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Institutions and Enforcement of the Bill of Rights

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INTRODUCTION

In some legal circles, reliance on judicial enforcement of the Bill of Rights[1] is virtually an axiomatic good. Erwin Chemerinsky asserts

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1 In this Article, I use the Bill of Rights as a shorthand for the first ten amendments to the Constitution, plus the nineteenth century civil rights amendments, which one may

that "[w]ithout judicial enforcement, the Constitution is little more than the parchment that sits under glass in the National Archives."[2] Legal scholars fairly widely assume judicial supremacy in constitutional interpretation.[3] This claim for judicial supremacy in the enforcement of rights is the heritage of *Marbury v. Madison*, in which Justice Marshall pronounced that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[4] Throughout history, the Court has been by turns deferential and aggressive in asserting its interpretive supremacy. We have today returned to a period in which the judiciary displays "incredible hubris" in asserting its "interpretive hegemony."[5]

Scholars have increasingly criticized reliance on judicial enforcement of the Bill of Rights during recent decades. The heaviest criticism initially came from the political right, which objected to various Warren Court decisions. Lino Graglia is probably the best known critic of judicial enforcement.[6] One may dismiss some critics as result-

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regard as belated additions to the fundamental rights which the Constitution recognized. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW 7 (1996) (observing that the Bill of Rights and Civil War Amendments provide most of the constitutional protection of individuals and minorities). My analysis of constitutional interpretation is limited to these amendments and is not suited for interpretation of the Articles of the Constitution.

2 Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 97 (1989); *see also* Kathleen Pritchard, *Comparative Human Rights: An Integrative Explanation*, 15 POL'Y STUD. J. 110, 112 (1986) (noting belief that "the existence and proper functioning of an independent judiciary are frequently cited as essential conditions for the respect and protection of human rights under the law"). The tendency to empower courts may be intrinsic among lawyers. They arguably view judges as a "powerful agent of the good" in order to foster faith in "extraordinarily powerful lawyers, law professors, and law students." Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 L. & SOC. INQ. 745, 758 (1992).

3 *See, e.g.*, JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES at x (1998) (reporting that "the nation's leading law faculty . . . are nearly unanimous" in believing the judiciary is best-suited to protecting liberties); Susan R. Burgess, *Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, & Judicial Supremacy*, 25 POLITY 445, 455 (1993) (observing that "[l]eading scholars as disparate as Raoul Berger, Ronald Dworkin, Robert Bork, John Hart Ely, and Michael Perry disagree about what the Court should say when it speaks, but they agree that once spoken, the Court's words are final").

4 5 U.S. (1 Cranch) 137, 177 (1803). More recently, the Court reaffirmed *Marbury*'s pronouncement. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (noting *Marbury* declared that the "federal judiciary is supreme in the exposition of the law of the Constitution"). *Marbury* has been taken to limit the authority of other branches to interpret the Constitution. *See, e.g.*, William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (suggesting that the case precludes "judicial deference to congressional interpretation of the Constitution").

5 Lillian R. BeVier, *Religion in Congress and the Courts: Issues of Institutional Competence*, 22 HARV. J.L. & PUB. POL'Y 59, 63 (1998).

6 *See, e.g.*, Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 634 (1993) [hereinafter Graglia, *Constitutional Interpretation*] (defending an originalist interpretation of the Constitution under which the Supreme Court should not hold anything unconstitutional "that is not, in fact, prohibited by the Constitution"); Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 HARV. L. REV. 1331, 1331 (1985) (book review) [hereinafter Graglia, *Constitutional Mysticism*] (commenting on

oriented, but Graglia seems committed to his devotion to majoritarian interpretation of the Bill of Rights by the elected branches of the government.[7] Conservatives argue that these branches will do a "better" job of enforcing the Bill of Rights, even though they have not been entirely successful in identifying a neutral external standard by which to measure such betterness.[8] No external standard currently exists to readily judge the best interpretation or correct interpretation of the Bill of Rights.[9] No accessible God Goldilocks exists to tell us which

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the "growing recognition that judicial review is much in need of justification and that prior efforts to justify it have not been successful"); Lino A. Graglia, *"Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789 (1987) (asserting that the Supreme Court's enforcement of constitutional protections has no constitutional basis and is a guise for judicial enactment of a liberal political agenda); Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119, 123-24 (1994) [hereinafter Graglia, *Policy-Making Role*] (arguing that judicial enforcement of the Fourteenth Amendment "give[s] the Justices unlimited policy-making power" and "make[s] the text of the Constitution practically irrelevant to the substance of constitutional law").

Michael McConnell has made a similar case, arguing that "rule by judges is objectionable in this society because it is inconsistent with the principles of self-government." Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1538 (1989) (book review). Other conservatives have made analogous arguments. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 177 (1990) (argning that a judicial branch limited to "implement[ing] the policies made by others . . . is what the separation of powers was designed to accomplish"); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987) (stating that "government by judiciary . . . would be utterly inconsistent with the very idea of the rule of law to which we, as a people, have always subscribed"). For a good recent assertion of this position, see Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999) (advocating a constitutional amendment to restrict the Supreme Court's judicial activism and strengthen self-government).

7 Much of Graglia's complaint involves the "left-liberal" policies that he believes result inevitably from judicial review. *See* Graglia, *Constitutional Interpretation*, *supra* note 6, at 637. But it is relatively clear that he is a defender of majoritarianism, whatever the results. The potential ideological neutrality of these critics is clear from Carrington, *supra* note 6, at 419-20 (criticizing both liberal and conservative constitutional decisions of the Court).

8 A central difficulty in the debate over institutional enforcement of the Bill of Rights is the identification of such an external neutral standard of right interpretation and enforcement. Devotees and critics of various institutions typically point to decisions where the judiciary got it "right" or "wrong." But this rightness or wrongness typically refers to the attitudes of the devotees and critics. This is an unpersuasive standard for others. The final section of this Article deals with this problem by attempting to establish and justify a standard for interpretation and enforcement that is ideologically more neutral. *See infra* Part III.

9 Of course, some claim that such a standard exists. Devotees of originalism may argue that it provides such an external standard. *See, e.g.*, Graglia, *Constitutional Interpretation*, *supra* note 6, at 634 (arguing that the Constitution cannot have meaning beyond the language of its provisions). But originalists have not been very effective in persuading others that this serves as an exclusive standard for rights interpretation and they have also failed to demonstrate that the technique of originalism can provide clear answers about the correct interpretation. Dworkin boldly believes that he has found the best interpretation of the Constitution, but his best interpretation looks like what his relatively liberal ideology would project. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE]

interpretation is "just right."[10] While there might be a true or correct interpretation of the Bill of Rights, the centuries of debates over the amendments demonstrate that this true interpretation's directives are not clear to us.

In recent years, the political left has also commenced an attack on judicial interpretation and enforcement of the Bill of Rights. Mark Tushnet presents the most dramatic exposition of this attack in *Taking the Constitution away from the Courts.*[11] Other progressives have taken similar positions to that of Tushnet.[12] The leftist critique confronts the same difficulty as the conservative critique in identifying an external standard by which to measure the betterness of interpretation and enforcement. No liberal God Goldilocks exists either. Tushnet fairly candidly admits that he favors whatever regime would advance the progressive ideological agenda that he favors,[13] but fails to propose a persuasive general standard for constitutional interpretation and enforcement.

A less ideological critique of judicial enforcement has emerged from the political science community. Robert Dahl, one of the most renowned contemporary political scientists, regards judicial enforcement as essentially ineffectual,[14] and others have suggested that the courts cannot do much on their own to protect individual rights.[15]

127-28 (1997). Moreover, the accurate application of Dworkin's standard requires imaginary Herculean judges. *See id.*

10 *See* Emerson H. Tiller & Frank B. Cross, *A Modest Reply to Judge Wald,* 99 COLUM. L. REV. 262, 263 (1999). Efforts to establish such a standard have not been very helpful. One suggestion is that interpretation should be guided by the constitutional interpretation that "would make us more praiseworthy as a people." SOTIRIOS BARBER, ON WHAT THE CONSTITUTION MEANS 122 (1984). Such a standard does not offer much guidance.

11 MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). He proposes that the Supreme Court issue a statement that "[w]e will no longer invalidate statutes, state or federal, on the ground that they violate the Constitution." *Id.* at 154.

12 *See, e.g.,* GIRARDEAU A. SPANN, RACE AGAINST THE COURT 94 (1993) (arguing that Supreme Court involvement has undermined the protection of civil rights in this country); Robin West, *The Aspirational Constitution,* 88 NW. U. L. REV. 241 (1993) (calling for a substantial reduction, if not elimination, of judicial constitutional review).

13 His conclusion that "progressives and liberals are losing more from judicial review than they are getting" seems to capture his judicial decision-making rule. TUSHNET, *supra* note 11, at 172.

14 In Dahl's original, and now classic, exposition of the limits of judicial action, he suggests there that the Court's constitutional decisions "are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,* 6 J. PUB. L. 279, 285 (1957).

15 *See, e.g.,* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 224 (1960) (declaring that it was "hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand"). Although legal principle suggests that Congress cannot reverse constitutional decisions of the Court, research indicates that Congress in fact functionally does so when judicial decisions are contrary to the strongly expressed will of the public. *See* James Meernik & Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution,* 41 AM. J. POL. SCI. 447 (1997). But actual legislative

Some political scientists have called the Court the "device by which central political regimes consolidate their control over the countryside."[16] In this view, *Marbury* asserted only a judicial power "to declare politically inconsequential laws unconstitutional."[17] Still other political scientists have further argued that judicial enforcement of the Bill of Rights is inferior or counterproductive, undermining the very rights it strives to protect.[18]

Legal academics from various disciplines have increasingly begun to question prevailing doctrines of deference to the judiciary from a less explicitly ideological perspective.[19] Burgeoning support exists for a doctrine called "departmentalism" or "coordinate construction," in which each of the branches acts as interpreter and enforcer of the Constitution.[20] While this theory does not deny the judicial role as

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action may be unnecessary. *See* SPANN, *supra* note 12, at 2 ("The Supreme Court has never been able to sustain significant independence from the demands of ordinary politics in the past. . . .").

16 MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS at viii (1981).

17 Mark A. Graber, *The Problematic Establishment of Judicial Review, in* THE SUPREME COURT IN AMERICAN POLITICS 28, 31 (Howard Gillman & Cornell Clayton eds., 1999). He goes on to argue that "[j]udicial power increased in the years between 1808 and 1828 because the exercise of the power advanced policies preferred by important members of the dominant national coalition, not because the Court remained above the political fray." *Id.*

18 The contention is that Supreme Court enforcement of the Bill of Rights causes the legislature to leave the field and rely solely on the Court, the result of which undermines the protection of rights. This position is discussed *infra* Part III.B.

19 For a brief summary of the different theories regarding the judicial role and the inability of originalism to settle the choice among the theories, see STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 92-96 (1996).

20 For good discussions of departmentalism, see generally Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 383-89 (1997) (discussing the descriptive and normative claims of departmentalists) and Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63 (1999) (examining the flaws of analyses supporting nonjudicial constitutional interpretation and suggesting areas for further scholarly development). Departmentalism now appears at some level to reflect "the consensus view among serious scholars of the Constitution." Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996).

Departmentalism comes in many variations. *See* Gant, *supra*, at 383-89; Peabody, *supra*, at 63 n.2. Virtually everyone would agree that presidential interpretation is legitimate in some contexts, such as the granting of pardons and vetoes or when no relevant judicial precedent exists. Conversely, virtually everyone would agree that the President or Congress is bound by the results of particular Supreme Court decisions to which they are a party. Between these extremes the uncertainty lies. Some might call for parallel interpretive authority across the board, with no branch possessing clear supremacy on any issue. *See, e.g.*, Gant, *supra*, at 384 & n.128 (discussing departmentalism theory in which "branches . . . of the federal government co-exist, equal in their capacity and authority to interpret the Constitution"). Others would grant different branches supremacy for different issues and in different realms. *See id.* at 384-85; *infra* note 21. Yet they might disagree as to which branch merits supremacy in a particular issue or realm. *See, e.g.*, Gant, *supra*, at 387 (discussing disagreement between scholars over whether the President may refuse to enforce a statute when the courts have already determined its validity). Given the nature of my pro-

enforcer of the Bill of Rights altogether, it does reduce that role.[21] Similarly, scholars are now calling for the judiciary to be somewhat more timid in its decision making, by deciding cases without making sweeping pronouncements about the demands of the Constitution.[22] Such an approach reduces the judiciary's role in interpretation and enforcement of rights.

The case for judicial interpretation and enforcement of the Bill of Rights is neither obvious nor axiomatic. The Constitution itself does not definitively assign final interpretive authority to a particular branch.[23] Judicial supremacy in enforcement requires justification, and this Article examines the justification for such judicial involvement. This Article concludes that although judicial enforcement

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posal below, I need not enter this thicket. In this Article, I use departmentalism as a convenient shorthand for recognizing interpretive authority in different institutions, without precisely referring to any of the variants of such departmentalism.

21 *See, e.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 276-84 (1994) (arguing that the executive branch could go so far as to disregard a Supreme Court opinion, even with respect to the parties involved in the case). Other departmentalists are more modest and would assign interpretive supremacy to different branches depending upon the particular provision in question. *See, e.g.*, Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 353-64 (1994) (offering a theory of "comparative institutional competence" which assigns issues such as affirmative action, judicial impeachment, legislative vetoes, and national security to the different branches on the basis of their relationship to popular will, government, experience, and structural considerations); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293 (1993). *But see* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 97-99 (1987) (arguing against departmentalists who use the generalized grievance prohibition and political question doctrine to assign interpretation to the political branches). There is not uniform agreement, though, about how the authority should be allotted. While these analyses are typically normative, McGinnis makes a positive argument that the power over particular constitutional issues will "move to the branch that will gain the most utility from its exercise." McGinnis, *supra*, at 294. This outcome is not a particularly desirable one—the end of the Constitution is to maximize the utility of the nation, not necessarily that of individual branches of the federal government. One might imagine, for example, that the Executive could gain enormous utility through its martial law authority.

22 *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME 5-6 (1999) (describing "decisional minimalism" as "democracy-promoting" and sensible in cases with "a constitutional issue of high complexity"); *cf.* Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297 (1996) (advocating that the Court adopt a flexible approach to the avoidance doctrine that instructs courts to avoid unnecessary constitutional decisions). Sunstein argues that judicial review should be "minimalist" and that this would be "democracy-promoting" by ensuring that "certain important decisions are made by democratically accountable actors." SUNSTEIN, *supra*, at 5. He would not preclude judicial review of constitutional rights but argues that the resulting decisions should not foreclose democratic action but should functionally serve as a "remand" to the public for further deliberation. *See id.* at 135.

23 *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 94 (1993) (noting that the "Constitution does not contain the instructions for its own interpretation"); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 137 (1993) (finding the Constitution "remarkably silent on the subject of ultimate responsibility for constitutional interpretation").

should play a critical role, other branches also have an important role and should not universally defer to the judiciary's interpretation and enforcement.

Part I of this Article addresses the conventional case for judicial enforcement, which typically claims that the judiciary is better suited to enforce the Bill of Rights, either because of the quality of judges and the judicial process or because of its purported nonmajoritarian nature. Part I asserts that these conventional arguments are intrinsically quite weak and cannot support a doctrine of reliance upon the judiciary for constitutional interpretation and enforcement. These conventional claims rest upon certain presumptions that are demonstrably false. In particular, the theories ignore a wealth of evidence that the other branches, called majoritarian, have a long and impressive history of rights protection.

Part II puts forth different justifications for continued judicial involvement in rights enforcement. Part II suggests two neutral cases for judicial review, "multiple vetoes" and "motive and opportunity analysis." The former is not a defense of the judiciary per se, but contends that the courts can add an additional veto to rights-restricting government action, thereby increasing the cost of such action and decreasing the probability of its occurrence. The latter relies upon the institutional weaknesses of the Court in taking affirmative government action, which lessens its opportunity to profit from rights-restricting action and hence its motive to take such action. While both theories suggest advantages to judicial review, neither provides a strong enough case for universal reliance on the courts.

Part III argues for a new interpretive decision rule that differs from the past and the currently prevailing proposals for legislative or judicial supremacy or departmentalism. Part III proposes a libertarian presumption that favors whichever institution is most protective of the liberty in question. Laurence Tribe suggests that the actual functioning of our system "on various occasions gives the Supreme Court, Congress, the President, or the states, the last word in constitutional debate."[24] Tribe does not explain why a given institution prevails in particular cases or demonstrates that the result makes good constitutional sense. This Article proposes a system that justifies the circumstances under which any of the institutions might merit the last word in interpretation of the Bill of Rights. In short, the institution that provides the greatest protection for individual rights prevails. This solution fails, however, in the limited circumstance in which rights are in direct conflict with one another. This Article proposes and justifies

24 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW at ix (1978)

why the legislature should be given the last word on constitutional interpretation and enforcement in that situation.

I
THE WEAK CONVENTIONAL CASE FOR JUDICIAL INTERPRETATION AND ENFORCEMENT

The traditional defenses of judicial interpretation and enforcement of the Bill of Rights are the courts' relative comparative advantage as constitutional interpreters and the courts' status as a nonmajoritarian institution.[25] Both arguments appear facially appealing and scholars often invoke them. They form the foundation for the romantic vision of the Court as "a heroic band of White Knights who courageously wielded their swords of principled legal reason to slay monstrous injustices long afflicting our nation."[26] This Article shall argue, however, that the romantic vision of the courts is false and that neither traditional defense presents a very strong case for exclusive or even primary reliance on judicial enforcement of the Bill of Rights.

A. Quality of Interpretation and Enforcement

One defense of judicial supremacy in interpretation and enforcement is simply that the courts are better interpreters than the other branches. Under this theory, judges should interpret and enforce the Constitution because they represent "a voice of reason, charged with the creative function of discerning afresh and of articulating and de-

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25 These are not the only two defenses. A recent article argues that judicial enforcement is justified because it provides a single source of authoritative settlement of constitutional disputes. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). The first problem with this position is that it elevates resolution stability to a higher priority than it deserves. *See* Peabody, *supra* note 20, at 68-71. The Court itself regards constitutional precedent as less binding than statutory precedent, because "in constitutional doctrine it is often less important that a rule be settled than it be settled correctly." ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 334 (1992). The second problem lies in its presumption that the judiciary will provide a stable resolution to constitutional matters. In fact, judicial outcomes are quite unstable, with precedents commonly modified and even reversed entirely. *See, e.g.*, TUSHNET, *supra* note 11, at 28 (suggesting that "statutes addressing fundamental constitutional questions . . . would have at least as long a shelf-life as the Supreme Court's constitutional decisions"); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) (contending that "stare decisis has always been a doctrine of convenience, to both conservatives and liberals"); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 181 (1998) (noting that judicial interpretations of the Constitution do not provide finality because they are frequently "overruled by the course of events or by subsequent judicial decisions").

26 Michael McCann, *How the Supreme Court Matters in American Politics: New Institutional Perspectives*, *in* THE SUPREME COURT IN AMERICAN POLITICS, *supra* note 17, at 63.

veloping impersonal and durable principles."[27] There are two distinct branches of the judicialist quality justification. First, one could argue that judges, by training, are most skilled at constitutional interpretation. Second, one might argue that the judicial process, independent of particular judges, is most conducive to proper constitutional interpretation. However, both branches of the quality defense of judicial supremacy contain at least three uncertain premises. First, they presume that the judiciary is most skilled at or the judicial process most amenable to some form of legal interpretation. Second, they presume that this form of legal interpretation is the correct one for enforcing the Bill of Rights. Third, they presume that the judiciary will reliably employ this form of interpretation in practice. These premises seldom enjoy strong evidentiary support[28] and, under examination, all three premises prove to be dubious.

1. *The Quality of Judges*

One can argue that judges should interpret and enforce the Constitution because they are especially adept or skilled at legal analysis. This argument presumes that legal analysis is a distinct, principled, identifiable concept, yet critical legal scholars would dispute this assertion.[29] Even accepting the theoretical existence of some principled formal analytical legal skills, the claim that judges are better at those skills still requires evidence. Arguments for the judiciary often take an extremely naïve view of judges and their decision making.[30] Some would contrast the model of unprincipled political decision making with a Court guided "by judges of extraordinary learning and wisdom" who create law that achieves "integrity, political morality, and coherence over time."[31] Although this sounds nice, it bears little relation to reality.

A key flaw of the judicial quality argument is the fact that individuals cannot even agree upon what comprises such quality. It is said to include temperament, expertise, integrity, intelligence, training, and

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27 Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959); *see also* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 12 (1999) (describing defense of Court grounded in "the special attributes of judges and the legal process").

28 *See* Burgess, *supra* note 3, at 457 (noting that both liberals and conservatives "largely *assume* that the Court is the most competent and expert branch in addressing rights-related issues" (emphasis added)).

29 *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 257 (1997).

30 *See* Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 60-61 (1986) (observing that "[a]rguments based on comparative competence . . . often iguore the realities of an institution's performance").

31 Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 76-77 (1993).

communication skills.[32] Yet judges themselves are unable to define the nature of characteristics such as temperament.[33] In fact, one suspects that two ideal judges could possess ample amounts of all of these characteristics and still disagree about the proper interpretation of the Constitution.[34]

Even if we could define more precisely the quality that we want in constitutional interpreters, the judiciary probably would not provide that quality in a unique amount. The procedure for selecting federal judges rarely focuses on the abstract qualities of judging.[35] In contrast to the judicial selection process in Europe, where judges are appointed through a meritocratic civil service process,[36] the "controlling factor" in judicial appointments in this country has been "political and ideological compatibility."[37] Commentators have remarked that gaining appointment to the Supreme Court is "pretty much a matter of chance."[38] In reality, selection to the Supreme Court or other federal courts is far from random—it depends crucially upon politics. Presidents overwhelmingly appoint like-minded members of their own party to the bench.[39] A potential judge's approach to "policy is typically a more important consideration than law for political leaders who help to select judges."[40] "The nomination and confirmation process is political to the very ground," similar to every other decision of the political branches.[41] Furthermore, eighty-three percent of the Jus-

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32 *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 57 (4th ed. 1996).

33 *See id.* at 58.

34 *See, e.g.*, William G. Ross, *The Ratings Game: Factors that Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 445 (1996) (rating Justice Harlan as one of the top ten greatest justices along with Justices Warren and Brennan, yet they often disagreed on constitutional interpretation). The text of this Article amply demonstrates the uncertainty of what standards are used in evaluating "greatness" of justices and the indeterminacy in the application of those standards.

35 *See* TUSHNET, *supra* note 11, at 152 (observing that "[j]ustices are nominated by the president and confirmed by the Senate; they are not chosen by legal professionals on the basis of their legal qualifications, although professionals are consulted").

36 *See* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 65 (1971) (discussing meritocratic, bureaucratic method of judicial selection in most European countries).

37 HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 6 (3d ed. 1992).

38 O'BRIEN, *supra* note 32, at 59.

39 *See* DEBORAH J. BARROW ET AL., THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE 15 (1996).

40 LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 62 (1997).

41 TUSHNET, *supra* note 11, at 152; *see also* SPANN, *supra* note 12, at 21 ("Although judicial temperament and legal competence play some role in the appointment and confirmation process, the acceptability of a candidate's political inclinations is likely to be dispositive at both stages."). One study contended that in 93% of the cases "the potential nominee's political philosophy" motivated a presidential appointment to the Supreme Court. William E. Hulbary & Thomas G. Walker, *The Supreme Court Selection Process: Presidential Motivations and Judicial Performance*, 33 W. POL. Q. 185, 189 (1980). A number of

tices have "engaged in some sort of political activity before their appointment to the Court."[42] Presidents do not ignore judicial competence altogether in the selection process, but they do not necessarily seek out the most competent or qualified candidate.[43] A study of Senate confirmation rejections found that "in the overwhelming number of instances . . . qualifications are not decisive (and often are not even important) in influencing the chamber's actions."[44] Indeed, mere chance or luck plays a material role in the selection of justices.[45]

Judicial partisans argue that "members of Congress are not selected by a process which has any tendency whatever to ensure possession of the kinds of skill and wisdom needed for constitutional decision."[46] Yet one could certainly say the same about the judiciary. After all, the political branches select judges using a process that relies on those same members of Congress who purportedly lack the skill and wisdom for constitutional decision making. If Presidents are political and Congress is political, how could one expect the judges those branches select to be otherwise?

