

THE SUPREME COURT  
2005 TERM

FOREWORD:  
THE COURT'S AGENDA — AND THE NATION'S

*Frederick Schauer*

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“Government by judiciary” is the traditional warning from those who seek to limit the power of the courts.<sup>1</sup> Policymaking in a democracy, so the argument goes, should be left to officials more responsive to popular will than judges, who because of their comparative nonaccountability to the public should keep their policymaking to

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<sup>1</sup> The phrase “government by judiciary” originated with LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932), rose in prominence after RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1st ed. 1977), and is now ubiquitous.

For now, I collapse the distinction between those who challenge the desirability or legitimacy of judicial review itself, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 129–94 (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* 10–17, 211–312 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006), and those who, while accepting judicial review, object to the supremacy of Supreme Court interpretations of the Constitution over the interpretations of the other branches of government, e.g., Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 *MICH. L. REV.* 2706 (2003) (arguing that judicial interpretive supremacy has no roots in *Marbury v. Madison*, 5 *U.S.* (1 Cranch) 137 (1803)); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 *GEO. L.J.* 217 (1994) (supporting executive branch authority to interpret the Constitution); 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 (2003) (urging that congressional interpretive power be commensurate with that of the Supreme Court); see also Keith E. Whittington, *James Madison Has Left the Building*, 72 *U. CHI. L. REV.* 1137, 1148 (2005) (book review) (describing “departmentalism”), or the public, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (defending the people’s authority to interpret the Constitution). There are key differences among these positions, but as I explain *infra* section IV.A, pp. 50–56, there are also features they share and that justify treating them, at times, as equivalent.

a minimum. Government by judiciary, it is said, is the antithesis of democracy.<sup>2</sup>

The charge of government by judiciary is one side of an old debate,<sup>3</sup> to which there is hardly more to add as a matter of political or constitutional theory. Yet the question of government by judiciary lingers, even as its political and ideological coloration changes.<sup>4</sup> It is this

<sup>2</sup> For a description, reformulation, and reconciliation of the alleged conflict between judicial review and democracy, see generally Frank I. Michelman, *Brennan and Democracy: The 1996–97 Brennan Center Symposium Lecture*, 86 CAL. L. REV. 399 (1998). “Government by judiciary” is of course a tendentious phrasing of what we now call the “countermajoritarian difficulty.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962). The full history of the academic debate over the tension between judicial review and democracy is recounted in Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *The Birth of an Academic Obsession*]; and Barry Friedman, *The Countermajoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001). See also LAURA KALMAN, *THE STRANGE CAREER OF LIBERAL LEGALISM* (1996).

<sup>3</sup> See Friedman, *The Birth of an Academic Obsession*, *supra* note 2; Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 821–22 (2005) (describing increase in concerns about judicial power at the time of *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>4</sup> It is increasingly common for commentators to note the shifting politics of debates over judicial review and to observe that skepticism about judicial review now comes from the left while endorsements come from the right. See, e.g., Waldron, *supra* note 1, at 1350 (pointing out that liberals increasingly now question the power of judicial review). Equally common nowadays is the claim that there is something hypocritical in taking an ideological shift in the membership of the Supreme Court as a justification for changing one’s view about judicial review. See, e.g., Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 155–57 (2004) (objecting to “strategic” or “political” attacks on judicial review and implying that the best theory, although inevitably motivated by political events, does not depend on “who [sits] on the Court”); Keith E. Whittington, *Herbert Wechsler’s Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 530 (2000) (questioning the quality of “partisan” scholarship). Yet it is hardly clear what is wrong with developing a normative or justificatory account of judicial review based on the foreseeable staffing of the Court, at least if done transparently. The justification for any institution may be based on the moral dimensions of its central features, as when we prefer one institution to another because it is more democratic or more fair. Alternatively, the justification may be instrumental, as when we prefer one institution to another because it is more conducive to (morally) favored outcomes. See Waldron, *supra* note 1, at 1362, 1370–76 (distinguishing outcome-based from process-based theories). But when we focus on outcomes and thus engage in the instrumental and empirical enterprise of consequential institutional design, the evaluation must assess in necessarily benefit-cost ways the expected value of outcomes under one institution rather than another. In the context of judicial review, then, a complete consequential evaluation of the institution must encompass any factor that would enable some approach to judicial review to generate a greater number of morally preferable results. Because such an evaluation must take into account all of the outcome-relevant characteristics of the likely decisionmakers, it is hard to find fault with pursuing institutional design in light of a current assessment of the institution’s staffing. In short, as long as ideology matters to judicial outcomes, see, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (recounting and defending the view that ideology is the best single predictor of Supreme Court outcomes), then any outcome-focused normative theory of judicial review or judicial authority may — indeed must — legitimately consider the ideology of the Justices who will be making the decisions over the relevant time period. See Frederick Schauer, *Neutrality and Judicial Review*, 22 LAW & PHIL. 217, 232–40 (2003).

very persistence of the issue that invites us to assess what appears to be one of its fundamental empirical premises — that the courts are on the verge of occupying a substantial portion of American policymaking terrain.<sup>5</sup> To evaluate this premise, however, we must examine critically the actual business of the courts and compare it to the business of the country and its citizens. One component of this examination, and my focus here, is the narrower question of what the Supreme Court does and how its agenda relates to the agenda of government as a whole. Implicit in the typical charge of government by judiciary is the belief that much of the task of governance and policymaking has been, is now, or might in the future be commandeered by an unelected federal judiciary, in particular the Supreme Court. And although concerns about government by judiciary need not be restricted to or focused on the Supreme Court, in practice the Court is the most frequent object of worries about judicial activism, with their accompanying calls for judicial restraint, judicial modesty, judicial minimalism, and judicial deference to the decisions of legislatures and administrative agencies.<sup>6</sup> Yet the extent to which this anxiety about judicial aggressiveness rests on a sound factual foundation has seldom been investigated, in part because the existing debates tend to focus on a small number of admittedly important substantive issues — abortion, same-sex marriage, affirmative action, the right to die, and the role of religion in public institutions, for example — and neglect to consider just what proportion of governance in the aggregate is actually at risk of being controlled by the judiciary in general or the Supreme Court in particular.<sup>7</sup>

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<sup>5</sup> “It is very troubling in a democracy to have *so many important decisions* made by unelected judges interpreting a document written more than 200 years ago.” Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1094 (2005) (book review) (emphasis added).

<sup>6</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509 (1996); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003); Cass R. Sunstein, *Burkean Minimalism* 3 (Univ. of Chi. Law Sch. John M. Olin Program in Law and Econ., Working Paper No. 273, 2006), available at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_251-300/273-crs-burke.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_251-300/273-crs-burke.pdf). But see Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005) (questioning descriptive accuracy and normative desirability of judicial minimalism).

<sup>7</sup> I bracket for now the obvious objection that even a single countermajoritarian exercise of power would be illegitimate regardless of the proportion of such acts within the universe of governmental decisions. I deal with this at length, see *infra* section IV.A, pp. 50–56, but for now it suffices to note that the concern about judicial activism derives in no insignificant part from the

This failure to probe how much of the policymaking or governance function resides in the Supreme Court can thus be seen as the consequence of a persistent misframing of the question in which commentators appear to make the fallacious leap from the accurate premise that much of what the Supreme Court does is important to the erroneous conclusion that much of what is important is done by the Supreme Court. Lawyers, judges, and legal academics are not alone, of course, in seeing the world through the lens of their own discipline.<sup>8</sup> But the tendency to exaggerate our own profession's role in the grand scheme of things appears more pronounced for constitutionalists and Court-watchers than for, say, rocket scientists, dentists, and plumbers. This tendency shows no signs of abating, and it is what prompts a careful look at the place of the judiciary and the place of the Supreme Court within the larger domain of politics and policymaking.

My goal in this Foreword is to examine the relationship between the Supreme Court's activities and the totality of the nation's governance. The October 2005 Term provides the initial platform for this examination, and I devote some attention to the Court's most recent decisions. Mostly, however, I examine the Court's agenda. And although I look at the issues the Court took on, I look even more closely at what it did *not* take on, whether (rarely) because the Court denied certiorari in cases presented to it for decision, or (far more commonly) because the noteworthy absences from the Supreme Court's agenda are equally noteworthy absences from the American judicial agenda in its entirety, even though they are generally not absences from the American governmental or policy agenda.<sup>9</sup> For in a year in which the war in Iraq,

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belief that such activism is frequent and pervasive. Yet without knowing just what the full array of governmental decisions looks like, it is difficult to estimate either frequency or pervasiveness.

<sup>8</sup> The point is best made by the iconic *New Yorker* cartoon depicting the world as seen by the stereotypical Manhattanite, a world in which the geographically proximate looms large and most of what lies beyond the Hudson fades into invisibility. Saul Steinberg, *View of the World from 9th Avenue*, NEW YORKER, Mar. 29, 1976, at cover.

<sup>9</sup> Consequently, my focus is not the same as that of the well-known series of articles in which Fowler Harper and a succession of Yale law students examined the Supreme Court's certiorari denials for important cases the Court refused to hear. Fowler V. Harper & Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term — An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950); Fowler V. Harper & Edwin D. Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951); Fowler V. Harper & George C. Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953); Fowler V. Harper & Arnold Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427 (1954). Harper, like others more recently, studied the consequences of certiorari case selection, a process in which the full field — the denominator, if you will — consists of decisions of the United States Courts of Appeals and the highest state courts. See, e.g., H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389 (2004); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error*

terrorism, escalating fuel prices, healthcare, immigration reform, Social Security, the nuclear capability of Iran and North Korea, Hurricane Katrina, the estate tax, corporate scandals, CEO salaries, bird flu, and the minimum wage<sup>10</sup> appeared to dominate the nation's public agenda and the workload of the nation's policymakers, only with respect to terrorism and related issues of homeland security — and then only as to one aspect of those — was there much overlap between the agenda of the nation's governance and the agenda of the Supreme Court. And even more striking is that, with few exceptions — one of which is the New Deal era but one of which is *not* the era of Warren Court activism — things have rarely been otherwise.

The Court serves no less an important function because it operates at a distance from the center of gravity of the nation's policy portfolio, a distance that is of course something of the Court's own (long-term) making. But that there exists such distance challenges the suggestion that the country has ever been in much jeopardy of government by the Supreme Court. Moreover, the Court's presence behind the scenes rather than on center stage presents a problem for those who wring their hands over the noninvolvement of the public or nonjudicial governmental institutions in constitutional decisionmaking. For in reality neither constitutional decisionmaking nor Supreme Court adjudication occupies a substantial portion of the nation's policy agenda or the public's interest,<sup>11</sup> as the Court's work in the 2005 Term makes stunningly clear. To repeat, this gap between the Court's agenda and the nation's does not make the Court's work less consequential. But it does cast new light on traditional debates about judicial review, judicial supremacy, and judicial activism, many of which are premised on an empirically mistaken view of the public's interest in the matters with which the judiciary deals.

Understanding the small proportion of the nation's agenda that comes directly before the Supreme Court in particular and the courts in general is important for reevaluating both academic and public debates about the power of the judiciary. Indeed, prompting that reevaluation is my first goal in this Foreword. A second goal, however, is arguably larger. Much of existing constitutional commentary operates under a rather grandiose conception of what the Constitution and constitutional law do. Robert Post describes constitutional law as “an

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*Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271 (2006). In this Foreword, however, I have different fish to fry. My principal concern is not with the decided cases the Supreme Court chooses not to hear, but with the topics and disputes so far removed from the judiciary that they do not produce decided cases at any level.

<sup>10</sup> An obvious omission from the list is the fighting in Israel and Lebanon, but the inception of those hostilities postdated the conclusion of the Term.

<sup>11</sup> Which is most emphatically not the same as the public interest.

expression of the deepest beliefs and convictions of the American nation.”<sup>12</sup> Bruce Ackerman tells us that constitutional discourse and constitutional politics represent “the language and process within which our political identities [can] be confronted, debated, and defined.”<sup>13</sup> Erwin Chemerinsky sees constitutional law as “a matter of defining and protecting society’s most cherished values.”<sup>14</sup> And for Akhil Amar, the Constitution can “teach us a great deal about who We are as a People, where We have been, and where We might choose to go.”<sup>15</sup> Yet although there is a vast difference between the Constitution and what the Supreme Court does, and although trumpeting the importance of the Constitution is not logically inconsistent with believing that other dimensions of American public life are also important, such pronouncements about the significance of the Constitution appear to rely heavily on a parallel view about the pervasive importance of Supreme Court decisions and the scope of the Court’s role in making public policy. In the debates on the confirmation of Chief Justice Roberts, for example, Senators from both parties worried that “courts are usurping the role of legislators,” acting as “superlegislatures,” and exercising judicial power with a “broad sweep.”<sup>16</sup> Jack Balkin notes that “judges engage in a wide variety of policy making” and “formulate significant amounts of policy.”<sup>17</sup> Others complain that the courts are making “so many important decisions”<sup>18</sup> and that judicial activism “radically diminish[es]” the ability of Americans “to govern themselves.”<sup>19</sup> Senator Biden has observed that the “Supreme Court has been at the crux of the major changes that have swept our society over the past 200 years,”<sup>20</sup> and the distinguished political commentator

<sup>12</sup> Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 36 (2003).

<sup>13</sup> Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1072 (1984).

<sup>14</sup> Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 47 (1989).

<sup>15</sup> Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000).

<sup>16</sup> Gail Russell Chaddock, *Senators Wary of Court Reach*, CHRISTIAN SCI. MONITOR, Sept. 14, 2005, at 1, available at <http://www.csmonitor.com/2005/0914/p01s04-uspo.html>.

<sup>17</sup> Jack M. Balkin, *The Passionate Intensity of the Confirmation Process*, JURIST, Apr. 15, 2004, <http://jurist.law.pitt.edu/forum/symposium-jc/balkin.php>.

<sup>18</sup> Calabresi, *supra* note 5, at 1094.

<sup>19</sup> Edward Whalen, *Supreme Confusion*, NAT’L REV. ONLINE, Apr. 13, 2005, <http://www.nationalreview.com/comment/whelan200504130752.asp> (also arguing that “[o]ver the last several decades the courts [and their ‘liberal activist’ supporters] have engaged in a massive judicial power grab . . . to entrench forever their own policy preferences”).

<sup>20</sup> *Nomination of Justice William Hubbs Rehnquist: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 3–4 (1986) (statement of Sen. Joseph R. Biden, Jr.), available at <http://a255.gakamaitech.net/7/255/2422/26sep20051215/www.gpoaccess.gov/congress/senate/judiciary/sh99-1067/3-7.pdf>.

David Broder has written that Justice O'Connor "can and does set more policy than President Bush or all 100 members of the Senate, 435 representatives or 50 governors."<sup>21</sup> Among academics, policymakers, and public commentators, across a broad range of the political spectrum, and for critics as well as celebrants, it appears widely accepted that the Constitution, constitutional law, and the Supreme Court not only occupy a major role in American policymaking, but also in fact make a great deal of American policy.

Perhaps not. Perhaps the Court occupies a smaller role in the nation's governance than is so often assumed. And perhaps what both the Court and the Constitution do is less important *to the public* (which is not the same as less important overall) than are a host of first-order policy decisions whose framing often rests on constitutional structure but which are quite removed from the questions with which the Constitution and the Court are concerned. If so, there is a need to rethink not simply the narrower debates about judicial review, but also the broader understandings of where the Supreme Court and its work are situated in the governance of the nation and in the consciousness of its citizens.

My first aim is thus to look at the Court's agenda in the context of the nation's as a way of refocusing longstanding debates about judicial review, judicial authority, and judicial power. My second aim is to use the same comparison between the Court's agenda and the country's to foster a more accurate understanding of the place of the Court (and indirectly of the judiciary in general) within the larger structure of governance. My last aim emerges from the first two. For when we look not to intrinsic importance but to the narrower question of what is important to the public, the contrast between the Supreme Court's agenda and the people's shows that the Court (as with many other organs of governance, especially the vast majority of administrative agencies) operates overwhelmingly in areas of low public salience, either because the Court is involved with rights-based side constraints on central policy decisions made by others, or because the Court deals with those second-order structural, procedural, and jurisdictional dimensions of policymaking which may have a substantial impact on the content of policy but which command little attention from the people or their representatives. Yet although there is an intuitive and verifiable distinction between high- and low-salience issues, the existing literature on the Court largely neglects the difference between judicial

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<sup>21</sup> David S. Broder, *O'Connor's Special Role*, WASH. POST, Oct. 1, 2003, at A23 (also observing that "[n]o one else in America has more authority in more areas of domestic policy" than Justice O'Connor).



involvement in low-salience issues — as is typically the case and especially so for the 2005 Term — and judicial involvement in issues the public and its representatives take to be most important. Because the latter is so rare, and has been since prior to the Warren Court, the erroneous assumption that the Court is deeply involved in what the people believe to be their most important problems has not just distorted the debates about judicial review and judicial supremacy. It has also, and more importantly, led to large-scale misunderstanding of the Court's role in the nation's scheme of government. So although distinguishing between high- and low-salience issues is important for understanding debates about judicial review and assumptions about the Court's significance, its real value is in potentially explaining much about the relationship among the judiciary, the public, and the policy-making process. My final goal in this Foreword is therefore to go beyond the questions of judicial review and the role of the Court in order to highlight the explanatory power of the often neglected concept of salience itself.

## I. THE NATION'S AGENDA

### A. *Definitional Preliminaries*

Does the public have an agenda? It is easy to be cynical about the idea of a public agenda, understood as the problems and issues people believe their government ought to address.<sup>22</sup> After all, what appears to be the public's agenda is so fluid,<sup>23</sup> so sensitive to unanticipated events,<sup>24</sup> so influenced by the ephemeral interests of the media,<sup>25</sup> so

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<sup>22</sup> For me, the word "agenda" is not pejorative, as it is when people talk about "having an agenda" in order to accuse others of subjugating important values or responsibilities to a suspicious, unspoken motivation. In this Foreword, however, as in the social science literature on which I draw, an agenda is simply an array of existing or proposed tasks.

<sup>23</sup> See FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); JAMES A. STIMSON, *PUBLIC OPINION IN AMERICA* (2d ed. 1999); Edward G. Carmines & James A. Stimson, *On the Structure and Sequence of Issue Evolution*, 80 AM. POL. SCI. REV. 901 (1986).

<sup>24</sup> See BAUMGARTNER & JONES, *supra* note 23, at 18–24 (describing "punctuations" in politics, policy, and public opinion); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984) (stressing the volatility of policy opportunities).

<sup>25</sup> See SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* (1987); MAXWELL MCCOMBS, *SETTING THE AGENDA: THE MASS MEDIA AND PUBLIC OPINION* (2004); JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* (1992); Frank R. Baumgartner & Bryan D. Jones, *Attention, Boundary Effects, and Large-Scale Policy Change in Air Transportation Policy*, in *THE POLITICS OF PROBLEM DEFINITION* 50, 56–65 (David A. Rochefort & Roger W. Cobb eds., 1994); Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OPINION Q. 176 (1972). The conventional wisdom is that the press "may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think about." BERNARD C. COHEN, *THE PRESS AND FOREIGN POLICY* 13 (1963).

dependent on symbols and images,<sup>26</sup> so subject to manipulation by political professionals,<sup>27</sup> and so difficult to measure<sup>28</sup> that the idea of a public agenda or even of public opinion seems fatally elusive.<sup>29</sup>

Such cynicism, however, goes rather too far. The public agenda is indeed both contingent and transitory, but it is hard to deny that at a given moment some things are on the public's agenda and others are not. As the Supreme Court concluded its 2005 Term, for example, immigration, looming inflation, the war in Iraq, and missile testing in North Korea seemed plainly on the public's agenda, whereas affirmative action, reform of the Electoral College, teen pregnancy, and relations with Taiwan seemed equally plainly off. Yet if it is true for a snapshot of one moment that some things are on the public agenda and others not, then there is no reason to believe that some of these snapshots might not be sufficiently consistent over weeks or months or years to allow us to identify, admittedly imprecisely, the topics the public finds most pressing and important.

