

THE MAJORITARIAN DIFFICULTY AND THEORIES OF CONSTITUTIONAL DECISION MAKING

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Recent scholarship in political science and law challenges the view that judicial review in the United States poses what Alexander Bickel famously called the “counter-majoritarian difficulty.” Although courts do regularly invalidate state and federal action on constitutional grounds, they rarely depart substantially from the median of public opinion. When they do so depart, if public opinion does not eventually come in line with the judicial view, constitutional amendment, changes in judicial personnel, and/or changes in judicial doctrine typically bring judicial understandings closer to public opinion. But if the modesty of courts dissolves Bickel’s worry, it raises a distinct one: Are courts that roughly follow public opinion capable of protecting minority rights against majoritarian excesses? Do American courts, in other words, have a “majoritarian difficulty?” This Article examines that question from an interpretive perspective. It asks whether there is a normatively attractive account of the practice of judicial review that takes account of the Court’s inability to act in a strongly counter-majoritarian fashion. After highlighting difficulties with three of the leading approaches to constitutional interpretation—representation-reinforcement, originalism, and living constitutionalism—the Essay concludes that accounts of the Court as a kind of third legislative chamber fit best with its majoritarian bias. However, such third-legislative-chamber accounts rest on libertarian premises that lack universal appeal. They also lack prescriptive force, although this may be a strength: Subordinating an interpretive theory—such as representation-reinforcement, originalism, or living constitutionalism—to a view of judicial review as a form of third-legislative-chamber veto can ease the otherwise unrealistic demands for counter-majoritarianism that interpretive theories face.

I. INTRODUCTION

Recent scholarship in political science and law challenges the claim that judicial review in the United States poses what Alexander Bickel famously called the “counter-majoritarian difficulty.”¹ Although courts do regularly invalidate state and federal laws on constitutional grounds, they rarely depart substantially from the median of public opinion. As Barry Friedman shows in his magisterial history of the tug-of-war over constitutional meaning between the People and the Supreme Court, criticism of the Court for its supposedly counter-majoritarian character has tended to track the substantive unpopularity of the Court’s decisions.² For a time, the Court can disregard such

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¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (Vail-Ballou Press, Inc. 2nd ed. 1986).

² See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 274–77 (2009) (explaining how the increase in the crime rate in the mid-1960s turned public opinion

criticism, but if public opinion does not eventually come in line with the judicial view, constitutional amendment, changes in judicial personnel, and/or changes in judicial doctrine will typically bring judicial understandings closer to public opinion. Consequently, American courts have not, over the long run, acted as strongly counter-majoritarian bodies.³ As Friedman observes in concluding his discussion of the Court-packing controversy of the mid-1930s, which followed the longest sustained period of counter-majoritarian decisions by the Supreme Court, “[f]or all of history’s frequent talk about the independence of the judiciary, that independence exists only at public sufferance.”⁴

The actual record of American judicial review thus mostly dissolves Bickel’s worry,⁵ but it raises a distinct one: Are courts that

against the Court’s criminal procedure decisions, especially *Miranda v. Arizona*, 384 U.S. 436 (1966)).

- ³ See *id.* at 369 (predicting that over the long run, the Roberts Court will follow the pattern of its predecessors so that “its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line”). For some years now, Michael Klarman has been making the point that most of the Supreme Court’s counter-majoritarian “interventions can best be described as marginal.” Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 14 (1996). Looking back upon the record of the Warren, Burger, and Rehnquist Courts, Klarman more recently reached a conclusion very much in line with Friedman’s assessment of the entire history of judicial review. The Court’s legitimacy, Klarman surmised, “flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion.” Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 488 (2005). For further evidence and arguments in the same general direction, see DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 145 (2002), arguing that “[a]lthough the counter-majoritarian difficulty has a core of truth, it has been blown out of proportion”; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957), observing that it is “unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite”; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993), arguing that on the rare occasions when the Supreme Court does act in a strongly counter-majoritarian fashion, it fills a law-making void that in turn initiates a dialogue); and Steven L. Winter, *An Upside/Down View of the Counter-majoritarian Difficulty*, 69 TEX. L. REV. 1881, 1889–90 (1991), noting that “[r]epeatedly, the unarticulated normative orientations immanent in [the] background conceptions [of judges] shape and produce deeply majoritarian legal outcomes.”

⁴ FRIEDMAN, *supra* note 2, at 234.

⁵ In saying this, I recognize that there are objections to judicial review that rest on points of principle, regardless of the results to which it leads in particular cases. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1346 (2006) (arguing that “quite apart from the outcomes it generates, judicial review is democratically illegitimate”). Even if, in the long run, courts reach roughly the same constitutional judgments as the People do, one might argue that the People are entitled to have their constitutional decisions respected simply in virtue of the fact that they made those deci-

roughly follow public opinion capable of performing what is generally understood as their core counter-majoritarian function—protecting minority rights against majoritarian excesses?⁶ Do American courts, in other words, have a “majoritarian difficulty?”⁷ As Friedman astutely observes, the almost-obsessive focus on the supposed counter-majoritarian difficulty has largely blinded critics to the real, and exactly opposite danger—that the Supreme Court is insufficiently counter-majoritarian to protect minority rights when they are really threatened.⁸

This Article examines the implications of the substantial role that majority opinion plays in shaping judicial decision making from the perspective of constitutional interpretation. I ask whether there is a normatively attractive account of the practice of judicial review that takes account of the Court’s inability to act in a strongly counter-majoritarian fashion. The Article shows how three leading normative approaches to constitutional interpretation—representation-reinforcement, originalism, and living constitutionalism—all assume a capacity for counter-majoritarianism that may exceed the abilities of

sions. In this view, to defend judicial review on the ground that its results coincide with popular opinion is a little like defending the outcome of a procedurally flawed criminal trial on the ground that the defendant was, after all, guilty; if there is a procedural right—to democratic participation or a fair trial—then the outcome is largely beside the point. *Cf. id.* at 1372–73 (distinguishing outcome-related arguments for and against judicial review from process-based arguments). However, in this Article, I am not interested in *defending* judicial review based on the majoritarian pattern of its results. Consequently, I shall simply set aside Waldron’s objection in principle.

