

IN DEFENSE OF JUDICIAL REVIEW: THE PERILS OF POPULAR CONSTITUTIONALISM[†]

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Since the 1920s, progressives have flip-flopped on the merits of judicial review at least three times. In the last few years, they have been forging a return toward the anti-judicial review camp, which ironically puts them in line with today's conservatives. The trendy progressive movement against judicial review calls itself "popular constitutionalism" and has at its helm such prominent scholars as Mark Tushnet, Larry Kramer, Richard Parker, and Jeremy Waldon. They contend in varying degrees that people—not judges—are the best arbiters of constitutional interpretation.

In his Baum Memorial Lecture on Civil Liberties and Civil Rights, Professor Erwin Chemerinsky demonstrates that popular constitutionalism is exactly the wrong strategy for progressives because it rests on flawed premises and comes to undesirable conclusions. Professor Chemerinsky proposes instead that progressives formulate an alternative vision of judicial review, distinct from that which the conservatives and popular constitutionalists espouse, and in which the courts play a central role. Because history has shown that the way prominent scholars view judicial review today will influence how it is practiced tomorrow, the real danger, Professor Chemerinsky fears, is that popular constitutionalism will undermine judicial review in the long term, creating progressive judges who, in the name of judicial restraint, are reluctant to enforce the Constitution to advance liberty and equality.

Progressives attacked the institution of judicial review at the height of the *Lochner*¹ era, during the 1920s and 1930s, when the Taft and

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Hughes Courts were consistently invalidating progressive legislation. One such progressive was Felix Frankfurter. He wrote articles in *The New Republic*, criticizing judicial review for usurping democratic decision making.² Although Frankfurter gained a reputation as a liberal professor, he turned out to be a conservative Supreme Court justice.³ One explanation for his surprising judicial philosophy is that it was borne of the positions he took attacking judicial review during the *Lochner* era.

The Warren Court, during the 1950s and 1960s, changed the political landscape regarding discussions of judicial review. Conservatives became the new critics of judicial review and they frequently did so by proclaiming the undemocratic nature of courts invalidating the choices of popularly elected legislatures.⁴ Throughout the 1970s and 1980s, a large body of scholarly literature debated the appropriate role for judicial review in a democratic society.⁵ Conservatives urged a limited judicial role and criticized decisions protecting unenumerated rights, such as the right to privacy. Progressives, though, continued to defend the Warren Court, even long after it ended.

Now it seems that constitutional scholarship is on the verge of another major shift in its discussion of judicial review. Conservative judicial rhetoric still rails against liberal judicial activism and still invokes the mantra that judges should enforce the law and not make it.⁶ But this is a position that is increasingly difficult for conservatives to maintain, especially after *Bush v. Gore*⁷ and when the current Court is invalidating statutes more often than any other in U.S. history.⁸ Conservatives now must defend a new judicial activism, one which justifies the Supreme Court invalidating laws as exceeding the scope of Congress's powers under the

1. The era from 1890–1940 is named for *Lochner v. New York*, 198 U.S. 45 (1905). Stephan A. Siegal, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 187 nn.1–2 (1984). In *Lochner*, the United States Supreme Court relied on the principle of freedom to contract to strike down a New York law limiting the number of hours per week a bakery employee could work. *Lochner*, 198 U.S. at 52, 64. Four justices, including Justices Holmes and Harlan, dissented. *Id.* at 65, 74.

2. See FELIX FRANKFURTER, FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE CONSTITUTION (Philip B. Kurland ed., 1970) (collecting Justice Frankfurter's essays exploring the Supreme Court's role in social policymaking); see also Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 19 (describing Frankfurter's position).

3. For a fascinating discussion of this transformation, see H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 144–54 (1981).

4. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 312–37 (1977); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

5. See, e.g., ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); MICHAEL PERRY, THE CONSTITUTION, THE COURT, AND HUMAN RIGHTS (1982).

6. See, e.g., John O. McGinnis, *PRO: Rehnquist's Court Renewed Civic Virtues*, TIME, June 30, 2003, at 24.

7. 531 U.S. 98 (2000).

8. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074 (2001).

