2012

The Institutional Case for Judicial Review

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ABSTRACT: The "popular constitutionalism" movement has revived the debate over judicial review. Popular constitutionalists have attacked judicial review as being illegitimate in a democracy or inconsistent with original intent, and they have argued that the Constitution should be enforced through popular, majoritarian means, such as elections and legislative agitation. This Article shows in response that the judicial process has institutional characteristics that make judicial review the superior method of constitutional enforcement. Prior literature has focused on just one such institutional characteristic—the political insulation of judges. This Article, by contrast, shows that the case for judicial review rests on a whole range of institutional distinctions among the judicial, electoral, and legislative processes. Most important among these distinctions are that the judicial process is focused (it resolves issues discretely, without entangling them with other issues), whereas the electoral process is unfocused; and the judicial process is mandatory (a complainant can invoke it as of right), whereas the legislative process is discretionary. The full range of its distinctive institutional characteristics, not just the political insulation of judges, normatively justifies judicial review.

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INTRODUCTION

The counter-majoritarian difficulty is back. Judicial review, that hallowed American institution, is once again under attack. After decades of praising the bold societal reforms achieved via judicial review, scholars—mostly, liberal scholars faced with a more conservative Supreme Court—have rediscovered objections to the practice.

Some of these scholars object to judicial review on historical, originalist grounds. They claim that, contrary to decades of settled understanding, the Framers never *intended* courts to enforce the Constitution.[1] Other scholars attack judicial review as inconsistent with democracy. Unelected, unaccountable judges, these scholars claim, should not have the final word on the Constitution.[2]

These critiques of judicial review constitute a movement—the "popular constitutionalism" movement. The popular constitutionalists suggest that the Constitution should not be enforced by judges, but by popular mechanisms. The "people themselves," some say, should enforce the Constitution, via elections, public debate, and similar means.[3] Others suggest that the elected legislature, not the undemocratic courts, should interpret and enforce the Constitution.[4]

Naturally, judicial review has its defenders. In response to the popular constitutionalism movement, some scholars defend judicial review on textual and historical grounds.[5] Others defend judicial review normatively.[6] The debate continues as the popular constitutionalists offer rebuttals and further arguments.[7]

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1. *See generally* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

2. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

3. Kramer, *supra* note 1, at 26–29.

4. TUSHNET, *supra* note 2, at 154–76; Waldron, *supra* note 2, at 1348–49, 1375–76.

5. *See generally* Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319 (2003); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003).

6. *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013 (2004); Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1699 (2008); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045 (2004).

7. *E.g.*, Mark Tushnet, *How Different Are Waldron's and Fallon's Core Cases for and Against Judicial Review?*, 30 OXFORD J. LEGAL STUD. 49 (2010); Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L J. CONST. L. 2 (2009). For other recent contributions to the discussion, see, for example, Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313 (2008); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837 (2009); Jamal Greene, *Giving the Constitution to the*

A vital argument, however, is missing from these exchanges. What is needed in defending judicial review is an *institutional analysis*. Such analysis would explain why judicial review is the superior mechanism for constitutional enforcement based on the *institutional characteristics* of courts. It would analyze the ways in which the characteristics of the judicial process, and, comparatively, the characteristics of the electoral and legislative processes, contribute to making each process likely or unlikely to serve as a good mechanism for constitutional enforcement.

The normative defenders of judicial review do provide some institutional analysis, but not much. They make just one point in this regard. Specifically, they echo Alexander Bickel's classic defense of judicial review as providing a necessary check on political actors by others who are insulated from the political process.[8] However, that observation, while important, is only part of the story. A more thorough institutional analysis would reveal other, vital ways in which the characteristics of the judiciary make judicial review the superior mechanism for enforcement of constitutional constraints on government.

This Article provides the institutional analysis that is missing from existing literature. The Article compares and contrasts the judicial process with the processes that the popular constitutionalists suggest as mechanisms for enforcing the Constitution—namely, the electoral and legislative processes. This comparison demonstrates the superiority of the judicial process as a constitutional enforcement mechanism. Indeed, it suggests that only a process of judicial constitutional enforcement is consistent with the concept of constitutional "rights."

Several institutional characteristics of courts combine to achieve this result. The most important of these characteristics (and the one most overlooked by the popular constitutionalists) is that the judicial process is *focused*. Specifically, the judicial process considers claims of right discretely and does not entangle them with unrelated issues. This critical feature allows the judicial process to reach a clear judgment on constitutional issues in a way that the electoral process cannot. In contrast, the electoral process is completely unfocused. It entangles issues together, which blocks it from providing a clear judgment on any one issue. This fundamental distinction severely undercuts the ability of the people to use elections to enforce the Constitution.

In addition, the judicial process exhibits several other key institutional characteristics. The judicial process is *transparent*: it provides reasons for its decisions. The process is *individually engageable*: a single person with a claim

Courts, 117 YALE L.J. 886 (2008) (book review); and Alec Walen, *Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism*, 7 INT'L J. CONST. L. 329 (2009) (book review).

8. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25–26 (1962).

of right can utilize the process without having to attract support from others. The process is *mandatory*: courts must consider and rule on properly presented claims of right. The process *employs a system of precedent*: rights, once established, tend to remain established. And finally, the process is *nonmajoritarian*: claimants do not have to demonstrate majority support to have their rights enforced.[9]

These critical characteristics make judicial review the superior process for enforcement of constitutional rights. The existing literature on judicial review has primarily focused on just *one* of these characteristics—the last one, the nonmajoritarian character of the process.[10] Other characteristics of the process have been neglected. This Article suggests that it is really *all* of these characteristics, in combination, that make judicial review superior.

The Article proceeds as follows. First, Part I sets the scene by briefly recounting the recent rise of the popular constitutionalism movement. This Part sets forth the classic justification for judicial review, the classic attack on, and defense of, judicial review by Alexander Bickel in the 1960s, and the more recent attacks on judicial review by the scholars of the popular constitutionalism movement. This Part also explains the defenses of judicial review that other scholars have given in response to this new movement.

Part II then presents an institutional defense of judicial review. It considers what would actually happen if someone tried to enforce constitutional rights using the mechanisms suggested by the popular constitutionalists—that is, the electoral or legislative processes. Neither the popular constitutionalists nor scholars responding to them have given sufficient attention to how these processes actually work. Part II therefore conducts a thought experiment that imagines how citizens might try to use the electoral or legislative processes to redress constitutional grievances. It compares these potential enforcement processes to the judicial process. It argues that the electoral and legislative processes cannot be adequate mechanisms for the enforcement of constitutional rights because they lack the institutional characteristics of judicial review listed above.

In contrast to the judicial process, the electoral and legislative processes each have some subset of the characteristics of being unfocused, inscrutable, nonmandatory, only collectively engageable, majoritarian, and not relying on precedent. As already noted, whereas the judicial process is focused, the electoral process is completely unfocused. Even if a constitutional grievance became an issue in an election, it would be only one of dozens or hundreds

9. I previously explored the importance of some of these characteristics of the judicial process in the narrower context of considering the political question doctrine. *See* Jonathan R. Siegel, *Political Questions and Political Remedies*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 243, 243–68 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007). This Article builds on my previous analysis and applies it to the broader question of judicial review.

10. *See infra* Parts I.B, I.C.2.

of issues. Voters cannot, therefore, use the electoral process to decide a constitutional issue in the way a litigant can use the judicial process. Moreover, whereas the judicial process is mandatory, the legislative process is discretionary—the legislature can ignore constitutional grievances indefinitely. And whereas the judicial process is individually engageable, the electoral and legislative processes both require collective action to achieve results. These differences, and the other institutional differences explored in Part II, make the judicial process superior to either the electoral or legislative process for the enforcement of constitutional rights.

Part III therefore suggests that judicial review is normatively justified because it is in society's best interest that people whose constitutional rights are violated have a mechanism available for redress that has the characteristics of the judicial process. As the thought experiment of Part II demonstrates, the judicial process is institutionally structured to serve as a good enforcement mechanism for constitutional constraints. The electoral and legislative processes are not. Part III therefore concludes that the institutional characteristics of the judicial process justify judicial review. At the same time, Part III also recognizes that the popular constitutionalists have identified a weakness in the system of judicial review, and it therefore considers potential improvements to that system. Part III shows how an understanding of the institutional structure of judicial review supports suggestions for some possible improvements—in particular, improvements that would increase the system's democratic responsiveness while not depriving it of the institutional characteristics that make it the superior mechanism for enforcement of the Constitution.

I. THE REVIVED DEBATE OVER JUDICIAL REVIEW

For decades, judicial review enjoyed general approval in American legal thinking.[11] Recently, however, scholars have revived the debate over its legitimacy.[12] Scholars have rediscovered the "[c]ounter-[m]ajoritarian [d]ifficulty" noted by Alexander Bickel in the 1960s.[13]

Unlike Bickel, however, they do not find judicial review to be nonetheless justified on the basis of judges' allegedly superior ability to interpret and apply the Constitution.[14] Rather, the recent wave of scholarship opposed to judicial review insists that the Constitution should be enforced by the people themselves or by the people's elected representatives.[15]

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11. Fallon, *supra* note 6, at 1694.
12. *See infra* Part I.C.
13. BICKEL, *supra* note 8, at 16.
14. *Id.* at 23–28.
15. *See infra* Part I.C.

In response to this recent wave of "popular constitutionalism," other scholars have come to the defense of judicial review.[16] Some have justified it on textual or historical grounds.[17] Others have defended judicial review on normative grounds based on the nature of the judiciary.[18]

This Part briefly recounts the pendulum swings in the debate over judicial review and notes the current bases on which the practice is being attacked and defended.

A. THE INSTITUTION OF JUDICIAL REVIEW

Judicial review is a venerable institution in American democracy, having existed nearly as long as America itself. In *Marbury v. Madison*, the first case in which the Supreme Court exercised the power to disregard an unconstitutional statute passed by Congress, Chief Justice John Marshall laid out arguments in favor of judicial review.[19] Chief Justice Marshall's familiar opinion need not be reviewed here in detail. It is, however, well worth recalling the basics of Marshall's arguments, for they set up the debate that continues today—more than two centuries later.

Marshall relied primarily on the "principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void."[20] Marshall derived this principle from the fact that the Constitution emanates from the "original and supreme will" of the nation—the people.[21] Because the Constitution comes from the people themselves, it is the "fundamental and paramount law of the nation" and is superior to any act of the legislature.[22] The Constitution, Marshall noted, limits the powers that the people have vested in the legislature, and these limits would be meaningless if they did not confine the legislature.[23] An act of the legislature that conflicts with the Constitution is therefore void.[24]

Moreover, Marshall said, not only are unconstitutional statutes void, but the determination of whether a statute is unconstitutional is part of the *judicial* function.[25] The courts are to treat the Constitution "as a paramount

16. Strictly speaking, not all of the defenders of judicial review cited herein wrote "in response" to popular constitutionalist attacks. Some defenses of judicial review cited herein were written in connection with scholarly debate about the issue of judicial *supremacy*, which occurred just before the rise of the popular constitutionalism debate. But the subjects are closely related and can be considered together.

17. *See infra* Part I.D.

18. *See infra* Part I.D.

19. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

20. *Id.* at 180.

21. *Id.* at 176–77.

22. *Id.* at 177.

23. *Id.* at 176–77.

24. *Id.* at 177.

25. *Id.* at 177–78.

law,"[26] and, as he most famously remarked, "It is emphatically the province and duty of the judicial department to say what the law is."[27] Therefore, just as courts must decide between the operation of two laws that conflict, they must also resolve conflicts between the Constitution and enacted law, and in doing so they must treat the Constitution as the superior authority.[28] Doing otherwise "would subvert the very foundation of all written constitutions."[29]

In addition to this general, theoretical argument, Marshall found support for judicial review in the text of the Constitution.[30] The Constitution, Marshall observed, grants the courts power to hear "all cases arising under the constitution,"[31] and a court could not, Marshall asserted, decide a case arising under the Constitution without enforcing that very document.[32] Marshall noted clauses that specifically restrain the legislative power (for example, the clause forbidding the imposition of any tax on exports) and inferred that courts could not "close their eyes" to these clauses and enforce laws that violate them.[33] He also observed that the Constitution requires judges to take an oath to support it, which, he said, implied that judges must enforce the Constitution.[34] Finally, Marshall found textual support for judicial review in the Supremacy Clause, which elevates the Constitution to the supreme law of the land and gives the same character only to laws made *pursuant* to the Constitution.[35]

B. ALEXANDER BICKEL'S ATTACK ON, AND DEFENSE OF, JUDICIAL REVIEW

Marshall's opinion in *Marbury v. Madison* is often said to be one of the greatest judicial feats of all time.[36] Still, it has not gone unchallenged. Writing in the 1960s, Alexander Bickel claimed that Marshall's analysis not only begged the question, but begged the wrong question.[37] The real question, according to Bickel, is not whether an unconstitutional law is void

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26. *Id.* at 178.
27. *Id.* at 177.
28. *Id.* at 177–78.
29. *Id.* at 178.
30. *Id.*
31. *Id.*
32. *Id.* at 179.
33. *Id.*
34. *Id.* at 180.
35. *Id.*
36. *See, e.g.*, CLIFF SLOAN & DAVID MCKEAN, THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT, at x (2009) (asking why *Marbury* is "considered the greatest decision in American law"); Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235, 1244 (2003) (calling *Marbury* "our greatest case"); *see also, e.g.*, RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 68 (6th ed. 2009) (noting that *Marbury* "is widely regarded as a political masterstroke"); Theodore B. Olson, *Remembering* Marbury v. Madison, 7 GREEN BAG 35, 42 (2003) (also referring to *Marbury* as a "masterstroke").
37. BICKEL, *supra* note 8, at 2.

(of course that is true), but *who should decide* whether a law is unconstitutional.[38] Marshall, Bickel said, gave little analysis to this critical issue; he simply assumed that courts could rule on the constitutionality of statutes.[39] Marshall failed to rebut the possibility that this role properly belonged elsewhere—that it should be performed by Congress itself, by the President, by juries in criminal cases, or ultimately by the people.[40]

Bickel considered Marshall's various arguments and concluded that none of them could show that the determination of the constitutionality of statutes is properly a judicial function. Bickel rejected Marshall's argument that judicial review follows from the very existence of a written Constitution.[41] While it may seem absurd that only the legislature would enforce the constitutional limits on its own power, Bickel noted that, under Marshall's scheme, only the courts enforce the constitutional limits on judicial power.[42] Bickel further observed that judicial self-policing seems even more absurd than legislative self-policing because courts are not checked by elections.[43] Something more than the very existence of the Constitution is therefore needed to show that the Constitution is judicially enforceable.

