POLICY DISTORTION AND DEMOCRATIC DEBILITATION: COMPARATIVE ILLUMINATION OF THE COUNTERMAJORITARIAN DIFFICULTY

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James Bradley Thayer set the terms of the past century's discussion of judicial review in *The Origin and Scope of the American Doctrine of Constitutional Law.*[1] Thayer was concerned with what Alexander Bickel labeled the "countermajoritarian difficulty" with judicial review,[2] that judicial review displaces decisions made by near-contemporaneous political majorities and therefore is open to the charge that it is undemocratic. Thayer attempted to minimize the displacement of political majorities through his "clear error" rule, according to which courts should not overturn legislation unless "those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question."[3] The generations that succeeded Thayer found that solution unpalatable.[4]

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1. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129 (1893). *See generally* Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium,* 88 NW. U. L. REV. 1 (1993).

2. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).

3. Thayer, *supra* note 1, at 144.

4. Among contemporary constitutional theorists, almost no one accepts Thayer's minimalism across-the-board. Henry Monaghan may be the sole exception. *See* Henry P. Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353 (1981). A broad generalization, inaccurate only at the margins, is that nearly every constitutional theorist urges minimal judicial review and vigorous democratic dialogue on issues on which the theorist believes her preferred position is likely to prevail in the democratic dialogue and more-than-minimal review on issues on which the theorist believes her preferred position is unlikely to prevail

Instead of reducing judicial review to Thayer's minimal level,[5] scholars have attempted to work around the countermajoritarian difficulty by identifying a domain in which more-than-minimal judicial review is compatible with democratic theory. Some originalists conclude from their examination of the relevant materials that more-than-minimal judicial review is sometimes justified because judicial enforcement of the Constitution's original meaning carries out the only agreement binding the people's representatives.[6] Process-oriented theorists argue that such review is justified when the majoritarian deficit associated with judicial review is smaller than the majoritarian deficit associated with other decisional processes.[7] The variations on these themes have preoccupied constitutional theorists in the United States for generations.[8] Even Bickel's emphasis on justiciability doctrines as a way of reducing the occasions for judicial review was designed to ensure the effectiveness of the Court's actions when it *did* exercise more-than-minimal review.

Perhaps democratic theory does allow for some displacement of near-contemporary majority views. Both Thayer and Bickel, how-

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there. For dramatic illustrations from two of the best, see CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993), especially at 315-17 (arguing that courts should require governments to fund abortions, at least in cases of rape and incest) and 228-30 (arguing that courts should not restrict government regulation of campaign finance), and Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools,* 104 HARV. L. REV. 989 (1991) (arguing that courts should require governments to assist parents with tuition charged by religious schools and that courts should not require governments to assist in paying for abortions).

5. I take the term "minimalist" from Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism,* 88 NW. U. L. REV. 84 (1993).

6. That is, the justification for making originalist materials authoritative is that doing so carries out the agreement. For another band of originalists, originalism is justified, not because it is compatible with democracy, but because it is the only account of constitutionalism that is compatible with the proposition that the Constitution is law. For myself, I find this definitional "justification" of originalism normatively unsatisfying; justifying originalism as compatible with democracy, in contrast, has what I regard as the appropriate form.

7. This formulation is designed to take into account Charles Black's important but widely overlooked point that we ought to distinguish between judicial decisions overturning statutes, for example, a statute specifically authorizing searches of automobile junkyards on less-than-probable cause, and judicial decisions overturning specific decisions made by officeholders, for example, a search of an automobile junkyard on less-than-probable cause by an individual police officer acting solely under her general authority to investigate the possibility that some crime has been committed. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 77-93 (1969). A court's relative majoritarian deficit is surely larger in the first than in the second situation, and — perhaps — an individual police officer may have *less* majoritarian legitimacy than a court.

8. I do not exempt myself from this observation, although I believe that my critical approach did not force me to engage in a normative defense of any particular version of the allocational strategy I describe. *See* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988). *But see* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 126-40 (1991) (characterizing my approach as prudentialist).

ever, were concerned with other costs associated with more-than-minimal judicial review. Judicial review, according to Thayer, "has had a tendency to drive out questions of justice and right, and to fill the mind[s] of legislators with thoughts of mere legality . . . . And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it."[9] Not only would judicial review *displace* majoritarian decisionmaking; it might also *distort* and *debilitate* it. First, judicial review might distort decisionmaking by injecting *too many* constitutional norms into the lawmaking process, supplanting legislative consideration of other arguably more important matters. Second, judicial review might debilitate decisionmaking by leading legislatures to enact laws without regard to constitutional considerations, counting on the courts to strike from the statute books those laws that violate the Constitution, leading to the problem of debilitation.

Looked at from one point of view, these problems are in some tension. The problem of policy distortion arises when legislators take what the courts say about the Constitution's meaning too seriously, and the problem of democratic debilitation arises when legislators and their constituents do not take the Constitution's meaning — or more precisely, their own views about that meaning — seriously enough. The problems would be troublesome if one occurred with respect to some issues and the other with respect to other issues or at other times. A legislator may fail to give enough weight to constitutional concerns about welfare reform but may give too much weight to the Supreme Court's constitutional pronouncements when considering whether to enact a statute about the distribution of sexually explicit materials over the information superhighway. But, precisely because legislative views about the Constitution's meaning *may* differ from the courts', the problems of distortion and debilitation may sometimes occur simultaneously.[10]

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9. Thayer, *supra* note 1, at 155-56.

10. I simply note here a question about what might be called the Constitution's ontological status. The analysis that follows is agnostic about whether in some deep sense the Constitution "has" a meaning. Its premise is that, however one answers that question, the only meanings anyone can identify are articulated by people with specific and differing interests and incentives. In particular, in addition to discussing judicially and legislatively articulated constitutional norms, a full analysis would at least occasionally advert to academically articulated constitutional norms, with some discussion of how the incentives of academic commentators affect the norms they articulate. For a brief discussion of those incentives, see Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986). *See also* Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397, 415 (1994) (noting the need for additional study of the impact of constitutional law professors, including the impact from testimony in parliamentary proceedings or advising political parties).

For Thayer, distortion and debilitation were independent arguments against more-than-minimal judicial review. Even if such review did not pose a problem of democratic displacement, the problems of policy distortion and democratic debilitation resulting from more-than-minimal review might still be so severe that the nation's constitutional order would be better without such review than with it.

Thayer believed that his minimalist theory of judicial review addressed all three problems. By eliminating the problem of displacement of democratic decisions, it would eliminate the problem of distortion because there would be no judicially articulated constitutional norms to intrude into legislative deliberations. Moreover, if all worked well, it would simultaneously eliminate the problem of debilitation by inducing the public to insist that their representatives take constitutional considerations into account because no one else would.

If Thayer was right,[11] proponents of more-than-minimal judicial review in any of its versions must deal with the problems of policy

11. To the extent that modern constitutional scholarship deals with the issues discussed here, it tends to reject the claim that the problem of democratic debilitation is a serious one. That rejection takes two forms. First, some argue that, contrary to Thayer, today's political discourse is *overly* concerned with constitutional concerns: according to these critics, constitutional concerns associated with the vigorous assertion of individual rights have taken over territory that pure policy concerns or concerns about individual and social responsibility ought to occupy. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991). To some extent, my discussion of policy distortion is designed to identify precisely what is wrong with that sort of constitutional discourse. Elsewhere Louis Michael Seidman and I contest that description of contemporary political discourse, arguing that the language of constitutional rights, though widely used, is an empty vessel into which people pour their antecedent policy and moral views. *See* LOUIS M. SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (forthcoming 1996). The Constitution, we argue, does no independent work in political discourse. My view, though not necessarily Seidman's, is that the latter phenomenon is widespread and constitutes a form of democratic debilitation in that constitutional norms play no independent role in deliberation.