Commerce Clause and Section Five of the Fourteenth Amendment,⁹ and dramatically expanding the scope of state sovereign immunity.¹⁰

Meanwhile, some progressives are already turning against the courts. In the last several years, the trendiest development in constitutional scholarship has prominent progressive scholars arguing against judicial review. Mark Tushnet's stunning book, *Taking the Constitution away from the Courts*, argues for the elimination of the authority for courts to invalidate legislative and executive decisions.¹¹ Other prominent scholars, including Larry Kramer,¹² Richard Parker,¹³ and Jeremy Waldon,¹⁴ have also argued against judicial review and for a far more modest role for the courts. This body of scholarship has acquired the label "popular constitutionalism," reflecting the notion of people—not judges—interpreting the Constitution.¹⁵

My thesis is that this is exactly the wrong strategy for progressives. Popular constitutionalism is based on flawed premises and comes to undesirable conclusions. I address three questions. First, what is popular constitutionalism?¹⁶ Second, what are the flaws in the arguments for popular constitutionalism?¹⁷ Third, what should be the approach of progressives to constitutional law at a time of increasingly conservative courts?¹⁸

I. WHAT IS POPULAR CONSTITUTIONALISM?

Although the phrase "popular constitutionalism" increasingly appears in constitutional scholarship,¹⁹ there is no precise definition of the concept. Professor Kramer juxtaposes popular constitutionalism with "judicial supremacy."²⁰ Of course, phrased this way, who could be against popular constitutionalism? Loaded language, though, can go both ways. Critics of popular constitutionalism might describe the de-

9. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as exceeding the scope of Congress's power under section five of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zone Act as exceeding the scope of Congress's commerce power).

10. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state governments have sovereign immunity and cannot be sued in state courts without their consent).

11. MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

12. Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) [hereinafter Kramer, *We the Court*].

13. RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994).

14. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

15. Kramer, *We the Court*, *supra* note 12, at 165.

16. See *infra* Part I.

17. See *infra* Part II.

18. See *infra* Part III.

19. See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (discussing "popular constitutionalism"); Kramer, *We the Court*, *supra* note 12, at 165.

20. Kramer, *We the Court*, *supra* note 12, at 13.

bate as a choice between “tyranny of the majority” as compared to “judicial enforcement of the Constitution.”

A major frustration in discussing the body of scholarship arguing for popular constitutionalism is its failure to define the concept with any precision. Larry Kramer, in both his *Harvard Law Review Foreword* and his recent book²¹, argues for popular constitutionalism, but a reader trying to find his definition will search in vain.²² Mark Tushnet argues that the elimination of judicial review will give rise to popular constitutionalism, but his only definition is his statement: “Populist constitutional law rests on the idea that we all ought to participate in creating constitutional law through our actions in politics.”²³

A. *Some Shared Premises of Popular Constitutionalists*

First, advocates of popular constitutionalism take the position that judicial review makes little difference. They frequently invoke Gerald Rosenberg’s book, *The Hollow Hope*, which argues that judicial review only has minimal effect in changing society.²⁴ The Warren Court, where judicial review facilitated progressive change, is seen as an aberration and not a basis for defending an expansive role for the courts in U.S. society. Professor Tushnet writes:

Looking at judicial review over the course of U.S. history, we see the courts regularly being more or less in line with what the dominant national political coalition wants. Sometimes the courts deviate a bit, occasionally leading to better political outcomes and occasionally leading to worse ones. On balance, judicial review may have some effect in offsetting legislators’ inattention to constitutional values. . . . The effect is not obviously good, which makes us lucky that it probably is small anyway.²⁵

Second, popular constitutionalists maintain that judicial review is unnecessary. They argue that the majoritarian processes can be trusted to adequately comply with the Constitution. Professor Kramer, for example, argues that the people can be trusted, and he defends the deliberative processes of Congress as at least equal to those of the judiciary.²⁶

Third, popular constitutionalists criticize judicial review as being undesirable. They exalt majority rule and argue that judicial review replaces majoritarian choices with decisions of unelected judges, a theme, of course, frequently expressed by conservatives as well. Popular consti-

21. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONAL AND JUDICIAL REVIEW* (2004): Kramer, *We the Court*, *supra* note 12, at 16–33.

22. Kramer, *We the Court*, *supra* note 12, at 16–33.

23. TUSHNET, *supra* note 11, at 157.

24. See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

25. TUSHNET, *supra* note 11, at 153.

26. Kramer, *We the Court*, *supra* note 12, at 15–16.

tutionalists stress that the Supreme Court frequently makes mistakes, and that when these mistakes are in constitutional decisions, they are virtually impossible to overturn. Professor Tushnet argues:

The conventional assumption is that of course we get a higher rate of compliance with constitutional values if the courts enforce the Constitution. That assumption often rests on the unstated, and largely indefensible, belief that courts never make mistakes. But they do. The peyote case shows that courts may underenforce some values that legislatures would vigorously enforce, and the RFRA decision showed that they may 'overenforce' some values, thereby depriving the people of our power to govern ourselves.²⁷

Popular constitutionalists argue that without judicial review, or at least with less judicial review, more desirable social policies would result. Tushnet, for instance, says: "Freed of concerns about judicial review, we might also be able to develop a more robust understanding of constitutional social welfare rights, which are recognized in many countries around the world."²⁸