Even after we accept that there is a public agenda, our preliminary work is not done. First of all, there is a difference between what the public is interested in (or wants done) and what is in fact important *for* the public. For now I am concerned simply with what the public wants its government to do, even if the public might be better off wanting something else.

In addition, what the public wants is not always what it gets, and so there is also a conceptual difference between the public agenda and the policy agenda — what government actually does. Yet although the gap between the public agenda and the policy agenda grows as policymakers respond to, for example, their own consciences or the intense preferences of small groups, current research in fact supports the existence — no surprise in a democracy — of a significant correlation between what the public wants its government to attend to and what government actually does.<sup>30</sup> Thus, the public's and the policy agendas

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<sup>26</sup> See PAUL M. SNIDERMAN, RICHARD A. BRODY & PHILIP E. TETLOCK, *REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY* (1991) (examining importance of images in shaping public opinion).

<sup>27</sup> See JAMES W. DEARING & EVERETT M. ROGERS, *AGENDA-SETTING* (1996); LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* (2000); WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986).

<sup>28</sup> See GEORGE F. BISHOP, *THE ILLUSION OF PUBLIC OPINION* (2005) (suggesting that measurement problems may be fatal to a usable conception of public opinion); Richard G. Niemi & Larry M. Bartels, *New Measures of Issue Salience: An Evaluation*, 47 J. POL. 1212 (1985) (explaining difficulties with public opinion measurement).

<sup>29</sup> See Robert Nisbet, *Public Opinion Versus Popular Opinion*, 41 PUB. INT. 166 (1975) (distinguishing consensus-based public opinion from aggregation of individual opinions).

<sup>30</sup> BRYAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* (2005). Jones and Baumgartner base their initial

— although conceptually distinct and hardly congruent — turn out to be sufficiently correlated for us to combine them into a single notion of the nation’s governance agenda. Accordingly, it is the governance agenda defined as a blend of public preferences and government activity to which we can initially compare the Supreme Court’s agenda.

### B. *The Data*

What, then, *is* on the nation’s governance agenda? What do Americans care about now, and what have they cared about in recent years? Issues like the war in Iraq, control of immigration, missiles in North Korea, skyrocketing gas prices, terrorism, inflation, the estate tax, disaster relief, and the crisis in healthcare come immediately to mind, as do more court-focused issues such as abortion, same-sex marriage, and nominees to the Supreme Court. But there is no reason to rely solely on our hunches when we have data available.<sup>31</sup>

Initially we can look at press coverage, in part because what the press thinks important turns out both to reflect and to influence significantly what the public thinks important.<sup>32</sup> And one measure of the press’s determinations of importance comes from what it decides to put on the front page, where the headlines in the *New York Times* for the one-year period starting June 16, 2005, and ending June 15, 2006,

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measure of the policy agenda on the number of statutes passed, congressional hearings held, executive orders issued, expenditures authorized, and discussions included in *Congressional Quarterly*. At Policy Agendas Project, <http://www.policyagendas.org> (last visited Oct. 15, 2006), which contains the data for all their determinants, they include mentions in State of the Union addresses. Their conclusion that the greatest determinant of the policy agenda is the public agenda is consistent with that reached in Clem Brooks & Jeff Manza, *Social Policy Responsiveness in Developed Democracies*, 71 AM. SOC. REV. 474 (2006); and Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107 (2005), although Jacobs and Page temper their conclusion that foreign policy attention follows public opinion with the caveat that public opinion in this area is weighted to the opinion of business elites. *Id.* at 117–20.

<sup>31</sup> Many in the legal academy would take issue with this statement, but that is a subject for another day.

<sup>32</sup> There is a vigorous debate about the causes of public opinion formation and change. Compare, e.g., BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES* (1992) (arguing that public opinion is a rational response to real problems), with Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in *IDEOLOGY AND DISCONTENT* 206 (David E. Apter ed., 1964) (stressing that most people have neither knowledge about, nor opinions on, many policy issues). See also Christopher H. Achen, *Mass Political Attitudes and the Survey Response*, 69 AM. POL. SCI. REV. 1218 (1975) (challenging Converse’s conclusions); and the sources cited *supra* notes 23–29. Nevertheless, it is widely accepted that media attention is a major driver of what the public cares about, even if not of the views the public holds on these issues. See *supra* note 25. See also JAMES A. STIMSON, *TIDES OF CONSENT: HOW PUBLIC OPINION SHAPES AMERICAN POLITICS* 17–19 (2004) (noting that “much public opinion is media-influenced”); Paul M. Kellstedt, *Media Framing and the Dynamics of Racial Policy Preferences*, 44 AM. J. POL. SCI. 245 (2000) (tracing effect of media framing on public opinion about race-related policies).

break down as follows<sup>33</sup>:

TABLE 1

Iraq	13.2%
Health/Healthcare	7.0%
Terrorism	5.8%
Hurricane Katrina/Aftermath	5.7%
Elections/Politics	5.5%
Education	3.9%
CIA/Spying/Surveillance	3.7%
Corporate/Business	3.1%
Crime	3.1%
Fuel Prices	2.3%
Government Corruption	2.0%
Immigration	1.7%
Darfur	1.5%

The items on this list are roughly as expected, but the surprise is in what is missing. In comparison with the items above, there were only twenty-six headlined stories over the one-year period on religion (1.2%), sixteen on race (0.8%), eleven on sexual orientation — including same-sex marriage — (0.5%), eight on abortion (0.4%), and six on gender (0.3%).<sup>34</sup>

These figures are especially revealing because the surprisingly under-covered items are ones we might have expected to be of greater interest to *New York Times* readers than to the public at large. Still, few would accuse the *New York Times* of having its finger on the pulse of ordinary folk. Yet even turning to *USA Today*, we see that although it concentrates more on the so-called kitchen table issues of personal concern to its typical reader, it nevertheless shows a focus during

<sup>33</sup> These data are based on a visual inspection and hand count from full-text microfilm at the Jones Media Center, Dartmouth College Library [hereinafter N.Y. TIMES Hand Count]. (Original notes available on request from author.) A word-based NEXIS search (“abortion,” “immigration,” “Iraq,” etc.) of the daily News Summary on page A2 yielded results at times different from the page one coding, but not significantly so, thus giving some confidence that the topics addressed on the front page do not differ wildly from those throughout the newspaper. Also reassuring are the results from hand counts of the coding of all *New York Times* articles for 2002 (the most recent year for which such coding is available in the dataset, and explained in JONES & BAUMGARTNER, *supra* note 30, at 291–93), a year in which the *Times* devoted 21.1% of its news and opinion attention to banking, finance, and domestic commerce (including domestic macroeconomics); 19.1% to international affairs, defense, and foreign trade; 13.6% to the social policy issues of health, employment, and education; 9.5% to government operations other than the courts; 7.4% to the peculiar combination of law, courts, crime, and family issues; and 1.9% to civil rights and minority issues.

<sup>34</sup> N.Y. TIMES Hand Count, *supra* note 33.

roughly the same time period that is not all that different from that of the *New York Times*<sup>35</sup>:

TABLE 2

Iraq	392
Social Security/Retirement/Pensions	179
Terrorism	169
Fuel Prices	159
Taxes	118
Health and Healthcare	110
Hurricane Katrina and Aftermath	92
Inflation/Economic Conditions	89
Immigration	82
Religion	51
Iran	49
Environment	39
Abortion	31
Race	24
Homosexuality/Same-Sex Marriage	20

These results are also largely consistent with the *Los Angeles Times* index for January 1, 2005, through March 31, 2006, which includes 844 stories on Iraq, 511 on Hurricane Katrina, 204 on Social Security and pensions, 158 on healthcare, 108 on Iran, 94 on fuel prices, 91 on homosexuality and same-sex marriage, 66 on race and race relations, and 48 on abortion.<sup>36</sup> Although mentions of homosexuality and same-sex marriage rate slightly higher relative to, say, Iraq and fuel prices than in *USA Today*, once again issues of race, sexual orientation, and abortion turn out to generate an unexpectedly low amount of attention.

The media results are revealing, but better (and longer-term) data are available from public opinion polls. So with the newspaper coverage in mind we can examine the polling data, in particular the answers to an open-ended multiple-response question about what Americans think are the most important issues facing the country and its govern-

<sup>35</sup> These are absolute numbers from a hand count of indexed stories for selected headings from USA TODAY INDEX 2005 (2006), supplemented by USA TODAY INDEX, JANUARY–MARCH 2006 (2006); USA TODAY INDEX, APRIL 2006 (2006); and USA TODAY INDEX, MAY 2006 (2006). (Original notes available on request from author.) Unlike the *New York Times* data, these reflect the content of the entire newspaper rather than only the front page. Because the full newspaper indexes contain tens of thousands of items and frequent multiple listings, it is impossible to calculate percentages. The absolute numbers are therefore most valuable if understood as measures of relative attention. So although we do not know, for example, how much of all of *USA Today* was devoted to Iraq for the relevant time period, the index allows us to conclude that Iraq received considerably more coverage than Social Security and fuel prices, and that these issues, among others, received vastly more coverage than abortion, race, and the environment.

<sup>36</sup> L.A. TIMES INDEX, JANUARY–MARCH 2006 (2006); L.A. TIMES INDEX 2005 (2006) (hand count of selected headings; original notes available on request from author).

ment.<sup>37</sup> Looking at representative Harris Poll data for the past year, we find the following results<sup>38</sup>:

TABLE 3

June 2006	February 2006	November 2005	August 2005
The War 27%	The War 27%	The War 34%	The War 41%
Immigration 20%	Healthcare 20%	The Economy 13%	The Economy 19%
The Economy 14%	The Economy 15%	Iraq 13%	Healthcare 11%
Healthcare 12%	Education 8%	Healthcare 11%	Gas/Oil Prices 10%
Iraq 8%	Social Security 7%	Education 10%	Social Security 10%
Education 7%	Taxes 6%	Taxes 9%	Education 8%

With the exception of the recent rise in concern about immigration, both the importance the public attributes to the war in Iraq, the economy, fuel prices, healthcare, education, taxes, and Social Security, and

<sup>37</sup> It is only a slight exaggeration to note that virtually every word in the last clause of the sentence in the text could justify a long methodological footnote referencing a substantial literature. To make a very long story very short, however, the initial point is the obvious one that asking people whether they are, say, pro-choice or pro-life, or for or against same-sex marriage, tells us nothing about whether they find the issue important. When we turn to questions designed to focus on importance, however, two key methodological issues influence the results of surveys about what the public thinks important and consequently influence the choice of surveys to examine. The first relates to the difference between prompting and open-ended questions. When given an issue and asked how important it is, survey respondents have been found to be heavily influenced by the suggestive and focused nature of the question, resulting in data that make many issues look relatively more important than they actually are. As a result, it has become widely accepted that a more accurate indication of what people think important comes from asking open-ended questions that allow respondents to determine for themselves what they believe to be important in a non-suggestive context. See, e.g., MICHAEL L. YOUNG, *DICTIONARY OF POLLING* 189–90 (1992); Jean M. Converse, *Strong Arguments and Weak Evidence: The Open/Closed Question Controversy of the 1940s*, 48 *PUB. OPINION Q.* 267 (1984); John G. Geer, *Do Open-ended Questions Measure “Salient” Issues?*, 55 *PUB. OPINION Q.* 360 (1991); Howard Schuman & Stanley Presser, *The Open and Closed Question*, 44 *AM. SOC. REV.* 692 (1979). The second methodological issue seems narrower yet is even more important. If the survey question asks only about the single most important issue — as with the Gallup poll that has since 1935 asked respondents, “What do you think is the most important problem facing the country today?” — the aggregate responses provide strong evidence that the public considers the top two responses very important, although less reliable information beyond that. But if instead respondents are asked to identify the *two* most important issues for government to address, as is the case with the Harris poll conducted bimonthly since 1993 (and monthly starting in 2006), the resulting ranking of what Americans think most important is robust down to the top six. So although different polls produce results largely consistent with each other in identifying the top two issues, the Harris and other multiple-response polls allow us to proceed further down the rankings of what Americans think important with greater confidence. See Stuart N. Soroka, *Number of Responses and the Most Important Problem* (Nuffield Coll. Politics, Working Paper No. 2002-W34, 2002), available at <http://www.nuff.ox.ac.uk/Politics/papers/2002/w34/Soroka%20MIP%202002.pdf>.

<sup>38</sup> HARRIS INTERACTIVE, *THE HARRIS POLL* #48, tbl. 17, available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=675](http://www.harrisinteractive.com/harris_poll/index.asp?PID=675); HARRIS INTERACTIVE, *THE HARRIS POLL* #83, tbl. 12, available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=613](http://www.harrisinteractive.com/harris_poll/index.asp?PID=613).

the priority the public gives this list of issues over all others, remain moderately consistent. Indeed, if we look at a broader sweep of time, we see the expected spikes for concerns about terrorism after September 11 and for worries about jobs during times of high unemployment, but otherwise the picture stays pretty much the same. Thus<sup>39</sup>:

TABLE 4

February 2005		February 2004		December 2002		December 2001	
Social Security	37%	The Economy	31%	The Economy	34%	The Economy	32%
The War	30%	Healthcare	16%	War	18%	Terrorism	22%
Healthcare	14%	Employment/Jobs	16%	Terrorism	17%	Education	12%
The Economy	11%	The War	13%	Iraq	11%	War	12%
Iraq	11%	Education	11%	Education	11%	Safety/Security	8%
Federal Budget	7%	Safety/Security	8%	Healthcare	10%	Employment/Jobs	7%

Focusing on late 2001 to 2006 prompts the objection that issues of war and terrorism are agenda distorting, but we can avoid this problem by looking prior to September 11 and the wars in Iraq and Afghanistan, examining a period in which war, foreign policy, and national security issues were far less salient.<sup>40</sup> Such an examination, however, indicates that even in times of relative peace, the overall picture of what concerns the public is still concentrated on the same domestic policy issues<sup>41</sup>:

<sup>39</sup> THE HARRIS POLL #83, *supra* note 38.

<sup>40</sup> “Salience” is a slippery and mysterious concept, but one of its key features, and the one distinguishing it from both “knowledge” and “importance,” is prominence. See Shelley E. Taylor & Susan T. Fiske, *Salience, Attention, and Attribution: Top of the Head Phenomena*, 11 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 249 (1978). Neither knowledge nor importance alone is sufficient, for although I know about the Holocaust, and although its non-recurrence is vastly important to me, it is not something I think about very often. But even prominence — what people actually think about with some frequency — is insufficient to capture the idea of salience. Salience also has a dimension of *weight*, for not everything that is in the foreground of my attention — the fortunes of the New York Yankees, for example — is genuinely important to me. As I use the word “salience,” therefore, and as it is commonly used in the literature on public opinion, see Roy L. Behr & Shanto Iyengar, *Television News, Real-World Cues, and Changes in the Public Agenda*, 49 PUB. OPINION Q. 38 (1985), this collective sense of weighty prominence — what simultaneously occupies people’s attention and is of significant importance — is the primary component and distinguishes salience from mere importance, mere knowledge, or even mere prominence.

<sup>41</sup> THE HARRIS POLL #83, *supra* note 38.

TABLE 5

August 2000		May 1997		February 1994	
Education	25%	Federal Budget	20%	Healthcare	45%
Social Security	16%	Crime/Violence	19%	Crime/Violence	36%
Healthcare	15%	Education	15%	Employment/Jobs	14%
Taxes	13%	Taxes	14%	The Economy	12%
Crime/Violence	10%	Welfare	14%	Federal Budget	8%
Medicare	6%	Healthcare	10%	Poverty Programs	8%
Abortion	6%	The Economy	8%	Education	6%

Although any measure of public opinion will be sensitive to the instruments and methodology employed, these results accord with those obtained using other surveys of the public's concerns. The Harris data are consistent with the Gallup Most Important Problem data, which are less reliable for determining lengthy rankings of salience<sup>42</sup> but do allow us to determine whether members of various single-interest groups see their particular issue — gun control, for example, or pornography, abortion, or same-sex marriage — as being of primary importance. The Gallup Organization codes responses differently from Harris, but the big picture remains the same. Consider the following results from the Gallup June 2006 poll<sup>43</sup>:

TABLE 6

War/Iraq	27%
Immigration	18%
Fuel Prices	11%
Economy in General	9%
Dissatisfaction with Government	8%
Healthcare	7%
Ethics/Values/Religion	7%

<sup>42</sup> See *supra* note 37; see also Christopher Wlezien, *On the Salience of Political Issues: The Problem with 'Most Important Problem,'* 24 ELECTORAL STUD. 555 (2005) (doubting whether asking people about *problems* can accurately predict which *issues* they think are important). Still, I do not want to underestimate the reliability of even the Gallup Most Important Problem data, which have "served as *the* measure of issue salience in well over 100 studies" of agenda setting and public opinion. Soroka, *supra* note 37, at 1.

<sup>43</sup> THE GALLUP ORG., MOST IMPORTANT PROBLEM POLL (June 1–4, 2006), available at <http://www.galluppoll.com/content/Default.aspx?ci=23254>. At the time of this writing, the July results had been published for the Gallup but not the Harris poll. Comparing the two June results is better for demonstrating consistency, but it is worth noting that the July Gallup results show that interest in immigration is already waning, with the war in Iraq still first at 25% and immigration still second but down from 18% to 10%. THE GALLUP ORG., MOST IMPORTANT PROBLEM POLL (July 6–9, 2006), <http://www.galluppoll.com/content/?ci=1675> (last visited Oct. 15, 2006).



In addition to being substantially consistent with each other, the Harris and Gallup data are consonant with other available polling data.<sup>44</sup> Thus, across multiple surveys, multiple dimensions of multiple newspapers, multiple measures of policy activity, and our own general sense when we look at the policy terrain without the impediment of Court-colored glasses, we see a consistent pattern. The various measures of the public's interest produce slightly divergent results for reasons of coding and methodology, but there is enough consistency to give us confidence in the big picture that all the measures indicate. And although the data are more reliable at higher rankings of importance,<sup>45</sup> the extended rankings can still tell us something about where a larger number of issues rank among the priorities of Americans. Consider these longer Harris listings<sup>46</sup>:

TABLE 7

June 2006	December 2002	January 1998	February 1995
The War 27%	The Economy 34%	Taxes 16%	Healthcare 25%
Immigration 20%	The War 18%	Education 14%	Federal Budget 22%
The Economy 14%	Terrorism 17%	Crime/Violence 13%	Crime/Violence 21%
Healthcare 12%	Education 11%	Federal Budget 12%	Taxes 12%
Gas/Oil Prices 8%	Healthcare 10%	Healthcare 11%	Education 10%
Education 7%	Safety/Security 9%	The Economy 9%	Employment/Jobs 10%
Employment/Jobs 7%	Employment/Jobs 8%	Welfare 8%	Poverty Programs 10%
Social Security 5%	Taxes 5%	Social Security 6%	The Economy 7%
Federal Budget 5%	Foreign Policy 4%	Medicare 5%	Immigration 2%
Taxes 4%	Environment 3%	Foreign Policy 5%	Foreign Policy 2%
Terrorism 4%	Social Security 2%	Employment/Jobs 3%	Environment 1%
Poverty Programs 4%	Poverty Programs 2%	Poverty Programs 2%	Military/Defense 1%
Energy 4%	Crime/Violence 2%	Environment 2%	Social Security <1%
Military/Defense 4%	Federal Budget 1%	Military/Defense 2%	Energy <1%
Environment 3%	Medicare 1%	Immigration 1%	Medicare <1%

<sup>44</sup> See, e.g., CBS NEWS, MOST IMPORTANT PROBLEM POLL (May 16–17, 2006), available at [http://www.cbsnews.com/htdocs/CBSNews\\_polls/mayb-all.pdf](http://www.cbsnews.com/htdocs/CBSNews_polls/mayb-all.pdf) (finding the public most concerned with Iraq at 28%, followed by the economy at 15%, immigration at 12%, gas prices at 6%, terrorism at 5%, healthcare at 4%, defense at 3%, and the performance of the President at 3%); Polling Report.com, Problems and Priorities, <http://www.pollingreport.com/prioriti.htm> (last visited Oct. 15, 2006) (reporting a Fox News/Opinion Dynamics Poll from September 9–10, 2003, showing the greatest concern for the economy/jobs/unemployment at 38%, followed by terrorism excluding Iraq at 14%, defense/military/homeland security at 8%, education at 7%, healthcare and prescription drug prices at 7%, war/Iraq at 6%, general domestic issues at 3%, balanced budget/deficit at 3%, taxes at 2%, and Social Security/Medicare at 2%).