6 See, e.g., Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 19–21 (2002) (contending “that human rights are the core of substantive democracy” and justifying judicial review on the ground that “protection of human rights—the rights of every individual and every minority group—cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion”).

7 I cannot claim originality for the term “majoritarian difficulty.” For uses of the phrase to mean roughly what I use it to mean, see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995), questioning whether elected judges have sufficient independence to police political actors, and Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 L. & INEQUALITY. 1 (2005), using Supreme Court cases involving affirmative action and same-sex sodomy to illustrate the proposition that judicial doctrine mostly follows, rather than shapes, public opinion. For a somewhat different use, see Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008), arguing that the Ninth Amendment should be given an individual rather than collective interpretation, and that the latter suffers from a “majoritarian difficulty.”

8 See FRIEDMAN, *supra* note 2, at 370–74 (discussing, *inter alia*, the Court’s shameful acquiescence in the detention of Japanese-Americans, and their exclusion from the West Coast, during World War II).

real courts. By contrast, accounts of the Supreme Court as a kind of third legislative chamber fit better with its majoritarian bias.⁹

Even if only occasionally exercised, the judicial “veto” of legislation improves the overall mix of under-enforcement and over-enforcement of constitutional rights. That is a modestly counter-majoritarian criterion, and thus one that courts can satisfy.

Third-legislative-chamber accounts have their own problems, however. Most importantly, they rest on a controversially libertarian normative view that sees government action as generally more dangerous than government inaction. Further, third-legislative-chamber views do not prescribe any particular interpretive methodology. They thus require supplementation by some other account, such as representation-reinforcement, originalism, or living constitutionalism. One might think that using one of these interpretive methods as interpretive “filler” in a generally third-legislative-chamber view of judicial review simply re-raises the objection that these accounts are inconsistent with the majoritarian difficulty. However, it is possible that “encasing” such substantive theories in a third-legislative-chamber account reduces the demands for counter-majoritarianism, and thus saves them from their unrealistic ambition.

II. INTERPRETATION AND MAJORITARIANISM

Let us call the notion that the Supreme Court is at most weakly counter-majoritarian the “Friedman thesis.” Friedman and others have compiled voluminous evidence for this thesis.¹⁰ Rather than rehearse that evidence, here I shall simply provide two categories of illustrations from the case law that are well known to anyone who is even passingly familiar with constitutional law.

First, consider the tendency of the Supreme Court to provide only weak resistance to movements to infringe civil rights and civil liberties in times of war. The Sedition Act, President Lincoln’s suspension of habeas corpus, the Red Scare of the World War I era, the internment of Japanese Americans during World War II, and McCarthyism are simply the highlights of public crackdowns when national security was

⁹ See generally Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1694 (2008) (arguing that “the . . . ground that legislatures and courts should both be enlisted to protect fundamental rights and, accordingly, that both should have veto powers over legislation that might reasonably be thought to violate such rights” underlies “[t]he best case for judicial review”).

¹⁰ See sources cited *supra* notes 2–3.

perceived as threatened. Yet as Geoffrey Stone has shown,¹¹ and as cases like *Abrams v. United States*¹² and *Korematsu v. United States*¹³ reveal, when push comes to shove, Supreme Court Justices have hardly been immune to what Judge Learned Hand called the “herd instinct.”¹⁴

Perhaps it is too much to expect courts to stand up for civil liberties and civil rights when the country perceives an existential threat—although one might as readily argue that such times of perceived crisis are exactly when courts are most needed. In any event, we also see strong evidence for the Friedman thesis in matters of civil rights even under ordinary circumstances. Consider the historical development of equal protection doctrine.

The Supreme Court granted recognition to equality claims based on race before it recognized claims against sex discrimination, which, in turn, were recognized before claims against sexual orientation discrimination were recognized. (The last of these categories is still not deemed “suspect” under the official doctrine.) Why? Because that was the order in which the larger society came to accept the claims of, respectively, the civil rights movement, the women’s movement, and the gay rights movement. “Before an argument or emotional appeal succeeds in changing the minds of lawmakers (including judges), it must first change the minds of a mass of the public.”¹⁵

Conversely—and problematically for present purposes—judges are highly unlikely to stand up for the civil rights of truly marginalized groups. They may get a little bit out ahead of public opinion, as has arguably happened now with respect to same-sex marriage, but only a little. Furthermore, as we saw in California in 2008, even a relatively small judicial move out ahead of public attitudes—as in the distance from same-sex civil unions to same-sex marriage—is susceptible to being snapped back by public opinion.¹⁶

11 See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004) (describing majority support for, and judicial acquiescence to, limitations on freedom of speech during wartime).

12 250 U.S. 616 (1919) (holding that the Sedition Act of 1918, which restricted anti-American speech, does not violate the First Amendment of the U.S. Constitution).

13 323 U.S. 214 (1944) (holding that Executive Order 9066, authorizing the use of internment camps for Americans of Japanese descent, does not violate the U.S. Constitution).

14 Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 749–50 (1975) (quoting Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921)).

15 Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 CALIF. L. REV. 791, 807 (2002).

16 See *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (describing Proposition 8 in the course of upholding the constitutional amendment that passed in 2008 to limit “marriage” to un-

Thus, we have the majoritarian difficulty. In all cases, and especially in cases involving the most vulnerable civil liberties and civil rights claims, courts appear to be ill-equipped to play their most basic constitutional function. The next three Parts of this Article show how the leading approaches to constitutional interpretation nonetheless assume a substantial counter-majoritarian capacity on the part of courts.

III. REPRESENTATION-REINFORCEMENT

As set forth most clearly and forcefully in the work of John Hart Ely and footnote 4 of the *Carolene Products* case,¹⁷ counter-majoritarianism can be a vice and a virtue of judicial review. With Bickel, Ely was prepared to recognize that judicial review substitutes the constitutional views of unelected judges for those of elected officials and that, absent some special justification, the practice is undemocratic.¹⁸ For Ely, the special justification was representation reinforcement: Where the mechanisms of democracy themselves have failed, courts can find a warrant in the Constitution for intervening.