B. Where Popular Constitutionalists Differ: What Should Courts Do in Constitutional Cases?

Common to all popular constitutionalists is their desire to reduce the role of the judiciary, though how and in what way is generally undefined. Here popular constitutionalists are often fuzzy and not in agreement with one another. One approach is the elimination of constitutional judicial review. Tushnet expressly argues for this: "Doing away with judicial review would have one clear effect: It would return all constitutional decision making to the people acting politically. It would make popular constitutional law the only constitutional law there is."²⁹ Tushnet, though, actually hedges on his proposal for eliminating all judicial review by saying that courts could invalidate actions, particularly of government officials, by deeming their actions to be ultra vires and thus "outside the bounds of authority granted the official by law."³⁰

Other popular constitutionalists argue not for the elimination of judicial review, but for much less frequent invalidation of the actions of the other branches of government and much more judicial deference to majoritarian choices. Professor Jeremy Waldron, for instance, writes:

The difference between decisions by the court and decision by the federal legislature or by the electorate is not a difference in decision-procedure, it is a difference in constituency: a constituency of nine, as opposed to voting constituencies numbered in the hundreds

27. TUSHNET, *supra* note 11, at 126.

28. *Id.* at 169.

29. *Id.* at 154.

30. *Id.* at 163.

(in our legislatures) or in the millions (among the voters of the various states.)³¹

Some popular constitutionalists take a third approach, arguing against “judicial finality” and “judicial supremacy.” These popular constitutionalists argue that every branch of government should interpret the Constitution and that every branch’s interpretation is equally authoritative. Courts are not entitled to the definitive view or the last word. Sometimes this is referred to as “departmentalism,”³² according each branch equal authority to interpret the Constitution. Conflicting interpretations would then be resolved through the interaction of the branches of government. For instance, by this view, the Supreme Court was entitled to hold that the Watergate tapes were not protected by executive privilege and had to be produced by Richard Nixon.³³ President Nixon, however, was equally entitled to interpret the Constitution differently and owed no deference to the Supreme Court. Ultimately, it would be for Congress, by deciding whether to impeach President Nixon, to resolve this constitutional impasse.

A large frustration in criticizing the popular constitutional movement is the lack of clarity as to what exactly the movement would entail. Mark Tushnet is the clearest in advocating the elimination of judicial review, but even he is unclear about what he means by the phrase “popular constitutionalism.” Tushnet makes vague statements, such as “[p]opulist constitutional law rests on the idea that we all ought to participate in creating constitutional law through our actions in politics.”³⁴ Other scholars who speak of popular constitutional law are even less clear about what this would entail and what courts would do when confronted with constitutional questions. At the very least, one can criticize popular constitutionalists for their ambiguity and for failing to spell out their visions of the judicial role in U.S. government.

II. WHAT ARE THE FLAWS IN THE ARGUMENTS FOR POPULAR CONSTITUTIONALISM?

A. *The Fallacy of Composition*

Those who argue for popular constitutionalism often commit the fallacy of composition: they show that judicial review is sometimes unnecessary and then conclude that it is always unnecessary; they demonstrate that judicial review is sometimes useless and then conclude that it

31. Jeremy Waldron, *Eisgruber’s House of Lords*, 37 U.S.F. L. REV. 89, 107–08 (2002).

32. See, e.g., Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359 (1997) (discussing “departmentalism”); see also Dawn Johnsen, *Nonjudicial Constitutional Interpretation: Toward a Model of Functional Departmentalism*, 67 LAW & CONTEMP. PROBS. (forthcoming 2004).

33. *United States v. Nixon*, 418 U.S. 683 (1974).

34. TUSHNET, *supra* note 11, at 157.

is always useless; they illustrate that judicial review is sometimes harmful and then conclude that it is always undesirable. Consider five examples of this.

1. *Overestimation of Compliance by the Other Two Branches*

First, popular constitutionalists focus on the likelihood that other branches of the federal government will comply with the Constitution in arguing against the need for judicial review. Mark Tushnet says that “[t]he Supreme Court at its best is clearly a lot better than Congress at its worst. But Congress at its best is better than the Court at its worst.”³⁵ Tushnet concedes that Congress does not have a laudable record of compliance with the Constitution, but he argues that this is largely *because* of the institution of judicial review. According to Tushnet, “[w]e really cannot know how Congress would perform if the courts exited, if Congress does badly because the courts are on the scene.”³⁶ He stresses how the “overhang” of judicial review “distorts what legislators say about the Constitution.”³⁷

But popular constitutionalism is not just about lessening judicial review to the other branches of the federal government. Popular constitutionalism extols the virtues of the will of the people, something generally thought to be even more manifest the smaller the unit of government. A commitment to majoritarianism, which is at the core of popular constitutionalism, would warrant deference to all elected officials at all levels of government.