Others argue that more-than-minimal judicial review contributes to a vigorous dialogue with and among the public about constitutional norms. I believe that this dialogic conception fails to distinguish two different aspects of the interaction between the courts and the public. The first description accurately points out that the process of constitutional development occurs over time, with interventions by the courts, responses by the public, additional interventions by the courts sometimes influenced by the public response to the first intervention, and so on. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). To counter Thayer's concerns, however, the public responses would have to be "constitutional," that is, cast in terms of the values embedded in the Constitution. One might contrast here the "dialogues" between the Court and the public with respect to abortion after Roe v. Wade, 410 U.S. 113 (1973), and with respect to capital punishment after Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976). My judgment is that the abortion debate has been constitutional in a way that the capital punishment debate has not.

Both forms of the claim that democratic debilitation due to more-than-minimal judicial review is not a problem raise empirical questions. *See also infra* note 204.

distortion and democratic debilitation.[12] Thayer did little to elucidate those problems. With the spread of constitutional review throughout the world, we now have a larger base of information on which to rest judgments about the nature and scope of those problems.[13] For example, what exactly is the problem of policy distortion, and does minimal judicial review eliminate it? If more-than-minimal judicial review is both required by democratic theory and associated with the problem of democratic debilitation, are there additional institutional arrangements that can reduce democratic debilitation?[14]

In this article, I explore these questions by relying on recent constitutional experience in France and Canada. Their experience helps illuminate the problems of U.S. constitutional law that Thayer and Bickel posed for us. Part I uses a recent study of the French Constitutional Council to examine the problem of policy distortion. Most of Part I is concerned with identifying the problem of policy distortion more precisely than Thayer did. It concludes with a brief suggestion that minimal judicial review might not be a full solution to that problem. Part II turns to the Canadian experience with sec-

12. The problem of democratic displacement has been the focus of most scholarly criticism of more-than-minimal judicial review. For my contributions, see the increasingly qualified sequence of articles: Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984); Mark Tushnet, *Rights: An Essay in Informal Political Theory*, 17 POL. & SOCY. 403 (1989); Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993). A parallel critical literature exists on the Canadian Charter of Rights and Freedoms. *See, e.g.*, ALLAN HUTCHINSON, WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS (1995); MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA (1989).

13. *See* United States v. Then, 56 F.3d 464 (2d Cir. 1995).

> Since World War II, many countries have adopted forms of judicial review, which — though different from ours in many particulars — unmistakably draw their origin and inspiration from American constitutional theory and practice. These countries are our "constitutional offspring" and how they have dealt with the problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.

56 F.3d at 469 (Calabresi, J., concurring) (citation omitted).

I have tried to heed the usual cautions about the dangers of comparative study by asking here only whether experience elsewhere can illuminate Thayer's and Bickel's arguments. One should be cautious about drawing strong lessons from experiences elsewhere because the outcomes in other societies may be tightly tied to the specifics of their cultures or may result from structural factors other than the constitutional structures to which this article pays attention.

14. This question is not here presented in a form parallel to the question I raise about the problem of policy distortion. I present the question in this way because of my view that it would be desirable for constitutional consciousness — and even authority — to be distributed more broadly than it is now. To some extent that view in turn rests on a notion of the proper role of what Richard Parker calls "political energy" in a good democracy. *See* RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 55-56 (1994). To some extent, it rests on a probably romantic belief that the public policies that would be enacted were constitutional authority more broadly distributed would be more compatible with my own political views.

tion 33 of the Canadian Charter of Rights and Freedoms, the so-called notwithstanding clause. U.S. scholars have suggested that the notwithstanding clause is an ingenious institutional arrangement that allows more-than-minimal judicial review to coexist with a vigorous majoritarian politics. Closer examination of the Canadian experience suggests that it is not. Part II goes on to explore the reasons for section 33's failure and speculates on the practicability of the Canadian approach to this problem of democratic debilitation generally. In conclusion, I suggest that, even as specified, the problems of policy distortion and democratic debilitation may be serious enough to confirm Thayer's initial sense that more-than-minimal judicial review poses difficult problems for the operation of a stable and vigorous constitutional democracy.

I. The French Constitutional Council and the Problem of Policy Distortion

Policy distortion occurs when, due to judicial review, legislators choose policies that are less effective but more easily defensible than other constitutionally acceptable alternatives. Political scientist Alec Stone's analysis of the French Constitutional Council focuses on this problem.[15] According to Stone, the Council's power to articulate constitutional norms "alter[s] legislative outcomes" through its "pedagogical authority" and "the threat of future Council censure."[16] Legislators sacrifice their policy goals "to insulate a bill from possible future Council censure."[17] Stone is not particularly concerned about the normative implications of this effect, which he calls "juridicization."[18] Others, following Thayer's lead, may think that juridicization is indeed a problem because the society is regulated by rules that its legislators would in some sense prefer to be otherwise. Specifying that sense, however, is quite difficult. My aim in this Part is primarily to clarify the notion of policy distortion and, by identifying a set of categories that might be help-

15. Alec Stone, The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective (1992).

16. *Id.* at 119.

17. *Id.* at 122.

18. *Id.* at 7. Stone properly calls the term "awkward[]." *Id.* Other political scientists have used cognate terms, particularly *juridification* and *judicialization,* to refer to the phenomenon Stone discusses, as well as other phenomena. *See, e.g.,* Special Issue, *The Judicialization of Politics,* 15 Intl. Pol. Sci. Rev. 91 (1994). The broader terms sometimes refer (a) to the displacement of issues previously confined to political fora into the judicial arena — this displacement is connected to the problem of democratic debilitation — or (b) to the use of judicial-type procedures in decisionmaking settings that previously had used less formal procedures.

ful for those who wish to address the problem of policy distortion, to examine when it might occur and whether and why it might be troublesome.

Section A lays out the basic structure of the French system of constitutional review and provides two examples in which policy distortion might have occurred as a result of that system. Section B addresses the problem raised by the examples in section A: What is the difference between policy distortion resulting from judicial review and proper enforcement by the courts of proper constitutional limits? By looking at the general role-allocation regime in which legislators have no role in articulating constitutional norms and the limited role-allocation regime in which legislators do not have to observe substantive constitutional limits within limited domains, this section concludes that in order for policy *distortion* to occur, legislators must be allowed to articulate constitutional norms that differ from those identified by the courts. Section C then goes on to explore when and how policy distortions might occur and analyzes approaches to the problem other than minimal judicial review.

A. *The Structure of Constitutional Review in France*

The French Constitutional Council was created in the Gaullist constitution of 1958. Designed primarily to ensure that Parliament would not trench on the important powers the 1958 constitution gave the President, the Council is an expressly political body. It has nine members who serve nine-year nonrenewable terms. The President of France, the President of the Senate, and the President of the National Assembly each name three members.[19] Politicians, particularly former ministers, have dominated the Council. In 1986, for example, eight of the Council's nine members had been ministers.[20]

The Council exercises what scholars of comparative constitutional law call abstract and *a priori* judicial review, in contrast to the U.S. system of concrete and *a posteriori* review.[21] The Council reviews laws after their adoption by parliament but before their official promulgation. This review is abstract because it does not occur in the context of a litigated case whose facts might illuminate the constitutional issue, and it is *a priori* because it occurs before the

19. Former presidents of France are members of the Council for life. Only two former presidents have served, the last in 1962, and, according to Stone, "it is likely that they will be the last to do so." STONE, *supra* note 15, at 50.

