ANN. § 31.022 (Vernon 2006).

155. *See, e.g.*, CAL. EDUC. CODE §§ 44200-44399 (West 2006).

156. *See, e.g.*, N.Y. EDUC. LAW §§ 340-348 (McKinney 2006).

determine the shape of our children's professional and personal lives. In the context of contemporary constitutional culture, these exercises will shape the citizens of tomorrow—their trust in government, their understanding of its institutions, and their self-conception as citizens. If constructed properly, the official narratives taught in public schools could capture the constitutional imagination of America's schoolchildren and entrench the important process of citizen formation.

Of course, this level of influence escapes most classrooms. Most students would rather flirt with their neighbor, play ball in the schoolyard, or do just about anything rather than attend class and do their homework. Truly curious youths are rare. Regardless, most young Americans spend the bulk of their days in the care of their public school teachers, and as was demonstrated in Part II, recent studies suggest that these days likely play an important role in political socialization. As such, we should be concerned with what public schools are actually teaching our schoolchildren.

Parts III and IV examine the content of civic education in today's classrooms, with a particular focus on the most widely used U.S. history textbooks.¹⁵⁷ I will also use textbooks from the last several decades to examine any trends over time. Because this Note investigates today's schools at a time when judicial supremacy is allegedly dominant, one would expect to see considerable evidence supporting popular constitutionalists' claims in the consensus narratives about the Court presented in our high school textbooks. We would expect contemporary textbooks to express fairly unambiguous support for judicial supremacy and not present significant alternatives to it.

To test these hypotheses, I use a series of indicators. I examine whether the account of judicial review in textbooks shades into judicial supremacy. For instance, when judicial review is mentioned, I ask whether it emphasizes the Court's role as the authoritative interpreter of the Constitution, rather than simply an important voice in our constitutional chorus. Furthermore, I ask whether our textbooks present a story that trumpets the Court as *the* defender of our constitutional rights—especially as they pertain to minorities. In this story, the Court may have erred at various points long ago—*Dred Scott* and *Plessy*, for instance—but was redeemed in the twentieth century by our heroic Chief Justice Earl Warren. I probe to see if our textbooks present few (if any) episodes stressing public challenges to the Court's authority, or if they express hostile attitudes toward such challenges. I examine our textbooks to determine whether and how they consider a variety of checks on the Court—ranging from blunt forms (like judicial impeachment and “court-packing”) to subtler forms

157. For an overview of my methodology, see *infra* Appendix.

(like social mobilization and judicial nominations). Finally, I ask whether stories of judicial supremacy become more pronounced in the second half of the twentieth century. If Kramer and Whittington are correct, there ought to be a key shift from the mid-1950s onward, as the Warren Court revolution took hold—with an increased emphasis on the *Marbury* myth, an emerging account of constitutional heroism through *Brown*, and a greater skepticism about popular challenges to the Court.

As Steven Teles notes, “A regime is most likely to endure when it can make its ideas seem natural, appropriate, and commonsensical, consigning its opponents to the extremes.”¹⁵⁸ Teles adds, “A regime that has achieved hegemony makes its principles seem like ‘good professional practice,’ ‘standard operating procedure,’ ‘the public interest,’ or ‘conventional wisdom.’”¹⁵⁹ The key question in this Note remains whether popular constitutionalism is portrayed in our high school textbooks as a legitimate, if minority, position or as utterly illegitimate.

A. Civic Education Today (and Yesterday)

It is important to stress at the outset that the Court is not the primary focus of our high school civics curriculum. Discussion of the Court’s powers in government textbooks invariably follows treatment of the other branches of government. In most government textbooks, discussion of the Court trails even that of the cabinet, the bureaucracy, the independent agencies, and political parties, among others.¹⁶⁰ This should come as little surprise. Our high school government teachers are expected to cover a variety of subjects, ranging from the structure of American government to great social movements to major demographic shifts. The same is true of our high school history teachers, who must focus not only on *Marbury* and *Brown*, but also on the American Revolution and World War II.

Even so, contemporary textbooks do contain plentiful discussions of the Court. They construct the image of an authoritative, if at times imperfect, Court—limited in its enforcement powers, but legitimate in its constitutional pronouncements. Although complicit in reprehensible acts of racism in the late nineteenth century, a redeemed Court reemerges in the twentieth as a pioneer

158. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 16 (2008).

159. *Id.*

160. See, e.g., KENNETH JANDA, JEFFREY M. BERRY & JERRY GOLDMAN, *THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA* (1994).

and defender of constitutional rights. Indeed, the Court of *Dred Scott* and *Plessy* becomes the Court of *Brown*.

There are important differences between the accounts in our history and government textbooks. As Diana Hess, Jeremy Stoddard, and Shannon Murto explain, “[H]istory textbooks tend to focus on telling a narrative of events” while “government . . . textbooks tend to focus more on content that explicates the form and structure of government in the United States”¹⁶¹ My analysis of our history textbooks focuses mostly on the consensus narratives that they convey about the Court, most particularly about the canonical cases that figure prominently in all or most of the history textbooks.¹⁶² My analysis of our government textbooks, by contrast, stresses their presentation of the structural role of the Court in our constitutional system, with a particular emphasis on the institution of judicial review.

In the remainder of Part III, I first outline the constitutional themes and canonical cases discussed in today’s U.S. history textbooks. Next, I turn to one key portrayal of the Court that emerges (particularly from the 1960s onward), which is that of the Court as redeemed institution. Finally, I consider the portrayal of the Court as authoritative constitutional interpreter, with a particular focus on the definitions of judicial review provided by our government textbooks and on the development of the *Marbury* myth from the 1940s onward.

B. Constitutional Themes, Canonical Cases, and U.S. History Textbooks

Turning first to today’s U.S. history textbooks, discussion of the Court comprises, on average, 16.9 pages in today’s most widely used textbooks, representing 1.7% of the overall content. This ranges from a high of 43.0 pages and 3.9% of content to a low of 6.2 pages and 0.9% of content. The textbooks cite 111 distinct cases, with an average of 29 case citations per textbook. Not surprisingly, race plays a central role in the Court’s story. Indeed, after combining the data on Court-related passages from all eleven of today’s most

161. Diana Hess, Jeremy Stoddard & Shannon Murto, *Examining the Treatment of 9/11 and Terrorism in High School Textbooks*, in *EDUCATING DEMOCRATIC CITIZENS IN TROUBLED TIMES: QUALITATIVE STUDIES OF CURRENT EFFORTS* 192, 195 (Janet Bixby & Judith Pace eds., 2008).

162. See Kerry J. Kennedy, *The Historical Perspective: The Contribution of History to Citizenship Education*, in *SOCIAL SCIENCE PERSPECTIVES ON CITIZENSHIP EDUCATION* 66, 84 (Richard E. Gross & Thomas L. Dynneson eds., 1991) (“History has a significant role to play in promoting citizenship education. . . . It has the potential to create an inclusive national community to which all belong and to which all can contribute.”).

widely used history textbooks,¹⁶³ 67.3 total pages and 43.2% of the overall Court-focused content features race—including 40.8 pages (26.2% of content) on segregation (and desegregation), 14.1 pages (9.0% of content) on slavery, and 12.4 pages (8.0% of content) on affirmative action. Other key areas include economic regulation (21.4 pages and 13.8% of content), free expression (13.4 pages and 8.6% of content), judicial review (13.3 pages and 8.5% of content), criminal rights (12.0 pages and 7.8% of content), elections (9.5 pages and 6.1% of content), and executive power (8.7 pages and 5.6% of content).

The Marshall and Warren Courts loom large in our history textbooks, with the Marshall Court comprising 31.3 pages overall and 20.1% of the Court-centered content and the Warren Court comprising 43.6 pages and 27.9% of the Court-centered content. The remaining eras represent around 10% of the Court-centered content, respectively—the Taney Court with 14.4 pages (9.2% of content), the end of the Taney Court through *Lochner* with 17.3 pages (11.1% of content), 1905 through “The Switch in Time”¹⁶⁴ with 16.4 pages (10.5% of content), 1938 through the Vinson Court with 7.5 pages (4.8% of content), the Burger Court with 15.2 pages (9.7% of content), and the Rehnquist-Roberts Courts with 10.4 pages (6.7% of content).