Even accepting the popular constitutionalists’ rosy view of Congress’s fidelity to the Constitution, lessening judicial review of the actions of state and local governments is not justified. James Madison expressed concern over factions that are much more likely, in his view, to capture local governments than the national government; he thought that the competition of factions at the national level would be an important protection of liberties.³⁸ Judge Learned Hand said that he could accept the elimination of judicial review of Congress, but never of state and local governments.³⁹

What would popular constitutionalism mean when applied to lessening judicial review of state and local governments? There would be no basis for the application of the Bill of Rights to the states. This, of course, occurred only through Supreme Court decisions incorporating most of the Bill of Rights into the due process clause of the Fourteenth

35. TUSHNET, *supra* note 11, at 56.

36. *Id.* at 55.

37. *Id.* at 57.

38. THE FEDERALIST No. 10 (James Madison) (discussing factions and their risk to the public good); James Madison, Speech in the Federal Convention on Factions, in JAMES MADISON, WRITINGS 92, 92–93 (Jack N. Rakove ed., 1999).

39. See LEARNED HAND, THE BILL OF RIGHTS (1958).

Amendment.⁴⁰ Seemingly, populist constitutionalism would mean that state governments would be freed of compliance with the constraints imposed because of incorporation.

Moreover, there would not be a basis for stopping state and local actions that distort the political process, such as malapportionment. Popular constitutionalists do not endorse theories, such as that advanced by Professor John Hart Ely,⁴¹ that justify judicial review as desirable when it is perfecting the democratic process. Popular constitutionalism, especially if it entails the elimination of judicial review as advocated by Professor Tushnet, would mean that there would be no way for courts to invalidate legislative choices in districting.⁴² This is not a trivial example. There is little reason to believe that the majoritarian process ever would have remedied malapportionment and other distortions of the political process; those with power were not about to voluntarily relinquish it.

Nor would there be a basis for judicial review of state and local actions that favor their residents over those from other places. Doctrines such as the dormant commerce clause and the Privileges and Immunities Clause of Article IV operate to limit state and local discrimination against outsiders. This is a quintessential example of where the political process cannot be trusted; those suffering the consequences have no representation in the political process that is inflicting injuries on them. But none of the popular constitutionalists argue for robust judicial review in this area.

Popularly passed initiatives, especially those amending state constitutions, seemingly would be the epitome of popular constitutionalism. Yet, I am highly skeptical of the initiative process, having lived in California for the last twenty years and having witnessed initiatives that impose life sentences on shoplifters, deny all government benefits to undocumented aliens, and eliminate affirmative action by state and local governments. The late Professor Julian Eule argued persuasively for even greater judicial scrutiny of direct democracy, contending that all of the procedural safeguards built into the legislative process are absent when laws are adopted directly by the people.⁴³

Popular constitutionalists who would eliminate judicial supremacy seemingly would empower state and local governments, as equally authoritative interpreters of the Constitution, to disobey Supreme Court decisions. This would mean that the Supreme Court was wrong in *Cook v. Aaron*,⁴⁴ in proclaiming that it was the authoritative interpreter of

40. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148–55 (1968) (summarizing the Supreme Court's decisions incorporating the Bill of Rights).

41. ELY, *supra* note 5.

42. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

43. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1504–08 (1990) (arguing for more aggressive review of laws enacted through initiatives because of the lack of protections present in the legislative process).

44. 358 U.S. 1, 1–3 (1958).

the Constitution and that Arkansas state officials could not disobey orders to desegregate the Little Rock public schools. *Cooper v. Aaron*, of course, is one of the Court's most forceful articulations of the principle of judicial supremacy.

2. *Failure to Recognize Courts Other than the Supreme Court*

Second, popular constitutionalists focus just on the Supreme Court in arguing that judicial review is unnecessary. Professor Tushnet, for example, looks only to the Supreme Court in questioning whether judicial review makes any difference.⁴⁵ Popular constitutionalists often argue that the Warren Court was an aberration and that defenders of judicial review mistakenly assume that its protection of individual rights are typical of the Supreme Court. But eliminating or reducing constitutional judicial review would not simply curtail the Supreme Court. It would also take the power away from all lower federal courts and seemingly all state courts as well. Popular constitutionalists make no argument as to why state judicial review is any different than the practice in the federal courts; every argument for popular constitutionalism applies equally as a criticism of state courts.