20. *Id.*

21. In addition, the French system centralizes constitutional review in a single specialized court, whereas the U.S. system authorizes every court to consider constitutional questions.

laws go into effect. The nation's leading political figures — the President, the Prime Minister, the Presidents of the branches of Parliament — may invoke judicial review by referring laws to the Council, as may sixty members of either branch of Parliament.

Stone offers two detailed case studies of the French system of constitutional review. These examples bring the "policy distortion" effect of constitutional review into a clearer light. In 1981, the newly elected Socialist government confronted a Council dominated by Gaullist appointees, a majority of whom had been elected politicians.[22] Among the government's primary proposals was an extensive nationalization of the economy, which the conservatives unsurprisingly resisted.[23] On January 16, 1982, the Council held that major aspects of the Socialist nationalization program violated a constitutional principle embedded in the 1789 Declaration of Rights of Man against taking property without just compensation. The government had proposed a complex compensation formula in which stock prices accounted for only fifty percent of the compensation for nationalized property.[24] The Council held, however, that compensation had to be based on stock prices "evaluated on the day of the property transfer, taking into account the influence which the prospect of the nationalization might have had on the value of their shares."[25] In response to this decision, the Socialist government modified the nationalization program by increasing the compensation offered by approximately thirty percent,[26] paying for it through a tax increase that was inconsistent with the government's general program of economic stimulation. Stone concludes that "[n]o stockholder who has ever been bought out by a modern, industrial state . . . has ever enjoyed terms as good as those in France in 1982."[27]

Stone also examines a second key element of the Socialist program, a press law aimed at breaking up media monopolies, particularly the one owned by the conservative and former Nazi

22. STONE, *supra* note 15, at 80. The analogy to the situation President Thomas Jefferson faced in 1801 is irresistible.

23. Stone quotes one source that noted that "the Right had begun to hail the Council as 'the last rampart against the socialist-communist government.' " *Id.* at 79.

24. Average share prices from 1978 to 1980 were 50% of the compensation; the remainder was divided equally between average net profits for the period multiplied by 10 and net accounting assets as of December 31, 1981. *Id.* at 150.

25. *Id.* at 161.

26. The new formula was based on the highest monthly average stock price between October 1980 and March 1981 — which in Stone's terms "discount[ed] for the effect of the Left's victory on prices," *id.* at 163, and two additional supplements.

27. *Id.* at 165.

collaborator Robert Hersant, and at preventing such monopolies from re-forming in the future.[28] The government's bill would have allowed one person or group to own or control no more than a single national daily newspaper or fifteen percent of a regional market; further, the bill would have guaranteed the independence of the editorial staff from the publisher. In addition, the government proposed to create an agency to regulate acquisitions, which could both suspend and nullify sales of publications.

The political battle over the bill was intense. Fearing that the Constitutional Council would invalidate the bill, legislators seized control of it and forced its modification. For example, under the final bill, individuals or groups could control "several dailies" so long as their combined market share did not exceed fifteen percent, and the regulatory agency could neither suspend sales nor directly dismantle merged enterprises. In considering changes to the bill, legislators referred to prior Council decisions indicating that some constitutional rights could not be subject to a requirement of prior authorization.[29]

Despite the legislators' efforts, when the proposed law reached the Constitutional Council, it "upheld the government's legislation in principle but not in detail."[30] In particular, the Council immunized existing media groups, including Hersant's, from the application of the new law.[31] The Council also held that market-share ceilings were constitutional only as applied to future acquisitions and not if the market share of existing or newly created publications associated with a group exceeded the fifteen percent ceiling. In addition, the Council concluded that the regulatory agency would in effect impose a system of prior authorization for the exercise of press freedom, which made its operation unconstitutional.

It seems clear that the Constitutional Council thwarted the enactment of two major pieces in the Socialist legislative agenda and that the legislation that emerged from the total process was different from the laws the Socialists had hoped to enact. Yet, the Council purported to invoke constitutional norms of private property, just compensation, and free expression. Stone gives the label *autolimitation* to "the government's exercise of legislative self-

28. *Id.* at 178-83 (discussing the 1984 Press Law, *Débats,* National Assembly *(Constituante),* 12 Sept. 1984, at 4431-33).

29. *See* STONE, *supra* note 15, at 184.

30. *Id.* at 84.

31. According to Stone, Hersant ignored the new law, and, by March 1986, he controlled over 38% of the national market for daily newspapers. *Id.* at 190.

restraint resulting from anticipation of a referral to, and an eventual negative decision of, the Constitutional Council."[32] More conventionally, though, the phenomenon might have been called *constitutional limitation.*

It is difficult, however, to see that this limitation necessarily results in a policy distortion for transition. Unless one simply disagrees with the Council's constitutional interpretation, in what sense was the result a *distortion* of legislative policy, rather than the enactment of policies consistent with the constitution's requirements? By specifically distinguishing between actions taken with a view toward limitations imposed by the constitution and actions taken with a view toward limitations imposed by the Constitutional Council in the name of the constitution, Stone allows us to examine the problem of policy distortion in more detail.

B. *Specifying the Nature of Policy Distortion*

That it is not obviously a distortion of policy to ensure that policy be consistent with the Constitution is the first puzzle to solve. Two other puzzles also deserve attention. Suppose judicial efforts to enforce constitutional norms distort policymaking. In the United States, legislators take an oath to uphold the Constitution. When *they* attempt to enforce constitutional norms, pursuant to one understanding of their oath, do legislators also distort policymaking? Once again, the sense in which attempting to enforce constitutional norms distorts policy requires clarification. One candidate is that the constitutional tribunal's decisions are not themselves "what the Constitution requires."[33] Yet, if so, where does "the Constitution" that is said to distort policymaking come from? An investigation into these puzzles reveals that policy distortion may occur only when legislators are allowed to consider constitutional norms in shaping policy and when the norms they identify are different from those laid down by the courts.

1. *Role Allocation and the Puzzle of the Oath*

Consider a constitutional system with a rigid allocation of roles: legislators are directed to respond solely to their judgments about what sound social policy requires — or to their constituents' demands — where *soundness* has nothing whatsoever to do with the

32. *Id.* at 122 (emphasis omitted).

33. In the terms of Article VI of the U.S. Constitution, the Constitution itself and not necessarily the Supreme Court's decisions is "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2; *see infra* text accompanying notes 34-52.

policies embedded in the constitution; judges are directed to respond solely to their judgments about what the constitution requires. Such a system might be defended on grounds of comparative advantage. Legislators, though not entirely incompetent at constitutional analysis, are sufficiently less competent than judges that the best set of policies will result from this rigid role allocation. In such a system, policy might be distorted when legislators inject considerations of constitutionality, which are irrelevant to their role, into their policy deliberations.

The oath U.S. legislators take to support the Constitution strongly suggests, though, that ours is not such a system.[34] True, one might argue that a legislator upholds the Constitution when she acts consistently with the rigid demands of the role-allocation system, even though her role requires that she not take any specific constitutional provision into account while she deliberates. It would be peculiar, however, to ask such a legislator to take an oath to uphold the Constitution. The role-allocation system directs legislators to take into account only matters of policy and politics. These considerations are what a legislator would take into account even without a constitutional oath.