<sup>45</sup> See *supra* note 37.

<sup>46</sup> THE HARRIS POLL #48, *supra* note 38.

### C. Some Surprising Omissions

These data, representative of longer trends, should be sobering for American constitutionalists.<sup>47</sup> Consider the interrelated issues of same-sex marriage and homosexual rights, justifiably subjects of great importance not only for those concerned with their substance but also for those interested in their larger implications for the courts, the Constitution, and individual rights.<sup>48</sup> Yet whereas the salience of these issues for constitutionalists and activists (on both sides) is apparent, the salience for the public is more doubtful, with the issues being mentioned by only 2% of respondents and ranking twenty-fourth in the Harris poll of June 2006.<sup>49</sup> At no other time, not even after the Vermont Supreme Court's decision in *Baker v. State*,<sup>50</sup> not even after the Massachusetts Supreme Judicial Court's decisions recognizing same-sex marriage in *Goodridge v. Department of Public Health*<sup>51</sup> and *Opinions of the Justices to the Senate*,<sup>52</sup> and not even during and after the congressional debates on the Defense of Marriage Act,<sup>53</sup> did these issues ever reach the 1% mark.<sup>54</sup>

Similar results appear for many other topics dominating the legal literature. The role of religion is mentioned by 1% of respondents in

<sup>47</sup> Note that I have not selected months supporting my conclusions while ignoring those that do not, a tactic hardly unknown in legal scholarship. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 17, 114 (2002) (identifying flaws in empirical legal scholarship although still encouraging law professors to do more of it).

<sup>48</sup> See, e.g., Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005) (analyzing recent same-sex marriage cases); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361 (2005) (relating debates about same-sex marriage to larger issues of marriage and sexual violence); Patrick Egan, Nathaniel Persily & Kevin Wallsten, *Gay Marriage, Public Opinion and the Courts* (May 1, 2006) (unpublished manuscript, on file with the Harvard Law School Library) (tracking degree of backlash to same-sex marriage decisions).

<sup>49</sup> THE HARRIS POLL #48, *supra* note 38.

<sup>50</sup> 744 A.2d 864, 886 (Vt. 1999) (holding Vermont's failure to recognize civil unions unconstitutional under the state constitution); see also *Brady v. Dean*, 790 A.2d 428, 435 (Vt. 2001) (upholding statutory delineation of civil unions enacted in the aftermath of *Baker*).

<sup>51</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>52</sup> 802 N.E.2d 565 (Mass. 2004).

<sup>53</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)).

<sup>54</sup> THE HARRIS POLL #48, *supra* note 38, shows same-sex marriage and related issues at less than 1% for April 1996, less than 1% for February 1999, and less than 1% for December 2001, placing the issue below not only the topics discussed above, but also homelessness (3% for April 1996, 3% for February 1999, and 2% for December 2001) and the environment (1%, 3%, and 1%, respectively). The Harris data are consistent with a growing academic consensus that the issue of same-sex marriage, views of the pundits notwithstanding, did *not* influence the 2004 presidential election, even in Ohio. See SIMON JACKMAN, SAME-SEX MARRIAGE BALLOT INITIATIVES AND CONSERVATIVE MOBILIZATION IN THE 2004 ELECTION (2004), available at <http://jackman.stanford.edu/papers/RISSPresentation.pdf>; D. Sunshine Hillygus & Todd G. Shields, *Moral Issues and Voter Decision Making in the 2004 Presidential Election*, 38 PS: POL. SCI. & POL. 201, 207 (2005); Egan, Persily & Wallsten, *supra* note 48, at 2 n.2.

the June 2006 Harris data, and the same percentage mentions civil and human rights, the role of law and the judiciary, and, perhaps most surprisingly, abortion.<sup>55</sup> Viewed over a longer time span, the abortion figure for June 2006 is unrepresentatively low. But the salience of abortion is never as great as American constitutionalists and political pundits seem to suppose. The percentage of respondents mentioning abortion rose to 6% in August 2000 (putting it sixth on the list), and occasionally it has risen to 4%, but ordinarily the figure is between 1% and 3% — making it fifteenth or lower in the public's rankings of most important issues.<sup>56</sup> Indeed, even after the nominations of John Roberts, Harriet Miers, and Samuel Alito to the Supreme Court, when abortion seemed to be the issue at the heart of public commentary, only 1% or 2% of Harris respondents cited abortion.<sup>57</sup> And lest we overestimate the salience of the Supreme Court itself, it is worth noting that during this period, when the nominations were the daily pre-occupation of television news shows and newspaper editorials, judicial and legal issues never rose above 2% in the Harris data and were usually at or below 1%.<sup>58</sup>

If these figures and their implications seem counterintuitive, it is partly a function of the difference between policy salience and campaign salience. Some issues of normally low salience — abortion and same-sex marriage, for example — are “framed” and “primed” by political professionals to appeal to marginal voters in certain contested elections. As a consequence of this difference between voting inten-

<sup>55</sup> THE HARRIS POLL #48, *supra* note 38.

<sup>56</sup> *Id.*; see also STIMSON, *supra* note 32, at 16 (“Most Americans are tuned out of [the abortion] debate. Even though they care about abortion, they don’t care enough to get involved in the back-and-forth over changes at the margin.”). Eight months after the decision in *Roe v. Wade*, 410 U.S. 113 (1973), the Gallup Most Important Problem poll, one of the few Gallup surveys to ask respondents for a second most important problem as well as a first, produced the high cost of living as the clear “winner” with 88% of respondents mentioning it, followed by trust in government with 17%, corruption/Watergate with 15%, foreign policy and international problems with 14%, crime with 13%, drugs with 11%, pollution with 8%, energy with 8%, and race with 4%, whereas abortion simply did not register, THE GALLUP ORG., THE GALLUP POLL #877 (Sept. 4, 1973), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0877>, nor did it in the earlier February 13 and May 1 polls, nor in the later January 2, 1974, poll, THE GALLUP ORG., THE GALLUP POLL #886 (Jan. 2, 1974), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0886>; THE GALLUP ORG., THE GALLUP POLL #870 (May 1, 1973), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0870>; THE GALLUP ORG., THE GALLUP POLL #864 (Feb. 13, 1973), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0864>. To be clear, then, at no point in the year following *Roe* did any appreciable number of Americans think that abortion was either the most or second most important problem facing the country, despite the fact that Americans at the time were approximately evenly divided between those who, in contemporary terminology, thought of themselves as pro-choice and as pro-life. See *Public Evenly Divided on Issue of Abortion During Early Stage of Pregnancy*, GALLUP OPINION INDEX, Feb. 1973, at 21.

<sup>57</sup> THE HARRIS POLL #83, *supra* note 38.

<sup>58</sup> *Id.*

tions and background opinion on issues, looking only at campaign salience tends to overstate residual policy salience.<sup>59</sup> So although various cultural issues genuinely matter in some contested elections, focusing on what counts to marginal voters in a few contested elections or close electoral districts may provide a flawed indicator of what the public consistently thinks.

In addition to the distorting effect of campaign salience, the tendency to confuse importance with relative importance may also account for the seemingly surprising data.<sup>60</sup> But once we understand the error, and remind ourselves that it was the political operative James Carville — and not a constitutionalist or a judge or even a lawyer — who said, “It’s the economy, stupid,”<sup>61</sup> we see that the survey results need not carry the weight of the principal point. Even without the polls and the analysis of media content and policy activity, we know that Iraq, fuel prices, immigration, inflation, employment, Hurricane Katrina, the general state of the economy, healthcare, and the nuclear capabilities of Iran and North Korea, among others, have recently been *more* salient than the somewhat salient issues with which the Supreme Court and other courts are now dealing, and it is this seemingly obvious conclusion — rather than the niceties of survey and other empirical data — that supports my main claim. The issues that American constitutionalists take to be important are indeed so, and especially so in elections, but they are issues that neither the American public nor its representatives place high on their day in and day out rankings of importance. Abortion, same-sex marriage, flag desecration, gun control, and the public place of religion are issues about which Americans are deeply divided (and are issues that political op-

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<sup>59</sup> See IRVING CRESPI, PUBLIC OPINION, POLLS, AND DEMOCRACY 65–66 (1989) (distinguishing voting intentions from opinions on issues); ROBERT E. LANE & DAVID O. SEARS, PUBLIC OPINION 15 (1964) (distinguishing salience influenced during election campaigns from enduring salience). This distinction presents a large issue of democratic theory, because as between aggregate residual views and primed and often ephemeral campaign-focused views in contested elections, it is not clear that the latter is a better measure of what the public wants, even though it is the measure most likely to attract media attention and most likely to be manifested at the ballot box.

<sup>60</sup> In this Foreword, I focus disproportionately on constitutional law and related statutory and administrative law issues. One reason is my own competence and interests, but another is that the nonsalient dimensions of what the Supreme Court does — determining, for example, whether a huge and largely but not completely stationary dredge called a “Super Scoop” is a “vessel” for purposes of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 905(b) (2000), as in *Stewart v. Dutra Construction Co.*, 125 S. Ct. 1118 (2005) — tend not to frame our understanding of the Court as an institution or prompt charges of government by judiciary. So although I tread lightly outside of constitutional law and the nonconstitutional domains near it, much that I say here applies, a fortiori but less controversially, to the balance of the Court’s work.

<sup>61</sup> See Louis Uchitelle, *Flat Wages Seen as Issue in ‘96 Vote*, N.Y. TIMES, Aug. 13, 1995, at A26.

eratives use to divide Americans<sup>62</sup>), but they are persistently less important to Americans than issues of foreign policy, the economy, and personal well-being. Although abortion and same-sex marriage are obviously more salient to some Americans than others, it is noteworthy that the number of Americans putting these issues high on their priority list is not only nowhere near a majority, but also smaller than widely suspected.<sup>63</sup> It is only a minor oversimplification to observe, therefore, that for most of the last decade the vast majority of Americans have been concerned less with abortion, same-sex marriage, religion, gun control, or even crime than with war, foreign policy, fuel prices, healthcare, Social Security, and taxes. Americans are divided about the former group of issues, but if the measure of what Americans *care* about is a product of salience and degree of division, then it is the latter group of issues that captures what Americans most care about and perhaps the sorts of issues about which they would most wish to have a say.<sup>64</sup>

## II. . . . AND THE COURT'S

### A. *The Highlights*

The preceding overview of the public's agenda and the nation's policy agenda provides a valuable template against which to examine the Supreme Court's agenda. Although "agenda" may not be the best word to describe a docket whose reactive posture contrasts with the public's or policymakers' more deliberate choices regarding what issues to address, the Supreme Court not only selects the cases it will decide, but also has much flexibility in determining how broadly to decide them and whether to venture views about questions not precisely up for decision. So if in the judicial context we understand "agenda" in the softer sense of what the Court takes on, we can compare the ar-

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<sup>62</sup> And this is why some of these topics become more salient in closely contested elections, when candidates look for so-called wedge issues. When this problem is compounded by the tendency of the press to focus on "horse race" issues for elections, THOMAS E. PATTERSON, *OUT OF ORDER* 78 (1993), the consequence is that persistently low-salience issues are perceived as high-salience because of the way they are treated during high-salience elections.

<sup>63</sup> See sources cited *supra* note 38.

<sup>64</sup> I do not want to press this final point too hard. Just as there is a plausible argument that democracy is best located in the public's underlying and more enduring policy views, so too is there an argument that elections are the consummate democratic forum and that the election-oriented opinions of actual voters are more central to democracy than are the diffuse views of a larger number of citizens with a broader range of policy interests and attention spans. The resolution of this tension encompasses virtually all of democratic theory, so I do nothing more than note the issue here while acknowledging that in this Foreword I emphasize the often ignored dimension of issue salience at the occasional and intentional expense of the often overstressed dimension of campaign salience.

ray of issues the Supreme Court considers with the array the people want their government to undertake and the array the nonjudicial branches of government actually consider. Keeping in mind the public's view of what matters were salient and the government's totality of policy activities and outputs, therefore, consider now the eighty-one cases (thirteen of which were per curiam<sup>65</sup>) the Court decided with opinions in the 2005 Term.

In part because it ended the Term, and in part because it seems to represent the obvious counterexample to what the data suggest about the gap between the nation's and the Court's agendas, it is useful to start with *Hamdan v. Rumsfeld*,<sup>66</sup> in which a 5–3 majority of the Court (Chief Justice Roberts having recused himself<sup>67</sup>) held that the military tribunals designed by the Bush Administration for use in trying the detainees at Guantanamo Bay were unlawful without explicit congressional authorization, and in which the Court additionally held that the procedures proposed for those tribunals violated both the Uniform Code of Military Justice and the Geneva Conventions.<sup>68</sup> On first impression, *Hamdan* looks like a case in which the Court was deeply involved with the question of terrorism, an issue of great absolute and relative importance to the public and nonjudicial policymakers. To the extent that *Hamdan* is about terrorism, and to the extent that terrorism is something the public cares a great deal about, the case appears to present a strong example of close alignment between the nation's and the Court's agendas, and at the very least a major qualification of the general point I stress here.

Yet whereas there can be no quarrel that *Hamdan* was about terrorism, it is less clear where dealing with terrorism now ranks on the public's agenda. It seems almost unimaginable that the nation has

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<sup>65</sup> Although the Court's per curiam decisions are typically, as in the 2005 Term, brief opinions correcting clear errors or remanding for further consideration of some finding or argument, the fact that some of the Court's most important decisions have been per curiam counsels against excluding per curiams from a survey of the Court's work. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (the Pentagon Papers case); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

<sup>66</sup> 126 S. Ct. 2749 (2006).

<sup>67</sup> As a judge of the United States Court of Appeals for the District of Columbia, Chief Justice Roberts had participated in the case under review. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

<sup>68</sup> *Hamdan* is technically a statutory decision (the Geneva Conventions having been ratified by the United States in 1949 and incorporated by reference in Article 21 of the Uniform Code of Military Justice), but Justice Stevens introduced his partial opinion of the Court and partial plurality opinion with the observation that "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure," *Hamdan*, 126 S. Ct. at 2759 (emphasis added), and then proceeded to make frequent references to constitutional principles and previous cases decided on constitutional grounds, see, e.g., *id.* at 2773 (concluding that military exigency is insufficient to justify tribunals and procedures not "contemplated" by the Constitution).

forgotten about September 11, and in important ways it has not, but Americans' relative concern about terrorism has plummeted to levels far below those that existed in the very first months after September 11.<sup>69</sup> Five years after September 11, the residual concern with terrorism on the part of the American people, as the data make clear, is unexpectedly low, especially given the public's knowledge of post-September 11 terrorist attacks in Madrid, London, and Mumbai, as well as the well-documented tendency of people to *overestimate* the likelihood of low-probability catastrophic events.<sup>70</sup> Surprisingly, the public has been less concerned over most of the last two years with the threat of terrorism than with the war in Iraq, fuel prices, immigration, employment, healthcare, Social Security, and the full range of national macroeconomic issues. It is true, of course, that the issues of terrorism and the war in Iraq remain linked for roughly half of all Americans,<sup>71</sup> yet it is revealing that terrorism was less important for most Americans a few months after September 11, but prior to the escalation of American casualties in Iraq and Afghanistan, than were a host of economic and social policy issues. What emerges from the data, therefore, is the conclusion that although Iraq and issues close to home like immigration, fuel prices, healthcare, and inflation remain highly salient for Americans, the threat of terrorism is less comparatively important to Americans than we might at first have supposed.

<sup>69</sup> In the October 11–14, 2001, Gallup Most Important Problem poll, terrorism led the field at 47% but dropped to 38% by November 8–11 and to 10% by August 7–10, 2006, up from 7% during July 6–9, 2006, and 3% during June 1–4, 2006. THE GALLUP ORG., MOST IMPORTANT PROBLEM POLL (July 6–9, 2006), *supra* note 43; THE GALLUP ORG., MOST IMPORTANT PROBLEM POLL (June 1–4, 2006), *supra* note 43; THE GALLUP ORG., GALLUP POLL SOCIAL SERIES: HEALTH AND HEALTH CARE (Nov. 8–11, 2001), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=Po111042>; THE GALLUP ORG., GALLUP POLL SOCIAL SERIES: CRIME (Oct. 11–14, 2001), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=Po1110039>. Indeed, the combined results for terrorism, national security, and war were at 64% in October 2001, but dropped to 59% in November, 47% in December, and 35% in January 2002. See Frank Newport, *Terrorism Fades as Nation's Most Important Problem*, GALLUP POLL MONTHLY, Jan. 2002, at 4; Lydia Saad, *Fear of Terrorism Subsides Despite Persistent Concerns About Nation's Security*, GALLUP POLL MONTHLY, Dec. 2001, at 4; Lydia Saad & Joseph Carroll, *Even After Attacks, Majority of Americans Not Living in Fear of Terrorism*, GALLUP POLL MONTHLY, Sept. 2001, at 8.

<sup>70</sup> Cf. Baruch Fischhoff et al., *How Safe Is Safe Enough? A Psychometric Study of Attitudes Towards Technological Risks and Benefits*, 9 POL'Y SCI. 127, 140 (1978); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

<sup>71</sup> See, e.g., PollingReport.com, Iraq, <http://www.pollingreport.com/iraq.htm> (last visited Oct. 15, 2006) (reporting that a CBS News/*New York Times* poll conducted August 17–21, 2006, found that 44% of Americans believe the issues of Iraq and terrorism to be closely connected). As recently as June 10–11, the percentage had been at 54%, and it appears to move continuously. See *id.*

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Not only has terrorism receded considerably in salience, but it is also hardly clear that *Hamdan* is too much more than a footnote to the war on terrorism. It is of course vastly more than a footnote to larger issues of due process and presidential power, but such concerns, for all their profound moral, political, and constitutional importance, simply do not register in the public's policy agenda. The people themselves are concerned simply with minimizing the chance of terrorism in the United States, and even the most ardent proponents of military detention of suspected terrorists do not imagine that such measures are as important to reducing the risk of terrorism as are various surveillance techniques, the general quality of our intelligence (of which the information obtained from detainees is admittedly a component), and the quantity and training of law enforcement and military personnel.

I do not want to overstate the case. Combating terrorism remains important to the public, and an evaluation of the public's perception of terrorism's importance must take into account that a large number of Americans believe, whether rightly or wrongly, that the war against terrorism and the war in Iraq are closely related.<sup>72</sup> Moreover, *Hamdan*'s direct confrontation with presidential military authority in the absence of explicit congressional authorization does represent nontrivial Supreme Court engagement with something about which the public does care. Still, the issues in *Hamdan* in fact have little to do with Iraq — the topic the public and their representatives now care most about — and much more to do with terrorism as such — an issue which attracts much less public and even congressional interest. And as a case about terrorism, *Hamdan* concerns aspects of terrorism — the apprehension and trial outside the country of those who commit terrorist acts against the United States, and, more importantly yet, the question of which government institutions should make decisions about combating terrorism — that have profound long-term constitutional implications, but which are rather removed from the issues the public and its representatives are thinking about and dealing with even when their attention does turn to terrorism.