Six canonical cases are cited in all eleven U.S. history textbooks—*Brown v. Board of Education*,¹⁶⁵ *Dred Scott v. Sandford*,¹⁶⁶ *Marbury v. Madison*,¹⁶⁷ *M’Culloch v. Maryland*,¹⁶⁸ *Plessy v. Ferguson*,¹⁶⁹ and *Worcester v. Georgia*.¹⁷⁰ The three race cases—*Dred Scott*, *Plessy*, and *Brown*—provide a redemptive narrative arc, as the Court moves from reinforcing slavery and racism in American society to pioneering equal rights for African Americans. *Marbury* introduces students to the formal powers of the Court and to the important concept of judicial review. *M’Culloch* serves as a foundational expression of national economic power. Finally, *Worcester v. Georgia* emphasizes the limits on the Court’s power when faced with a recalcitrant President. Each of these cases will be discussed in greater detail below. Twelve additional cases are cited in a

163. For an overview of my methodology, see *infra* Appendix.

164. For a brief overview of the origin of this phrase, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 974 n.9 (2000).

165. 347 U.S. 483 (1954).

166. 60 U.S. (19 How.) 393 (1857).

167. 5 U.S. (1 Cranch) 137 (1803).

168. 17 U.S. (4 Wheat.) 316 (1819).

169. 163 U.S. 537 (1896).

170. 31 U.S. (6 Pet.) 513 (1832).

majority of the U.S. history textbooks. Four focus on economic regulation (*Gibbons v. Ogden*,¹⁷¹ *Muller v. Oregon*,¹⁷² *Munn v. Illinois*,¹⁷³ and *Lochner v. New York*¹⁷⁴), three on criminal rights (*Gideon v. Wainwright*,¹⁷⁵ *Miranda v. Arizona*,¹⁷⁶ and *Escobedo v. Illinois*¹⁷⁷), three on elections (*Reynolds v. Sims*,¹⁷⁸ *Baker v. Carr*,¹⁷⁹ and *Bush v. Gore*¹⁸⁰), one on privacy (*Roe v. Wade*¹⁸¹), and one on free expression (*Schenck v. United States*¹⁸²).

C. *The Court as Redeemed Institution*

There are three key portrayals of the Court that emerge in our textbooks' consensus narrative—the Court as redeemed institution, the Court as authoritative constitutional interpreter, and the Court as limited institution. In this Section, I outline the portrayal of the Court as redeemed institution, focusing particularly on the *Dred Scott-Plessy-Brown* arc. In Section III.D, I turn to the portrayal of the Court as authoritative constitutional interpreter and explore the relationship between judicial supremacy and judicial review as portrayed in our textbooks. Finally, in Part IV, I discuss the Court as a limited institution, relating the portrayal of a limited Court to the textbooks' implicit critique of certain checks on the Court.

The “redemption” narrative focuses particularly on the Court’s role in race relations throughout American history. It is important to note that this canonical narrative only emerges in the 1960s and 1970s, in the wake of the *Brown* decision. This story often begins with an extensive discussion of *Dred Scott*, portraying the Court as complicit in the sin of slavery and focusing on the role the Court played in precipitating the outbreak of the Civil War. One contemporary textbook notes, “[*Dred Scott*] is now pointed to as an important lesson on the limits of the Supreme Court’s power, as a key step on the road to

171. 22 U.S. (9 Wheat.) 1 (1824).

172. 208 U.S. 412 (1908).

173. 94 U.S. 113 (1876).

174. 198 U.S. 45 (1905).

175. 372 U.S. 335 (1963).

176. 384 U.S. 436 (1966).

177. 378 U.S. 478 (1964).

178. 377 U.S. 533 (1964).

179. 369 U.S. 186 (1962).

180. 531 U.S. 98 (2000).

181. 410 U.S. 113 (1973).

182. 249 U.S. 47 (1919).

the Civil War, and as one of the worst decisions ever made by the Supreme Court."¹⁸³ Early accounts of *Dred Scott* in the 1940s and 1950s were rather equivocal—focusing on the case as a collusive lawsuit “managed and financed by abolitionists” and noting that “[o]f course the Negro slave . . . did not start this case himself.”¹⁸⁴ These accounts emphasized the controversy the case aroused in the North,¹⁸⁵ but also noted the consensus Chief Justice Roger Taney was able to secure on the Court, as he had “the support of all but two of his colleagues on the bench.”¹⁸⁶ *Dred Scott* did not emerge as a clear-cut case of constitutional evil until more critical accounts arose in the 1960s and the 1970s, when Abraham Lincoln emerged as an anti-*Dred Scott* crusader¹⁸⁷ and the decision was denounced as “sensational.”¹⁸⁸ Today, *Dred Scott* is portrayed as the Court’s original sin.

Following *Dred Scott*, some contemporary textbooks turn their focus to the Court during Reconstruction and to the ways in which the Court served to undermine the protections that the Fourteenth Amendment was intended to provide to African Americans, particularly in the South. One textbook powerfully notes, “The Supreme Court . . . played a role in bringing about the end of Reconstruction.”¹⁸⁹ This “nineteenth century sin” narrative often culminates in an extensive discussion of *Plessy* and the pivotal role the Court played in entrenching the doctrine of “separate but equal.” As one representative textbook notes, “Perhaps the greatest setback to African

183. GERALD A. DANZER ET AL., *THE AMERICANS* 333 (2007); see also WILLIAM DEVERELL & DEBORAH GRAY WHITE, *UNITED STATES HISTORY 489-90* (2007) (identifying the *Dred Scott* decision as among the “causes of conflict”).

184. DAVID SAVILLE MUZZEY, *A HISTORY OF OUR COUNTRY* 283 (1952).

185. See, e.g., EUGENE C. BARKER & HENRY STEELE COMMAGER, *OUR NATION* 374 (1949); FREMONT P. WIRTH, *UNITED STATES HISTORY* 221 (rev. ed. 1955).

186. DAVID SAVILLE MUZZEY, *A HISTORY OF OUR COUNTRY: A TEXTBOOK FOR HIGH-SCHOOL STUDENTS* 370 (1943).

187. See, e.g., LEON H. CANFIELD & HOWARD B. WILDER, *THE MAKING OF MODERN AMERICA* 291 (Howard R. Anderson et al. eds., 1962).

188. HENRY F. GRAFF & JOHN A. KROUT, *A HISTORY OF THE UNITED STATES: THE ADVENTURE OF THE AMERICAN PEOPLE* 264 (2d ed. 1968).

189. ANDREW CAYTON ET AL., *AMERICA: PATHWAYS TO THE PRESENT* 444 (2005); see also DANZER ET AL., *supra* note 183, at 398 (“Although Congress had passed important laws to protect the political and civil rights of African Americans, the Supreme Court began to take away those same protections.”); JESUS GARCIA ET AL., *CREATING AMERICA: A HISTORY OF THE UNITED STATES* 548 (2007) (“To make matters worse for the Republicans, the Supreme Court began to undo some of the changes that had been made in the South. . . . These Court decisions weakened Reconstruction and blocked African-American efforts to gain full equality.”); GARY B. NASH, *AMERICAN ODYSSEY: THE 20TH CENTURY AND BEYOND* 191 (2004) (“[T]he Supreme Court’s support of African American rights diminished still further.”).

American equality came with the Supreme Court's establishment of the 'separate-but-equal' doctrine in the case of *Plessy v. Ferguson*.¹⁹⁰

Again, *Plessy* only emerges as a constitutional sin over time. In the 1940s and 1950s, *Plessy* was not even mentioned in the textbooks analyzed for this Note. In the wake of *Brown* in the 1960s, textbooks began to mention *Plessy*, but excused this act of constitutional evil by noting that "[t]he Supreme Court reflected prevailing opinion by refusing to hold that segregation" was unconstitutional¹⁹¹ and adding that "Northerners, who on the whole had lost interest in the Negro cause, did not raise any serious protests against these developments."¹⁹² By the 1970s, the updated edition of one key textbook noted that *Plessy* "was a serious blow to efforts of black Americans to improve their lives."¹⁹³ The *Plessy* narrative finally begins to take on a more modern tone in the 1980s, as one textbook noted, for instance, that "the facilities offered to blacks were not equal."¹⁹⁴ Today, *Plessy* is the Court's second great sin, and the specific sin that is redeemed by the Warren Court in *Brown*.