Even if such a general role-allocation regime were in place, it is difficult to see how the institution of constitutional review could distort legislative policy. First, in such a system the courts would be the only body permitted to find the substantive policy limits embedded in the Constitution. Therefore the courts' interpretation of the Constitution would necessarily be "what the Constitution requires."[35] As such, any limits the courts could place on the legislature's policy decisions would not be *distortions* but would simply be indications of proper constitutional limits. Second, if legislators in such a system improperly considered constitutional norms while forming policies, it would not be the institution of constitutional review that would work improper policy distortions but rather the

34. *See* Alec Stone, *Judging Socialist Reform: The Politics of Coordinate Construction in France and Germany*, 26 COMP. POL. STUD. 443, 463 (1994) ("In France, deputies and senators are required to behave as constitutional judges whenever a motion of unconstitutionality is raised;" the standing rules of both houses provide for such motions). According to Stone, "During these debates, legislators cite constitutional provisions, original intent, past Council decisions, and the work of respected law professors." *Id.*

35. This must be so because under such a system, there is no other body capable of giving the Constitution meaning. The legislative body might be able to *amend* the Constitution and add to it, but they would not be allowed to find meaning in the *existing* Constitution.

improper actions of legislators.[36] Thus, under a general role-allocation regime, policy distortion *as a result of constitutional review* could not exist.

2. *Political Questions and the Puzzle of "the Constitution"*

Treating the Constitution as a document that creates only a structure of incentives for legislators[37] is unsatisfactory as a general account of the U.S. constitutional system and as a basis for an explanation of the problem of policy distortion. Such an approach, however, might retain some force in our system of constitutional review within limited domains where legislators need not take the Constitution into account. If they did take the Constitution into account when making policy in those areas, the legislative product might be distorted. Even this restricted role-allocation account has serious difficulties. In particular, it will prove hard to identify "the Constitution" that legislators might take into account in a way that could distort the laws they enact.

An examination of Supreme Court decisions regarding federalism and the political question doctrine, areas in which an approach akin to limited role allocation is used, is instructive. According to Justice Blackmun, "The political process ensures that laws that unduly burden the States will not be promulgated" because of the "built-in restraints that our system provides through state participation in federal governmental action."[38] This account of federalism is hotly contested and may not represent the Court's current position.[39] For present purposes, however, its interest lies in its account of the responsibility of members of Congress. Under Blackmun's version of federalism, members of Congress considering legislation that might affect the states uphold the Constitution when they respond to normal political pressures.[40] They need not explicitly con-

36. Under the constitutional demands of the general role-allocation system, legislators considering constitutional norms would not only be acting improperly by considering constitutional norms but also unconstitutionally.

37. Elsewhere I distinguish between a constitution of substance and a constitution of structure or incentives. *See* Mark Tushnet, *Clarence Thomas: The Constitutional Questions*, GEO. WASH. L. REV. (forthcoming 1996)(book review). A legislator who believed that the Constitution was only one of structure might take an oath to uphold the Constitution; in doing so, she would be swearing to act in response to the incentives the Constitution creates, which is what the legislator would do even without the oath.

38. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

39. *See* New York v. United States, 504 U.S. 144 (1992).

40. Elsewhere I call this a *structural* view of the Constitution as seen from the legislature and distinguish it from a *substantive* view, according to which members of Congress have a constitutional duty to respond to some normative vision of federalism embedded in the Constitution. Tushnet, *supra* note 37 (manuscript at 3).

sider whether the proposal is consistent with some normative version of federalism.

One might describe the political question doctrine in similar terms.[41] Consider first a question reserved in *Powell v. McCormack*.[42] The Court held that it had the power to consider whether the House of Representatives could exclude a person on grounds other than the person's failure to satisfy one of the three so-called standing qualifications — age, citizenship, and residency — enumerated in Article I, Section 2.[43] It "express[ed] no view" on the question of whether the courts "might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications."[44] If the doctrine did bar the courts from such considerations, one reason would be that the political constraints on irresponsible fact-finding are so strong that the risk to constitutional values posed by invoking the doctrine is smaller than the risks that attend on judicial review of the House's factual determinations.

The Justices were divided over this analysis when they revisited the political question doctrine in *Nixon v. United States*.[45] In that case, Judge Nixon challenged the process by which the Senate had tried his impeachment. He contended that, by delegating large parts of the process to a committee, the Senate had failed to accord him the trial to which the Constitution entitled him. Chief Justice Rehnquist wrote the Court's opinion holding that Nixon's claim was nonjusticiable. In separate opinions concurring in the judgment, Justices White and Souter expressed concern about the scope of that holding. Each raised what Justice Stevens in his concurrence called "improbable hypotheticals"[46] to challenge the Court's holding: Could the Senate, "without any procedure whatsoever," impeach a judge for "being a 'bad guy' ";[47] could it decide based "upon a coin-toss"?[48]

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41. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). Choper's "Federalism Proposal," *id.* at 175-76, has widely been described as seeking to make federalism questions nonjusticiable. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1205 (1991).

42. 395 U.S. 486 (1969).

43. U.S. CONST. art. I, § 2, cl. 2.

44. 395 U.S. at 521 n.42.

45. 113 S. Ct. 732 (1993).

46. 113 S. Ct. at 740 (Stevens, J., concurring).

47. 113 S. Ct. at 741 (White, J., concurring in the judgment).

48. 113 S. Ct. at 748 (Souter, J., concurring in the judgment).

If taken seriously, the Court's holding is indeed that impeachments based on coin tosses are unreviewable, even for failure to hold the constitutionally mandated trial.[49] In response to Judge Nixon's argument that "judicial review is necessary in order to place a check on the Legislature,"[50] Chief Justice Rehnquist mentioned "two constitutional safeguards to keep the Senate in check": the impeachment power is shared with the House, and a two-thirds majority vote to convict is required.[51] The Chief Justice did not make the point in precisely this way, but one interpretation of the argument here is that the political safeguards are sufficient to ensure that the improbable hypotheticals will never come to pass.[52]

The federalism and political questions analysis suggests that there are circumstances in which a legislator might indeed uphold the Constitution while acting solely in response to ordinary policy and political concerns. Nonetheless, the analysis conceals a serious problem: it deprives us of the language of constitutionalism even as it purports to invoke the Constitution.

Take, for example, Justice Blackmun's view that the political safeguards of federalism mean that Congress will not enact laws that "unduly burden" the states. This formulation presumably invokes some normative vision of federalism, according to which the states ought not to be unduly burdened. Where, though, does that normative vision come from? Not from Congress, because on the role-allocation account, members of Congress need not have any normative vision of federalism in mind when they act. Not from the Court, either, because under this analysis, the Court refrains from expressing any normative vision.

Thus, the limited role-allocation explanation for policy distortion fails for the exact opposite reason than the one for which the general role-allocation explanation fails. Under the general role-allocation regime, there can be no policy distortion because only courts are allowed to speak to the substantive limits of the Constitution.[53] Under the limited role-allocation system, however, there

49. Chief Justice Rehnquist's opinion is opaque enough, however, that it might not require that conclusion. Some passages in his opinion suggest that Judge Nixon got the trial to which he was entitled. 113 S. Ct. at 736 ("[P]recise" limitations in the Impeachment Trial Clause "suggest[ ] that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try' in the first sentence.").

50. 113 S. Ct. at 739.

51. 113 S. Ct. at 739.

52. Note, however, that the House's participation will have ended when the Senate decides by coin toss.

53. *See supra* text accompanying notes 35-36.

can be no policy distortion because *no body* may speak to the substantive limits of the Constitution. Because it lacks a normative vision of what the Constitution requires, that system has no possibility of constitutional review that could result in policy distortions.

