Justice Kennedy and the Counter-Majoritarian Difficulty

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Justice Kennedy is known for his vigorous view of the judiciary's role.[1] The statistics bear that out. In a study of how often Justices voted to strike down legislation from 1994 to 2005, Justice Kennedy voted at the highest rate of the Justices on the Court.[2] A quick recall of Justice Kennedy's most famous decisions naturally brings to mind decisions that invalidated legislative action. Think of *Lawrence v. Texas*,[3] *Obergefell v. Hodges*,[4] and *Citizens United v. Federal Election Commission*,[5] just to name a few.

Some believe that Justice Kennedy lacked a consistent jurisprudential philosophy that guided his best-known work. I disagree. It's true that Justice Kennedy's opinions don't fit the standard narratives that guide so much analysis of Supreme Court decisions. These days, a judicial philosophy tends to be evaluated either using theories of interpretation such as originalism or by considering whether a Justice's opinions tend to favor consistently liberal or conservative outcomes. From those perspectives, Justice Kennedy's opinions don't seem to trace a straight line.

But I think Justice Kennedy's opinions do reflect a consistent view of the Supreme Court's role. It's a judicial philosophy rooted in a particular answer to

1. *See, e.g.*, Jeffrey Rosen, *The Roberts Court & Executive Power*, 35 PEPP. L. REV. 503, 508 (2008) (concluding that Justice Kennedy was a "judicial supremacist" and the "Court's most vocal defender of judicial power").

2. *See* Orin Kerr, *Counting Votes to Strike Down Legislation—the Surprisingly Flat Graph*, VOLOKH CONSPIRACY (Feb. 25, 2008, 1:18 AM), volokh.com/posts/1203919203.shtml (combining statistics of the number of times Justices voted to invalidate state and federal legislation to find that Justice Kennedy voted to do so more than any other Justice in the period from 1994 to 2005); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43 (2007) (containing the raw data for the previously mentioned blog post at Tables 1 and 6).

3. 539 U.S. 558 (2003).

4. 135 S. Ct. 2584 (2015).

5. 558 U.S. 310 (2010).

the famous problem of constitutional law known as the counter-majoritarian difficulty.[6] As you know, that phrase is generally attributed to Alexander Bickel and his famous book *The Least Dangerous Branch*.[7] The puzzle is this: judges exercising judicial review invalidate legislation. But how is it democratically legitimate for judges, who are not elected, to strike down laws that the people's elected branches have enacted?

This brief Essay makes two points. First, it argues that Justice Kennedy's jurisprudence was rooted in a particular answer to the counter-majoritarian difficulty. According to this view, a vigorous judiciary is not necessarily counter-majoritarian because the public, over time, wants the Supreme Court to take that role. A strong Supreme Court that invalidates legislative action can be popular and even beloved among the public over time. I think Justice Kennedy's opinions are generally consistent with that theme.

Second, the Essay scrutinizes the assumptions of Justice Kennedy's view. It argues that what we might call the "popular support" solution to the counter-majoritarian difficulty can be expressed in four different ways. It then explores each of the four arguments and considers whether they are persuasive. The persuasiveness of the approaches depends on your background assumptions about constitutional structure and the broader role of constitutions.

I confess at the outset that I am not persuaded by Justice Kennedy's view. I have some significant priors here: I'm a longtime fan of stare decisis, judicial restraint, and a modest view of the judicial role.[8] Given that, my skepticism should be no surprise. But my interest in this Essay is not in the views of a single wayward former clerk like me. Instead, my goal is to try to contribute, in some small way, to understanding the assumptions on which Justice Kennedy's jurisprudence rests.