Bickel also found Marshall's textual constitutional arguments lacking. Clauses that specifically constrain legislative power add nothing, Bickel argued, to the general argument for judicial review.[44] The Oath Clause proves nothing because the clause applies equally to judicial, executive, and legislative officials.[45] And the Supremacy Clause, Bickel argued, serves only to make federal law supreme over state law, not to give federal courts the power to determine the constitutionality of federal statutes.[46]

The lack of solid grounding for judicial review is particularly troublesome, Bickel observed, because judicial review is "counter-majoritarian."[47] Courts exercising the power of judicial review claim to be acting in the name of the people and to be enforcing the commands that the people enshrined in the Constitution.[48] But in striking down a statute enacted by a democratically elected legislature, courts thwart the actions of

38. *Id.* at 3.
39. *Id.*
40. *Id.*
41. *Id.* at 3–4.
42. *Id.*
43. *Id.*
44. *Id.* at 6–7.
45. *Id.* at 7–8.
46. *Id.* at 8–12.
47. *Id.* at 16.
48. *Id.*

the current popular majority.[49] Therefore, Bickel argued, judicial review is a "deviant institution" in a democratic society.[50]

Yet despite his criticism of Marshall's arguments in favor of judicial review, Bickel nonetheless resuscitated the practice with an argument of his own. Judicial review is appropriate, Bickel argued, precisely because of its counter-democratic nature.[51] The Constitution embodies our society's enduring, long-term values. Such values may clash with more immediate needs, and the political accountability of elected officials makes them particularly vulnerable to the influence of short-term interests.[52] By contrast, the political insulation of judges puts them in a good position to enforce our long-term values when those values clash with popular short-term desires.[53] Thus, Bickel concluded, it is beneficial to have the acts of politically accountable officials reviewed for constitutionality by politically insulated judges.[54]

Bickel saw other advantages to judicial review as well. He claimed that the judiciary is superior to the legislature at constitutional interpretation because judges have specialized scholarly training and the institutional habit of acting on principle.[55] The legislature, on the other hand, for the most part operates "with a different set of gears" and would likely find it difficult to switch its focus to the enforcement of constitutional principle when the occasion demanded.[56] He also saw advantage in the judicial practice of acting on "the flesh and blood of an actual case" as opposed to the abstraction of a statute.[57] Bickel's main defense of judicial review, however, was that constitutional principles are best enforced by politically insulated actors.[58] His argument became a standard, normative defense of the institution of judicial review.[59]

C. THE MODERN REVIVAL OF THE DEBATE

After Bickel's seminal analysis, judicial review again enjoyed general, and even rather uncritical, acceptance, which continued for a long time—indeed, Charles Black prescribed "two aspirin and a good night's sleep" for

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49. *Id.* at 16–17.
50. *Id.* at 18.
51. *Id.* at 24–26.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 26.
57. *Id.* For more on this point, see *infra* note 208.
58. *See supra* note 54 and accompanying text.
59. *See, e.g.*, Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 142–43 (1997) (referring to Bickel's argument as "the classic modern argument" in support of judicial review).

those who doubted its legitimacy.[60] Recently, however, scholars have revived the debate over judicial review. In part, this may result from recent changes in the composition of the Supreme Court. So long as judicial review produced results that were cheered by the mostly liberal legal academy, most scholars had little impetus to question the practice. Now that judicial review by a more conservative Supreme Court frequently blocks liberal political action (as, for example, when the Court strikes down affirmative-action programs[61] or eliminates limits on campaign spending by corporations[62]), scholars are recalling that the Supreme Court, over the course of American history, has often been a conservative or reactionary force, and they are finding themselves increasingly prone to question the legitimacy of judicial review itself.[63]

Recent attacks on judicial review have taken two main forms. One is historical: scholars have asserted that the Framers and the founding generation never intended courts to treat the Constitution as ordinary, judicially enforceable law, but rather that the people themselves were to enforce the Constitution through the electoral or legislative process. The other argument rediscovers the counter-majoritarian difficulty: scholars have asserted that the principles of democracy demand that questions of constitutionality be resolved by politically accountable officials, not by politically insulated judges.

1. Historical Claims About Means of Enforcing the Constitution

Professor Larry Kramer attacks the historical basis for judicial review.[64] Kramer asserts that the framing generation never intended courts to treat the Constitution as ordinary, judicially enforceable law.[65] Rather, the Constitution was "fundamental law," and its enforcement was not to be a judicial responsibility, but rather the concern of the people themselves.[66]

Kramer asserts that the founding generation regarded "the people" not as an abstraction but as a group that could speak and take responsibility "for seeing that the Constitution was properly interpreted and implemented."[67] In the ratification debates, federalists asserted that if the new national government violated the Constitution, it would face popular resistance.[68] In

60. CHARLES L. BLACK, JR., THE HUMANE IMAGINATION 119 (1986); *see also, e.g.*, Fallon, *supra* note 6, at 1694 (referring to the desirability of judicial review as a "complacent assumption" of American thinking).

61. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

62. Citizens United v. FEC, 130 S. Ct. 876 (2010).

63. *See* TUSHNET, *supra* note 2, at 129–53; Waldron, *supra* note 2, at 1350.

64. Kramer, *supra* note 1, at 16.

65. *Id.* at 26, 48–50.

66. *Id.* at 49.

67. *Id.* at 11–12.

68. *Id.* at 43, 50, 73.

particular, Kramer says, the framing generation intended elections to be the primary mechanism for enforcing the Constitution.[69] The framing generation believed that the people would surely vote against politicians who violated the constitutional restraints that the people had placed on their behavior.[70]

Although exercising the right to vote was the "first and foremost" means of popular constitutional enforcement,[71] Kramer also notes other popular means of resistance that could be used against unconstitutional governmental action. The people could use the right of free speech to denounce such action in petitions and pamphlets, they could resist unconstitutional enactments while serving as state or local government officials or as jurors, and they could also employ "mobbing"—taking direct physical action to resist government encroachment on constitutional rights.[72] "The idea of turning this responsibility over to judges," Kramer asserts, "was unthinkable."[73]

Kramer does not suggest that judicial review be abolished.[74] He recognizes that judicial review may even be necessary "to counter certain endemic pathologies of party politics and representative assemblies," but he argues that our Constitution prefers democratic solutions and that we should adopt a "minimal model of judicial review."[75] Kramer suggests that the "New Deal settlement," under which the Supreme Court enforces constitutional restraints on the states and protects individual rights from federal action, but leaves questions regarding the scope of congressional power primarily to political resolution (subject to only very limited judicial scrutiny),[76] is "a sensible place to start."[77] Kramer particularly rejects the modern development of what he calls "judicial sovereignty," which suggests that courts should not only interpret and enforce the Constitution as ordinary law, but that constitutional interpretation by other branches, or by the populace at large, is inherently suspect.[78]

2. Rejecting Judicial Review on Democratic Grounds

Even more ambitious than Professor Kramer's call for a judicial review that leaves some room for popular constitutional interpretation are recent suggestions that judicial review should be abolished altogether and that

69. *Id.* at 27, 50, 72–74.
70. *Id.* at 72–74.
71. *Id.* at 27.
72. *Id.* at 27–29.
73. *Id.* at 12.
74. *Id.* at 166.
75. *Id.*
76. *Id.* at 122.
77. *Id.* at 166.
78. *Id.* at 163.

constitutional questions should be resolved only politically. The scholars making this bold claim have, essentially, rediscovered the counter-majoritarian difficulty. Unlike Professor Bickel, however, these scholars do not resolve the difficulty by concluding that courts are institutionally better than legislatures at interpreting and enforcing the Constitution. They reject this conclusion and argue instead that the principles of democracy demand that constraints on the democratic process be interpreted and enforced democratically.

Professor Jeremy Waldron makes this argument in an article with the arresting title, *The Core of the Case Against Judicial Review*.[79] In this article, Waldron is not so concerned about the correct understanding of the U.S. Constitution in particular.[80] Rather, he considers the general problem of whether judicial review is good or bad for a democratic society.[81] Waldron asserts that so long as a society meets several conditions—that it has a representative legislature and nonrepresentative courts, both in reasonably good working order, and that most members and officials of the society share a commitment to the idea of individual and minority rights, but that there are frequent disagreements about the content of these rights[82]—the legislature should interpret the limits of its own powers and should not be constrained by the judiciary's understanding of the Constitution.[83]

Waldron denies that this practice will lead to worse decisions about the content of rights. Political institutions, Waldron claims, are capable of grappling with issues thoroughly and honorably, while at the same time giving proper consideration to rights and principles.[84] Pressures that legislators face to deny rights may also affect judges.[85] Moreover, legislators' democratic responsiveness may put them in a better position than judges to appreciate the plight of those seeking to have their rights vindicated.[86]

Even more important, Waldron claims that the principles of democracy demand that constitutional questions be resolved democratically.[87] The content of constitutional requirements is typically disputed and subject to good-faith disagreement. Democratic theory explains why we should privilege a resolution of such disagreements reached by a majority of elected representatives, but it cannot explain why we should give weight to a resolution reached by a group of politically unaccountable judges, nor why the judges should resolve disagreements among themselves by majority

79. Waldron, *supra* note 2.
80. *See id.* at 1351–52, 1360.
81. *See id.*
82. *Id.* at 1360.
83. *See id.* at 1353.
84. *See id.* at 1384–85.
85. *Id.* at 1377.
86. *Id.* at 1378.
87. *Id.* at 1386–91.

vote.[88] It cannot be, Waldron explains, that the judges are merely implementing a democratically reached societal precommitment to a certain outcome because society will not have precommitted itself to a certain understanding of the precise content of a disputable right.[89] Even if it had, Waldron says, a precommitment should not prevent society from democratically changing its mind.[90] The democratic credentials of legislatures, Waldron therefore concludes, make them the superior vehicle for resolving disagreements about the scope of rights.[91]

Professor Mark Tushnet also makes arguments for the abolition of judicial review in his book *Taking the Constitution Away from the Courts*.[92] Much of the Constitution, he asserts, is "self-enforcing" in that it sets up mechanisms, such as those famously noted by Professor Herbert Wechsler,[93] that tend to ensure that the political process will result in enforcement of constitutional constraints.[94] Because judges are appointed politically, and because the Supreme Court tends to follow the election returns, judicial review, over time, "is likely simply to reinforce whatever a political movement can get outside the courts."[95] But on the whole, Tushnet believes, progressives and liberals are currently losing more from judicial review than they are gaining from it.[96] They should, therefore, prefer a system of populist constitutional law in which constitutional issues would be resolved legislatively.

D. Recent Defenses of Judicial Review

Naturally, the legal academy has responded to these recent attacks on judicial review. Some scholars have revived and refined Bickel's defense of the practice. Others have relied on different arguments.

Some scholars defend judicial review on textual constitutional grounds.[97] They observe, for example, that the Supremacy Clause is generally understood to permit judicial review, including federal judicial

88. *Id.* at 1387–92.

89. *Id.* at 1393–94.

90. *Id.* at 1394.

91. *Id.* at 1394–95.

92. TUSHNET, *supra* note 2. In this book, Tushnet does not quite say, "Let's get rid of judicial review"—his final sentence is, "*Perhaps* it is time for us to reclaim [the Constitution] from the courts." *Id.* at 194 (emphasis added). He does, however, have a chapter entitled "Against Judicial Review" in which he favorably discusses the possibility of abolishing judicial review. *Id.* at 154–76. More recently, Tushnet has stated that Waldron's "case against constitutional review disposes of the other cases on offer." Tushnet, *supra* note 7, at 51.

93. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

94. TUSHNET, *supra* note 2, at 95–128.

95. *Id.* at 134–35, 152.

96. *Id.* at 172.

97. *See generally* Clark, *supra* note 5; Harrison, *supra* note 5; Prakash & Yoo, *supra* note 5.

review, of *state* law to determine its compliance with the Constitution, and they argue that the text of the Supremacy Clause makes no distinction between judicial review of state law and federal law.[98] The clause also does not distinguish between judicial review based on individual rights and judicial review based on structural provisions of the Constitution.[99] Therefore, these scholars argue, the Supremacy Clause provides solid textual support for judicial review.

Scholars also defend judicial review historically. These scholars claim that the constitutional convention and the ratification debates, as well as early state and federal practice, show that the Framers and ratifiers of our Constitution intended courts to exercise the power of judicial review.[100]

Finally, scholars defend judicial review based on various normative, structural, and institutional grounds. Some, like Bickel, see particular value in entrusting constitutional enforcement to an institution largely insulated from political pressure instead of one that is majoritarian.[101] These scholars see the Constitution as imposing "second-order," long-term constraints on the decisions of policymakers who may be honestly attempting to do what is best for their constituencies, and they defend judicial review as an appropriate mechanism for enforcing these constraints against decision makers who may find it difficult to enforce limits on their own power in the absence of an external check.[102] Scholars also point to the "settlement function" of law—the need to settle authoritatively what is to be done—as a basis not merely for judicial review but for judicial supremacy.[103] And some scholars, even though somewhat persuaded by Waldron's argument that courts are not likely to be any better than legislatures at resolving contestable questions of constitutional rights, nonetheless value judicial review as providing a second veto gate through which government action must pass before it can potentially endanger individuals.[104] The overenforcement of constitutional restraints that might result from this system will, these scholars argue, be less costly than the underenforcement that would follow from abolishing judicial review.[105]

II. A DIFFERENT DEFENSE OF JUDICIAL REVIEW

The ongoing debate over judicial review makes clear that the popular constitutionalists have shaken things up considerably. Judicial review was an unquestioned mainstay of American law for decades. Now, even some of

98. Prakash & Yoo, *supra* note 5, at 910–14.
99. Clark, *supra* note 5, at 335–48.
100. Prakash & Yoo, *supra* note 5, at 927–81; *see also* BICKEL, *supra* note 8, at 14–16.
101. Chemerinsky, *supra* note 6, at 1016, 1022.
102. Schauer, *supra* note 6, at 1054–65.
103. Alexander & Schauer, *supra* note 6, at 1372–81.
104. Fallon, *supra* note 6, at 1699.
105. *Id.* at 1713–15.

those defending judicial review are self-confessedly "uneasy" about it.[106] It is therefore vital to understand the case for judicial review.