In sum, policy distortion can only occur when legislators may take constitutional norms into account and when those norms are not necessarily identical to the ones the courts lay down. That legislators must be allowed to consider constitutional norms takes account of the problems exposed by the analysis of the general and restricted role-allocation descriptions of legislators' roles. That the norms considered by the legislature differ from those identified by the courts deals with the restricted role-allocation description and the first puzzle, that of distinguishing between compliance with the Constitution and the development of a distorted policy in light of judicial review. Having established the necessary preconditions for the occurrences of policy distortions as a result of constitutional review, a further question must be addressed: What types of situations will lead to policy distortions in a system in which they might occur?

C. *Judicially and Legislatively Articulated Constitutional Norms*

Intuitively, the problem of policy distortion arises when the courts, exercising the power of judicial review, say something about what the Constitution requires, and legislators somehow improperly take what the courts have said into account as they shape policy. So, for example, Stone writes of the French Parliament's restructuring of the nationalization law to make the compensation formula fit the Constitutional Council's requirements.

In a first cut at the analysis, I have argued that such responsiveness can be problematic only if the Council's articulation of constitutional requirements is itself questionable.[54] Nothing interesting follows, however, if the questions merely express disagreement with the merits of the Council's decision. In contrast, if we distinguish between judicially articulated constitutional norms and legislatively articulated ones *and* refuse to treat the judicially articulated norms as normatively superior to the legislatively articulated ones,[55] interesting perspectives on the problem of policy distortion open up.

54. For a second cut at the analysis, see *infra* text accompanying notes 100-10.

55. The analysis becomes more complex if we treat the judicially articulated norms as pragmatically but not normatively superior to the legislatively articulated ones.

Recall that neither the general nor the restricted role-allocation description of the legislator's role, in which legislators do not articulate constitutional norms, helps make sense of the notion of policy distortion. If, however, legislators articulate constitutional norms different from those articulated by judges, we can make sense of the idea of policy distortion. Policy distortion would occur, on this account, when legislators who would otherwise articulate their own constitutional norms instead choose to follow the norms the courts articulate.

Further, if legislators may articulate constitutional norms, there are good reasons to think that the norms they articulate will be different from the ones judges articulate. Although we have no good explanations of how the incentives judges face affect the norms *they* articulate,[56] we do know that the mix of incentives faced by judges and legislators differ to the extent that legislators' incentives to respond to current electoral concerns are likely to be somewhat greater than the parallel incentives on federal judges appointed to life terms or, in France, members of the Constitutional Council serving nonrenewable terms.[57] On the margin, then, the norms a legislator articulates will be different from those a judge articulates.

The following sections explore the implications of distinguishing between judicially articulated constitutional norms and legislatively articulated ones.

1. *When Legislators Ignore Judicially Articulated Constitutional Norms*

If legislators ignore judicially articulated constitutional norms,[58] the resulting policy could not be distorted by the existence of such norms and therefore by the existence of judicial review, in any in-

56. A good summary of standard accounts is Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 648 (1994) ("[J]udges' desire to improve their working environment . . . to increase their prestige and influence, or to enhance their reputation."). In this list, *reputation* is something like a black box without what would seem to me a necessary account of how judges' reputations are built, which, as I see it, is likely to be a highly politicized account: any result a judge arrives at can be "explained" by seeing it as the result of an effort to enhance her reputation. *See also* RICHARD POSNER, *What Do Judges Maximize?*, *in* OVERCOMING LAW 109 (1995).

57. I do not believe that judges' incentives to respond to current electoral concerns are nonexistent. To use only the U.S. example, federal judges will have been appointed by a politicized process, with "sponsors" in the executive and legislative branches. Those sponsors or their political successors are likely to have current political interests, and a judge may want to preserve her reputation among that group by reaching results consistent with its current political interests.

58. Or if there are no judicially articulated norms, as in cases involving nonjusticiable norms or as would be true if the courts used minimal judicial review with respect to the subject of the legislation being considered.

teresting sense.[59] The legislature will simply adopt whatever policy it prefers — including a policy influenced by its own understanding of the Constitution, whether that would be the courts' understanding or not — and the courts will either allow that policy to go into effect or not.[60]

Further distinctions bring this conclusion into clearer light. Judicial articulations of constitutional norms will fall into three categories. Sometimes the courts' articulation will be so unclear as to be effectively useless. At other times, the judicially articulated norm is clear enough, and the legislature will easily be able to evaluate policies against existing judicial doctrine.[61] Finally, there are times when judicially articulated norms are not clear enough to justify firm predictions about the likely outcome of litigation concerning the constitutionality of the legislative output; as I will put it, the legislature's position is fairly litigable. In all of these situations, policy distortion cannot occur if the legislature ignores judicially articulated norms.

a. Unclear Judicial Norms. Consider here the question of federalism and health care reform. Nearly every health care reform plan has aspects of congressional imposition on state authority that raise questions under one of the Court's most recent statements about federalism limits on congressional power.[62] That statement, in *New York v. United States*,[63] is so unclear that a responsible legislator concerned about protecting the states from unjustified impositions

59. Mark Graber has suggested, however, one form of policy distortion that deserves note. Mark Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993). Graber argues that legislators sometimes deliberately choose to pass the buck to the courts, relying on the existence of judicial review to address a contentious political issue that the legislators themselves were unable to resolve, whether through ordinary politics or through the invocation of constitutional norms in the legislative process.

60. If the legislature refrains from developing its own understanding of the Constitution out of a misplaced allocation of sole constitutional responsibility to the courts, the problem of democratic debilitation arises.

61. I omit discussion here of those relatively rare situations where changes in the composition of the Court make it difficult to predict the outcome of such litigation even though the articulated norms are clear enough. These situations are made complex by the intrusion of yet another concern, the weight the new Court gives stare decisis. More commonly, previously clear norms become unclear over time, as the Court's composition changes or as competing lines of precedent develop.

62. For an extensive analysis, see Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489 (1994).

63. 505 U.S. 144 (1992).

would be unable to get any guidance from the Court's norm.[64] Such a legislator ought to ignore *New York v. United States*[65] because it does not tell her anything *useful* even about the Court's understanding of the Constitution.[66] Therefore, where the courts' constitutional norms are indecipherable, the existence of judicial review cannot distort policy.

b. Clear Judicial Norms. Where the implications of the judicially articulated norms are clear, and the legislature nonetheless ignores those norms, it is helpful to distinguish between cases in which it is reasonably clear that the courts would invalidate the legislation and those in which it is reasonably clear that they would uphold it.

Former Attorney General Edwin Meese III provoked a flurry of extreme rhetoric when he suggested that legislators, due to their oath to uphold the Constitution, could ignore judicially articulated norms even if those norms clearly implied that the courts would hold their proposals unconstitutional.[67] Much in the responses to Meese's suggestion was overstated, but they had a core of good sense. Consider, for example, a criminal statute that the courts are sure to hold unconstitutional. Unless a potential defendant can somehow obtain pre-enforcement judicial review, she will have to undergo the cost and trauma of putting up a defense to a criminal prosecution whose outcome is, for all practical purposes, predeter-

64. *See* Martin H. Redish, *Doing It with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation,* 21 HASTINGS CONST. L.Q. 593 (1994) (emphasizing the lack of clarity in *New York v. United States*).

65. Neither my research assistants nor I have found any references to *New York v. United States* in the available hearings or debates on health care reform. This is not to say that no one referred to the case, but it seems a sufficient basis for saying that the Court's decision has not played a large part in Congress's deliberations. The discussions do contain references to federalism, usually in the context of asserting that the joint federal-state arrangements are appropriate methods of administering a reformed health care plan in a federal system. Without making too much of the fact, I also note that I briefed a member of the President's Task Force on Health Care Reform on the constitutional questions likely to arise in connection with health care reform and emphasized that the federalism issues associated with *New York v. United States* were likely to be the most important and neglected constitutional questions the President's proposals would raise.