The narrative ends with a pioneering Court issuing its redemptive opinion in *Brown*. Today, *Brown* is characterized as a "stunning victory,"¹⁹⁵ a "landmark verdict,"¹⁹⁶ and a "historic ruling."¹⁹⁷ *Brown's* importance was recognized as early as the 1960s, with textbooks noting that the decision "extended the constitutional rights of Negroes"¹⁹⁸ and was "[t]he most important development of the Eisenhower years."¹⁹⁹ In the end, the case becomes the canonical example of the Court overcoming the odds to triumph over evil, as it "strengthened the Civil Rights movement . . . and paved the way for the end of Jim Crow."²⁰⁰

As Part IV clarifies, contemporary textbooks often contrast the heroic Court in *Brown* with the evil Southern backlash that emerged in its wake. Although

190. CAYTON ET AL., *supra* note 189, at 566.

191. HENRY W. BRAGDON & SAMUEL P. MCCUTCHEN, HISTORY OF A FREE PEOPLE 540 (6th rev. ed. 1967).

192. LEWIS PAUL TODD & MERLE CURTI, RISE OF THE AMERICAN NATION 413 (2d ed. 1966).

193. LEWIS PAUL TODD & MERLE CURTI, RISE OF THE AMERICAN NATION 422 (3d ed. 1972).

194. LEONARD C. WOOD, RALPH H. GABRIEL & EDWARD L. BILLER, AMERICA: ITS PEOPLE AND VALUES 578 (1985).

195. DANZER ET AL., *supra* note 183, at 908.

196. *Id.*

197. CAYTON ET AL., *supra* note 189, at 931.

198. BRAGDON & MCCUTCHEN, *supra* note 191, at 744.

199. TODD & CURTI, *supra* note 193, at 824.

200. DANZER ET AL., *supra* note 183, at 915.

this serves to emphasize the limited enforcement power of the Court, it does not undermine the Court's heroism, as indicated by the glowing descriptions above and the increased space devoted to the case over time.²⁰¹

D. The Court as Authoritative Constitutional Interpreter: Or, the Judicial Supremacy/Judicial Review Confusion

Throughout our contemporary textbooks, a moderate form of judicial supremacy often masquerades as judicial review. Some textbooks simply conflate judicial supremacy and judicial review. For instance, one textbook defines "judicial review" as "[t]he role of the Supreme Court as the final authority on the meaning of the Constitution."²⁰² In most instances, however, contemporary textbooks begin with an appropriate definition of judicial review before providing additional definitions that shade toward judicial supremacy. For instance, one textbook begins by noting,

[T]he principle of judicial review plays a vital role in our federal system of checks and balances. With *Marbury*, the judicial branch secured its place as one of the three coequal branches of the federal government. The judiciary has no power to make laws or to carry them out. However, judges have an important role in deciding what the law is and how it is carried out.²⁰³

This is an evenhanded view of the Court's role in our constitutional system—one that popular constitutionalists would likely accept. Only a few paragraphs later, however, this textbook notes that "[t]he Court, and not Congress, is the interpreter of the Constitution"²⁰⁴ and presents the Court as "the protector of the rule of law."²⁰⁵ Furthermore, even textbooks that note the devices at Congress's disposal to challenge the Court present them as outside the mainstream of typical constitutional actions. For instance, one textbook

201. See, e.g., *id.* at 914-15.

202. JANDA ET AL., *supra* note 160, at 321.

203. DANZER ET AL., *supra* note 183, at 207.

204. *Id.*

205. *Id.*; see also WILLIAM A. MCCLENAGHAN, *MAGRUDER'S AMERICAN GOVERNMENT* 517 (2007) ("[T]he Supreme Court [is] the final authority on the meaning of the Constitution."); RICHARD C. REMY, *UNITED STATES GOVERNMENT: DEMOCRACY IN ACTION* 66 (2008) ("[T]he Supreme Court is the final authority on the meaning and interpretation of the Constitution.").

explains, “The Constitution gave Congress power both to create the lower federal courts and to limit the jurisdiction of the Supreme Court. Congress, however, has been reluctant to use this authority.”²⁰⁶

These subtle methods of reinforcing judicial supremacy are further supported by contemporary accounts of *Marbury* that tend to emphasize the *Marbury* myth. For instance, one textbook provides the following “excessive celebration”²⁰⁷ of *Marbury*:

Of the greatest significance to the nation was whether the Supreme Court had the power to declare a law of the land unconstitutional. In his brilliant, if devious, decision the strong-willed Chief Justice answered that question with a resounding, epoch-making Yes! [I]n 1803 the Court suddenly assumed the right of *judicial review* in its role as guardian of the Constitution. The leading role ever since of the Supreme Court in American history has followed from this bold decision of Chief Justice Marshall.²⁰⁸

Several features of this account should give popular constitutionalists pause. First, the passage associates “judicial review,” an important checking mechanism, with the Court’s proper “role as guardian of the Constitution.” Not only is the Court an *interpreter* of the Constitution, but it is also the Constitution’s *guardian*. Second, while undoubtedly important, one might question the dramatic usage of the term “epoch-making” to describe the Marshall Court’s decision in *Marbury*. Finally, popular constitutionalists would surely question an account of judicial review that suggests a clear line from *Marbury* to the present, as this passage does in suggesting that the Court has taken on a “leading role ever since” *Marbury*. This ignores the fact that it was only a half-century later that the Court took a more active role in our constitutional system, first in *Dred Scott*, then in the *Lochner* era, at the beginning of the New Deal, and from the Warren Court onward.

Early accounts of *Marbury* frame the decision as a partisan act by Chief Justice Marshall, who was portrayed as a Federalist with “stronger views upon the necessity of having a national government with strength enough to govern

206. REMY, *supra* note 205, at 74-75.

207. KRAMER, *supra* note 29, at 229.

208. DANIEL J. BOORSTIN & BROOKS MATHER KELLEY, *A HISTORY OF THE UNITED STATES* 191 (2005); *see also* DEVERELL & WHITE, *supra* note 183, at 269 (“[*Marbury*] established the Court as the final authority on the Constitution.”); GARCIA ET AL., *supra* note 189, at 317 (“[*Marbury*] states that the Supreme Court has the final say in interpreting the Constitution.”).

than Alexander Hamilton,²⁰⁹ and who “detested his cousin and fellow-Virginian, Thomas Jefferson.”²¹⁰ In the 1940s, the *Marbury* Court is portrayed as having “assumed” power as “guardian of the Constitution”—a power not found in its text.²¹¹ Although these early accounts stress the importance of *Marbury* as a “momentous decision,” they also implicitly criticize judicial review by noting that “the opinion of a single justice can determine what is law for one hundred and fifty million people when the court, as it has frequently done in important cases, hands down a five-to-four decision.”²¹² This textbook adds, “In no other self-governing country in the world is such power given to so small a group of men.”²¹³ This criticism of *Marbury* and judicial review disappears from the accounts in later decades and is replaced by laudatory accounts of *Marbury* that more closely resemble the contemporary narrative.²¹⁴

In the end, a moderate form of judicial supremacy is (at least) implicit in most textbooks’ discussions of judicial review and *Marbury*. This conclusion lends some initial support to Kramer and the popular constitutionalists. But this conclusion tells us little about which public challenges to the Court (if any) our textbooks declare out-of-bounds, assuming that judicial supremacy is a complex concept that can encapsulate many different domains of Court dominance.