As stated before, the purpose of this Article is to defend the practice of judicial review against recent attacks, but with a different argument than has been made in recent defenses. This Article does not concern itself with whether the U.S. Constitution contains a textual basis for judicial review. The text has been extensively mined elsewhere.[107] Likewise, this Article does not address the historical question of whether the Framers of our Constitution intended it to be enforced through judicial review. Rather, the defense of judicial review given in this Article is normative and, above all, institutional. Thus, although the arguments presented herein apply to the United States—and indeed, the United States will be the main focus—the ultimate question, as with Waldron's article, is the more general question of whether a generalized, abstract society, with a representative legislature and nonrepresentative courts, should desire its courts to exercise the power of judicial review.[108]

Like some of the normative defenses recently (and not so recently) offered, this Article agrees that one important value of judicial review is that it provides a check by politically insulated officials on the actions of officials who are politically accountable. But that is not the main focus of the Article's analysis. Rather, this Article argues that other institutional characteristics of the judicial process make it the superior instrument for enforcement of constitutional requirements.

The Article's argument proceeds by examining what it would actually mean to attempt to enforce the Constitution through either the electoral or legislative processes. Imagine that the regime of "popular constitutionalism" promoted by those who attack judicial review were in place. Imagine that judicial review were now abolished, or that it simply had never been available.[109] Someone, however, believes that the government is acting unconstitutionally. What is this person to do?

The thought experiment of imagining how a grievant would actually go about attempting to enforce the Constitution by popular means immediately reveals the tremendous obstacles that such a party would face. As I have

106. Fallon titles his defense *The Core of an Uneasy Case for Judicial Review*. Fallon, *supra* note 6.

107. *See generally* Clark, *supra* note 5; Harrison, *supra* note 5; Prakash & Yoo, *supra* note 5.

108. *See* Waldron, *supra* note 2, at 1351–52, 1360 (noting that Waldron desires to address the core question of whether an abstract society with specified characteristics should desire to have judicial review).

109. As discussed above, not every popular constitutionalist argues that judicial review should be abolished. No one scholar defines what "popular constitutionalism" is, and this Article is directed at an amalgam of popular constitutionalist positions. The Article primarily addresses the suggestion of Waldron and Tushnet that judicial review should be abolished, but it also draws on some of Kramer's arguments as to how the Constitution might be popularly enforced.

elsewhere discussed in connection with an examination of the political question doctrine,[110] consideration of these obstacles highlights vital institutional differences, both practical and theoretical, between the judicial process and the electoral and legislative processes. These differences will show that the judicial process is well constructed, and the electoral and legislative processes, by contrast, poorly constructed, for the enforcement of constitutional requirements.

A. ENFORCING THE CONSTITUTION THROUGH THE ELECTORAL PROCESS

Popular constitutionalists suggest that the original intent of the framing generation was that *the people themselves* would interpret and enforce the Constitution.[111] They note that, during the framing generation, people spoke of submitting constitutional controversies to "the people."[112] To the Framers, such an invocation of "the people" was "neither empty rhetoric nor a veiled threat of revolution."[113] It was, rather, "the invocation of a very real, very available legal remedy."[114]

But how exactly would this remedy work? Popular constitutionalists speak rather blithely about submitting a controversy to "the people," but "the people"—to say the least—do not have a convenient mailing address to which controversies can be submitted. What would it actually mean to submit a constitutional controversy to "the people"? What would "the people" actually do to enforce the Constitution? According to those who adhere to this view, one vital mechanism by which "the people" would enforce the Constitution would be *elections*. Specifically, popular constitutionalists assert that members of the framing generation suggested that the people would control politicians who violated the Constitution by voting them out of office.

Professor Kramer provides numerous quotations from the founding period that take this view. Richard Dobbs Spaight, Governor of North Carolina, who rejected judicial review as "absurd," said that the better, absolutely necessary check on government was "the annual election."[115] John Randolph, a Congressman from Virginia, spoke of elections as "the true check."[116] An anonymous "Jerseyman" wrote that "[e]very two years the

110. *See* Siegel, *supra* note 9, at 258–68.

111. *E.g.*, Kramer, *supra* note 1, at 41, 43, 49.

112. *Id.* at 41.

113. *Id.*

114. *Id.*

115. *Id.* at 50 (quoting Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), *in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 145, 168, 169–70 (Griffith J. McRee ed., Peter Smith 1949) (1857)) (internal quotation marks omitted).

116. *Id.* at 43 (quoting 11 ANNALS OF CONG. 660 (1802)) (internal quotation marks omitted); *see also* 11 ANNALS OF CONG. 661 (1802) (asserting that an appeal lies "through the elections, from us to the nation, to whom alone, and not a few privileged individuals, it belongs to decide, in the last resort, on the Constitution").

people may change their Representatives if they please; and they certainly would please to change those who would act with so much baseness and treachery [as to violate the Constitution]."[117] George Washington himself pointed out to his nephew Bushrod that whenever government power is executed contrary to the people's interests, "their Servants can, and undoubtedly will be, recalled."[118]

Even some judges, who might have been expected to favor judicial review, took the view that elections, not judicial review, provide the true remedy for a constitutional violation. For example, in 1825, when Pennsylvania's highest court first declared a state statute to be unconstitutional under the state constitution,[119] Justice Gibson vehemently dissented from the court's assertion of the power of judicial review.[120] Justice Gibson believed that the state legislature "ought . . . to be taken to have superior capacity to judge of the constitutionality of its own acts."[121] The remedy, in Justice Gibson's view, for an error in the legislature's understanding of its own powers lay in "an exertion of the [public] will, in the ordinary exercise of the right of suffrage"[122]—that is, by the public's voting against legislators whose understanding of their powers deviated from the public's understanding.

Indeed, even modern courts, which generally accept the power of judicial review, sometimes echo these same thoughts. Although judicial review is usually available today to enforce the Constitution, there are some cases where it cannot work. For example, sometimes, under current doctrine, there is no plaintiff with standing to challenge an alleged constitutional violation.[123] In other cases, an alleged constitutional violation raises a "political question" not subject to judicial review.[124] Such cases provide an illuminating window into the system envisioned by the popular constitutionalists, as the plaintiffs have no judicial remedy and are left with such remedies as would be available to them under popular constitutionalism. In some such cases, the courts (or individual judges) have directed the disappointed plaintiffs to their electoral remedies. The courts

117. Kramer, *supra* note 1, at 73 (quoting A Jerseyman, *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 146, 148 (Merrill Jensen ed., 1976)) (internal quotation marks omitted).

118. *Id.* (quoting Letter from George Washington to Bushrod Washington (Nov. 10, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 117, at 152, 154).

119. Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825).

120. *Id.* at 344–58 (Gibson, J., dissenting).

121. *Id.* at 350.

122. *Id.* at 355.

123. *E.g.*, United States v. Richardson, 418 U.S. 166, 170 (1974) (no private standing to enforce the Statement and Account Clause).

124. *E.g.*, Nixon v. United States, 506 U.S. 224, 228, 238 (1993) (alleged violation of the Senate Trial Clause raises a nonjusticiable political question).

have noted that a disappointed plaintiff can still "assert his views . . . *at the polls*."[125] People without judicial remedies, courts observe, merely have to "convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."[126] Judges have suggested that if elected officials violate the Constitution, "they will have to contend with public outrage that will ultimately impose its sanction *at the ballot box*."[127]

Thus, some people, both historically and currently, have with all apparent seriousness suggested *elections* as a mechanism for enforcing the Constitution against politicians who violate it. They do not merely suggest that the whole political process, including the legislative process, can be counted on to remedy constitutional violations. They specifically assert that if politicians violate the Constitution, the populace at large will enforce it by voting them out of office.

The possibility of enforcing the Constitution by using the entire political process, with the goal of ultimately achieving legislative success, is considered in the next section.[128] But first it is necessary to address the suggestion that the people themselves can enforce the Constitution through elections. Let us think, therefore, about what that would really be like. What would actually happen to anyone who attempted to enforce the Constitution through the electoral process? Courts and scholars who blithely suggest that people could use elections to enforce the Constitution by voting offending politicians out of office have grossly neglected to consider this question. The thought experiment of imagining what would actually happen shows that any such attempt would immediately run up against institutional characteristics of the electoral process, both practical and theoretical, which demonstrate its inadequacy as a mechanism for the enforcement of constitutional guarantees.

1. Practical Difficulties

Those who suggest that voters might use the electoral process to remedy constitutional violations seem to have given little thought to how utterly impractical such efforts would usually be. Consider the plight of disappointed plaintiffs in cases in which judicial review is not available today. William Richardson, for example, believed that Congress had violated the Constitution's Statement and Account Clause by authorizing the government to withhold details of the CIA's budget,[129] but he learned in

125. *Richardson*, 418 U.S. at 179 (emphasis added).

126. *Id.*

127. Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991) (emphasis added), *aff'd*, 506 U.S. 224 (1993).

128. *See infra* Part II.B.

129. *Richardson*, 418 U.S. at 168–69.

court that he lacked standing to obtain judicial review—and, judging from the court's opinion, so did everyone else.[130] Walter Nixon, an impeached federal district judge, complained that the Senate had violated its constitutional obligation to "try" his impeachment but discovered that his case raised a nonjusticiable political question.[131] The situation of these disappointed plaintiffs provides a ready example of what life would be like in a world without judicial review.[132] What would these disappointed plaintiffs do?

As noted above, courts in each of these cases explicitly suggested that the plaintiff could seek a political remedy through the electoral process. But that was hardly so in practice. The alleged constitutional violations were, first of all, not of sufficient importance to gain any traction in the electoral process. It is difficult to imagine either plaintiff's getting any public attention at all for their issues and impossible to imagine that they could actually turn politicians out of office over them. Judge Nixon would have faced the particularly daunting problem that he was the only one injured by the alleged violation in his case; thus, he would have faced the impossible task of getting the electorate to care about a problem that affected only him. Richardson's complaint at least affected everyone, but still, his issue was not of sufficient importance that he could actually have turned politicians out of office over it.

For these reasons, the alleged electoral remedy would simply not be available as a practical matter. The same seems likely to be true for a very substantial number of potential constitutional violations involving the many constitutional provisions that are of a similar order.[133] Thus, the first difficulty with the suggestion that "the people" could enforce the Constitution through elections is that, in many cases, doing so would be wholly impractical.

Some who write against judicial review might not find this point troublesome. Professor Tushnet, in particular, suggests that the essence of

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130. *Id.* at 179.

131. Nixon v. United States, 506 U.S. 224, 228 (1993).

132. It should be noted that popular constitutionalists are most concerned about judicial review of legislative action and do not necessarily condemn judicial review of executive or administrative action. *See, e.g.*, Waldron, *supra* note 2, at 1353–54. The categories are not always distinct (a challenged executive or administrative action may do no more than implement a legislative command), and some cases do not fit neatly into any of them. For example, the *Nixon* case cited here concerned action taken by the Senate, but not in its legislative capacity, *see Nixon*, 506 U.S. at 228, and it is not entirely clear how popular constitutionalists would desire courts to handle it. But the point of considering *Nixon* and *Richardson* is simply as illustrations of the difficulties facing parties injured by allegedly unconstitutional action for which judicial relief is not available.

133. For example, it is difficult to imagine actual elections turning on alleged violations of the Full Faith and Credit Clause, the Origination Clause, the Emoluments Clause, or the Duty of Tonnage Clause. *See* Polar Tankers, Inc. v. City of Valdez, 129 S. Ct. 2277 (2009) (striking down a city ordinance as violative of the Duty of Tonnage Clause).

constitutionalism lies not in the enforceability of lesser constraints such as those imposed by the Statement and Account Clause or the Senate Trial Clause, but only in the largest principles of freedom and equality.[134] Tushnet cares little about the availability of a mechanism for enforcing lesser details of governance, even those that are embodied in the Constitution (he uses the Emoluments Clause as an exemplar of provisions not worth caring about).[135] He thinks the point of constitutionalism is to carry forward what he calls "the Thin Constitution" or "the Declaration [of Independence]'s project," which is what really "constitutes us as a people."[136]

There are, of course, numerous problems with this view. Obviously, it disregards the fundamental concept that the Constitution is a set of instructions from the people, acting as principals, to their representatives, as agents, that limits the agents' authority to act. It substitutes the Declaration of Independence for the Constitution as the document that defines constraints on government—a strange choice, given that the Declaration had a very different purpose and was never popularly ratified. It effectively denies the people the ability to constrain the government with rules that they think important enough to embody in the Constitution, even though the rules would not be of a nature to capture attention in an election contest—apparently, if a rule is not of that degree of importance, any deviation from it is simply to be disregarded as trivial. It is entirely possible, however, that the people might desire to ensure the permanent enforcement of a detail of governance, and to put such a detail beyond the power of their elected representatives to alter, rather than have to perennially fight over such a detail legislatively.[137]

But most pertinent to the point of this section, even taking Tushnet's argument on its own terms—even imagining that somehow one should care only about the enforceability of *important* constitutional provisions, however importance might be defined—the same kind of practical difficulties discussed above could easily block an electoral remedy for even the most important constitutional violations. Tushnet posits that the essential Constitution consists solely of a few principles—"equality, freedom of expression, and liberty."[138] These grand ideas, we might imagine, could actually capture some public attention in an election contest. But even if we

134. *See* TUSHNET, *supra* note 2, at 33–53.

135. *Id.* He asserts that the clause has become "silly." *Id.* at 37.

136. *Id.* at 30–31.

137. As Chief Justice Marshall remarked, the creation of the Constitution, by which the people limited the powers of their elected officials, was "a very great exertion" that could not be "frequently repeated." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). In that great exertion, the people bound, not themselves, but their elected agents by laying down such rules as they desired to put beyond the power of ordinary political processes. Tushnet's rule would make it impossible for the people to do this with regard to any matter that would not command attention in the electoral process.

138. TUSHNET, *supra* note 2, at 11.

overlook the fact that Tushnet is condemning crucially important *structural* constitutional provisions to unenforceability[139] and limit ourselves to worrying about individual rights, what about, for example, the criminal procedure protections of the Fifth and Sixth Amendments or the Eighth Amendment rights of prisoners? Surely these provisions are vital constitutional protections, yet they are not rights that appeal to much of the electorate. Given the politics of criminal defendants' and prisoners' rights, there would obviously be the greatest practical difficulties in enforcing these rights through the electoral process. Many exercises of the right of free speech might, similarly, fare poorly in the political arena, as the right of free speech is most important precisely when speakers use it to express politically unpopular viewpoints.[140]

Moreover, there is simply no necessary correlation between the importance of a claimed constitutional violation and the ability of voters to use the electoral process to remedy the claimed wrong. Hardly any claim, for example, could be more important than the claim that the 2000 presidential election was stolen, yet voters who believed it was had no effective opportunity to remedy it electorally. This was not simply because the claim was resolved judicially instead of, as some thought it should have been, by Congress.[141] Even in a world without judicial review, in which Congress itself had resolved the 2000 election dispute, voters who thought the election was stolen would have had to wait two, four, or six years for the next opportunity to vote against those who had done the alleged stealing. By that time, other matters dominated the public's attention, particularly the terrorist attacks of September 11, 2001. Angry voters therefore had little ability to turn subsequent elections into a referendum on the validity of the 2000 election. Thus, even for the most significant constitutional violations, the electoral process often offers no practical remedy.