In fact, devotees of judicial supremacy unfairly demean the abilities of the legislative and executive branches. Congress enhanced its general legal analysis abilities by establishing an Office of Legislative Counsel in each house of Congress to provide constitutional advice and assistance in drafting legislation.[47] It also established an Office of Senate Legal Counsel in the Senate to conduct litigation for Congress.[48] In addition, Paul Brest observed:

> Legislation is typically drafted by lawyers—in an executive agency, department, or congressional committee—who have expertise in the subject area and are familiar with the potential constitutional issues presented by the legislation. The committee to which a bill is

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studies have shown that ideological considerations also drive the Senate confirmation process. *See* PERETTI, *supra* note 27, at 88-90.

42 LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 37 (1998). Those who have sought out political involvement, as Justices typically have, are "likely to care more about public policy than do other members of the legal profession." Lawrence Baum, *Recruitment and the Motivations of Supreme Court Justices, in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 201, 208 (Cornell W. Clayton & Howard G. Gillman eds., 1999). Hence, the selection process for Justices does not produce judges focused on legal accuracy as much as on good policy.

43 *See* LAWRENCE BAUM, THE SUPREME COURT 42-43 (5th ed. 1995) (reviewing selection and noting that there is a minimum standard for competence to screen out "questionable" candidates but that a large number of candidates survive this competency screen).

44 Thomas Halper, *Senate Rejection of Supreme Court Nominees*, 22 DRAKE L. REV. 102, 112 (1972).

45 *See* BAUM, *supra* note 43, at 71-72.

46 CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 177 (1960).

47 *See* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 730 (1985).

48 *See id.* at 729-30.

> referred can call upon its own legal staff or the American Law Division of the Congressional Research Service of the Library of Congress for assistance in considering constitutional questions, and it can hold hearings to gain factual and legal information. Moreover, standing committees—especially the judiciary committees—often have expertise in constitutional law.[49]

Perhaps most significantly, committees can avail themselves of the most expert legal assistance in the country by calling constitutional scholars as testifying witnesses.[50] As a result, Congress can ensure that it receives better legal advice than can the Court, which must suffer whichever advocates appear before it.

The Executive Branch may have the best case of all for legal quality. The Department of Justice has far greater support resources than the Court or Congress. It also has attracted the most highly regarded legal minds. Historically, it has included many who went on to become Supreme Court Justices.[51] Judge Easterbrook concluded that "if expertise is important it parades down the halls of the executive branch."[52]

Even if judges were more qualified at constitutional interpretation, the case for judicial supremacy would still not be complete. Perhaps judges *are* at least somewhat more skilled at formal legal analysis than Congress or the Executive. But even if judges are technically more adept at legal interpretation, this fact still lends little support to the argument for judicial supremacy in interpretation and enforcement of the Bill of Rights. Interpretation and enforcement of the Bill of Rights requires more than mere legal formalism.

Formalism begs essential and unavoidable interpretive issues.[53] The Bill of Rights is rife with terms of uncertain meaning that inescapably demand political value judgments in interpretation.[54] Concepts such as due process, liberty, equal protection, and freedom itself are not self-defining but inevitably require value judgments.[55] The technical formalism of legal analysis cannot resolve those value judgments. John Hart Ely has noted that constitutional provisions such as the ban on cruel and unusual punishment, the privileges and immunities clause and other language are "difficult to read responsibly as anything other than quite broad invitations to import into the constitu-

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49 Brest, *supra* note 30, at 98.

50 *See* Fisher, *supra* note 47, at 730.

51 *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 917 (1989-1990) (listing numerous prominent judges who have served in the Department of Justice).

52 *Id.* at 916.

53 *See* CHEMERINSKY, *supra* note 21, at 110-11.

54 *See id.* at 111.

55 *See id.*

tional decision process considerations that will not be found in the language of the amendment or the debates that led up to it."[56]

One could argue that the considerable body of constitutional precedent has transformed these value judgments into settled law, but this defense is circular and incoherent.[57] Today's well-established precedents had their genesis in some case of first impression in the past, and the Court resolved that case according to its value judgments at that time. The Warren Court interpreted the Bill of Rights expansively and went beyond well-established precedent, while the Rehnquist Court has been more restrained. This difference in approach surely illustrates how value judgments influence the interpretation of precedent. A conservative might maintain that the Warren Court decisions are wrong, but those decisions are now precedents that succeeding courts shall apply.

As a general rule, most "constitutional issues . . . turn not so much on technical legal analysis of particular provisions but rather on a choice between competing sections that contain conflicting political and social values."[58] More than a legal text, the Constitution is a "political text" that "expresses normative sensibilities."[59] This is especially true of the Bill of Rights—particularly its most contested provisions. How can one formalistically ascertain how much process is due in administrative decisions or how search and seizure protections should be applied to new technologies?[60] The Constitution itself does not determinately define equal protection, due process, cruel and unusual punishment or other key terms.[61] Free speech proves vague when courts are called upon to identify what constitutes speech and whether the First Amendment should protect all forms of speech.[62] A critical legal studies scholar (crit) would declare that all language is inescapably indeterminate,[63] but one need not be a crit to conclude that the heart of the Bill of Rights is legally indeterminate. Even those commentators who purport to be pure formalists do not so much

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56 JOHN HART ELY, DEMOCRACY AND DISTRUST 14 (1980).

57 *See* Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term*, 19 CARDOZO L. REV. 2259, 2309 (1998) (discussing shift in emphasis away from individual rights from Warren to Rehnquist Courts).

58 LOUIS FISHER, CONSTITUTIONAL DIALOGUES 5 (1998); *see also* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 744 (1985) (noting that the "Constitution does not even attempt to provide a detailed set of rules that might suggest the possibility of pseudomechanical application" but speaks "in abstract and general terms").

59 KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 8 (1999).

60 *See* Chemerinsky, *supra* note 2, at 90 (reporting that it "seems impossible to construct a meaningful approach to judicial decisionmaking that excludes value choices by individual Justices").

61 *See supra* note 55 and accompanying text.

62 *See* CHEMERINSKY, *supra* note 21, at 48.

63 *See* David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243 (1984).

"abandon[ ] value judgments" as they "mak[e] them covertly."[64] The decision to adopt a formalist interpretive rule, be it originalism, English common law, or otherwise, itself involves a value judgment.[65] Nor have those approaches proved effective in constraining judicial discretion.[66] Hence, in order to be persuasive, advocates of formalism and judicial supremacy must independently justify why formalism is the appropriate standard for interpretation and enforcement of the Bill of Rights. Advocates have not offered that justification and, in any event, judges, who have no particular expertise in this regard, cannot conclusively determine this question.

Even supposing that legal formalism is meaningful, useful, and the appropriate methodology for interpreting the Bill of Rights, and that judges are the most capable at applying this methodology, advocates still have not made the case for judicial supremacy. Advocates would have to show that judges are willing to actually employ this methodology in their decision making. This may be the most difficult premise to sustain.

Judges are not superhuman creatures. They have many of the same interests, objectives, and limitations as the rest of us.[67] Their interests surely include legally correct decision making, but they also encompass a desire to make good policy, please constituencies, avoid excessive work, and innumerable other factors.[68] Those interests do not compel the reliance on formalistic decision making any more than do the interests of Congress and the President. The most salient nonformalistic interest is ideology.[69]

Political and ideological factors pervade the lives of federal judges from early on. Judicial appointments "are highly political appointments by the nation's chief political figure to a highly political

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64 SUNSTEIN, *supra* note 23, at 104.

65 *See* Chemerinsky, *supra* note 2, at 91-95.

66 *See id.* at 91 (suggesting that efforts to constrain judicial value choices through theories of constitutional interpretation have proved "unworkable in practice"). Chemerinsky elaborates on how originalism has been unable to have this effect. *See id.* at 91-92.

67 *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); *see also* BAUM, *supra* note 40, at 27-30 (reviewing studies which show that judges have manifold goals).

68 *See* BAUM, *supra* note 43, at 26-27.

69 By ideology I do not mean to imply that Justices are political partisans or even consciously seek to impose their ideologies on society. I simply mean that Justices have a certain world view regarding justice that roughly corresponds to a conservative or liberal ideology. *See* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 220-24 (1999) (arguing that judges decide ideologically); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 239-41 (1999) (responding that judges do not vote the party line, although they are influenced by their personality and life experiences). For a response to Judge Wald, see Tiller & Cross, *supra* note 10, at 264 (noting that these effects of personality and life experiences cause judges to decide ideologically).

body."[70] The influence of political factors may even predate their careers as judges, as most appointees "have been active in legislatures, government agencies, and other aspects of political life" and are unlikely to "adopt the manner and habits of a cloistered judge" upon assuming the bench.[71]

Scholars have explored the influence of ideology on judicial decision making at least since the legal realist movement earlier this century.[72] Mark Tushnet recently observed that a "judge is rather more likely to pick the theory that points where he or she wants to go anyway, than to pick a theory and reluctantly find that it leads to conclusions he or she would have preferred to avoid."[73] A case's resolution need not rest upon legal theory though, as rigorous empirical research in political science has demonstrated the considerable significance of ideology in judicial decision making.[74] This research labels opinions as liberal or conservative in direction and then matches those results against the political party with which the relevant judge is affiliated.[75] The results of the research are quite consistent in demonstrating that ideology substantially impacts judicial decision making.[76] A recent meta-analysis that evaluated dozens of independent studies of judicial decision making found a statistically significant and practically substantial difference in ideological outcomes, depending upon whether the judge was Democratic or Republican.[77] In reality, "members of the Supreme Court make decisions largely in terms of their personal attitudes about policy."[78] Terri Jennings Peretti concludes that if "objectively constrained constitutional interpretation exists, we

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70 Michael A. Kahn, *The Politics of the Appointment Process: An Analysis of Why Learned Hand Was Never Appointed to the Supreme Court*, 25 STAN. L. REV. 251, 283 (1973).

71 FISHER, *supra* note 58, at 153.

72 For a brief background review of legal realism and critical legal studies, see Cross, *supra* note 29, at 256-59.

73 TUSHNET, *supra* note 11, at 155.

74 *See* Tiller & Cross, *supra* note 69, at 220-24; *see also* Tiller & Cross, *supra* note 10, at 263-65 (responding to criticisms of such research).

75 The studies generally use the party of the appointing President as a proxy for the ideology of the judge. While this proxy is obviously an imperfect one, it has proved roughly accurate. *See, e.g.*, Tiller & Cross, *supra* note 69, at 221 n.25 (citing considerable research to support the approach); Tiller & Cross, *supra* note 10, at 263-64 (noting that the approach is validated by social scientific research and accepted at least generally by judges). Moreover, to the extent that the proxy variable is imperfect, it is likely to obscure a true relationship between ideology and voting—a perfect measure of ideology would show a closer relationship than the appointing president's party coding.

76 *See* BAUM, *supra* note 40, at 70-87 (providing a more detailed review of the studies linking judicial decisions to political ideology); Cross, *supra* note 29, at 275-79 (reviewing the data supporting the model).

77 *See* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999).

78 BAUM, *supra* note 43, at 160.

have yet to see it, which casts substantial doubt on whether we are ever likely to see it."[79]

The widespread effect of political ideology upon judicial decision making is very pronounced at the Supreme Court level and especially strong in Bill of Rights decisions. Most researchers "implicitly treat the Supreme Court as different from other courts" due to the "dominance of policy over law" in Court decisions.[80] Jeffrey Segal and Harold Spaeth have created a database covering decades of decisions and extensively studied Supreme Court decision making in particular issue areas.[81] They found a strong association between a Justice's ideology and his or her votes.[82] The association was particularly strong in decisions involving civil liberties and weaker in decisions concerning economic regulation, federalism, and other areas.[83] Segal and Spaeth demonstrated a statistically significant ideological association in every area of civil rights, criminal procedure, and First Amendment decision making in which they had a significant number of opinions to test.[84] A number of other studies, including two replications, support their results.[85] A review of the Justices' comments in internal conference case discussions concluded that nearly half their comments related to policy concerns.[86] This discussion is not to say that judicial decision making is utterly ideological; ample evidence exists that judges also care about the principles of legal formalism.[87] The key

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79 PERETTI, *supra* note 27, at 51.

80 BAUM, *supra* note 40, at 69; *see also* Cross, *supra* note 29, at 285 (noting that Justices on the Supreme Court have broader judicial discretion, which presumably permits ideology to have a broader influence).

81 The primary initial published product of their research is JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

82 *See id.* at 228-29, 246-51. Their model predicted 74% of the votes and the nature of the study meant that this was probably an underestimate of the effect of ideology. *See id.* at 227-29.

83 *See id.* at 225-26.

84 *See id.* at 256-57.

85 *See* BAUM, *supra* note 40, at 73-74. While these supportive studies did not reach identical results, they all found that ideological preferences were more powerful than precedents as explanations of judicial decision making. *See id.* at 74. For examples of such studies, see SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992 (1995); Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POL. 1 (1992); Saul Brenner & Marc Stier, *Retesting Segal and Spaeth's* Stare Decisis *Model*, 40 AM. J. POL. SCI. 1036 (1996); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

86 *See* EPSTEIN & KNIGHT, *supra* note 42, at 29.

87 *See, e.g.*, Cross, *supra* note 29, at 299; Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 538-47 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998)) (arguing that political scientists have exaggerated the role of ideology and that legal issues also matter to judges).

point is that judicial interpretation of the Bill of Rights does in fact, and must inevitably, involve a substantial ideological component.[88]

Paul Carrington emphasized that "it is no longer unreasonable to regard the Court less as a court of law engaged in law enforcement and more as a political institution openly and primarily engaged in making policy."[89] Even if judges were markedly more adept at formalistic legal decision making, it would not be particularly significant, because their decision making is heavily influenced by ideological factors. Advocates of judicial supremacy do not even try to argue that judges are more adept at ideological decision making, because they presumptively allocate such value judgments to the more accountable branches of the government.[90] I do not contend that ideological judicial decision making is necessarily illegitimate when interpreting and enforcing the Bill of Rights, but its prevalence destroys the formalist justification for judicial supremacy.

2. *The Quality of the Judicial Process*

A second claim for judicial supremacy relies not on the quality of the judges themselves but on a "special capacity of the adversarial process which accompanies judicial interpretations to foster wise deliberation and judgment about the meaning of the Constitution."[91] Additionally, the argument declares that courts "are uniquely well-qualified to deal with constitutional value judgments because of their commitment to principle and their relative insulation from political pressure."[92] This "process quality" argument suffers much the same

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88 In addition to the inescapable vagueness of the language of the Bill of Rights, the Supreme Court tends to take the "hard cases" on which the law is most ambiguous. These cases will necessarily reflect judicial attitudes as the Justices seek to fill in the interstices of existing law. *See* Baum, *supra* note 43, at 203; Cross, *supra* note 29, at 285. Jack Peltason concluded that the Supreme Court makes policy, "not as a matter of choice but of function." JACK W. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS 3 (1955).

89 Carrington, *supra* note 6, at 401-02.

90 *See, e.g.*, Martin H. Redish, *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation*, 88 NW. U. L. REV. 165, 166 (1993) (observing that ideological decision making by the judiciary "threatens the values of self-determination, accountability, and representationalism that provide core notions of American political theory"); Tiller & Cross, *supra* note 69, at 215-16 (noting that such ideological judicial decision making is generally considered improper).

91 Gant, *supra* note 20, at 391; *see also* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 258 (1994) (describing but criticizing the view that "judges are much more capable of the contemplation and deliberation necessary to discover and enunciate long-term moral principles and fundamental values"); Rosenfeld, *supra* note 23, at 148 (referring to "the special capacity of the adversarial system of justice for producing balanced and considered resolutions of legal conflicts").

92 Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 865 (1999) (stating the justification for the division of institutional labor between the Supreme Court and Congress).

flaw of naivete as did the quality of judges argument. Stephen Griffin notes:

> Constitutionalists sometimes compare an ideal Court to the nonideal world of legislative decisionmaking and argue that judicial review is justified because it contributes a desirable element of deliberation, even scholarly wisdom, to the sordid world of interest group politics. This is clearly a non sequitur. To fairly justify judicial review in a prudential sense, we must compare the nonideal legislative process to the nonideal judicial process.[93]

Judge Abner Mikva embarked on this comparison and set forth a litany of reasons why the process of congressional constitutional interpretation is poor.[94] He argues that the houses of Congress are too large in size for effective constitutional debate, that the institution is only reactive, and that the abstract nature of constitutional issues is ill-suited for legislative analysis.[95] Congress surely suffers from these deficiencies to some degree, but historical experience does not support much of Judge Mikva's condemnation.[96] Moreover, some of Judge Mikva's purported congressional disadvantages may in fact facilitate the process of constitutional interpretation.

Although Judge Mikva is not alone in claiming that legislatures have "too many members to allow for thoughtful deliberation,"[97] this argument could easily cut the other way. Thorough deliberation requires a variety of perspectives and ideas, and the limited size of the Supreme Court undermines the scope of deliberation. For decades, the Court had no blacks or women, and it still lacks a Latino perspective.[98] Historically, Congress has contained far more ethnic diversity. The limited minority presence on the Court makes it more likely that minority Justices will not be accurate representatives of the broader community.[99] The legislature, by virtue of its size, also probably has greater socioeconomic diversity than does the Court.[100] This diversity

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93 GRIFFIN, *supra* note 19, at 123 (footnote omitted).

94 *See* Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983).

95 *See id.* at 609-10.

96 *See infra* Part I.B.2.a. Mark Tushnet suggests that Judge Mikva's portrait is "overdrawn" and biased by the presence of a presumed regime of judicial supremacy. TUSHNET, *supra* note 11, at 55.

97 Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 273 (1993).

98 *See* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 369 (1999) (noting that "however well motivated [judges] may be, they are likely to bring to their work the perceptions of an upper middle class, educated, largely male, and largely white elite").

99 There is surely an argument that Clarence Thomas is not representative of black Americans. If he is, Thurgood Marshall must not have been.

100 *See* ELY, *supra* note 56, at 58-59. Historically, the "Supreme Court's membership has been quite unrepresentative of the general population in terms of social class." BAUM, *supra* note 43, at 67.

surely contributes to sound deliberation. At a minimum, the legislature has many more members than does the Supreme Court, which ensures the consideration of additional perspectives. Historically, Congress and the President have been "much more pluralistic than the Supreme Court with respect to their openness to the voices of outside interests."[101]

While Judge Mikva also laments the reactive nature of congressional action, this criticism more accurately applies to the judicial deliberative process. Congress at least has the power to set its own agenda, while the judiciary is a captive of the cases that come before the Court and the interests of the parties to those cases.[102] Michel Rosenfeld praises the judicial process because "a judge must consider competing arguments relating to that issue from a diversity of self-interested perspectives."[103] Yet this defense contains its own serious indictment of the process—that the perspectives before a court are limited to the "self-interested" perspectives of the parties. Moreover, there is no assurance of true diversity, as many interested parties, such as the general public, are not present before the Court. This makes it "hard for judges to understand the complex, often unpredictable effects of legal intervention."[104]

Time may also favor the legislature and executive as deliberative entities. Supreme Court cases never receive more than a few hours of oral argument, while Congress and the President can spend far more time on issues they consider to be important.[105] Moreover, the Court generally must render a decision during the year in which it accepts a case. The legislature, by contrast, may postpone a decision for more extended deliberation, perhaps by a new Congress with different members. Mikva's contention that constitutional rights are too abstract for Congress is only asserted and, as I will show, is contrary to the historical record. More centrally, Mikva erroneously assumes that constitutional issues are purely abstract, when in fact they contain a considerable factual component.

Congress and the President, unlike the Court, are more able to develop specialized expertise to enhance the deliberative process. Congress divides its members into committees, whose members ac-

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101 Kevin T. McGuire, *The Supreme Court Bar and Institutional Relationships, in* THE SUPREME COURT IN AMERICAN POLITICS, *supra* note 17, at 115, 117.

102 *See* Carrington, *supra* note 6, at 410-11 (observing that the courts "are locked into an adversary process that, despite the mitigating effect of the certiorari process, limits their choice of timing their decisions").

103 Rosenfeld, *supra* note 23, at 150.

104 SUNSTEIN, *supra* note 23, at 148.

105 *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 636 (1994) (observing that among other institutional shortcomings to judicial constitutional decision making "their dockets are so crowded that judges can devote little time even to critical cases").

quire specialized expertise in particular policy areas.[106] The President also has a vast bureaucracy upon which he can call. The Court has fewer members and fewer resources.

Limited fact-finding ability is another weakness undermining the judicial process quality defense of judicial supremacy in enforcing the Bill of Rights. Constitutional issues are not purely legal and often depend upon factual issues.[107] Posner describes "empirical knowledge" as the "greatest need of constitutional adjudicators."[108] For example, major constitutional rules such as the requirement of *Miranda* warnings or the exclusionary rule have obvious factual groundings. The Court itself "recognizes that much of constitutional law depends on factfinding."[109] Congress has greater resources and ability to engage in relevant fact-finding. In *Katzenbach v. Morgan*, the Court deferred to congressional determination of the unconstitutionality of a language-based voting test and observed that such a determination required analysis of considerations such as

> the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected . . . .[110]

These are all classic fact-finding issues. Congress can devote significant resources to crucial fact-finding, while courts are limited to potentially unrepresentative cases and the presentation of facts by interested parties.[111] Even when the formal finding of facts is not at

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106 *See generally* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991) (setting forth the theory that Congress organizes into committees in order to enable members to gain information and expertise on particular issues).

107 *See, e.g.*, Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 199-200 (1971) (breaking down the resolution of constitutional claims into subfunctions that include "the finding of facts" and "the characterization of congeries of facts in terms of their operative significance"). While some would limit the significance of this fact-finding to the matter of remedies, *see* Levinson, *supra* note 92, at 865-66, this limitation does not logically follow. For example, the facts regarding modern investigatory devices are relevant to whether and how the Fourth Amendment should be applied to them; the facts regarding modern telecommunications devices are relevant to their protection under the First Amendment, and so on. The Supreme Court has suggested that *Lochner*'s error was not so much one of theory as one of fact. *See id.* at 936.

108 RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 145 (1999).

109 Fisher, *supra* note 47, at 722. Louis Fisher suggests that this recognition explains the development of the "rational basis" standard for equal protection review of economic regulation. *Id.*

110 Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

111 *See* Young, *supra* note 105, at 636 (noting that the information possessed by courts "is generally limited to the facts that litigants choose to present to them"); *see also* McGuire, *supra* note 101, at 117 (observing that "the legislature and the executive are far better equipped to generate and organize vast amounts of policy information" than the Court).

issue "[l]egislators in ordinary politics are [more] deeply embedded in the realities of public life" than are judges.[112]

Still another shortcoming of the judicial process arises from the Supreme Court's resource constraints. While most debates over the proper institution to interpret and enforce the Bill of Rights compare the Supreme Court with the legislative and executive branches, all federal judges assume the power to make constitutional decisions. The Supreme Court can review only a tiny percentage of lower court decisions.[113] Consequently, the circuit courts are making most of the constitutional decisions. While those courts follow much the same procedures, they are not national in their scope and may disagree over the proper constitutional interpretation. The extremely undesirable result is that the Constitution may acquire different regional meanings. This is a prevailing problem in the matter of affirmative action, which is generally unconstitutional in the Fifth Circuit after *Hopwood v. Texas*,[114] but apparently acceptable in other parts of the country.[115]

Law professors frequently criticize judicial decisions, yet these academics seem devoted to the judicial decision making process.[116] Judicial errors, the critics imply, are epiphenomenal aberrations destined for correction by right-thinking judges of the future. Robert Nagel has noted that "serious criticisms of the court[s]" are typically accompanied by the "belief that judges are personally and institutionally competent."[117] He notes that "commentators pay almost no attention to the possibility, certainly suggested by the barrage of criticism, that both judges and adjudication are unsuited for the broad task being urged upon them."[118] That possibility deserves attention.[119]

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112 TUSHNET, *supra* note 11, at 68.

113 *See, e.g.*, Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1096-99 (1987) (describing how the Court can review only a fraction of the conflicts presented on its docket).

114 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

115 *See* Susan M. Maxwell, Note, *Racial Classifications Under Strict Scrutiny: Policy Considerations and the Remedial-Plus Approach*, 77 TEX. L. REV. 259, 268-78 (1998) (reviewing circuit split associated with *Hopwood*). On the frequency and problems created by such circuit splits, see Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1249-52 (1999).

116 Mark Tushnet observes a tendency to "idealize the Court by saying that the good decisions—the ones we like—occur when the Court gets the Constitution right, and the bad ones occur when we happen to have the wrong justices." TUSHNET, *supra* note 11, at 172.

117 ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 34 (1989)

118 *Id.* at 35.