To give credit where credit is due, Ely's theory elegantly explained and justified one category of important cases:¹⁹ The reapportionment rulings in *Baker v. Carr*²⁰ and *Reynolds v. Sims*.²¹ In finding apportionment challenges justiciable and then insisting on a principle of one-

ions between "a man and a woman"). Such public control over judicial rulings is easier under a state constitution like California's, which can be amended by a majority vote in a referendum, than under the Federal Constitution. Nonetheless, as Friedman and others have shown, we find the same phenomenon at the federal level.

17 United States v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

18 See BICKEL, *supra* note 1, at 16–17 ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 62 (1980) ("[P]art of the point of the Constitution is to check today's majority.").

19 In criticizing Ely's theory, as I do in the balance of this Part, I do not back away from my earlier evaluation. I continue to regard *Democracy and Distrust* as "the single most perceptive justificatory account of the work of the Warren Court and arguably of modern constitutional law more broadly." Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237, 1238 (2005).

20 369 U.S. 186 (1962) (rejecting the characterization of reapportionment issues as purely political questions).

21 377 U.S. 533 (1964) (holding that state legislative districts must be apportioned to represent approximately equal numbers of people).

person-one-vote, the Court stood up to the political process as it was then configured. But the apportionment cases were unusual because they involved a highly non-majoritarian elective system that was made *more* majoritarian by judicial intervention. Once the Court intervened, a new political reality appeared, and the officials elected under one-person-one-vote had a strong interest in supporting the regime the Court had created.

By contrast, other Warren Court interventions endorsed by Ely—especially the rights revolution in criminal procedure²² and protection for racial minorities²³—fall more clearly into those areas in which the image of heroic counter-majoritarian Court was destined to succumb to the Friedman thesis.

The rollback of Warren Court criminal procedure protections under the ensuing Burger and Rehnquist Courts may not have been a full and open counter-revolution, but it was real enough nonetheless. As Carol Steiker observed, the Burger and Rehnquist Courts left the Warren Court's edifice of criminal procedure jurisprudence intact but hollowed it out by eliminating remedies.²⁴

We can discern a similar pattern in the Court's equality jurisprudence. Even as the status of *Brown v. Board of Education*²⁵ has become ever-more iconic, its meaning has been transformed into a principle of color-blindness that is now most commonly used to protect the status quo against race-conscious efforts to aid racial minorities.²⁶ Thus, in *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁷ Chief Justice Roberts, writing for a 5-4 Court, treated a city's race-conscious efforts to increase the level of integration of its public schools as themselves in conflict with the core of *Brown*. One need not necessarily disagree with the Roberts opinion (although I do disagree with it rather strongly) to see it as no less a culmination of Ri-

²² See ELY, *supra* note 18, at 73–75, 96–97.

²³ See *id.* at 135–79.

²⁴ See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) (“[T]he Burger and Rehnquist Courts have accepted to a significant extent the Warren Court’s definitions of constitutional ‘rights’ while waging counter-revolutionary war against the Warren Court’s constitutional ‘remedies’ of evidentiary exclusion and its federal review and reversal of convictions.”).

²⁵ 347 U.S. 483 (1954) (finding racially segregated public schools to be unconstitutional because they are “inherently unequal”).

²⁶ See Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 187, 189–91 (Michael C. Dorf ed., 2d ed. 2009) (describing the modern principle of color-blindness as a descendant of the nineteenth-century formalism that sustained segregation).

²⁷ 551 U.S. 701, 708–11, 747–48 (2007).

chard Nixon's "Southern Strategy" than the application of Herbert Wechsler's neutral principles of constitutional law.²⁸

By contrast with the Roberts Court, Ely himself thought that race-conscious government programs aimed at overcoming racial hierarchy ought to be judged by a more forgiving standard than discrimination against members of racial minority groups,²⁹ but race-based affirmative action has proven highly unpopular.³⁰ Here, we see the Friedman thesis undermining the counter-majoritarian—i.e., minority-protecting—role that courts are assigned under Ely's theory of representation-reinforcement. A Court subject to majoritarian influence transformed a principle initially understood as affording protection to "discrete and insular minorities"³¹ into a constitutional rule whose primary role appears to be to limit the occasional efforts of majoritarian politics to constrain itself in favor of minority interests.

The evidence is starkest at the national level. Richard Primus notes that since the Justices first held in *Bolling v. Sharpe*³² that, under a doctrine sometimes called "reverse incorporation," the Fifth Amendment's Due Process Clause applies principles of equal protection to the federal government,

the Supreme Court has never declared a federal statute or regulation unconstitutional on the grounds that it discriminates against members of a racial minority group. Nor has the Court ever invalidated any other kind of federal action on those grounds. The Court has never found that a federal prosecutor impermissibly struck a juror from a venire on account of race, that a federal law enforcement officer engaged in unconstitutional racial discrimination against criminal suspects, or that a federal employer fired an employee for unconstitutional racial reasons. This does not mean that reverse incorporation has had no progeny at all. In

²⁸ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

²⁹ See ELY, *supra* note 18, at 170–72 (noting that when a majority discriminates against itself in order to benefit minority groups, fewer constitutional suspicions arise).

³⁰ See Press Release, Quinnipiac Univ. Polling Inst., U.S. Voters Disagree 3-1 with Sotomayor on Key Case, Quinnipiac University National Poll Finds; Most Say Abolish Affirmative Action (June 3, 2009), <http://www.quinnipiac.edu/images/polling/us/us06032009.doc> (indicating that a significant majority of U.S. voters oppose affirmative action). Opinions reported to pollsters translate into votes. Even voters in the relatively liberal states of California, Michigan, and Washington voted to ban affirmative action when given the chance. See Tamar Lewin, *Colleges Regroup After Voters Ban Race Preferences*, N.Y. TIMES, Jan. 26, 2007, at A1 (noting that California, Florida, Michigan, and Washington "forbid racial preferences").

³¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

³² 347 U.S. 497, 500 (1954) (applying the same equality principle to public schools segregated on the basis of race at the federal and state level).

an important development [sic] decades after 1954, the courts have invoked *Bolling* to limit the use of affirmative action.³³

To be clear, I am not now interested in whether equal protection, properly understood, requires color-blindness, anti-subordination, or any other approach.³⁴ The point is that the Supreme Court's adoption of the rhetoric and much of the reality of color-blindness was a predictable consequence of the Friedman thesis, in light of the unpopularity of affirmative action. Despite its broad influence on the shape of constitutional law, Ely's advice to courts—act in a counter-majoritarian fashion to protect the long-term systemic losers in the political process—has proven nearly impossible for the Court to follow. And that is exactly what an attentive student of the Friedman thesis would have predicted.

IV. ORIGINALISM

Originalism also succumbs to the Friedman thesis because originalism, like Ely's representation-reinforcement theory, aims to justify counter-majoritarian judicial decisions, albeit somewhat different ones. Indeed, on principle, originalism would appear to be even harder to follow than just about any non-originalist competitor because of the utterly reactionary counsel of originalism.³⁵

³³ Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 978 (2004). No Supreme Court decision since 2004 falsifies Primus's observation.

³⁴ For what it is worth, I believe that not much turns on the general interpretive principle selected to give effect to the concept of equal protection. See generally Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, ISSUES LEGAL SCHOLARSHIP (2002), <http://www.bepress.com/cgi/viewcontent.cgi?article=1006&context=ils> (arguing that some criticisms of the "anti-discrimination" principle are misguided).

³⁵ I use the term "originalism" here to refer to theories of interpretation that place dispositive weight on the relatively concrete understandings and practices of the Framers' generation. My use of the term may thus exclude "new" originalists who would define the original public meaning of constitutional text at a sufficiently high level of generality to overcome the concrete, expected applications of the framing generation. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118–30 (2004) (distinguishing interpretation from construction); Lawrence B. Solum, *Legal Theory Lexicon: Interpretation and Construction*, LEGAL THEORY BLOG (Feb. 8, 2009), <http://lsolum.typepad.com/legaltheory/2009/02/legal-theory-lexicon-interpretation-and-construction.html> (explaining the difference between interpretation and construction, and demonstrating the purpose of distinguishing the two); cf. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 291–311 (2007) (attempting to reconcile originalism and living constitutionalism by contending that the Constitution's original meaning is not its "original expected application" because its adopters "sought to embody general and abstract principles . . . to be fleshed out later on by later generations"). My point is not that such theorists are not "really" originalists, whatever that might mean. However, an originalist who avers that interpretation runs out before most or all of the hard work of constitutional "construction" begins, see, e.g., KEITH E.

Theories of interpretation rooted in contemporary values (including representation-reinforcement) offer the courts one side in a contemporary debate: pro-choice or pro-life on abortion; separationism versus neutrality on religion; permitting or invalidating the death penalty; and so forth. Where a constitutional theory offers a consistently minority position—as Ely’s theory does with respect to affirmative action—we can expect that, over the long run, its counsel will be disregarded by a Court subject to majoritarian influences. But in choosing a side in a contemporary debate, a non-originalist theory at least has a chance of choosing the winning or close-to-winning side, so that majority opinion does not coalesce against that position.

By contrast, originalism—if honestly applied, an important caveat to which we shall return in a moment—offers positions that have been thoroughly rejected. Suppose an originalist Supreme Court Justice thinks the best evidence of the original understanding is inconsistent with the laws establishing paper money not backed by specie, as a majority of the Court thought in 1870.³⁶ A majority opinion so holding would be simply unthinkable, because “in our age of checks, credit cards and electronic banking, the issue is off the agenda: no Supreme Court would now reexamine the merits, no matter how closely wedded it was to original intent theory.”³⁷

Likewise, suppose an originalist Justice thought that the federal administrative state clearly violated the original understanding of federalism and/or separation of powers.³⁸ Or suppose an originalist concluded that the Fourteenth Amendment was not originally understood to restrict state laws and policies that discriminate on the basis of sex. In none of these areas would an opinion substituting doctrines based on the original understanding for more publicly acceptable current doctrines long survive. How do I know? Consider

WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 2, 4–5 (1999), must supplement his originalist theory of interpretation with some other theory to produce normative guidance for adjudication. Because I am interested in actual judicial outputs, a largely empty version of originalism is not especially relevant to my purposes here.

36 See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 623 (1869) (looking to the intentions of “those who framed and those who adopted the Constitution”), *overruled by* *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1870). Although invoking the original understanding, most of the majority opinion in *Hepburn v. Griswold* might be better characterized as a form of doctrinal or structural interpretation.

37 Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 744 (1988).

38 See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 & n.1 (1994) (arguing that “[t]he post-New Deal administrative state is unconstitutional,” that is, “at variance with the Constitution’s original public meaning”).

that despite the Supreme Court's distinct rightward turn over the last three decades, only one Justice, Clarence Thomas, consistently avows originalist positions,³⁹ and we might wonder whether he does so only because he has the luxury of knowing that his one vote will not make law.

More broadly, on a great many issues the gap between originalist positions and the contemporary spectrum of acceptable views is simply too wide to survive the Friedman thesis. A Supreme Court that abolished paper money, invalidated the alphabet soup of federal regulatory agencies, or declared women ineligible to be lawyers,⁴⁰ simply would not last. As a prescriptive account of constitutional interpretation, originalism is a non-starter. Not infrequently, it asks judges to take strongly counter-majoritarian views, not in the service of currently controversial positions, but in the service of positions that have for decades or even centuries been relegated to the margins of public opinion.

To be sure, one might argue that, as supplemented by *stare decisis*, originalism is not so nearly counter-majoritarian. In this view, the original understanding only plays a substantial role in constitutional adjudication with respect to questions of first impression. However, it is not at all clear why the sorts of prudential concerns that underlie the doctrine of *stare decisis* should be permitted to displace the original understanding when employed indirectly, but such concerns are deemed illegitimate when invoked directly as grounds for non-originalist decision making.⁴¹ For such reasons, some originalists

³⁹ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (“[T]he term ‘commerce’ [was] consistently used [in founding-era documents] to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange.”); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (“[T]he very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers . . .”); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (“[O]ur case law has drifted far from the original understanding of the Commerce Clause.”).