IV. POPULAR CONSTITUTIONALISTS: HISTORY’S VILLAINS OR LEGITIMATE INTERPRETERS?

Today’s textbooks consistently describe the Court as the *final* interpreter of the Constitution. Although this finding tracks with the expectations of popular constitutionalists like Larry Kramer, it may also be regarded as stating the obvious, that the Court often speaks last in many (perhaps most) constitutional disputes. One recalls Justice Jackson’s famous line about the Court, “We are not final because we are infallible, but we are infallible only because we are final.”²¹⁵ A focus on the language of “finality” can obscure a deeper insight offered by Robert Post and Reva Siegel—namely that even if

209. BARKER & COMMAGER, *supra* note 185, at 285.

210. BRAGDON & MCCUTCHEN, *supra* note 191, at 196.

211. MUZZEY, *supra* note 186, at 167.

212. *Id.* at 166–67.

213. *Id.* at 167.

214. See, e.g., DANIEL J. BOORSTIN & BROOKS MATHER KELLEY, A HISTORY OF THE UNITED STATES 154 (1990); GRAFF & KROUT, *supra* note 188, at 148; WOOD ET AL., *supra* note 194, at 257.

215. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

“our legal system invests Supreme Court decisions with finality, the Court’s judgments cannot be incorporated into the constitutional self-conception of the country until they are taken up by citizens outside the courts.”²¹⁶

This Part conducts a more detailed analysis of paradigmatic examples of popular resistance to the Court in order to generate a more fine-grained picture of the message that our textbooks actually convey to students. Kramer catalogued many of these incidents:

Thomas Jefferson . . . abolished a lower court, revised Supreme Court procedures, threatened to ignore the Court’s mandates, and briefly pursued a strategy of impeaching judges. Andrew Jackson followed Jefferson in threatening to ignore judgments, while Lincoln actually did so (and on more than one occasion). Congresses before and after the Civil War manipulated the Court’s size, played with its budget, and stripped it of jurisdiction in controversial areas. Theodore Roosevelt advocated recalling both errant judges and faulty opinions, while his cousin Franklin made a famously brazen effort to pack the bench.²¹⁷

Only a few of these incidents are consistently included in contemporary textbooks. There is scant mention of President Jefferson’s more aggressive challenges to the Court, though one contemporary textbook mentions the impeachment of Justice Samuel Chase. Only two contemporary textbooks consider President Lincoln’s defiance of Chief Justice Taney during the Civil War.²¹⁸ No contemporary textbook focuses on congressional challenges to the

²¹⁶. Post & Siegel, *supra* note 41, at 31.

²¹⁷. Kramer, *supra* note 17, at 748.

²¹⁸. Although I will not focus on President Lincoln’s defiance of Chief Justice Taney, it is worth noting that one of the accounts of President Lincoln’s direct challenge to Chief Justice Taney provides the clearest instance of support for popular constitutionalism in any of the textbooks:

Lincoln now showed his instinctive grasp of the deeper meaning of the conflict for this nation. He felt that the Constitution could not contain the seeds of its own destruction. If he had to bend the Constitution in order to save the Constitution and the Union, he would do so.

BOORSTIN & KELLEY, *supra* note 208, at 339. The textbook continues,

When Chief Justice Taney issued a writ of habeas corpus for a secessionist named Merryman, the military commander of the area refused to free the man. Taney then issued an opinion that the President had no right to suspend the writ of habeas corpus, only Congress could do that. Lincoln believed that he must act to

Court, pre- or post-Civil War, or on Theodore Roosevelt's support for judicial recalls. In the analysis that follows, I will focus on Justice Chase, *Marbury*, and Jefferson's challenge to the judiciary, Jackson's attack on Chief Justice Marshall over *Worcester v. Georgia*, Jackson's veto of the Second Bank of the United States, and Franklin D. Roosevelt's attempt to pack the Court during the New Deal. If Kramer's diagnosis is correct, contemporary textbooks ought to approach these episodes with skepticism, if not outright hostility.

The incidents mentioned by Kramer are all examples of blunt institutional checks. In this Part, I also analyze checks on the Court that are more consistent with the Post-Siegel account of democratic constitutionalism, as well as more general accounts of non-Article V constitutional change through judicial nominations. To that end, I will focus on Lincoln's criticism of *Dred Scott* in the Lincoln-Douglas debates, the Southern response to *Brown*, Nixon's "Southern Strategy," and Reagan's judicial nominations, as well as accounts of key social movements, such as the abolitionists, the anti-Warren Court conservatives, and the pro-life movement. The question I will ask throughout is whether any of these public challenges to the Court are legitimized in high school textbooks.

A. Chase, Marbury, and Jefferson's Challenge to the Judiciary

Only one contemporary textbook mentions the impeachment of Justice Samuel Chase.²¹⁹ Most contemporary textbooks simply use President Jefferson's challenge to the Federalist judiciary to frame *Marbury*. For instance, one textbook approaches the overall debate over the judiciary after the election of 1800 as follows: "Though Jefferson ended many Federalist programs, he had little power over the courts. . . . Jefferson often felt frustrated by Federalist control of the courts. Yet because judges received their appointments for life, the president could do little."²²⁰ From there, most textbooks proceed to

save the Union—even if he had to break the law to do so. So he ignored Taney's decision.

It was by actions such as these that Maryland was held in the Union and Washington was saved.

Id. at 340. Another textbook mentions matter-of-factly, "When Supreme Court Chief Justice Roger Taney declared that Lincoln had gone beyond his constitutional powers, the president ignored his ruling." DANZER ET AL., *supra* note 183, at 349. Perhaps the key conclusion to be drawn from these accounts is simply that it might be legitimate to defy the Court and bend the Constitution, but only if your name is Abraham Lincoln and the nation is in a civil war. Furthermore, it is significant that most textbooks ignore this episode entirely.

219. BOORSTIN & KELLEY, *supra* note 208, at 192.

220. GARCIA ET AL., *supra* note 189, at 316.

introduce President John Adams's "midnight appointments" and connect these unsavory acts to the specific controversy at issue in *Marbury*.²²¹ As was noted in Part III, this discussion culminates in the establishment of judicial review and a celebration of this famous case. Needless to say, this account of President Jefferson's challenge to the Federalist judiciary would not satisfy the popular constitutionalist.

Earlier accounts emphasized President Jefferson's broader assault on the judiciary, noting his "direct attack" on Federalist judges through "impeachment proceedings against several Federal judges"²²² and the repeal of the Judiciary Act.²²³ Many earlier textbooks also included Justice Chase's impeachment²²⁴ and implied some legitimacy for President Jefferson's actions. Federal judges were portrayed as "beyond the control of the people,"²²⁵ since they were "not controlled by popular vote,"²²⁶ and as "political[ly] bias[ed]."²²⁷ Furthermore, Justice Chase was described as having "attacked democracy in general and Jefferson in particular while addressing a Baltimore jury,"²²⁸ and Chief Justice Marshall's doctrines were portrayed as "harmful" to President Jefferson.²²⁹

The single contemporary account of Justice Chase's impeachment begins by noting that this was just one of several challenges to the early judiciary.²³⁰ This account concedes that Justice Chase was "open to attack" because he had "gone out of his way to denounce Republicans" in "his charges to juries in cases brought under the Sedition Act."²³¹ Yet this textbook also portrays President Jefferson as a self-important, power-hungry politician, who acted because he "felt his political prestige and power were at stake."²³² In noting

221. See, e.g., CAYTON ET AL., *supra* note 189, at 214; DANZER ET AL., *supra* note 183, at 199.

222. MUZZEY, *supra* note 186, at 214, 215; see also BRAGDON & MCCUTCHEN, *supra* note 191, at 196 (discussing the Republicans' successful impeachment of Federalist Judge John Pickering); CANFIELD & WILDER, *supra* note 187, at 164 (describing Republican efforts to "weaken the Federalist hold by impeaching several Federalist judges").