66. That conclusion holds even if Congress enacts legislation that the Court holds unconstitutional "under" *New York v. United States.* It would be *that* decision that could give an indication of what the judicially articulated norm really is; *New York v. United States* does not.

67. *See* Edwin Meese III, *The Law of the Constitution,* 61 TUL. L. REV. 979 (1987).

mined.[68] Because the Court will ultimately vacate, it is unclear what good public purposes enacting the statute serves.[69]

When a legislator ignores clear judicial norms in these circumstances, she acts rather imprudently. Furthermore, to the extent that the legislature acted solely because the courts articulated a norm with which it disagreed so vigorously, perhaps we could say that, in a perverse way, judicial review resulted in policy distortion. Of course, this distortion would not be the result of ignoring the Court's articulated constitutional norm but rather would be the result of peculiar legislative *attention* to that norm.

The case where legislators ignore clear judicial norms that indicate any resulting legislation would be upheld provides a better transition to a full discussion of the problem of policy distortion. Here the judicial norm implies that legislators may but need not change the status quo. In these situations, the distinction between judicially articulated and legislatively articulated constitutional norms can have real significance. This point is easiest to see in connection with minimal-rationality review in equal protection cases.

The Supreme Court has held that the Equal Protection Clause does not impose a strong norm of fair treatment of different groups unless the groups have characteristics that make them particularly vulnerable to legislative exploitation, or the interests affected are themselves of constitutional importance. Rather, legislatures need only satisfy the courts that the course they have adopted is a rational way of accomplishing some public end.

Two of the Court's reasons for this doctrine are especially important in this context. First, the Court has expressed concern that imposing a stronger norm would have destabilizing implications because the norm would operate as a precedent in areas other than the one in which it was initially articulated.[70] Second, the Court has suggested that it is institutionally incapable of assessing the infor-

68. Of course, for that very reason, the trauma would likely be less severe than that normally associated with appearing as a defendant in a criminal prosecution.

69. I put aside the possibility that courts may take the statute's enactment as a signal that their previously articulated norms are so wrong that they ought to be reconsidered. *See supra* notes 56-57 and accompanying text.

70. *See* McCleskey v. Kemp, 481 U.S. 279, 315 (1987) ("[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."); Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

mation relevant to an informed decision about the fairness of differential treatment.[71] Both of these reasons emphasize the special characteristics of courts that impose limits on the norms they articulate.[72] Legislatures, lacking those characteristics, have the capacity to articulate different and more precise norms.

Suppose Congress is considering a health care reform proposal to finance some but not all treatments for cancer. A member proposes to amend the plan to guarantee financing for allogeneic bone marrow transplants for leukemia, saying that norms of equal treatment make it unfair to include treatments that are effective for many patients but to exclude the only effective treatment for patients with a particular form of cancer.[73] I believe that it would not make sense to respond to that argument by pointing out what is undoubtedly true — that the courts would never find a refusal to finance allogeneic bone marrow transplants to be in violation of the Equal Protection Clause. The reason is that the refusal may satisfy the minimal standard of rationality review[74] that the courts use because of their institutional incapacities but may nonetheless violate what we may now call a legislatively articulated norm of equal protection.[75]

In situations where, for reasons of institutional limits, courts, refuse to articulate meaningful constitutional norms, it appears that it is not only appropriate for the legislature to articulate constitutional norms but also necessary because it is the only body capable of finding meaningful limits in the Constitution. An event typical when a controversial bill is before a legislature provides a useful

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71. 481 U.S. at 319 ("McCleskey's arguments are best presented to the legislative bodies. . . . [which] are better qualified to weigh and 'evaluate the results of statistical studies . . . .' ").

72. *See* Lawrence Gene Sager, *Fair Measure: The Status of Underenforced Constitutional Norms,* 91 HARV. L. REV. 1212 (1978).

73. For a discussion of allogeneic bone marrow transplants as a treatment for leukemia, see Dexter v. Kirschner, 984 F.2d 979 (9th Cir. 1993) (finding no constitutional violation in state medicaid statute providing financing for autologous but not allogeneic bone marrow transplants, where only allogeneic transplants hold out possibility of successful treatment).

74. I think it suggestive that these issues are ordinarily discussed under headings like "standards of review," which explicitly direct attention to what *courts* do in reviewing legislation, not to the Constitution itself.

75. The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 1988, 2000bb to 2000bb-4 (Supp. V 1993)), makes it appropriate to emphasize that not all responses to judicially articulated norms make equal sense. Employment Division v. Smith, 494 U.S. 872 (1990), relied in part on the courts' inability to use sensibly a "compelling state interest" test to determine whether facially neutral rules that adversely affected religious practices were constitutional. *See* 494 U.S. at 886-88. The Religious Freedom Restoration Act directs the courts to use that test. Given the Supreme Court's claim that the judicial branch lacks the capacity to do so, one wonders what Congress believed it was accomplishing in enacting the legislation.

contrast to the cases discussed earlier. An opponent will point out that existing judicial decisions imply that the proposal is unconstitutional. Supporters respond that, although they cannot be sure until the courts actually rule on the issue, they believe that the proposal is consistent with the judicially articulated norms. Occasionally, commentators treat this practice as an illustration of how legislators are indifferent to constitutional values.[76]

I believe that is the wrong way to look at the legislators' position. If, as they claim, the proposal's constitutionality is fairly litigable, that is, if the courts might find it consistent with judicially articulated norms, the legislators should be understood to assert one crucial proposition: that, when a proposal's constitutionality is fairly litigable,[77] legislators may — and perhaps should — articulate their own understanding of constitutional norms.[78]

Policy distortion would occur if legislators took the judicially articulated norms as dispositive of the Constitution's meaning and chose to refrain from adopting a statute that, in their view, might advance constitutional norms as they understand them, simply because the courts might not define the Constitution's norms in the same way. In short, policy distortion would occur if legislators did *not* ignore what the courts might say.

2. *When Legislators Take Judicially Articulated Norms Into Account*

Judicial review means that legislators will necessarily act in the shadow of the courts' constitutional interpretation,[79] and prudence indicates that they sometimes ought to anticipate what the courts will do with the policies they enact. Thayer's argument for a minimal scope of judicial review was aimed at reducing the size of this

76. *See, e.g.*, Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1354 (1994) (arguing that Congress has been "ignoring constitutional issues" in developing reform proposals). Sorauf quotes a source indicating that at least some Senators believed that these constitutional questions were fairly litigable. *Id.*

77. Note that the fact that the position is fairly litigable eliminates the imprudence involved when a legislature enacts a statute that is sure to be held unconstitutional.

78. They may also be asserting a number of other propositions as predicates for the claim that their position is fairly litigable: first, the fact that the legislation was enacted might persuade the courts to interpret their prior norms in a way that would make the legislation consistent with those norms; second, the meaning of the judicially articulated norms can only be understood in the context of actual cases; and third, the prior cases involved different statutes that are distinguishable in ways made relevant by the judicially articulated norms themselves.

79. As previously discussed, *see supra* text accompanying notes 37-53, this is not the case when a true political question is involved. There legislators act with no guidance from the courts and with no prospect of judicial review.

shadow. This section considers whether and when it makes sense to minimize judicial review because of the problem of policy distortion.