119 *See id.*

Ultimately, the issue of which institution is most conducive to appropriate deliberation is an empirical question.[120] It would be difficult to design a rigorous test to compare the quantity and quality of deliberation that occurs in each branch. Nevertheless, experience does not particularly support the judicial supremacy position. Cass Sunstein believes that "the major reflections of principled deliberation in the American history have come from Congress and the President, not the courts."[121] Louis Fisher, who has written extensively on congressional constitutional interpretation, summarized:

> The historical record, however, demonstrates that Congress deliberated for years on such constitutional issues as judicial review, the Bank of the United States, congressional investigative power, slavery, internal improvements, federalism, the war-making power, treaties and foreign relations, interstate commerce, the removal power, and the legislative veto long before those issues entered the courts. Congressional debate was intense, informed, and diligent.[122]

By contrast, he found that the historical "record does not support the assertion that judicial review has been a force for protecting individual liberties."[123] Robert Burt further suggests that the Court's opinion in *Dred Scott v. Sandford*[124] "should have disqualified" the Court from playing an "exalted role" in constitutional decision making.[125]

B. Majoritarian/Minoritarian Institutions

Graglia argues that judicial enforcement of the Bill of Rights is patently unjustifiable, because "the power of appointed, life-tenured judges to invalidate policy choices made by elected, politically accountable representatives of the people" cannot be reconciled with "representative self-government."[126] This fact famously troubled Alexander Bickel[127] and continues to confound legal liberals and others.[128] Yet, for many, this dilemma validates the appropriateness of

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120 *See* TUSHNET, *supra* note 11, at 122-23 (contending that such empirical judgments "are the only way to see whether the system is defensible").

121 SUNSTEIN, *supra* note 23, at 146.

122 Fisher, *supra* note 47, at 708-09 (footnote omitted). For further evidence of the relatively positive record of congressional constitutional interpretation, see *infra* Part I.B.2.a.

123 FISHER, *supra* note 58, at 63.

124 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment as stated in* Oliver v. Donovan, 293 F. Supp. 958, 967-68 (E.D.N.Y. 1968).

125 BURT, *supra* note 25, at 208.

126 Graglia, *Constitutional Mysticism*, *supra* note 6, at 1331.

127 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986) (noting that the "root difficulty is that judicial review is a counter-majoritarian force in our system").

128 The persistence of this problem is a theme of LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 6 (1996). Barry Friedman calls the countermajoritarian difficulty the "central obsession of modern constitutional scholarship," Barry Friedman, *The History of*

judicial review. The founders established the Bill of Rights to serve as a check upon the actions of representative self-government.[129] Constitutional structures likewise restrain majoritarianism.[130] Defenders of judicial enforcement note that our overall constitutional design is not so wildly majoritarian as Graglia would have it.[131] Justice Jackson provided a classic explication of the minoritarian argument for judicial review in the flag salute case, where he declared that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[132] The majoritarian/minoritarian defense of judicial enforcement is substantively set forth in the infamous *Carolene Products* footnote that urged judicial protection of discrete and insular minorities.[133] This defense of judicial interpretation and enforcement distingnishes between majoritarian elected institutions and the judiciary, which is isolated from electoral accountability and sometimes called a minoritarian institution. Legislatures, defenders of judicial enforcement argue, "are notoriously and particularly incompetent at responding to the claims of individuals and small groups."[134] In contrast, the defenders regard judges as "apolitical" and "relatively resistant to majoritarian pressures."[135] Ronald Dworkin claims that the "United States is a more just society than it would have been had its constitutional rights been left to the conscience of

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the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. REV. 333, 334 (1998), and Chemerinsky simply refers to it as the "obsession of constitutional law scholarship." Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1207 (1984).

129 *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 494-95 (1997) (suggesting that "[n]atural rights adjudication seems inconsistent with the very premise of democratic control"). However, an argument exists that the Bill of Rights originally had a substantial majoritarian component. *See* Akhil Reed Amar, *Some Comments on "The Bill of Rights as a Constitution,"* 15 HARV. J.L. & PUB. POL'Y 99, 109-10 (1992) (suggesting that many of the rights were meant to be "majoritarian or collective").

130 *See* Chemerinsky, *supra* note 2, at 74 (referring to the "false priority of majoritarianism" under the Constitution); Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 673 (1999) (noting that the Framers "inserted numerous republican-like speed bumps to democratic rule").

131 Stephen Griffin has observed that "[t]he very existence of the Constitution establishes that Americans have traditionally regarded restraints on the will of a democratic majority as legitimate." GRIFFIN, *supra* note 19, at 103; *see also* PERRETTI, *supra* note 27, at 210-11 (noting that "[i]t was precisely the Framers' fear of majorities that motivated their many choices regarding the system's structure and design"); POSNER, *supra* note 108, at 149 (discussing the often undemocratic nature of the Constitution).

132 West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); *see also* Rosenfeld, *supra* note 23, at 158-59 (making the case that "constitutionalism ought to be considered, at least in part, as antagonistic to unconstrained democracy").

133 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

134 Calabresi, *supra* note 97, at 273.

135 Gant, *supra* note 20, at 391.

majoritarian institutions."[136] But he then concedes that he supports this claim with no argument, either theoretical or empirical.[137] Surely, the claim requires more analysis.

Both sides thus invoke the majoritarian/minoritarian argument. While defenders of judicial interpretation and enforcement of the constitution most commonly employ the argument, critics argue that the nonmajoritarian nature of the judiciary renders it ill-suited for the task. Proponents and critics both appear to accept the fundamental premise that judges are nonmajoritarian, but differ on its implications. In reality, the unchallenged premise may be the weakest link in the argument for either side. But even if the premise were correct, the majoritarian/minoritarian argument would offer little support for judicial supremacy in constitutional interpretation.

1. *The Complexity of Institutional Majoritarianism*

The first problem with the antimajoritarian defense of judicial review (and the opposite attack on judicial review) is its naïve perception of the nature of government institutions. Describing the accountable branches as majoritarian is at best roughly accurate. The legislature and executive may generally reflect majoritarian will, but this reflection is highly imperfect. Conversely, declaring courts nonmajoritarian is also facile. While judges are not elected, they may reflect the majoritarian will for a variety of reasons. The clear distinction of majoritarian versus nonmajoritarian institutions is unduly simplistic.[138]

It is naïve to assume that legislative or executive branch decisions are necessarily majoritarian. The Constitution and its structures contain a variety of nonmajoritarian components, including age restrictions on voting and service in office, term limits for the President, the state-based representation scheme of the Senate, and a myriad of organizing rules for the branches of the legislature, such as committee and chairman powers and filibuster rules.[139] When representatives

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136 RONALD DWORKIN, LAW'S EMPIRE 449 n.2 (1986). Dworkin challenges the theory that the people can secure their rights by arguing that one cannot count on legislatures to be responsive to the desires of the people. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 124 (1987). Yet Dworkin pays little heed to the practical shortcomings of the judiciary. A fair comparison requires consideration of the practice of majoritarianism and judicial decision making, not a naïve view of the latter.

137 *See* Silas Wasserstrom, *The Empire's New Clothes*, 75 GEO. L.J. 199, 293 (1986) (reviewing RONALD DWORKIN, LAW'S EMPIRE (1986)).

138 *See* Chemerinsky, *supra* note 2, at 78 (referring to a relative spectrum of majoritarianism among the branches of government).

139 *See* FISHER, *supra* note 58, at 62; GRIFFIN, *supra* note 19, at 109 (arguing that "judicial review only differs in degree, not in kind, from other countermajoritarian restraints such as bicameralism, the congressional committee system, and the presidential veto"); Klarman, *supra* note 129, at 495 n.19 (contending that "[l]engthy terms in office, bicameral

vote their consciences, an action may not be majoritarian,[140] and the influence of special interest money may also undermine the majoritarian nature of the Congress.[141] The whole notion of republican governance as opposed to direct democracy implies that government need not necessarily represent the majority opinion.[142]

Clear empirical evidence indicates that the elected branches are not perfectly majoritarian, if that term means reflecting the position of a majority of individuals.[143] Even if we define majoritarian loosely as consistency between legislative action and public opinion, legislative actions often are not consistent with majority opinion. Research has examined whether congressional action is simply in the same ideological direction as public opinion and found that often it is not the case. Between 1935 and 1979, legislative action reflected public opinion about sixty-six percent of the time.[144] Between 1980 and 1993, agreement dropped to around fifty-five percent.[145] For civil rights/civil liberties issues, the agreement for both periods was between fifty-five and sixty percent.[146] These agreement levels are roughly consistent with the frequency of agreement between Supreme Court opinions and popular majority opinion.[147] Thomas Marshall's review

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legislatures, executive vetoes, legislative committee systems within which seniority plays some role—all of these institutional arrangements have the effect, and generally were designed with the purpose, of obstructing realization of the majority's immediate will"); Alan D. Monroe, *Public Opinion and Public Policy, 1980-1993*, 62 PUB. OPINION Q. 6, 7 (1998) (noting that existence of divided government, committee powers, and other factors means that "even if most representatives do what a majority of their constituents would wish, the resulting outcomes would not be what most of the public as a whole would wish"). For a review of other nonmajoritarian aspects of legislative decision making, see Chemerinsky, *supra* note 2, at 78-81.

140 *See infra* notes 230-41 and accompanying text.

141 This is the thrust of a considerable strain of public choice scholarship. *See, e.g.*, Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-18 (1984) (arguing that legislatures are responsive to special interest groups rather than the general public interest).

142 *See* Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 796-97 (1999) (describing how democracy encompasses both a pluralist conception of responsiveness to immediate popular will and a civic republic conception that requires reflective deliberation).

143 For a concise review of this research, see Benjamin I. Page, *Democratic Responsiveness?: Untangling the Links Between Public Opinion and Policy*, PS: POL. SCI. & POL., Mar. 1994, at 25.

144 *See* Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175, 178 (1983).

145 *See* Monroe, *supra* note 139, at 15-16.

146 *See id.* at 14.

147 *See id.* at 9 (reporting Thomas Marshall's finding that in a study of "146 U.S. Supreme Court decisions from 1934 through 1986" a public majority and the Supreme Court agreed around 62-66% of the time). For a review of the research, see Gregory A. Caldeira, *Courts and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 314-15 (John B. Gates & Charles A. Johnson eds. 1991). The review states that the research shows approximately the same level of conformity between the Court and polls as between the legislature and polls. *See id.* at 315.

concluded that the "modern Court appears neither markedly more nor less consistent with the polls than are other policy makers."[148]

One could also ask: If the elected branches are in fact majoritarian, why do they so often disagree among themselves?[149] It is not uncommon for the House and Senate to fail to agree on a piece of legislation or, when they do concur, for the President to veto the resulting bill. Another example of the difficulty of ascertaining a majority opinion in our system is the fact that a distinctly conservative President such as Ronald Reagan may be in office at the time when liberal Democrats have the majority in both the House and Senate. Frequent agreements between the political parties surely reflects majoritarianism, but when Congress and the President disagree on controversial issues the majoritarian position is unclear.[150] It is too simplistic to assert that the position of any elected body is necessarily a majoritarian one.

It is likewise too simplistic to declare that judicial decisions are not themselves majoritarian in nature, at least to a degree. Supreme Court decisions are seldom out of step with majority opinion for very long.[151] We can perhaps explain the Court's responsiveness by acknowledging that members of the Court are steeped in the culture of

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148 THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 80 (1989).

149 Public choice theory offers one answer. The Arrovian branch of the theory suggests that election results for a single majority will change or cycle depending upon the way that the question and choices are presented to that majority. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46-60 (1951). For a nice brief summary of this theory, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 638-40 (1993). Of course, this theory calls into question the ability of elections to ever ascertain a true majority opinion. *See, e.g.*, WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 115-36 (1982) (explaining how Arrovian theory precludes our ability to identify the majority position).

Alternatively, the differences can be explained by different procedures for decision making among the elected institutions or the fact that they represent different majorities. For a discussion of how different procedures can preclude the cycling problem, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 49-55 (1991); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 511-14 (1981).

150 *See, e.g.*, Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1987 (1999) (reviewing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999)) (contending that whenever the President vetoes legislation, the majoritarian result is defeated); *see also* Friedman, *supra* note 149, at 629 (describing the "faulty assumption" that there exists an "identifiable majority whose will can be assessed").

151 *See* BAUM, *supra* note 40, at 49 (reviewing research indicating general agreement between the Supreme Court and the public); O'BRIEN, *supra* note 32, at 364 (reporting that a "number of political scientists theorize and draw on various kinds of data to support the hypothesis that the Court usually registers public opinion and legitimates policies of the prevailing national alliance, rather than playing the role of a countermajoritarian institution over the long haul"); Ferejohn, *supra* note 98, at 383 (noting that "in normal circumstances, the actions of the judiciary are not far out of step with the general policy preferences of the popular branches—at least not for long time periods").

the public[152] and are appointed through the acquiescence of publicly elected branches.[153] Consequently, judges seem to be aware that some level of popular support is essential as "the ultimate justification for their power."[154] Maybe Justices are simply subject to the human desire to be liked and accepted.[155] Malcolm Feeley and Ed Rubin argue that the judiciary is "quite sensitive to changes in public opinion" and acts aggressively only when the Justices' beliefs are "strongly felt and widely held, that is, that these beliefs are truly elements of social morality."[156] Thus, "in cases involving individual rights the Court has often relied upon conceptions of law that require sensitivity to 'contemporary standards' of society, the 'evolving standards of decency,' or even the values found in the 'conscience and traditions' of our people."[157] Marshall concludes that "[o]verall, the evidence suggests that the modern Court has been an essentially majoritarian institution."[158]

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152 *See* SPANN, *supra* note 12, at 19 (noting that "Supreme Court justices are socialized by the same majority that determines their fitness for judicial office"); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16 n.72 (1996) (noting that "the Court strays relatively little from majoritarian impulses because the justices are embedded in majoritarian culture").

153 *See* TUSHNET, *supra* note 11, at 152 (describing the fundamentally political nature of the nomination and confirmation process for federal judges); Chemerinsky, *supra* note 2, at 82 ("Presidential appointments assure that the Court's ideology, over time, will reflect the general sentiments of the majority in society.").

154 FISHER, *supra* note 58, at 84 (quoting Judge Irving R. Kaufman, *What Did the Founding Fathers Intend?*, N.Y. TIMES, Feb. 23, 1986, § 6 (Magazine) at 42, 69). Judge Kaufman further suggests that "[w]ithout popular support, the power of judicial review would have been eviscerated by political forces long ago." *See id.*; *see also* BAUM, *supra* note 43, at 151 (suggesting that "justices care about public regard for the Court, because high regard can help the Court in conflicts with the other branches of government and increase people's willingness to carry out its decisions"). For other research on the Court's responsiveness to public opinion, see Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468 (1997); Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 POL. RES. Q. 61 (1995); William Mishler & Reginald S. Sheehan, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994).

155 *See* BAUM, *supra* note 40, at 48-49 (discussing the universal human interest in being socially accepted and how "justices would be a singular group of people if none of them were concerned with respect and popularity outside the Court"); BAUM, *supra* note 43, at 151 (noting that "justices might pay attention to public opinion simply because they want to be popular").

156 MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 219, 332 (1998); *see also* Robert F. Nagel, *Disagreement and Interpretation*, 56 LAW & CONTEMP. PROBS. 11, 11 (1993) (noting that "the Supreme Court has been narrowing rights in important areas such as abortion regnlation, criminal procedure, religious freedom, and school desegregation" and "much of this constriction has followed the expression of political opposition to earlier, more expansive judicial decisions").

157 Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES, *supra* note 42, at 15, 37.

158 MARSHALL, *supra* note 148, at 192.

One might ascribe judicial majoritarianism to the Justices' strategic concern for public opinion so as to protect their public standing.[159] Little question exists that judges are concerned about this—in a recent survey, eighty-four percent of judges polled agreed that "courts should devote more resources to public relations."[160] Studies have shown that judges are more likely to overrule relatively unpopular precedents than popular ones.[161] One might explain some majoritarianism by the fact that judges are steeped in much the same culture as the majority. In addition, the Court passively hears claims brought by litigants whom the general societal culture shapes and frames.[162] The judiciary's need to maintain good relations with Congress also pushes it in a majoritarian direction.[163] Should the federal judiciary diverge too sharply from the legislature, Congress may undertake

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159 For a discussion of the Justices' strategic concern with public standing, see EPSTEIN & KNIGHT, *supra* note 42, at 48, 114. For a series of cases in which the Justices have used public opinion in their decisions, see James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1090. Wilson argues that judges write opinions "to persuade public opinion." *Id.* at 1115. Wilson finds that public opinion "has influenced modern substantive due process cases." *Id.* at 1117. A review of polling data indicated that the "Court's record of supporting rights claims often follows public opinion." Thomas R. Marshall & Joseph Ignani, *Supreme Court and Public Support for Rights Claims*, 78 JUDICATURE 146, 148 (1994). A recent review observed that the "most recent studies indicate that the Court does seem to respond, albeit modestly, to changes in public preferences." EPSTEIN & KNIGHT, *supra* note 42, at 48. Steve Griffin suggests that "[s]tudies of the relationship of the Court to public opinion and the impact of Court rulings suggest that the Court cannot have a strong role defending the rights of minorities." GRIFFIN, *supra* note 19, at 115.

160 Kevin M. Esterling, *Public Outreach: The Cornerstone of Judicial Independence*, 82 JUDICATURE 112, 116 (1998).

161 *See* MARSHALL, *supra* note 148, at 180-81.

162 *See* CHARLES R. EPP, THE RIGHTS REVOLUTION 15-16 (1998) (observing that "judges are themselves shaped by a society's cultural assumptions and are therefore unlikely to either create rights not recognized by their society or undermine rights highly valued by their society" and that "the number and kinds of issues that citizens take to the courts as rights claims depend on whether and how the society's culture frames disputes in terms of rights"); BURT, *supra* note 25, at 331 (attributing the Court's move to the right on death penalty issues as a consequence of the Justices having "absorbed and reflected the changed ethos regarding the prevalence and permissibility of social subjugation").

The sociological explanation for judicial majoritarianism seems imperfect, though, because judges are not necessarily representative of the general public. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542 (1992) (suggesting that courts "are too far removed from the voice of the citizenry, and judges' backgrounds are too homogenous and distinct from those of many Americans to ensure that judicially-defined policy will accord with the public values of the polity"). In short, judges are elites. While this incidentally may lead to greater rights protection, it is a tenuous foundation on which to rest judicial policymaking authority.

163 *See* GRIFFIN, *supra* note 19, at 98 (observing that the Court "can build goodwill among the branches by ruling that their actions are constitutional" or at least by basing findings of unconstitutionality on "narrow or technical" grounds without "important policy implications"). When the Court briefly began protecting the rights of communists in the late 1950s, it provoked a congressional backlash, and "the Court quickly retreated." L.A. Powe, Jr., *Does Footnote Four Describe?*, 11 CONST. COMMENT. 197, 203 (1994).

court-curbing measures to punish the courts.[164] For all of these reasons, a growing recognition exists that the Court cannot simply be called countermajoritarian. For some political scientists, such as Dahl, the Court is a firmly majoritarian institution.[165]

While judicial minoritarianism is too simplistic a theory, so are some of the political science descriptions of judicial majoritarianism. It is easy to find examples of the Supreme Court's disregard for a clearly contrary majority position.[166] For example, in *Texas v. Johnson*,[167] the Court held that flag burning was protected by the First Amendment.[168] The judiciary's general concern for defendants' rights perhaps is better evidence of a judicial flouting of public opinion, because "criminal defendants . . . have never received much sympathy from the American public," and protections of the rights of the accused have led to a "widespread belief that criminal defendants receive unfair advantages in the judicial system."[169] One can criticize the Court for not going far enough in support of defendants' rights, but the Court has certainly gone farther than majoritarianism would dictate.[170] Yet this is hardly a bad thing from a Bill of Rights perspective. Perhaps the judiciary recognizes its limits yet seeks to transform society insofar as possible. If so, the courts take an unpopular stand and test the waters for a backlash.[171] In some cases, perhaps including *Brown v. Board of Education*,[172] the courts may contribute to change. In

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164 *See generally* FISHER, *supra* note 58, at 200-30 (discussing the history of such court-curbing efforts).

165 *See* Dahl, *supra* note 14, at 293-94.

166 *See* FISHER, *supra* note 58, at 13 (observing that "[i]f the Court succumbs to social needs in such areas as economic regulation, so are there examples—school prayer, school busing, abortion—where the Court can be steadfast in the teeth of intense opposition"). This may be because the opposition was not truly intense. *See* Michael Comiskey, *The Rehnquist Court and American Values*, 77 JUDICATURE 261 (noting that a substantial majority of the public disagrees with school prayer decisions but that most people do not have strong a preference intensity on the issue).

167 491 U.S. 397 (1989). In the wake of *Johnson* and a second flag-burning case, *United States v. Eichman*, 496 U.S. 310 (1990), "[a]lmost two thirds of society appeared to support a constitutional amendment to ban flag burning" and Congress unsuccessfully attempted to amend the Constitution. Friedman, *supra* note 149, at 605-06.

168 For opinion polls on the unpopularity of the flag burning decision, see Friedman, *supra* note 149, at 605-06.

169 EPP, *supra* note 162, at 34.

170 Congress has even expressly disapproved and apparently sought to override significant Supreme Court decisions protecting defendants' rights, including *Miranda*. *See* Cox, *supra* note 107, at 248-52. Even in the case of defendants' rights, the story is not a simple one. Recently the Court has reduced its protection of defendants' rights, and in some cases the majority might prefer more protection than the Court has granted. *See* Comiskey, *supra* note 166 (discussing how the Court has cut back on defendants' protections and how the public would go further than the Court on issues of the death penalty for juveniles or retarded individuals).

171 *See* Nagel, *supra* note 156, at 25 (suggesting that "[e]ngendering and surmounting disagreement have, in fact, become siguificant aspects of the judiciary's role").

172 347 U.S. 483 (1954).

others, such as the anti-New Deal cases, the courts' position fails to produce sufficient public support and the courts back down.[173]

One might concede that the elected branches are imperfectly majoritarian and even acknowledge that in individual instances the judiciary may coincidentally be more majoritarian. Yet the net majoritarianism or at least the relative accountability of the elected branches may still be greater than that of the judiciary. If we are seeking a general institutional rule, this net effect is crucial. Arguably, the elected branches are on average *more* majoritarian than the judiciary.[174] The Supreme Court itself has used "the statutes passed by society's elected representatives" as the foremost "objective indicia" of public will.[175] But this concept of "more majoritarian" both begs the question and simultaneously misses a relevant point. In many instances the judiciary is not so much *less* majoritarian than *differently* majoritarian. In this circumstance, it is unclear which majority should be considered more democratic.

The issue of majoritarianism becomes more complicated when the federal judiciary strikes down a state action. In such a case, a good prospect exists that the national majority opinion coincides with that of the judiciary, while the state action reflects only a local majority opinion.[176] The 1954 *Brown* decision seems to reflect this concept.[177] It is not obvious which is the more majoritarian.[178] The answer to the question depends upon whether it is more appropriate for the na-

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173 On the unpopularity of the Court's anti-New Deal opinions, see BAUM, *supra* note 43, at 217-18. For a discussion of how the Court backed down in the face of this opposition, see, for example, McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1670 (1995).

174 *See* Klarman, *supra* note 129, at 493 (conceding the oversimplification of the majoritarian/countermajoritarian dichotomy but arguing that judicial review should nevertheless be regarded as "*somewhat* countermajoritarian"). Klarman suggests that the difference between an appointed federal judiciary and an elected legislature "may be one of degree rather than of kind, but it is a real difference." *Id.* at 495 n.19.

175 Stanford v. Kentucky, 492 U.S. 361, 370 (1989) (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987)).

176 *See* GRIFFIN, *supra* note 19, at 114 (observing that it is "possible for the Court to be supported by a national majority when it strikes down legislation prevalent in a limited number of states or even in an entire region (as was the case with southern policies of segregation)").

177 *See* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2013-18 (1990) (describing the "accomplishments" of the *Brown* decision as "correspond[ing] to the political preferences of the durable majority"). According to a recent poll, 54% of all Americans agreed with the holding in *Brown*. *See* Comiskey, *supra* note 166, at 263; *see also* PERRETTI, *supra* note 27, at 178 (suggesting that the Court tends to be assertive when supported by national opinion in striking down state laws).

178 The original intention of the Bill of Rights may have been to protect "local majorities against a central government." Edward A. Hartnett, *The Akhil Reed Amar Bill of Rights*, 16 CONST. COMMENT. 373, 377 (1999) (book review). The judiciary arguably rejected this original understanding during Reconstruction, so that the rights are individual ones to be enforced against local majorities. *See id.* at 382-87.

tional or regional majority to resolve the particular issue in dispute. The debate between majoritarianism versus minoritarianism does not inform questions about which majority should rule in a particular case.