Much of what can be said about the Court's treatment of terrorism vis-à-vis the public's concerns can be said about the Court's treatment of "ordinary" domestic crime as well. As in most of the Court's recent history, its output in the 2005 Term was led by issues of criminal law and procedure — understood as also including habeas corpus, capital punishment, and prison conditions — with the category encompassing thirty-one of the eighty-two cases the Court decided with opinions and

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<sup>72</sup> See *id.*



on the merits.<sup>73</sup> Some of these thirty-one cases were quite significant to criminal procedure, as with, for example, *Davis v. Washington*,<sup>74</sup> clarifying the limitations imposed by the Sixth Amendment's Confrontation Clause on exceptions to the hearsay rule; *Hudson v. Michigan*,<sup>75</sup> refusing to apply the exclusionary rule to warrant-authorized searches in which the police violated the so-called knock and announce rule;<sup>76</sup> and *Georgia v. Randolph*,<sup>77</sup> in which the Court's strong statement about the ability of a co-occupant of a dwelling to consent to a search targeted at the other occupant<sup>78</sup> may turn out to be a significant milestone in Fourth Amendment doctrine. These and other cases<sup>79</sup> make clear that the Court's 2005 Term was hardly insignificant with respect to statutory and constitutional issues of criminal law, criminal procedure, and post-conviction remedies. And these statutory and constitutional issues plainly connect to the public's concern about crime inso-

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<sup>73</sup> The dominance of criminal procedure cases in the past has, indeed, rarely been fully appreciated by the editors of the *Harvard Law Review*, who ordinarily devote about 20% of the pages on the Court's cases to an area that typically generates about 40% of the Court's output and who have never invited a Foreword from someone with a primary specialty in criminal law and procedure. I note this not (only) to chide the editors of the *Harvard Law Review*, but also to underscore the gulf between the issues deemed salient by the constitutional elite (of whom the views of the Supreme Court Editors of the *Review* are likely a reliable indicator) and those deemed salient by the public, policymakers, the elite media, and even practicing lawyers.

<sup>74</sup> 126 S. Ct. 2266 (2006) (decided concurrently with *Hammon v. Indiana*, 126 S. Ct. 552 (2006), and holding that a 911 call was not testimonial for purposes of the Confrontation Clause and of *Crawford v. Washington*, 531 U.S. 36 (2004), but that answering questions from a police officer at one's residence was testimonial). *Davis* is significant in part because *Crawford* appeared to leave open the possibility that numerous hearsay exceptions would become unusable in criminal cases because of the constraints of the Sixth Amendment. Justice Scalia's majority opinion in *Crawford* seemed on its face to foreclose much of this fear but relied heavily on a historical understanding of the provenance of those exceptions, *Crawford*, 531 U.S. at 42-47, that might in the future be less important to Justices with equally strong views about the Confrontation Clause but less of a commitment to originalism as an interpretive methodology. Moreover, the large number of criminal cases involving a police officer's testimony about what was said by a currently unavailable witness made it important to clarify *Crawford*'s explicit, but open-ended, limitation to testimonial statements.

<sup>75</sup> 126 S. Ct. 2159 (2006).

<sup>76</sup> *Id.* at 2168. *Hudson* should be understood together with *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), in which the Court refused to exclude evidence obtained in violation of a foreign national's treaty right to consult with the consular office of his home country upon being charged with a crime in the United States. Although *Hudson* and *Sanchez-Llamas* dealt with different underlying claims, the Court's unwillingness in both to require exclusion despite agreeing that a violation had occurred signals growing doubts about the future viability of the exclusionary rule itself.

<sup>77</sup> 126 S. Ct. 1515 (2006).

<sup>78</sup> *See id.* at 1527-28.

<sup>79</sup> *See, e.g.*, *Clark v. Arizona*, 126 S. Ct. 2709, 2724-37 (2006) (clarifying relationship between insanity defense and proof of mens rea on the underlying charge); *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2566 (2006) (holding that defendant denied counsel of choice need not prove that his preferred counsel would have achieved a different outcome in order to establish a right-to-counsel violation).

far as the scope and strength of the restrictions imposed by the Court on police and prosecutors bear a significant causal relationship to the state's ability to deal with crime and violence.<sup>80</sup> Yet even assuming that a significant relationship does exist, it is hard to argue that constitutional criminal procedure rights are as important a determinant of the ability of the states and the federal government to fight crime as are the size of the police force, the experience and training of police officers, and the amount of money spent on crime control. Moreover, even if constitutional restrictions *did* significantly affect crime control, issues of crime and violence have not been appreciably salient for the public since the middle of 2000 (and even then ranking only fifth, after education, Social Security, healthcare, and taxes), and not highly salient since the 1960s except for a relatively brief period in the mid-1990s.<sup>81</sup> Criminal procedure thus turns out to be a large concern for the Supreme Court but only episodically (and not recently) a concern for the public or the nation's policymakers. And even when the public

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<sup>80</sup> Compare Thomas Y. Davies, *A Hard Look at What We Know (and Still Need To Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 667 (concluding that costs of the exclusionary rule to police effectiveness are small), with Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996) (highlighting the costs of *Miranda v. Arizona*, 384 U.S. 436 (1966)). For an important but different claim about the costs of *Miranda* and other criminal procedure landmarks of the 1960s, see William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792 (2006) (arguing that constitutional impediments create incentives for police and legislatures to misprioritize and misallocate law enforcement resources).

<sup>81</sup> As is well documented, Richard Nixon largely ran against the Supreme Court in 1968, arguing that the Court was making it harder to fight crime. See, e.g., Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 192 (1983) ("Richard Nixon's charge that the Warren Court was soft on crime contributed to his election in 1968."); Jonathan Simon, *Gun Rights and the Constitutional Significance of Violent Crime*, 12 WM. & MARY BILL RTS. J. 335, 343 (2004) (describing Nixon's "repeated attacks on the Supreme Court" in the 1968 election). When we see the dramatic increase in public concern about crime during that period, we can appreciate that Nixon's strategy was not to change people's minds about where they stood on crime. He knew where they stood — and that was with him. But he also knew that crime, especially with Vietnam and racial tensions in the center ring, was a low-salience issue for most Americans, however much they agreed with the Republican anti-Court position. What Nixon clearly did, therefore, was not to try futilely to change minds about the substance of the issue, but rather to raise the salience of an issue that played out in his favor but which would not have benefited him without a substantial increase in its salience. And this dynamic is why *Hamdan* may benefit the current Administration even though it lost the case. *Hamdan* helps keep the salience of terrorism and national security high, and these issues still tend to favor Republicans. See PollingReport.com, War on Terrorism, <http://www.pollingreport.com/terror.htm> (last visited Oct. 15, 2006) (presenting August 2006 CNN, *Newsweek*, and CBS News polls reporting greater confidence in Republicans than Democrats in dealing with terrorism). Thus, because attitude is far less changeable than salience, see *supra* notes 25, 32, it benefits Republicans to keep the electorate's attention focused on war and terrorism — which *Hamdan* certainly has done (and is still doing at this writing) — regardless of the valence of the particular issue. In other words, from the Administration's perspective, bad press about terrorism and national security may be better than no press at all.

does care about crime, the relationship between the Court's focus on constitutional criminal procedure, the death penalty, habeas corpus remedies, and prison conditions, on the one hand, and the public's concern about crime control, on the other, is contingent upon a highly contested causal relationship between criminal procedure and the effectiveness of crime control.<sup>82</sup>

*Hamdan* and the Court's criminal procedure docket thus emerge as the areas in which the Court's agenda connects most closely to the public's, although even these connections are less close than we might have thought. But after terrorism and crime, the gap between agendas turns into a chasm, with the balance of the Court's work located some distance away from what concerns America's citizens and policymakers, even with respect to those issues about which there is a modicum of public interest. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*<sup>83</sup> the Court came somewhat close to dealing with issues of homosexual rights; in *Ayotte v. Planned Parenthood of Northern New England*<sup>84</sup> and *Scheidler v. NOW, Inc.*<sup>85</sup> it dealt with outcroppings of the abortion controversy; in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*<sup>86</sup> it dealt with the intersection between generally applicable law and religious practices; and in *Rapanos v. United States*<sup>87</sup> and *S.D. Warren Co. v. Maine Board of Environmental Protection*<sup>88</sup> it dealt with the environment. Aside from the fact that the Court's opinions did not touch on the most contested aspects of these issues, the issues themselves do not dominate the public's consciousness or the nation's policy agenda. Homosexual rights,

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<sup>82</sup> As with the relationship between terrorism and the war in Iraq, the public *does* believe that there is a causal relationship between constitutional constraints on police and sentencing and the amount of crime, which is why being perceived as "soft on crime" tends to be politically fatal. See Ronald J. Allen, *Foreword: Montana v. Egelhoff — Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633, 661 (1997) ("There are no votes in being soft on crime."). To the extent that the public believes the relationship between constitutional constraints and crime to be close — even if it is not — the connection between the Court's agenda and the public's becomes tighter.

<sup>83</sup> 126 S. Ct. 1297, 1313 (2006) (concluding that law schools' First Amendment rights were not curtailed by Solomon Amendment, which conditioned a university's eligibility for federal research funding on willingness of all units of the university to allow military recruiters on campus).

<sup>84</sup> 126 S. Ct. 961, 964 (2006) (holding that total invalidation of New Hampshire parental notification law was too broad a remedy when injunction against unconstitutional applications would have been sufficient).

<sup>85</sup> 126 S. Ct. 1264, 1274 (2006) (interpreting Hobbs Anti-Racketeering Act not to include threats of violence unrelated to robbery or extortion, and thus not to reach anti-abortion protesters).

<sup>86</sup> 126 S. Ct. 1211, 1037 (2006) (ruling that Religious Freedom Restoration Act protects use of otherwise unlawful hallucinogenic drugs that are central to religious practices and beliefs).

<sup>87</sup> 126 S. Ct. 2208, 2235 (2006) (remanding to lower court after failing to reach agreement on whether a dry basin acting as a runoff for a wetland was itself a wetland).

<sup>88</sup> 126 S. Ct. 1843, 1853 (2006) (holding that federal license to operate a hydroelectric dam required compliance with state water quality regulations).

abortion, religion and the state, and environmental protection are highly important issues, but they have been far less important to the *public* and to their representatives than one might assume.<sup>89</sup> Moreover, at least in the above cases the Court dealt with some aspect of an issue that has attracted the interest of some of the public. Beyond these issues, however, the Court's work, for all of its importance, was essentially invisible, and the Court had only minimal direct engagement with the central issues of the nation's public and policy agenda. For example, by requiring proof of market power in every case alleging an illegal tying arrangement, *Illinois Tool Works, Inc. v. Independent Ink, Inc.*<sup>90</sup> not only put the final nail in the coffin of a per se rule of antitrust liability for tying arrangements, but also may have larger implications for the law of tying arrangements and the use of per se rules in general. But even if the case turns out to be important to antitrust law — and however important antitrust law is to the economy in general — it cannot be maintained with a straight face that in *Illinois Tool Works* the Court connected anywhere close to directly with an issue of concern either to the public or to the country's policymakers.

My central point may still seem counterintuitive, but recall again what the Court did *not* address.<sup>91</sup> Our general impressions as well as the polling data tell us that the public is concerned about Iraq more

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<sup>89</sup> See, e.g., EVERETT CARLL LADD & KARLYN H. BOWMAN, ATTITUDES TOWARD THE ENVIRONMENT TWENTY-FIVE YEARS AFTER EARTH DAY 16 (1995) (describing low salience of environmental issues).

<sup>90</sup> 126 S. Ct. 1281, 1293 (2006).

<sup>91</sup> In the immediate sense, what the Court did not address in the 2005 Term were the 8013 cases the Court declined to hear, whether by denial of certiorari or otherwise. See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 294–95 (2005) (urging increased focus on distinction between cases the Court chooses to hear and those it does not). But although there is obviously agenda setting in the certiorari process, see Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 724 (1993) (book review), much more takes place far earlier when potential litigants decide whether to bring an action at all, to settle or go to trial, and to appeal decisions they have lost, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (analyzing incentives of litigants to continue or settle); Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1722–25 (1988) (identifying unrepresentativeness of the Supreme Court's docket vis-à-vis all legal events). An unscientific sample of the 8013 reveals that few of these cases came any closer to the nation's public and policy agendas than did the eighty-two that produced opinions. This result is not surprising, for the real action is not in the certiorari process but rather much earlier when influential litigants, activists, and policy entrepreneurs decide which issues will be channeled into the legislative arena, which into the administrative process, which into litigation, and which into nongovernmental decision-influencing mechanisms such as consumer boycotts and public interest advertisements. The reason the Court did not deal with the war in Iraq, immigration, healthcare, Social Security, avian flu, Hurricane Katrina, and the estate tax is not the time lag between trial court filing and Supreme Court decision, and not that cases raising such issues were jettisoned by the Court in the certiorari process, but rather that cases raising such issues existed nowhere in the legal system. This picture could be different were the substantive constitutional doctrine different, but it is not, and is not likely to be in the foreseeable future.

than anything else, but neither the wisdom nor the legality nor the conduct of that conflict constituted any part of the Court's work, nor have they since the war in Iraq started, nor did they for the first Iraq war in 1991. Immigration has absorbed the nation's citizens, pundits, and policymakers at least since the beginning of 2006, but the Court's two narrow and procedural immigration decisions in the 2005 Term were leagues away from engagement with the central issues of immigration policy.<sup>92</sup> And the Court dealt not at all with fuel prices, the minimum wage, income taxes, the estate tax, Social Security, inflation, interest rates, avian flu, or the nuclear capabilities of Iran and North Korea, while taking on issues related to healthcare,<sup>93</sup> employment,<sup>94</sup> and education<sup>95</sup> that could not seriously be described as in any way connected with current or past policy debates on these topics. While the Court was thus working on problems and issues about which the public and their representatives at best cared little, the people and the policymakers were devoting their attention and energies to topics the Court simply did not touch. When we remove our blinders and survey what the Supreme Court did not do as well as what it did, we see clearly just how few of the public's major issues of concern or the nation's first-order policy decisions come anywhere near the purview of the judiciary.

### B. *A Quiet Term?*

Some of the distance between the nation's agenda and the Court's is doubtless attributable to 2005 being an unusually quiet Term.<sup>96</sup> *Hamdan* aside, the Supreme Court's work in the aggregate was less consequential as well as less salient than in other recent and not-so-recent Terms, and we can posit four reasons for this being so.

First, the Court's decisions in the 2005 Term displayed an unusual level of agreement among the Justices. It is impossible to tell whether this exceptional amity was the result of Chief Justice Roberts's leader-

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<sup>92</sup> In *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2425 (2006), an 8–1 Court dealt solely with the retroactivity of a 1996 amendment to the federal immigration laws, and in *Gonzales v. Thomas*, 126 S. Ct. 1613, 1615 (2006), a unanimous per curiam decision required the Ninth Circuit to wait until the Board of Immigration Appeals had first made a determination about the vulnerability of the applicant to persecution before reaching its own conclusion about what constituted persecution on account of “kinship” or membership in a “social group.”

<sup>93</sup> See, e.g., *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 126 S. Ct. 1752 (2006) (dealing with procedures for recovering third-party health insurance claims).

<sup>94</sup> See, e.g., *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2416–18 (2006) (holding that sexual harassment includes retaliatory suspension for complaining about sexual harassment).

<sup>95</sup> See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006) (clarifying when expert fees may be awarded in civil actions under Individuals with Disabilities Education Act).

<sup>96</sup> In observing that 2005 may have been a particularly unimportant Term, I depart from the expectations of the Foreword genre, one in which all Terms are more important than average.

ship, or of the other Justices being less inclined to air their disagreements in deference to a new Chief Justice, or of a shift in membership that made the Justices more reluctant to be publicly fractious. Whatever the reason for the uncharacteristic harmony, however, the effect is clear. There were fewer dissents and fewer concurrences than in past years,<sup>97</sup> and with few exceptions both the concurrences and dissents were brief indications of narrow disagreements rather than lengthy arguments for an entirely new approach to the topic at hand. Moreover, it appears upon reading through the Term's opinions — although I have not conducted a systematic quantitative analysis — that more of the concurrences and dissents, as well as the plurality and majority opinions responding to them, went out of their way to emphasize respect for the views (and the authors) they challenged.

Little of this harmony was for want of opportunity to behave otherwise. Even with a unanimous outcome, *FAIR* might have provided a forum for a Justice wishing to signal sympathy for treating sexual orientation as a suspect or quasi-suspect classification,<sup>98</sup> but no Justice seized the chance. *Ayotte* and *Scheidler* could even more obviously have been the vehicles for broader individual pronouncements about abortion, but again no Justice bit at the opportunity.<sup>99</sup> And any member of the Court eager to weigh in on larger federalism issues certainly could have used *Gonzales v. Oregon*<sup>100</sup> for that purpose, but here too, and even though there was disagreement on the statutory questions, all of the Justices contented themselves with a narrower focus.

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<sup>97</sup> For example, the ratio of concurrences to opinions of the Court for the 2005 Term was 35/81, compared to 61/79 for the 2004 Term and 49/83 for the 2003 Term, and the ratio of dissents to opinions of the Court was 60/81 for the 2005 Term but 63/79 for the 2004 Term and 68/83 for the 2003 Term. *The Supreme Court, 2005 Term—The Statistics*, 120 Harv. L. Rev. 372 (2006); *The Supreme Court, 2004 Term—The Statistics*, 119 Harv. L. Rev. 415, 420 (2005); *The Supreme Court, 2003 Term—The Statistics*, 118 Harv. L. Rev. 497, 497 (2004).

<sup>98</sup> The constitutionality of the military's "Don't Ask, Don't Tell" policy (upheld, for example, in *Able v. United States*, 155 F.3d 628, 635–36 (2d Cir. 1998)) is a necessary condition of the result in *FAIR*, so the case could have been a viable platform for a Justice wishing to question the constitutionality of that policy on equality grounds, see Andrew Koppelman, Lawrence's *Penumbra*, 88 MINN. L. REV. 1171, 1177 (2004) (emphasizing the equality dimensions of Justice Kennedy's majority opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003)), or fundamental rights grounds, see PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1298–13 (5th ed. 2006) (offering arguments why "Don't Ask, Don't Tell" might not survive *Lawrence*).

<sup>99</sup> Indeed, using *Ayotte* as the springboard for a broader look at abortion remedies is precisely the focus of Note, *After Ayotte: The Need To Defend Abortion Rights with Renewed "Purpose,"* 119 HARV. L. REV. 2552 (2006).

<sup>100</sup> 126 S. Ct. 904, 925 (2006) (holding Attorney General's attempt to prohibit doctors from prescribing assisted suicide medications under the Controlled Substances Act beyond the scope of the statute). Much the same can be said about *United States v. Georgia*, 126 S. Ct. 877 (2006), and, to a lesser extent, *Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006), sovereign immunity cases that could have reignited recent federalism disputes but instead produced narrower rulings.

