The Most Democratic Branch: How the Courts Serve America

Jeffrey Rosen

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THE MOST DEMOCRATIC BRANCH

The Annenberg Foundation Trust at Sunnylands'
Institutions of American Democracy

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For Akhil Amar and Bruce Ackerman,
who taught me to love constitutional law.

The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important, that [a judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?

—CHIEF JUSTICE JOHN MARSHALL

I would make all the Judges responsible, not to God and their own consciences only, but to a human tribunal.

—GOVERNOR WILLIAM GILES

VIRGINIA CONSTITUTIONAL CONVENTION, 1829

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Preface

When Oxford University Press and the Annenberg Foundation asked me to write about the U.S. courts and American democracy as part of a series of books about the institutions of democracy, I was delighted but also daunted by the challenge. This is an unusually polarized moment in American judicial politics, and many people define themselves based on their views about whether cases like *Roe v. Wade* or *Bush v. Gore* were good or bad for the country. I'm often struck, however, by how few citizens have opportunities to think about the role of the courts in a larger context.

As a result, perhaps, public opinion about the role of the courts in American democracy seems to be uncertain and conflicted. In a series of polls commissioned in 2005 by Syracuse University, 73 percent of the respondents embraced a view that many of us learned in high school civics: namely, that the role of courts is to protect minorities from the tyranny of the majority and that judges, as a result, should be shielded

from outside pressures. But in the same poll, 47 percent of the respondents complained that courts were out of step with the American people, reflecting the familiar criticism by interest groups that judges have become out-of-control activists thwarting the will of the people. And nearly the same percentage, 44 percent, said that courts were in step with public opinion—a view hard to reconcile with both of the other two positions.

In this book, I argue that the third view—that courts are broadly in step with public opinion—has tended, throughout American history, to be the most descriptively accurate. Far from protecting minorities against the tyranny of the majority or thwarting the will of the people, courts for most of American history have tended to reflect the constitutional views of majorities. (The cartoon character Mr. Dooley was correct when he declared at the turn of the last century that "th' supreme coort follows th' iliction returns.") Moreover, on the rare occasions when courts have acted unilaterally—trying to impose a constitutional vision that a majority of the country rejects—they have tended to provoke backlashes that often undermine the very causes the judges are attempting to advance.

Although hard to reconcile with the claims of interest groups or romantic idealists, the historical claim that courts have tended, over time, to reflect the will of the majority rather than thwarting it is hardly novel; on the contrary, it has become a kind of underground conventional wisdom among the political scientists and legal scholars on whose work I've drawn in this book. Even at the risk of upsetting conventional pieties, I hope it may be useful to set out in some detail, on the theory that citizens cannot make intelligent choices about the kinds of judges they think should be confirmed to the federal courts without a realistic understanding of how judges have tended, over time, to behave.

Perhaps more controversial than my observations about how judges have behaved in the past will be my argument about how courts can best maintain their legitimacy in the future, as they confront a range of vexing issues—from human cloning and other technologies of assisted

reproduction to attempts to patent human life. Not only have judges tended to reflect the constitutional views of national majorities in the past, they should, broadly speaking, continue to do so in the future if they want their decisions to be accepted as being based in sound constitutional principles as opposed to transitory political judgments. Paradoxically, the courts, often derided as the least democratic branch of government, have maintained their legitimacy over time when they have been more rather than less democratic in their constitutional views. By contrast, throughout American history, the least effective decisions have been those in which courts unilaterally try to strike down laws in the name of a constitutional principle that is being actively and intensely contested by a majority of the American people. When judges vainly imagine they can save the country from democratic excesses that they alone can perceive, they often imperil their own legitimacy and effectiveness in the process. Therefore, far from threatening judicial independence, judicial sensitivity to the constitutional views of the president, Congress, and the American people has tended surprisingly to preserve it.

Throughout the book, I'd like to defend a tradition that used to command widespread support among mainstream liberals and conservatives but is increasingly out of fashion: namely, the tradition of bipartisan judicial restraint. This tradition, famously associated with judges like Oliver Wendell Holmes, Felix Frankfurter, and Learned Hand, holds that courts should play an extremely modest role in American democracy. They should hesitate to strike down laws unless the constitutional arguments for second-guessing the decisions of a political majority are so powerful that people of different political persuasions can readily accept them. "If my fellow citizens want to go to hell, I will help them," Holmes said. "It's my job."