Majoritarianism can be uncertain even on a national basis. The judiciary clearly does reflect a *different* majority than the elected branches (otherwise they would not differ).[179] One popular conception is that the judiciary reflects the political majority of "ten to fifteen years before."[180] Thus, the judiciary supposedly reflects the majorities in control of Congress and the presidency at the time of the various judges' appointments.[181] By contrast, the President reflects a majority of no more than four years past, and the House of Representatives reflects a majority of less than two years past.[182] The Court simply responds "more modestly and more slowly to changes in public preferences,"[183] thus tending to be countermajoritarian in periods, such as the New Deal era, when the majority coalition shifts dramatically.[184] Hence, the key question might be which majority is the relevant one? One could argue that the democratically preferable majority is the most recent one, but a contrary argument is equally plausible. The more recent majority may be caught up in a momentary circumstantial passion that poses a grave threat to Bill of Rights freedoms.[185]

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179 *See* Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 72 (1998) (arguing that all three branches are ultimately majoritarian, but the judiciary's majoritarianism "over the long term . . . reflects the strongly felt views of the people").

180 Calabresi, *supra* note 97, at 272; *see also* Mark Tushnet, *The Politics of Constitutional Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 219, 225 (David Kairys ed., rev. ed. 1990) (suggesting "that it takes about a decade for a political majority to get control of the courts"). Another study suggests that the elected opinions respond to the public opinion of the previous year, while the judiciary responds to that of the past seven years. *See* James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 558 (1995).

181 *See, e.g.*, O'BRIEN, *supra* note 32, at 361 ("The Court has usually been in step with major political movements, except during transitional periods or critical elections."); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975) (showing that after major realigning elections, the Court tends to enforce the old majority in striking down statutes); John B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837-1964*, 31 AM. J. POL. SCI. 259 (1987) (showing that the Court is most likely to invalidate state laws when the states are ideologically contrary to the Court in periods of "systemic change").

182 Of course, none of the branches are necessarily a direct reflection of a majority opinion on any particular issue. But elections ensure that they are at least roughly representative of the majority, and we have no better institutional tool to reflect majority opinion.

183 PERETTI, *supra* note 27, at 222.

184 David Adamany, *The Supreme Court*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT, *supra* note 147, at 5, 22.

185 *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 814 (1983) (Brennan, J., dissenting) (indicating that courts can pass "sober constitutional judgment" at times when legislators are influenced by "the passions and exigencies of the moment").

Barry Friedman argues for the judicial role from this different majority perspective. He suggests that the judiciary seems countermajoritarian because politics is cyclical, and "[j]ust as a President is gaining firm control over the judiciary, the people are likely to change political direction, leaving the judiciary and the political branches at odds."[186] Friedman claims that this was "no accident," because the Framers were centrally concerned with "fear of tyranny of the majority."[187] By being out of step with current majority opinion by perhaps ten years,[188] the Court can temper the swings of the popular passions. In this view, the Court's role is valuable not because it is minoritarian, but because it represents a different majority with a longer range perspective.

James Madison offered a well-known perspective on this issue in *The Federalist Papers*.[189] He justified the existence of the Senate, with its longer six year terms, on the grounds that it could check the tendency of legislatures to "yield to the impulse of sudden and violent passions."[190] By being less immediately majoritarian, the Senate would foster stability in government.[191] Hence, the less immediate majority may sometimes be preferable for constitutional decision making. Of course, Madison chose not to involve the Supreme Court in legislation, though that might have contributed to stability. The Court cannot automatically be preferred merely because it represents a more distant majority and cannot be voted out of office.

This framing is probably the best majoritarian/minoritarian argument for judicial review, but it suffers from a key problem. Implicit in the argument is the belief that the majority, in its passions, will often tend to restrict individual freedoms and therefore the judiciary must act as a check. Critics too often assume this view of majoritarianism without demonstrating it.[192] In fact, majoritarianism generally has not been hostile to rights. If majoritarianism is in fact more rights protective, the longer range perspective of judicial review may be anti-individual rights.[193]

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186 Friedman, *supra* note 149, at 677. If a political regime lasts long enough, the Justices will fall in line. *See* Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2140 (1999) (describing the New Deal and the Court and observing that "[a]s long as the changes in view were approved by a large majority of the public, presidents could always find Justices" who would uphold them).

187 Friedman, *supra* note 149, at 677.

188 *See supra* note 180 and accompanying text.

189 THE FEDERALIST No. 62 (James Madison).

190 THE FEDERALIST No. 62, at 379 (James Madison) (Clinton Rossiter ed., 1961).

191 *See id.* at 380.

192 *See infra* note 197 and accompanying text.

193 Friedman recognizes this, noting that the judicial role will be "at times visionary, and at times reactionary." Friedman, *supra* note 149, at 678. Friedman suggests that the courts will never be too far out of step with the popular will and not terribly countermajoritarian. *See id.*; *see also* Klarman, *supra* note 25, at 192 (contending that "[o]nly one who

On those occasions when one may fairly criticize majoritarianism for an excess of passion or fear at the expense of individual liberties, the courts have not been of much benefit. Michael Klarman observes:

> [T]he Court frequently has *declined* to intervene when this paradigm calls for judicial involvement—when legislatures perpetrate short-term departures from long-term principles. The most notable illustrations here are the Justices' refusal to invalidate Japanese-American internment during World War II or virtually unprecedented speech restrictions during World War I and the early Cold War.[194]

Indeed Congress, rather than the courts, finally compensated American citizens of Japanese descent for their internment.[195] Alexander Hamilton anticipated this with the recognition that "judges would be no match for legislative power backed by predominant popular sentiment."[196] At least the elected branches eventually acknowledged and redressed their unconstitutional response to passions of the time, while the courts failed both at the time and in later years.

2. *Unfairness to Majoritarianism*

The premise of the majoritarian/minoritarian distinction on behalf of the judiciary as interpreter is questionable. But among scholars a widely held intuitive sense remains that the judiciary is less majoritarian or less accountable. Indeed, this sense may be valid, at least sometimes and in some degree. Even so, the majoritarian/minoritarian defense of judicial supremacy founders on the premise that majorities will be inclined to deny rights to minorities. The legislative and executive branches are both theoretically and empirically protective of individual rights.

Scholars often assume that majorities will have little concern about the rights of others.[197] The common judicialist vision of

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thinks about judicial review ahistorically and acontextually could subscribe to the romantic vision of the Court as countermajoritarian hero").

194 Klarman, *supra* note 25, at 153 (footnotes omitted); *see also* SPANN, *supra* note 12, at 32 (noting that "when majoritarian insistence on the exploitation of minority interests is most intense, Supreme Court protection of racial minorities is likely to be least effective").

195 *See* GRIFFIN, *supra* note 19, at 124.

196 *See* WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 169 (1996) (reviewing Hamilton's argument in *The Federalist No. 78*).

197 *See, e.g.*, Marshall & Ignani, *supra* note 159 (noting "[t]he 'classic tradition' of public opinion has typically assumed that public opinion during most periods is hostile toward individual rights"). Data such as polling may sometimes support this often casual assumption by suggesting that members of the public have little respect for Bill of Rights freedoms.

While poll results may be disturbing, they are not strong evidence against majoritarianism. First, polls reflect only a preference between limited choices, when the respondent has little at stake in the answer. This stands in sharp contrast to the revealed preferences found in the political actions of the public. *See* Benjamin R. Barber, *Reductionist Political Science and Democracy*, *in* RECONSIDERING THE DEMOCRATIC PUBLIC 65, 68 (George E. Marcus

majoritarian legislatures and executives casually tromping upon the rights of minorities is unsupportable. Majoritarian institutions have often been "sensitive to minority rights."[198] The confirmation process for Supreme Court appointees provides interesting evidence of this effect. In current practice, each nominee has been "required to demonstrate his or her support of past Court decisions that various groups saw as fundamental."[199] Louis Hartz notes that "when a nation is united on the liberal way of life the majority will have no interest in destroying it for the minority."[200]

Scholars seldom analyze the theory of majoritarian tyranny. First, a majority has no reason to choose to deny minority rights. Do the members of a majority gain some utility from denying the rights of others? Even if the majority had some prejudice about a particular group, it does not follow that they would benefit from imposing unconstitutional restrictions upon that group. With respect to economic rights, of course, members of a majority might financially profit by taking resources from a minority.[201] As for most other rights, such as free speech and freedom of religion, it is unclear how a majority could profit from denying others' rights. If the members of a majority had a

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& Russell L. Hanson eds. 1993) (reporting that polls elicit only "undeliberated biases unmediated by reason or common deliberation"). Evidence indicates that the intolerant generally forbear from acting on their beliefs. *See* Russell L. Hanson, *Deliberation, Tolerance, and Democracy, in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra*, at 273, 274. Second, the phrasing of the question itself or the pollster's assumptions may distort the polling results. *See, e.g.*, Russell L. Hanson & George E. Marcus, *Introduction: The Practice of Democratic Theory, in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra*, at 11 (suggesting that polling findings of intolerance merely confirmed researchers' a priori assumptions of intolerance); Benjamin I. Page & Robert Y. Shapiro, *The Rational Public and Democracy, in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra*, at 35, 39 (noting that polling results may be due to "measurement errors" such as ambiguous questions). Third, considerable recent polling data shows much more public respect for individual rights. *See, e.g.*, Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1623-25 (1997) (observing that while polls reveal strong disapproval of homosexuality they nevertheless show opposition to discrimination based on sexual preferences).

198 FISHER, *supra* note 58, at 20.

199 GRIFFIN, *supra* note 19, at 118; *see also* Stephen J. Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, LAW & CONTEMP. PROBS., Autumn 1993, at 121, 121-22 (indicating that "members of the Judiciary Committee have learned to shape the constitutional dialogue in confirmation hearings to make clear to nominees that a willinguess to profess belief in some threshold constitutional values is prerequisite for the job").

200 LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 129 (1955).

201 Even in this case, the ability of majorities to benefit by denying rights is not clear. Discrimination could deprive majority populations of the economic benefits members of minorities potentially offer, which "can be as mundane as manual labor, as lucrative as athletic or entertainment appeal, or as exceptional as a lifesaving scientific discovery." SPANN, *supra* note 12, at 131 (footnotes omitted).

taste for homogeneity they might benefit,[202] but those in the majority who have a taste for diversity would lose out from the denial of minority liberties. In a majoritarian world, the minority loses only when those with a penchant for homogeneity numerically exceed the combined force of minorities and those with a desire for diversity. In the United States, the public may generally have an affirmative "taste for tolerance," perhaps ascribable to our public devotion to the Bill of Rights.[203]

Even if a prevailing majority had a collective predilection for homogeneity or intolerance, which seems unlikely, that fact would not necessarily lead to intolerance in policy. The majority is potentially concerned with innumerable policy issues, of which intolerance is but one. The political power of those with a predilection for intolerance would also depend upon the intensity of the taste among the majority. Only when the majority has an intense preference for intolerance would democracy compel this result.[204] In reality, it is far more likely that a minority has a much greater preference intensity for avoiding oppression than a majority has for oppressing. The relative solidarity of minorities in voting their group interests reflects this reality, while the majority vote is more divided.[205] Public choice theory dictates that small groups such as minorities possess disproportionate political power, precisely because of their smallness facilitates their political collaboration.[206]

Another danger of majority disrespect for minority rights might stem from a lack of sensitivity to the proper weight accorded to those

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202 Even in this case, the evidence suggests that those with a taste for intolerance forbear from acting on their desires in public policy. *See* Hanson, *supra* note 197, at 274 ("Most people refrain from intolerant actions, even though they harbor less-than-tolerant attitudes."). For example, people may "disavow the right of, say, the Ku Klux Klan to march in places like Skokie, but they do little or nothing to prevent such marches from occurring." *Id.* Of course, unfortunate exceptions exist. In *Romer v. Evans*, the Supreme Court lamented that a Colorado anti-gay law appeared motivated by a "desire to harm a politically unpopular group." 517 U.S. 620, 634 (1996).

203 *See, e.g.*, Pamela Johnston Conover et al., *Duty is a Four-Letter-Word: Democratic Citizenship in the Liberal Polity*, *in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra* note 197, at 147, 156 (noting that the Bill of Rights "defines the very substance" of American thinking about rights). The authors report focus group results that show that citizens believe that individual rights or individual freedom are *core and essential* features of a healthy polity. *See id.*

204 *See* Ackerman, *supra* note 58, at 733 (indicating that the "magnitude of this [majoritarian] prejudice must be very great indeed to preempt concern for practical matters"). This combination of great majority preference intensity for intolerance seems unlikely. Although it may have prevailed among Southern whites in the era of slavery and subsequent racial segregation, that was a regional and not national phenomenon.

205 *See, e.g.*, David H. Tabb, *Political Incorporation and Racial Politics*, *in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra* note 197, at 393 (discussing political solidarity of black groups and its importance in gaining political power).

206 Ackerman applied this point to constitutional rights in Ackerman, *supra* note 58, at 724-30; *see also* KOMESAR, *supra* note 91, at 69-70 (describing the advantages that smaller groups have in the political process).

interests and a consequent willingness to sacrifice them in the pursuit of some other objective that benefits the majority. Thus, a majority may not affirmatively care to deny anyone freedom of expression, but because it fears the threat of communism or some other ideology, it may deny free speech to members of the feared group.[207] Or because the majority fears crime, it may give insufficient respect to the rights of criminal defendants. This obviously can occur and has occurred, but majoritarianism contains other features that counteract this risk.

Members of the majority with respect to one characteristic or issue can simultaneously be members of a minority on other issues. After all, people do not have name tags categorizing them as members of a universal unalterable majority or minority. Most of us are simultaneously members of majorities on some issues or with respect to some personal characteristics,[208] and members of minority groups on many other issues. Consequently there is no universal identifiable majority that has an incentive to oppress some identifiable minority. James Madison recognized this point, foreseeing "in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable."[209] Race is probably the closest thing to an unalterable minoritarian name tag in American history. Hence, the majoritarian/minoritarian argument appears strongest when it comes to judicial enforcement of racial equality, because the theory would expect majority Anglo legislatures to disregard the interests of ethnic minorities. American history obviously contains examples of when this has occurred. However, the comparative institutional experience does not demonstrate the relative shortcomings of majoritarianism—civil rights is an area in which the elected branches have been far more vigorous and progressive than have the courts.[210] If the minoritarian defense of the judiciary fails on this issue, it is clearly a weak reed on which to rest judicial supremacy.

Any individual's future uncertainty may not quite amount to a Rawlsian veil of ignorance,[211] but the future is by definition uncertain. Save for a few fairly immutable characteristics, such as race and gen-

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207 Chemerinsky suggests that "majoritarian processes often favor tangible goals over abstract values." Chemerinsky, *supra* note 2, at 84. This notion forms the basis of the motive and opportunity defense of judicial review. *See infra* Part II.B.

208 The minority group for whom the Framers were most concerned was "property owners." Klarman, *supra* note 25, at 162.

209 BURT, *supra* note 25, at 235 (quoting James Madison in *The Federalist No. 51*).

210 *See infra* Part I.B.2.a. The elected branches are also more effective in advancing civil rights. Notwithstanding the decision in *Brown*, "[o]nly when the president intervened with armed force and Congress later took statutory sanctions did significant desegregation commence." McCann, *supra* note 26, at 64.

211 John Rawls tries to identify the just by positing an "original position" in which people must decide upon the proper organization of society without knowing at the time what

der, we do not know our future status. We therefore have an incentive to favor rights that we may need in the unforeseen future.[212] The Americans with Disabilities Act (ADA)[213] passed into law even though only a minority of Americans are disabled and would benefit directly.[214] Perhaps this was because of Americans' altruistic concern for the welfare of the disabled or perhaps it was attributable to their awareness that anyone is potentially a future beneficiary of the law's protections. In either case, the majority protected the rights and interests of a minority.

Even absent future uncertainty or altruism, majoritarianism may still protect rights. A coalition of minorities can override a majority sentiment on issues of importance to the minorities.[215] Robert Dahl argues that in American democracy, "all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision."[216] Policy is "formulated through a process of negotiations between interest groups," and "contemporary racial minorities possess sufficient political influence to participate effectively in that process."[217] Such coalitions must attend to the concerns of their member groups. A majority itself may be nothing more than a coalition of minority groups.[218] Dahl said that "no single group can win national elections—only heterogeneous combinations of groups can."[219] Moreover, given the instability of coalitions and the swings of politics, coalition members have reason to fear ending up

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their position in that society will be, the "veil of ignorance." JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

212 *See, e.g.*, Ferejohn, *supra* note 98, at 367 (noting that "[i]t would be better, of course, if we could secure for ourselves an unfair legal advantage, but the vagaries of fortune make such self-serving behavior intolerably risky").

213 42 U.S.C. §§ 12101-12213 (1994).

214 In interpreting the ADA, the Supreme Court has emphasized that Congress intended to extend its protections to only a minority of Americans. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484-85 (1999) (citing preamble to this effect and rejecting interpretation of "disabled" that would have extended protections to majority as contrary to legislative intent).

215 Anthony Downs discusses the classic and mathematical exposition of this principle in ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 55-60 (1957). Minorities may prevail because they have stronger preference intensities on an issue than does the majority. *See* Klarman, *supra* note 129, at 496. It surely seems fair to suggest "that a minority group generally will have a more intense preference against its own oppression than the minority will have for oppressing the majority." *Id.* at 496 n.26.

216 ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 137 (1956).

217 SPANN, *supra* note 12, at 90.

218 *See* Ackerman, *supra* note 58, at 720 (describing American pluralist democracy as "myriad pressure groups, each typically representing a fraction of the population, [who] bargain with one another for mutual support").

219 ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 456 (1967).

outside a majority coalition in the future.[220] Hence, they all have reasons to adopt structural protections for minorities.[221] Moreover, a party's ability to attract a minority group of even five to ten percent might turn an election.[222] Minorities also have the power to "logroll," by trading votes on other issues, for example taxes, for protection of their interests.[223] Contemporary legislative procedures further protect against abuses of majoritarianism, as "[e]ven small political minorities, especially in the Senate, are generally able to place procedural hurdles in front of the majority."[224] So long as minorities have access to politics, such as the right to vote and serve, and a variety of issues are at stake, minorities can protect their own interests. A recent game theoretic analysis demonstrates that majoritarianism "*can* be ordinarily relied upon to protect minorities."[225] The consequence, for Dahl, is that minorities rule in American democracy.[226] Majoritari-

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220 *See* JAMES M. BUCHANAN & ROGER D. CONGLETON, POLITICS BY PRINCIPLE, NOT INTEREST 19-20 (1998) (noting that "dominant coalitions" tend to "rotate . . . with sufficient frequency . . . to ensure some modicum of generalized representation of all interests"); William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 445 (1980) (arguing that "political outcomes truly are unpredictable in the long run").

221 *See* Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 How. L.J. 1, 69 (1995) (noting that while minorities cannot "control the United States Congress, they do possess sufficient political power to compel occasional legislative concessions from Congress"). Posner reviews Habermas in noting:

> Political parties being coalitions of disparate interests, it is difficult for a politician to formulate an appeal for votes in terms limited to the narrow interests of the members of his coalition. The politician is constrained to speak in broader terms of principle, and this forces the voting public to think in terms of principle too.

POSNER, *supra* note 108, at 103.

222 Researchers have analyzed this effect in the context of congressional districting designed to ensure the representation of minorities in the national legislature. *See* Klarman, *supra* note 129, at 526. Drawing districts with a majority minority population reduces the size of the minority vote in other districts. The issue is whether a minority vote really matters, whether a minority can influence the outcome of an election. The research suggests that the creation of majority minority districts did make a difference. *See id.* at 527 (citing evidence that effect of diluting minority representation in other districts caused net gain in seats for Republican party). This real world experiment demonstrates how minority groups can play a role in determining the representatives sent to Congress by majority vote.

223 *See* SPANN, *supra* note 12, at 89 (describing how logrolling gives minorities at least a "degree of influence"). In addition, "specific policy choices are often shaped by intense, narrowly focused minorities, rather than by a broad majority coalition." PERRETTI, *supra* note 27, at 202-03.

224 Ferejohn, *supra* note 98, at 359 n.11. For example, the filibuster cloture rules of the Senate require a supermajority of 60% to take action, meaning a minority needs only a coalition of 41% to protect its interests. *See* Senate Rule XXII, para. 2.

225 James R. Rogers, *Legislative Incentives and Two-Tiered Judicial Review: A Game Theoretic Reading of* Carolene Products *Footnote Four*, 43 AM. J. POL. SCI. 1096, 1107 (1999).

226 *See* DAHL, *supra* note 216, at 146 (contending that democratic decision making is not the "march of great majorities," but the "steady appeasement of relatively small groups"); KALMAN, *supra* note 128, at 25 (summarizing Dahl to the effect that elections

anism might also advance rights because the minorities that the Bill of Rights protects are not generally discrete and insular or even identifiable. First Amendment rights are exercised by white supremacists and black separatists, by mainstream religions and obscure cults. And there is a widespread perception that the rights of all depend on respect for the rights of the fringe.[227] The civil liberties that the Bill of Rights protects are "now thought to be good for everybody."[228] Securities fraud prosecutions have surely given privileged white males an appreciation for the rights of criminal defendants. Just as one cannot predict future majority coalitions, one cannot predict whether one may need constitutional protections in the future.[229]

This analysis may explain the theory of collective rationality.[230] This might be called the efficient political market hypothesis. Even if individuals are often irrational and intolerant, their collective decision making will not be.[231] Research has shown a distinction between "individuals' opinions and *collective* public opinion," with the latter influenced by a social formation of preferences through deliberation.[232] This has been called the "miracle of aggregation."[233]

The uncertainty and instability of majority status explains how even majority members who act out of pure self-interest could favor strong protection of minority rights. But this utterly selfish vision of the majority voter is not supportable. In fact, "[m]any actions seem driven by more than self-interest, and many governmental outcomes

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increase "the size, number, and variety of minorities, whose preferences must be taken into account by leaders in making policy choices" with the consequence that "minorities rule").

227 In addition to the prospect of actual restriction of mainstream speech following restriction of fringe speech, the mere possibility of this effect could have a chilling effect on the mainstream. *See* Rosenfeld, *supra* note 23, at 165. Moreover, the fear of majoritarian speech restrictions simply assumes that we do not want to hear speech with which we disagree and that people do not respect the concept of a marketplace of competing ideas. *See id.* (contending that "the actual *worth* of one speaker's free speech rights depends to a significant degree on respect for the speech rights of other persons").

228 RIKER, *supra* note 149, at 7.

229 The minority whose rights were of particular concern to the founding generation was "men of property." BURT, *supra* note 25, at 40. Obviously we are all potentially vulnerable future minorities. Hartz suggests that Americans' fear of future majorities serves as a "leash" that constrains current majorities. HARTZ, *supra* note 200, at 129.

230 For a discussion of the theory see Page & Shapiro, *supra* note 197, at 39-42.

231 The efficient market hypothesis explains how securities markets reach efficient results even when a large number of individual investors are ill-informed or unwise. *See* Mark H. Van De Voorde, Note, *The Fraud on the Market Theory and the Efficient Markets Hypothesis: Applying a Consistent Standard*, 14 J. CORP. L. 443, 475-76 (1989).

232 Page & Shapiro, *supra* note 197, at 41.

233 Jennifer L. Hochschild, *Disjunction and Ambivalence in Citizens' Political Outlooks*, *in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra* note 197, at 187, 188; *see also* Donald R. Kinder & Don Herzog, *Democratic Discussion*, *in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra* note 197, at 347, 369, 370 (noting how the "law of large numbers" enables rational policy to emerge from a populace that itself is ill-informed and explaining how ideas can affect collective public opinion even when most individuals are unaware of their details).

cannot be fully explained by the pursuit of self-interest."[234] As a general rule "the self-interest hypothesis has fared poorly in a variety of empirical tests."[235] Instead, people vote sociotropically, for the position that is best for the nation as a whole, not for their particular situation.[236]

The majority dedication to minority rights should not be exaggerated; polling data shows that the Court has on average, over time, been at least slightly more protective of rights than has majority opinion.[237] However, even when general public opinion as reflected in polls is hostile to rights claims, it does not necessarily follow that the legislative and executive branches are necessarily so hostile. The opinions of the republican representative branches are not perfectly congruent with those of the general public.[238] Classically, the opinions of representative institutions are expected to reflect more than a snapshot of public opinion; representatives are to conduct a civic-minded deliberation about the nature of a just society which would recognize minority rights.[239] One can reach the same result through a more

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234 John W. Kingdon, *Politicians, Self-Interest, and Ideas, in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra* note 197, at 73, 74; *see also* David O. Sears et al., *Self-Interest vs. Symbolic Politics in Policy Attitudes and Presidential Voting*, 174 AM. POL. SCI. REV. 670 (1980) (finding that political behavior is better explained by symbols and ideas than by self-interest).