In addition to there being more agreement and a narrower range of disagreement than has been typical recently, a second explanation for the quiet Term is that cases that might have produced substantial shifts in doctrine in the Court's traditional areas of concentration tended to be decided in ways that continued existing trends. So although *Randall v. Sorrell*<sup>101</sup> could have been momentous had the Court even hinted at a potential reversal of *Buckley v. Valeo*,<sup>102</sup> *Randall*'s explicit reaffirmation of *Buckley* with respect to both campaign contributions and campaign expenditures<sup>103</sup> turned it into a less noteworthy case about the limits of a state's power to control campaign finance.<sup>104</sup> Much the same can be said about *League of United Latin American Citizens (LULAC) v. Perry*,<sup>105</sup> for the Court's decision effectively allowing the continuation of the age-old practice of partisan gerrymandering<sup>106</sup> is of far less import than would have been a decision actually threatening to upset that venerable tradition.<sup>107</sup> What these and other cases show is that nonsalience of the Court's output is often a function of outcome, and thus the quietness of the Term is partially the product of decisions that did not depart from existing doctrine or trends.

Third, many disputes that could have put the historically most visible judicial issues on the Court's agenda were simply not heard. There was no major affirmative action case of the magnitude of *Adarand Constructors, Inc. v. Peña*<sup>108</sup> or *Grutter v. Bollinger*.<sup>109</sup> The one religion case was neither visible nor important,<sup>110</sup> and neither was the one relatively small federalism case,<sup>111</sup> and there was no significant gender discrimination case apart from one involving sexual harassment.<sup>112</sup> Throughout the list of the topics that have traditionally given

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<sup>101</sup> 126 S. Ct. 2479 (2006).

<sup>102</sup> 424 U.S. 1 (1976).

<sup>103</sup> *Randall*, 126 S. Ct. at 2500.

<sup>104</sup> As the first case to strike down a *contribution* limit, *Randall*'s importance may actually lie in its reaffirmation and arguable invigoration of *Buckley*.

<sup>105</sup> 126 S. Ct. 2594 (2006).

<sup>106</sup> *Id.* at 2626.

<sup>107</sup> *LULAC* is hardly unimportant, however, because the possibility that the Court would be less tolerant of partisan gerrymanders was a live one. See *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004) (plurality opinion) (concluding that the typical partisan gerrymandering claim was nonjusticiable); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (using *Vieth* to analyze relationship between constitutional meaning and constitutional enforceability); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55–83 (2004) (arguing for greater judicial involvement to remedy partisan self-entrenchment).

<sup>108</sup> 515 U.S. 200 (1995).

<sup>109</sup> 539 U.S. 306 (2003).

<sup>110</sup> See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006).

<sup>111</sup> See *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

<sup>112</sup> See *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006).

the Court its greatest visibility,<sup>113</sup> the 2005 docket was uncharacteristically sparse.

Finally, most of the significant cases the Court *did* decide were decisions of low salience. In *Garcetti v. Ceballos*,<sup>114</sup> for example, the Court's holding that the First Amendment did not reach speech of public employees that was part of their employment responsibilities — no matter how much a matter of public concern it might be<sup>115</sup> — established a new rule governing a vast amount of lower court litigation.<sup>116</sup> But although public employee cases pervade lower court First Amendment litigation, such cases rarely attract much attention from the public or from policymakers, whose interest in issues of freedom of speech and press is never very great and seemingly becomes intensified only when issues of sex and flag burning come to the fore.

The same holds for *Davis*, whose clarification of the limitations on hearsay exceptions imposed by the Confrontation Clause will make it a major presence in criminal trials despite the fact that the case and the issues it addressed remain unnoticed by the public, members of Congress, and even the writers for *Law & Order*. Or consider the controversy about the definition of “wetlands,” which was the focus of *Rapanos*. The issue touches on a significant aspect of environmental law, but the statutory questions in the case are unlikely to attract much attention outside of the narrow domain of environmental lawyers, scholars, and activists.

For these reasons, the Court's quiet 2005 Term may display with special clarity the gap between the Court's judicial agenda and the nation's public and policy agendas. But although the 2005 Term highlights this divide, its very quietness (a characteristic it shares with many of the last decade's Terms) may make it unrepresentative of long-term trends. Consequently, it may be misleading to generalize from the 2005 Term to larger conclusions about the Court and its agenda. So, in order to consider the possibility that not only the 2005 Term but also the Court's activities over the past several years may be atypical, it seems wise to take a longer view of the relationship be-

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<sup>113</sup> This seems as good a place as any to point out that even the highly salient *Bush v. Gore*, 531 U.S. 98 (2000), generated a television audience far smaller than did the O.J. Simpson trial. See STIMSON, *supra* note 32, at 20.

<sup>114</sup> 126 S. Ct. 1951 (2006).

<sup>115</sup> *Id.* at 1962.

<sup>116</sup> Doubters may be interested in learning that since January 1, 1995, state and lower federal courts have cited the seminal public employee speech case of *Pickering v. Board of Education*, 391 U.S. 563 (1968), in excess of 1000 times (the exact LEXIS citation count of 1639 as of August 16, 2006, may contain some number of spurious “hits”) while citing the hate speech case of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which is far more visible in the casebooks and the law reviews, only 537 times as of the same date.



tween what the Court does and the issues about which the public and its representatives worry.

### III. THE LONGER VIEW

#### A. *Looking Back*

It is tempting to interpret the gap between the Court's agenda and the nation's as the product of a so-called conservative Court hesitant to tackle the largest issues of our times and reluctant to challenge the political branches of government. The temptation, however, does not survive the data. For when we look at the years of the Warren and Burger Courts and again compare the Court's agenda with the nation's, we find that a similar picture emerges.<sup>117</sup>

Going back in time, and using the obvious starting point of race, a striking feature of the historical comparison of agendas is that race relations were not very much on the public's mind — at least comparatively — prior to *Brown v. Board of Education*.<sup>118</sup> On March 17, 1954, for example, exactly two months before *Brown* was decided, but fifteen months after the first Supreme Court argument and three months after reargument, issues of race and civil rights were mentioned by only 2% of Americans as most important, compared to 57% for peace, 17% for the atom bomb, 16% for Asia/Korea/Indochina, 16% for depression/inflation/recession, 9% for war/Russia, 6% for taxes, and 5% for cost of living/low wages, with various others ranked behind cost of living but ahead of race and civil rights.<sup>119</sup> These numbers are consistent with the extent of media attention: for all of 1954 prior to May 17, headlines and stories in the *New York Times* on issues of race — whether in schools or otherwise — were close to non-existent.<sup>120</sup> Setting aside the question of post-*Brown* salience and the degree to which post-*Brown* increases in salience were caused by the Court's decision, the data illuminate how low race was in salience in the months and years leading up to *Brown*.

More surprising yet is the extent to which this state of affairs held even in the years immediately following *Brown*. *Brown* was assuredly

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<sup>117</sup> Because the Harris “two most important issues” question dates back only to 1993, I rely here on Gallup Most Important Problem data. Although Gallup asks respondents only about *the* most important problem, it does record multiple responses, making it more reliable and explaining why the aggregate percentage typically exceeds 100%.

<sup>118</sup> 347 U.S. 483 (1954).

<sup>119</sup> THE GALLUP ORG., THE GALLUP POLL #528 (Mar. 17, 1954), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0528>.

<sup>120</sup> I performed a visual inspection and hand count based on full microform for 1954 at the Jones Media Center, Dartmouth College Library. (Original notes available on request from author.)

front-page news, but it had less effect on elevating the salience of race as an issue for the public than we now think. The subsequent rise in public attention and knowledge was more a consequence of the highly contentious 1963 integration of the University of Alabama, the contemporaneous civil rights demonstrations, and the policy debates about proposed civil rights legislation, all of which raised the percentage of people identifying race relations as the most important problem from 4% in April 1963 to 49% in July of the same year.<sup>121</sup> Despite the fact that there was the occasional temporary increase in salience prior to 1963 when various manifestations of “massive resistance” made the headlines, such spikes were short-lived.<sup>122</sup> Although *Brown* did raise the level of concern about race substantially, with 4% to 9% of the public mentioning it as the Most Important Problem with some frequency throughout the post-*Brown* 1950s and the early 1960s, it is still the case that when *Brown* was decided, and to some extent afterwards, the public had little concern with issues of race, at least relative to a host of highly salient foreign policy and economic issues.<sup>123</sup> The reality is that in the 1950s, the public’s attention was focused less on race and equality than on the Cold War.<sup>124</sup> What concerned — obsessed —

<sup>121</sup> LANE & SEARS, *supra* note 59, at 79.

<sup>122</sup> See, e.g., *infra* p. 38.

<sup>123</sup> See, for example, THE GALLUP ORG., GALLUP POLLS, available at <http://brain.gallup.com/documents/decadebreakout1950.aspx> (follow “Gallup Poll #540,” “Gallup Poll #573,” and “Gallup Poll #601” hyperlinks) for poll data from the 1950s. For 1960 poll data, see, for example, THE GALLUP ORG., GALLUP POLLS, available at <http://brain.gallup.com/documents/decadebreakout1960.aspx> (follow “Gallup Poll #624,” “Gallup Poll #636,” “Gallup Poll #653,” and “Gallup Poll #657” hyperlinks). It should be acknowledged that *Brown*’s connection with local schools, and then only in one part of the country, gave it a more regionally differentiated impact than issues like the fear of Communism, and thus we can expect more regionally differentiated salience. This dynamic plainly has an effect on the relationships between salience and democracy and salience and federalism, but I can do no more than note the issue here.

<sup>124</sup> Mary Dudziak has persuasively argued that *Brown* was in part a Cold War case because the Court, the federal government, and the subsequent public framing of the decision were all attentive to the extent to which racial segregation in the United States was an international embarrassment, fueling frequent Soviet and other Eastern bloc anti-American propaganda. See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 79–114 (2000); see also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); Mary L. Dudziak, *The Court and Social Context in Civil Rights History*, 72 U. CHI. L. REV. 429, 448–53 (2005) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)). A similar argument is found in Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980). And Michael Klarman sees *Brown* as part of a larger connection between concerns about race and issues of war and foreign policy, a connection that spans the period from World War II through the Cold War. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 14 (1994). Yet although the *New York Times* did note in its coverage of *Brown* the day after the decision that the Voice of America had broadcast a description of the outcome to thirty-four countries, ‘Voice’ Speaks in 34 Languages To Flash Court Ruling to World, N.Y. TIMES, May 18, 1954, at A1, little in the contemporaneous media coverage suggests that the decision was framed princi-

the American people were the foreign policy and defense issues of nuclear disarmament, relations with the Soviet Union and “Red China,” the space race, tensions over Quemoy and Matsu, the Suez crisis, and the Hungarian revolution, among others. In the year after *Brown*, for example, 4% of the public thought that race relations was the most important problem facing the government, compared to 28% for avoiding war, 20% for Russia, China, and foreign policy, and 6% for Communism.<sup>125</sup> A year later, in 1956, race relations rose to 9%, but “the threat of war” was at 33%, and with a recession looming, the economy and cost of living rose to 15%.<sup>126</sup> In 1957, 43% mentioned one of the combination of issues relating to the Soviet Union, national security, nuclear weapons, and foreign policy, while 4% mentioned race relations.<sup>127</sup> There was again a brief jump in concern about race relations in late 1957 and early 1958, when the confrontation in Little Rock (and *Cooper v. Aaron*<sup>128</sup>) was front-page news, but public interest quickly subsided, and race relations was designated as the most important problem by a scant 5%, 6%, and 4% of the population in 1959, 1960, and 1961, compared to 49%, 69%, and 60% for issues involving war, Russia, Cuba, and related foreign policy questions.<sup>129</sup> Only when issues of civil rights and race relations were connected with more visible demonstrations and violence starting in 1963 did those issues become significantly salient for the American people. Shortly thereafter, however, with the growth of attention to Vietnam, the dominance of race as a public concern was again eclipsed by questions of war and foreign policy. And as the 1960s gave way to the 1970s, race relations dropped precipitously as a concern, giving way to worries about inflation, the cost of living, crime, and employment.

If the public concern about race relations, although undoubtedly substantial, was far surpassed by Cold War issues, the contrast is even

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pally in a Cold War context or that the public perceived it that way. The Court understood and was likely in part motivated by the Cold War–related propaganda value of its decision, but it is a stretch to claim (and Dudziak does not) that in deciding *Brown*, the Court saw itself as entering the vortex of a highly salient foreign policy controversy.

<sup>125</sup> THE GALLUP ORG., THE GALLUP POLL #548 (June 3–8, 1955), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0548>.

<sup>126</sup> THE GALLUP ORG., THE GALLUP POLL #573 (Oct. 18, 1956), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0573>.

<sup>127</sup> THE GALLUP ORG., THE GALLUP POLL #593 (Dec. 31, 1957), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0593>.

<sup>128</sup> 358 U.S. 1 (1958).

<sup>129</sup> For the 1959 poll, see THE GALLUP ORG., THE GALLUP POLL #618 (Sept. 16, 1959), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0618>. For 1960 and 1961, see THE GALLUP ORG., THE GALLUP POLL #637 (Oct. 18–23, 1960), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0637>; and THE GALLUP ORG., THE GALLUP POLL #653 (Dec. 5, 1961), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0653>.

greater for some of the other issues that dominate American constitutional law. When the Supreme Court was strengthening the wall of separation between church and state in the 1960s, particularly in *Engel v. Vitale*<sup>130</sup> and *Abington School District v. Schempp*,<sup>131</sup> public concern about religion and government never even registered on the Most Important Problem rankings, and so too with the reapportionment decisions in the 1960s<sup>132</sup> and abortion at the time of *Roe v. Wade*.<sup>133</sup> And when the Court was in the process of deciding monumental criminal procedure cases like *Mapp v. Ohio*,<sup>134</sup> *Miranda v. Arizona*,<sup>135</sup> and *Gideon v. Wainwright*,<sup>136</sup> concern about crime was largely invisible,<sup>137</sup> not to surface until some years later when George Wallace and then Richard Nixon made it a central focus of the 1968 election.<sup>138</sup>

<sup>130</sup> 370 U.S. 421 (1962).

<sup>131</sup> 374 U.S. 203 (1963).

<sup>132</sup> See *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

<sup>133</sup> 410 U.S. 113 (1973); see also *supra* note 56. In the week prior to the January 22, 1973, decision in *Roe*, public attention, as measured in *New York Times* front-page stories, was overwhelmingly on Vietnam (eleven front-page stories for the week), followed by the second Nixon inauguration (five stories), inflation (four), the early Watergate trials (three), and the trial of Daniel Ellsberg (three). Abortion did not register at all, nor had it in the preceding months. And although the decision itself made the front page, we often now neglect the fact that it was relegated to secondary importance by the death of Lyndon Johnson. See *High Court Rules Abortions Legal the First 3 Months*, N.Y. TIMES, Jan. 23, 1973, at A1; *Lyndon Johnson, 36th President, Is Dead; Was Architect of Great Society Program*, N.Y. TIMES, Jan. 23, 1973, at A1.

Abortion's nonsalience at the time of and prior to *Roe* shows that the suggestion that people now treat abortion as having low salience because they believe it has been preempted or taken off the policy agenda by the courts does not stand up to the data. People treat abortion as having low policy (but not necessarily campaign) salience because they always have. If anything, as proponents of the "backlash" explanation of the Supreme Court's effect contend, *Roe* pushed the trend upwards and not downwards. See Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1291–93 (2004). The backlash idea is most prominently associated with Michael Klarman, who applies it to numerous decisions in Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005). See also Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992) (implying that *Roe* motivated the pro-life movement).

<sup>134</sup> 367 U.S. 643 (1961).

<sup>135</sup> 384 U.S. 436 (1966).

<sup>136</sup> 372 U.S. 335 (1963).

<sup>137</sup> The concern about crime, typically mentioned by around 2% of the public, was ordinarily articulated as a concern about "juvenile delinquency," a term that appears to have passed from public consciousness. See THE GALLUP ORG., THE GALLUP POLL #728 (May 5–10, 1966), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0728>; THE GALLUP ORG., THE GALLUP POLL #664 (Oct. 19–24, 1962), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0664>.

<sup>138</sup> Indeed, the public concern about crime, which did not register until 1968, came less from fear of "traditional" crime and more as a consequence of the urban riots of 1967 and 1968. LEO BOGART, SILENT POLITICS: POLLS AND THE AWARENESS OF PUBLIC OPINION 38 (1972); see also Dennis D. Loo & Ruth-Ellen M. Grimes, *Polls, Politics, and Crime: The "Law and Order" Issue of the 1960s*, 5 W. CRIMINOLOGY REV. 50 (2004) (arguing that public concern for crime

The data thus suggest that many of the issues we associate with the Warren Court (and the early years of the Burger Court) were not ones that Americans deemed highly salient at the time of the most important decisions, and even to some extent thereafter. Race and crime were indeed salient during much of this period, but less than we now think, less than at the time of the original and visible decisions than later, and less than the foreign policy and economic issues that persistently rise to the top in Americans' assessment of salience. While the Court was thus reshaping the constitutional law of individual rights with respect to criminal procedure, freedom of speech, reapportionment, church and state, privacy, personal liberty, and equal protection, the public was more focused on issues as to which the Supreme Court in particular and constitutional adjudication in general were largely spectators. Apart from the Court's intervention in Truman's seizure of the steel mills during the Korean War,<sup>139</sup> the Court stayed away from the foreign policy crises of the 1950s and early 1960s, and in the later 1960s and early 1970s the Court was involved with the Vietnam War only peripherally, as it dealt repeatedly with questions of protest<sup>140</sup> and occasionally with the issue of conscription.<sup>141</sup> During this period the

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was engineered by conservative elites as a response to race riots and social insurgencies in the 1960s). The May 1965 Most Important Problem survey showed no appreciable concern with crime as such, but a 2% response (ranking fourteenth) for "juvenile delinquency," with similar results for October 1965, May 1966, and September 1966. THE GALLUP ORG., THE GALLUP POLL #735 (Sept. 30–Oct. 6, 1966), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIP00735>; THE GALLUP ORG., THE GALLUP POLL #728, *supra* note 137; THE GALLUP ORG., THE GALLUP POLL #719 (Oct. 29–Nov. 2, 1965), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIP00719>; THE GALLUP ORG., THE GALLUP POLL #711 (May 15–18, 1965), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIP00711>. See *infra* section IV.B., pp. 56–62, in which I explore the implications of the fact that the Court decided *Brown* when the nation was preoccupied with Communism and the Cold War; *Mapp*, *Miranda*, and *Gideon* when the country was concerned with Vietnam and race (finally); and *Roe* when America's attention was fixed on Vietnam and Watergate — the hypothesis being that the Court's most divisive decisions have often come when the country's attention was elsewhere.

<sup>139</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For context, see MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE* (1977).

<sup>140</sup> See, e.g., *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding military base not a public forum); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (overturning Massachusetts flag desecration statute on vagueness grounds); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (ruling injunction against publication of Pentagon Papers to be an impermissible prior restraint); *Cohen v. California*, 403 U.S. 15, 26 (1971) (upholding First Amendment rights of protester who put words "Fuck the Draft" on the back of his jacket); *Street v. New York*, 394 U.S. 576, 594 (1969) (avoiding issue of constitutionality of prosecution for flag desecration by finding that Street had been impermissibly prosecuted for the words he uttered while burning the flag); *United States v. O'Brien*, 391 U.S. 367, 386 (1968) (upholding conviction for draft-card burning); *Bond v. Floyd*, 385 U.S. 116, 136–37 (1966) (invalidating attempt to exclude Julian Bond from Georgia legislature for statements he made in opposition to the draft).

<sup>141</sup> Most famously in *Clay v. United States*, 403 U.S. 698, 704–05 (1971), in which the Court held an induction notice served to Muhammad Ali invalid because it was based on an erroneous

Court was also largely removed from the most salient economic issues, as important policy debates and decisions about jobs, inflation, fuel prices and fuel supply, the cost of living, recession, and much else took place well outside the Supreme Court's attention.