⁴⁰ That last example is, I admit, somewhat unrealistic. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872) (upholding a state bar decision excluding a female applicant based on sex—a decision that has been effectively repudiated by modern equal protection decisions). But see *United States v. Virginia*, 518 U.S. 515, 519 (1996) (invalidating Virginia Military Institute policy of denying women admission on account of their sex); *Craig v. Boren*, 429 U.S. 190, 208–10 (1976) (striking down a state law granting women access to alcohol at a younger age than men); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (holding that women may be required to prove their husbands’ dependency to receive additional benefits when men do not have to prove the same for their wives). In order for the Supreme Court to reinstate *Bradwell*, a state would first have to adopt such a blatantly discriminatory policy, which is highly unlikely.

⁴¹ See Monaghan, *supra* note 37, at 772 (“[I]f the Court legitimately may prevent inquiry into original understanding in order to *maintain* transformative change, does this concession

think that non-originalist precedents are not entitled to much, if any, weight.⁴²

None of this is to say that originalism lacks a certain rhetorical force. The Supreme Court's decision in *District of Columbia v. Heller*⁴³ powerfully illustrates how the language of original meaning can be invoked to obscure the role that politics and public opinion play behind the scenes. We can cheerfully grant that every Justice who voted to find an individual right to possess a handgun for home defense thought this result was compelled in some way by the original understanding of the Second Amendment. But that takes nothing away from the sort of legal realist analysis that could readily show how views of the eighteenth century changed in response to a political campaign in the late twentieth century.⁴⁴ Whether the Court's holding in *Heller* will stick depends not on its correctness as a matter of original understanding, but on whether a critical mass of the American people, over the long run, continue to value a right to armed self-defense.

The best that can be said for originalism as a viable theory of constitutional interpretation is that it may be sufficiently indeterminate to permit its practitioners to reach results in harmony with the mainstream of public opinion. That, however, is nearly the exact opposite of the sort of claim typically made by originalism's champions.⁴⁵

V. LIVING CONSTITUTIONALISM

On its face, living constitutionalism—a capacious term that I shall use to refer to a family of non-originalist theories that task judges with incorporating current values and attitudes in their understanding of

also license prospective disregard of original understanding when the Court is satisfied that change is necessary to maintain systemic equilibrium?”).

42 See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 155–60 (1990) (advocating a narrow role for precedent in constitutional adjudication); Edwin Meese III, U.S. Attorney Gen., *Construing the Constitution*, Address Before the Washington, D.C. Federalist Society Lawyers' Division (Nov. 15, 1985), in 19 U.C. DAVIS L. REV. 22, 26–28 (1985) (contending that the overruling of precedent merely corrects past judicial mistakes).

43 128 S. Ct. 2783, 2822 (2008) (holding that the Second Amendment protects an individual right to possess firearms for, among other things, self-defense).

44 See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 315–21 (1998) (“This is not the result of mere chance; it is part of a concerted campaign to persuade the courts to reconsider the Second Amendment . . .”).

45 See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 288–305 (2009) (noting how the evolution of originalism and the wide disagreement among contemporary originalists undercut originalists' claim to determinacy).

the Constitution⁴⁶—should be able to accommodate the Friedman thesis. Indeed, we might even reformulate the Friedman thesis to state that the Supreme Court will inevitably engage in living constitutionalism, even when it denies doing so.

Living constitutionalism runs into trouble when we attempt to justify it. Originalists (and others) will be heard to object that there is no need for courts to engage in judicial review if their goal is to keep the Constitution in tune with the times. Any reasonably fair majoritarian process will lead to results that reflect the views of contemporary majorities.

To be sure, we can give a partial response on behalf of living constitutionalism. Where the baseline understanding of the Constitution forbids some newly popular policy, living constitutionalism can be invoked as a reason for the Court to permit that policy. This is the dynamic that President Franklin D. Roosevelt had in mind when he criticized the New Deal Court's "horse-and-buggy interpretation of the Constitution."⁴⁷ However, one does not need living constitutionalism as such to permit newfangled arrangements; one only needs an approach to constitutional interpretation that permits substantial room for democratic experimentation. The leading theories of constitutional interpretation—whether of the representation-reinforcing, originalist, or living variety—exist for the purpose of justifying judicial review, not for justifying the failure to exercise the power of judicial review in any given circumstance.

And indeed, in practice, living constitutionalism justifies counter-majoritarian judicial review. The Supreme Court's death penalty jurisprudence is instructive because it illustrates the substantial ambition and limited reach of living constitutionalism.

In 1972, in *Furman v. Georgia*, a majority of the Court invalidated the death penalty as it was then practiced in nearly every state.⁴⁸ Jus-

⁴⁶ Indeed, we might define living constitutionalism as simply "the polar opposite" of strong originalism. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 11 (2010). In saying that living constitutionalism incorporates contemporary values and attitudes into the judicial "understanding" of the Constitution, I do not mean to be taking a position on the recent debate over how much of constitutional law is "interpretation" versus "construction." See Solum, *supra* note 35 (using "interpretation" to refer to the "activity of determining the linguistic meaning (or semantic content) of a legal text," while using "construction" to refer to the "activity of translating the semantic content of a legal text into legal rules").

⁴⁷ FRIEDMAN, *supra* note 2, at 216 (stating that "by 1937 there was a pervasive sentiment that the real problem lay not with the Constitution but with the justices—'nine old men' who could not understand that times had changed").

⁴⁸ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (holding that the death penalty is in some instances cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

tice Douglas's concurring opinion expressly spoke the language of living constitutionalism, invoking "the evolving standards of decency that mark the progress of a maturing society."⁴⁹ Nor was this language mere cover. There was good evidence that American public opinion was turning away from the death penalty.⁵⁰ It just happened that the majority in *Furman* misread that evidence. In response to the Court's decision, states re-wrote their death penalty statutes, and the Court soon acquiesced.⁵¹

So far, our story looks like it puts living constitutionalism in harmony with the Friedman thesis. But if we probe a bit deeper we see that the Justices who acceded to public opinion—Stewart and White⁵²—were not in any way committed to living constitutionalism. Neither Justice Stewart nor Justice White ever strongly endorsed any particular interpretive methodology (although as dissenters in, respectively, *Griswold v. Connecticut* and *Roe v. Wade*, though not vice-versa, each occasionally sounded judicial restraint themes).⁵³ By contrast, the two Justices most closely associated with living constitutionalism—Justices Brennan and Marshall—dissented from the Court's acceptance of the death penalty in *Gregg*.⁵⁴ Thereafter, they consis-

49 *Id.* at 242 (Douglas, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted).