223. See, e.g., BARKER & COMMAGER, *supra* note 185, at 190; MUZZEY, *supra* note 186, at 215.

224. See, e.g., BRAGDON & MCCUTCHEN, *supra* note 191, at 196; MUZZEY, *supra* note 186, at 215.

225. BRAGDON & MCCUTCHEN, *supra* note 191, at 195.

226. CANFIELD & WILDER, *supra* note 187, at 160.

227. GRAFF & KROUT, *supra* note 188, at 147.

228. BRAGDON & MCCUTCHEN, *supra* note 191, at 196.

229. FRANK FREIDEL & HENRY N. DREWRY, *AMERICA: A MODERN HISTORY OF THE UNITED STATES* 152 (1970).

230. BOORSTIN & KELLEY, *supra* note 208, at 192.

231. *Id.*

232. *Id.*

Justice Chase's acquittal by the Democratic-Republican Senate, the textbook concludes that "[f]ortunately, the Senate decided that Chase's behavior did not amount to an impeachable offense."²³³ The textbook notes that "[i]f Chase had been convicted, the next candidate for impeachment would probably have been Chief Justice John Marshall,"²³⁴ which could have threatened judicial independence. This account trivializes the interpretative differences between President Jefferson and the Federalists by noting that Chief Justice Marshall would have been impeached "simply because of an honest difference between him and the President over the meaning of the Constitution."²³⁵

This account suggests that the President and Congress should not aggressively resist a powerful (and dangerous) Court. The idea that Jefferson was simply acting upon a reasonable claim as a competing constitutional interpreter is not presented and certainly not legitimized as a minority position. The possibility that Jefferson's challenge to Justice Chase effectively "constructed" the proper role of a Supreme Court Justice as an independent, nonpolitical actor in our system is ignored.²³⁶ Even the one contemporary textbook that includes Justice Chase's impeachment offers little support for judicial impeachment as a means of checking a potentially menacing Court.

B. Jackson, Marshall, and the Rights of the Cherokee Nation

Worcester v. Georgia is a canonical case mentioned in every contemporary history textbook. Interestingly, it is also a paradigmatic example of the executive directly challenging the Court. In this case, the popular constitutionalist is aligned with an executive determined to displace tens of thousands of Native Americans. Unlike the distorted picture of a powerless (and overly political) Jefferson portrayed in Section IV.A, this episode depicts a powerful President staring down a powerless Court for an evil purpose. Although one contemporary textbook directly questions the legitimacy of

²³³. *Id.*

²³⁴. *Id.*

²³⁵. *Id.*

²³⁶. For an extended discussion of how the Chase impeachment helped "construct" the proper role of a Supreme Court Justice in our constitutional system, see WHITTINGTON, *supra* note 27, at 20-71. Whittington notes that "[t]he Chase impeachment was the culmination of a movement to define the nature of the federal courts under the Constitution and how judges were to conduct themselves and their courtrooms in a republic." *Id.* at 25. Whittington adds, "The Republicans were fairly successful in both areas, expanding the impeachment power to serve as a mechanism for disciplining the judicial branch while constraining judges from engaging in political disputes." *Id.*

President Jackson's action from a constitutional perspective,²³⁷ most textbooks use this episode to stress the limits of the Court's enforcement power. They convey the message that the Court would do the right thing, but it was powerless to do so. This constitutional narrative has not changed much since the 1950s,²³⁸ except insofar as accounts become more sympathetic to the displaced Native Americans in the 1960s²³⁹ and, especially, the 1970s.²⁴⁰ Again, the Court emerges as a heroic, if limited, institution.

In contemporary accounts, this successful example of popular resistance to the Court is balanced against the obvious immorality of President Jackson's Indian removal policy, with several textbooks emphasizing the human cost of President Jackson's constitutional defiance. For instance, one textbook notes,

In 1838, the United States Army rounded up more than 15,000 Cherokees. Then in a nightmare journey that the Cherokees called the Trail of Tears, men, women, and children, most on foot, began a 116-day forced march westward. . . . Roughly 1 out of every 4 Cherokees died of cold or disease, as troops refused to let them pause to rest.²⁴¹

Another textbook adds, "Elias Boudinot, editor of the *Cherokee Phoenix*, wrote that he had no hope 'that we will be reinstated in . . . our rights.' To silence further criticism, the Georgia militia destroyed the *Phoenix's* printing press."²⁴² In the end, Chief Justice Marshall emerges as a defender of human rights, and the popular constitutionalist is allied with a power-hungry scoundrel and violent mob defiantly silencing the press and sending thousands of Native Americans to their deaths.

C. Jackson and the Second Bank of the United States

President Jackson's veto of the Second Bank of the United States is also mentioned in every contemporary textbook. The veto could have provided

237. DEVERELL & WHITE, *supra* note 183, at 334 ("By not enforcing the Court's decision, Jackson violated his presidential oath to uphold the laws of the land.").

238. See, e.g., WIRTH, *supra* note 185, at 173-74.

239. See, e.g., CANFIELD & WILDER, *supra* note 187, at 208 ("The removal of the Indians went on all through the Jacksonian Era. States passed laws extending their authority over Indian lands within their boundaries and more or less forced the Indians to pick up and go west.").

240. See, e.g., FREIDEL & DREWRY, *supra* note 229, at 206; TODD & CURTI, *supra* note 193, at 270.

241. CAYTON ET AL., *supra* note 189, at 301.

242. STERLING STUCKEY ET AL., *CALL TO FREEDOM* 347 (2005).

students with one of the quintessential examples of Presidential constitutional interpretation. Jackson weighed Court precedent, congressional practice, and his own constitutional judgment in his decision to veto the Second Bank. He observed in his veto message that “[i]t is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent.”²⁴³ Jackson added, “The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.”²⁴⁴ This strong constitutional account of Jackson’s veto is either altogether lost or (at least) underemphasized in our contemporary textbooks.

Instead contemporary textbooks tend to focus on Jackson’s personal background and ideological support for the common man. The veto is characterized as “very personal”²⁴⁵ and presented as an example of Jackson’s “tendency to place personal prerogative above constitutional law or national policy.”²⁴⁶ Some accounts do focus on Jackson’s constitutional claims,²⁴⁷ but the dominant theme is that he was attacking Eastern elites and defending ordinary citizens.²⁴⁸ Importantly, this tendency to focus on Jackson’s personal reasons for opposing the bank has been evident in every wave of textbooks analyzed for this study, from accounts of Jackson as “the professed foe of monopoly and privilege”²⁴⁹ in the 1940s to later accounts focused on “Jackson’s personal attitude” as a “Westerner[.]”²⁵⁰ and his view that “the Bank [was] a personal enemy.”²⁵¹

243. BREST ET AL., *supra* note 4, at 75.

244. *Id.*

245. DANZER ET AL., *supra* note 183, at 232.

246. *Id.* at 233.

247. *See, e.g.*, EDWARD L. AYERS ET AL., AMERICAN ANTHEM 248 (2007).

248. *See, e.g.*, PAUL BOYER, AMERICAN NATION 247 (2005) (“President Jackson attacked the Bank as a dangerous monopoly that benefited rich investors at the expense of poor, honest, and industrious people.”); CAYTON ET AL., *supra* note 189, at 302 (“Jackson justified his action as a protection of the rights of ordinary citizens. He attacked the bank as a tool of greedy, powerful people.”).

249. MUZZEY, *supra* note 186, at 299.

250. BRAGDON & McCUTCHEN, *supra* note 191, at 268.

251. GRAFF & KROUT, *supra* note 188, at 190; *see also* WIRTH, *supra* note 185, at 174 (“[Jackson] felt that it was a corporation which represented the moneyed powers rather than the people”); WOOD ET AL., *supra* note 194, at 334 (“What Jackson really objected to was the great influence of the Bank on national affairs and Congress”).