Thus, when we look back to the 1950s, 1960s, 1970s, and 1980s, the picture emerging from the 2005 Term and other recent Terms represents less of a change than we might have suspected. Even in the period of so-called Warren Court activism, the Court's major efforts were largely in domains of moderately low salience, a fact we often forget because we assume the conclusion by looking primarily at issues with a significant place in the courts. We tend to gloss over the Cold War, the Soviet Union, Red China, Hungary in 1956, Cuba in 1961 and 1962, the Berlin Airlift in 1948, the Berlin Wall in 1961, Suez in 1956, nuclear disarmament, fallout, space exploration, and somewhat later the hostage crisis in Iran and numerous other foreign policy flashpoints, to say nothing of a preoccupation with nuclear weapons and "the bomb" that led large numbers of Americans to build bomb shelters in their backyards in the 1950s and prompted schools to have frequent emergency drills designed to prepare students for nuclear attack.<sup>142</sup> We also tend to forget significant concerns about recession in the late 1950s, major worries about inflation and astronomical interest rates in the late 1960s and the 1970s, and a fuel crisis in the 1970s that produced lines at gas pumps far longer than we have seen since. And we forget about all of this because as lawyers (and especially as legal academics obsessed with courts and their written opinions) we are conditioned to see the world through a judicial lens. But when we look at the world as ordinary Americans see it, we begin to understand that even when the Supreme Court is at its most influential and most visible, the American people quite often have other things on their minds.

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denial of conscientious objector status. Numerous attempts were made to have the federal courts adjudicate the constitutionality of the undeclared war in Vietnam, but the Supreme Court's unwillingness to entertain such claims was predictable even before the actual summary actions. *See, e.g., Mora v. McNamara*, 387 F.3d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1967) (denying certiorari to request for declaratory judgment that U.S. military activity in Vietnam was "illegal"); *Orlando v. Laird*, 443 F.2d 1039, 1043-44 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971) (holding that ordering serviceman to participate in war was not unconstitutional); *Atlee v. Laird*, 347 F. Supp. 689, 707-09 (E.D. Pa. 1972), *aff'd mem. sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973) (dismissing class action challenging constitutionality of war in Southeast Asia); *see also* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 214-16 (1972) (explaining potential negative consequences of adjudicating the constitutionality of the Vietnam War). For a view more receptive to potential judicial intervention, *see* JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 54-67 (1993).

<sup>142</sup> I was one of those students, but even then I doubted whether hiding under my desk ("duck and cover," as it was called) would provide sufficient protection against a hydrogen bomb landing on Times Square, approximately eight miles from my hiding place.

This is what makes the New Deal era different from most of what has transpired since. When the Court was first impeding<sup>143</sup> and then ultimately permitting<sup>144</sup> federal (and state) legislation aimed at economic recovery, it was a central player in the dominant issue of the times.<sup>145</sup> It is virtually impossible to overestimate the salience of the Depression and subsequent recovery efforts. We have neither Gallup nor Harris polling data for the crucial part of this period, but we do have the newspapers, and an examination of *New York Times* page one stories for the period from March 1933, when Franklin Roosevelt was first inaugurated, to January 1937, when he was inaugurated for his second term, shows a dominance of Depression-related stories as great as the dominance of war-related stories from 1942 to 1945, and greater than any single issue has achieved for any sustained period of time since.<sup>146</sup>

For much of this period the Supreme Court's role in the issues of economic conditions and economic recovery was as visible as it was important.<sup>147</sup> Virtually every judicial confrontation with a recovery

<sup>143</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238, 314–17 (1936) (holding “labor-regulating” prong of the Bituminous Coal Conservation Act of 1935 unconstitutional); *United States v. Butler*, 297 U.S. 1, 78 (1936) (holding Agricultural Adjustment Act unconstitutional); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (holding “code-making authority” conferred by the National Industrial Recovery Act an unconstitutional delegation of legislative power); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 374 (1935) (holding Railroad Retirement Act unconstitutional); see also *Morehead v. New York ex rel. Tiplido*, 298 U.S. 587, 618 (1936) (invalidating New York minimum wage law for women on due process grounds).

<sup>144</sup> See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 578–98 (1937) (upholding constitutionality of tax imposed on employers by Social Security Act); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937) (holding National Labor Relations Act constitutional); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937) (same); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (same); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding Washington minimum wage law); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (upholding constitutionality of Filled Milk Act of 1923). The Court's shift has produced a voluminous literature. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); Bruce Ackerman, *Revolution on a Human Scale*, 108 *YALE L.J.* 2279 (1999); Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 *HARV. L. REV.* 620 (1994); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 *U. PA. L. REV.* 1891 (1994); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *YALE L.J.* 2165 (1999).

<sup>145</sup> As it had been earlier with respect to, for example, highly salient controversies about slavery, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the income tax, *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), and child labor laws, *Hammer v. Dagenhart*, 247 U.S. 251 (1918). See Barry Friedman, *History, Politics and Judicial Independence*, in *JUDICIAL INTEGRITY* 99, 106–08 (András Sajó ed., 2004).

<sup>146</sup> In the ten-day period from May 11–20, 1934, for example, there were an average of 4.2 front-page stories per day (out of approximately nine) on the Depression and related recovery and economic issues, 3.25 for the same dates in 1935, and 2.6 for 1936, all higher than any single issue except World War II has sustained since.

<sup>147</sup> See generally JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* (1948).

program was front-page news, and the Court was almost as salient as the major issues with which it dealt. In the 1930s, unlike in later times, there can be little doubt that the most visible part of the Court's agenda was closely aligned with the nation's.<sup>148</sup>

Although the New Deal alignment of agendas has not been repeated since for any extended period of time, it did have roots in the earlier part of the twentieth century. If we look at the history prior to the New Deal, we see the Court as a significant factor in the highly visible transformation of social policy in the first quarter of the twentieth century. *Lochner v. New York*<sup>149</sup> is but one highlight, and many of the Court's most important decisions around the turn of the twentieth century<sup>150</sup> involved social programs whose introduction and desirability were the stuff of highly visible public debates.<sup>151</sup> The New Deal built on this history and aligned the Court's focus even more closely with that of the public and its policymakers. The New Deal thus establishes the benchmark for alignment between the policy interests of the public and the business of the Supreme Court.

With the New Deal as our benchmark, it is clear that we have never come anywhere near the New Deal alignment. Not as much as we think for race, and not as early. Not as much as we think for crime, and not for as long a time. Not as much as we think for abortion, certainly not before *Roe* and afterwards only after some delay and only in a narrower campaign context.<sup>152</sup> And not even now for

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<sup>148</sup> During and prior to the New Deal, the Supreme Court's docket was dominated by economic and business cases, but this is no longer so. See DREW NOBLE LANIER, OF TIME AND JUDICIAL BEHAVIOR: UNITED STATES SUPREME COURT AGENDA-SETTING AND DECISION-MAKING, 1888–1997, at 70–72 (2003); RICHARD L. PACELE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 55 (1991). Thus, one possible explanation for the post–New Deal agenda gap is that over the past seventy years, the Court has moved away from the economic issues that are persistently at or near the top of the public's agenda. Moreover, the early days of the Republic evidence a pattern similar to the present one. In a fascinating and important article, Mark Graber demonstrates that the claim that the United States has traditionally turned most policy or political questions into judicial ones — a claim most prominently associated with Tocqueville — is simply false. Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485 (2004).

<sup>149</sup> 198 U.S. 45 (1905).

<sup>150</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–36 (1925) (invalidating prohibition on private schools); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (invalidating restriction on teaching foreign languages); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 44 (1922) (invalidating Child Labor Tax Act); *Stafford v. Wallace*, 258 U.S. 495, 528 (1922) (upholding Packers and Stockyards Act); *Hammer*, 247 U.S. at 276–77 (invalidating federal child labor regulation); *S. Ry. Co. v. United States*, 222 U.S. 20, 26–27 (1911) (upholding railroad safety legislation); *Champion v. Ames*, 188 U.S. 321, 363–64 (1903) (upholding Federal Lottery Act).

<sup>151</sup> See LANIER, *supra* note 148.

<sup>152</sup> On the post-*Roe* political realignment on abortion and the post-*Roe* rise in the campaign salience of abortion, see Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718 (1997).



terrorism and war. Rather, the period following the New Deal and prior to 2001 included a host of issues from which the Court was largely or completely detached, and not just temporarily as a result of the Court's necessary slowness in addressing any issue. Rather, the Court's noninvolvement, with few exceptions, encompassed almost all of World War II, European postwar recovery, the occupation of Japan, the Berlin Airlift, the Cold War, the Korean War, nuclear disarmament, Cuba, farm policy and agricultural subsidies, recession, the creation of the interstate highway system, the establishment of Medicare, the war in Vietnam, double-digit inflation, severe gas shortages, and military operations in the Dominican Republic, Panama, Somalia, Lebanon, Kosovo, and Iraq, among others. When we take a longer view, therefore, and when we look at the periods in which foreign policy does not dominate as well as the periods in which it does, we see that the big picture is still the same. Even the most salient issues the Court deals with are at least somewhat less salient than we might have imagined, and the most salient issues are ones with which the Supreme Court has been at best indirectly involved, and usually hardly involved at all. And although there is plainly a time lag between when an issue surfaces and when it might reach the Supreme Court,<sup>153</sup> this delay does not explain the fact that for the issues just listed, and many more, the Court's distance from the central policy questions of the day has been far more than temporary. For most of the highly salient issues of modern times, the Court has been largely absent.

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I do not mean to suggest that the Supreme Court's relative noninvolvement with most of the major policy issues of the day is either natural or inevitable. Much but not all of the Court's nonsalience is a function of the outcome of its own earlier decisions. Had the Court decided the Vietnam legality cases differently,<sup>154</sup> and in particular had it weighed in on whether and when a declaration of war or other equally explicit congressional authorization is necessary to justify American military action abroad, it might have become a major participant in the debates and decisions about numerous post-Vietnam wars, rescue missions, and police actions, including Grenada, Panama, Lebanon, Somalia, Kosovo, Afghanistan, and Iraq. Had the Court

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<sup>153</sup> Obviously the question of a litigation time lag is relevant, but the issues mentioned in the text and others remained largely untouched by the courts, not only temporarily but permanently. That courts (especially the Supreme Court) are ill-equipped precisely because of the time lag problem to enter many of the most important and most salient policy debates is one factor in explaining their distance from these debates, but here I focus less on the reasons for the courts' noninvolvement and more on the implications of the simple fact of that noninvolvement.

<sup>154</sup> See *supra* note 141.

been receptive to the kind of wealth discrimination or social welfare rights claims that were explicitly or implicitly at issue in cases like *James v. Valtierra*,<sup>155</sup> *San Antonio Independent School District v. Rodriguez*,<sup>156</sup> and *DeShaney v. Winnebago County Department of Social Services*,<sup>157</sup> we might live in a world in which our highest court — like its counterparts in South Africa, Hungary, and Poland, for example — is centrally involved in major social policy decisions about issues such as healthcare, housing, pensions, welfare, and the minimum wage.<sup>158</sup> And had the Court decided some number of equal protection and First Amendment “effects” cases differently, especially *Washington v. Davis*<sup>159</sup> and *Clark v. Community for Creative Non-Violence*,<sup>160</sup> a much larger number of policy decisions with incidental effects on individual rights could be subject to close and frequent judicial scrutiny. But none of these paths have been taken, and it is unlikely that any will be in the near or not-so-near future. So although there is indeed an outcome-dependent counterfactual in which the Court plays a more central role than it does now or has for the past half-century, the counter-

<sup>155</sup> 402 U.S. 137, 142–43 (1971) (rejecting equal protection challenge to special referendum requirement for low-rent housing projects). See also *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (holding that state welfare determinations receive only minimal scrutiny).

<sup>156</sup> 411 U.S. 1, 36 (1973) (refusing to find fundamental positive right to education); see also *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (same for right to shelter).

<sup>157</sup> 489 U.S. 189, 202 (1989) (rejecting argument that a state had a positive constitutional duty to provide certain child protective services).

<sup>158</sup> See generally Richard J. Goldstone, *A South African Perspective on Social and Economic Rights*, 13 HUM. RTS. BRIEF 4 (2006); Andras Sajo, *How the Rule of Law Killed Hungarian Welfare Reform*, 5 E. EUR. CONST. REV. 31 (1996); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004); Amanda Littell, Note, *Can a Constitutional Right to Health Guarantee Universal Health Coverage or Improved Health Outcomes?: A Survey of Selected States*, 35 CONN. L. REV. 289 (2002). The South African cases on housing, *Government of the RSA v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), and anti-retroviral drugs for AIDS, *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.), have been particularly visible internationally, and domestically they have put the Constitutional Court at the center of what are arguably South Africa’s two most important policy issues. Canada may be a potential addition to this list of countries, because although the text of the Charter of Rights and Freedoms is hardly more conducive to positive social welfare rights than the text of the United States Constitution, there are indications that Canada is nevertheless moving in the direction of recognizing such rights. See, e.g., *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.R. 791 (holding ban on private health insurance unconstitutional unless waiting times for public healthcare are shortened).

<sup>159</sup> 426 U.S. 229, 239–45 (1976) (holding Equal Protection Clause not violated in absence of discriminatory intent). To the same effect are *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 276–80 (1979), which held that the foreseeability of a gender differential in veterans’ benefits was insufficient to support a constitutional sex discrimination claim without evidence of “discriminatory purpose,” and *McCleskey v. Kemp*, 481 U.S. 279, 297–99 (1987), which held the same with respect to racial disparity in death penalty administration.

<sup>160</sup> 468 U.S. 288, 299 (1984) (exercising highly deferential review when effect on speech was incidental to non-invidious application of law of general application).

factual remains well outside the realm of even remotely possible constitutional change.

*B. A Digression on Importance*

Some might draw from all of this the conclusion that the post–New Deal Supreme Court is relatively unimportant. But they would be wrong. The data confirm that the Court operates at some distance from the vast bulk of front burner public or policymaker concerns, but that does not make its work in any way unimportant. The importance, however, is of a less visible kind. It would, of course, take far more than the small number of pages I have here to offer a full account of the importance of the judiciary in general and of the Supreme Court in particular, or of the importance of the structural but rarely litigated dimensions of the Constitution,<sup>161</sup> but a few words may still be in order, if only to stress that the argument against judicial salience is decidedly not an argument against judicial significance.

Much of what the Constitution and the Supreme Court address is, in the broadest sense, about *process*, an overused word that encompasses determinations of both who is to decide an issue and the procedures according to which an issue is to be decided. The Supreme Court may make policy far less than its harshest critics (or, for that matter, its most enthusiastic supporters) suppose, but what it does do persistently is decide *how* policy will be made.

The Court's second-order role in deciding how policy decisions are to be made is most apparent when it decides major constitutional issues of separation of powers or presidential authority — as with the decision this Term in *Hamdan*<sup>162</sup> and earlier decisions such as *INS v. Chadha*,<sup>163</sup> *Morrison v. Olson*,<sup>164</sup> and *Clinton v. City of New York*<sup>165</sup> — or when it decides significant federalism issues, largely absent from this Term but plainly a major part of the Court's work over the last

<sup>161</sup> See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 400–08 (1985).

<sup>162</sup> Similarly, two Terms ago, *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion), found congressional authorization existed for the detention of enemy combatants. See also *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (failing to reach the merits on jurisdictional grounds in habeas corpus case involving detained terrorist suspect).

<sup>163</sup> 462 U.S. 919, 959 (1983) (invalidating one-house legislative veto).

<sup>164</sup> 487 U.S. 654, 696–97 (1988) (upholding independent counsel provisions of Ethics in Government Act of 1978).

<sup>165</sup> 524 U.S. 417, 448–49 (1998) (invalidating Line Item Veto Act). *Clinton* represents a closer alignment between public salience and the Court's agenda than much of the Court's modern work because the balanced budget had often been a high-salience item in the years preceding the case, with Harris poll mentions of 19% in January 1993, 22% in February 1995, 22% in April 1996, and 20% in May 1997. THE HARRIS POLL #48, *supra* note 38; HARRIS INTERACTIVE, THE HARRIS POLL #65, tbl. 5, available at [http://www.harrisinteractive.com/harris\\_poll/tables/1998/nov\\_27\\_1998.asp](http://www.harrisinteractive.com/harris_poll/tables/1998/nov_27_1998.asp).

decade.<sup>166</sup> For with both separation of powers and federalism, the Court's far from insignificant role is not to decide the policy question but to decide who is to decide the policy question. We can label this category of process decisions *jurisdictional*, even though such decisions deal with jurisdiction in the largest — and not merely in some smaller or more technical — sense. These decisions are *constitutive* because they play a major role in establishing which institutions will be making the first-order policy decisions.

A second category of process decisions are more obviously *procedural* as we ordinarily understand that word. Whether it be an interpretation of the Administrative Procedure Act<sup>167</sup> or a resolution of a dispute, as with this Term's decision in *LULAC*, over whether partisan gerrymandering is unconstitutional, an important part of what the Court does is to enforce — and, yes, make — the rules of the game, the “game” in this instance consisting of the creation of first-order policy and the “rules” consisting of the processes of legislative, executive, and administrative governance.<sup>168</sup> Although it might be hypothesized that procedure does not greatly affect substance and that more or less the same policy outcomes would be produced regardless of the procedure for producing them (or the identity of the producers), that hypothesis seems almost certainly false. Far more plausible is the hypothesis that not only the rarely litigated parts of the Constitution, but also the less litigated basic features of the Administrative Procedure Act, the Fed-

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<sup>166</sup> See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195, 2215 (2005) (holding congressional regulation of medical marijuana within Commerce Clause power); *Sabri v. United States*, 541 U.S. 600, 608–10 (2004) (upholding law mandating federal prosecution for certain acts of bribery under the Spending and Necessary and Proper Clauses); *Pierce County v. Guillen*, 537 U.S. 129, 147–48 (2003) (upholding under Commerce Clause federal law limiting discovery in federal and state trial courts); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (striking down Massachusetts law sanctioning companies doing business with Burma as violative of the Supremacy Clause); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (invalidating District of Columbia tort action for conflicting with Federal Motor Vehicle Safety Standard); *United States v. Morrison*, 529 U.S. 598, 617–18, 627 (2000) (striking down portions of Violence Against Women Act as unconstitutional under Commerce Clause); *United States v. Locke*, 529 U.S. 89, 112–16 (2000) (holding that federal regulations preempted Washington state regulation of oil transportation); *Reno v. Condon*, 528 U.S. 141, 150–51 (2000) (holding federal law prohibiting sharing of driver's license information by states to be valid exercise of commerce power and not violative of Tenth Amendment); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding Brady Act to be an unconstitutional administration of a federal program by the states). For a comprehensive discussion, see Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004).

<sup>167</sup> 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. IV 2004).

<sup>168</sup> Indeed, the process function is especially important in the context of elections, for here the Court occupies a role that would otherwise be played by directly self-interested participants, as the issue of partisan gerrymandering makes clear. See generally Pildes, *supra* note 107; Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1336–42 (1994) (discussing whether election procedures are best made by institutions not self-interested in electoral outcomes).

eral Advisory Committee Act,<sup>169</sup> the Freedom of Information Act,<sup>170</sup> and various other procedural statutes are more central to structuring the policymaking process than are the Supreme Court decisions construing those statutes around the edges, and arguably even more than the full array of judicial decisions interpreting such statutes. Yet without resolving the question of just how much procedure matters to substance, it still seems safe to posit that a large number of second-order procedural decisions about how policy will be made, decisions in which the courts are major (even if not the only) players, are ones that have a large and lasting effect on the substance of policy itself.