50 See FRIEDMAN, *supra* note 2, at 286–87 ("There was a flood of evidence that public sentiments were tipping against capital punishment.").

51 See *id.* at 288 (observing how the *Furman* Court's 5-4 vote finding the death penalty unconstitutional gave way to a decision upholding the death penalty); see also *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (plurality opinion) ("[I]t is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction.").

52 Justices Stewart and White voted with the majority in *Furman* to strike down the application of the death penalty at issue in that case, but they appeared to change course by voting with the majority to uphold the use of the death penalty at issue in *Gregg*. See *Gregg*, 428 U.S. at 206–07 (plurality opinion) (Stewart, J.) (White, J., concurring); *Furman*, 408 U.S. at 306–14 (Stewart, J., concurring) (White, J., concurring).

53 See *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) (stating, in a companion case to *Roe v. Wade*, 410 U.S. 113 (1973), that "[the abortion] issue, for the most part, should be left with the people and to the political processes"); *Griswold v. Connecticut*, 381 U.S. 479, 530–31 (1965) (Stewart, J., dissenting) ("It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not.").

54 *Gregg*, 428 U.S. at 230–31 (Brennan, J., dissenting) ("The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." (quoting *Furman*, 408 U.S. at 290) (internal quotation marks omitted)); *id.* at 231 (Marshall, J., dissenting) ("The death penalty . . . is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.").

tently dissented from every Supreme Court decision upholding a death sentence.⁵⁵

Thus, the Brennan/Marshall version of living constitutionalism—like the variants of it one finds in academic writings—eschewed poll-driven decisions. They and other living constitutionalists could give an answer to the originalists and other critics who charge that living constitutionalism is unnecessary because it simply replicates the judgments of majoritarian processes. No, it does not, Brennan and Marshall emphatically declared. Justice Brennan’s dissent in *Gregg* spoke of the (im)morality of the death penalty, without any serious effort to connect his moral judgments to those of the People.⁵⁶ Justice Marshall made the effort, but in *Furman* and *Gregg* he articulated what might be called a “false consciousness” account of public opinion.⁵⁷ Marshall averred that “the American people are largely unaware of the information critical to a judgment on the morality of the death penalty,” and concluded that “if they were better informed they would consider it shocking, unjust, and unacceptable.”⁵⁸

Whether Justice Marshall was right or wrong about that prediction, it should be clear that this version of living constitutionalism escapes the criticism that it simply replicates majoritarianism within the judiciary. Instead, Marshall’s version of living constitutionalism, like Brennan’s, aspires to be substantially counter-majoritarian. The judge who practices living constitutionalism does not simply look to public opinion for the contemporary meaning of constitutional provisions. Instead, he filters raw public opinion by asking how it would change if it were fully informed.

Although Ronald Dworkin has not championed living constitutionalism per se, the coherentism of his view of law as integrity is fairly characteristic of how judges committed to living constitutionalism

⁵⁵ See MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL 4 (1996) (discussing “Brennan’s and Marshall’s relentless dissents in capital cases,” including dissents from denials of certiorari “in more than twenty-five hundred [capital] cases between 1976 and 1991”).

⁵⁶ *Gregg*, 428 U.S. at 229 (Brennan, J., dissenting) (“[T]he State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings . . .”).

⁵⁷ See *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting) (“[T]he American people know little about the death penalty, and . . . the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.”); *Furman*, 408 U.S. at 360–69 (Marshall, J., concurring) (“[W]hether or not a punishment is cruel and unusual depends, not on whether its mere mention ‘shocks the conscience and sense of justice of the people,’ but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.”).

⁵⁸ *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting).

produce counter-majoritarian results. We may envision raw public opinion as the pre-interpretive intuitions of the public at large.⁵⁹ The coherentist judge brings these pre-interpretive intuitions, along with any relevant legal materials, such as constitutional provisions and precedents, into reflective equilibrium. And because in Dworkin's version, as in other versions of this approach, the glue that makes the data points cohere in one place rather than another consists of "principles of political morality"⁶⁰ that are often contestable, the judge will sometimes find that the Constitution requires broadly unpopular results. Living constitutionalism, as preached and practiced by those most committed to it, is substantially counter-majoritarian.⁶¹ Hence, living constitutionalists have an answer to the objection that there is no justification for using the courts, rather than the elective branches, to channel public opinion; living constitutionalism, they can say, does not simply channel public opinion.

However, that conclusion leaves living constitutionalism vulnerable to the Friedman thesis. Like representation-reinforcement and originalism, living constitutionalism places counter-majoritarian demands on judges that are too difficult for them to meet. Here, the death penalty jurisprudence is telling. Justices Brennan and Marshall, who both would have struck down the death penalty as invariably cruel and unusual in *Furman*, adhered to that view throughout their careers, but they only ever were joined by "deathbed converts." After his retirement, Justice Powell came to the conclusion that the death penalty was unconstitutional.⁶² Only months before his own retirement, Justice Blackmun announced that he had reached the same conclusion and would "no longer . . . tinker with the machinery of death."⁶³ Less than two years before announcing his retirement from the Court,⁶⁴ Justice Stevens revealed that he too had concluded that the death penalty was categorically unconstitutional (nevertheless he

59 See RONALD DWORKIN, *LAW'S EMPIRE* 45–49 (1986) (discussing pre-interpretive views of a community).

60 RONALD DWORKIN, *A MATTER OF PRINCIPLE* 36 (1985).

61 See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) ("It is the particular role of courts to hear [death-sentenced prisoners'] voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.").

62 In his biography of Justice Powell, John Jeffries reports a conversation in which Powell stated that, were he still on the Court, he would vote to reject the death penalty in all cases. See JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* 451 (2001).