Assessing the desirability of judicial review requires accounting for the countless decisions by courts other than the Supreme Court, throughout history and now, that enforce the Constitution and invalidate constitutional violations by governments and government officials. Some of the most egregious actions never make their way to the Supreme Court once lower courts have struck them down. Gerald Rosenberg's much-cited book arguing that courts fail to make a difference looks only to the Supreme Court and not lower courts and the impact of their rulings.⁴⁶

Moreover, critics of judicial review ignore the extent to which even the conservative Rehnquist Court has advanced individual rights. In its most recent term, the Court upheld affirmative action by colleges and universities,⁴⁷ invalidated a state law prohibiting private consensual homosexual activity,⁴⁸ and struck down a state law that retroactively extended the statute of limitations for sex offenders.⁴⁹ No one would suggest that the Rehnquist Court is the reincarnation of the Warren Court. Yet, even this Court, at times, has advanced individual freedom.

45. TUSHNET, *supra* note 11, at 129–53.

46. ROSENBERG, *supra* note 24, at 336–43 (focusing primarily on the Supreme Court's desegregation, abortion, and self-incrimination decisions).

47. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003).

48. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

49. *Stogner v. California*, 123 S. Ct. 2446, 2448 (2003).

3. *Judicial Review of Elected and Unelected Officials*

Third, popular constitutionalists, at most, justify eliminating (or reducing) judicial review of the actions of elected officials. Their theory, however, would eliminate (or reduce) judicial review of the actions of unelected officials as well. Much actual governance in the United States is done by unelected officials: police officers, prison guards, zoning board members, and regulatory agencies at all levels of government. Popular constitutionalism stresses the desirability of majority rule, but decisions by these officials meet no definition of majoritarianism. Yet, popular constitutionalism would extend to acts by these officers as well. Even if one could accept the popular constitutionalists' trust in the majoritarian process, it seems absurd to say that police officers or prison guards or zoning board members will have compliance with the Constitution at the forefront of their concerns.

Popular constitutionalists can respond to this argument in several ways. Professor Tushnet, for example, argues that the offending actions of these officers can be struck down as "ultra vires," making constitutional judicial review unnecessary.⁵⁰ In fact, Professor Tushnet contends that "[t]he courts might be *more* willing to regulate police activities if they could do so without invoking the Constitution. In this odd way, the existence of judicial review may actually *reduce* our protection against government overreaching."⁵¹ This is a very clever argument because it keeps judicial review, albeit under another label, and contends to be even better than constitutional enforcement. But Professor Tushnet offers no content for his theory of ultra vires. Would any action by police in violation of the Fourth Amendment be deemed ultra vires? If so, then he is keeping constitutional judicial review. If not, then Professor Tushnet never explains how courts will decide whether an action is ultra vires. Further, his assertion that this would be better than judicial review has no support. Recall that prior to the incorporation of the Bill of Rights, many states failed to provide counsel in felony cases or effectively check police abuses.

Popular constitutionalists might argue that elected officials ultimately oversee the actions of unelected officials and thus exists a majoritarian process. This, too, seems untenable. Even if electoral accountability exists on paper, there is often little actual control over actions by the police in particular cases, or of prison guards, or of the myriad of regulatory agencies that exist at all levels of government.

50. TUSHNET, *supra* note 11, at 165.

51. *Id.*

4. *Undue Faith in Elected Branches to Protect Liberties*

Fourth, popular constitutionalists assume that because elected branches sometimes protect liberties, they always can be trusted to do so. Almost every state has antidiscrimination laws that often are even more protective than federal statutes. Popular constitutionalism in its very title is based on a romantic assumption that the people can be trusted to advance the Constitution's values.

Certainly, popular constitutionalists are correct that this sometimes occurs. But at many other times there is the tyranny of the majority. Laws enforcing segregation existed throughout the South and likely would have lasted long beyond their invalidation by the Supreme Court if it had been left to the political process. Throughout history, majorities have persecuted racial, religious, and political minorities. This, too, is popular constitutionalism, but hardly the one that any of us wants to preserve.

The famous *Carolene Products*⁵² footnote got it exactly right: when it comes to politically powerless minorities, or ensuring the workings of the political process, or safeguarding fundamental rights, the political process—and popular constitutionalism—cannot be trusted.⁵³ If there is no judicial review, or no judicial supremacy, then the checks on persecution of minorities are dramatically reduced, if not eliminated. Minorities should not need to depend on the majority for their protection.

5. *Once a Failure, Always a Failure*

Finally, popular constitutionalists assume that because judicial review sometimes has not succeeded, it usually fails. Gerald Rosenberg's book, in its subtitle, asks "Can Courts Bring About Social Change?"⁵⁴ Several things about the question need to be noted.