In addition to setting jurisdictional and procedural parameters, the Supreme Court (and of course the judiciary in general) also plays a special role in a different kind of second-order decision: the delineation of those second-order side constraints on first-order policy decisions that we tend to refer to as “rights.”<sup>171</sup> Again, the extent to which these constraints actually affect the implementation of first-order policy goals is open to debate. Policymakers tend to exaggerate the extent to which enforcement of rights makes the realization of policy goals difficult or impossible, just as those who urge the enforcement of rights tend to underestimate the effect of rights enforcement on policy goals, often arguing that the rights are cost-free, even with respect to the policy goals being constrained.<sup>172</sup> Between these implausible extremes, however, exists a middle ground, recognizing that the process of locating, defining, and enforcing second-order rights-based constraints on first-order policy preferences is likely in the aggregate to have a substantial effect on policy itself. Yet even if the delineation and imposition (and, indeed, creation) of rights that constrain policies are less consequential than the development and pursuit of the policy itself in the first instance, the domain of rights is still highly consequential both

<sup>169</sup> 5 U.S.C. app. §§ 1–16 (2000).

<sup>170</sup> 5 U.S.C. § 552(a)(4)(B) (2000).

<sup>171</sup> On rights as side constraints, see especially ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–53 (1974); Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1 (1981); Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415 (1993); Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977). The basic idea, that rights constrain the government’s ability to pursue otherwise consequentially efficacious policies, is the same as that developed by Ronald Dworkin under the well-known label of “rights as trumps.” See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984). And although Nozick, Dworkin, and most other proponents of a side-constraint view of rights are not consequentialists, there is no reason why a side constraint cannot also be a rule-consequentialist constraint on act-based consequence maximization. Indeed, some constitutional rights — the right to freedom of the press, for example — might best be understood in precisely these terms. See RONALD DWORKIN, *The Farber Case: Reporters and Informers*, in A MATTER OF PRINCIPLE 373 (1985).

<sup>172</sup> On the tendency of civil libertarians to underestimate the costs of civil liberties, see RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 31–51 (2006).

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to the rights holders and to the policies that rights constrain. The accelerator and steering wheel may be the most significant controls for determining where a car is to go, but the brakes are hardly without consequence.

Highlighting the second-order importance of the courts in general and the Supreme Court in particular should not blind us to the Court's relatively indirect involvement in most of the nation's first-order policy decisions. Although I have largely been comparing the Court's agenda with the public's agenda — comparing the Court's work with public salience — an implicit additional message is that most of the important (and not just salient) first-order policy decisions of the nation — whether the country should withdraw from Iraq, or raise the minimum wage, or eliminate the estate tax, or double its aid to Darfur, or build a fence on its southern border, or send more aid to New Orleans, or open its borders to anyone desiring to leave Cuba, or have a different Ambassador to the United Nations, for example — are made with at most the indirect involvement of the courts. Understanding just how much the Supreme Court does *not* do is thus crucial in helping us to see the role of the Court in proper — albeit deflated — perspective. So although I am concerned primarily with salience and not importance, I do not resist too strongly the idea that a secondary goal here is to point out that most of the important policymaking is not in the hands of the courts, even if the courts play a vital and outcome-relevant role in determining how that policy will be made.

To repeat, all of the above is just the barest outline of the importance of the Supreme Court and the judiciary itself to the governance of the nation, and I offer it to forestall the too quick objection that my claims about nonsalience imply non-importance. The fact that none of the process functions I sketch is especially salient to the public or even to its elected representatives may be unfortunate, but the empirical fact of the nonsalience of such considerations is plain, as the data in Part I make clear. It is true that much of the terrain of American democracy does not take such issues seriously, but that unfortunate fact is in no way inconsistent with the importance of those issues to policy itself. This nonsalient and indirect importance is what I have tried to stress in this embarrassingly brief section, but the fact of nonsalience, independent of the fact of importance, is one of the things that can help us to understand both the Court and numerous current debates about its power and authority. Put differently, intrinsic importance to the substance of policy and to the constraints on policymaking is itself significant, even if it is less visible, and even if it is less significant in the public's actual understanding. The frequent importance of what is not salient to the public makes the courts themselves important even when not salient, but the importance of what is not salient does not mean that salience itself is not important. With this qualification about the distinction between importance and salience in mind, there-

fore, it is time to turn to broader implications of the idea of salience itself.

#### IV. IMPLICATIONS

##### A. *On Salience and Democracy*

If the judiciary's effect on policy is no less significant because of its indirectness, then what is the point? If the Supreme Court's backstage role makes it no less crucial to the substance of what is going on in front of the audience, then what actually are the implications of focusing on the Court's noninvolvement in so many of the most salient first-order policy decisions of our times? In other words, what have we learned by coming to terms with the Court's essentially low-salience existence and with its docket of low-salience issues?

Perhaps most importantly, the distance between the Court's activities and the public's major concerns — the relatively small number of decisions the Court actually removes from what the public would desire to control directly — calls into question much of the contemporary and not-so-contemporary angst about the countermajoritarian or anti-democratic behavior of the Court. This angst tends to take two forms. In the weaker one, it is a concern about the authority of the Court's constitutional decisions. It is an objection to treating Supreme Court interpretations of the Constitution as having authoritative status outside of the Court itself or outside of the judiciary as a whole. And within this objection there are two further distinguishable positions. One, commonly called departmentalism, argues that each of the three branches of the federal government — or each of the three branches of the federal government and also the states<sup>173</sup> — has a constitutionally sovereign role in the interpretation of the Constitution, such that the nonjudicial branches need not take Supreme Court interpretations, other than in the particular case at issue, as binding on them.<sup>174</sup> The

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<sup>173</sup> It is important to remember that one of the primary *bêtes noires* of some departmentalists is *Cooper v. Aaron*, 358 U.S. 1 (1958), a decision affirming the Supreme Court's interpretive supremacy not against Congress or the President but against the states. See, e.g., Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 987–88 (1987).

<sup>174</sup> See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1290–1302 (1996); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849 (1998); Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, *supra* note 1; Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002); Saikrishna Prakash & John Yoo, *Against*

other position, often labeled popular constitutionalism, looks to “the people themselves” as the primary authoritative source of constitutional meaning, with public interpretations of the Constitution being entitled to as much respect as those emanating from the Supreme Court.<sup>175</sup>

What makes these concerns about Supreme Court authoritativeness “weak” is that they all accept the power of judicial review and acknowledge that the courts have the authority to declare acts of Congress invalid. By contrast, objections to judicial review itself, most prominent these days in the work of Mark Tushnet<sup>176</sup> and Jeremy Waldron<sup>177</sup> and reflecting a worry associated earlier with Alexander Bickel<sup>178</sup> and Learned Hand,<sup>179</sup> question not the authority of the Supreme Court’s interpretations of the Constitution but the Court’s power to issue them in the first place.<sup>180</sup> The target here is not just the secondary effect of a judicial interpretation on the decisions of

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*Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005) (reviewing KRAMER, *supra* note 1); Whittington, *supra* note 1. The *locus classicus* of departmentalism is Abraham Lincoln’s resistance to the decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Abraham Lincoln, First Inaugural Address (March 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953). And the most famous recent public advocacy of departmentalism is Meese, *supra* note 173.

<sup>175</sup> KRAMER, *supra* note 1; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001). Although less focused on interpretive authority, RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994), sounds similar populist themes. Because most arguments for departmentalism rest on the relatively greater responsiveness of Congress and the Executive to the people, it is common to treat departmentalism and popular constitutionalism as closely related. See, e.g., Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 721–24 (2006) (describing theories that urge congressional constitutional interpretation as “popular constitutionalism”).

<sup>176</sup> See TUSHNET, *supra* note 1.

<sup>177</sup> WALDRON, *supra* note 1; Waldron, *supra* note 1.

<sup>178</sup> See BICKEL, *supra* note 2. Even earlier, the same worries can be found in James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); see also Mark Tushnet, *Thayer’s Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9 (1993). Thayer’s sympathies were more for legislatures than for the people themselves. He was no great admirer of the people, as is apparent from his work on evidence, in which he justified most of the exclusionary rules of evidence on the grounds of the cognitive and decision-making failings of juries. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 263–76 (1898).

<sup>179</sup> LEARNED HAND, *THE BILL OF RIGHTS* (1958) (questioning the legitimacy and desirability of judicial review).

<sup>180</sup> Robert Post and Reva Siegel offer a mixture of departmentalism (endorsing the constitutional interpretive authority of Congress), popular constitutionalism (giving a role to the people in defining the Constitution), and skepticism about aggressive judicial review (criticizing the Supreme Court for insufficient deference to the constitutional determinations of Congress) which is not easily pigeonholed. Nevertheless, their view plainly falls within a tradition of concern over the anti-democratic tendencies of strong forms of judicial review and judicial supremacy. Post, *supra* note 12; Post & Siegel, *supra* note 1; Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).



other branches, other jurisdictions, or other actors, but rather the primary power to declare the acts of other governmental bodies invalid.

Some arguments offered against judicial review and against judicial constitutional authoritativeness are historical or textual,<sup>181</sup> and I have no desire to engage them here. Others are outcome based, insisting that substantively better results will be achieved by denying judicial power or judicial authority.<sup>182</sup> Once again, this is not the place to address these arguments, although I have my doubts.<sup>183</sup>

What I do want to engage here, however, is the widespread argument that we should prefer departmentalism, or popular constitutionalism, or the nonexistence of judicial review, because these approaches are more democratic than the alternatives. And although there are numerous plausible conceptions of “democracy”<sup>184</sup> — some placing more emphasis on majority rule and others on rights and self-governance, some emphasizing active citizen involvement and others emphasizing faith in elected representatives — all share a commitment to the notion that a considerable degree of political power should be held by the population at large.

In referring to a “considerable degree” of political power, I intentionally cast the question of democracy in quasi-quantitative terms. Although in theory a strong populist or strong democrat could object to any decision not directly accountable to the citizenry, the common implicit claim of those who argue for popular constitutionalism or object to judicial review is that there are many such decisions and that it

<sup>181</sup> See, e.g., KRAMER, *supra* note 1; Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 1.

<sup>182</sup> See, e.g., TUSHNET, *supra* note 1; Mark Tushnet, Book Review, 116 ETHICS 607 (2006).

<sup>183</sup> For my bona fides as a proponent of both judicial review and, more controversially, judicial interpretive supremacy, see Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045 (2004). The view is hardly idiosyncratic. See Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement: Marbury v. Madison and the Case for Judicial Supremacy*, 20 CONST. COMMENT. 369 (2003); Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387; Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987); Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865, 903–05 (1998); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing KRAMER, *supra* note 1); L.A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005) (same). My goal is not, however, to make the case for judicial review or judicial interpretive supremacy, but (at least here) only to cast doubt upon one argument against judicial supremacy, one we can call the argument from democracy. Even if I am correct that this argument is weakened by the recognition of the low-salience workload of the Supreme Court, there may well be other arguments against judicial supremacy and judicial review, as well as arguments against those arguments, all of which I bracket here.

<sup>184</sup> To say nothing of the implausible ones, like those that inspire the formal names of countries such as the (former) German Democratic Republic or the (current) Democratic People's Republic of Korea.

is the quantity and import of them that create cause for worry. The widespread reference in Europe to a “democratic deficit,” a term typically used to describe the number of decisions made by allegedly faceless and nonresponsive European Union bureaucrats,<sup>185</sup> captures the idea nicely. Similarly, the worry in the United States — and the motivation behind the call for popular constitutionalism or for limiting judicial review — seems also to be primarily about a democratic deficit in the aggregate rather than the theoretical problem arising from isolated and relatively inconsequential individual exercises of nondemocratic power, or even from episodic but consequential judicial counter-majoritarian interventions. It is thus this quantitative sense of democracy that appears to be at stake in many of the debates, and it is this quantitative claim that there is a democratic deficit that is my primary target here.

One of the things that a compass of the full universe of policymaking reveals, however, is that there may be less of a democratic deficit than the popular constitutionalists and the departmentalists imagine, and that the judicial incursion on democracy — if an incursion it is — is quite a bit smaller in quantity and aggregate consequence than might be thought. Even if, for the sake of argument, we understand the Supreme Court as making final decisions about abortion, freedom of speech, freedom of religion, separation of powers, federalism, and criminal procedure that totally disregard either the views of the people at large or the views of the people’s elected representatives,<sup>186</sup> the people and their elected representatives can nevertheless be understood as still making the vast bulk of decisions that are most important to the people themselves. What the data and the eye-opening attention to what the courts do *not* decide reveal is that with respect to the issues that most concern the people, the courts are keeping their distance, leaving the central decisions to be made in a comparatively more popularly responsive way. Moreover, although the foregoing is applicable only to salience, the 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 — or by institutions more responsive to popular control than the Supreme Court — but also that the same holds true for decisions that have important policy consequences, regardless of their public salience.<sup>187</sup> What the

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<sup>185</sup> See Pippa Norris, *Representation and the Democratic Deficit*, in THE DEMOCRACY SOURCEBOOK (Robert Dahl, Ian Shapiro & José Antonio Cheibub eds., 2003).

<sup>186</sup> *But see, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (drawing on polls to prohibit capital punishment for the mentally retarded).

<sup>187</sup> See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 53–150 (1994); ADRIAN VERMEULE, JUDGING

Court does is truly important, but most of what is important as well as what is salient is still done outside the Supreme Court, and, almost certainly, outside the judiciary as a whole.

The Supreme Court can thus be understood as a substantially specialized institution. When the Court is so understood, it becomes intriguing that there is considerably less angst about the nondemocratic dimensions of the Occupational Safety and Health Administration (OSHA), the Securities and Exchange Commission (SEC), and even (perhaps surprisingly) the Federal Reserve Board, for example,<sup>188</sup> than there is about the Supreme Court. This widespread acceptance of countermajoritarian policymaking outside of the courts is no doubt a consequence of these nonjudicial institutions being — at least in theory — subject to the control of Congress (and/or the President) in a way that the Supreme Court is not. In reality, however, these and countless other governmental institutions make important policy decisions with little efficacious congressional<sup>189</sup> or executive control, and most of the people making the decisions have something pretty close to life tenure. Yet there is still less worry about any tension between this form of governance and democracy itself. One reason for this lack of concern is that many people believe, rightly or wrongly, that most agency decisions are based on technical knowledge which neither the people nor their directly elected representatives possess.<sup>190</sup> Even more important is the public's recognition that a large number of governmental institutions, even if at times producing outcomes with which the public disagrees, nevertheless operate within the confines of their own relatively narrow domains. Still, the activities of OSHA, the SEC, and certainly the Federal Reserve have highly consequential spillover effects on other policy issues and on the economy in general. But even once we recognize that their decisions are laden with moral and political value

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UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 268–70 (2006).

<sup>188</sup> See Friedman, *The Birth of an Academic Obsession*, *supra* note 2, at 158 (pointing out the nondemocratic forms of decisionmaking that pervade American politics).

<sup>189</sup> This claim about the lack of congressional control over agencies has not gone without challenges. See, e.g., JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* (1996) (arguing that congressional control over agencies is real and efficacious). The conventional wisdom about Congress's relative lack of control is explained and defended (albeit with qualifications) in David B. Spence, *Administrative Law and Agency Policymaking: Rethinking the Positive Theory of Political Control*, 14 *YALE J. ON REG.* 407, 421–38 (1997).

<sup>190</sup> It is also possible that public acceptance of the Supreme Court's role is in part based on the public's erroneous belief that the Court's decisions are mostly technical, not policy-based, and not ideological — a belief encouraged by the notion that cases like *Bush v. Gore* are more exceptional than they really are. *Bush v. Gore* was a high-salience decision, but the ideological explanation for its outcome hardly goes against the grain of what the attitudinal political scientists have been insisting for decades. See SEGAL & SPAETH, *supra* note 4.

judgments, and are thus not entirely technical and mechanical, we often worry less about these institutions' unchecked and countermajoritarian power because we have some confidence that they will not frequently, nor directly, intrude themselves into foreign policy or social policy decisions.

Perhaps so too with the Supreme Court. Even taking *Hamdan* into account, the Court in its 2005 Term stayed much further away from the issues that genuinely concerned the people than did the Federal Reserve Board, the Joint Chiefs of Staff, the Department of Homeland Security, and the nation's healthcare and insurance industries, to list just a few, none of which would be considered an exemplar of popular responsiveness. In many ways, the Court, like a host of agencies, is best understood as an institution off doing its own thing rather than insinuating itself into a wide range of policy decisions. Moreover, it is hardly inconceivable that such a role is in accord with the public's preferences and with a plausible conception of a complex democracy (and a busy world) in which direct public responsiveness must necessarily be treated as a scarce resource.

That the Supreme Court can be understood in this more specialized way should concern no one except those lawyers who might be dissatisfied with what they could see as a less central role for law in society as a whole. But any complex society reposes considerable non-aggregated power in specialized individuals and institutions, and it should be no cause for worry by lawyers or judges or legal academics that their role is less well-analogized to that of Congress or the President than it is to the role of brain surgeons, software designers, AIDS researchers, actuaries, exterminators, or electricians. The members of all of these professions perform vital roles in society, and we could not imagine not having them. But unlike some lawyers, the brain surgeons and the electricians, among others, usually have the good sense to recognize that it would not necessarily make for a better society were they and their ilk to be in charge of all or even most of the vital questions of public policy beyond their own important but delimited domains. In reality, much the same applies to the law.

All of this is a long way of saying that a considerable amount of the current democratic angst appears unjustified. The Supreme Court is nowhere near taking over the most important policymaking functions in the United States — a problem to no one except those who find it necessary to have lawyers and the courts as captains (and much of the crew as well) of the ship of state. For everyone else, however, including, most importantly, the citizenry, things may be more or less all right as they are, and more tolerable than much of the modern hand-wringing about the courts and democracy would suggest. The courts

operate in an area of surprisingly little concern to the public,<sup>191</sup> although of considerable (even if largely indirect) importance in structuring the making of policy. And as long as this remains so then there may be far less need to worry about the countermajoritarian or anti-democratic aspects of judicial review or judicial supremacy than some theorists believe.

*B. In Search of Explanation*

I have suggested that the distinction between low-salience and high-salience issues may call into question at least one of the chief arguments against judicial review or judicial supremacy. My goal in this Foreword, however, is much less to engage in a normative theoretical debate than it is to offer the low-salience/high-salience distinction as a potential device for explaining important and often puzzling aspects of the Supreme Court's work. Although there are many aspects of the Court's work that are in need of explanation, and although some number of them might well qualify as puzzles, I want to focus on just two here.

1. *The Puzzle of Esteem.* — The first is the puzzle of popular respect for the Court. Those who study the degree of trust of or respect for various institutions have discovered what they believe to be apparently inconsistent beliefs on the part of the American people. On the one hand, the people tend to disagree with particular Supreme Court decisions far more than they agree with them, including, for example, decisions on freedom of speech (think of flag desecration,<sup>192</sup> non-obscene pornography,<sup>193</sup> and media invasion of privacy<sup>194</sup>), or the prohibitions on school prayer, or the protection of rights of those accused of crimes, or, although public opinion is more evenly divided here, the decisions about abortion. And even though the public opinion data is not yet available, it would hardly come as a surprise to discover similar negative public reaction to *Hamdan*.

Yet whereas the public tends to disagree with many — conceivably most — of the Court's somewhat salient decisions, the data show that the same public tends to respect and trust the Court far more than it respects and trusts Congress or the media, to take two institutions the

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<sup>191</sup> It is depressing but true that three times as many Americans can name two of the Seven Dwarfs than can name two of the nine Justices of the Supreme Court. See Reuters, *We Know Bart, but Homer Is Greek to Us*, L.A. TIMES, Aug. 15, 2006, at A14.

<sup>192</sup> See *United States v. Eichman*, 496 U.S. 310, 318–19 (1990) (protecting flag burning); *Texas v. Johnson*, 491 U.S. 397, 417–20 (1989) (same).

<sup>193</sup> See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) (protecting dial-a-porn service).