When I was lucky enough to become legal affairs editor of *The New Republic* magazine at the beginning of the 1990s, I absorbed the tradition of bipartisan judicial restraint, which had been championed over the years by editors such as Frankfurter, Hand, and Alexander Bickel.

This tradition led *The New Republic* to criticize the judicial invalidation of laws the editors' supported as well as those they opposed, from minimum wage laws during the Progressive era to health and safety regulations during the New Deal to postwar laws restricting abortion and permitting affirmative action. In both *Roe v. Wade* and *Bush v. Gore*, the magazine insisted that the Supreme Court should have resisted the temptation to plunge recklessly into the political thicket.

The tradition of bipartisan restraint is based on a strong—but, at the moment, hotly contested—claim about the relationship between the law and politics in American democracy: namely, that the most controversial political issues in American history always have been resolved in the political arena rather than the courts. When the courts attempt to short-circuit an intensely contested political debate, those of us in the bipartisan restraint crowd argue, they are likely to imperil their own legitimacy without dramatically influencing the ultimate outcome of the political debate in question. In the long run, majorities in America will always have their way.

Despite its venerable history, the claim that political questions should be resolved in the legislatures rather than courtrooms has increasingly less appeal, on the left and the right, now that so many of our political questions are being legalized—from assisted suicide to presidential elections. When judges take it upon themselves to decide the most divisive questions of politics, technology, and culture, who can blame both liberals and conservatives for selectively embracing judicial activism when it suits their purposes? Now that constitutional politics has become a blood sport, many believe, bipartisanship of any kind has become an unaffordable luxury.

Although the Supreme Court has generally tended to reflect the constitutional views of majorities in the past, that may change in the future. During the postwar era, liberals and conservatives were united around the importance of judicial deference to democratic decisions. But in the 1980s and 1990s, partly in response to *Roe v. Wade*, influential

movements developed on the left and the right urging judges to ignore the constitutional views of national majorities. On the right, some activists now embrace an especially aggressive form of conservative libertarianism, calling on judges to strike down economic and environmental regulations by resurrecting limits on federal and state power that have been dormant since the New Deal. On the left, other activists are rallying around an equally aggressive form of liberal egalitarianism, encouraging judges to strike down other practices that national majorities embrace—from the death penalty to restrictions on gay marriage—in the name of an ill-defined and amorphous international consensus. These movements have not yet persuaded very many federal judges or Supreme Court justices to embrace their adventurous axioms. But the historically shortsighted assumption that courts are supposed to be aggressively antidemocratic is in the air, and judicial interest groups are trumpeting their indifference to the views of national majorities as a sign of their devotion to principle.

The book that follows is offered as a series of cautionary tales about the chaos that may result if judges heed this reckless and shortsighted counsel. It is also an attempt to persuade readers from both ends of the political spectrum to consider the virtues of bipartisan judicial restraint. Those of us who subscribe to this venerable tradition are, at the moment, a small but devoted band. Please join us.

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THE MOST DEMOCRATIC BRANCH

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Introduction

The Most Democratic Branch

In March 2005, for the first time in history, Congress ordered the federal courts to reexamine a case involving the right to die. The case involved Terri Schiavo, a young woman who collapsed from a heart attack in 1990 and whose brain suffered a severe oxygen loss that left her in a coma. In 1998, after winning a malpractice suit against the doctors who failed to diagnose Terri's eating disorder, her husband, Michael, argued in court that she would have wanted her feeding tube to be removed. Her parents responded that Terri would have wanted to stay alive, insisting that Michael, who had become engaged to another woman, was not a reliable representative of Terri's wishes. A state judge agreed with Michael Schiavo that Terri would have wanted to refuse treatment, based on her statements to her husband and relatives; and after two other state courts affirmed the decision, he ordered the tube to be removed in 2001. After further legal wrangling, the Florida legislature passed "Terri's law," which authorized the Florida governor to issue a "one time stay" of a

court order in Terri's case; nearly a year later, the Florida Supreme Court unanimously struck down "Terri's law" as an unconstitutional attempt by the legislature to delegate judicial powers to the executive branch. Another year of legal fights ensued, and in February 2005, the state judge once again ordered Terri's feeding tube to be removed.

At this point, the U.S. Congress intervened. Terry Schiavo received a subpoena ordering her to appear before the U.S. House of Representatives, with her feeding tube intact. The Senate delayed its Easter recess and passed a private relief bill giving Terri Schiavo's parents the right to contest her constitutional rights in federal court. Early the next morning, having suspended its rules, the House passed the bill and the president returned from Easter vacation to sign it. Despite this extraordinary intervention, the federal courts authorized to review Schiavo's case wasted no time in upholding the state judge's original order. A federal district court judge refused to order the reinsertion of the tube, and over the next few days, a federal appellate court and the U.S. Supreme Court refused to intervene. On March 31, 2005, Terry Schiavo died.