235 Kinder & Herzog, *supra* note 233, at 367.

236 *See id.* at 368.

237 *See* Marshall & Ignani, *supra* note 159, at 148. This differential has disappeared, in recent years, under the Rehnquist Court. *See id.* Interestingly, the Court has proved slightly more majoritarian when ruling on fundamental freedoms than in its economic decisions. *See* Thomas R. Marshall, *The Supreme Court and the Grass Roots: Whom Does the Court Represent Best?*, 76 JUDICATURE 22, 28 (1992).

238 Social scientists sometimes refer to elected officials' failure to represent the preferences of their constituency as legislative "shirking." *See, e.g.*, Dennis Coates & Michael Munger, *Legislative Voting and the Economic Theory of Politics*, 61 S. ECON. J. 861, 861 (1995) (stating that "legislators who use their own 'ideology' are shirking"). Scholars have conducted ample research on this phenomenon. Shirking tends to occur when elected officials have relatively safe seats or on votes that are not of high salience to their constituency. *See, e.g., id.* at 870. Other research indicates that there is a strong relationship between constituency opinion and legislator voting only on salient issues. *See, e.g.*, JOHN KINGDON, CONGRESSMAN'S VOTING DECISIONS 30-31 (1973); Robert S. Erikson, *Constituency Opinion and Congressional Behavior: A Reexamination of the Miller-Stokes Representation Data*, 22 AM. J. POL. SCI. 511 (1978) (examining correlation between congressional attitudes and constituency opinions about social welfare, civil rights, and foreign policy); James H. Kuklinski, *Representative-Constituency Linkages: A Review Article*, 4 LEGIS. STUD. Q. 121 (1979).

Elected officials probably have a lot of free votes, which will not affect their reelection prospects. *See* Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 476 (1998) (noting that "[i]t seems safe to say . . . that most of the issues a representative will vote on during a given legislative session will not have been a particular focus of his or her election campaign" as there "are many issues voters do not care much about"). Elections usually turn on economic issues rather than matters of individual rights. *See* Comiskey, *supra* note 166, at 267.

239 *See* Kingdon, *supra* note 234, at 76 (reporting empirical evidence to the effect that lawmakers are interested in the pursuit of "good public policy" in addition to reelection); Jane Mansbridge, *Self-Interest and Political Transformation, in* RECONSIDERING THE DEMO-

cynical vision—elected officials will be responsive to minority groups that have strong preference intensities on minority rights concerns and that may provide campaign contributions or offer a key swing vote in elections.[240] And since many particular issues do not drive or even affect a voter's choice between candidates, elected officials have considerable discretion to do what they think best, independent of public opinion.[241]

The universal embrace of minoritarianism in response to this concern, though, is also illogical. An authoritarian minority, after all, might affirmatively prefer to violate the rights of the majority or some other minority.[242] World history demonstrates that minoritarian institutions, such as monarchies, have not always exhibited particular concern for civil liberties. Hitler represented a minority when he came to power in Germany. The Klan is surely a minority in this country, but giving the Klan authority over individual rights clearly would be unwise. Some contemporary rights disputes are essentially one minority against another, for example, cultural conservatives often clash with gays and lesbians. Hence, devotion to minority interests does not necessarily correspond to devotion to freedom or the Bill of Rights.[243] Simply defining an institution as minoritarian does not imply that it will advance the rights of individuals. The issue is which minority the institution will advance because that minority will not necessarily be freedom-loving.[244] Historically, the Court has been overwhelmingly white and male and not necessarily structured to protect the interests of disadvantaged minorities.[245] In fact, minorities may actually fare

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CRATIC PUBLIC, *supra* note 197, at 91, 94 (reviewing particular studies indicating that members of Congress want to "make good public policy for its own sake").

240 The public choice theory of collective action suggests that representative institutions will ignore general public opinion at the expense of minorities who are better able to organize for political action due to their smaller numbers.

241 *See* Kingdon, *supra* note 234, at 78-79 (noting that a legislator often has considerable policy discretion within the bounds set by his or her constituents).

242 *See, e.g.*, Jeremy Rabkin, *Partisan in the Culture Wars*, 30 MCGEORGE L. REV. 105, 106 n.6 (1998) (noting that the Supreme Court does not so much choose between majority and minority perspectives as it "takes sides on which 'minority' concerns it will champion").

243 The structures aimed at creating judicial independence—life tenure, salary protection—intend to prevent the judiciary from being motivated by certain improper considerations such as corruption. But nothing in these structures affirmatively provides "positive inducements to behave in a desirable manner." Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 969 (1995). Even if the structures may help enable the courts to be concerned with minority rights, they do not motivate such concerns.

244 *See* Klarman, *supra* note 25, at 162 ("It is not clear why one would expect the Justices to do a better job than majoritarian politics of selecting the *right* minority groups for protection.").

245 *See supra* notes 98-99 and accompanying text.

better in majoritarian contexts.[246] Defending minoritarian courts requires some further reason why the courts will favor freedom.[247] Thus, the theory does not demonstrate the likelihood that majoritarian institutions will be inferior in protecting minority rights. Examination of the empirical record will generally confirm this conclusion.

a. *The Record of Majoritarianism*

Advocates of judicial review may seem merely to assume that a majoritarian institution such as Congress will show no concern for minority rights. Not only is the assumption theoretically unwarranted, the historical record does not support it. Majoritarian institutions have shown solicitude for minority rights on many occasions. The noted historian Henry Steele Commager wrote that there was no "persuasive evidence from our own long and complex historical experience that majorities are given to contempt for constitutional limitations or for minority rights."[248]

The Bill of Rights itself was not an entirely antimajoritarian theory at its inception. Debates may rage over whether the founders contemplated judicial review of constitutional provisions, but it is fairly clear that judicial enforcement was not the primary purpose of the existence of the Bill of Rights. James Madison urged that the amendments would "become incorporated with the National sentiment" and thus prevent majoritarian infringement.[249] At the time of its passage, the first ten amendments "were prized more for their capacity to educate citizens and public officials than for their ability to serve as legal

246 *See, e.g.*, SPANN, *supra* note 12, at 156 ("The Supreme Court is mostly white and mostly male, and as an institution it is mostly nonresponsive to fresh or innovative political thinking."). One suspects that the majoritarian/minoritarian defense of the judiciary owes much to the experience of the Warren Court. But that Court may have been *sui generis*, a confluence of unique factors of the era and unlikely to be replicated. *See, e.g.*, Friedman, *supra* note 149, at 678-79 (noting that the Warren Court was a creature of particular circumstances and questioning whether the judiciary really has any inherent tendency to protect minority interests).

247 Michael Klarman asserts that judicial review promotes "elite values" which happen to correspond with tolerance and freedom. Klarman, *supra* note 25, at 189-91. Some empirical evidence supports this position. *See, e.g.*, Hanson & Marcus, *supra* note 197, at 16-17 (discussing research "findings [that] elites, and not masses, were the carriers of the democratic creed"); Lawrence Bobo & Frederick C. Licari, *Education and Political Tolerance*, 53 PUB. OPINION Q. 285 (1989). The elite values position is not a significant comparative defense of judicial constitutional interpretation and enforcement, however, because members of Congress and the executive branch would probably also be considered elites, with similar elite values.

248 HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 80 (1943).

249 SUNSTEIN, *supra* note 23, at 9 (quoting James Madison's letter to Thomas Jefferson on October 17, 1788).

principles to be enforced through judicial decisions."[250] About half of the amendments in the Bill of Rights "reveal a lack of confidence in the judiciary: *they guarantee rights within judicial proceedings.*"[251] Thus, one purpose of the first ten amendments was to induce majoritarian protection of individual liberties. History shows that our institutions have at least somewhat fulfilled this purpose.

In the nineteenth century, before the Fourteenth Amendment applied the Bill of Rights to state governments, majoritarian institutions disestablished religions, protected freedom of worship in the schools and throughout society, expanded rights of free expression against defamation, and enhanced a variety of aspects of the rights of criminal defendants.[252] Women and minorities secured equal rights legislatively rather than by court decree.[253]

The record of majoritarianism in civil rights matters remained strong even throughout the conservative Reagan Administration. Most of the landmarks in civil rights protection have been legislative.[254] Steve Griffin identified nine progressive civil rights statutes that became law while Ronald Reagan was president.[255] Some of these laws "were passed in response to numerous Court rulings that restricted the scope of laws designed to ensure the enforcement of civil rights."[256] He observes that the "contemporary debate over judicial review is at a loss with respect to such consistent legislative protection of individual rights."[257] Legislative shortcomings with respect to civil rights may have been a consequence of the Congress *not being majoritarian enough.*[258] Girardeau Spann's book-length review concluded that, "historically, minority interests have fared better before

250 DINAN, *supra* note 3, at 2; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 336 (1996) (noting that the Bill of Rights established "standards that would enable the people to judge the behavior of their governors").

251 Gerard V. Bradley, *The Post-Constitutional Era, in* REINVENTING THE AMERICAN PEOPLE: UNITY & DIVERSITY TODAY 137, 141 (Robert Royal ed., 1995) (referring to "the Fourth, much of the Fifth, the Sixth, the Seventh, and the Eighth Amendments").

252 *See* DINAN, *supra* note 3, at 34-53 (surveying the legislative record during this time period).

253 *See id.* at 53-58. Although women tried to employ the judicial process to gain suffrage, the Supreme Court rebuffed them. *See* Minor v. Happersett, 88 U.S. 162 (1874).

254 Many of these breakthrough laws are catalogued in SPANN, *supra* note 12, at 97-98. The executive branch has also advanced minority interests in areas such as affirmative action and school desegregation. *See id.* at 98.

255 *See* GRIFFIN, *supra* note 19, at 117.

256 *Id.* at 116.

257 *Id.*

258 *See* BURT, *supra* note 25, at 296 (describing how congressional seniority system empowered southern senators through committee powers to fend off civil rights legislation until the early 1960s).

the representative branches of government than before the Supreme Court."[259]

Legislatures have either advanced or refrained from infringing upon other rights. Mark Tushnet notes that when the Supreme Court in *Planned Parenthood v. Casey*[260] "made it substantially easier for the states to adopt regulations restricting the availability of abortion . . . essentially nothing happened."[261] Indeed, legislatures were well on the way to protecting the rights of women to an abortion[262] before the infamous *Roe v. Wade* decision.[263] Speculating about the nature of abortion rights absent *Roe* and judicial intervention is counterfactual and irresolvable. But a case could be made that majoritarian institutions can generally be relied on to protect reproductive freedom of choice. In addition, a review of the congressional debate over the National Endowment for the Arts funding found that Congress takes First Amendment concerns very seriously.[264]

Perhaps the best case against majoritarianism focuses upon those moments when the majority seems caught up in a temporary passion or fear and disregards individual liberties. Elected institutions have become caught up in authoritarian fervors, from anticommunist to anti-Japanese. The record of majoritarian institutions is not entirely positive. However, it is noteworthy that the courts generally have not counteracted these moments of majoritarian passion.[265]

Certainly, legislatures have passed numerous laws that have infringed upon rights and that the Court had to strike down. Nearly all of the Supreme Court's famous Bill of Rights decisions respond to instances of the shortcomings of the states or of the other branches of the federal government. The Court has sometimes protected rights that the traditional majoritarian branches did not.[266] Of course, it is

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259 SPANN, *supra* note 12, at 3; *see also* Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 558 (1999) (suggesting that "during Reconstruction, Congress showed blacks far more solicitude than the courts did, and today the independent federal judiciary seems to be leading a frontal assault on black political and educational aspirations").

260 505 U.S. 833 (1992).

261 TUSHNET, *supra* note 11, at 124.

262 *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 262-64 (1991) (noting trend to liberalize state abortion laws prior to *Roe* decision).

263 410 U.S. 113 (1973).

264 *See* John H. Garvey, *Black and White Images*, LAW & CONTEMP. PROBS., Autumn 1993, at 215.

265 Thomas Marshall found that the Court tended to be especially majoritarian in times of national crisis. *See* MARSHALL, *supra* note 148, at 82-83.

266 *See, e.g.*, Martin Shapiro, *The Supreme Court: From Warren to Burger*, *in* THE NEW AMERICAN POLITICAL SYSTEM 179, 181 (Anthony King ed., 1978) ("Few American politicians . . . would care to run on a platform of desegregation, pornography, abortion, and the 'coddling' of criminals.").

not enough to point out cases of one branch's shortcomings, without considering the cases in which the other branches have displayed shortcomings of their own. Majoritarianism, if imperfect, has evinced good support for individual rights.

b. *Majoritarian Good Faith*

Judicial supremacists presume the bad faith of majoritarian institutions, without much depth of reason or evidentiary support. They argue that permitting Congress to interpret and enforce the Bill of Rights would essentially eliminate the very concept of an overarching Constitution, reducing it to the status of mere legislation.[267] The process for amending the Constitution is imposing, but the "legislative amendment" criticism posits that congressional interpretation would permit a de facto amendment on the strength of a mere legislative majority. Such a functional amendment under the rubric of interpretation would subvert the very nature of a constitution.[268] Although superficially appealing this argument is meritless.

The argument that congressional constitutional interpretation and enforcement reduces the Constitution to the status of legislation confuses the question of constitutional primacy with the separate question of who should interpret the Constitution. Giving Congress primacy in constitutional interpretation would only subvert the Constitution insofar as Congress did not take the document seriously.[269] Hence, the criticism has validity only if congressional interpretation is insincere or in bad faith. Congressional bad faith, of course, is an independent reason to disfavor constitutional interpretation, so the legislative amendment criticism contributes little. The concept of a legislature enforcing constitutional restrictions upon its own action is not intrinsically illogical and is the explicit rule of some foreign constitutions, which recognize parliamentary supremacy.[270] The initial flaw in the legislative amendment argument against congressional

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267 This was Thomas Jefferson's concern. *See* JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 83-84 (1984); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996).

268 *See, e.g.*, AGRESTO, *supra* note 267, at 84 (contending that relying on Congress for constitutional interpretation "minimizes the relevance of a constitution as a self-binding of the democracy upon itself and it blurs the distinction between the Constitution and ordinary legislation").

269 *See* WHITTINGTON, *supra* note 59, at 218 ("Subjecting constitutional meaning to political determination does not necessitate the abandonment of constraints . . . [because] [c]onstructions remain binding on future political actors, even if they are not legally enforceable."). Whittington also observes that the "elective branches are forums of principle and venues for deliberation as well." *Id.* at 223.

270 Many European nations have historically adhered to a system of parliamentary supremacy. However, there is a trend among such nations to provide a greater role for the judiciary in constitutional interpretation, thereby limiting legislative powers. *See* Ran

constitutional interpretation and enforcement is in its extremely cynical view of majoritarian institutions, suggesting that they would give no independent credit to apparent constitutional commands. The argument implies that when legislating, Congress would functionally ignore the Constitution's substantive meaning. Such an argument cannot be merely asserted but should be demonstrated.

In fact, we know that majoritarian institutions have respect for the Constitution in itself. This is evidenced by the historical record of majoritarian institutions' solicitude for minority rights. It is also evidenced by legislative restraint. The Constitution gives Congress the power, by ordinary legislation, to withdraw jurisdiction from the courts.[271] This power provides the legislature with the functional authority to disable, if not overrule, judicial interpretations of the Bill of Rights. Yet Congress has been extremely loathe to exercise this power.[272] Simply presuming that Congress lacks respect for constitutional commands is to rig the debate unfairly.[273] Of course, this is not to claim that Congress is perfectly sincere or unqualified in its devotion to constitutional principles. Congress may compromise rights in attempting to advance some policy or personal end of the legislators.[274] These limitations of Congress, though, are only a relevant criticism of congressional interpretation if the critics can identify an institution that is less subject to such limitations.

The second flaw in the legislative amendment argument is its extremely disingenuous view of judicial institutions. If one asserts that legislative interpretation reduces the Constitution to the status of ordinary legislation, then it follows that judicial interpretation reduces the Constitution to the status of ordinary common law.[275] Just as the critics of Congress assume that the legislature will ignore the Constitution

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Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J. INT'L L. 73 (2000).

271 U.S. CONST. art. III, § 2, cl. 2.

272 *See* AGRESTO, *supra* note 267, at 121 (observing that attempts to limit jurisdiction have "serious political liabilities"); Gant, *supra* note 20, at 376 (observing that the limited success of jurisdiction-stripping measures in Congress "may be attributable to doubt about whether they are constitutional"). Certain Court decisions have been notoriously unpopular and have provoked legislators to introduce bills to restrict jurisdiction over school busing, school prayer, and other issues, but the majoritarian Congress did not pass these bills. *See* Brest, *supra* note 30, at 79.

273 *See, e.g.*, Graglia, *Policy-Making Role*, *supra* note 6, at 122 (observing that laws in obvious disregard of constitutional commands "do not occur").

274 This is evidenced by the at least occasional passage of laws that deny Bill of Rights freedoms.

275 *See* J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT 97-98 (1965) (noting that "the exclusive right to interpret necessarily involves the power to change its substance" which gives the judiciary the virtual "power to amend the Constitution"); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 371 (1998) (responding to criticisms of executive constitutional review, and noting that judiciary is as subject to bad faith interpretation as is the President).

in pursuit of its other policy or personal interests, one could assume that judges will do likewise. Advocates of judicial interpretation and enforcement simply assume that judges are above that type of behavior.[276]

In fact, the Court is much like Congress in that it respects and defers to the Constitution but also has its own preferred policy ends. Defenders of the Court can surely point to congressional and executive decisions that seemed to be clearly wrong under the Constitution, perhaps even ignoring the Bill of Rights entirely. But such examples cannot make the case for judicial supremacy. As Judge Easterbrook has observed, "[i]f misuse of power in the name of the Constitution is enough to condemn it, then we shall have to abandon judicial review: *Lochner [v. New York*[277]] and *Plessy [v. Ferguson*[278]] reigned longer than *Brown.*"[279]

Scholars have tended to overidealize the Court's purported dedication to a minoritarian perspective. Scot Powe assessed the Court's actual record in applying the *Carolene Products* footnote.[280] Prior to 1962, he found little or no descriptive validity to the claim that the judiciary must protect discrete, insular minorities.[281] Over the next ten years, the Warren Court did appear to be applying the principles of the famous footnote, but this dedication ended in the 1970s.[282] Even in the Warren Court, the decisions could be ascribable to judicial ideology or, in Powe's theory, to the sway of "Northern elites" who "favored ridding the country of backwards laws, to make the country one, and with the best—their—values available."[283] Even if the Court were minoritarian, there is no good theory why they would use their power to advance the interests of particular disadvantaged minority groups. The best theoretical majoritarian/minoritarian case for judicial review is that the differently majoritarian courts may check the passions of a temporary majority. Historically, however, the Court has not demonstrated much of an actual ability to fulfill this role.[284]

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276 *See supra* note 197.

277 198 U.S. 45 (1904), *overruling recognized by* Planned Parenthood v. Casey, 505 U.S. 833, 836 (1992).

278 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

279 Easterbrook, *supra* note 51, at 925. Robert Burt suggests that the fundamental fault of the *Lochner* decision was not in its constitutional analysis but in "the judges' view of themselves, as the hierarchically supreme, definitive interpreters of the Constitution." BURT, *supra* note 25, at 254.

280 *See* Powe, *supra* note 163, at 197.

281 *See id.* at 198-204.

282 *See id.* at 205, 212 (noting that "everything from the 'real' Warren Court looks very much like Footnote Four" and finding that this tendency ended "[s]ometime in 1973").

283 *Id.* at 212-13.

284 *See supra* note 281 and accompanying text.

The countermajoritarian difficulty has proved most confounding for judicial review. While the issue is a relevant one, the majoritarian/minoritarian argument is not intrinsically a strong argument for or against judicial interpretation and enforcement of the Constitution. There is a fair theoretical, normative and historical dispute over whether majoritarian institutions are best-suited to constitutional decision making. Even if scholars could settle that long conflicted dispute, there remains a tricky descriptive issue about the relatively majoritarian nature of the judicial branch vis-à-vis the legislative and executive branches. The majoritarian argument cannot convincingly justify nor discredit reliance on judicial interpretation and enforcement of the Bill of Rights.

II
THE TRUER AND STRONGER CASE FOR JUDICIAL ENFORCEMENT

The quality of enforcement and majoritarian/minoritarian defenses of judicial review may have some validity, but these defenses have serious logical shortcomings. Nor does the country's empirical experience regarding the interpretation and enforcement of the Bill of Rights obviously support these defenses. Hence, they offer a weak foundation on which to rest judicial supremacy and deny departmental constitutional interpretation and enforcement to the other branches. However, two justifications, the "multiple vetoes" justification and the "motive and opportunity" analysis, present a strong case for providing judges with authority to interpret and enforce the Bill of Rights.

First, the multiple vetoes justification does not suggest that the judiciary has any intrinsic advantage in constitutional interpretation and enforcement. Rather, the multiple vetoes concept relies on the benefit of adding judicial review on top of congressional and executive action. Judicial review under the Bill of Rights provides just another hoop through which government action must pass. By adding an additional hoop, government action becomes more difficult. Because the rights in the Bill of Rights are generally negative rights—freedom from invasive government action—adding an additional check on government action will enhance the liberty the Bill of Rights offers.

Second, the motive and opportunity analysis also does not rest on the intrinsic advantage of the judicial process but relies upon the structural weakness of the judiciary. Because the judiciary is a weaker branch, at least with respect to implementation of mandates, the judiciary is less likely to be able to advance other interests at the expense of constitutional freedoms. Consequently, the judiciary will tend to

evaluate the programs that the other branches initiate, and be more likely to disapprove of those programs under the Bill of Rights than would the other branches.

A. Multiple Vetoes

The logic of the multiple vetoes defense is straightforward. The more institutions that possess a veto over government action, the more costly that action will become and the more likely the action will be struck down. If Congress believes a bill is unconstitutional, it would not pass it into law.[285] If the President is presented with unconstitutional legislation, he may veto the bill.[286] If the law passes the congressional and presidential tests, the courts may still strike down its terms as unconstitutional.[287] At the federal level, "all three branches must at least acquiesce for a serious violation of constitutional liberty to proceed."[288] Hence, the judiciary is always a backstop in cases in which the elected branches fail to protect rights.[289] Under the multiple vetoes analysis, judicial review for constitutionality is valuable even if the courts were typically wrong and much less capable than Congress. Suppose that Congress is fifty percent accurate in identifying and screening out unconstitutional action, and the President is fifty percent accurate in this regard, but the courts are only twenty percent accurate in identifying and screening out unconstitutional action. A case for empowering judicial interpretation and enforcement still exists. If all operated independently, there would only be a twenty-five percent chance of unconstitutional legislation getting through the legislative and executive branches (.5 x .5). Then, the judiciary would review this residuum of unconstitutional legislation and even if the courts were correct only twenty percent of the time, they would reduce the quantity of unconstitutional legislation from twenty-five percent to twenty percent (.25 x .8). The judiciary would not hear cases involving the seventy-five percent of legislation Congress and the President accurately screened out, so the courts' higher error rate would not produce additional unconstitutional action. Consequently, even a

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285 *See* Laycock, *supra* note 179, at 72.

286 *See id.*

287 *See id.*

288 *Id.*

289 *See* William N. Eskridge, Jr. & John Ferejohn, *Virtual Logrolling: How the Court, Congress, and the States Multiply Rights*, 68 S. CAL. L. REV. 1545, 1549 (1995) (reporting how independent actions of government institutions multiply rights). Eskridge and Ferejohn's thesis is premised on the assumption that the institutions will not override one another in denying rights. For example, they explicitly predicted that the Court would *not* strike down the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (Supp. 1993), as the Court eventually did. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); *see also* Eskridge & Ferejohn, *supra*, at 1561-62.

wildly incompetent court would have a constitutional benefit as a backstop to screen out unconstitutional legislation.[290]

Multiple vetoes analysis operates differently but equally convincingly with respect to state legislation that infringes upon Bill of Rights liberties. It is valuable to have three federal government branches that can review and reverse unconstitutional actions of state governments. One cannot universally count upon Congress to monitor and correct state constitutional violations. A determined minority can hold up legislative action for years, as illustrated by the struggle to pass civil rights legislation over Southern filibusters.[291] Moreover, Congress may have an incentive to avoid making hard constitutional decisions in order to avoid assuming responsibility.[292] In these circumstances, it is beneficial to have judicial review.