The question focuses just on courts. The question could be asked even more broadly as to whether laws can bring about social change. Over the past thirty-five years, Congress and many state legislatures have adopted major civil rights statutes. The failure to improve economic circumstances for African Americans obviously reflects inadequacies not just of the courts, but also, and perhaps even more significantly, of legislatures. The point is to ask whether it makes sense to evaluate the ability of courts to make a difference apart from the general ability of the law to make a difference. Scholars like Professor Rosenberg assert that it is better to direct social reform efforts at legislatures rather than courts. These scholars assume, however, that legislatures would be successful where they perceive courts to fail.

52. 304 U.S. 144 (1938).

53. *Id.* at 152–53 n.4.

54. ROSENBERG, *supra* note 24.

The question assumes that it is possible to measure causation. Professor Rosenberg, for example, asks if courts can bring about social change. Obviously, causation is often enormously complex. Change is often a long-term process. The more profound the social change, the longer it is likely to take, and the more variables that are likely to be involved. Great care needs to be taken in articulating how causation and change will be observed and measured. If changes are noted, then it is difficult to evaluate whether they result from the courts, from other legal changes, or from other social phenomena.

The question also assumes that litigation and decisions are to be evaluated in terms of the social change that results. At the very least, this requires deciding what social changes are relevant as a measure of success. For many reasons, focusing on whether court decisions cause social change is an incomplete inquiry. Even if court decisions brought about no social change, they still might serve enormously important ends. Perhaps most importantly, court decisions can provide redress to injured individuals. Even if laws forbidding employment discrimination are shown to have had little net impact in eradicating workplace inequalities, the statutes still serve a crucial purpose if they provide compensation to the victims of discrimination. Similarly, even if tort law does not succeed in deterring dangerous products and practices, it can be successful in compensating innocent victims. Moreover, the redress might be noneconomic. Court decisions can provide vindication to those who have suffered from unconstitutional or illegal practices. *Brown v. Board of Education*⁵⁵ was an enormously important statement of equality even if little school desegregation resulted.

Professor Tushnet and others focus on whether social changes would have occurred even without judicial decisions. In other words, the analyst concedes that social change happened and that it followed a Supreme Court decision, but then argues that the reform would have occurred even without the Court's ruling. For example, in *The Hollow Hope*,⁵⁶ Professor Rosenberg argues, in part, that there was a trend toward increased numbers of legal abortions even before *Roe v. Wade*.⁵⁷

The difficulty with such arguments is that they are projections of a world that never existed. There certainly are possible scenarios where legislatures might have done what courts accomplished. It is conceivable that state legislatures would have loosened restrictions on access to abortion if *Roe* had not invalidated such laws. But it also is conceivable that as pro-choice forces gained political strength, anti-abortion groups would have mobilized, just as they did after *Roe*. Analysis of trends could support all sorts of imagined scenarios. It is questionable what is gained by the exercise or how much it can ever demonstrate that court action is un-

55. 347 U.S. 483 (1954).

56. ROSENBERG, *supra* note 24.

57. *Id.* at 178-80.

necessary. Also, a key problem with such projections is that they often fail to account for time or geography. *Roe v. Wade* made abortion legal in 1973 for the entire country. How long would it have been before abortion was legal everywhere in the nation without this decision?

In evaluating the ability of the judiciary to change society, one must address two interrelated questions. One is whether the Supreme Court's constitutional decisions succeed in changing the government's conduct. The other is whether changing the government's actions makes a difference in society. Although generally these questions are merged, they are analytically distinct. Sometimes the complaint of scholars like Professor Rosenberg is that government officials do not implement Court decisions or that they circumvent them. Sometimes the argument is that other social forces undermine any effect of the decisions.

Consider the example of reapportionment. In *Reynolds v. Sims*,⁵⁸ the Supreme Court articulated the rule of one-person one-vote.⁵⁹ All election districts for any elected body must be approximately equal in population size. This was a dramatic change in the law. The first question is whether this Court decision changed government. The answer is, unequivocally, yes: reapportionment of state legislatures occurred throughout the country. The second question, then, is whether changing the composition of legislatures made a difference in society. This is a much harder question, if nothing else because causation is so difficult to know and measure.⁶⁰ Can particular laws be traced to the reapportioned legislatures and which laws should be regarded as significant enough to be deemed social change?

B. Courts and Social Change

Assessing the ability of court decisions to bring about change, thus, requires analysis of when the judiciary is likely to be successful in altering government conduct and also analysis of when that is likely to make a difference in society. In evaluating the ability of court decisions to change government conduct, several different situations exist.

1. Court Decisions' Ability to Change Government Conduct

First, there are those instances when a court's decision is essentially self-executing; no further action of any government official or even of the courts is necessary. The most obvious example is when the court refuses to issue a ruling. In the Pentagon Papers case, for instance, the Court refused to enjoin the publication of a study of the United States involvement in the

58. 377 U.S. 533 (1964).

59. *Id.* at 567-68.