Finally, even with regard to those issues that might gather some traction in an election, the task of a citizen who desires to redress an alleged constitutional violation through the electoral process would be immense. Litigation is not cheap, but it is a bargain compared with elections. A citizen

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139. In other chapters of his book, Tushnet suggests that many of the structural provisions are "incentive compatible," that is, they create a structure in which the rules will be self-enforcing by virtue of the political process. *Id.* at 95–128. However, this still means that all the structural provisions of the Constitution in fact impose no real constraints; they impose only whatever system the Congress and the President work out. That hardly seems like what one expects of a Constitution designed to constrain government action.

140. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (striking down a statute prohibiting desecrating the American flag); Schacht v. United States, 398 U.S. 58 (1970) (striking down a statute forbidding the unauthorized wearing of a military uniform in a theatrical production unless the portrayal of the armed force involved "does not tend to discredit that armed force" (emphasis omitted) (quoting 10 U.S.C. § 772(f)) (internal quotation marks omitted)).

141. *See, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 300 (2002).

who desired to bring a judicial challenge to, say, the failure of Congress to publish the CIA's budget, might have to spend tens of thousands of dollars on legal fees, and this price tag might stand in the way of some legal challenges. Still, it is nothing compared with what a citizen would have to spend to engineer the electoral defeat of members of Congress who voted to keep the CIA budget secret—especially to defeat enough members to change Congress's collective view on the issue. That bill would surely run into the tens or hundreds of millions.

So while it is easy enough to suggest that a disappointed plaintiff take his or her case to the polls, the suggestion would often be hopelessly impractical. In most cases the electoral process would offer no relief for a constitutional violation.

2. Theoretical Differences

Even more important, the difficulties with electoral enforcement of the Constitution lie not just in practicalities. Rather, the practical difficulties are symptoms of the larger structural and theoretical differences between the judicial and electoral processes. Thinking further about *why* elections would be such an impractical remedy for constitutional violations, and *why* the judicial process works to provide a remedy, reveals a series of crucial differences—*institutional* differences—between the two processes. These differences show why the judicial process is well suited, and the electoral process poorly suited, to ensure the enforcement of constitutional requirements.

a. Focused vs. Unfocused

First and foremost, the judicial process is *focused*. The judicial process resolves a specific claim raised by a specific plaintiff. Assuming a plaintiff can construct a justiciable case that properly raises an issue, the court will address the particular issue presented. Of course, the plaintiff might lose, but at least the plaintiff will get a ruling on the specific claim raised.

By contrast, the electoral process is entirely *un*focused. Elections are not referenda. Even if disgruntled citizens somehow managed to make an alleged constitutional violation an issue in a congressional or presidential election, it would never be the *only* issue. There are always innumerable issues facing the electorate at any given time, and elections provide no mechanism for voting on issues individually.[142] In fact, voters do not vote for "issues" at all; they vote for candidates. Each candidate represents a package of positions on many different issues, in addition to general qualities such as experience, trustworthiness, and charm.

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142. Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing To Challenge Governmental Action*, 73 CALIF. L. REV. 52, 99 (1985).

Thus, elections provide voters with no real way to register their views on a particular alleged constitutional violation. At most, voters could vote against a candidate who has participated in what they regard as a constitutional violation. In doing so, however, they would also have to consider whether that candidate had done well with the economy, foreign policy, and other important issues.

This distinction is the most crucial institutional distinction between the judicial and electoral processes, yet it is overlooked by those who suggest that disgruntled citizens could use the electoral process to remedy constitutional violations. Popular constitutionalists seem to imagine that if politicians violated the Constitution, angry voters would rise up and vote them out of office based on that alone.[143] But in reality, the structure of the electoral process means that the constitutional issue would, at most, be one of dozens of issues that would all be jumbled together in an election.

Indeed, an election could easily involve *multiple* constitutional issues—particularly in a world without judicial review. In such a world voters might, and indeed probably would, have to try to raise multiple constitutional issues in every election because, as the unending stream of suits challenging government action shows, the government is always pushing the envelope of its constitutional powers in many different directions at once. The jumbling together of such multiple, possibly conflicting issues in a single election could leave voters with no way of enforcing their constitutional views. For example, if, in a given election, one candidate favors policies that arguably violate the right of free speech, while her opponent favors policies that arguably violate property rights, what is a voter who agrees with *both* constitutional grievances to do? The voter would be able to express disapproval of one set of policies only by ostensibly expressing approval of the other. Again, the fundamental problem is that elections simply do not present clean opportunities to express views on particular constitutional issues.

Thus, the suggestion that, in a world without judicial review, citizens could take their constitutional grievances to the polls and enforce the Constitution so long as they "convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them"[144] is almost absurdly naïve. It overlooks a fundamental, structural feature of the electoral process. Because of the unfocused nature of the electoral process, the disgruntled voter's task would not simply be a matter of convincing fellow electors that some politician or group of politicians is violating the Constitution. It would be necessary to convince the electorate that the violation is so severe that it overcomes whatever good things those same politicians are doing. Unlike the judicial process, which

143. *See* quotations and examples gathered *supra* in text accompanying notes 111–28.

144. United States v. Richardson, 418 U.S. 166, 179 (1974).

provides a focused mechanism for resolving a specific constitutional claim, the electoral process provides an unfocused mechanism in which the claim would become entangled with economics, foreign policy, and every other issue facing the electorate (probably including other constitutional issues), as well as the personal qualities of the candidates involved.

b. Transparent vs. Inscrutable

The unfocused nature of the electoral process necessarily leads to another vital difference between the electoral process and the judicial process: the electoral process is *inscrutable*, whereas the judicial process is *transparent*. Because of its inscrutable nature, even success in the electoral process is no guarantee of enforcement of constitutional norms.

Let us suppose, notwithstanding all of the tremendous difficulties already discussed, that a group of voters who are upset about an alleged constitutional violation by a government official manages to make the violation an issue—indeed, a prominent issue—in the next election. More than that, let us imagine that the group *succeeds* in using the election to unseat the official. Would the group's electoral success necessarily translate into a remedy for the claimed constitutional violation?

Not at all. The problem is that no one can be sure exactly *why* a politician was defeated. This is because, as discussed above, elections are always about multiple issues. Therefore, even if the allegedly offending politician is thrown out of office, there is no way to know why. It might have been because the voters decided the politician's actions were unconstitutional, but it might also have been because of unfavorable economic conditions, a scandal affecting the incumbent's party, the personal qualities of the challenger, or any of innumerable other reasons.

The election process is critically different from the judicial process in this respect. A fundamental feature of the judicial process is that it gives reasons for its decisions.[145] The process does not simply produce a result. The process is, in this respect, transparent.[146]

By contrast, the electoral process produces only a result. It gives no reasons. Afterwards, pundits attempt to read the tea leaves to decide what the election "meant" and to discern what "message" the voters were trying to send. But as with all attempts to receive messages from "the people," the message lies more in the recipient than in the sender. The actual fact is that the election process produces results but does not articulate norms.

The recent 2008 and 2010 elections provide excellent examples. In one sense (probably more so than usual) the 2008 presidential election *was* a

145. *E.g.*, Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1292 (1975).

146. The term *transparent* imperfectly captures the point made here, and it is used only for want of a better term. In some respects the judicial process is the opposite of transparent: for example, appellate courts, unlike legislatures, deliberate in private. The term *transparent* should be understood here as meaning only "explaining the reasons for actions taken."

referendum on constitutional claims—claims that were working their way through the judicial process, but at a frustratingly slow pace and with much doubt as to whether they could ever be fully resolved judicially. These claims included the allegations that the government was violating Fourth Amendment rights on a mass basis through warrantless wiretapping, unconstitutionally detaining prisoners without criminal charge or trial (particularly at Guantanamo Bay, Cuba), and subjecting prisoners to illegal and possibly unconstitutional treatment, including torture.

These claims received considerable attention in the election,[147] and the country voted against the candidate of the party that was most responsible for the alleged constitutional violations. But did the electorate, in choosing Barack Obama over John McCain, vote against warrantless wiretapping, detention without trial, and torture? Or did the electorate vote for Obama simply because of the 2008 economic crisis? Or because it hoped he would end the Iraq War? Or for any of dozens of other reasons? No one can say. Yes, many people were upset by what they perceived as constitutional violations, but many were also upset by the severe economic crisis of 2008, many were against the Iraq War, and many had any number of other concerns.[148]

There is no way to know the true reason the electorate voted for Obama in 2008. The election result is, as always, inscrutable. Although some constitutional issues played a prominent role in the 2008 election, the election itself could not resolve those issues.

The same may be said of the 2010 midterm elections. The "Tea Party" prominently advanced legal issues during the election campaign, particularly the claim that the federal government is exceeding its powers under the Constitution.[149] The party had some notable successes, such as the

147. *See, e.g.*, Editorial, *Barack Obama for President*, N.Y. TIMES (Oct. 23, 2008), http://www.nytimes.com/2008/10/24/opinion/24fri1.html; Editorial, *Obama for President*, BOS. GLOBE (Oct. 13, 2008), http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2008/10/13/obama_for_president.

148. In addition, the two main candidates for President were both against torture and in favor of closing Guantanamo Bay, *see Barack Obama for President*, *supra* note 147, so the election said even less than it otherwise might have about the voters' preferences on these issues.

149. *See, e.g.*, Thomas Fitzgerald, *Christine O'Donnell Emerges with Entourage and War Chest*, PHILA. INQUIRER (Oct. 2, 2010), http://articles.philly.com/2010-10-02/news/24999577_1_new-campaign-headquarters-tea-party-express-supporters (quoting Tea Party candidate Christine O'Donnell as planning to "lead the charge . . . for limited, constitutional government" (internal quotation marks omitted)); Kim Murphy, *Alaska Senate Race Keeps Surprises Coming*, L.A. TIMES (Oct. 20, 2010), http://articles.latimes.com/2010/oct/20/nation/la-na-alaska-senate-20101020 (noting that Tea Party candidate Joe Miller "has campaigned on a message of returning to strict constitutional government structures"); Matt Viser, *In Ky. Race, Tea Partier Tones it Down*, BOS. GLOBE (Sept. 20, 2010), http://www.boston.com/news/nation/articles/2010/09/20/in_ky_us_senate_race_rand_paul_tones_it_down (quoting Tea Party candidate Rand Paul as calling for "limited constitutional government" (internal quotation marks omitted)).

election of Senator Rand Paul in Kentucky.[150] But did Tea Party candidates win because of their demand for "constitutional government," or simply because voters were fed up with the nation's poor economy and high unemployment rate? No one knows. As always, the election produced results but articulated no norms.

The failure of the electoral process to articulate explanations for its results means that the process cannot serve as a mechanism for the enforcement of constitutional constraints. In order for politicians to follow the voters' judgment on constitutional issues, they would need to know what that judgment is. But even the politicians involved cannot know for sure why they were elected. As a result, they cannot know what the voters' positions are on any specific constitutional issue.

Therefore, elections cannot really enforce constitutional rights. Again, the 2008 elections provide a good example. A popular constitutionalist might try to argue that the elections established that holding prisoners at Guantanamo Bay without trial is unconstitutional. But as of this writing, more than three years after President Obama took office, the prisoners are still there.[151] Obviously the election did *not* establish a constitutional principle the way a judicial judgment might. This is not an accident; it is the inevitable result of the institutional difference that elections are inscrutable, whereas judicial rulings are transparent.

Of course, one might observe that the judicial process is not perfectly transparent either. Courts deliberate in secret, and judges are not always candid in expressing the reasons that led to their decision.[152] Still, as the popular constitutionalists point out, the arguments for or against a particular mode of constitutional enforcement are comparative.[153] The

150. Mark Leibovich & Ashley Parker, *Tea Partiers and Republican Faithful Share Exuberant Celebrations*, N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/03/us/politics/03scene.html.

151. *E.g.*, Peter Finn, *Guantanamo Detainees Cleared for Release but Left in Limbo*, WASH. POST (Nov. 8, 2011), http://www.washingtonpost.com/national/national-security/guantanamo-detainees-cleared-for-release-but-left-in-limbo/2011/11/03/gIQAJivM3M_story.html.

152. Even judges sometimes accuse other judges of hiding their true reasoning. *E.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring) (accusing the majority of using legislative history as a "makeweight" for a decision arrived at for other reasons); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 66 (1976) (Brennan, J., concurring) (accusing the majority of manipulating standing doctrine so as to dismiss a case the majority simply prefers not to hear).

153. *E.g.*, Waldron, *supra* note 2, at 1389, 1391, 1394. For example, in discussing the legislature's democratic credentials, Waldron acknowledges that legislators' representativeness is imperfect because of defects in the electoral process. *Id.* at 1389. But he notes that their democratic pedigree is still far superior to that of judges. *Id.* at 1394. Similarly, Tushnet acknowledges that "[t]he Constitution is not perfectly incentive-compatible" (that is, it is not perfectly self-enforcing), but he observes that "judges are not perfect either" and that the question is which of two imperfect alternatives gets us closer to our desired ideal. TUSHNET, *supra* note 2, at 108.

judicial process is not *perfectly* transparent, but it is far *more* transparent than the wholly inscrutable electoral process. It is fundamentally different from the electoral process in that it gives reasons for its decisions, whereas the electoral process produces only a result.

c. Precedent Based vs. Non-Precedent Based

The unfocused and inscrutable nature of the electoral process necessarily produces yet another important contrast with the judicial process—the electoral process does not operate within a system of precedent. How could it? Given that there is no way to know what rule a particular election lays down, there would be no way for the electorate to follow that rule in future elections even if it wanted to.

Moreover, following precedent is simply not a norm of the electoral process. The electorate's changing its mind is a perfectly sufficient basis for a different result in a new election. Thus, even if voters turned a politician out of office because of their perception that he had acted unconstitutionally, there would be no guarantee of the same result in a future election.