Some earlier textbooks did portray President Jackson as an assertive constitutional interpreter. One 1940s textbook framed Jackson's actions as an attempt to lay claim to the People's mantle: "Theodore Roosevelt used to say that our Presidents were of two types: the Jackson-Lincoln kind . . . and the Buchanan-Taft kind. The former asserted their leadership in the name of the American people; the latter deferred more to Congress and . . . the Constitution."²⁵² Another textbook from that decade provided a fuller account of Jackson's constitutional argument: "Opponents of the bank emphasized most . . . their belief that the bank was unconstitutional. They argued, as Jefferson had done in 1791, that the Constitution contained no statement authorizing Congress to establish a bank," even in light of *M'Culloch*.²⁵³ A textbook from the 1960s added, "The fact that the Supreme Court had declared the bank constitutional was of small importance to the aroused Jackson."²⁵⁴ The strongest constitutional account of Jackson's veto emerged in a widely used textbook in the 1960s and persisted (albeit in a weakened form) in various editions of that textbook through the 1980s. Because it is one of the most striking accounts of constitutional interpretation by a President that emerges in any of the textbooks studied for this Note, it merits extended mention:

Jackson . . . claimed that the mere existence of the Bank was unconstitutional. In so doing he was . . . ignoring the Supreme Court decision of 1819 in *McCulloch v. Maryland* that ruled that the Bank was acceptable under the Constitution . . . Jackson indicated that he did not intend to be bound by verdicts of the Supreme Court. "Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others . . ." Jackson bluntly asserted. "The opinion of the judges has no more authority over Congress than the opinion of Congress over the judges, and, on that point, the President is independent of both."²⁵⁵

252. MUZZEY, *supra* note 186, at 302.

253. BARKER & COMMAGER, *supra* note 185, at 283; see also BRAGDON & MCCUTCHEN, *supra* note 191, at 268 ("It was an overextension of federal power, because the Constitution nowhere explicitly granted the federal government the right to establish a central bank."); GRAFF & KROUT, *supra* note 188, at 190 ("[A]fter *McCulloch v. Maryland* in 1819, the Bank seemed to be beyond successful attack. Nevertheless, Jackson's supporters were finding new reasons for criticizing 'the Monster.'").

254. CANFIELD & WILDER, *supra* note 187, at 209-10.

255. TODD & CURTI, *supra* note 193, at 271 (citation omitted).

Although this account effectively represents President Jackson's constitutional arguments, it is striking that these well-developed constitutional rationales only emerge in one widely used textbook in the 1960s and 1970s. This portrait is weakened in the 1980s edition of the textbook²⁵⁶ and disappears in all contemporary accounts.

D. Roosevelt and "Court-Packing"

President Franklin D. Roosevelt's "court-packing" scheme is mentioned by every contemporary textbook. Roosevelt mostly emerges from this episode as an overly political President, attempting to subvert the independence of the Court. One contemporary textbook's title for the section on Roosevelt and the Court sums up the overall tone of these passages: "The Court-Packing Fiasco."²⁵⁷ Another refers to his actions as "clumsy."²⁵⁸ Every contemporary account questions the legitimacy of President Roosevelt's motives. One textbook notes that "Roosevelt's real intention was to 'pack' the Court with judges supportive of the New Deal," thus attempting to "inject politics into the judiciary."²⁵⁹ It asserted that President Roosevelt's actions would "undermine the constitutional principle of separation of powers."²⁶⁰ Not to be outdone, several contemporary textbooks draw parallels between President Roosevelt's actions and early twentieth century totalitarianism.²⁶¹ The most striking feature of these accounts is the degree to which they dwell on the law/politics distinction²⁶² and laud judicial independence²⁶³ (and supremacy²⁶⁴) in the face of a resounding electoral mandate and a powerful President.

256. See LEWIS PAUL TODD & MERLE CURTI, RISE OF THE AMERICAN NATION 263 (Liberty ed. 1982).

257. CAYTON ET AL., *supra* note 189, at 783.

258. GARCIA ET AL., *supra* note 189, at 738.

259. CAYTON ET AL., *supra* note 189, at 783.

260. *Id.*

261. See, e.g., *id.* at 783 ("With several dictators ruling in Europe, the world seemed already to be tilting toward tyranny. If Congress let FDR reshape the Supreme Court, critics worried, the United States might head down the same slope.").

262. BOORSTIN & KELLEY, *supra* note 208, at 638 ("What [President Roosevelt] offered as a plan to 'reform' the Court really was a way to make the Supreme Court approve the New Deal laws.").

263. DANZER ET AL., *supra* note 183, at 699 ("Many people believed that the president was violating principles of judicial independence and the separation of powers.").

264. See, e.g., DEVERELL & WHITE, *supra* note 183, at 789 ("Critics charged that Roosevelt was trying to change the balance of power so carefully defined in the U.S. Constitution.").

Early accounts offered at least some support for Roosevelt by stressing that the Court's decisions "invalidate[d] laws passed by a large majority of Congress"²⁶⁵ and by offering evenhanded accounts of Roosevelt's constitutional arguments.²⁶⁶ Some accounts even portrayed Roosevelt's plan as the moderate response to the Court's provocation, noting other progressive proposals to require a "unanimous, or at least a two-thirds, vote of the justices" before the Court could exercise judicial review, "allow Congress to override [Court] decisions by a two-thirds vote," "submit [Court decisions] to a popular referendum," or "forbid[] the court" from "annul[ing] [federal] laws."²⁶⁷ Importantly, these early accounts also included criticisms of Roosevelt, but overall, they offered a more nuanced narrative of this constitutional showdown. By the 1960s and 1970s, the contemporary account was already emerging in certain textbooks,²⁶⁸ and it was firmly entrenched by 1990.²⁶⁹

In the end, contemporary accounts delegitimize efforts by the executive and Congress to check the Court through the manipulation of the Court's size—a power that the popularly elected branches had employed in the past and a potentially potent method of challenging a Court aligned against overwhelming public opinion. No contemporary textbook presents an account that even subtly suggests the potential legitimacy of an argument in favor of "packing" the Court under similar circumstances. Furthermore, no textbook suggests the potential illegitimacy of the Court pursuing its own partisan economic program, based on dubious constitutional reasoning, in the face of contrary public opinion.

E. Alternative Challenges to an Aggressive Court: Public Campaigning, Social Movements, and Judicial Nominations

Contemporary high school textbooks are filled with passages that reinforce at least a moderate form of judicial supremacy through their (implicitly) critical accounts of powerful Presidents challenging either menacing, virtuous, or

265. MUZZEY, *supra* note 186, at 852-53.

266. BARKER & COMMAGER, *supra* note 185, at 935 ("Those who supported the change contended that the Court was already packed, and that this was merely an effort to unpack it, and that the Court should be in harmony with the purposes of the people as expressed through their political branches.")

267. MUZZEY, *supra* note 186, at 853.

268. See, e.g., BRAGDON & MCCUTCHEN, *supra* note 191, at 642-43; GRAFF & KROUT, *supra* note 188, at 661.

269. See, e.g., BOORSTIN & KELLEY, *supra* note 214, at 534.

recalcitrant Courts. In the context of blunt institutional checks on the Court, popular constitutionalism is tied either to illegitimate acts by otherwise legitimate leaders (like Presidents Jefferson and Roosevelt) or immoral acts by historical villains (like President Jackson in *Worcester*). But this does not settle the question of how textbooks portray subtler and longer-term methods of checking the Court—including public campaigning, social movements, and judicial nominations. It is possible that contemporary textbooks may reject blunter checking tools, but still authorize popular challenges through subtler means.

1. *The Lincoln-Douglas Debates*

A potential example of norm contestation through public persuasion is Lincoln's critique of slavery and *Dred Scott* in the Lincoln-Douglas debates. Every contemporary textbook contains an account of the debates, but they tend to discuss them in a manner that underemphasizes Lincoln's constitutional attacks on *Dred Scott* and focus instead on the broader theme of slavery. One textbook notes that "Lincoln attacked the *Dred Scott* decision"²⁷⁰ and another mentions that his famous "House Divided" speech focused on *Dred Scott*,²⁷¹ but most simply focus on the debates as a key dispute about slavery in general²⁷² and as a platform for "catapult[ing] [Lincoln] into the national spotlight."²⁷³

In earlier decades, there were scattered references to *Dred Scott*,²⁷⁴ but Lincoln's criticism of this infamous case was never the primary focus of the

270. BOYER, *supra* note 248, at 360.

271. See AYERS ET AL., *supra* note 247, at 340.

272. See, e.g., CAYTON ET AL., *supra* note 189, at 366 ("The debates highlighted two important principles in American government, majority rule and minority rights."); DANZER ET AL., *supra* note 183, at 326 ("The crucial difference between the two was that Douglas believed that popular sovereignty would allow slavery to pass away on its own, while Lincoln doubted that slavery would cease to spread without legislation outlawing it in the territories.").