Initially, I must emphasize again that it is not obvious that legislating in the shadow of judicial review necessarily creates a problem of policy distortion. It may only create a situation in which a legislature adopts a constitutionally permissible policy when its deeper preference is for a constitutionally impermissible one. For example, one interpretation of the French legislative response to the Constitutional Council's nationalization decision might be that a legislative majority strongly desired to nationalize the affected enterprises. The legislative majority's first choice was to nationalize without paying the compensation the constitution required; its second choice was to nationalize and pay the required compensation. Its first choice, that is, was to violate the constitution as understood by the Constitutional Council; its second choice was to comply with the constitution.[80] To characterize the outcome as a policy *distortion* resulting from judicial review requires some additional analysis.

Policy distortion due to judicial review might occur in the following way: the French legislature's first preference is nationalization without the compensation the Constitutional Council requires; its second preference is no nationalization;[81] and its third preference is nationalization with compensation at the level the Council's decision requires. Despite this preference ordering and because of the Council's decision, the legislature enacts nationalization with the Council-required compensation. This begs the obvious question: Why would a legislature follow its third preference rather than simply give up on the effort?

Before exploring possible explanations for this result, other examples may be instructive. In 1988, the Canadian Supreme Court held that existing legislation regulating the availability of abortion violated the Charter of Rights and Freedoms.[82] The prevailing opinions emphasized that the legislation impaired the Charter's guarantee of security of the person because the procedures it required before a woman could obtain a lawful abortion caused un-

80. For an alternative interpretation, see *infra* text accompanying notes 113-15.

81. Or, as discussed below, a substantially restructured nationalization bill. *See infra* text accompanying notes 113-15.

82. Morgentaler v. The Queen, 44 D.L.R.4th 385 (Can. 1988).

necessary delay.[83] Parliament might have responded to the decision by rewriting the statute to eliminate the procedures the court found problematic. Proposals to do so were introduced, but Parliament found itself unable to enact them. Instead, no legislation was adopted.[84] It turned out that, when forced to choose between no regulation of abortion and regulations that might have complied with what the court seemed to demand, a majority of Parliament preferred no regulation.[85]

In the United States, parallel questions about the occurrence of policy distortion may be raised in connection with congressional flag-burning and campaign-finance legislation. After the Supreme Court held a Texas ban on flag burning an unconstitutional regulation of speech based on its content,[86] Congress attempted to devise a constitutionally permissible alternative.[87] The resulting legislation, the Flag Protection Act of 1989,[88] made it a crime to mutilate, physically defile, or burn a flag. Its sponsors asserted, with some support from legal academics and Supreme Court precedent, that because their proposal was aimed at protecting the physical integrity of the flag, it was content-neutral and therefore constitutional.[89]

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83. 44 D.L.R.4th at 402-07, 414 (Dickson, C.J.C., plurality opinion) ("I conclude that the procedures . . . for obtaining a therapeutic abortion do not comport with the principles of fundamental justice"); *see also* 44 D.L.R.4th at 429-40 (Beetz, J., concurring).

84. For an analysis, see F.L. MORTON, PRO-CHOICE VS. PRO-LIFE: ABORTION AND THE COURTS IN CANADA 290-92 (1992).

85. More precisely, no majority could be formed in support of any particular set of regulations that might have complied with the Canadian Supreme Court's requirements. It may be, of course, that the majority's preferences changed between the time the legislature enacted the invalidated statute and the time Parliament considered a new statute. That is, at the time the statute was enacted, a majority may have preferred the enacted statute to a procedurally regular statute (as the Court eventually required) and a procedurally regular statute to none at all; but, by the time Parliament considered the issue the second time, a majority preferred no statute to a procedurally regular one *and* to the invalidated statute. For a discussion of how constitutional courts may assist in purging the statute books of laws that have lost majority support, see BICKEL, *supra* note 2, at 148-56, and GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 16-30 (1982).

86. Texas v. Johnson, 491 U.S. 397 (1989).

87. For an overview of the congressional process, see Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue,* 29 HARV. J. ON LEGIS. 357 (1992).

88. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (held unconstitutional by United States v. Eichman, 496 U.S. 310 (1990)).

89. *See, e.g., Hearings on the United States Supreme Court Decision in* Texas v. Johnson *Before the United States Senate Comm. on the Judiciary,* 101st Cong., 1st Sess. 187, 200 (1989) (Statement of Geoffrey R. Stone, Harry Kalven, Jr., Professor of Law and Dean, The University of Chicago Law School), *reprinted in* 2 THE CONSTITUTION AND THE FLAG: THE FLAG-BURNING CASES 361, 374 (Michael Kent Curtis ed., 1993) ("I cannot say — and I do not think anyone can fairly say — that the [proposed] Flag Protection Act is necessarily constitutional or necessarily unconstitutional under existing law. There are at least reasonable grounds to believe, however, that the proposed legislation might be upheld by the Supreme Court.").

The Supreme Court disagreed in *United States v. Eichman*,[90] finding that the government's interest in protecting the flag from destruction was content-based. According to Justice Brennan, "the mere destruction . . . of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself . . . ."[91] The government's "desire to preserve the flag as a symbol for certain national ideals is implicated 'only when a person's treatment of the flag communicates [a] message' to others that is inconsistent with those ideals."[92]

The flag-burning controversy *may* illustrate policy distortion due to judicial review. Perhaps members of Congress wanted only a flag-burning ban that would violate judicially articulated free-speech norms and would have preferred no ban at all to one that hypocritically purported to satisfy the Court's demand for content neutrality. After all, Congress did not respond to *Eichman* with yet another attempt to develop a flag-burning ban that the Court could find constitutional. An effort to amend the Constitution failed, and the flag-burning episode ended. When pressed to choose between a statute that might satisfy the Supreme Court and no statute at all, Congress made the latter choice. On this view, the Flag Protection Act of 1989 was a policy distortion.

Legislative proposals to reform the campaign-finance system may reflect similar distortions. In developing such proposals, members of Congress operate within the constraints placed on them by *Buckley v. Valeo*.[93] It may well be that they would strongly prefer to develop proposals without facing those constraints.[94] In this sense, Congress structures the reform proposals in the shadow of judicial review.[95]

Policy distortion would occur if campaign-finance reforms designed in *Buckley*'s shadow were likely to be worse public policy than the existing campaign-finance system. The argument here would be tied to the problem that campaign-finance legislation, for

90. 496 U.S. 310 (1990).

91. 496 U.S. at 316.

92. 496 U.S. at 316 (citation omitted).

93. 424 U.S. 1 (1976).

94. *See, e.g.*, H.R. REP. No. 375, 103d Cong., 1st Sess. 32 (1993) ("However, short of challenging the *Buckley* decision or amending the Constitution, our only real alternative is to propose a system of spending limits for candidates, in exchange for certain benefits.").

95. This is so despite the observation, which I have no reason to question, that the principal reform proposal may raise nine constitutional problems. *See* Sorauf, *supra* note 76, at 1353. Those questions are fairly litigable. For a discussion of the issues under these circumstances, see *supra* text accompanying notes 76-78.

predictable reasons, tends to be incumbent-protective.[96] According to this argument, we can come as close as possible to avoiding incumbent protection only if we level the playing field by placing equal limits on what incumbents, challengers, and their respective supporters can spend.[97] *Buckley,* however, makes that impossible. As things are now, the argument continues, challengers have *some* chance at winning, but under some new regime adopted within the constraints *Buckley* set, incumbents will actually strengthen their position, making it harder for their challengers to win. The conclusion is that the status quo is better public policy than any legislation likely to be adopted within *Buckley*'s constraints, though worse public policy than the one *Buckley* bars. If policy distortion occurs when legislators adopt a policy that is worse than the status quo and worse than a constitutionally permissible alternative defined in a positivist sense as one the courts would find constitutionally permissible,[98] we need to understand why they do so.[99] Two plausible explanations for the distorting effect of judicial review are legislative misunderstanding of judicially articulated constitutional norms and bargaining breakdowns resulting from the invalidation of a legislature's preferred policy choice.