Therefore, politicians might or might not think it important to avoid allegedly unconstitutional behavior that landed their predecessors in trouble. Politicians might well hesitate to repeat behavior that had caused other politicians to lose their offices. But they might also sense that the temper of the electorate had changed, and they might risk the same behavior again. Elections, therefore, cannot provide long-term redress for constitutional violations. Even if voters "established" in some election that a particular statute is unconstitutional, a subsequent legislature might not repeal it or might pass it again if it were repealed, and the fight would begin anew.

Of course, because judicial precedent can be overruled, one might say that the judicial process never definitively resolves constitutional issues either. But again, the argument is comparative. The judicial process at least operates within a norm of following precedent. If the Supreme Court holds that a statute is unconstitutional, one has a strong expectation that if another legislature passed an identical statute, the courts would strike it down. But one cannot have similar confidence about what the voters would do in the next election.

d. Majoritarian vs. Rights Based

The three points discussed so far are closely connected. They all stem from the basic fact that elections are always about multiple issues. For this reason, elections provide no focused way to resolve a particular constitutional claim, they produce no clear statement of reasons, and they cannot be followed as precedent. A quite different feature of the electoral process, however, is that it is, of course, majoritarian. As numerous writers

have observed, it therefore seems like a poor process for enforcing constraints on majoritarianism.[154]

The majority of voters might like a candidate precisely because of the candidate's willingness to ignore constitutional constraints. One likely reason why politicians would ignore constitutional constraints is that they perceive some political advantage in doing so.[155] This is particularly likely to be true where the constitutional constraint involved provides protection for unpopular or minority groups. Waldron and Tushnet tout the ability of the political process to take minority views and rights seriously,[156] but history shows that politicians or voters often pass laws that impose burdens on unpopular or minority groups or views.[157] Even though the nation is supposedly committed to taking minority rights seriously and respecting the right to be different, there are certainly occasions when violating constitutional rights would produce a political plus rather than the minus posited by popular constitutionalists. On these occasions, elections would fail to remedy the wrong.[158]

The judicial process is nonmajoritarian. The complainant comes to court with a claim of right, not a claim of popularity. Success depends on judicial recognition of the validity of the claim, not upon popular opinion. Judges, being insulated from popular reprisal, are freer than politicians to recognize constitutional protections in contexts where they might not be popular.[159] Of course, as popular constitutionalists observe, judges may not do the greatest job of protecting unpopular or minority groups either.[160] But once again, the argument is comparative. The judicial process is not as intrinsically stacked against minority positions as the electoral process is.

e. Collective vs. Individualized

Finally, the electoral process necessarily requires *collective* action to remedy constitutional violations. As the Supreme Court suggested in *Richardson*, remedying a constitutional violation through the electoral

154. *E.g.*, BICKEL, *supra* note 8, at 23–28; Chemerinsky, *supra* note 6, at 1016, 1022.

155. BICKEL, *supra* note 8, at 25.

156. TUSHNET, *supra* note 2, at 159–60; Waldron, *supra* note 2, at 1383–85.

157. *See, e.g.*, 1 U.S.C. § 7 (2006) (refusing federal recognition to same-sex marriages, even if valid under state law); Okla. Const. art. VII, § 1(C) (providing that the state's courts "shall not consider . . . Sharia Law").

158. For example, the Flag Protection Act, which the Supreme Court struck down in United States v. Eichman, 496 U.S. 310 (1990), passed the House of Representatives by a vote of 371 to 43, 135 CONG. REC. H6997 (daily ed. Oct. 12, 1989), and the Senate by a vote of 91 to 9, 135 CONG. REC. S12655 (daily ed. Oct. 5, 1989). These lopsided votes suggest that, notwithstanding its constitutional infirmity, the statute was very politically popular.

159. BICKEL, *supra* note 8, at 25–26.

160. *See* TUSHNET, *supra* note 2, at 8; *see, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding the "exclusion order" imposed against persons of Japanese ancestry during World War II).

process requires those who believe the violation is occurring to "convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."[161] The electoral process does not allow individuals, by themselves, to remedy a constitutional violation. Effectively, the ability to remedy constitutional violations in the electoral process does not belong to individuals; it can be achieved only by a substantial group acting together.

By contrast, the judicial process is individually engageable. A plaintiff can come to court alone and fight against the collective might of the government. The government may have advantages even in the judicial process (more resources, better lawyers, etc.), but the process effects a substantial leveling of the playing field. Certainly, the plaintiff is not required to collect a whole group of like-minded people together before being entitled to a remedy.

This point is particularly significant for constitutional violations that fall on individuals or on small groups. For example, as noted earlier, the alleged constitutional violation in the impeachment of Judge Nixon affected him alone. It would be impossible to gather a group of impeached federal judges who were disgruntled by the procedure followed in their Senate trials. Similarly, there are many governmental actions that primarily affect an individual or a small group. It would be particularly hard to use the electoral process to remedy a claim of constitutional violation with respect to such actions. The judicial process, by contrast, is well suited to remedy constitutional wrongs that fall upon a single individual.

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For all these reasons, the suggestion that people aggrieved by constitutional violations seek a remedy in the electoral process seems extremely dubious. In the debate over judicial review, considerable focus has been placed on *one* difference between the electoral and judicial process—the fact that the electoral process is democratic, whereas the judicial process relies on unelected, unaccountable decision makers. As agreed above, that is certainly an important distinction between the two processes. But there are also other vitally important differences that explain why the judicial process is much better suited than the electoral process for the enforcement of constitutional rights and, indeed, why it seems almost essential to the very concept of having constitutional rights. Having a focused, transparent, precedent-based, individualized mechanism available for redressing constitutional grievances is entirely different from remitting such grievances to a process that is unfocused and inscrutable, that does not rely on precedent, that requires collective action, and that is immensely expensive to boot. It is hardly an exaggeration to say that a "right" enforceable only in such a process is no right at all.

161. United States v. Richardson, 418 U.S. 166, 179 (1974).

B. ENFORCING THE CONSTITUTION THROUGH THE POLITICAL PROCESS

The previous section demonstrates that the electoral process has both practical and theoretical differences from the judicial process that make it a poor mechanism for the enforcement of constitutional requirements. But perhaps, the reader might think, the discussion so far has been somewhat naïve. Courts and commentators do speak of taking constitutional grievances "to the ballot box," and, as demonstrated above, some of their statements suggest that at least some people intended this idea to be literally applied.[162] It is, therefore, important to consider that suggestion. (It is also important for another reason that will become clear shortly.)[163]

Nonetheless, the discussion so far fails to capture the richness of the process by which popular constitutionalists imagine that "the people" will enforce the Constitution. Popular constitutionalists do not imagine that the people will enforce the Constitution *solely* through the electoral process. Rather, they imagine that the people will use the *whole political process*, of which the electoral process is but a part, with the ultimate goal of achieving success in the legislature.[164] The people, in this view, will enforce the Constitution partly through elections, but also through free speech, through exercise of the right to petition, through interest groups, and through all the other means that people use to attempt to bring about legislative change.[165] The electoral process is important, but an interest group does not always have to turn a politician out of office in order to get what it wants; the group need only show enough electoral strength to make the politician *fear* being turned out of office in order to get at least some attention paid to its desires.[166] Besides, there is also the possibility of convincing the politician that a claim is just and should be heeded simply because it is the right thing to do. Thus, the full political process might produce good results for constitutional grievants, ultimately winning them legislative success, even if they lack the electoral strength to vote politicians out of office.

People have, in fact, had some notable successes in using the political process to remedy constitutional grievances. The issue of same-sex marriage provides an example. At least in federal court, the judicial process does not currently appear to be the most hospitable forum in which to raise the claim that the Constitution prohibits discrimination against same-sex marriage,[167]

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162. *See supra* text accompanying notes 111–28.

163. *See infra* Part II.B.4.

164. *See, e.g.*, Waldron, *supra* note 2, at 1349, 1360.

165. *See* Kramer, *supra* note 1, at 27; Waldron, *supra* note 2, at 1349.

166. *See* Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 191–94 (1991).

167. National gay-rights groups have carefully refrained from pursuing the same-sex marriage issue in federal court, although two prominent lawyers have chosen to bring a federal lawsuit raising an equal-protection challenge. *See, e.g.*, John W. Dean, *The Olson/Boies Challenge to California's Proposition 8: A High-Risk Effort*, FINDLAW (May 29, 2009), http://writ.news.

but gay-rights groups, working through the political process, have succeeded in getting several state legislatures to permit same-sex marriage.[168] This full process of political agitation is, presumably, just what popular constitutionalists have in mind when they say that the scope of constitutional rights should be determined through the political process.

This section, therefore, discusses whether the whole political process corrects the deficiencies of the electoral process discussed in the previous section. Again, let us assume a world without judicial review, as posited by popular constitutionalists, and imagine that an individual or group has a constitutional grievance. If such a complainant were not limited to elections, but could seek legislative relief through the full political process, would a remedy be available?

In fact, this section suggests the political process, like the electoral process, differs substantially from the judicial process, and, once again, its majoritarian nature is just part of the story. The political process has other institutional characteristics that make it a poor mechanism for the enforcement of constitutional rights. In some respects the comparison between the political and judicial processes is like the comparison between the electoral and judicial processes (and to the extent that it is, the discussion can be brief), but in other respects it is different.

1. Focused vs. Unfocused

The previous section noted that the judicial process provides a focused mechanism for the consideration of a particular claim of right, whereas the electoral process does not. The political process lies between the two. It is *capable* of coming to a focused judgment on a claim of right, but its vagaries might also result in the claim becoming entangled with other issues in a way that blocks a clear judgment.

As Waldron observes, a legislature is capable of debating the merits of a constitutional claim.[169] In the course of passing a bill, a legislature could debate and reach a judgment on whether the bill as a whole, or any particular provision of it, violates constitutional rights. If some particular provision in the bill might be unconstitutional, the legislature could debate an amendment to eliminate that provision. By voting up or down on the

findlaw.com/dean/20090529.html (discussing the strategic decision of national gay-rights groups to avoid litigation). That lawsuit has succeeded at the district-court level, and on a narrow basis before an appellate panel as well, *see* Perry v. Brown, Nos. 10–16696, 11–16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012), but its fate, particularly in the Supreme Court, remains highly uncertain.

168. *E.g.*, Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State To Pass Law*, N.Y. TIMES (June 24, 2011), http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html; Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES (Apr. 7, 2009), http://www.nytimes.com/2009/04/08/us/08vermont.html.

169. Waldron, *supra* note 2, at 1384–85.

amendment, the legislature could reach a clear, focused judgment on the constitutional question involved.

However, just because the legislative process is capable of such debate does not guarantee that it will take place. The legislature might choose to include an unconstitutional provision as part of an overall bill. Citizens and interest groups could try to get the unconstitutional provision deleted, but they would have no way to force the legislature to vote on that provision separately. In the end, the people might have to decide whether they support the overall bill, notwithstanding the presence of an allegedly unconstitutional provision in it.

In such a case, the constitutional issue would get entangled with other issues. The process would be more focused than the electoral process inasmuch as the constitutional issue would get entangled with fewer other issues. In the electoral process, every issue facing the electorate is always entangled with every other issue, whereas in the legislative process, entanglement is limited to such issues as find their way into the same bill. Still, even a little entanglement could easily block a clear judgment on a constitutional issue. If, for example, a bill would make a landmark change in the availability of health insurance but would, at the same time, limit a woman's ability to obtain insurance coverage for abortion in a way that some believe to be unconstitutional,[170] citizens who favor health care reform, but oppose the abortion restriction on constitutional grounds, would face a dilemma. Of course, they could try to get the abortion provision deleted, but they would have no mechanism to force a vote on that particular issue. If the legislature chose to consider the bill as a whole without voting separately on the potentially unconstitutional provision, citizens and interest groups would face the tough decision of choosing between supporting a beneficial law and thereby implicitly accepting the potential constitutional violation, or opposing a bill that would help many people in order to protect a particular group's constitutional rights.

One might argue that, if the legislature adopts a law, it has necessarily reached a judgment that all parts of the law are constitutional—especially in a world without judicial review, in which the legislature would have sole responsibility for the constitutionality of legislation. But this is not really so. This could be said of the subgroup of legislators who are directly responsible for drafting the particular law in question (say, the members of the relevant committee). If that subgroup, however, chooses to embed a potentially unconstitutional provision in a bill, the legislature as a whole still might not

170. *Cf.* Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 222(e) (2009) (prohibiting abortion coverage as part of the minimum benefits package). This is not to suggest that the cited provision *is* unconstitutional, but only that it, or a similar provision, might raise a constitutional issue. Governments are not required to fund abortions, *see* Maher v. Roe, 432 U.S. 464 (1977), but a restriction on a woman's ability to use her own money to obtain insurance coverage for abortion could at least raise constitutional questions.

consider the constitutional issue discretely. Passage of the bill might not reflect the legislature's *collective* judgment that all parts of the bill are constitutional.

Indeed, even those legislators who were concerned about a particular provision's constitutionality might be unable to force a debate or a vote on the constitutional issue. It would depend on the legislative leadership and the legislature's rules. Individual legislators might or might not be able to force a clean, up-or-down vote on a particular provision of a bill.[171] They might only have the option to vote up or down on the bill in its entirety. In such a case, again, the constitutional issue would be entangled with other issues, and the legislators, like voters in an election, would have to weigh the negatives of the perceived constitutional problem against the positives that would come from enactment of the bill that they favored.

Indeed, legislators frequently state that they voted for a particular bill even though they were not happy with every provision in it.[172] Legislators recognize that while they can work to improve bills, in the end they must vote for a bill as a package and may not be able to control every detail of it. They have to weigh its positives against its negatives and make their best decision on the bill overall. The arguable unconstitutionality of a particular provision of a bill would, similarly, have to be weighed against the good done by the bill overall.

Therefore, while the legislative process is certainly superior to the electoral process in terms of its ability to provide a focused mechanism for debating and voting on constitutional issues, it is still inferior to the judicial process in this regard. The legislative process *may* yield a clear decision on a constitutional issue, but it may also entangle issues and force voters, and even legislators, to decide whether they support an overall bill despite a potential constitutional problem.

2. Inscrutable vs. Transparent

Similar observations apply to the question of whether the legislative process is, like the electoral process, inscrutable, or, like the judicial process,

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171. This would be particularly true in the U.S. House of Representatives, where the full body may consider legislation under a "closed rule" that limits amendments. CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 291–96 (1989). In the Senate, any senator may raise a point of order that a pending bill is unconstitutional, *id.* at 506, although in practice such a procedure is rare. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 120 (2008).