How did the courts perform in this stressful and illuminating case? By and large, state and federal judges performed well by following existing law rather than embracing novel constitutional arguments. The performance of Congress was less impressive. In the midnight House debate over the private relief bill for Schiavo's parents, there were frequent references to Terri Schiavo's "constitutional right to life." But there were no serious efforts to define the contours of that right or to make arguments about why it was not adequately protected by the judicial procedures that the Florida state courts had followed.

To the degree that Congress was attempting to challenge the constitutional vision of the courts, moreover, its competing vision did not seem to be embraced by the American people. After Schiavo's death, an overwhelming 82 percent of Americans in a CBS news poll said they disapproved of the decision by Congress and the president to intervene in the case.[1]

The reaction to the Schiavo case reveals something odd and unexpected about American judicial politics in the early twenty-first century. Conservative critics of the Schiavo ruling charged that unelected activist judges were thwarting the will of the people. But in fact, the critics had it exactly backward. In our new, topsy-turvy world, it was the elected representatives who were thwarting the will of the people, which was being channeled instead by unelected judges.

The Schiavo case was not unique. On a range of issues during the 1980s and 1990s, the moderate majority on the Supreme Court represented the views of a majority of Americans more accurately than the polarized party leadership in Congress. Congressional Republicans and Democrats are increasingly pandering to their respective bases: these include conservative and liberal interest groups who care intensely about judicial nominations because they are upset about the current direction of the Supreme Court, which has rejected their extreme positions on a range of issues, from abortion to religion. By contrast, the country as a whole is relatively happy with the Supreme Court and has no interest in paralyzing the federal government over symbolic fights about judicial nominations that will do little to affect the Court's overall balance. In 2005, only 22 percent of respondents in a Gallup poll said they trusted Congress "quite a lot" or "a great deal," compared to more than 40 percent who had similar trust in the Supreme Court and the president.

As these polls suggest, the Supreme Court in recent years has become increasingly adept at representing the views of the center of American politics that Congress is ignoring. In the 1980s and 1990s, as conservatives won the economic war to pass tax cuts and to scale back the size of government, the Court modestly followed their lead, striking down laws on the margins of the post–New Deal regulatory state, such as largely symbolic federal laws regulating violence against women and guns in schools. And as the public sided with liberals rather than conservatives in the culture wars—endorsing gay rights (but not gay marriage),[2]

limited forms of affirmative action,[3] and protections for early (but not late) term abortions,[4]—so did the Court.

Of course, the Court's relationship to public opinion is complicated: sometimes the Court identifies a strong national sentiment and imposes it on a few isolated state outliers (striking down an obsolete state ban on contraceptives, for example); and sometimes it endorses a position that roughly half the public supports and that comes to be more widely embraced (striking down school segregation).[5] This is hardly consistent with a vision of an antidemocratic court boldly resisting popular will. Whether the moderate justices on the Supreme Court are self-consciously reading the polls, neutrally interpreting the Constitution, or trying to compensate for other polarities in the system, their high-profile decisions, for much of the past two centuries, have been consistently popular with narrow majorities (or at least pluralities) of the American public.[6]

How did we get to this odd moment in American history where unelected Supreme Court justices sometimes express the views of popular majorities more faithfully than the people's elected representatives? One obvious culprit is partisan gerrymandering. In the 2000 elections, 98.5 percent of congressional incumbents won with over 75 percent of the vote, thanks to increasingly sophisticated computer technology that makes it possible to draw House districts where incumbents are guaranteed easy reelection simply by catering to the interest groups that represent their ideological base. As a result, Democrats and Republicans in Congress no longer have an incentive to court the moderate center in general elections, resulting in parties that are more polarized than at any other point in the past fifty years. And since half of the current senators previously served as representatives, it's hardly surprising that the polarized culture of the House is infecting the Senate.