A recent empirical study of comparative protection against unreasonable search and seizure is evidence of the complementarity of political protection and judicial review.[293] This study reviewed the actual protection offered from search and seizure by various nations and then sought to identify the determinants of protection.[294] In the basic legal model, the two most powerful determinants of protection were judicial independence (a proxy for judicial enforcement) and political rights (a proxy for democracy).[295] When the analysis included extralegal factors, judicial independence proved more significant to rights protection.[296] The essential point was that both courts and democratic political branches tend to addictively protect individual liberties.

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290 This reasoning implicitly assumes that legislative action will infringe the Constitution rather than advance it. An inaccurate court would undermine constitutional protection if it struck down action that affirmatively promoted constitutional liberties, as in *Boerne*. Hence, the multiple vetoes analysis is most compelling as a defense of judicial review in tandem with the one-way ratchet discussed *infra* Part III.A.1.

291 *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 199-200 (1997) (briefly reviewing the Southern filibusters against civil rights legislation).

292 *See* AGRESTO, *supra* note 267, at 136 (reporting that "[i]nsofar as members of Congress have been able to extricate themselves from hard decisions, decisions especially about constitutionality, they have done so"). This criticism seems a bit harsh in light of the strong affirmative record of legislative action. *See supra* Part I.B.2(a). However, it is undeniable that Congress generally left it to the Court to strike down state actions violating defendants' rights, rather than passing legislation to this effect. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (guaranteeing a right to criminal defense counsel where most states, but not Congress, had enacted statutes providing for the same).

293 *See* Frank B. Cross, *The Relevance of Law in Human Rights Protection*, 19 INT'L REV. L. & ECON. 87 (1999).

294 *See id.* at 87-88.

295 *See id.* at 93.

296 *See id.* at 96.

B. Motive and Opportunity Analysis

Government institutions are unlikely to deny constitutional liberties out of a malicious desire to deny the people their freedoms. Rather, infringements tend to come about when the Bill of Rights stands in the way of some practical policy objective of the institution.[297] Pressure to cut back on the rights of criminal defendants arises out of concern for crime. Institutions may constrain speech out of concern for the growth of communism or some other feared philosophy. They may also take private property without compensation in order to advance environmental or other policy objectives. The point is that rights are at serious risk only when their enforcement conflicts with a desired policy.

An institution is likely to infringe upon constitutional rights when it has a motive (a policy objective) and opportunity (the ability to implement that policy objective) that contravenes the rights. James Madison observed that "[w]herever there is an interest and power to do wrong, wrong will generally be done."[298] It is for this reason that the judiciary may be the least dangerous branch of government. The Bill of Rights is more likely to serve as a restraint on legislative objectives than on those of the judiciary.[299] Even if the judiciary has similar motivations, the courts have far more limited opportunities to effect whatever policy objectives they may have.[300]

The judiciary's ability to implement policy programs is contingent upon parties bringing appropriate cases before the Court. Even if such a case appears, the Court is far more limited in its ability to implement a preferred policy program, because of its institutional powers.[301] The Court will issue a decision but not a detailed regulation or legislative statute. Courts are surely well aware of the limits of their ability to implement programs.[302] Consequently, "judges may restrain their own decision-making power because they believe the judi-

297 *See* John P. Burke, *Freedom in American Democracy: A Commentary on Gibson's "Political Freedom," in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra* note 197, at 139, 144 (observing that "individuals perceive liberty in trade-off with other values").

298 MOORE, *supra* note 196, at 154 (quoting James Madison). Madison further observed that the legislature was the branch most likely to expand its powers excessively. *See id.* at 161.

299 *See* Calabresi, *supra* note 97, at 273 (arguing that "constitutional constraints tend to impinge far more on legislative power than on judicial power").

300 *See* POSNER, *supra* note 108, at 229 (discussing the constitutional setting of the judiciary and observing that it "would not make much law, hampered as it would be by the informational, remedial, legitimacy, and, again, transaction-cost limitations of courts").

301 *See* ROSENBERG, *supra* note 262, at 338 (claiming that "courts can *almost never* be effective producers of significant social reform").

302 *See* GRIFFIN, *supra* note 19, at 127 (observing that "the Court is aware that its rulings can be difficult to enforce and may be ignored" which "can influence the willingness of the Court to take on certain cases and may limit the remedies the Court applies in cases it does decide"); PERRETTI, *supra* note 27, at 152 ("Only the policy-motivated justice will care about

ciary should play a limited role in policy making or because they perceive that they lack the power to enforce broad policy decisions."[303] They are generally reliant upon other institutions of government to expand upon and implement their directives. The record of judicially provoked policy change is thin.[304]

Judge Easterbrook made the relevant comparison, observing that "the President is more likely to find in the Constitution a rule favorable to his political program," while "Justices do not have political programs."[305] Justices do have politics, but this is different from political programs to be advanced through affirmative government action.[306] The judiciary is a reactive institution, not a proactive one.[307] Consequently, judicial action is less likely to threaten individual liberties via a public policy.

The typical Bill of Rights claim challenges a legislative action, often an act of a state legislature.[308] If the Supreme Court approves of the legislature's policy, the Court might fail to provide sufficient protection for individual liberties. The "opportunity" lies in the Court's approval of the challenged law. Of course, the Court is no worse than the legislature in this case. Court review adds no harm to that created by the legislature. Since the Court and Congress represent different constituencies and have different objectives, the motives of the two branches often will not line up, and the Court will disapprove the legislature's efforts to limit freedom. Judicial review is thus sometimes an improvement. The Court would only be an actual detriment if it struck down a legislative policy that increased rights protection. Al-

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the willingness of other government officials to comply with the Court's decisions or carry them out effectively.").

303 CHRISTOPHER E. SMITH, COURTS AND THE POOR 95-96 (1991).

304 *See* ROSENBERG, *supra* note 262, at 336-40 (suggesting that the litigation strategy has actually been counterproductive in bringing about social change because of institutional constraints upon the courts); *see also* SUNSTEIN, *supra* note 23, at 146 ("Judicial decisions are often surprisingly ineffective in bringing about social change."); Scott Barclay & Thomas Birkland, *Law, Policymaking, and the Policy Process: Closing the Gaps*, 26 POL'Y STUD. J. 227, 229 (1998) (citing research regarding the "judiciary's apparent inability to implement effectively many of its decisions" and how as a result "the judiciary is forced to depend on the popular legitimacy accorded the law, or to rely on the support of nonjudicial institutions to accomplish its policymaking goals").

305 Easterbrook, *supra* note 51, at 925.

306 It might fairly be said that the Justices do in fact have political programs. For example, the Court may have a program of color-blind interpretation of the Equal Protection Clause, which could be called a political program. Judicial political programs are far more limited in scope, however, because of the nature of judicial power. The court simply could not implement an aggressive infringement of personal liberties on its own. It cannot bring prosecutions or fund initiatives.

307 *See supra* note 102 and accompanying text.

308 *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 148-74 (2d ed. 1996) (cataloguing dozens of state and municipal actions held unconstitutional by the Supreme Court).

though these episodes are not common, they do occur and represent a disadvantage to judicial supremacy in constitutional interpretation.[309]

Judge Mikva called the courts the "ultimate nay-sayers" with good reason.[310] Courts are effective at saying no in order to halt government action. Preventing action requires only a paper injunction. In contrast, taking affirmative governmental action requires a considerable administrative apparatus to put a program into effect and monitor its results. As Corwin declared, "The Court can forbid somebody else to act but cannot, usually, act itself."[311] Courts notoriously lack the resources and skills to undertake affirmative government action and they typically, though not universally, recognize this limitation.[312] Courts also lack the information-gathering opportunities necessary to formulate policy.[313] "[W]hen it acts as an engine of (rather than a brake on) social change, the Court is quite ineffective."[314]

The motive and opportunity argument might be analogized in part to the "least dangerous branch" position. That position says that we have little to fear from judicial action, because the courts lack the powers of purse or sword with which to implement their positions.[315] Of course, judicial supremacy implicitly grants the courts those powers of purse and sword by claiming that the other branches are duty-bound to carry out judicial decrees. The motive and opportunity argument is slightly different in that it recognizes the uncertainty of implementation of judicial supremacy, which reduces courts' incentives

309 *See infra* notes 375-78 and accompanying text; *see also* City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act (RFRA)).

310 Mikva, *supra* note 94, at 610.

311 EDWIN S. CORWIN, TWILIGHT OF THE SUPREME COURT 122 (1934); *see also* Barclay & Birkland, *supra* note 304, at 232 ("Foremost among the courts' tools is the ability to delay or block the implementation of a policy.").

312 Judge Posner, for example, observed that "trying to change the world" is not a typical judicial objective. Posner, *supra* note 67, at 3. Indeed, when judges do attempt to provoke affirmative changes it has historically been in defense, rather than derogation, of constitutional rights. *Brown* is the obvious example. Yet *Brown* was not particularly effective in compelling desegration. *See* ROSENBERG, *supra* note 262, at 42-71. This example effectly proves the point—while Southerners reacted to *Brown* with "massive resistance," they were largely accepting of the civil rights laws passed by Congress. BURT, *supra* note 25, at 302, 432 n.53.

313 *See* Barclay & Birkland, *supra* note 304, at 234 (noting that courts are "forced to consider only the information and claims that are placed directly before them"). This and other characteristics of the litigation process mean that judicial review "is not broad enough to develop the comprehensive and dynamic policies necessary to resolve many social issues." *Id.*

314 PERETTI, *supra* note 27, at 150.

315 *See id.* at 151 (observing that, "as the Framers intended, the Court cannot unilaterally impose its reform agenda on a nation powerless to stop it; the Court is politically checked in a variety of effective ways, and its power is accordingly limited").

to embark upon political programs of liberty restriction.[316] Even if the limits of courts' implementation ability do not restrict them, those limits still serve to restrain the effect of rights-infringing provisions.

An entirely different sort of motive and opportunity analysis also supports judicial enforcement, particularly as it applies to constitutional review of state actions. Many of the Court's rights decisions have struck down a state law or enforcement action.[317] In theory, Congress could pass legislation prohibiting or preempting such laws as unconstitutional, but it has seldom done so. When one or a few outlier states embraces an unconstitutional provision, the congressional majority from other states may have little concern for that policy and hence little motive to take action.[318] Moreover, Congress has a lot of policy issues to address every session, given its strong affirmative powers to adopt policy programs. The Court, by contrast, is likely to give over more of its agenda to constitutional interpretation, due to its subjective priority or simply because it cannot adopt new affirmative policy programs. For example, the Court has taken many state law defendants' rights cases and placed constitutional limits on state police practices.[319]

While positive evidence for legislative interpretation and enforcement of the Bill of Rights exists, the historical record also provides ample support for a defense of judicial interpretation and enforcement of constitutional rights. One need only skim the casebooks for numerous examples of judicial enforcement of individual rights.[320]

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316 *See, e.g.*, Rosenfeld, *supra* note 23, at 148 (observing that judicial acknowledgment of their limited powers of implementation creates incentives for judicial self-restraint). Numerous scholars over the years have urged judicial self-restraint, and Paul Carrington has skewered this position by noting that "[t]hey would have Justices eschew fame, the adoration of the media and the academy, and even 'greatness' to settle for the modest facelessness of drones." Carrington, *supra* note 6, at 406. The motive and opportunity analysis explains why Justices would exercise self-restraint in efforts to infringe upon rights. Carrington's position clarifies why Justices have an incentive to be activist in protecting rights, which they can enforce more effectively, but that furthers this Article's argument for judicial interpretation and enforcement of the Bill of Rights. *See infra* Part III.A.

317 *See* EPSTEIN ET AL., *supra* note 308, at 148-74.

318 This was not the case with civil rights legislation, of course. Perhaps because one state's antiminority policy may inflame members of another state's minority constituency. When it comes to defendants' rights, however, I question whether the Texas representatives care much about what the police in other states are doing.

319 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (requiring police to administer procedural safeguards to subject in custody before eliciting inculpatory statements); Escobedo v. Illinois, 378 U.S. 478 (1964) (restricting admissibility of involuntary confessions of suspect in police custody); Gideon v. Wainright, 372 U.S. 335 (1963) (requiring states to provide counsel to indigent criminal defendants).

320 *See, e.g.*, J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 964, 974 n.43 (1998) (summarizing the decisions most commonly found in casebooks, including a number of individual rights decisions).

Sometimes, these examples operate in the face of strong contrary public opinion.[321]

The historical record is not so clear cut, however, as to plainly favor judicial supremacy in enforcement over Congress and the President. John Agresto suggests "that there is no consistent correlation whatever between the growth of judicial authority and increases in social justice or in the protection of personal liberty."[322] Rather, he finds that on balance "the exercise of judicial review, especially as against national legislation, has been oppressive to the cause of human rights rather than restrictive of illiberal legislation."[323] John Frank concluded that "[i]f the test of the value of judicial review to the preservation of basic liberties were to be rested solely on consideration of actual invalidations, the balance is against judicial review."[324] It is the Court, of course, that is responsible for the decision in *Dred Scott v. Sandford*[325] and other anti-civil rights rulings.[326] The presence of positive effects from judicial enforcement does not eliminate the negative effects or in itself demonstrate the preferability of judicial enforcement. Fond feelings about the courts' protection of constitutional liberties rely too heavily upon the recent record, usually of the Warren Court.[327]

Yet the Warren Court era was long and cannot be ignored. While it may have been unique in the extent of its vigorous protection of individual rights, other courts have occasionally created and protected individual rights.[328] One need not even claim that courts are typically better than other institutions in protecting individual rights but could

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321 *See* Klarman, *supra* note 129, at 493 ("Yet it seems impossible to deny that the Supreme Court on numerous occasions has staked out positions—for example, on school prayer, criminal procedure, and flag-burning—inconsistent with the preferences of a sizable majority of American citizens.").

322 AGRESTO, *supra* note 267, at 27.

323 *Id.*; *see also id.* at 154 ("The Court has often acted as a barrier not to national tyranny but rather to almost all national attempts to expand the meaning and scope of liberty in this country.").

324 John P. Frank, *Review and Basic Liberties, in* SUPREME COURT AND SUPREME LAW 109, 112 (Edmond Cahn ed., 1954).

325 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment as stated in* Oliver v. Donovan, 293 F. Supp. 958, 967-68 (E.D.N.Y. 1968).

326 The Court's record on civil rights was so bad that the author of the Fourteenth Amendment, John Bingham, threatened to introduce a constitutional amendment abolishing the Supreme Court. *See* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 448-49 (1928).

327 *See* Carrington, *supra* note 6, at 419 (noting that only since 1937 "has the Court sometimes overborne its role to enlarge the rights of *disadvantaged* individuals or minorities against those of the more secure majority").

328 For example, the Burger Court protected a woman's right to obtain an abortion in *Roe v. Wade*, 410 U.S. 113 (1973). The Rehnquist Court protected free speech in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (invalidating the Communications Decency Act restrictions seeking to protect minors from harmful material on the Internet), and *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating an anti-flag burning statute).

simply maintain that courts are better at some times, under some circumstances. Some commentators have argued that the positive examples of judicial protection of individual rights stem from the federal nature of rights rather than the fact that courts are the deciding institution.[329] In the alternative, judicial protection may simply reflect a change in societal values.[330] Yet this cannot be entirely the case. Courts struck down state laws when other federal institutions had not acted to eliminate those laws.[331] Something about the courts sometimes provides greater protection for individual freedom. Even advocates of reliance on the legislature concede that courts have "provided a decidedly better level of protection for the free-speech rights of political dissenters in times of political excitement" and have provided this higher level of protection for some other rights.[332]

The argument for excluding courts from constitutional interpretation and enforcement also fails the "market check."[333] Rick Pildes observes that "all new democratic systems are being formed as constitutional democracies, with courts operating under fairly indeterminate constitutional texts" and "embracing constitutional courts as means of settling controversial and profound moral questions."[334] Perhaps the critics would simply cite this trend as evidence of a mass hallucination. But it is difficult to justify such an assumption of widespread universal irrationality on the part of individuals who make judgments based on an empirical record. Constitution framers have examined the experience of courts—especially the United States Supreme Court—and found it to be good.[335] It does not follow, however, that courts have demonstrated a right to serve as the exclusive or even supreme interpreters and enforcers of constitutions. Rather, they are best employed in an additive role.

The right to counsel issue illustrates the complementarity of both political and judicial rights protection. Anthony Lewis praised the 1963 decision in *Gideon v. Wainwright*[336] as an example of Supreme

329 *See, e.g.*, Powe, *supra* note 163, at 209-11 (suggesting that Warren Court civil rights and civil liberties decisions reflected triumph of liberal federal government consensus over more rural and Southern state culture).

330 *See* DINAN, *supra* note 3, at 152.

331 *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (striking down state statute criminalizing flag burning); Roe v. Wade, 410 U.S. 113 (1973) (striking down state statute criminalizing abortion).

332 DINAN, *supra* note 3, at 155-56.

333 By "market check," I mean a test of what is happening in the real world. Thus, the fact that democracies are instituting judicial review implies that it must be considered democratically valuable.

334 Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 613 (1999).

335 *See id.*

336 372 U.S. 335 (1963).

Court decision making and rights protection.[337] Less well known is the fact that by 1959, forty-one states had already established a right to counsel by statute.[338] At first glance, the Supreme Court looks rather laggard and ineffective in protecting the interests of the accused. But even if one were to conclude that the state legislatures were relatively more effective than the courts at protecting this right, that conclusion does not disprove the value of judicial interpretation and enforcement. For example, Florida did not have such a law, and Gideon required the Supreme Court to protect his rights.[339] Moreover, some of the state laws which did exist were of unequal value in protecting the right to counsel. Illinois, for example, passed a right to counsel law in 1935, but after *Gideon* the Court set aside Illinois convictions because the legislative guarantee fell short of the level of protection the Court demanded.[340] These examples demonstrate that legislatures and the Court *together* provided greater protection than either would have alone.[341] This story is not an uncommon one.[342]

The multiple vetoes and motive and opportunity analysis both provide justifications for judicial interpretation and enforcement of the Bill of Rights, but neither logically requires making the Court the only or even the supreme interpreter. Indeed, the multiple vetoes analysis explicitly affirms the concept of constitutional vetoes for the other branches of government. Scholars might employ these justifications to argue that the judiciary is the best branch on which to rely, but such an argument creates an unnecessary choice among branches.

Those who have written in this area have sought to identify the single branch of government that will be best at interpreting and enforcing the Bill of Rights. For some departmentalists, that branch may differ by issue area, but even they may still seek to choose one particular institution for particular issues or circumstances.[343] One clear answer to this search for the optimal institution does not exist. Fortunately, we do not have to irrevocably choose between branches in the abstract.

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337 *See* Anthony Lewis, Keynote Address, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1111-12 (1994).

338 *See* EPP, *supra* note 162, at 61 tbl.4.1. States began passing these laws as early as 1929. *See id.*

339 *See id.*

340 *See id.*

341 The experience with *Mapp v. Ohio*, 367 U.S. 643 (1961), is similar. At the time of that opinion, a majority of states had already adopted some version of the exclusionary rule. *See* FISHER, *supra* note 58, at 196.

342 *See* POSNER, *supra* note 108, at 251 (noting that invalidation of antimiscegenation statutes came only after most states had abolished such laws and *Roe v. Wade* was decided in the context of liberalizing state abortion laws).

343 *See supra* notes 20-22 and accompanying text.

III
PRINCIPLES FOR INSTITUTIONAL ENFORCEMENT OF THE BILL OF RIGHTS

If judicial enforcement does play a valuable role in enforcing the Bill of Rights, scholars must define that role. Some advocates of departmentalism would suggest that each branch enforce the amendments within its own realm.[344] This was essentially President Lincoln's response to the *Dred Scott* decision, which he considered binding upon the parties alone.[345]

Departmentalism provides an unattractive prescription for institutional enforcement of the Bill of Rights for several reasons. First, it sacrifices the central benefits of judicial review and comes close to abolishing judicial enforcement. If a judicial ruling legally binds only the immediate parties and immediate controversy, its impact is fairly minimal.[346] Second, to the extent that judicial enforcement is at all meaningful under departmentalism, the theory potentially introduces a wild instability into constitutional law.[347] If no institution gets the final, indisputable word on interpretation and enforcement, private parties cannot easily modify their behavior in reliance on compliance with the law. Dialogue and accommodation are certainly important, but our society needs at least a tentative standard during the indefinite time required to reach accommodation.[348]

Departmentalism loses the benefits of judicial enforcement because it transforms multiple vetoes into multiple simultaneous interpretations. Consequently, departmentalism empowers to some degree the standard that affords the least protection to individual rights, at least within the parameters of the least protective institution's authority. In response to these concerns, advocates of departmentalism foresee a mutual dialogue in which the branches accommodate one another's interpretations.[349] Exactly how this ac-

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344 *See supra* notes 20-22 and accompanying text.

345 *See* Graglia, *Constitutional Mysticism*, *supra* note 6, at 1339; *see also* AGRESTO, *supra* note 267, at 93 (recognizing the "power of the Court to bind authoritatively in a particular case" but arguing that "a particular decision of the Court need not be taken as a generalized or permanent decision").

346 *See, e.g.*, Rosenfeld, *supra* note 23, at 139-40 ("Finally, if the executive branch were bound by Supreme Court judguents only to the extent necessary to vindicate the rights of the actual parties to the litigation that led to the particular judgment involved, many constitutional rights, though judicially endorsed, could end up with virtually no effective protection.").

347 *See* Graglia, *Constitutional Mysticism*, *supra* note 6, at 1340 (observing that such a doctrine creates a "prescription for legal chaos and endless litigation").

348 *See* Harrison, *supra* note 275, at 357 ("Finality, letting someone have the last word on a disputed question, is basic to cooperation.").

349 *See, e.g.*, Paulsen, *supra* note 21, at 337-40 (describing "accommodation," within the context of presidential interpretation, as "a willingness to tolerate, where necessary, an

commodation is to occur remains obscure. Given the political hostility that often prevails between the executive and legislative branches, the existence of such accommodation is surely uncertain.[350] Moreover, the very concept of accommodation encompasses a risk that the weak must accommodate the powerful, which is hardly the desirable interpretive outcome and inherently tends to limit constitutional freedoms. Nor does dialogue and accommodation require some tentative, uncertain, departmentally contingent resolution pending consensus. When the Court renders a constitutional decision protecting rights it is commencing a dialogue and the justices may be persuaded to revise or reverse that ruling.[351]

The most serious problem with departmentalism may be the uncertainty and instability it introduces into constitutional law. While certainty and stability are not transcendent values of constitutional law, they should not be disregarded, and departmentalism's instability may be of the worst kind. Departmentalists happily acknowledge the uncertainty associated with their prescription: one review describes the departmentalist interpretive process as "one where an important dispute is not finally settled until it has been widely affirmed after cautious and interactive deliberation."[352] This process could take quite some time—*Roe* is more than twenty-five years old and we are not yet close to a consensus on abortion rights. Even if the ultimate result of the departmentalist process were indeed better, the intervening uncertainty could impose a considerable cost upon rights. Departmentalists have failed "to acknowledge the havoc wrought by departmentalism, or explain sufficiently how such chaos is to be avoided."[353] It is well established that uncertainty has a "chilling effect" upon the exercise of constitutional freedoms,[354] and the uncertainty attendant to departmentalism's ongoing dialogue potentially has this effect. A preferable rule would avoid the chilling effect. This Article proposes a "preference for rights" approach with a rule: the

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ultimate result produced by the interactions of multiple interpreters that is contrary to the result that one would reach in the exercise of his own independent judgment").

350 *See* Rosenfeld, *supra* note 23, at 140 (observing that "conflict and competition are likely to become too divisive to remain productive" and that "each branch is likely to go its own separate way, thus undermining unified and consistent commitment to the rule of law").

351 *See* Friedman, *supra* note 149, at 643-53 (discussing the "faulty assumption of judicial 'finality'").

352 Gant, *supra* note 20, at 388.

353 *Id.* at 405.

354 The chilling effect is well recognized in constitutional doctrine. For an empirical investigation of the extent to which speech is already chilled by fear of government repression, see James L. Gibson, *Political Freedom: A Sociopsychological Analysis*, *in* RECONSIDERING THE DEMOCRATIC PUBLIC, *supra* note 197, at 113.

most liberty-protecting branch's rule would serve as the governing rule for all branches.