172. *See, e.g.*, Press Release, Stephanie Herseth Sandlin, U.S. Representative, Comments on Stimulus & Recovery Package Conference Negotiations (Feb. 11, 2009), *available at* http://www.lexisnexis.com/lnacui2api/auth/checkbrowser.do?rand=0.6727854520731715&cookieState=0&ipcounter=1&bhcp=1 (quoting a U.S. Representative who explained that she voted for the American Recovery and Reinvestment Act even though "no bill is perfect, and this bill is not perfect").

transparent. Again, it lies somewhere between the two. Unlike the electoral process, the legislative process is at least capable of giving reasons for its decisions. Legislators can, either individually or collectively, explain why they believe a certain statutory provision to be constitutional or unconstitutional.[173] But once again, the legislative process does not guarantee this result. Legislators may choose not to give reasons. Also, as suggested in the previous subsection, a legislature may choose to pass a bill without ever holding a vote on a specific, potentially unconstitutional provision within the bill. In such a case, it seems particularly likely that legislators might choose to cast their votes without stating their reasoning as to the constitutionality of that provision.

A couple of examples show these different possibilities. On the one hand, when the Senate debated the District of Columbia House Voting Rights Act of 2007, which would have given the District of Columbia a voting representative in the U.S. House of Representatives, senators expressed their views on the obvious constitutional concerns that the bill raised.[174] A legislative debate on constitutionality, then, is certainly possible. But in that case the bill was closely focused on the issue of D.C. voting rights,[175] and the constitutional question went to the heart of the bill. By contrast, when Congress, in 1988, amended the diversity-jurisdiction statute to provide that aliens admitted for permanent U.S. residence would be deemed citizens of the state in which they reside,[176] it did so as part of a substantial bill that covered numerous topics,[177] and members of Congress did not express a view on the constitutional issue that subsequently arose as a result of that particular change.[178] So a potentially unconstitutional provision may be

173. Legislators are more likely than judges to give reasons individually, rather than subscribing to a single opinion. As courts learned long ago, giving reasons seriatim dilutes the power of the process to articulate a norm; it is better for the decision makers to subscribe to a single opinion. But legislators are at least capable of giving reasons, and a committee report, for example, may provide a suitable vehicle for giving something like an "official" explanation for why a particular statutory provision is constitutional. A statute may also contain a "findings" section that could give reasons.

174. 153 CONG. REC. S11626–32 (daily ed. Sept. 18, 2007). Obviously, the concern is that the Constitution provides representation in the House of Representatives to states, and the District of Columbia is not a state.

175. *See* S. 1257, 110th Cong. (2007).

176. 28 U.S.C. § 1332 (2006). This provision was recently amended to cure the constitutional problem discussed in the text. *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 101, 125 Stat. 758, 758 (codified as amended at 28 U.S.C. § 1332(a)).

177. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 203, 102 Stat. 4642, 4646 (1988) (codified as amended at 28 U.S.C. § 1332). The full statute covered over thirty pages in the Statutes at Large.

178. The problem was that the statute apparently instructed district courts to hear, under diversity jurisdiction, certain cases in which an alien was a party on both sides of the controversy (if at least one of the aliens was "deemed" to be a citizen of a state), which might be outside the scope of the judicial power under Article III. *E.g.*, Saadeh v. Farouki, 107 F.3d 52, 54–55 (D.C.

enacted without discussion of the constitutional issue. This example also brings out the important point that a legislative debate on a law's constitutionality may not occur simply because the relevant constitutional problem is not spotted during the legislative process. The judiciary, by contrast, can examine the law's constitutionality at any time after it is passed, and so is available whenever a constitutional problem with the law comes to light.[179]

3. Precedent Based vs. Non-Precedent Based

Like the electoral process, the legislative process lacks a system of precedent. One legislature may repeal what a prior legislature enacted or re-enact what a prior legislature repealed. Of course, as observed earlier, courts also overrule prior decisions, but at least courts operate within a system that takes precedent as its starting point and regards departure from previous decisions as an exceptional circumstance that requires explanation. In the legislature, there is no shame in changing a statute because the legislative majority has changed.[180] Thus, even if the legislative process established a constitutional "right," that right would remain subject to legislative incursions or outright repeal at any time.

4. Mandatory vs. Discretionary

The first two difficulties with the legislative process discussed above are really symptoms of the most important structural distinction between the legislative and judicial processes: the judicial process is *mandatory*, whereas the legislative process is *discretionary*. Part of the reason why legislators may or may not vote cleanly on a constitutional issue, and may or may not give reasons for their result, is that the legislature has discretion whether to act at all. The legislative process is quite different from the judicial (and even the electoral) process in this regard.

Plaintiffs can invoke the judicial process as a matter of right. If a plaintiff presents a court with a justiciable case that is within the court's

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Cir. 1997). The history of the statutory provision suggests that members of Congress intended it to apply in circumstances where it would have the effect of contracting diversity jurisdiction (which would occur in cases in which an alien admitted to permanent residence and residing in a state sues or is sued by a citizen of that same state), and that they did not realize that in some circumstances the provision could have the potentially unconstitutional effect of expanding diversity jurisdiction. *See id.* at 57–60 (reviewing the legislative history).

179. Of course, this assumes the existence of a justiciable case. *See infra* Part II.B.4 for a discussion of the impact of the justiciability requirements.

180. Currently, for example, most Republicans are expressly running on their desire to repeal the Patient Protection and Affordable Care Act ("Obamacare"), and some also wish to repeal the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See, e.g.*, Ezra Klein, *At the Republican Debate, Who Would Bring You the Least Government?*, WASH. POST (Oct. 11, 2011), http://www.washingtonpost.com/business/economy/at-the-republican-debate-who-would-bring-you-the-least-government/2011/10/11/gIQALo13dL_story.html.

jurisdiction, the court must decide the case. The plaintiff might, of course, lose, but at least the plaintiff receives a decision on his claim. As Chief Justice Marshall observed in *Cohens v. Virginia*:

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.[181]

The legislative process, by contrast, is discretionary. Citizens have no guaranteed way to invoke it. The Petition Clause of the Constitution ensures that citizens have the right to *ask* for legislation, but it does not guarantee that they will receive an answer—not even the answer "no."[182] Citizens may argue to legislators that existing law must be changed because it is unconstitutional, but the legislature may choose to ignore their complaints indefinitely.[183]

The discretionary nature of the legislative process is its most serious defect as a remedy for constitutional violations. Even the electoral process, for all its difficulties, is mandatory. Elections occur at required intervals.[184] But the legislative process can hardly be an effective remedy for constitutional violations when citizens have no guaranteed way even to invoke the remedy.

Of course, one might argue that if the legislature takes no action on a constitutional grievance put to it by "the people," then the legislature is, effectively, taking the view that the grievance is meritless. But that is not so. Just as silence is generally not acceptance,[185] a legislature's failure to adopt a measure does not prove that the legislature agrees with the opposite of that measure. There are innumerable reasons why a legislature may fail to act,

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181. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

182. Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."); We The People Found., Inc., v. United States, 485 F.3d 140, 143 (D.C. Cir. 2007) ("[T]he Petition Clause does not provide a right to a response or official consideration.").

183. *Cf.* Kramer, *supra* note 1, at 27 (noting that, before protesting it through action, American colonists challenged the Stamp Act by petitioning Parliament, but Parliament ignored the petitions and failed even to consider them).

184. In some Parliamentary systems, such as that of Great Britain, the Parliament (effectively, the majority party within the Parliament) has discretion as to when to call an election. But there is, at least, an outer time limit between elections (in Great Britain, five years). *See* Septennial Act, 1715, 1 Geo. 1 St. 2, c. 38 (Eng.); Parliament Act, 1911, 1 & 2 Geo. 5, c. 13, § 7 (Eng.).

185. RESTATEMENT (SECOND) OF CONTRACTS § 69 (1979).

and its inaction in the face of a constitutional grievance does not imply a legislative judgment that the existing statutes are constitutional.

Indeed, even if a clear majority of citizens believed that an existing law is unconstitutional, there would be no guarantee that they could get the legislature to consider their grievance, much less to act on it, because there are many obstacles to achieving legislative success even for measures favored by a popular majority. The legislature might be malapportioned, as is the case with the U.S. Senate. Even in a properly apportioned legislature, the vagaries of districting might result in a legislature that does not accurately reflect popular sentiment. The two houses of a bicameral legislature might represent different constituencies, so that legislation might pass through one house but not the other. In either house, legislation might have to pass through a committee with different views from those of the house as a whole. A committee chair alone might have the power to block legislation. The rules of the legislature might permit a minority to block legislative action, as in the U.S. Senate.[186] The executive might have a veto over legislation.

Finally, even if all the many actors in the legislative process agreed that a constitutional grievance really ought to get fixed, the legislature still might not be able to provide the remedy simply because of time pressure. The legislature might be overwhelmed with other, more pressing matters. The judicial process also entails famously frustrating delays,[187] but at least it uses a system of "parallel processing" in which not every matter has to go through a single venue. The legislature might never find time to remedy a claimed constitutional violation, but the judicial system will eventually find some judge who can give attention to the matter.

In sum, the people can certainly try to remedy constitutional grievances through the legislative process, but they face the daunting obstacle that the legislative process cannot be invoked as a matter of right. If a legislature chooses, it can, as Waldron observes, hold a debate on a constitutional matter and reach a constitutional judgment. But it can always choose *not* to do so, and the choice may be based not necessarily on the legislature's collective judgment that the constitutional grievance is meritless, but simply on its discretion to do nothing.

This fundamental difficulty with the legislative process is another reason why it is so important to first examine the institutional reasons why the electoral process does not serve as an effective remedy for constitutional violations.[188] As remarked earlier, the previous section, by focusing only on

186. *See* S. COMM. ON RULES AND ADMIN., 111TH CONG., STANDING RULES OF THE SENATE R. XXII (2009), *available at* http://rules.senate.gov/public/index.cfm?p=RuleXXII (requiring a three-fifths vote to close debate on any measure).

187. *See, e.g.*, WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1 (complaining of "the law's delay").

188. *See supra* Part II.A.

the electoral process, might seem to reflect a naïve understanding of what popular constitutionalists mean when they suggest that "the people" could use popular methods to enforce the Constitution.[189] But while the electoral process is merely a part of the process popular constitutionalists have in mind, it is the *only* part of the process to which the people have guaranteed access. What are the people to do if they attempt to remedy a constitutional wrong through the legislative process, but the legislature simply ignores their grievance? In a world without judicial review, the people would be thrown back on the electoral process as their only remedy. But, as the previous section showed, that process is even less capable of remedying constitutional violations than the legislative process. The combination of the discretionary nature of the legislative process with the unfocused and inscrutable nature of the electoral process is a double obstacle that makes the overall political process a poor vehicle for enforcement of constitutional rights.

Once again, one might try to counter these arguments by pointing out that the judicial process is not perfect in this regard either. The judicial process, although ostensibly mandatory, is in practice not perfectly so. The judicial process is encumbered by justiciability requirements, including, most importantly, the standing requirement, whereas the political process is at least open to all, without regard to who is technically "injured" by a constitutional grievance. Moreover, even in the face of an apparently justiciable case, the courts have many escape valves—praised by some as "the passive virtues"[190]—through which they can wriggle. Courts can sometimes find a justiciability problem even when one is not really there,[191] and the political question doctrine is an official mechanism for declining to right certain constitutional wrongs on the ground that they are not suitable for judicial consideration. Some scholars even argue that the political question doctrine confers a general judicial discretion to decline to decide otherwise justiciable cases.[192]

A full answer to these arguments would be complex. I have elsewhere discussed my disagreement with much of justiciability doctrine,[193] and other scholars have argued that the political question doctrine, although removing some questions from the judicial purview, does not permit courts to exercise general and unprincipled discretion in deciding what to decide.[194] But for purposes of the present discussion, the short answer, once again, is that the

189. *See supra* notes 164–66 and accompanying text.

190. BICKEL, *supra* note 8, at 111–98.

191. *See, e.g.*, Naim v. Naim, 350 U.S. 985 (1956) (dismissing an obviously justiciable case on spurious grounds).

192. BICKEL, *supra* note 8, at 187, 197.

193. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007).

194. *E.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959).

argument is comparative. It is not necessary to prove that the judicial process is perfectly mandatory. It is only necessary to observe that it comes far closer to this ideal than does the legislative process. There are some exceptions to the general principle that courts must decide a claim of right properly brought before them, but it is undoubtedly the general principle.[195] Legislatures, by contrast, have the discretion to do nothing, even when presented with a claim that current law violates the Constitution. It is the discretionary nature of the legislative process, perhaps more than anything else, that makes the process a poor vehicle for enforcing constitutional rights.

5. Majoritarian vs. Rights Based

Like the electoral process, the legislative process is majoritarian. As noted earlier, the existing literature has focused primarily on this point. As with the electoral process, the majoritarian nature of the legislative process makes it a poor vehicle for the enforcement of constraints on majoritarianism. The Constitution exists to put certain points beyond the power of ordinary political processes and to guarantee certain rights against invasion from those processes. This point is of great importance, but it does not need to be addressed here at length, both because it is already well discussed in existing literature and because the arguments made above, in connection with the electoral process,[196] apply here as well.

One additional point is, however, worth noting. The popular constitutionalists like the idea of remitting constitutional questions to the legislative process because that process is majoritarian. But the claim of the legislative process to be majoritarian with regard to constitutional questions is, in fact, highly imperfect.

To say that the legislative process is "majoritarian" is to suggest that the judgment of the legislature on a question can be expected to reflect the collective judgment of the populace on that question. But can we have any real confidence that the majority of the populace believes, for example, that the Constitution does not require publication of the CIA's budget? In fact, because of the institutional characteristics of the electoral and legislative processes discussed herein, the answer is no. It is entirely possible that most of the populace, if their opinion about the meaning of the Statement and Account Clause were specifically solicited, would say that it does require publication of the government's entire budget. And yet that same majority might find the issue insufficiently important to consider as they make their electoral choices.

There would therefore be little, if any, electoral pressure on members of Congress to change the law to conform to the majority will on this

195. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

196. *See supra* Part II.A.2.d.

constitutional question. Because the electoral process provides no focused opportunity for "the people" to vote on individual constitutional questions, legislators need respond only to those issues that could be expected to play a meaningful role in the electoral process. With regard to many constitutional issues, legislators might confidently expect that the issue will carry little weight in voters' choices once it is entangled with other, more important issues. Thus, the unfocused nature of the electoral process spills over into imperfect majoritarianism in the legislative process.