It's also not surprising that interest groups have continued to attack judges as tyrannical activists despite the fact that, in many cases, judges actually reflect the constitutional views of national majorities more pre-

cisely than the interest groups do. Throughout American history, the people most fervently devoted to judicial activism have been political losers who are no longer able to enact their agenda in the political arena, from the conservative Federalists of the early 1800s to the Democrats of the Civil War era to the conservative Republicans during the New Deal.[7] Today, the groups most devoted to judicial activism are once again those whose beliefs have been repudiated by a majority of the country—from the social conservatives represented by groups like Focus on the Family, who want a chance to resurrect statewide bans on early-term abortions, to liberal egalitarians represented by NARAL Pro-Choice America, who oppose restrictions on late term abortions and want the courts to impose gay marriage by judicial fiat.

The idea that the federal courts might represent the views of national majorities more precisely than Congress is hard to reconcile with the familiar, if romantic, vision of courts that many of us were taught in high school civics: courts are heroically antidemocratic institutions whose central purpose is to protect vulnerable minorities against the tyranny of the majority. It is also hard to reconcile with familiar criticisms of judges as antidemocratic activists in black robes. Critics of judicial activism frequently charge that whenever a court strikes down a law, it effectively thwarts the will of the majority that passed the law. "The root difficulty is that judicial review"—that is, the authority of the court to review the constitutionality of actions taken by other branches of government—"is a counter-majoritarian force in our system," wrote the legal scholar Alexander Bickel in 1962. "[J]udicial review is a deviant institution in the American democracy," he continued, because whenever the Supreme Court strikes down a law, "it exercises control, not in behalf of the prevailing majority, but against it."[8]

There are familiar answers to what Bickel called "the counter-majoritarian difficulty," and the most familiar comes from the American founders. In the course of defending the power of judges to strike down laws clearly inconsistent with the Constitution, Alexander

Hamilton rejected the charge that this power supposed that judges would be superior to legislators. "It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former," he wrote in *The Federalist Papers*.[9]

More recently, majoritarian scholars have argued that there's no need to worry about judges thwarting the will of the people, because the vision of antidemocratic courts protecting vulnerable minorities against tyrannical majorities is, in some sense, a romantic myth. For all the invective that it initially generated, *Brown v. Board of Education*, which struck down school segregation, was supported by more than half the country when it was handed down in 1954,[10] as were many of the most controversial decisions by the Warren and Burger Courts.[11] Beginning with Robert Dahl in the 1950s, political scientists have argued that the Supreme Court throughout its history has tended to follow national opinion rather than challenging it. Instead of protecting minorities against the tyranny of majorities, Dahl argued in 1957, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[12]

According to this majoritarian view, courts play an important role as policy makers in American government, but their role tends to be more subtle than partisans of the countermajoritarian myth like to believe. Interest groups are not the only people who use the courts for parochial purposes; elected politicians, attempting to steer clear of controversial topics, often do the same.[13] Moreover, during periods when legislatures themselves are failing to represent the wishes of the majority, the Court may be able to remove an obstacle to democracy in the political process: the most obvious examples are the Warren Court's reapportionment decisions in the 1960s, which declared "one man, one vote" to be a Constitutional principle, over the objection of House incumbents who preferred the malapportioned old system that allowed them to protect their seats.

What the courts cannot do is thwart the will of national majorities for long. The great political scientist Robert McCloskey recognized that courts, always sensitive to sustained political attacks by the president and Congress, are ultimately constrained by public opinion even as their decisions can subtly nudge the country in one direction or gently apply the brakes in another. "[P]ublic concurrence sets an outer boundary for judicial policy making," McCloskey wrote. "In truth the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment. It has worked with the premise that constitutional law, like politics itself, is a science of the possible."[14]

The majoritarians offer a useful description of how courts actually behave as institutions of democracy: throughout American history, judges have tended to reflect the wishes of national majorities and have tended to get slapped down on the rare occasions when they have tried to thwart majority will. But this description doesn't tell us how courts *should* behave as institutions of democracy. It doesn't tell us, in other words, how the courts can best maintain their effectiveness and legitimacy over the long term, reaching decisions that will be accepted by the country, over time, as being rooted in constitutional rather than political values. To gain democratic legitimacy over the long term, after all, a court's decisions must not merely be popular with 50 percent of the country in an opinion poll, since opinion polls fluctuate and the people are often caught up in temporary enthusiasms. Moreover, judges are not supposed to be so crude as to simply follow the polls; that would make them politicians. Instead, successful judicial decisions must be accepted by the country as being rooted in constitutional principles rather than political expediency. Only with this kind of democratic legitimacy will the decisions be accepted, enforced, and followed by the political branches and the American people as a whole.

How can the courts serve America in this sense? That is, how can they maintain their effectiveness and legitimacy as institutions of democracy? Scholars and citizens disagree fiercely, of course, about the