63 *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (denying certiorari).

64 See Sheryl Gay Stolberg & Charlie Savage, *Justice Stevens Retiring, Giving Obama a 2nd Pick*, N.Y. TIMES, Apr. 10, 2010, at A1.

declared himself bound to continue to apply precedents upholding the death penalty so long as they were not overruled).⁶⁵

Although Justices Powell, Blackmun, and Stevens each explained their respective conclusions regarding the death penalty in somewhat different terms, their conversions were remarkably similar in all coming too late to change the course of the Court. Speaking only for themselves either after the fact or in parting shots, these Justices could invoke a living Constitution that substantially diverged from the views of the public more broadly. In each case, however, the Court they left behind, whether invoking living constitutionalism or some other theory, found itself accepting the death penalty, even as it was troubled by marginal cases such as the execution of mentally retarded and juvenile defendants.⁶⁶ Even though the Court continues to assert that its “own judgment will be brought to bear on the question of the of the death penalty’s acceptability under the Eighth Amendment,”⁶⁷ that judgment ends up looking a great deal like the judgment of the American people as a whole.

When it comes to state infliction of death, living constitutionalism proves unable in practice to garner the votes to implement its counter-majoritarian program. Nor is there any reason to think that the death penalty is an area in which the pull of public opinion on the Justices would be especially strong. If anything, the view that “death is different”⁶⁸ would suggest that capital punishment cases comprise an area in which the Court should be inclined to act in a strongly counter-majoritarian fashion. Yet it has not been able to do so.

VI. THIRD-LEGISLATIVE-CHAMBER THEORIES

The three immediately foregoing Parts of this Article have shown that three leading approaches to constitutional interpretation—representation-reinforcement, originalism, and living constitutionalism—all assume a greater judicial capacity for counter-majoritarian decision making than the historical record supports. That is no accident. These methodologies rest on theories specifically designed to justify some measure of counter-majoritarianism.

⁶⁵ See *Baze v. Rees*, 553 U.S. 35, 86–87 (2008) (Stevens, J., concurring).

⁶⁶ See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding the death penalty unconstitutional for “offenders who were under the age of 18 when their crimes were committed”); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding the death penalty unconstitutional for the mentally disabled).

⁶⁷ *Roper*, 543 U.S. at 563 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)).

⁶⁸ See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

It is thus tempting to generalize and say that every theory of constitutional interpretation designed to justify counter-majoritarianism will end up placing demands on the judiciary that it is unable to meet. Yet surprisingly, that generalization may be false. At least one family of theories—what I shall call “third-legislative-chamber” theories—seeks to justify counter-majoritarianism but does not necessarily demand of courts results that they cannot produce.

What is a third-legislative-chamber account of judicial review? Just as the Senate and the House of Lords provide the opportunity for reconsideration of proposed legislation by a body of legislators with a somewhat different perspective and constituency from the Houses of Representatives and Commons, respectively, the Supreme Court provides yet a third look at the laws, or so the argument goes. The third-legislative-chamber notion is only a metaphor, of course, because the U.S. Supreme Court does not act on legislation until after it is adopted, and frequently invalidates legislation as applied, rather than killing an entire bill.⁶⁹ Moreover, given the Court’s role in reviewing state legislation, it is a mistake to think of it as a part of the distinctively *federal* lawmaking process. Nonetheless, the core idea of third-legislative-chamber accounts of judicial review is clear enough. And if one finds third-legislative-chamber theories attractive, then one may think that they solve the majoritarian difficulty.

Rather than provide a comprehensive catalogue of third-legislative-chamber accounts of judicial review, I shall take one very ably presented version to stand in for the family as a whole.⁷⁰ In response to Jeremy Waldron’s critique of judicial review,⁷¹ Richard Fallon has recently articulated “an uneasy case” for judicial review as a phase in the legislative process during which courts, like each chamber of Congress and the President before them, can “veto” legisla-

69 The “Council of revision” that James Madison envisioned and that Edmund Randolph proposed as part of the Virginia Plan would have had the power to reject laws before their coming into operation. However, under Madison’s proposal, the Council would not have been a “legislative” chamber exactly, as it was to be composed of “the Executive and a convenient number of the National Judiciary.” See JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 25 (Gaillard Hunt & James Brown Scott eds., Oxford University Press 1920).

70 For an early suggestion that, in exercising judicial review, the courts function as an additional legislative chamber, see Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 25 (1936), proposing that reasonableness review under the Constitution enables the Court to “represent the sober second thought of the community.”

71 See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing against judicial review of legislation).

tion.⁷² For Fallon, the crucial advantage of a third-legislative-chamber account of judicial review over other accounts (such as the ones discussed above) is that it escapes an epistemic criticism offered by Waldron and others: Even if we assume that there are objectively correct answers to questions about constitutional rights,⁷³ the critics charge, there is no reason to assume that judges—who frequently disagree with each other on just the same issues that divide legislators—are more likely to reach the correct answers. No matter, Fallon replies. Because of the “commonly held assumption” “that legislative action is more likely to violate fundamental rights than is legislative inaction,”⁷⁴ a system that includes judicial review will provide greater protection for constitutional rights than a system in which legislators are the final arbiters of constitutional meaning. Thus, Fallon’s defense of judicial review does not depend on the assumption that judges are better at getting to the truth about constitutional rights claims than legislators.⁷⁵

Third-legislative-chamber defenses of judicial review have a number of vices, however. To begin, judicial review cannot simply be added to a system of legislative supremacy. One of the complaints of the judicial review critics, including Waldron, is that judicial review discourages elected officials from taking seriously their obligation to uphold constitutional rights. Conscientious legislators in a system without judicial review, the argument goes, know that their potential vote against a bill is all that stands between it and the persons subject to it; by contrast, legislators in a system with judicial review may vote for legislation without giving serious consideration to constitutional

72 Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1695 (2008) (“[L]egislatures and courts should *both* be enlisted in protecting fundamental rights, and . . . both should have veto powers over legislation that might reasonably be thought to violate such rights.”).

73 Waldron and Fallon both discuss constitutional rights rather than constitutional law more broadly, but for present purposes nothing turns on that fact.