<sup>194</sup> See *Fla. Star v. B.J.F.*, 491 U.S. 524, 532, 541 (1989) (protecting publication of sexual assault victim's name).

public routinely holds in contempt.<sup>195</sup> But why, say those who are puzzled, does the public respect an institution with whose outcomes it so routinely disagrees?

Some of the explanation for the gap between agreement with particular decisions and respect for the Court as a whole undoubtedly lies in the Court's own fostering of its trappings of neutrality and political disinterest. Robes. A grandiose building. Highly formal and ritualized proceedings. Opinions written as if the results were the product of largely nonpolitical consultation of highly specialized knowledge not accessible to ordinary folk. And some of the explanation may stem from a desire of the Court not to stray *too* far from public opinion, although for me there are too many examples of persistent divergence — once again, school prayer, flag desecration, non-obscene pornography, and, even now, much of criminal procedure<sup>196</sup> — to place much weight on this increasingly common<sup>197</sup> claim.

Yet although such factors plainly play some role, it may well be that the Court's overwhelming concern with low-salience issues provides the most significant explanation for how the Court can retain much of its respect while consistently reaching decisions with which the public disagrees. Obviously, the low salience of the unpopular decisions does not furnish the entire explanation, but it does seem to pro-

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<sup>195</sup> The large literature on the public's trust of the Supreme Court includes, *inter alia*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003); Walter F. Murphy & Joseph Tanenhaus, *Explaining Diffuse Support for the United States Supreme Court: An Assessment of Four Models*, 49 NOTRE DAME L. REV. 1037 (1974). In the Gallup 2005 Mid-May Economic Poll, the percentage of people expressing "a great deal" or "quite a lot" of confidence in the Supreme Court was 41.38%, while it was 28.90% for television news, 27.77% for newspapers, and 21.94% for Congress. THE GALLUP ORG., MID-MAY ECONOMIC POLL (May 23–26, 2005), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=Po505024>.

<sup>196</sup> See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 394 (2000) (noting lack of public support for Warren Court criminal justice rulings); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54 (1997) (describing Warren Court criminal procedure decisions as strongly countermajoritarian). The claim that these decisions were less countermajoritarian than commonly supposed is made in Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004), but Lain's view that even the most seemingly unpopular of those decisions were "publicly acceptable," *id.* at 1411, seems more a function of low salience in light of the fact that the public disagreed with the substance both before and after the decisions were issued.

<sup>197</sup> See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145 (1998). The classic exposition of the view that the Court does not stray very far from political majorities is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). Additional sources can be found in Klarman, *supra* note 133, at 440 n.68.

vide at least a previously unrecognized part of a more complex explanation. Because the Supreme Court engenders a high degree of baseline trust and respect from the public just because it is the highest court — and indeed just because it is a court — little that it does will jeopardize that baseline degree of respect and trust as long as it keeps to its place. Thus, as long as the Court remains concerned with low-salience issues, and thus does not interfere, against the public's wishes, with issues the public thinks truly important (as it did in 1935 and 1936, and as it did in the minds of Democratic voters in *Bush v. Gore*<sup>198</sup>), it is unlikely to jeopardize its own status or the esteem in which it is held by the public.<sup>199</sup> The Court places that esteem at risk, it appears, not when it unpopularity decides cases involving low-salience issues, but rather only when it reaches unpopular decisions on issues the public deems (or is induced to deem) truly important.

I offer the foregoing explanation not as a firm conclusion but rather as a (plausible) hypothesis that can (and should) be tested. Assume that we can control for the actual degree of disagreement with a particular decision. In other words, assume that we are dealing with issues that engender an identical degree of disagreement. With the degree of disagreement removed as a causal factor, we would want to test whether the decline in (or absolute level of) respect for the Court varies directly with salience, such that disagreement with low-salience issues produces less decline in respect than does disagreement with high-salience issues. This is what I predict a serious test would establish, although, to repeat, at the moment I offer this only as a testable hypothesis.

2. *The Puzzle of Power.* — Related to the puzzle of esteem, but different in some respects, is what might be called the puzzle of power. How is it that the Supreme Court gets away with deciding issues in an unpopular way and then, despite its lack of enforcement power, is often able to see its decisions change the particular policy landscape upon which they exist? Why is there now less prayer in public schools than in 1962, more media aggressiveness than in 1963,<sup>200</sup> more legal abortion than in 1972, and more racial integration in public schools in the South than in 1953? Of course it is possible that none of these

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<sup>198</sup> 531 U.S. 98 (2000).

<sup>199</sup> The statement in the text is deliberately not normative. The hypothesis that refraining from making unpopular decisions on high-salience issues allows the Court to retain the esteem in which it is held by the public is a descriptive one and silent on the question of when, if ever, the Court should be willing to sacrifice some of its accumulated esteem in order to do what it perceives to be the right thing. For a far more nuanced discussion of the relationship between judicial aggressiveness and public approval/disapproval, see Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. (forthcoming 2006) (on file with the Harvard Law School Library).

<sup>200</sup> This was the year preceding *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

conclusions is true, and one of Gerald Rosenberg's important contributions to constitutional understanding is in arguing that such consequences, if they have ensued at all, have not done so because of the Supreme Court, which he sees as a largely ineffectual institution.<sup>201</sup> But assuming for the sake of argument that the Court has some effect — even if less than its most ardent celebrants imagine — then what, in the absence of an army or decisions with which people actually agree, enables it to exercise this power?

Here again, salience may provide part of the answer. Although at times the Supreme Court's decisions help to make the issues with which it deals more salient, its post–New Deal history suggests a positive correlation between low salience and judicial countermajoritarian aggressiveness. When World War II was highly salient, the Court was largely unwilling to challenge military decisions on either equal protection<sup>202</sup> or free speech<sup>203</sup> grounds.<sup>204</sup> When the Vietnam War became controversial but no less salient, the Court, while drawing on a free speech solicitude developed in the civil rights era<sup>205</sup> to protect many anti-war protesters,<sup>206</sup> avoided the central issue of the legality of the war.<sup>207</sup> Indeed, even in its most important and most famous Water-

<sup>201</sup> See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); see also KLARMAN, *supra* note 124, at 450 (arguing that the Court is “likely to protect only those minorities that are favorably regarded by majority opinion”); Klarman, *supra* note 124, at 9–11 (attributing much of the actual desegregation of schools in the South to the Civil Rights Act of 1964). The contrast in the text is an egregious oversimplification of a substantial and important literature focused on whether, how, and when judicial decisions, especially Supreme Court decisions, produce changes in policy or changes in the world itself. For a comprehensive survey of this literature, see Whittington, *supra* note 1.

<sup>202</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>203</sup> See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 236–83 (2004).

<sup>204</sup> It has been argued that during wartime the Court becomes less protective of civil liberties, but that this shift does not affect cases directly related to the war. See Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 9 (2005). I do not take these results as inconsistent with the modest claim I make here, nor with the less modest claim that salience may be a relevant independent variable in explaining why the Court, even controlling for ideology, is more aggressive in some anti-majoritarian civil liberties cases than in others.

<sup>205</sup> See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 112–13 (1969) (protecting civil rights marchers from charge of disorderly conduct); *Brown v. Louisiana*, 383 U.S. 131, 141–43 (1966) (protecting orderly protest in public library); *Cox v. Louisiana*, 379 U.S. 536, 552, 558 (1965) (overturning conviction for organizing peaceful protest); *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963) (protecting civil rights demonstration at South Carolina State House).

<sup>206</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (upholding right of students to wear anti-war armbands in class); *Bond v. Floyd*, 385 U.S. 116, 136–37 (1966).

<sup>207</sup> See *supra* note 141.



gate case, *United States v. Nixon*,<sup>208</sup> the Court climbed on the train of anti-Nixon public opinion well after it had left the station.

The timing of the Supreme Court's response to McCarthyism provides a good example of the basic point. When the fear of Communism and related domestic subversion and infiltration was highly salient during the peak McCarthy years, the Court stood aside.<sup>209</sup> But several years later, on Monday, June 17, 1957, the Court issued a group of highly visible<sup>210</sup> opinions, all of which protected the rights of alleged subversives against McCarthyite investigation.<sup>211</sup> J. Edgar Hoover was so incensed that he called the day "Red Monday."<sup>212</sup> But the salience of these opinions was short-lived, in large part because they came at the very tail end of the McCarthy era, three years after McCarthy himself had ceased to be a force.<sup>213</sup> Red Monday is consequently not an instance of the Court's taking on a highly salient issue, but rather an example of the Court's holding back during a period of high sali-

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<sup>208</sup> 418 U.S. 683 (1974).

<sup>209</sup> See Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1406 (2005).

<sup>210</sup> The large *New York Times* headline for a group of articles about several Supreme Court opinions read *High Court, Releasing Watkins, Restricts Congress on Privacy; Frees 5 Reds in Smith Act Case*, N.Y. TIMES, June 18, 1957, at 1, and its lead editorial on that day was entitled *A Day for Freedom*, *id.* at 32. The size of the headline must be seen in context, however, for in an era in which New York had at least four non-tabloid daily newspapers, headlines were an important way of attracting readers. Less than a week earlier, for example, the *New York Times* had used a similar size type to announce the arrival of the replica ship *Mayflower II* from Plymouth, England. John H. Fenton, *Mayflower II Hailed at Plymouth Rock*, N.Y. TIMES, June 14, 1957, at A1.

<sup>211</sup> See *Yates v. United States*, 354 U.S. 298, 318, 328-29 (1957) (overturning Smith Act convictions that were not limited to advocacy designed to incite action); *Sweezy v. New Hampshire*, 354 U.S. 234, 254-55 (1957) (overturning conviction of university professor who had refused to cooperate with state legislative investigation); *Watkins v. United States*, 354 U.S. 178, 214-15 (1957) (holding that House Un-American Activities Committee could not investigate beyond its clear authorization).

<sup>212</sup> See ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 1 (1999).

<sup>213</sup> Although press coverage was significant for two days after the decision, it declined precipitously thereafter. Red Monday departed the front page entirely by June 20, and on June 24 the only significant reference was in a story headlined *High Court Views Upset Law Group*, a page 19 story about the fact that the decisions were a significant concern at the Conference of State Attorneys General meeting. Lawrence E. Davies, *High Court Views Upset Law Group*, N.Y. TIMES, June 24, 1957, at 19. More telling is the fact that in the week preceding the decision — from June 10-16, 1957 — the front page of the *New York Times*, by my count, had fifteen stories on disarmament, five on the Middle East crisis between Egypt and Jordan, five on a proposed civil rights bill, four on China, two on President Eisenhower's health, two on France, two on Cuba, two on organized crime, and seven others on various topics, one of which was on Soviet infiltration. In other words, by the time the Supreme Court got around to McCarthyism, McCarthyism had largely faded as a public phenomenon.

ence and becoming aggressive only when the issue had ceased to be highly salient to the public.<sup>214</sup>

This is a recurring pattern. Race was not on the public's radar screen at the time of *Brown*, nor was criminal procedure at the time of *Mapp* and *Gideon* and *Miranda*, school prayer at the time of *Engel*, contraception at the time of *Griswold v. Connecticut*,<sup>215</sup> abortion at the time of *Roe*,<sup>216</sup> reapportionment at the time of *Reynolds v. Sims*,<sup>217</sup> or flag desecration at the time of *Texas v. Johnson*.<sup>218</sup> And most issues of federalism, separation of powers, and procedural due process have never been on the public's radar screen at all.

<sup>214</sup> The conventional wisdom is that negative public and political reaction to the Red Monday cases caused the Court to retreat. See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 62–65 (1998); POWE, *supra* note 196, at 99–103, 135. But even apart from the fact that the retreat was far from total, see *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961) (striking down requirement that public employees take oath of nonassistance to the Communist Party); *Noto v. United States*, 367 U.S. 290 (1961) (overturning Smith Act conviction for lack of evidence of advocacy of action); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating loyalty oath requirement for property tax exemption), the implication of what I say here is that the Court need not have retreated, even if in fact it did. The counterfactual I offer is that the Court's unwillingness to retreat from the Red Monday decisions would have been tolerated far more than it would have been had those decisions been rendered when McCarthyism and related fears of domestic infiltration were at their apex and far more salient in the early 1950s.

<sup>215</sup> 381 U.S. 479 (1965). On *Griswold's* nonsalience and compatibility with prevailing opinion, see TUSHNET, *supra* note 1, at 144.

<sup>216</sup> Due to Watergate and even more to huge inflation fears, *Roe* not only failed to register on the Most Important Problem poll conducted at about the time the case was decided on January 19, 1973, but it also failed to register in the February 13 poll, the May 1 poll, or the September 4 poll, which was led by cost of living at 89%, followed by trust in government at 17%, corruption and Watergate at 14%, crime at 13%, international problems at 12%, and drugs at 10%. THE GALLUP ORG., THE GALLUP POLL #877 (Sept. 4, 1973), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0877>; THE GALLUP ORG., THE GALLUP POLL #870 (May 1, 1973), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0870>; THE GALLUP ORG., THE GALLUP POLL #864 (Feb. 13, 1973), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0864>; THE GALLUP ORG., THE GALLUP POLL #862 (Jan. 9, 1973), available at <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0862>. A year after *Roe*, in the January 1974 poll, in which energy was at the top at 39%, followed by high cost of living at 25%, abortion still did not appear at all. THE GALLUP ORG., THE GALLUP POLL #886, *supra* note 56. And although the current oscillation between 1% and 6%, *supra* p. 22, is lower than many people think, it is sufficiently higher than zero to lend some support to the well-known backlash explanation. See, e.g., KLARMAN, *supra* note 124, at 85–150; Ginsburg, *supra* note 133; Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994); Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1138–39 (2001) (arguing that *Roe* and *Brown* both awoke previously dormant opposition); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 96 (2000) (same).

<sup>217</sup> 377 U.S. 533 (1964).

<sup>218</sup> 491 U.S. 397 (1989). The decision produced a considerable degree of outrage but little increase in salience, a dynamic that may explain not only why the Court was comfortable with its decision in 1989, but also why Congress was equally comfortable with disregarding it in passing the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (2000)), which was unsurprisingly invalidated in *United States v. Eichman*, 496 U.S. 310 (1990).

Again, it is crucial to understand this claim as a hypothesis and not a conclusion. Put more precisely, the hypothesis is that the Court feels<sup>219</sup> (whether consciously or not) more emboldened with respect to low-salience issues and more hesitant when it comes to high-salience issues, and that, again controlling for the degree of popular disagreement with the outcome (as well as for much else, including judicial ideology), we can expect to see a more aggressive Court on low-salience issues than on high-salience ones. Would the Justices who decided *Hamdan* have decided the same case in the same way in October 2001? I doubt it.<sup>220</sup>

## V. CONCLUSION: SITUATING THE SUPREME COURT

Those of us accustomed to having the highest court in the land pronounce upon paramount issues of our national life will not be surprised to learn that as long ago as 1893 the Justices resoundingly declared the tomato a vegetable, not a fruit.

— THE JOY OF COOKING<sup>221</sup>

Perhaps the facetiousness of *The Joy of Cooking* is not so far off the mark. Much of what the Supreme Court does is probably more important than deciding whether a tomato is a vegetable or a fruit, but it is surely an exaggeration to think that the Court is pronouncing on very many of the “paramount issues of our national life.” In truth, as the data show, it is not.

The tendency to exaggerate the Court’s importance is not restricted to the authors of the nation’s cookbooks. Overestimating the salience (and perhaps even the intrinsic importance<sup>222</sup>) of Supreme Court adjudication and possibly even the Constitution itself is one of the recurring pathologies of American legal scholarship. The Constitution, the Supreme Court, and constitutional adjudication are salient, but not

<sup>219</sup> Or could feel, even if it does not.

<sup>220</sup> I do not claim that the same Justices deciding the same case would necessarily have reached the exact opposite result. The Justices in the majority might (or would at least have been more inclined to) have denied certiorari, or disposed of the case on procedural grounds without reaching the merits, or decided the merits on even narrower grounds. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2349–56 (2006) (arguing that the Court often defers to the President in national security contexts by insisting on congressional agreement rather than imposing rights-based constraints).

<sup>221</sup> IRMA S. ROMBAUER & MARION ROMBAUER BECKER, *THE JOY OF COOKING* 311 (Bobbs-Merrill Co. 1975) (1931).

<sup>222</sup> And maybe also the inherent interest. A useful corrective is Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2387 (2006) (book review) (“The work of the federal courts generally blunders along unnoticed except by legal professionals and the immediately interested parties. The judiciary may not be the least dangerous branch, but it is usually the most boring.”).

nearly as much as large numbers of other governmental institutions. And the Constitution, the Supreme Court, and constitutional adjudication are important, but so is much else.<sup>223</sup> And none of these are as salient or as important to the American people as a host of first-order policy decisions and the institutions that generate them. Like the rule of law itself, the courts and the Constitution are necessary components of a good society. But the courts and the Constitution are not all there is, as the American people well recognize.

The Supreme Court's October 2005 Term is a superb example of the business of the Court<sup>224</sup> and an equally superb example of where that business fits into the larger business of the nation. In the narrowest sense, the Term is likely to be remembered as the one in which the Court dealt with military detention and trials, state campaign finance restrictions, partisan gerrymandering, parental consent for minors' abortions, and military recruitment on campus in light of the military's ban on open homosexuality — and in which it dealt less significantly, or at least less so in the eyes of the public, with the Confrontation Clause and the hearsay rule, the scope of federal wetlands regulation, the remedies for violations of the knock and announce rule, the free speech rights of public employees, the use of hallucinogens for religious purposes, and assisted suicide. But the Term should also be remembered as the Term in which the Court did *not* deal with the war in Iraq, with the production of enriched uranium in Iran, with nuclear testing in North Korea, with skyrocketing fuel prices, with the rise in interest rates and the worries about inflation, with the aftermath of Hurricane Katrina, with the cost of prescription drugs, with the threat of avian flu, with the minimum wage, with illegal immigration, or with the proposed elimination of the estate tax.

There is no reason to think that what the Court does *not* do is any less important than what it does do. Nor is there any reason to think

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<sup>223</sup> Obviously the truth of the statements in this paragraph is a function of the breadth of what one understands as “the Constitution” or “constitutional.” If, for example, policy decisions about Medicare and environmental regulatory strategy count as constitutional, *see* MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 30, 168–69 (2003), even under a “thin” constitution, TUSHNET, *supra* note 1, at 11, then it is hard to see what work is being done by the word “constitutional” or what distinguishes constitutional decisionmaking from policy analysis or from decisionmaking about the major substantive principles of political theory. It is understandable that constitutionalists would prefer expansive definitions of “constitutional,” just as policy analysts would prefer expansive definitions of “policy” and political scientists would prefer expansive definitions of “politics.” Implicit in what I say here, however, is that an important role for constitutional decisionmaking is lost if the term is defined so broadly as to collapse under its own weight. A broad definition may serve the interests of those who describe themselves as “constitutionalists” more than it serves the larger society and may depart so dramatically from ordinary usage as to render the word of little assistance.

<sup>224</sup> The phrase comes from FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (Wm. W. Gaunt & Sons, Inc. 1993) (1927).

that what the Court does out of the glare of public salience is any less genuinely and pervasively important than what it does when the whole world, or at least much of the whole nation, is watching. But once we understand that most of the Court's agenda lies some distance from the nation's, we can begin to understand the Court in a better way, and we can begin to solve many of the existing puzzles about the Court's decisions and influence. The 2005 Term, in which not much besides *Hamdan* was particularly salient to the public or to its elected representatives, provides an ideal forum for exposing this issue and for inviting further exploration of the empirical and normative issues raised. But the Court's low-salience agenda is not a peculiarity of the 2005 Term. As the data rather clearly show, and with remarkably few recent exceptions, it has always been so.