A. The Preference for Rights

An ideal institutional structure would provide the optimal interpretation and enforcement of the Bill of Rights. Unfortunately, no external neutral test for such optimality exists. While it is ironic that Graglia and Tushnet both believe that entirely non-judicial enforcement would be optimal,[355] at least one of them would be disappointed with the results.[356] And even if the other were pleased, that actually would not be much of an argument for nonjudicial enforcement, as the Framers did not design the Bill of Rights to please a particular scholar or ideological end. Lillian BeVier has observed that "'[n]irvana,' the situation in which we get the right institutional actor to reach the right outcome every time, is, unfortunately, not an option."[357] Under these circumstances, there is a temptation to rely upon the institution with the best net accuracy record.[358] Such an unalterable choice among institutions is not necessary, however, because one could establish a decision rule that gives ultimate effect to different institutions in different circumstances.

This Article argnes that the best test is the absolute level of protection for Bill of Rights freedoms. Rather than preferring one institutional interpreter in the abstract, this decision rule prefers whatever institution extends the greatest protection to these freedoms. Thus, the institution that provides more protection is the better institution. This position is subject to an obvious general challenge—it creates a rule that more protection of rights is always better than less. The absolute protection of rights would optimize such a rule, yet few believe that the Bill of Rights requires such absolutism. In the abstract, this rule's optimum does not strike the right balance. Whatever the theoretical merits of this challenge, however, it is irrelevant to a comparative institutional analysis of the actual operation of structures. The actuality of absolutist protection is unlikely under this proposal. The key question should be how the proposal operates in reality as opposed to in theory. The following section addresses the fears of potential actual overprotection of rights.

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355 *See supra* notes 6-13 and accompanying text.

356 *See supra* notes 11-13 and accompanying text.

357 BeVier, *supra* note 5, at 63.

358 *See, e.g.*, TUSHNET, *supra* note 11, at 107 (arguing that it is not enough to identify "constitutional mistakes" of Congress but that one must compare "official actions outside the courts . . . with judicial behavior").

1. *Providing a One-Way Ratchet Preference for Freedoms*

The key to this proposal for institutional enforcement of the Bill of Rights is that whichever national institution provides the greatest protection of rights prevails. Thus, if the judiciary strikes down a campaign finance law as a violation of the First Amendment, the law becomes unconstitutional. But if the legislature acts to strengthen the First Amendment protections of freedom of religious exercise, that law is effective and impervious to judicial invalidation. The prevailing law is that of the most rights-protective institution.[359] The decision rule is thus a simple one.

Katzenbach v. Morgan at least hinted at a preferential rule for rights protection.[360] That decision involved the Voting Rights Act of 1965,[361] which prohibited English literacy voting tests in New York under the authority of the Fourteenth Amendment.[362] Although the judiciary had not held that such tests violated the Constitution, the Court upheld the congressional action that interpreted and enforced the Fourteenth Amendment. Writing for the Court, Justice Brennan held that it was not necessary to adjudicate the constitutionality of the literacy test, because Congress had constitutional authority to determine that the test was unconstitutional under its explicit authority to enforce the amendment.[363] Justice Brennan stated that the Court's only role was to ensure that the action actually furthered the Fourteenth Amendment and did not undermine its ends.[364] In substance, the Court decided that Congress could interpret and enforce the Constitution in order to go beyond what the Court had done, but could not cut back on judicially recognized protections. This case essentially illustrates the one-way ratchet concept, although *Boerne* clearly extinguished any such preferential rule.[365] While that decision still represents a fairly rare example of judicial denial of individual rights, the

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359 Steve Griffin suggests that the "constitutional logic of separated and divided power" has begun to work in furtherance of "individual rights." GRIFFIN, *supra* note 19, at 118. He states that when governments offend such rights, citizens can turn to the courts for redress, and when courts violate individual rights, citizens can turn to the elected branches. *See id.* Griffin made this argument prior to *Boerne*, and *Boerne* implies that the elected branches cannot provide redress that the Supreme Court has denied. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

360 384 U.S. 641 (1966).

361 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973).

362 *See Katzenbach*, 384 U.S. at 643-46.

363 *See id.* at 648-49.

364 *See id.* at 651-52. He observed that the Fourteenth Amendment gave Congress the power to "enforce" its terms but not "to restrict, abrogate, or dilute those guarantees." *Id.* at 651 n.10.

365 The decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), struck down the Religious Freedom Restoration Act (RFRA), which sought to expand the Supreme Court's doctrine of protection for free exercise of religion. *See also supra* note 290 and accompanying text (discussing the implications of *Boerne* for multiple vetoes analysis).

language of the opinion is pregnant with the threat of similar future denials.[366]

Consider the implications of the one-way ratchet preference. If enforcement of the Bill of Rights is a qualification on all government authority, even that of the Articles, several controversial conclusions follow. In one typical circumstance, this position would require Congress and the President to abide by a judicial decision that some legislation or other action is unconstitutional.

Thus, this position implies that Congress could not withdraw the courts' jurisdiction to interpret and enforce the terms of the Bill of Rights.[367] Doing so would eliminate one of the vetoes on government action and foreclose the possibility that the Court could be the most protective branch on an issue. If, however, Congress were the most protective branch, its decisions would stand.

This position would rule out decisions such as *Boerne*. While the Court in *Boerne* did not disapprove of all congressional or executive efforts to interpret and enforce the Constitution, it made clear that such efforts could not contravene Supreme Court precedent, even when a statute expanded First Amendment rights.[368] Rather than respecting the most protective rule, the Court invalidated it. Under the Bill of Rights preference, the President could disregard legislative commands that the President deemed violative of the Bill of Rights,

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366 *See Boerne*, 521 U.S. at 536 (granting that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment and its conclusions are entitled to much deference," but asserting that "Congress' discretion is not unlimited, however, and the courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution"). Chemerinsky warns that judicial supremacy in such circumstances has a "pernicious effect" that "effectively eliminates the right." Chemerinsky, *supra* note 2, at 102.

367 *Cf.* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (holding that Congress could not exercise its power to constrain court jurisdiction "as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation"). Several classic articles advance this position. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372-73 (1953) (arguing that "a court must always be available to pass on claims of constitutional right"); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 171-73 (1960) (stating that Congress can limit federal jurisdiction only to the extent that it does not interfere with the "Court's essential constitutional role"); Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (asserting that the Court has the final authority concerning the constitutionality of jurisdiction stripping statutes). Court stripping efforts have often tried to scale back individual rights recognized by the Court, but these efforts have proved unsuccessful. *See* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 48-49 (2d ed. 1996).

368 *See Boerne*, 521 U.S. at 536-37 (observing that "[w]hen the political branches of the government act against the background of a judicial interpretation of the Constitution already issued . . . it is this Court's precedent . . . which must control").

even if the Supreme Court had upheld the laws in question as constitutional.[369]

Although the current state of this authority is uncertain,[370] presidential authority to interpret the Constitution is historically well grounded. Thomas Jefferson, who believed that the Alien and Sedition Acts were unconstitutional, not only refused to enforce the laws but pardoned those already convicted under their authority.[371] This is surely substantial positive evidence for a one-way ratchet preference. Under the preferential ratchet, of course, the President would only be empowered to ignore laws or decisions that undermined individual freedoms—the office could not ignore laws or decisions that increased freedoms.

It is important to note that this proposal provides no independent authority for other constitutional issues, such as those involving the separation of powers. The bottom line is that the most protective, libertarian branch would get the last word. Giving the most libertarian branch the last word essentially requires deference by the branches that are less libertarian. Such deference is an inevitable aspect of defining the institutional enforcement of the Bill of Rights and is commonly granted today.[372] Historically, the other branches have deferred to the Supreme Court's decisions. As this consensus breaks down, the one-way ratchet offers a different organizing principle for granting deference.

Although unacknowledged, the one-way ratchet functionally has prevailed for parts of our nation's history. In the early days, Jefferson

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369 Several articles discuss this controversial authority. *See, e.g.*, Easterbrook, *supra* note 51, at 926-27; Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994); Paulsen, *supra* note 21, at 221-22.

370 *Compare* Weinberger v. Salfi, 422 U.S. 749 (1975) (questioning executive authority to disregard statutes as contrary to the Constitution); Continental Air Lines, Inc. v. Department of Transp., 843 F.2d 1444 (D.C. Cir. 1988) (same); Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988) (same), *with* United States v. Nixon, 418 U.S. 683 (1974) (affirming executive authority to interpret Constitution in implementing statutes); National Wildlife Fed'n v. ICC, 850 F.2d 694 (D.C. Cir. 1988) (same); Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987) (same).

371 *See* Fisher, *supra* note 47, at 712 (discussing Jefferson's actions and the theory of presidential constitutional interpretation).

372 *See* Gant, *supra* note 20, at 368 (explaining that traditional judicial supremacy requires other branches to obey the Court's ruling and follow its reasoning in future deliberations); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 155-58 (1999).

Congress and the President typically show deference to the Court's rulings, which they seldom directly challenge. The Court may show deference to the elected branches in doctrines such as the political question doctrine or the presumption of a statute's constitutionality. Deference may even be explicit. *See* Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (observing that the "customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality").

pardoned the convicted under the Alien and Sedition Acts, notwithstanding judicial approval for the convictions.[373] More recently, when the Court declined to protect the press from search and seizure by law enforcement agencies, the President and Congress advocated such protection.[374] The Court has also recently intervened in the *Boerne* and the redistricting decisions to restrict freedoms granted by the other branches. But this antiliberty Court is not unprecedented. In the latter half of the nineteenth century, the Court invalidated a federal law protecting the right to vote,[375] an antilynching law,[376] a law prohibiting segregation in public accommodations,[377] and a law giving minorities the right to make and enforce contracts,[378] among others. The one-way ratchet approach would implement a more protective regime that would preclude the courts from denying the other branches the opportunity to provide greater rights protection.[379]

In the following section, this Article first explains why false negatives (underenforcement of constitutional freedoms) are both more serious and more likely to occur than false positives (overenforcement of constitutional freedoms). All branches of government may make mistakes when interpreting the Constitution. While those errors may take the form of false positives (overenforcement of constitutional freedoms) or false negatives (underenforcement of constitutional freedoms), other discussions of institutional enforcement seek to minimize mistakes and treat false negatives and false positives equally. This Article argues for a decision rule that does not necessarily minimize all mistakes but rather minimizes false negatives.

Although some commentators might contend that this preference for rights is but another example of personal ideology masquer-

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373 *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 305 (1998) (noting that the courts "enthusiastically enforced the infamous Sedition Act of 1798, cheerfully sending men to prison for their antigovernmental speech and neutering juries along the way").

374 *See* FISHER, *supra* note 58, at 27 (describing President Carter's support for such legislation).

375 *See* United States v. Reese, 92 U.S. 214 (1875).

376 *See* United States v. Harris, 106 U.S. 629 (1883).

377 *See* The Civil Rights Cases, 109 U.S. 3 (1883).

378 *See* Hodges v. United States, 203 U.S. 1 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

379 Justice Kennedy argued for such a position in his confirmation hearings. He hypothesized that if some future court were to overrule *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a member of Congress would be fulfilling his or her duty by legislatively restoring the rule and to "stand up on the floor of the U.S. Senate and say I am introducing this legislation because in my view the Supreme Court of the United States is 180 degrees wrong under the Constitution." *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Sen. Comm. on the Judiciary*, 100th Cong., 1st Sess. 222-23 (1987) (statement of Judge Anthony M. Kennedy).

ading as constitutional interpretation,[380] this is truly not the case. First, the preference for Bill of Rights freedoms is not truly liberal or conservative. After all, the Amendments contain rights generally regarded as liberal, such as speech, and search and seizure, and those generally regarded as conservative, such as bearing arms and private property takings.[381] The preference for individual rights simply recognizes the Bill of Rights for what it is: a rule that individual rights presumptively override government powers.

The following section also addresses the criticism that this preference would cause an overenforcement of individual rights at the expense of the common weal. Although some may argne that this preference is a prescription for libertarianism, all government branches are majoritarian in different ways; a preference for rights therefore would not exalt rights over consistent and strongly held majority views. The following section also discusses structural political and economic reasons that cause an inevitable bias *against* individual rights protection. Thus, even with the rights preference, it is likely that individual rights will still end up underprotected. This preferential decision rule might simply produce a lesser degree of underprotection than otherwise.

2. *The Risk of Overenforcement of Rights*

The libertarian presumption of this decision rule clearly favors individual rights. The Bill of Rights is concededly nonabsolutist in protecting individual liberties, so this proposal presents a risk of overprotection of liberties through false positive decisions. This rule would be highly undesirable to Graglia, and perhaps Tushnet, because they suggest that judicial supremacy already overprotects individual liberties. The risk of overenforcement of rights, though, is not a compelling criticism. Those who object to this decision rule are really objecting to the Bill of Rights itself. Mark Tushnet almost concedes as much.[382]

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380 Indeed, I have criticized Tushnet and Graglia on these grounds. *See supra* notes 6-13 and accompanying text; *supra* text accompanying notes 355-56.

381 *See* Eskridge & Ferejohn, *supra* note 289, at 1563 ("The tendency to rights creation is not necessarily biased in conservative or liberal directions.").

382 Tushnet observes that "legal rights are *essentially* individualistic, at least in the United States constitutional and legal culture, and that progressive change requires undermining the individualism that vindicating rights reinforces." TUSHNET, *supra* note 11, at 142. His complaint may be with the rights themselves. Although the claim that the United States is too rights-oriented is plausible, Tushnet should make it directly and not subversively through interpretive institution. Moreover, Tushnet's claim is inconsistent with his position in favor of certain individualistic rights.

a. *The Structural Case For The Rights Preference*

False negatives, or underenforcement of rights, are structurally and inherently more common and present a much more serious threat to the Constitution and social welfare than false positives. While some would argue that underenforcement false negatives are far more serious and troublesome than overenforcement false positives,[383] my position rests not on the relative severity of false negatives but on the fact that institutional structures are more likely to produce false negatives than false positives. Lawrence Sager has explained how judicial difficulties in framing remedies for constitutional rights violations can cause the underenforcement of the constitutional rights themselves.[384]

Critics may suggest that this approach undermines the structural articles of the Constitution by privileging the Bill of Rights with a trump on issues of separation of powers, for example. The easy answer is that the Bill of Rights *was* passed specifically for this reason, to trump the authority granted in the Articles.[385] If an action is authorized by the Articles but contrary to the Bill of Rights, the latter prevails. Were it otherwise, the Amendments would have little meaning. Matthew Adler thus argues that "[r]ights are, by definition, trumps."[386] This assertion is perhaps too simplistic; constitutional rights are not literally trumps. Because rights are not absolute, invoking a right does not always "take the trick."[387] But there is a clear preference for enforcement of rights, which the rights preference proposal reflects.[388] The one-way ratchet does not transform constitu-

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383 Richard Posner provides a striking metaphor that can be used in justification of overenforcement:

> The free speech strategy of civil libertarians and the courts . . . resembles the U.S. defense strategy during the Cold War. It was a forward defense. Our front line was the Elbe, not the Potomac. The choice between a forward and a close-in defense involves trade-offs. The forward defense is more costly, and the forward-defense line, because it is nearer the enemy forces, is more likely to be overrun. But the forward defense allows a defense in depth, reducing the likelihood that the home front will be penetrated.

POSNER, *supra* note 108, at 278.

384 *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220-28 (1978). As a consequence of the remedial complication, it "takes some work to find a right that is *fully* enforced." Levinson, *supra* note 92, at 923.

385 *See* ELY, *supra* note 56, at 36 (noting that "rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers").

386 Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 133 (1998).

387 *See, e.g.*, POSNER, *supra* note 108, at 158 (criticizing view of rights as trumps).

388 *See* Rosenfeld, *supra* note 23, at 158 (describing the general consensus that the central value of the Constitution is that "fundamental rights should not be readily upset even for the sake of advancing broadly supported collective goals").

tional rights into absolutes, it merely defines them in accordance with the interpretation of the most protective institution. The following sections sets forth two additional theoretical reasons, political and economic, why false negatives are more probable and present a greater risk than false positives.

b. *The Political Case For The Rights Preference*

The Bill of Rights itself embodies a libertarian presumption for the enforcement of rights. The existence of the Amendments testify to the concern that political institutions, not just the majoritarian ones, will not protect individual liberties sufficiently. While I have catalogued considerable majoritarian support for rights protection,[389] that support is not unalloyed. The Bill of Rights exists because the relatively good rights protection offered by political institutions cannot always be counted upon.

All three institutions are majoritarian political branches, to some degree. Hence, it is unlikely that any of the institutions would wildly overenforce the Bill of Rights at the expense of majority public welfare. Thus, a reasonable concern for political underenforcement of Bill of Rights freedoms justifies the creation of a preferential ratchet.

The political case for a rights preference is fundamental to the notion of government power itself. The literature of rights often speaks of concern for tyrannous institutions,[390] but the very nature of American institutions guards against such a risk. The relatively majoritarian nature of all the branches protects individuals from tyrannical behavior. The real concern should be protecting against the subtle but inexorable bias of government institutions for expanding their power, if only at the margins. This was of concern to the generation of drafters, who realized that "men who govern will, in doubtful cases, construe laws and constitutions most favourably for increasing their own powers."[391]

Perhaps some people go into government in order to maximize their income, but most are surely more concerned with what one might call "policy power." They might desire power for its own sake

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389 *See supra* Part I.B.2(a).

390 The Bill of Rights was born out of a concern for tyranny, both majoritarian and otherwise. *See, e.g.*, Paul Finkleman, *Between Scylla and Charybdis: Anarchy, Tyranny, and the Debate over a Bill of Rights, in* THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 103 (Ronald Hoffman & Peter J. Albert eds., 1997). Some commentators continue to speak of a concern for tyranny, usually of the majoritarian sort. *See, e.g.*, James V. Schall, *A Reflection on the Classical Tractate on Tyranny: The Problem of Democratic Tyranny*, 41 AM. J. JURIS. 1 (1996). The Supreme Court also continues to speak in these terms. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (speaking of First Amendment right of anonymous speech as "a shield from the tyranny of the majority").

391 MOORE, *supra* note 196, at 138 (quoting Richard Henry Lee, *Letters from the Federal Farmer*).

but more likely is their desire to effectuate policies that they sincerely believe are in the nation's best interest.[392] Yet advancing such policy ends may incidentally trample upon rights.

Undoubtedly, the fear of power-grabbing legislatures and executives doubtless motivates much of the case for judicial supremacy. But judges are not immune from the appeal of "policy power." Tushnet observes that "[i]f members of Congress have an incentive to maximize the sphere of their power and responsibilities, so do Supreme Court justices with respect to *their* sphere."[393] The generally ideological pattern of judicial decision making[394] attests to judges' concern for a policy power of their own. Consequently, any governmental institution has some bias for its preferred policy outcomes, even at the expense of individual rights. Courts may suffer less from this bias because they have less of an ability to implement their policy objectives.[395] Courts are not immune from the effect, though, and the result is a built in political bias for underenforcement of individual rights.

c. *The Economic Case for a Rights Preference*

The best case for creating a one-way ratchet for the protection of individual rights may be an economic one. This economic case does not rest on the proposition that more rights are substantively conducive to greater economic growth, even though they are and this could add further justification to rights protection.[396] Rather, it rests on the proposition that individual rights are similar to a good that society must produce, and the procedural structures that encourage rights

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392 *See* TUSHNET, *supra* note 11, at 65-66 (noting that legislators' objectives include "making good public policy" among other factors).

393 TUSHNET, *supra* note 11, at 26.

394 *See supra* notes 72-90 and accompanying text.

395 See *supra* Part II.B for a discussion of motive and opportunity analysis.

396 Studies suggest that individualist property rights *are* empirically associated with greater economic growth. *See, e.g.*, Jakob de Haan & Clemens L.J. Siermann, *Further Evidence on the Relationship Between Economic Freedom and Economic Growth*, 95 PUB. CHOICE 363, 374 (1998) (concluding that under some measures of economic freedom "there appears a robust direct relationship" between "economic freedom and economic growth"); Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207, 223 (1995) (finding that "institutions that protect property rights are crucial to economic growth and to investment").

Other research has found that individual freedoms, including nonproperty rights, generally translate into greater and more evenly distributed economic growth. *See, e.g.*, Burton A. Abrams & Kenneth A. Lewis, *Cultural and Institutional Determinants of Economic Growth: A Cross-Section Analysis*, 83 PUB. CHOICE 273, 285 (1995) ("Personal freedom (liberty) and economic freedom represent separate and powerful factors encouraging economic growth."); Gerald W. Scully, *Rights, Equity, and Economic Efficiency*, 68 PUB. CHOICE 195, 212 (1991) (concluding that societies with more rights protection have better income distribution and economic growth).

production are inefficiently weak. Economic analysis supports the one-way ratchet as a tool for desirable Bill of Rights enforcement.

Individual freedoms are a sort of a public good.[397] Once society recognizes a particular freedom or right, everyone can take advantage of that freedom. The theory of collective action, though, establishes that the broad public cannot readily organize to protect such diffuse public interests.[398] The law is a public good, which means that all individuals benefit from rights that an individual plaintiff creates.[399] For example, after Ernesto Miranda prevailed in his claims before the Supreme Court, everyone in the country became entitled to "*Miranda* rights."[400] Fighting for rights creates a positive externality.[401] Because the individual litigant bears the costs of rights establishment yet everyone receives the benefits, there is an inefficiently low incentive for rights establishment. People have an incentive to free ride on the efforts of others to establish rights.[402] Public goods are notoriously underproduced.

A generalized support for public goods is not sufficient to motivate action on their behalf. Even isolated litigation on behalf of personal freedoms can be quite costly. Effective litigation may well require a pattern of cases that costs even more.[403] Voters may pursue rights protection in the political branches of government more cheaply, but voting for a candidate is a very imprecise method for advancing a particular right. Moreover, voting has some cost, and the marginal benefits are small, so turnout in elections often is quite low.[404] One need not vote in order to receive the benefits of govern-

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397 *See* EPP, *supra* note 162, at 19.

398 The classic explication of the problem is found in MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965). The theory asserts that larger groups have more difficulty organizing collectively for government action. *See id.* at 48.

399 *See* EPP, *supra* note 162, at 19.

400 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

401 Economists speak of a positive externality when the producer of a good cannot capture all of its benefits. For example, a private individual will seldom create a park open to all, which is why the public jointly must create this public good or positive externality. Creating and enforcing rights is like creating a public park. The party who must bear the costs and effort of litigation creates a legal rule that benefits all through the declaration of rights. On the public good nature of precedents, see William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

402 The free rider problem is a consequence of the positive externalities produced by precedents. People can use rights freely without having to bear the cost of their creation. *See, e.g.*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 (1995) (noting that "[a]lthough the original litigants of the cases 'purchase' the rules, future litigants use these rules without paying").

403 Effective litigation strategy requires persistence and the ability to pursue a number of cases. *See* EPP, *supra* note 162, at 18 (noting that the "rights revolution" in twentieth century America required "widespread and sustained litigation").

404 For a brief review of low turnout levels, see Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609, 1614 n.22 (1999).

ment. Thus, voting is an imperfect method of protecting rights, even if a majority is so motivated.

Litigation that establishes a protected right judicially or political lobbying for rights recognition is somewhat analogous to a technological invention because both certainly require considerable money, time, and effort. While the inventor can get a patent and profit from the benefits his innovation provides to others, the litigant must make freely available the rights benefits his case confers upon the public. Clearly, the inventor has a much greater incentive to proceed.[405] The individual or group that pursues rights protection does so without the ability to capture the full societal benefits of their action.

There are of course individuals and collective groups, such as the American Civil Liberties Union (ACLU), who do pursue litigation or political action in defense of Bill of Rights freedoms. Members of such groups tend to feel so strongly about rights that they will bear far more than their proportional cost of rights protection. The theory of collective action does not deny that such groups exist, but it does explain why such groups will be relatively smaller and weaker than the economically efficient level.[406] Virtually every American values individual rights at some level, yet relatively few contribute to or belong to organizations that advance those rights.

The need to create incentives for private action for rights protection is profound. One cannot entirely count on the government to establish such protection without private prodding.[407] It is naïve to think that the general public or government institutions will always perceive and act to protect rights without prodding. Charles Epp has recently demonstrated how private action was pivotal in the "rights revolution" of recent decades.[408] Without a "support structure" of private groups pursuing litigation to advance rights, the Court would not have acted as it did.[409] Epp describes how groups such as the ACLU and NAACP were the driving forces behind the Court's actions.[410] The Court also attended to the equal rights of women only after pri-

405 This is the reason for the constitutional authorization of exclusivity of patent protection, to "promote the [p]rogress of [s]cience and useful [a]rts." U.S. CONST. art. 1, § 8, cl. 8.