I. JUSTICE KENNEDY'S THEORY OF JUDICIAL REVIEW

Perhaps the most illuminating of Justice Kennedy's many discussions of his views of the law appeared in an interview recorded in 2005.[9] The interview was recorded for the American Academy of Achievement, a non-profit group that aims to inspire America's youths by telling the success stories of prominent Americans.[10] The Academy posted Justice Kennedy's interview on the web in

6. For a helpful overview, see Lawrence Solum, *Legal Theory Lexicon: The Counter-Majoritarian Difficulty*, LEGAL THEORY BLOG (Sept. 9, 2012, 4:42 PM), https://lsolum.typepad.com/legaltheory/2012/09/legal-theory-lexicon-the-counter-majoritarian-difficulty.html.

7. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

8. *See generally* Orin S. Kerr, *Upholding the Law*, LEGAL AFF. (Mar./Apr. 2003), http://www.legalaffairs.org/issues/March-April-2003/feature_marapr03_kerr.msp.

9. Interview with Justice Anthony M. Kennedy, for the American Academy of Achievement: The Essential Right to Human Dignity (June 3, 2005), http://www.achievement.org/achiever/anthony-m-kennedy/#interview.

10. *See* AM. ACAD. ACHIEVEMENT, http://www.achievement.org/our-history/e (last visited May 13, 2019).

both video and written form, and I think it's a gem to understand his views of the law.

In the interview, Justice Kennedy explains his answer to the counter-majoritarian difficulty. First he states the problem: "Most law professors and many commentators say that the judicial review—the idea that courts can set aside legislation—is anti-majoritarian, or contra-majoritarian, so that a majority can't make its will binding on an injured minority."[11] Justice Kennedy concedes that striking down legislation may "for the moment, . . . displease the majority."[12] But here's the key. "[I]f you look over time," he says, " if you ask what the American people—the majority of the American people—want over time, over our history, they want judicial review."[13] More broadly, "[t]hey want to make sure that the promises of the Constitution are honored," and "that the commitments we made basically over time with our ancestors are followed."[14]

Justice Kennedy then expands on the relationship we have to the Constitution. In his view, "the Constitution defines the American people." Indeed, "Americans have their self-definition—their self-identity—shaped by the Constitution."[15] The story of the American people is that "we rebelled against England" because "[w]e want[ed] freedom."[16] The Constitution is the central document that reflects that identification: "[T]he Constitution is a formulation of what we think the principles of freedom are, and that's what defines America."[17] As a result, "the self-image of an American relates to his or her Constitution."[18] And that means that the American people love and revere the Constitution and the commitment to freedom. Over time, the Constitution has acquired "the reverence of its people."[19]

I think these two points go together. In Justice Kennedy's view, the American people have a deep love for the commitments of the Constitution. They love the Constitution's commitment to freedom that is at its core. And that means that the people also love the Supreme Court when it "make[s] sure that the promises of the Constitution are honored."[20] Judicial review is not counter-majoritarian, on this thinking, because the people want the Supreme Court to exercise judicial review. And they want the Supreme Court to exercise judicial

11. Interview with Justice Anthony M. Kennedy, *supra* note 9.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* (internal quotation marks omitted).
17. *Id.*
18. *Id.*
19. *Id*. Justice Kennedy offered some similar remarks over a decade later. *See Supreme Court Justice Anthony Kennedy Perspective*, C-SPAN (July 11, 2016), https://www.c-span.org/video/?412371-1/supreme-court-justice-anthony-kennedy-perspective&start=133 (providing a video recording of Justice Kennedy's remarks at the 2016 Ninth Circuit Court of Appeals Judicial Conference in Big Sky, Montana).
20. Interview with Justice Anthony M. Kennedy, *supra* note 9.

review because it reflects and reinforces a central part of the American self-identity.

II. JUSTICE KENNEDY'S THEORY AS STYLE AND SUBSTANCE

Bracket for now whether you find this argument persuasive. Instead, notice how it helps explain distinct features of Justice Kennedy's work as a Justice. Start with his style. Every lawyer knows that Justice Kennedy's opinions read differently than those of other Justices—and not just because they have none of the "-ly" words the Justice dislikes. Kennedy opinions are often written in the grand style. Language can be flowery. They call on basic first principles. There are no footnotes. And they rarely respond explicitly to dissents.