273. NASH, *supra* note 189, at 171. Although this is understandable, given the limited space each textbook could devote to these historic debates, "*Dred Scott* figured centrally in the exchanges between Abraham Lincoln and Stephen Douglas during their campaign for the U.S. Senate in 1858." BREST ET AL., *supra* note 4, at 257. For instance, Lincoln argued, "[Judge Douglas] would have the citizen conform his vote to [the *Dred Scott*] decision; the member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of government. I would not." *Id.* at 259. Lincoln added, "By resisting [*Dred Scott*] as a political rule, I disturb no right of property, create no disorder, excite no mobs." *Id.*

274. See, e.g., BRAGDON & MCCUTCHEN, *supra* note 191, at 339; CANFIELD & WILDER, *supra* note 187, at 291; MUZZEY, *supra* note 186, at 373-74; WOOD ET AL., *supra* note 194, at 426.

consensus accounts of the Lincoln-Douglas debates. This significantly underemphasizes key constitutional exchanges between Lincoln and Douglas and ignores a key opportunity to teach students about legitimate constitutional interpretation outside of the Court through the actions of one of America's acknowledged heroes – Abraham Lincoln.

2. Norm Contestation and Social Mobilization

Although our contemporary textbooks tend to downplay the constitutional exchanges between Lincoln and Douglas in their famed debates, there are several scattered examples of norm contestation through social mobilization in our contemporary accounts. These include passages focused on abolitionist criticism of *Dred Scott*²⁷⁵ and conservative criticism of the Warren Court.²⁷⁶ One of the most persistent examples of social mobilization in response to a Court decision is the *Roe v. Wade*²⁷⁷ controversy. *Roe* began to emerge as a key example of social mobilization in the 1980s, when it was embedded in the textbooks' broader accounts of the 1970s women's rights movement. These earlier textbooks discuss *Roe* but fail to mention the case by name, with one textbook noting that "[i]n 1973 the Supreme Court ruled that women had the right to have abortions This controversial decision clashed with existing laws in most of the states."²⁷⁸ This account noted that "anti-abortion groups challenged the right of the Court to make such a decision" and "demanded a Constitutional amendment banning abortions."²⁷⁹ Today, almost every textbook observes social mobilization around *Roe*, with one representative example noting that *Roe* "sparked debate that continues to this day"²⁸⁰ and another adding that *Roe* "was, and remains, highly controversial, with radical thinkers on both sides of the argument."²⁸¹

275. See, e.g., CAYTON ET AL., *supra* note 189, at 365 ("Antislavery forces were disgusted with the *Dred Scott* decision.").

276. See, e.g., *id.* at 980 (featuring a picture of a billboard that exclaims, "Save Our Republic! Impeach Earl Warren!").

277. 410 U.S. 113 (1973).

278. TODD & CURTI, *supra* note 256, at 810.

279. *Id.* at 810-11; see also BOORSTIN & KELLEY, *supra* note 214, at 730 ("The new feminists hailed a victory. They said that a woman's most important right was to control her own body. But their passionate 'Right-to-Life' opponents said that the unborn child had rights of its own and that abortion was murder.").

280. AYERS ET AL., *supra* note 247, at 989.

281. CAYTON ET AL., *supra* note 189, at 1000.

In the end, these accounts tend to state matter-of-factly that social movements often converge around controversial Court decisions. Although these narratives are hardly as well developed as many of the episodes previously discussed, their presence in contemporary textbooks lends recognition and legitimacy to these forms of norm contestation.

3. *Reagan and Judicial Nominations*

Several contemporary textbooks also offer rich accounts of President Reagan's judicial nominations. These episodes emphasize how Presidents can influence the ideology of the Court through judicial nominations, as well as how the nomination process itself is often rife with constitutional controversy. Several contemporary accounts begin with headlines emphasizing President Reagan's influence on the Court. One headline reads, "Judicial Power Shifts to the Right,"²⁸² and another, "A New Orientation on the Supreme Court."²⁸³ These accounts note that "[o]ne of the most important ways in which Reagan accomplished his conservative goals was through his appointments to the Supreme Court"²⁸⁴ and that these appointments "ended the liberal control over the Court that had begun under Franklin Roosevelt."²⁸⁵ In a full account of President Reagan's "conservative philosophy," one textbook observes,

Reagan's conservative philosophy included passionate opposition to two major Supreme Court decisions—that prayer in public school is unconstitutional and that women have a constitutional right to an abortion. . . . Reagan sought constitutional amendments that would reverse the Court's decisions. Meanwhile, he waited for his chance to appoint justices who would leave policy making to the legislative and executive branches of government.²⁸⁶

These accounts directly link President Reagan's nominations to conservative judicial outcomes, as "the Court revisited constitutional issues related to such topics as discrimination, abortion, and affirmative action."²⁸⁷

²⁸². DANZER ET AL., *supra* note 183, at 1042.

²⁸³. NASH, *supra* note 189, at 861.

²⁸⁴. DANZER ET AL., *supra* note 183, at 1042.

²⁸⁵. *Id.*

²⁸⁶. NASH, *supra* note 189, at 861.

²⁸⁷. DANZER ET AL., *supra* note 183, at 1042; *see also* BOYER, *supra* note 248, at 1049 ("President Reagan vowed to appoint justices who would uphold his conservative agenda."); NASH,

Some of these accounts also emphasize the controversy surrounding Judge Robert Bork's nomination.²⁸⁸ These accounts stress the ideological clash between conservatives, who "advocated a strict interpretation of the Constitution," and "[m]any senators and liberal groups," who "feared he would roll back *Roe v. Wade* and civil rights laws."²⁸⁹ In these accounts, the judicial nomination process itself emerges as an essential focal point of social mobilization, with judicial nominations presented as key opportunities to bring about non-Article V constitutional change without resorting to blunt institutional checks.²⁹⁰ The portrayal of President Reagan appears to legitimate the judicial nomination process as a proper forum for shaping judicial outcomes and advancing non-Article V constitutional change.

4. *The Southern Response to Brown and Nixon's "Southern Strategy"*

Even with these accounts of social mobilization and judicial nominations, our contemporary textbooks remain ambivalent about subtle checks on the Court through norm contestation. This is most obvious in their accounts of the aftermath of *Brown*—the clearest, most consistent, and most fully developed account of social mobilization against the Court in our contemporary textbooks.

Although every contemporary textbook includes passages describing the heroic actions of a unanimous Court in *Brown*—indeed, it is the apex of our redemption story in Section III.C—perhaps even more interesting for our purposes is that this episode is also used to undermine the legitimacy of popular resistance to the Court through social mobilization. Contemporary textbooks note that the *Brown* decision "encountered fierce resistance."²⁹¹ Furthermore, these accounts emphasize the limits of the Court's enforcement

supra note 189, at 861 ("The Supreme Court began to hand down some conservative decisions that pleased the President. For example, the Court curtailed affirmative action and limited the rights of criminal suspects.").

288. See, e.g., AYERS ET AL., *supra* note 247, at 1071 ("[Reagan's conservative nominations] at times set[] off furious confirmation clashes in the Senate.").

289. *Id.*

290. See, e.g., BOYER, *supra* note 248, at 1050 ("Bork's views concerned many people, including a number of senators."); CAYTON ET AL., *supra* note 189, at 1110 ("The Democratic Party had won control of the Senate in the 1986 elections and most Democratic senators did not share Reagan's goal of appointing conservative judges. Liberal groups joined together in 1987 to lobby the Senate to reject Bork's nomination.").