Of course, as the popular constitutionalists have observed, and as is noted above, the arguments for and against methods of constitutional enforcement are comparative. The legislative process is only imperfectly majoritarian, but the judicial process is hardly majoritarian at all. The judicial process gets some majoritarian input from the political role in the selection of judges, but because judges are not politically accountable once in office, the judicial process is, on the whole, nonmajoritarian. Thus, to the extent that majoritarianism is thought to be a virtue in constitutional interpretation, the legislature clearly wins over the judiciary. The point here is not to deny the legislature's superior claim to majoritarian status but simply to point out that even that claim is imperfect.

6. Collective vs. Individualized

As observed earlier,[197] the judicial process is individually engageable, whereas the electoral process necessarily requires collective action to remedy constitutional violations. A final, vital problem with the legislative process is that it is much closer to the electoral process in this regard.

Technically, one might say that the legislative process is individually engageable. Any person can ask for legislation. But practically, as noted earlier, the legislative process is not "engageable" at all.[198] Anyone, or any group, can seek legislation, but no one has a right to any response. The real question, therefore, is what kind of action is likely to yield a legislative response. While it is not impossible for a single individual to instigate legislative action, getting a response out of a legislature typically requires collective effort. This feature of the legislative process would tend to make many constitutional injuries, such as those falling on individuals or on small or minority groups, particularly difficult to remedy.

Moreover, many widespread constitutional violations might fare no better. The collective nature of the legislative process is particularly important because of the many free-rider and collective-action problems that it generates. As social scientists have long observed, the legislative process poses obstacles to reforming laws that slightly burden a broad group, particularly if, at the same time, the law provides substantial benefits to a

197. *See supra* Part II.A.2.e.

198. *See supra* Part II.B.4.

small, concentrated group.[199] The legislative process makes it all too easy to pass or preserve "rent-seeking" laws that benefit a small group at the expense of the public interest.[200]

This point could easily apply to a constitutional violation. A law might slightly violate the constitutional rights of many people, while greatly benefiting a concentrated group. In such a case, the legislative process might provide no remedy because of collective-action problems.

The popular constitutionalists envision the legislature as fully capable of having rational, public-spirited debates about constitutional issues.[201] This picture might even be accurate as to issues that truly excite the passions of the general populace. One can imagine a legislature having a deep debate about the constitutionality of abortion restrictions[202] or laws prohibiting same-sex marriage because the populace is fully engaged in these issues. But not every constitutional issue—not even every constitutional issue involving our most important freedoms—is of the same grand character. Even as to our most important constitutional rights, incursions can be large or small. On many constitutional issues, it seems likely that legislative debate would suffer from the same defects that infect debate over any law that harms the populace only slightly while providing substantial benefits to a concentrated group.

Consider an example. "Food libel" statutes, which provide a cause of action for disparagement of perishable commodities,[203] pose a threat to freedom of speech, which is one of our most important constitutional rights (even Professor Tushnet agrees that it matters whether the people can enforce their right to free expression).[204] Yet the speech such laws target is speech that most people have no great desire to engage in. Such laws therefore make only a small incursion on the rights of the general populace. At the same time, they provide a benefit of considerable importance to the food industry. It is easy to see how such laws could get onto the books in numerous states,[205] despite the obvious First Amendment issues they raise.[206]

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199. *E.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (21st prtg. 2003); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227–33 (1986).

200. *E.g.*, OLSON, *supra* note 199; Macey, *supra* note 199, at 227–33.

201. *See* Waldron, *supra* note 2, at 1349–50, 1382–85.

202. *See id.* at 1384–85.

203. *See* David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 194–201 (1998) (reviewing such statutes).

204. Professor Tushnet derides most of the Constitution's provisions as not "thrill[ing] the heart," TUSHNET, *supra* note 2, at 10, and suggests that he does not particularly care whether most of them are enforceable, *id.* at 116, but he recognizes freedom of expression as one of the "fundamental guarantees," *id.* at 11.

205. *See* Bederman, *supra* note 203, at 195–96 (noting thirteen states that have enacted such laws).

In a world without judicial review, anyone desiring to challenge such laws on constitutional grounds would face the formidable, and probably impossible, task of getting "the people" sufficiently exercised about this minor incursion on their freedom of speech. Most individuals, even if made aware of the First Amendment problem posed by food-libel laws, would rationally choose to do nothing about them, since it would not be worthwhile for most individuals to fight hard to change a law that they have no great desire to disobey anyway. Meanwhile, food-industry representatives would lobby hard to keep the laws on the books, and their efforts would be backed by comparatively greater resources. It is not hard to predict who would win this legislative battle.

And yet, although the constitutional claim against food-libel laws would probably lose in the legislative arena, the claim is hardly trivial. It lies at the heart of the interests protected by the First Amendment. If the food supply were unsafe, calling attention to the problem would be a matter of great public moment. Free speech and a free press could play a vital role in protecting the populace against the hazards posed by a food supplier that chooses to sacrifice safety in the name of profit. But again, because unsafe food poses only a slight risk to the life and health of any one individual, most individuals would not have a great interest in fighting hard to preserve the freedom to criticize foods, and it would therefore be difficult to win the battle against food-libel laws legislatively.

Thus, collective-action problems might block legislative remedies for constitutional violations, even for violations of our most cherished freedoms.[207] The judicial process, being individually engageable, is far less susceptible to such collective-action problems. To be sure, one might point to some collective-action problems in the judicial process too. The process does require a single person or interest group to take on the burden and expense of litigating a claim, even though the resulting benefit might accrue to society at large, and a small group that benefits from a constitutional violation could be expected to fight hard in the courts, as it would in the

206. *See id.* at 202 (arguing that most states' food-libel statutes do not satisfy basic requirements of the First Amendment); Howard M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323, 403–04 (2000) (concluding that food-libel statutes ignore fundamental free-speech principles).

207. The collective-action problem is just one of the pathologies of the legislative process that might infect constitutional debates in a world without judicial review. In such a world, we would also expect a sharp increase in constitutional violations that harm the populace at large while benefiting the special class of legislators themselves, especially by making it harder to turn legislators out of office. Pathologies of this kind would be particularly hard to remedy through the legislative process because they would affect the process itself. Malapportionment, for example, could be impossible to remedy through the legislative process precisely because those that it harms are thereby disadvantaged in that very process. Similarly, laws prohibiting speech on political issues could be hard to change because speech is a vital tool in promoting such change. These may be the kind of pathologies that Professor Kramer has in mind as possibly justifying judicial review. *See* Kramer, *supra* note 1, at 166.

legislature. But experience shows that ideological plaintiffs are willing to take on such battles, and in the courts, the playing field is much more level. The plaintiff is not required to achieve active support from a widely dispersed populace that is only slightly affected. The process is not intrinsically rigged against claims of minor incursions to important freedoms. Once again, the judicial process is not perfect, but, as a comparative matter, it is far less susceptible to collective-action problems than the legislative process.

* * * * *

In sum, the legislative process does have certain important advantages over the electoral process as a mechanism for the enforcement of constitutional rights. It is at least capable of giving focused consideration to a constitutional claim and of passing judgment on such a claim, complete with a statement of reasons.

But the legislative process also has a huge disadvantage in that it is discretionary. A legislature might choose to ignore constitutional grievances, and "the people" would have no way to force the legislature into action. The legislature might also choose to entangle a constitutional issue with other issues in a way that blocks a clear judgment, and the people would have no way to demand a discrete vote on the constitutional question. And even where a legislature focuses cleanly on a constitutional issue, the legislative process has the disadvantage of being beset by collective-action problems. Particularly where a constitutional violation harms people only mildly and benefits a concentrated group, those desiring change may find it impossible to collect enough support to achieve legislative success.

These institutional features of the legislative process, like the features of the electoral process considered in the previous section, must be considered in addition to the feature that has received the most attention in the existing literature—its majoritarian nature. The existing literature correctly notes that the majoritarian nature of the legislative process makes the process a poor vehicle for enforcing constraints on majoritarianism. But once again, that is only part of the story. Other features of the process, particularly its discretionary quality, also make a right that is enforceable only through the legislative process hardly something that can be called a "right" at all.[208]

208. One other institutional distinction between the legislative and judicial processes has received some previous attention: defenders of judicial review observe that legislation is abstract and generalized, whereas judicial review acts on particular cases. Defenders of judicial review consider this to be an institutional advantage. *E.g.*, BICKEL, *supra* note 8, at 26. However, this Article does not rely on this distinction because, as the popular constitutionalists correctly point out, this argument is unconvincing. Defenders of judicial review claim that courts have an advantage because they see how their decisions will affect particular, flesh-and-blood cases. But in fact, cases become more abstract as they ascend through levels of the judicial system, and decisions at the highest level are, in effect, abstract decisions that could be made just as well in the absence of any particular case. Waldron, *supra* note 2, at 1379–80; *see also* David M. Driesen,

III. THE CASE FOR JUDICIAL REVIEW

The foregoing analysis of the institutional differences between the judicial process and the electoral and legislative processes permits a new understanding of the case for judicial review. Judicial review is superior because of *all* of its institutional characteristics, not merely because of the political insulation of judges.

In considering the normative case for or against judicial review, the previous literature has focused predominantly on the question of whether judges might be expected to be *better* at interpreting the Constitution than legislators.[209] Defenders of judicial review have claimed that judges will do a better job of interpreting the Constitution because they will not be subject to the majoritarian pressures that come from having to seek reelection. Freed from these pressures, judges will apply the Constitution fearlessly and honestly, even when constitutional restrictions on majoritarian rule clash with the desires of short-term majorities. Legislators, however, will feel pressure to cater to short-term political interests at the expense of long-term principles.[210]

Popular constitutionalists, by contrast, have touted the ability of legislators to think deeply and honestly about constitutional rights.[211] They claim that legislators can reach judgments that respect the rights of minority groups while also having a democratic pedigree far superior to anything a judicial judgment can provide.[212] Popular constitutionalists also claim that legislative judgments on constitutional questions are likely to be superior to judicial judgments because the legislature is freer to focus on the full range of moral and normative issues involved in addressing a question of right, whereas courts focus unduly on constitutional text and precedent.[213]

In other words, both sides of the debate have focused on the question of whether courts or legislatures might be expected to produce *better* interpretations of the Constitution. That point is indeed an important factor in the debate over judicial review. Still, it is just one factor. Equally important is what the existence or nonexistence of judicial review means for the enforceability of constitutional rights.

Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication, 89 CORNELL L. REV. 808 (2004).

209. As noted earlier, much of the existing literature also debates the question of whether textual and historical analysis supports the conclusion that the U.S. Constitution provides for judicial review. Such analysis is also quite important to the question of whether judicial review should be practiced in the United States, but this Article is focused solely on normative and institutional considerations.

210. *E.g.*, BICKEL, *supra* note 8, at 24–26.

211. *E.g.*, Waldron, *supra* note 2, at 1349, 1384.

212. *E.g.*, *id.* at 1349–50.

213. *Id.* at 1385.

The core of the case for judicial review is that a society's Constitution should be enforceable via a usable mechanism that creates an appropriate likelihood that violations of the Constitution will be cured. The Constitution is a set of instructions from the ultimate sovereign of society—the people—vesting power in the officials who make up their government while at the same time limiting that power. The people should want the constraints they impose on their government to be real, enforceable constraints, which requires that the constraints be safeguarded by an institution that has the necessary characteristics to serve as an effective enforcement mechanism.

As this Article has demonstrated, judicial review provides a mechanism for enforcement of constitutional constraints that is vastly superior to the electoral or legislative processes. This is true because of all the institutional characteristics of judicial review, not just because of the political insulation of judges. A grievant who believes his constitutional rights have been violated can seek a remedy in the judicial process as a matter of right, without having to enlist support from others. The process will focus specifically on his claim, decide it free of entanglement with other issues, articulate reasons for the decision, and maintain rights thus established through a system of precedent. The grievant might lose but would at least obtain a result. Such a process provides a real enforcement mechanism for constitutional constraints. The rights that it protects can therefore really be called rights.

Without judicial review, as this Article has demonstrated, the grievant would be remitted to enforcement processes that have completely different structural characteristics. The grievant could, as the popular constitutionalists observe, seek relief in the electoral and legislative processes. But while these processes would be available, they lack the institutional characteristics of the judicial process, and the likely result would be considerable underenforcement of constitutional norms.

Either process would, first of all, compel the grievant to win the support of many others for his claim.[214] Moreover, even for a substantial group sharing the same grievance, neither process is institutionally capable of providing strong enforcement of constitutional constraints. If the group tried to seek redress through the electoral process, that process would entangle its claim with every other possible issue facing the electorate and might not provide any relief even if the group's favored candidates won the election.[215] The alternative would be for the group to seek relief from the legislature, but the legislature would have the discretion to ignore it, might be beset by collective-action problems, might or might not entangle the group's claim with other issues, and might be too busy to provide relief even

214. *See supra* Parts II.A.2.e, II.B.6.

215. *See supra* Part II.A.

if it were sympathetic to the group's claim.[216] These formidable obstacles to relief suggest that popular constitutionalism's processes would lead to far less effective enforcement of constitutional norms than would the judicial process.

Indeed, these other processes are so different from the enforcement mechanism provided by the judicial process that, by comparison, they hardly seem like "enforcement mechanisms" at all. Certainly, they depart from the ordinary expectations created by that term. A creditor seeking to "enforce" a debt expects to do so in a straightforward proceeding in which the decision maker hears the facts and determines whether the debt must be paid. If the creditor were told that the process involved an election that required him to garner general social support for his case and, moreover, that the debt owed to him would be only one of dozens of issues in that election, the creditor might be forgiven for thinking that the process was not only likely to lead to underenforcement, but that it was not really an "enforcement" process at all. Similarly, while one might say that popular constitutionalism is likely to lead to underenforcement of constitutional norms, its enforcement mechanisms are so different from the judicial process that it makes sense to question whether they are enforcement mechanisms at all and whether a right secured only by the electoral and political processes can really be called a "right." The institution of judicial review, by contrast, provides for an enforceable Constitution.[217]

Thus, the case for judicial review goes far beyond the claim that judges will be better than politically accountable officials at interpreting the Constitution. Even if legislators could do an equally good job—perhaps even a *better* job—of interpreting the Constitution, one would still want their handiwork subjected to judicial review. The case for judicial review is that a society should want its Constitution enforced by an institution that has the characteristics of the judicial process: a process that is focused, transparent, mandatory, rights based, individually engageable, and that respects precedent.