Consider a few examples of how Justice Kennedy invoked the concept of liberty. There's the opening sentence from *Obergefell*: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[21] Or consider this line from the opening paragraph of *Lawrence*: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[22] Or the line in the joint plurality opinion attributed to Justice Kennedy in *Casey*: "Liberty finds no refuge in a jurisprudence of doubt."[23]

Lawyers can find that style frustrating. We lawyers see Supreme Court decisions from the perspective of insiders. We value the precision insiders tend to like. We wonder exactly what a line means, and what specific legal significance it has. But I think Justice Kennedy's approach to judicial review helps explains his capacious style. Justice Kennedy sees the public's self-identity as reflected in and shaped by the Constitution. As a result, his opinions are aimed as much at the public as they are at the lawyers. His opinions try to teach, and to recognize, basic commitments such as freedom and dignity. The grand style may not be what lawyers prefer. But I suspect that language is aimed at a different audience.

This understanding also sheds light on the substance of Kennedy's views. Justice Kennedy often found himself at or near the ideological center of the Court. Justice Kennedy's view of the law was not shaped by opposition to the Warren Court in the way that you might find with other Reagan nominees such as Justice Antonin Scalia or Chief Justice William Rehnquist. If the Warren Court took a particular step, there was a good chance that Justice Scalia or Chief Justice Rehnquist saw those rulings as mistakes to be overturned or at least sharply cut back. Justice Kennedy did not.

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21. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

22. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

23. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.).

Kennedy's philosophy helps illuminate why. To him, the famous opinions of the Warren Court were not aberrations. Those decisions were just as much of the constitutional understanding that the people revered as were the rulings of any other Court. The Warren Court's decision were part of the body of work that the people loved and identified as their own. Justice Kennedy might think a particular ruling was taken too far, of course. He might want to cut back on perceived excesses or take the law in a somewhat different direction.[24] But the Warren Court's rulings were part of the fabric of the Constitution that the people accepted and loved. And that meant that they were legitimate to and valued by Justice Kennedy, too.

III. FOUR VERSIONS OF JUSTICE KENNEDY'S SOLUTION TO THE COUNTER-MAJORITARIAN DIFFICULTY

Is Justice Kennedy's solution to the counter-majoritarian difficulty persuasive? The counter-majoritarian difficulty is the most obsessed-over problem in constitutional law, and there is a massive literature on the topic. I cannot do it justice in a few pages, and I can't pretend to have anything original to say about it. But no self-respecting academic can lay out a view and not critique it. So here are some brief and unoriginal thoughts in response to Justice Kennedy's view of the Supreme Court's role.

At the outset, it's important to see that Justice Kennedy's theory can be expressed in four different ways. Recall that his view is premised on popular support. Because the public supports judicial review, the thinking runs, exercising judicial review is not against the public's will. Assessing this claim requires being specific about what exactly the people support. I think there are four plausible answers. The people might support the principle of judicial review; they might support the results of judicial review; they might endorse specific interpretive methods used when the Court exercises judicial review; or they may approve of the Court's rulings because they are persuaded by its opinions. I'll consider each claim in turn.

A. THE PUBLIC WANTS THE PRINCIPLE OF JUDICIAL REVIEW

The first possibility is that the people support judicial review in the limited sense that they approve of the principle that judges have the final say on what the Constitution means. On this view, public support for judicial review means that the public wants other branches to go along with court rulings invalidating acts as unconstitutional.[25] To isolate this argument, we need to assume perfect

24. See, for example, Berghuis v. Thompkins, 560 U.S. 370 (2010), which changed the waiver standard established in Miranda v. Arizona, 384 U.S. 436 (1966).

25. Under this view, the people want what Barry Friedman has called judicial supremacy—"when the Supreme Court says the Constitution means something, government officials not party to the proceeding must comply with the decision." Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 169 (2002).

clarity about what the Constitution means. For now, at least, assume that the meaning of the Constitution is fixed and that every government act is either obviously constitutional or obviously unconstitutional.