60. In *The Hollow Hope*, Professor Rosenberg questions whether significant laws were passed as a result of reapportionment. ROSENBERG, *supra* note 24, at 296.

Viet Nam War.⁶¹ No further action of any government official was necessary and yet government policy changed.

Second, there are those instances where the judiciary can fully enforce a court's decision through its power to dismiss future cases. For example, if the Supreme Court declares unconstitutional a criminal statute, then the judiciary can enforce that decision simply by dismissing any future prosecutions brought under the law. The Court, by definition, has changed governance by altering the law and by ending a set of criminal prosecutions. A simple illustration of this is the Supreme Court's recent decision in *United States v. Lopez*,⁶² invalidating a federal law making it a crime to have a firearm within one thousand feet of a school.⁶³ The federal government will no longer use that statute. If the government tried to enforce it, then any court would dismiss the case. The judiciary could enforce the Supreme Court's decisions invalidating laws prohibiting the use of contraceptives⁶⁴ and forbidding abortion⁶⁵ just as effectively. The courts simply could dismiss any future prosecutions brought under these laws.

Third, some Supreme Court decisions uphold the constitutionality of laws or government practices that encourage government action. By stepping aside, the Court encourages other governments to act in the same manner. A Supreme Court decision upholding a local ordinance might encourage other cities to adopt similar laws. In that way, the Court's ruling will change government. If the Court had upheld Richmond, Virginia's affirmative action program, then it might have encouraged other cities to adopt similar set-aside programs.⁶⁶

Fourth, there are Court decisions that require compliance by others in government, but that the judiciary can enforce through its contempt power. This is typified by the classic negative injunction. The court issues an injunction and punishes violations by contempt. Usually, the threat of contempt is sufficient to gain the government's compliance. If an employer is sued for using a racially discriminatory test in hiring, then the court, upon finding a violation of the law, can enjoin future use of the test. If the employer is recalcitrant and continues to use the test, then the court can hold the employer in contempt of court.

Fifth, there are Court decisions that are enforced through the award of money damages that are likely to change government conduct. An obvious example is the law of the Takings Clause. If the Supreme Court were to hold that a taking occurs whenever a government regulation decreases the value of a person's property, then the judiciary could enforce this by awarding money damages in the future. There is no doubt that this would pro-

61. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

62. 514 U.S. 549 (1995).

63. *Id.* The Court invalidated the law as exceeding the scope of Congress's Commerce Clause authority.

64. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965).

65. *Roe v. Wade*, 410 U.S. 113 (1973).

66. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

foundly alter government as it would have to pay compensation for a wide array of laws, from zoning statutes to environmental regulations. More generally, damages can deter wrongful government conduct. Section 1983 litigation has as part of its purpose deterring government from violating constitutional rights. For instance, the possibility of money damages for sexual harassment provides strong encouragement for government employers to refrain from such behavior.

Sixth, there are Court decisions that require substantial actions by government in compliance and implementation and therefore continuing judicial monitoring and enforcement. The most obvious example is the school desegregation litigation. Changing the government laws that segregated parks or water fountains simply required taking down the "whites only" sign. If the government failed to do this, then the court could impose contempt. Although there was a period of massive resistance in the mid-1950s, compliance with the court orders was obtained in a relatively short period of time. Desegregating schools, however, was a far more daunting challenge because it required affirmative steps ranging from changing pupil assignments, to redrawing attendance zones, to busing.

The above six categories are not exhaustive, but they are instructive of the many ways in which courts can change government. In some of the categories, there is a very high likelihood that judicial action will succeed in altering government conduct. Denying the government an injunction or invalidating a criminal statute virtually always will succeed in changing government behavior. In some of the categories government compliance is less certain. When the Court awards money damages against the government, particularly against the federal government, there is relatively little that the judiciary can do except hope for voluntary compliance. When the Court issues an affirmative injunction, such as for school desegregation, compliance might be a more lengthy and uncertain process. Those who criticize the impact of Court decisions tend to pick their examples from the most problematic categories. Recognizing the range of situations where the judiciary can change government helps in properly assessing the ability of courts to make a difference.

2. *Government Conduct's Impact on Society*

A distinct, although certainly related question, concerns whether changing government conduct really has any impact on society. This inquiry is much more difficult to assess, if nothing else, because there are not clear criteria for assessing or measuring social change. Social change connotes an overall noticeable impact in society. Yet, few Court decisions possibly could have such an effect. For example, Supreme Court decisions concerning prisoners' rights might be enormously important for those imprisoned, but they are unlikely to cause social change. Likewise, Court decisions preventing discrimination against nonmarital children might be very significant in the lives of those individuals, but the rulings cannot be as-

essed in terms of social change.⁶⁷ Therefore, care has to be taken in assessing which cases should be evaluated in terms of their ability to achieve social change. Assuming that such cases are properly identified, care must be taken to construct a meaningful measure of social change to use in evaluating the impact of the decisions.