For these reasons, it is unnecessary for defenders of judicial review to prove that judges will have the *best* interpretation of the Constitution. As defenders of judicial review have argued, there are in fact institutional reasons to believe that courts will often do a better job than legislatures when it comes to constitutional interpretation.[218] But even if, like the popular constitutionalists, one believed that on some issues the popularly elected legislature would have a better insight into constitutional meaning, one would still wish to retain the system of judicial review. Judicial review is

216. *See supra* Part II.B.

217. *Cf.* Weinberg, *supra* note 36, at 1412 ("In *Marbury*, a great father of our country bequeathed to us his greatest legacy and our most precious inheritance—the inestimable treasure of an enforceable Constitution." (footnote omitted)).

218. *See supra* Parts II.A.2.d, II.B.5.

normatively desirable, not merely because there are reasons to believe courts will better interpret the Constitution, but because only a system of judicial review has the appropriate institutional structure to provide a suitable degree of enforcement of constitutional constraints on government.[219]

IV. IMPROVING JUDICIAL REVIEW

In arguing for a position, it is always important to consider potential counterarguments. Although judicial review is superior to popular constitutionalism as a method of constitutional enforcement for the reasons explained above, even the staunchest defender of judicial review would have to agree that the popular constitutionalists have exposed at least one substantial problem with judicial review. However, this Article provides a better answer to this problem than prior arguments. This answer also helps in understanding a potential solution.

The problem is that there is something uncomfortably arbitrary in the selection of judges, particularly with regard to the limited number of judges on the Supreme Court. With regard to the federal judiciary overall, there are enough positions that at any given time one can expect the number of sitting judges appointed by each political party to be roughly proportional to the number of years that party controlled the White House over the last couple of generations.[220] But with regard to the Supreme Court, there are too few spots for the law of averages to operate fairly. The composition of the Supreme Court is determined by the vagaries of illness, death, and retirement among a very small group of judges.[221] Because this one court plays the chief role in determining our nation's constitutional

219. As noted earlier, judicial review does, admittedly, suffer from being constrained by justiciability requirements. *See supra* Part II.B.4. Someone who believes the Constitution is being violated might not immediately be able to seek a judicial remedy because he might lack standing to do so or might be constrained by some other justiciability issue. A full solution would require some changes in the justiciability requirements. *See* Siegel, *supra* note 193, at 129–38 (proposing reforms to existing justiciability law). But that is a contingent feature of the U.S. Constitution that does not really impact the argument about whether a generalized society with a representative legislature and nonrepresentative courts should desire to have a system of judicial review.

220. For example, as of the date of this writing, there are currently 437 Republican appointees in the federal judiciary and 352 Democratic appointees. *GOP Candidates Would Cut Federal Judges' Power*, WASH. POST (Oct. 23, 2011), http://www.washingtonpost.com/politics/gop-candidates-would-cut-federal-judges-power/2011/10/23/gIQA5u4Z9L_story.html. If one looks back thirty-five years (that being about as long as long-serving judges tend to spend in office), Republicans have controlled the White House for twenty-one years out of the last thirty-five. Thus, over the last thirty-five years, Republicans have controlled the White House 60% of the time, and they have appointed 55% of current federal judges, a roughly matching percentage.

221. Of course, Justices can, and probably do, time their retirements so that Presidents of their preferred political party can name their successors. But Justices have much less control over illness and death, and health problems may force them to retire at a time when their preferred party does not control the White House.

jurisprudence, it hardly seems fair that its composition should be determined so arbitrarily.

To put it another way, it seems more than a little absurd that the ultimate reason for important elements of constitutional jurisprudence as it exists today may lie in the stupendous approval ratings enjoyed by the first President Bush immediately following the Gulf War in 1991. But for that, everything might be different. President Bush's approval ratings made his reelection seem inevitable, which may have influenced Justice Thurgood Marshall's decision to retire in 1991, rather than to stick it out one more year.[222] If Justice Marshall had stayed on until 1992, President Clinton, rather than President Bush, would have named his successor.[223] In that case, Justice Marshall's seat would likely now be filled by a moderately liberal Justice, rather than by the very conservative Justice Clarence Thomas. As a result, the many 5-4 decisions won by the Court's conservative wing since then would probably have come out 5-4 the other way.[224]

Thus, it seems highly likely that the vagaries of history and a single Justice's decision to retire have decisively influenced our national understanding of free speech,[225] equal protection,[226] abortion rights,[227] state

222. Justice Marshall announced his retirement on June 27, 1991. Andrew Rosenthal, *Marshall Retires from High Court; Blow to Liberals*, N.Y. TIMES (June 28, 1991), http://www.nytimes.com/1991/06/28/us/marshall-retires-from-high-court-blow-to-liberals.html. At the end of February 1991, following the Gulf War, President George H.W. Bush had an approval rating as high as 91%. *E.g.*, Sharen Shaw Johnson, *Poll: Bush Backed by 91%*, USA TODAY, Mar. 1, 1991, at 1A. That rating was still 75% in June 1991. Andrew Rosenthal, *Poll Finds Strong War Support, but Some Erosion*, N.Y. TIMES (June 11, 1991), http://www.nytimes.com/1991/06/11/us/poll-finds-strong-war-support-but-some-erosion.html. Who could have guessed that just a year later President Bush's approval rating would be down to 29%? The Gallup Organization, *Bush, GOP Ratings Still Falling, New Poll Shows*, L.A. TIMES (Aug. 4, 1992), http://articles.latimes.com/1992-08-04/news/mn-5085_1_bush-s-approval-rating. Who could have guessed that Bill Clinton, then the virtually unknown Governor of Arkansas, would best him in the 1992 election?

223. Justice Marshall probably would not have needed to stay on until 1993, when President Clinton took office (in fact, Justice Marshall died just a few days after that happened). If Justice Marshall had stayed on until sometime in late 1992, the Democrats, who then controlled the Senate, could legitimately have refused to let his seat be filled until after the election.

224. It is also possible that President Bush's approval ratings made no difference in Justice Marshall's decision to retire, which might have been dictated solely by the state of his health. But if that is so, the above analysis is equally applicable. It is equally, if not more, absurd that our constitutional jurisprudence for decades should be determined by the fortuity of exactly when a given Justice develops health problems.

225. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876 (2010) (holding, 5-4, that the government may not suppress political speech based on the speaker's corporate identity).

226. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (striking down, 5-4, the use of racial preferences in the assignment of students to slots in oversubscribed high schools).

227. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding, 5-4, the constitutionality of the federal Partial-Birth Abortion Ban Act).

sovereign immunity,[228] Congress's commerce power,[229] and innumerable other vital constitutional doctrines. This state of affairs is hardly a triumph for the system of judicial review. It seems quite arbitrary. Waldron, in his article, imagines the difficulties of explaining to a disgruntled citizen why unelected judges get to make crucial societal decisions.[230] Certainly, if one were called upon to explain constitutional law today and to give the reasons why so many constitutional doctrines are what they are, it would be unsatisfying to say: "The ultimate reason is that Justice Thurgood Marshall retired in 1991, rather than in 1992. But for that, the First Amendment, the Equal Protection Clause, and innumerable other parts of the Constitution would mean something different from what they mean today." And yet, that is probably the truth.

This, then, is where the popular constitutionalist arguments have real bite. As Waldron points out, judges do more than enforce the Constitution; they choose from among the multiple possible competing interpretations of the broad phrases in the Constitution.[231] The choice of the judges who make these contestable choices has a vital impact on the outcome. And yet, under the U.S. Constitution, a stunningly arbitrary system determines which Presidents get to choose Supreme Court Justices.

This is also where the standard defense of judicial review, contained in the previously existing literature, is most vulnerable. As noted above, the standard defense of judicial review primarily claims that courts, because of their political insulation, will do a better job than legislatures of interpreting the Constitution.[232] The fact that numerous, important Supreme Court judgments result more from the accidents of history than from the persuasiveness of constitutional arguments undermines this claim. Even if one agrees that judicial political insulation provides courts with an advantage in constitutional interpretation, that advantage has to be set against the disadvantage that results from the arbitrariness in the selection of the small group of judges who make the most important constitutional decisions. It is not *a priori* clear which effect outweighs the other.

The arguments made in this Article provide a better answer to this problem. As this Article has shown, insulation from popular pressure is just *one* relevant institutional feature of judicial review. That feature does provide

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228. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding, 5-4, that Congress lacks power to abrogate state sovereign immunity when acting pursuant to its commerce power).

229. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (holding, 5-4, that provisions of the Violence Against Women Act exceeded Congress's commerce power); United States v. Lopez, 514 U.S. 549 (1995) (holding, 5-4, that the Gun-Free School Zones Act exceeded Congress's powers under the Commerce Clause).

230. Waldron, *supra* note 2, at 1387–93.

231. *Id.* at 1369, 1371.

232. *E.g.*, BICKEL, *supra* note 8, at 25–26; Chemerinsky, *supra* note 6, at 1016, 1022.

courts with some advantage in constitutional interpretation. But judicial review is normatively desirable because of its other features as well. In particular, even if courts, especially the Supreme Court, may not always have the *best* interpretation of the Constitution, they at least provide a good enforcement mechanism for the Constitution. The electoral and legislative processes cannot do this. The arbitrariness involved in the selection of judges does not undermine this distinction. The societal need for a good constitutional enforcement mechanism suggests that society should retain the system of judicial review even if the courts cannot always claim to have the best interpretation of the Constitution.[233]

In other words, if the sole basis for judicial review is that courts are thought to be better at constitutional interpretation, then anything that undermines their claim to superiority leaves judicial review highly vulnerable. But if judicial review is also normatively desirable because only judicial review provides an appropriate constitutional enforcement mechanism, then a weakness in that claim is less damaging. One may desire to retain the system of judicial review because of the vital role it plays in the enforcement of constitutional constraints while still recognizing that there is a problem in the system of selecting judges.

This analysis also helps in appreciating the virtues of potential solutions to the judicial-selection problem. The popular constitutionalists would solve the problem by eliminating the judicial role in constitutional enforcement and turning the interpretation of the Constitution over to elected representatives. For all the reasons explained in this Article, however, that is not a good solution. True, it would have the advantage that it would substantially reduce the role of happenstance in selecting the group of people who make constitutional decisions. The group would also be sufficiently large that the role of happenstance in selecting any one member would be much less likely to have a decisive impact on constitutional decisions.

But the popular constitutionalists' solution would achieve these virtues only at great cost. Their solution would lead to severe underenforcement of constitutional norms and would undermine the security of individual rights. The problem is not just that the Constitution and the individual rights it protects would be remitted to a majoritarian process. The problem is that they would be remitted to a process that is, for all the reasons described in this Article, not structured as a good constitutional enforcement mechanism.

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233. Of course, if one thought that courts would be systematically *worse* than legislatures at interpreting the Constitution, even their advantage in providing mechanisms for constitutional enforcement might not justify retaining judicial review. But the arbitrariness inherent in judicial selection does not show that courts will be systematically worse than legislatures at interpreting the Constitution; it only undermines the strength of their claim to be systematically better because of their political insulation.

The arguments in this Article help in appreciating the virtues of a better solution. If the virtue of judicial review is that it provides an appropriate constitutional enforcement mechanism, but the vice is that judicial selection is arbitrary, then the solution is to retain those characteristics of the system that make it a proper enforcement mechanism, but to reduce the arbitrariness. This solution would imbue judicial review with some degree of majoritarianism, although not the degree desired by the popular constitutionalists. The solution would imbue judicial review with that degree of majoritarianism that is consistent with maintaining its institutional character.

The revised system would not be majoritarian in the legislative sense. For the reasons already explained, judges should not worry about reelection as they make their decisions. Therefore, judges would not be politically accountable once appointed. Nor should the system be majoritarian in a way that would destroy the other vital, institutional characteristics of judicial review highlighted in this Article: its focused nature, its mandatory character, its ability to be individually engaged, and so on.

But without threatening any of these vital features of judicial review, the process for *selecting* judges, particularly Justices, could be made more majoritarian and less arbitrary. Doing so would not be complicated. All that would be needed would be to shift the tenure of the highest judges from indefinite terms to fixed, staggered terms. In the United States, the creation of staggered eighteen-year terms, so that one Justice's term would expire every two years,[234] is an obvious possibility—so obvious, indeed, that it has been suggested multiple times before.[235]

Such a system would maintain the many advantages of judicial review while avoiding the perils of popular constitutionalism. Because judges would still not be politically accountable once appointed, they could still exercise their counter-majoritarian function. Moreover, because the judicial process would still be focused, mandatory, transparent, and so on, it would still provide a superior constitutional enforcement mechanism. But the choice of Justices, and therefore of constitutional doctrine, would be less arbitrary and relate more directly to popular will. To be sure, there would be only a rough

234. Of course, there would be some important details to work out. There would be difficulty transitioning in a fair way from our current system to a system of fixed, staggered terms. Moreover, even once the new system got going, there would be the question of what to do if a Justice dies, retires, or is removed by impeachment before the expiration of her eighteen-year term. Probably the system would allow the President to name a replacement to finish out the remainder of that term. Such a rule would reintroduce a small part of the arbitrary character of the current system, but, as noted several times in this Article, nothing is perfect.

235. *E.g.*, Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 476 (Roger C. Cramton & Paul D. Carrington eds., 2006); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006).

and imperfect translation of popular will into constitutional decisions. But it would be better than what we have now.

The proposal for eighteen-year, staggered terms for Supreme Court Justices is not new. But institutional analysis provides new support for the proposal. Previous analyses were deficient because, so long as judicial review is regarded as desirable precisely because it is counter-majoritarian, the desire to improve majoritarian input into the selection of judges will be difficult to explain. But as this Article has argued, judicial review is justified by a whole set of institutional features, not just its nonmajoritarian character. That makes it easier to understand why it would be desirable to introduce some more majoritarian input into the system of judicial selection while also desiring to retain the essential character of the institution of judicial review.

V. CONCLUSION

Prior debate about judicial review has focused on just one of its institutional features—the political insulation of judges. Judicial review is normatively desirable, however, not only because of the political insulation of judges, but because of the whole set of institutional features of the judicial process: because the judicial process is focused, because it is transparent, because it is mandatory, because it operates within a system of precedent, and because it is individually engageable. These institutional features of judicial review, acting together, provide an appropriate enforcement mechanism for the Constitution and provide us with true individual rights. They justify judicial review.