Does public support for the principle of judicial review solve the counter-majoritarian difficulty? I don't think so. It denies the problem rather than solves it. When the constitutionality of government acts are obvious and fixed, a court exercising judicial review isn't acting in a counter-majoritarian way in any obvious sense. And this means that public support for judicial review doesn't tell us much interesting about the kinds of debates we have today—how judges should decide cases or what role the Supreme Court should assume.

The reason is inherent in constitutionalism. When a polity enacts a constitution, it agrees to tie its hands in the future. The constitution provides the rules of the road. It says what institutions will exist, what powers they will have, and what powers they will lack. If it is always mathematically clear whether a future decision by one of those institutions fits the constitution, judicial review is merely holding the future to the agreement of the past. It's not at all obvious that this version of judicial review is counter-majoritarian in any significant sense.

I think I can make this point with donuts. Say I lack the willpower to stop eating donuts. For my New Year's resolution, I make an announcement to my friends on January 1st: "I hereby declare I will not eat a donut this year. If you see me about to eat a donut, I beg you to grab the donut and take it away from me." A month later, I am in the faculty lounge and I eye a delicious Boston cream pie donut. Just as I bring it to my lips, a colleague rushes over, grabs it, and tosses it in the trash. I'm pretty upset, as I really wanted that donut.

Was my friend acting against my will? It just depends on which will matters. I expressed one will on New Year's day, and I expressed another will a month later. I set up the conflict, as I recognized my will might change. I therefore asked my friends to prioritize my first will over my second will. If you assume the first will is the controlling one, my friend's act wasn't against my will at all. It was exactly what I wanted when I made a commitment for the year.

Now go back to judicial review. If public support for judicial review merely means support for the principle of judicial review, then the existence of judicial review isn't obviously counter-majoritarian for pretty much the same reason. The Constitution is like my New Year's resolution, and the unconstitutional law is like the donut. A judge who strikes down the law is like my friend who threw that donut away. Striking down the law isn't obviously counter-majoritarian for the same reason taking away the donut wasn't obviously against my will.

Granted, you can have a debate over which will matters more. It's inherent in the idea of a constitution that the first will matters. Otherwise the constitution doesn't mean much. But you could also argue that the second will matters, especially if the polity today is very different from the polity that established the rule of the road. Either way, I think those are arguments about constitutionalism

instead of about judicial review. If you accept the notion of constitutionalism, then public support for the principle of judicial review doesn't so much solve the counter-majoritarian difficulty as avoid it.[26]

B. THE PUBLIC WANTS THE RESULTS OF JUDICIAL REVIEW

A second version of this argument is that the public supports judicial review because the Court's rulings match the public's policy preferences. As Barry Friedman argues in *The Will of the People*,[27] the Supreme Court's rulings tend to be in "basic alliance"[28] with public opinion. Friedman argues that this is no accident. The Supreme Court has exercised tremendous power and has had strong public support, he argues, precisely because the Justices have tended to hand down rulings that a majority of the public likes.[29] "Over time," Friedman writes, "the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values."[30] From this perspective, perhaps the American people self-identify with the Constitution because the Supreme Court's rulings on the Constitution reflect the wishes of the American people.

If this is right, does it solve the counter-majoritarian difficulty? In one sense it may seem so. If courts strike down laws that most people dislike, then such acts could be seen (as Friedman argues) as "enforcing the will of the American people."[31] If the Justices are giving the majority of people what they want, the argument runs, then they are acting as a majoritarian institution when they exercise judicial review.[32]

But I'm not convinced. The first problem is how to measure the relevant majority. In a federal system, I would think that the unit of measurement for assessing the counter-majoritarian difficulty should be the polity that has constitutional authority over the relevant policy. We are not a nation with federal control over all policy. The Constitution was joined by member states, and it creates and empowers the federal government. It also imposes some limits on states. But many issues remain the exclusive domain of the states, and as the Ninth Amendment reminds us, of the people.[33]

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26. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 227–28 (2004) (noting the "all-but-complete disappearance of public challenges to the Justices' supremacy over constitutional law").

27. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

28. *Id*. at 15.

29. *Id*. at 369–71.

30. *Id*. at 367–68.

31. *Id*. at 368.

32. *See, e.g.*, Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty?*, 11 INT'L J. CONST. L. 13 (2013).

33. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

As I see it, the Constitution's retention of many legal issues for the states and the people means that a national majority rule is not necessarily majoritarian in the constitutionally relevant sense. Constitutionalizing a policy means federalizing it. A rule that a national majority likes may be a rule that a majority of states and localities dislike. And federalization means precluding majorities at the state or local level from controlling the outcomes they wish. If a particular issue is properly left to the states but is nationalized by Supreme Court decree, the Court's national rule will be majoritarian in the states that prefer it but counter-majoritarian in the states that don't.

This solution to the counter-majoritarian difficulty has other difficulties. Past performance is no guarantee of future results. The fact that the public approved of striking down legislation in the past does not mean that they will approve of doing so in the future. And more significantly, at a conceptual level, possibly solving the counter-majoritarian difficulty by striking down unpopular legislation may solve that problem by raising other ones. Among them, why have a Supreme Court that pushes the law toward national majoritarianism? Aren't there better ways of achieving national majority rule than selective votes by unelected judges, especially given that judges can strike down existing laws but not enact new ones?[34]

C. THE PUBLIC SUPPORTS THE INTERPRETIVE METHOD USED WHEN THE COURT EXERCISES JUDICIAL REVIEW

A third version of the popular-support claim is more granular: Perhaps the public supports the particular interpretive theories the opinions rely on when they exercise judicial review. Maybe some kinds of theories of constitutional interpretation are particularly popular, over time, entirely apart from the results they reach. If public support is precise enough that we can pinpoint a particular theory that the public favors, then perhaps that longstanding popular support can solve the counter-majoritarian problem so long as judges apply the theory that the public likes.

If the evidence exists to back up this claim, then I think it forms the strongest response to the counter-majoritarian objection and the best case for Justice Kennedy's view. The more the public over time shares a commitment to a particular interpretive theory, the more we can say that applying that theory matches the public's wishes. If the interpretive theory generates predictable results and has strong public support over time, then a public consensus in favor of that theory edges us closer to the clear Constitution described earlier in which the Court's exercise of judicial review was not obviously counter-majoritarian.

34. *Cf.* Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 286 (2010) (noting that the idea of the courts as an additional legislative chamber "rest[s] on a controversially libertarian normative view that sees government action as generally more dangerous than government inaction").

Again, though, I am skeptical. The evidence suggests that no particular interpretive theory draws strong support across the ideological spectrum. A 2008 survey of 1,000 adults asked the following question: "Should the Supreme Court make decisions based on what's written in the Constitution and legal precedents or should it be guided mostly by a sense of fairness and justice?"[35] This isn't a great survey question, as each answer could reflect a wide range of views. But the results were fascinating. Answers diverged sharply based on who the respondent supported in the 2008 presidential race. In the poll, eighty-two percent of those who supported the Republican candidate, John McCain, believed in following the Constitution as written and following precedents.[36] On the other hand, just twenty-nine percent of those who supported the Democratic candidate, Barack Obama, agreed.[37]

I take the lesson to be that the public's views of constitutional interpretation likely reflects ideology and cultural cognition rather than abstract theoretical commitments.[38] Think about the political context. Republican Presidents and politicians typically speak of Supreme Court Justices having to "follow the law, not make the law."[39] Democratic Presidents and politicians typically speak more of Justices exercising discretion and fairness, such as President Obama's well-known support of judicial "empathy."[40] Most people are not lawyers, and they haven't been exposed to debates over interpretive theory beyond these buzzwords. It shouldn't surprise us that public views tend to track ideological lines.