74 Fallon, *supra* note 72, at 1710.

75 Fallon nonetheless claims that judges have a distinct “perspective” that will likely make them more sensitive to some kinds of rights violations than legislators are likely to be. *See id.* at 1708–09 (“[A] reason to give courts a veto power is that courts are likely to have a perspective that might make them more sensitive than legislatures to some possible rights violations . . .”). In describing that distinct perspective, Fallon uses language that suggests that it is not merely different but also more likely to get at the truth about rights. *See, e.g., id.* at 1709 (“[J]udges’ professionally ingrained instincts and processes of judgment are likely to differ from those of legislators and to be better adapted to reflecting such imperfect wisdom about the content of rights as our legal tradition embodies.”). Because the issue is tangential to my purposes here, I shall bracket the question of whether Fallon truly treats judges as no better than legislators at understanding the truth about rights.

objections, on the assumption that the courts will protect any constitutional rights the law violates.⁷⁶ In principle, the addition of judicial review to a legal system could actually weaken protection for constitutional rights. Absent judicial review, perhaps the legislature would have rejected on constitutional grounds some number of laws each year. With the addition of judicial review, however, the legislature only rejects some smaller number of laws per year on constitutional grounds, relying on the promise of a judicial failsafe. But that promise proves false if the courts do not invalidate all of the additional laws the legislature has passed—and, guided by principles of judicial restraint, it is at least possible that the courts will fail in just that way.⁷⁷

These considerations are obviously quite speculative. It is impossible to say in the abstract whether the direct effect of judicial review—judicial invalidation of some number of laws—is larger than its possible indirect effect—discouraging independent constitutional judgment by legislators. The answer will undoubtedly depend on historically path-dependent factors such as political culture. But the possibility that judicial review could actually diminish protection for rights cannot simply be dismissed.

Moreover, even if we assume with Fallon that the addition of judicial review decreases the likelihood that any given legislative proposal will become operative, it is not obvious that this is normatively desirable. At some point, added veto gates make legislation too difficult to enact. Where that point is, of course, depends on how strongly libertarian one's premises are. Fallon himself acknowledges as much by relying on substantive as well as procedural principles to increase the odds

that a system of judicial review can be so designed that the total moral costs of the overenforcement of rights that judicial review would likely produce will be lower than the moral costs that would result from the underenforcement of rights that would likely occur in the absence of judicial review.⁷⁸

⁷⁶ See, e.g., MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–60 (1999) (referring to the phenomenon as “judicial overhang”); cf. Waldron, *supra* note 71, at 1384–85, 1403 (suggesting that the existence of judicial review focuses attention on legal interpretation at the expense of sustained legislative debate and acknowledging the possibility that “legislatures . . . operate irresponsibly and in a way that fails to take rights seriously because [of] the knowledge that the courts are there as backup”).

⁷⁷ But see Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 538–39 (2000) (asserting that notwithstanding the judicial overhang, the net effect of judicial review is beneficial).

⁷⁸ Fallon, *supra* note 72, at 1713–14.

The crucial question is “how to weigh the risks and costs of underenforcement against those of overenforcement.”⁷⁹

What Fallon shows is the *possibility* that judicial review might improve a legal system. If, in some legal system, the risks of underenforcement of rights outweigh the risks of overenforcement, then adding judicial review could result in a net improvement. However, a highly counter-majoritarian form of judicial review could result in a legal system in which the overenforcement risks outweigh the underenforcement risks. One has a plausible third-legislative-chamber account of judicial review only if one is reasonably confident that judicial review will come closer to the right balance of overenforcement and underenforcement risks.

One would still need to say quite a good deal more (as Fallon does) in order to justify any particular third-legislative-chamber account of judicial review. After all, if one were *only* interested in making legislation more difficult, then it is hardly clear why moving from a regime of legislative supremacy to a system that includes judicial review is superior to other barriers to legislative action, such as imposing a supermajority requirement for all legislation. Nor is the question of balancing the risks of over-protection against the risks of under-protection a simply quantitative question. The real issue is not *how much* regulation is optimal but *what* regulation is optimal. A third-legislative-chamber account thus needs to be supplemented by a substantive defense of *judicial* review. And the supplemental account may end up including an interpretive theory like representation-reinforcement, originalism, or living constitutionalism. If so, then the third-legislative-chamber account will not be an alternative to these other theories but a way of reconceptualizing the work they do.

That reconceptualization would have value because, to return to our main topic, the Friedman thesis does not undercut third-legislative-chamber theories. The proper function of judicial review in third-legislative-chamber accounts is to nudge the legal system off of a rights-under-protective point and onto a somewhat less under-protective or slightly overprotective point. That is a modest goal, consistent with the relatively modest capacity of courts for counter-majoritarian decisions. If we can “encase” whatever interpretive theory we deem most attractive in a third-legislative-chamber view of judicial review, perhaps we can draw some of the sting of the Friedman thesis. Specifying exactly how to do so is the difficult task that

79 *Id.* at 1733.

the Friedman thesis sets for constitutional theorists who grapple seriously with the track record of judicial review in the United States.

VII. CONCLUSION

The record of judicial review in the United States shows that courts rarely act in a strongly counter-majoritarian way, and that when they do, the political system eventually finds ways of bringing the courts back in line with the considered opinions of the public. Consequently, constitutional law faces a majoritarian difficulty to which the leading theories of constitutional interpretation succumb. Representation-reinforcement, originalism, and living constitutionalism all aim to justify counter-majoritarian judicial interventions beyond the demonstrated capacity of the courts. By contrast, third-legislative-chamber accounts of judicial review only require courts to act in an occasionally counter-majoritarian fashion, and for that reason, do not succumb to the majoritarian difficulty. Third-legislative-chamber accounts, however, do not prescribe any particular mode of constitutional interpretation; they must be supplemented by other, more substantive, theories. The leading accounts of constitutional law—representation-reinforcement, originalism, and living constitutionalism—are obvious candidates for filling in the content of third-legislative-chamber approaches. Placing such substantive interpretive accounts within the context of a third-legislative-chamber view may ease the otherwise-impossible-to-satisfy demands of strong counter-majoritarianism.