There also is another pitfall in analysis: seeing the ineffectiveness of a particular decision or judicial strategy as proving an inherent weakness of the courts. It certainly is possible to try to assess whether a specific decision or set of rulings brought about certain results. A conclusion that the decisions failed may reflect a general weakness of courts or it may reveal only a misguided approach in those cases.

Those who argue that judicial action can have little impact in society point to school desegregation especially and the legacy of *Brown v. Board of Education*.⁶⁸ For instance, almost half of Professor Rosenberg's book, *The Hollow Hope*, focuses on civil rights. Yet, the story of school desegregation and whether it succeeded is a complicated one and not one that lends itself to a yes or no answer. Some school desegregation was achieved, although much of the promise of *Brown* remains unfulfilled. Some of the failure may have been inherent to judicial actions, but a great deal of it may be because the Court did not implement the proper remedies.⁶⁹

In sum, popular constitutionalists dramatically overestimate the likelihood of voluntary compliance by the other branches of government and underestimate the likely benefits of judicial review. As someone who often argues cases on behalf of prisoners or those whose civil liberties have been violated, I have the sense that popular constitutionalism is the product of an academic detachment failing to recognize that, for clients like mine, it is often the courts or nothing. Prisoners and civil rights litigants very well might lose in the courts, but often they have no recourse except in the judicial process.

III. THE DANGERS OF POPULAR CONSTITUTIONALISM

The strongest argument for popular constitutionalism is that the current Supreme Court has unduly limited the powers of Congress to advance individual rights in its decisions restricting the scope of Congress's powers under Section Five of the Fourteenth Amendment. Professors Robert Post and Reva Siegel have persuasively developed this argument.⁷⁰ I definitely

67. See, e.g., *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (invalidating a section of the Social Security Act that disadvantaged nonmarital children).

68. 347 U.S. 483 (1954).

69. I develop this point in Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1620-22 (2003).

70. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Discrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 447-56 (2000).

share their criticism of recent Supreme Court decisions, such as *City of Boerne v. Flores*,⁷¹ which dramatically lessened the scope of Congress's authority under Section Five.⁷²

I question whether popular constitutionalism is needed in order to criticize these recent Court rulings. One can attack the Court's decisions on their own terms, as a misguided interpretation of Section Five and an undue restriction of legislative power under a specific provision intended to empower Congress to enforce the Constitution. There need not be an elimination or reduction of the overall power of the courts to overturn these decisions as misguided.

The real risk of popular constitutionalism is that it will undermine judicial review in the long term. How judicial review is discussed by scholars today will influence how it is practiced tomorrow. The liberal criticism of the *Lochner* era led to a Supreme Court that was highly deferential to the government for at least a decade and a half after President Franklin Delano Roosevelt appointed a solid Democratic majority. The conservative criticism of the Warren Court led to the Burger and Rehnquist Courts and the originalist philosophy of judicial review. My fear is that popular constitutionalism will cause future progressive judges to practice judicial restraint and not to enforce the Constitution to advance liberty and equality.

The challenge for progressives is to articulate an alternative vision of judicial review—different from the one offered by conservatives or the popular constitutionalists—that has courts acting to protect dignity, enhance freedom, and further equality. Turning against the courts is not the vehicle to accomplish this.

IV. CONCLUSION

I fear that popular constitutionalism is a view that is on the rise among constitutional scholars. Any school of thought advanced by such eminent academics as Mark Tushnet, Larry Kramer, Richard Parker, Jeremy Waldron, Robert Post, and Reva Siegel, deserves careful attention and is likely to develop a large number of followers. Popular constitutionalism is an attractive theory for progressives because it emphasizes populism and trust in the people, while turning against the courts at a time when the federal judiciary is increasingly dominated by conservative Republicans. Ironically, it has the left and the right coming together in their criticism of the courts. The attack on judicial supremacy, today, comes both from conservatives, such as Robert Bork, and progressives, such as Larry Kramer.

The David C. Baum Memorial Lecture Series on Civil Liberties and Civil Rights provides an occasion to question popular constitutionalism.

71. 521 U.S. 507 (1997).

72. Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 604–29 (1998).

The assumption that civil liberties and civil rights will be equally well protected through the political process as in the courts has no basis in U.S. history or contemporary culture. Legislatures, at times, do protect civil liberties and civil rights, and courts, at times, fail. But there seems little doubt that over time the judiciary is essential in protecting our most basic rights. Popular constitutionalism's central flaw is its failure to recognize that the protection of minorities and their rights cannot rely on the majority. The judiciary, for all its warts, is essential.