This is probably true of lawyers as much as members of the public. We are disproportionately attracted to interpretive theories that we associate with results that echo our worldview. When a theory is associated with a particular set of results that one side of the political spectrum supports, that theory is likely to find wide appeal on that side. Given that, it's not surprising that the public as a whole doesn't favor a particular and clear interpretive theory that might overcome the counter-majoritarian difficulty.

D. THE PUBLIC SUPPORTS THE SUPREME COURT'S PERSUASIVE POWER

A final version of the public-support claim is that perhaps the Supreme Court leads public opinion rather than follows it. Maybe its opinions teach the public about values that persuade the American people to support the Supreme

35. Orin Kerr, *Survey Shows Sharp Differences in How McCain Supporters and Obama Supporters View Proper Role of the Supreme Court*, VOLOKH CONSPIRACY (Sept. 9, 2008, 12:37 AM), http://www.volokh.com/posts/1220935033.shtml.

36. *See id*.

37. *See id*.

38. *See generally* David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731 (2012).

39. *See generally* Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?* 86 JUDICATURE 284 (2003).

40. *See generally* Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012).

Court's work. What the public appreciates, on this view, is the wisdom that the Supreme Court imparts that helps the American people settle difficult questions.

If the evidence backs it up, this argument can offer at least a partial solution to the counter-majoritarian difficulty. If a judicial opinion can change minds, it might persuade those in jurisdictions with divergent preferences to switch over to the majority side. Decisions striking down locally-popular laws might transform public opinion enough to make them locally-unpopular laws. If that happens consistently, then perhaps judicial review is majoritarian in the sense that the Court's persuasive power actually creates majorities.

As I read the evidence, though, this does not occur. Studies of how Supreme Court opinions influence public opinion don't all point in the same direction. For the most part, however, it seems that the Court's decisions don't persuade the public on major issues. In 1989, for example, Thomas Marshall reviewed public opinion polls taken before and after Supreme Court decisions about major questions the Court decided.[41] Reviewing polls from 1937 to 1983 concerning eighteen different Supreme Court decisions, Marshall found that there was essentially zero average shift in opinion following the Court's ruling.[42] He writes: "The polls shifted away from the Court's position more often than toward it, and the average poll shift was almost zero."[43]

Experimental studies suggest that Supreme Court opinions may have more of a polarizing effect than a persuading effect. For example, a small study of college students found that the students who already viewed the Supreme Court enthusiastically were somewhat persuaded when told that the Supreme Court had ruled a particular way.[44] Those who were not fans of the Supreme Court were largely unmoved by the same news, however.[45] A more recent study by my former colleagues David Fontana and Donald Braman suggested a similar dynamic.[46] Although the studies are not conclusive, they don't appear to support the claim that the Court's decisions have a consistent positive effect on public opinion.

These results seem intuitively right. Most people don't read Supreme Court opinions. And people who read them aren't likely to be persuaded about a controversial issue just because the Supreme Court has decided it. A decision that cuts against their values is more likely to trigger cynicism about the Court than a change in those values.

41. *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 131–66 (1989).

42. *See id*. at 146.

43. *Id*.

44. Valerie J. Hoekstra, *The Supreme Court and Opinion Change: An Experimental Study of the Court's Ability to Change Opinion*, 23 AM. POL. Q. 109, 120 (1995).

45. *See id*. at 121.

46. *See* Fontana & Braman, *supra* note 38, at 763–64.

CONCLUSION

Justice Kennedy's opinions did not readily fit the interpretive categories or political dynamic that dominate commentary about the Supreme Court today. But there is a consistency to his approach, rooted in a particular view of the Supreme Court, that deserves greater recognition. As I noted in the beginning, I am ultimately unpersuaded by Justice Kennedy's solution to the counter-majoritarian difficulty. But I think appreciating his solution helps reveal some of the assumptions underlying his opinions that can help explain his work as a Justice.