291. DANZER ET AL., *supra* note 183, at 915.

powers in the face of broad-based mobilization.²⁹² This has been a key part of the *Brown* narrative since *Brown* first emerged as a canonical case in the 1960s.²⁹³

Several contemporary textbooks focus particularly on the “Southern Manifesto” and the role of congressional Southerners in the *Brown* backlash. The “Southern Manifesto” emerged as part of the *Brown* backlash narrative in the 1960s²⁹⁴ and has persisted ever since.²⁹⁵ For instance, one contemporary textbook notes that the South “was encouraged to resist when, in March 1956, more than 100 southern members of Congress signed the ‘Southern Manifesto.’ They bitterly attacked the Supreme Court decision and promised ‘to use all lawful means to bring about the reversal of this decision which is contrary to the Constitution.’”²⁹⁶ The constitutional argument offered by the Southerners in this document “awakened the old battle cry of states’ rights” and noted that, “[i]n taking a stand on a social issue . . . the Court had taken a step away from simply interpreting legal precedents.”²⁹⁷ In this, “[c]ritics charged that the Warren Court had acted as legislators and even as sociologists.”²⁹⁸

What emerges from this account of *Brown* is the image of a heroic (and redeemed), but limited, Court—largely unable to quell the fire of racist resistance. The Southern backlash against *Brown* is often tied to later arguments advanced by Richard Nixon against the Warren Court in one of the most prominent examples in our textbooks of public resistance to the Court through public campaigning. Nixon’s campaign drew upon Southern Democrats’ opposition to desegregation. A contemporary textbook notes that “[i]n one approach, known as the Southern Strategy, Nixon tried to attract Southern conservative Democrats by appealing to their unhappiness with federal desegregation policies and a liberal Supreme Court. He also promised

292. See, e.g., BOORSTIN & KELLEY, *supra* note 208, at 739; DEVERELL & WHITE, *supra* note 183, at 871.

293. See, e.g., CANFIELD & WILDER, *supra* note 187, at 776-77.

294. CAYTON ET AL., *supra* note 189, at 932.

295. See, e.g., BOORSTIN & KELLEY, *supra* note 214, at 628; FREIDEL & DREWRY, *supra* note 229, at 753.

296. BOORSTIN & KELLEY, *supra* note 208, at 739.

297. DANZER ET AL., *supra* note 183, at 915.

298. *Id.*; see also CAYTON ET AL., *supra* note 189, at 932-33 (“The congressmen asserted that the Supreme Court had overstepped its bounds . . .”).

to name a Southerner to the Supreme Court.”²⁹⁹ In the end, it appears that if one is not portrayed as an anti-*Brown* Southern racist for challenging the constitutional pronouncements of the Court, one is then likened to Richard Nixon.

In the context of *Brown*, textbooks are unanimously negative about public opposition to the Court. This portrayal is in tension with accounts of social mobilization outlined in Subsection IV.E.2, which matter-of-factly note the existence of social mobilization against the Court and do not question the legitimacy of such actions. Taken together, these contemporary accounts evince ambivalence about social mobilization against the Court. Although contemporary textbooks hardly shy away from examples of the People and their elected officials challenging the Court through norm contestation, these episodes are not celebratory (and some are downright hostile).

CONCLUSION

The stories we tell our schoolchildren matter. They help set the terms of our constitutional culture—defining the proper scope of action for each constitutional actor, the underlying trust citizens place in each institution of government, and the acceptable modes of constitutional argumentation and adjudication. Today our public schools present a Court that is authoritative, if not omnipotent—mostly just, if not perpetually perfect. These stories help reinforce a constitutional culture that is largely deferential to the Court, limiting references to popular resistance to the Court and often linking such popular resistance to the actions of self-interested politicians, at best, and historical villains, at worst. Our textbooks are especially critical of blunt institutional checks on the Court (like judicial impeachment and “court-packing”), but are sometimes receptive to subtler, longer-term checks (like social mobilization and judicial nominations). If judicial supremacy does run rampant, as popular constitutionalists claim, it would appear as though our public schools are complicit in its entrenchment.

299. DANZER ET AL., *supra* note 183, at 1003; *see also* BOORSTIN & KELLEY, *supra* note 208, at 829 (“[Nixon] criticized the Supreme Court for giving the ‘green light’ to criminals and for failing to slow down the integration of the schools.”).

APPENDIX: METHODOLOGY

Textbook analysis can be as much an art as a science. This Note draws upon the best practices of other scholars, both for textbook selection and for the analysis of the textbooks themselves.³⁰⁰ It is important to note that it remains difficult to obtain lists of the most widely adopted high school U.S. history and government textbooks, as education publishers closely guard information about volume and sales as trade secrets.³⁰¹ Therefore, I have followed the guidance of noted education scholars in selecting the textbooks to use for this Note.³⁰²

The best resource for determining today's most widely used high school U.S. history textbooks is the American Textbook Council's list of "Widely Adopted History Textbooks."³⁰³ The Council has been tracking this information since 1986 by surveying "key states and large school districts."³⁰⁴ In particular, they focus on Texas, California, Indiana, North Carolina, Florida, and New York.³⁰⁵ The American Textbook Council notes that the textbooks I have analyzed comprise an estimated 80% of the national market in U.S. history textbooks.³⁰⁶

For the older American history textbooks I have analyzed for this Note, I relied upon a list compiled by Robert Lerner, Althea Nagai, and Stanley Rothman.³⁰⁷ In compiling their list of most widely used history textbooks by decade, Lerner, Nagai, and Rothman "surveyed all state departments of education" by "requesting information regarding the high school American history textbooks most widely used throughout the state since 1940."³⁰⁸ They

300. This Note draws heavily on the methodologies employed by FITZGERALD, *supra* note 137; LERNER ET AL., *supra* note 138; and BESSIE LOUISE PIERCE, *CIVIC ATTITUDES IN AMERICAN SCHOOL TEXTBOOKS* (1930).

301. American Textbook Council, *Widely Adopted History Textbooks*, <http://www.historytextbooks.org/adopted.htm> (last visited Feb. 18, 2009).

302. In selecting the textbooks for this Note, I was guided by Diane Ravitch, Meira Levinson, and John J. Patrick, as well as Frederick Hess of the American Enterprise Institute and staff members at the Center for Civic Education and the National Council on the Social Studies.

303. American Textbook Council, *supra* note 301.

304. *Id.*

305. *Id.*

306. *Id.*

307. For an overview of their methodology, see LERNER ET AL., *supra* note 138, at 159-62.

308. *Id.* at 159.

also “decided to survey the 120 largest school districts in the nation, asking them what books their high schools used in the 1940s, 1950s, 1960s, and 1970s.”³⁰⁹ Although this is an imperfect method, I was unable to find a more reliable list. As a result, the trends I outline in Parts III and IV should be viewed as suggestive rather than definitive.

In addition, there is no single list of high school government textbooks that is as authoritative as the American Textbook Council’s list above.³¹⁰ Following the American Textbook Council’s methodology, I consulted the lists of government textbooks that have been adopted by Texas, California, Indiana, North Carolina, Florida, and New York—all key states for textbook adoption nationwide.³¹¹ From there, I pulled a sample of government textbooks that were adopted both by these states and affiliated with major publishers. Finally, I consulted with education scholars about the textbooks I selected,³¹² and they agree that the textbooks I have analyzed are likely to be in wide use.

The textbook analysis itself is guided by social science best practices.³¹³ For each contemporary U.S. history textbook, I first noted its overall length. I began my study of each textbook by scanning the index line-by-line for references to the Court, including any cases. For each case, I noted the year of the case, the substantive issue involved, and the amount of space devoted to the case. For any Justices mentioned, as well as any mentions of public challenges to the Court, I included similar information. I also noted if any relevant pictures accompanied the text. Once I completed my line-by-line exploration of the index, I skimmed each textbook cover-to-cover for any other mentions of the Court or any cases that I might have missed by simply scanning the index. I also double-checked the information that I coded for each Court reference. This is the source of the aggregate information I used for my objective analysis of the space devoted to the Court overall in today’s American history textbooks, as well as the canonical cases, substantive issues, and years covered. These objective observations also guided the episodes I decided to cover throughout Part IV, as well as the subjective conclusions that I drew about each key episode.

309. *Id.* at 160.

310. This is part of the reason why I have focused more on the history textbooks than the government textbooks in my analysis above.

311. This methodology was suggested by Diane Ravitch and Frederick Hess, as well as a staff member from the National Council on the Social Studies.

312. I consulted with Meira Levinson and John J. Patrick.

313. To that end, I draw upon KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (1980); and DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH* (2000).