406 For a brief summary of the theory of collective action problems, see Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523, 528-31 (1996).

407 *See supra* Part III.A.2.a.

408 EPP, *supra* note 162, at 198-99. After reviewing experience in the United States, India, Britain, and Canada, Epp wrote that "[u]nder conditions in which the support structure is deep and vibrant, judicial attention to rights may be sustained and vigorous; under conditions in which a support structure is shallow and weak, judicial attention to rights is likely to be intermittent and ineffective." *Id.*

409 *Id.* at 65-70 (describing how this support structure was integral to the rights revolution in the United States).

410 *See id.* at 48-54.

vate groups pressed litigation.[411] While these advances are testimony to the ability of groups to organize for the protection of rights, they did not arise until the Bill of Rights was well into its second century. In addition, the private group support structure for poverty litigation never fully developed, which means that they have seen little success in court.[412] Moreover, some evidence of success does not disprove the collective action problem—a more efficient and effective incentive structure might have provided far more rights protection. The ACLU has limited resources and does not take on all the cases that it might. Hence, the economic incentive structure discourages the optimal promotion of individual rights.

This Article's proposed preference for rights protection does not overcome the free rider problem associated with efforts to protect individual rights or directly increase the supply of efforts to protect rights.[413] The proposal does reduce the costs of rights protection, however. Those seeking to advance rights can choose the branch of government in which protection would be most effective and least costly. Moreover, they need not worry about the costs of fighting to prevent other branches of the government from overriding their victories.

Those who fear overenforcement of the Bill of Rights probably take issue with the content of the Amendments themselves.[414] Given the political and economic factors that conspire to underprotect rights, those who find the outcome overprotective are probably unhappy with the fundamental nature of the rights themselves. They may have fair criticisms of the Framers' choice of protecting particular individual liberties, but they should present that criticism at face value. It is unprincipled to argue for manipulation or subversion of the substance of the Bill of Rights under the color of a superior interpretive principle.

B. The Risk of Counterproductive Majoritarian Deference

Some critics of judicial enforcement argue that contemporary reliance on judicial supremacy in rights enforcement has caused the elected branches to withdraw from the field, to defer constitutional

411 *See id.* at 52-53, 66-67.

412 *See id.* at 203-04.

413 *See supra* notes 398-402 and accompanying text.

414 *See* West, *supra* note 12, at 252 (suggesting that the Constitution is an "irredeemably conservative document"); *supra* note 382 and accompanying text. Occasionally, communitarians decry the lack of a constitutional "Bill of Duties" or "Bill of Obligations" to complement the Bill of Rights. *See, e.g.*, THE LIBERALISM-COMMUNITARIANISM DEBATE: LIBERTY AND COMMUNITY VALUES (C.F. Delaney ed., 1994); LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984); NEW COMMUNITARIAN THINKING (Amitai Etzioni ed., 1995). Legally, the relevant point is that the Constitution contains no such bills.

matters to the courts, and thereby undermine majoritarian protection.[415] Judicial supremacy, these critics claim, will cause Congress and the President to defer to whatever the courts decide and not make their own independent evaluations of constitutionality. James Bradley Thayer famously declared that judicial review could "dwarf the political capacity of the people, and [serve] to deaden its sense of moral responsibility."[416] The fear is that judicial activism has caused Congress to legislate "in the shadow of judicial decisions"[417]—relying on the courts to define the scope of the Bill of Rights. Mark Tushnet calls this the "judicial overhang" that drives constitutional issues from the congressional debate.[418] He further suggests one possible solution, removing the Supreme Court from constitutional decision making in order to engage a "vibrant public rhetoric about the Constitution."[419] The critics directly and authentically present this issue and, if it is true, the critics could establish a sound case for eliminating judicial involvement in interpretation and enforcement of the Bill of Rights.

The concern over counterproductive majoritarian deference is supported by some evidence. Judge Mikva, who has experience in all three branches of the federal government, notes that the "very knowledge that the courts are there, as the ultimate nay-sayers, increases the tendency to pass the issue on, particularly if it is politically controversial."[420] Some commentators point to Congress's historical tradition of constitutional concern but contend that this concern "no longer exists today."[421] One might respond that if this concern no longer exists, removing the Court from constitutional enforcement would leave the field empty and rights wholly unprotected.[422] There is, however, a more straightforward and empirical response to the concern.

Experience does not generally validate the fear of majoritarian deference to the Court. For example, in 1984 supporters of a presidential line item veto sought to evade discussion of its constitutionality by arguing that the issue was one for the courts and not the legislature.[423] The Senate vigorously resisted this effort and soundly de-

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415 *See, e.g.*, Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 300 (1995) (describing "minimal judicial review" as "a successful response to the problem of democratic debilitation").

416 JAMES BRADLEY THAYER, JOHN MARSHALL 107 (1901).

417 DINAN, *supra* note 3, at 143.

418 TUSHNET, *supra* note 11, at 57.

419 *Id.* at 113.

420 Mikva, *supra* note 94, at 610.

421 Brest, *supra* note 30, at 92.

422 *See, e.g.*, Cheinerinsky, *supra* note 2, at 98 (suggesting that lack of congressional concern means that judicial abdication will cause rights simply to be unprotected).

423 *See* FISHER, *supra* note 58, at 35.

feated it on a point of order vote.[424] While commentators typically do not debate the issue so squarely, the record of majoritarian rights protection even in recent years dispels concerns over undue deference to judicial interpretations of the Constitution.

It is difficult to think of a major Supreme Court decision that caused the elected branches of government to defer and withdraw from the constitutional dialogue. Consider abortion. *Roe* hardly put the issue to rest politically. If anything, it activated the political battle over abortion.[425] Or segregation. *Brown* did not exactly command the immediate complicity of deferential governments.[426] Or gay rights. *Bowers v. Hardwick*[427] hardly halted public efforts to extend rights and privileges to gays. Scot Powe approvingly cites Bruce Ackerman's conclusion that the Court's attack on the New Deal did not disrupt the majoritarian dialogue, but actually enhanced it and "contributed to the democratic character of the outcome" by focusing the public debate.[428] Politicians do not hesitate, at times, to go beyond questioning decisions and, at times, actually evade them.[429] Experience shows that "the process of displacing controversial issues from electoral venues into judicial forums often ends up catalyzing as much as discouraging political mobilization around them."[430]

The majoritarian institutions continue to debate the constitutionality of government action. Constitutional issues even may be important in elections. "Presidential elections since at least 1968 have involved a dimension of politicized discourse about the course of constitutional law."[431] Rather than blind deference, attacking the courts

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424 *See id.* at 35-36.

425 *See* BURT, *supra* note 25, at 353 (observing that in cases of abortion and death penalty, "the impact of the Court's interventions was provocation rather than pacification").

426 Indeed, even subordinate "judges in the South balked at school desegregation even though the Fifth Circuit Court of Appeals and the Supreme Court stood ready to reverse them." BAUM, *supra* note 40, at 117. The Court here could not even command the deference of lower courts, much less the governmental parties to litigation. *See* Barclay & Birkland, *supra* note 304, at 230 (reporting that "it is difficult to identify *Brown* as a successful act of policy change by the courts").

427 478 U.S. 1039 (1986).

428 L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 CONST. COMMENT. 547, 557 (1998) (book review) (quoting BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998)).

429 *See* McCann, *supra* note 26, at 64 (citing examples of government evasion of undesirable Supreme Court opinions).

430 *Id.* at 72. Congress not infrequently seeks to override a judicial decision, and has proposed various constitutional amendments to override decisions. *See id.* at 76. A Supreme Court decision may put rights issues onto the political agenda and compel elected officials to take a stand that they would otherwise avoid. *See* John B. Gates, *The Supreme Court and Partisan Change: Contravening, Provoking, and Diffusing Partisan Conflict*, *in* THE SUPREME COURT IN AMERICAN POLITICS, *supra* note 17, at 98, 99.

431 Gant, *supra* note 20, at 412; *see also* Gates, *supra* note 430, at 103 (suggesting that the Court played a significant role in national elections from 1960-68). Indeed, this use of the Court as an election issue may well have increased along with the Court's increased

has "become part of orchestrated strategies of political parties and other groups."[432] The greatest examples of majoritarian rights protection, such as the civil rights statutes, occurred after the era of judicial assertiveness in rights protection.[433] This fundamentally undermines the thesis of counterproductive majoritarian deference.

The fear of majoritarian deference to judicial decisions is most convincingly belied by Tushnet's own paradigmatic example, the Religious Freedom Restoration Act (RFRA).[434] Congress passed the RFRA in order to expand constitutional rights beyond those recognized by the Court.[435] Even the *Boerne* decision[436] has not halted congressional efforts to expand free exercise rights. Considerable research demonstrates that "robust, independent interpretation by nonjudicial actors has been and remains the norm in our political order."[437] If judicial activism has been historically matched with somewhat less congressional attention to the Constitution, this is explained simply by congressional agreement with judicial pronouncements, rather than timid deference to judicial decisions.

The risk of counterproductive majoritarian deference is not clearly established even under a constitutional paradigm of judicial supremacy. The risk should be much less under the proposed one-way ratchet policy of preference for rights protection. This proposal explicitly recognizes the legitimacy of nonjudicial constitutional interpretation and enforcement, when such actions expand the rights of individuals. It would openly create a structure for what Eskridge and Ferejohn call "virtual logrolling," in which each branch ensures the protection of the rights about which it cares most deeply.[438]

Perhaps the best case for judicial involvement in constitutional protection and the preference for individual rights is itself a democratic, majoritarian one. The majority of the general public appears to want nonmajoritarian institutions to play a role in protecting indi-

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role in protecting rights. FDR actually did not make the Court an issue in his 1936 election, notwithstanding its disruption of his program. *See* Powe, *supra* note 428, at 557.

432 Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 315 (1999); *see also* PERETTI, *supra* note 27, at 246-47 (noting that Court decisions have become "election campaign issues" and "[s]enate confirmation hearings are often a vehicle for sanctioning or criticizing the Court's policy course").

433 *See supra* note 255 and accompanying text.

434 *See* TUSHNET, *supra* note 11, at 4-5.

435 The Court explicitly recognized this fact and found it objectionable. *See* City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (noting that "Congress enacted RFRA in direct response to *Employment Div., Dept. of Human Resources of Oregon v. Smith*" (citation omitted)).

436 For a discussion of the *Boerne* decision, see *supra* notes 365-66 and accompanying text.

437 Peabody, *supra* note 20, at 86; *see, e.g.*, FISHER, *supra* note 58, at 231-74.

438 Eskridge & Ferejohn, *supra* note 289, at 1559-60.

vidual rights.[439] This effect is clearly visible in the story of the failed nomination of Robert Bork to the Supreme Court. Judge Posner has observed that the nomination failed because a clear majority of Americans wanted the Court to protect minority rights.[440] The majority did not want to leave legislatures free "to forbid abortion," "to engage in racial discrimination," or "to enact 'savage' laws."[441] The *majority* doubted "whether minorities whose rights are not expressly protected by the Constitution should be left to the mercy of the prejudices of the majority."[442] In short, the broad public majority did not trust its future self, and wanted the judiciary to check its decisions. The people of the country have accepted "judicial review and judicial supremacy."[443] The democratic criticism of judicial review lodged by Graglia, Tushnet, and others[444] looks strange in a world where the majority wants to preserve the institution of judicial review to protect rights.

In addition to widespread public concern about Bork's commitment to individual civil liberties such as privacy rights, his confirmation was doomed by the interest of minority groups. Black leaders expressed considerable concern about Bork's commitment to racial equality.[445] Consequently, "Southerners were more united in opposing him than the Senators from any other region; and of the southern Senators, opposition was concentrated among the Democrats, all of whom were white men who had depended on black votes for their electoral victories."[446] The Bork story was thus fundamentally about the majority's desire for self-paternalism that would restrain the ability of majoritarian institutions to restrict individual rights.[447]

C. When Rights Conflict

This Article's proposed rule of a one-way ratchet of protection for Bill of Rights freedoms fails when such rights are in conflict with one another.[448] Such conflicts are not typical of Bill of Rights jurispru-

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439 *See* Wilson, *supra* note 159, at 1136 (noting that "the American people seem to prefer a Court that does not expressly ground its opinions on public opinion" and "want its Constitution and Court to be both predictable and largely immune from momentary public passions").

440 *See* Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1381 (1990).

441 *Id.*

442 *Id.*

443 Burbank, *supra* note 432, at 324.

444 *See supra* notes 6-13 and accompanying text.

445 *See* BURT, *supra* note 25, at 13.

446 *Id.*

447 Ironically, Congress itself has used "the nomination of Supreme Court Justices as a forum for defending judicial supremacy." FISHER & DEVINS, *supra* note 367, at 14.

448 Rawls and others have argued that all rights claims involve rights conflicts, because the right to vote in a democracy is an essential right that is hampered by a judicial decision striking down legislation as contrary to the Bill of Rights. *See* GRIFFIN, *supra* note 19, at 123.

dence, but neither are they uncommon. We have seen conflicts between the freedom of the press and the right to a fair trial,[449] between the free exercise of religion and the establishment clause prohibition,[450] and between equal protection clause affirmative action and colorblindness.[451] Laws against racial or sexual verbal harassment are obviously in potential constitutional tension with freedom of speech,[452] as is the regulation of pornography.[453] Privileging the Bill of Rights over other governmental concerns is no answer to internal rights conflicts. This produces the toughest question in institutional enforcement of the Bill of Rights. No longer can one defer to the most rights-protective institution because the protection of one right would undermine protection of another. Hence, rights conflicts must give one institution the last word. If one governmental institution must set the final word on interpretation, which institution should get that authority for rights conflicts?

The presumptive answer today is that the judiciary gets the final word in rights conflicts.[454] Yet the legitimate justifications for judicial review are largely absent in rights conflicts and the judiciary may be ill-suited to address such conflicts. Neither multiple vetoes nor motive

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I reject this contention because it conflates the fundamental right to vote or participate in government with the separate issue of the right to prevail on a policy matter. The right to prevail on a policy matter is not constitutionally founded even when one has a majority on one's side. Otherwise, our fundamental institutions such as the Senate would become constitutionally dubious. While there is certainly some value to democratic decisions, they are not a right of any individual and should be subordinated to certain fundamental individual rights for the reasons discussed above. *See also infra* note 458 (discussing the complexity of congressional action).

449 *See, e.g.*, Mark R. Stabile, Note, *Free Press—Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337 (1990). The Supreme Court has struggled with the issue in a number of cases, such as *Irvin v. Dowd*, 366 U.S. 717 (1961).

450 The conflict was recognized by the Court in *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) (noting that the "Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other").

451 The Court has grappled with the contradiction between constitutional colorblindness and affirmative action for disadvantaged groups in a variety of contexts, including government contracts programs, *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and legislative redistricting, *see* Bush v. Vera, 517 U.S. 952 (1996). The current Court has leaned toward colorblindness but compromised somewhat and avoided a clear prohibition on affirmative action. *See, e.g.*, Jennifer R. Byrne, *Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action*, 42 ST. LOUIS U. L.J. 619 (1998).

452 For differing perspectives on this conflict, see J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

453 For contrasting views on this conflict, see NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN'S RIGHTS (1995), and Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

454 *See* Laycock, *supra* note 179, at 77 (observing that "a law that violates a judicially declared right is invalid, even if it purports to enforce some other right").

and opportunity analysis apply to a conflict of rights. Hence, this Article argues that legislative action accompanied by presidential approval should have the final authority over rights conflicts. Given the value laden nature of individual rights, difficult tradeoffs are best made by more majoritarian institutions.

The multiple vetoes and motive and opportunity analysis justifications for judicial enforcement offer no comparative advantage in rights conflicts. Because some right must be compromised in the case of rights conflicts, it is no longer a matter of adding vetoes on rights infringement or comparing the institutions' motives and opportunities to infringe rights. Rather, the resolution of rights conflicts must ultimately turn on institutional competence in balancing rights claims. Because we can no longer embrace an abstract constitutional preference for liberty over other values, we must choose the institution with the net advantage, the one that will be preferable on average or in most cases.

Given the absence of an external standard of "rightness," the empirical evidence cannot clearly resolve which institution has best solved rights conflicts.[455] For structural reasons, though, I suggest that Congress is best suited to ultimately resolve rights conflicts.[456] Passing legislation through the bicameral legislature, with numerous procedural roadblocks, and obtaining a presidential siguature is not easy. Independent of these structural difficulties, incentives in a two party system may discourage action.[457] Such action generally requires the support of a strong majority, not a slim or transient one.[458] Moreover, legislative action typically requires conflicting interests to compromise.[459] These circumstances are well suited to the resolution of rights conflicts, where important competing interests must be recog-

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455 However, the historical and empirical evidence does tell us something important about the resolution of rights conflicts. The consensus that the Court has been terribly wrong on some past occasions prevents us from assigning any presumptive deference to judicial supremacy in this area. *See supra* notes 125, 194-95, 279-84, 375-79 and accompanying text. Of course, the other branches have also erred on occasion, but experience precludes a simplistic reliance on or faith in the courts and judicial process.

456 For a discussion of why the legislature rather than the courts should settle complicated affirmative action issues, see SUNSTEIN, *supra* note 22, at 117-36.

457 *See* Peter Howitt & Ronald Wintrobe, *The Political Economy of Inaction*, 56 J. PUB. ECON. 329, 330 (1995).

458 The political science literature is full of articles on the complexity and difficulties of congressional action. For a brief review, see Keith Krehbiel, *Pivotal Politics: A Refinement of Nonmarket Analysis for Voting Institutions*, 1 BUS. & POL. 63 (1999). Risk aversion enhances this difficulty. *See* Howitt & Wintrobe, *supra* note 457, at 330.

459 *See, e.g.*, Harrison, *supra* note 275, at 376-77 (noting how Congress is well suited to "the representation and accommodation of competing interests"). By contrast, the fact "[t]hat cases must be decided also impedes the judiciary's opportunity to broker prudent compromises between competing values." Carrington, *supra* note 6, at 411.

nized and balanced out.[460] Robert Burt emphasizes that Congress is "more sensitively tuned to the competing social interests that demand accommodation" and can command greater "institutional legitimacy" for its decisions than can the Court.[461] Congress may choose not to act on a rights conflict, but if it does act, it should get the final word.

This analysis is a justification for Congress having the last word in rights conflicts, through legislation, but not for Congress having the only word. Should the legislature fail to resolve a rights conflict, the judiciary would have little choice but to address the question when litigants present it to the courts in a case. Given the complexity of legislation, the judicial answer might often functionally serve as the last word.[462] Only in cases in which Congress can create a majority coalition and feels strongly enough to overrule a judicial outcome could it trump the judicial resolution.[463] This still leaves the judiciary with a substantial functional role in cases of rights conflicts.

Some might argue that rights conflicts can always be summoned up, leaving Congress with the only word on interpretation. The determination of when rights conflict obviously involves definitional problems, and the legislature might dishonestly claim a rights conflict to get the last word. Therefore, this Article's proposal necessarily requires a certain amount of institutional good faith. This reliance is not unreasonable, as the history of congressional constitutional interpretation generally reflects such good faith.[464] Moreover, should a Congress be truly determined to act in bad faith, there is little the courts can do under any interpretive regime. Such a Congress could withdraw jurisdiction or simply ignore the Court's decision.

Nor is it clear that rights conflicts plausibly will be invoked as a general rule. The rights preference proposal's reference to rights means those found in the Constitution, not those discovered through some theory of natural law. Absent a radical critical perspective, the

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460 The nature of judicial decision making, by contrast, is not so amenable to compromise, as adversarial legalism tends to cast the dispute as "a clash of moral absolutes." BURT, *supra* note 25, at 355.

461 Robert A. Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 114.

462 *See* AGRESTO, *supra* note 267, at 136 (suggesting a congressional tendency to evade responsibility for making tough constitutional decisions); Chemerinsky, *supra* note 2, at 97 (concluding that "political pressures and expediencies often make it unlikely that Congress, the President, or state legislatures or executives will deal carefully with constitutional issues").

463 Robert Burt argues that this should be the general decision rule for courts—adopt a tentative rule that can be overridden by express legislative directive. *See* BURT, *supra* note 25, at 184.

464 For a discussion of congressional good faith, see *supra* Part I.B.2(b).

words of the Constitution have some measure of definiteness.[465] Posner suggests that there is an inevitable conflict between the "rights of the law-abiding and the rights of criminals," as a system of property rights "requires an apparatus for keeping crime within tolerable bounds."[466] Perhaps so, but this is a rights conflict only in the broad theoretical sense, not in the constitutional one. The constitutional property rights do not extend to protection from private takings.

The dispute over "victim's rights" provides an apt illustration. Defenders of rights for crime victims may argue that such rights are morally indispensable, but they do not generally claim that these rights currently reside in the Constitution, though they have every incentive to try to do so.[467] The Bill of Rights simply does not contain any broad concept of victim's rights. This explains why the advocates of the position seek a constitutional amendment establishing victim's rights.[468] Until such an amendment is adopted, the Constitution is concerned with criminal defendants' rights but not those of victims.[469]

CONCLUSION

The rights-preferential proposal for institutional enforcement of Bill of Rights freedoms is general and undoubtedly requires some adjustment before actualization. For example, a strong case exists that electoral rights, such as legislative apportionment or the right to vote, involve too much legislative or executive self-interest and should be resolved conclusively by the judiciary.[470] Hence, if electoral rights came into conflict with some other rights, the judiciary should proba-

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465 Even if the terms of the Constitution could theoretically mean anything, they have been interpreted in a certain fashion, and the rights preference proposal overlies this history.

466 POSNER, *supra* note 108, at 158.

467 For a brief history of efforts to litigate in support of victims' rights, efforts which have not relied on constitutional claims, see Richard E. Wegryn, *New Jersey Constitutional Amendment for Victims' Rights: Symbolic Victory?*, 25 RUTGERS L.J. 183 (1993).

468 *See, e.g.*, Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5 (arguing that victims' rights "are the very kinds of rights with which our Constitution is typically and properly concerned"). Interestingly, even the proposed victims' rights amendment might not conflict with constitutional rights of criminal defendants. *See* S. REP. No. 105-409, at 82 (1998) (additional views of Senator Biden) (concluding that he was "convinced that no potential conflict exists between the victims' rights enumerated in [the constitutional amendment] and any existing constitutional right afforded to defendants").

469 The exception to this rule would apply when victims' rights happen to coincide with an express provision, such as the First Amendment.

470 This is John Hart Ely's key thesis in *Democracy and Distrust*. *See* ELY, *supra* note 56. This should not in fact be much of a problem—the main concern with self-interested congressional and executive interpretation would be with a restriction of the right to vote, not an expansion. But one can imagine circumstances wherein some self-interested entrenching legislative action might plausibly be presented as an expansion of electoral rights.

bly get the last word. There may be some risk that one branch would adopt any amendment in the Bill of Rights as a tool to address a separation of powers question and seize more power for itself.

Some might also question the ability to determine which interpretation is *more* protective of Bill of Rights freedoms, even in cases when rights are not in conflict. While this issue might occasionally be unclear, most disputes present a fairly clear directionality for freedom. In a criminal prosecution, for example, the constitutional rights generally lie with the defendant. Moreover, inasmuch as any proposal requires a certain amount of institutional good faith, the theoretical potential of bad faith is not a particular criticism of the rights preference proposal vis-à-vis alternatives.

The fundamental answer to these concerns rests in the good faith of our government institutions. While these institutions are far from perfect, it is unrealistic and unfair to presume their bad faith as a general matter. *Any* inter-institutional decision rule ultimately depends on all of the branches deferring to the actions taken under the rule.[471] The existence of such deference depends upon fair play, and one branch is unlikely to grant another branch deference if it acts in apparent bad faith. This in turns deters institutions from acting in bad faith, because the bad faith actor may suffer reciprocal nondeference and is unlikely to benefit. One cannot always count on good faith, but it pays to adopt rules, such as the rights preference approach, in order to encourage and channel institutional good faith.

One need not choose among federal government institutions and select a single branch with universally supreme authority to interpret and enforce the Bill of Rights. Nor need one suffer the uncertainty and irresolution attendant to simultaneous but contradictory departmentally independent cases of interpretation and enforcement. We can simply create a structural preference for the individual freedoms of the Bill of Rights and adopt as binding whatever interpretation offers the greatest protection for those rights.

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471 *See* Fisher, *supra* note 47, at 716 (reviewing historical record and observing that recognition of Supreme Court as ultimate constitutional interpreter has occurred "only when its decisions have been accepted as reasonable and persuasive by the people and other governmental units").