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96. It is enacted by incumbents, after all. I note, however, that to the extent that the statute invalidated in *Buckley* is treated here as good public policy because it would have weakened the position of incumbents, I would need to provide an explanation for its adoption. In doing so, I would develop a distinction akin to but weaker than Bruce Ackerman's distinction between ordinary politics, which is at work after *Buckley,* and constitutional politics, whose relative would have been at work to produce the statute invalidated in *Buckley.*

97. The playing field cannot be made completely level, of course, because both incumbents and challengers have nonfinancial resources — the availability of free publicity through sponsoring legislation, their precampaign celebrity, and the like — that are not distributed equally.

98. And, for reasons discussed *supra* in note 96, worse than the statute the courts have invalidated.

99. I note one possibility, which has played a larger role in the scholarly literature than seems justified. Alexander Bickel's presentation of the Thayer argument relied in part on Charles Black's suggestion that the Court may play a particularly important role in legitimating legislative policy. *See* BICKEL, *supra* note 2, at 29-31. When the courts refrain from holding a statute unconstitutional, legislators may misunderstand them as saying, not that the legislation is not inconsistent with judicially articulated constitutional norms, but that it is sound public policy. If this occurs, legislators may refrain from adopting legislation that would be better public policy and that the courts would in fact uphold. This may occur, but there are notable examples of judicial decisions upholding legislation that did not have this effect. The Supreme Court's school finance decision, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), probably had little impact on continuing efforts to reform school-financing systems. After the Supreme Court found that Oregon had not violated the Constitution in refusing to exempt the sacramental use of peyote from its general prohibition on drug use, Employment Div. v. Smith, 494 U.S. 872 (1990), the Oregon legislature enacted such an exemption. *See* OR. REV. STAT. § 475.992(5) (1993). I suspect that these responses are common enough to give the "legitimation" account of why legislatures enact worse public policy than they could a much smaller domain than the scholarly literature suggests.

The first reason is *misunderstanding* the judicially articulated norms. The courts' rulings will define a range of actions that are constitutionally permissible or whose permissibility is fairly litigable. Within that range, legislators can articulate their own understanding of constitutional norms. If legislators mistakenly believe that the permissible range is smaller than it actually is, they may choose a policy that is less desirable, from their own point of view, than one that the courts would allow them to adopt. Put differently, policy distortion occurs when the legislature acts within the range of policies it believes is available to it, mistakenly believing that the policy they prefer is outside that available range.

Misunderstanding might be common, in part because not all legislators are well-advised about the norms the courts have articulated.[100] In addition, outside groups have an interest in characterizing judicially articulated norms in the way most favorable to their positions. On nearly every issue, some group will have an interest in arguing that a particular policy proposal lies outside the permissible range. Legislators concerned about not enacting unconstitutional laws or worried about the cost of defending a fairly litigable policy that the courts might reject may give these arguments more weight than they deserve.

The obvious remedy for misunderstanding is education.[101] In this connection, some aspects of judicial confirmation hearings deserve note. Recent hearings have involved extended exchanges between Senators and the nominees about constitutional interpretation. To the extent that these exchanges were designed to elicit commitments from the nominees on particular issues, they were probably misguided and futile.[102] Perhaps they should be

100. For example, a proponent of a federal statute to grant only limited authority to local governments to designate facilities to which solid waste could be sent argued that "Congress should follow the Supreme Court's ruling that flow control was a burden to [sic] interstate commerce." *House Approves Flow Control Legislation to Restore Full Authority to Municipalities,* 25 Envt. Rep. (BNA) (Envt. Rep. Cas.) 1147 (Oct. 7, 1994) (citation omitted). In light of the way the Supreme Court has constructed its doctrine, however, judicial decisions invalidating local regulations of commerce as burdensome do not provide arguments in favor of or against *any* congressional action. Further, the decision to which the speaker referred may be understood as striking down a local flow-control ordinance as discriminatory rather than burdensome. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994).

101. In 1994, Representatives David Skaggs and Jim Leach convened a series of "Constitutional Forums" for interested members of the House of Representatives, at which experts outlined their understanding of the constitutional law relevant to issues the members might have to address. For a brief description, see David G. Savage, *Congress's Constitutional Forum,* CONST., Fall 1994, at 96. I participated in one forum, on the constitutional law of religion. About 20 members attended. Their comments suggested that there was a fair degree of misunderstanding, at least in the sense that some members believed that policies that I would characterize as fairly litigable or even clearly permissible were actually impermissible.

102. *See* STEPHEN L. CARTER, THE CONFIRMATION MESS 80-82 (1994).

seen, though, as efforts to educate the public, including other legislators, about the limits the courts have set on permissible legislation.[103] For an academic, the discussions about what a "compelling state interest" is and when "strict scrutiny" is triggered, might seem painfully oversimplified.[104] But, for legislators, the discussions might lead to a better understanding of the range within which they can permissibly act — not because the legislators would be in a position to pass a law school examination in constitutional law with flying colors after hearing the discussions but because they would be less likely to make a mistake about what the courts will let them do.[105]

Devising an institution that could provide adequate continuing education for legislators, however, might prove quite difficult.[106] To reduce the occasions when policy distortion results from misunderstanding, such an institution must produce disinterested constitutional evaluations of policy proposals.[107] To best serve its educational purpose, its judgments should be in the form, "if *this* proposal is enacted, there is an 80% chance that the Supreme Court ultimately will hold it unconstitutional, but if *that* one is enacted, there is only a 50% chance that the Court would do so." I believe that it would be quite difficult to structure the incentives of the institution's staff to ensure that they would give answers in that form rather than in the form, "the first proposal is unconstitutional, and the second is probably not unconstitutional."[108]

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103. I draw here on the impressions I had after briefing a member of the Senate in connection with a recent nomination. For additional observations about methods of educating the public about constitutional norms, see *infra* text accompanying notes 106-08.

104. For an example of the difficulty, see ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 254-55 (1989) (describing the discussion of standard of review in gender discrimination cases during Bork's confirmation hearings).

105. Note as well, that minimal judicial review can serve as a form of education by instructing legislators that the courts' view of the Constitution does not preclude them from adopting the policy they prefer.

106. William Landes and Richard Posner have argued that advisory opinions may be a useful way of avoiding what they call "erroneous constitutional interpretations" in systems where amending the Constitution is relatively easy. *See* William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication,* 23 J. LEGAL STUD. 683, 710-11 (1994). The erroneous interpretations to which they refer are errors by the high court that can be corrected by constitutional amendment. Their model assumes that the legislature will not enact a statute without a favorable advisory opinion. An unfavorable advisory opinion would lead the legislature to amend the Constitution. On that assumption, the advisory opinion is more a coercive than an educational mechanism of the sort I am considering.

107. One might imagine here institutions like the Congressional Budget Office or the Office of Technology Assessment, both designed to give Congress disinterested advice.

108. I am also skeptical that such an institution would attract staff members of a high enough quality to make their advice useful as a form of education.

Bargaining breakdowns that occur as a result of judicial review might be another reason why legislators would adopt a less desirable policy. Economic theory provides a useful metaphor here. Thomas Schelling pointed out that people who need to coordinate their actions but are unable to communicate with each other can accomplish their goal of coordination by identifying an "obvious" focal point on which to converge.[109] Schelling's most dramatic example is outdated: How can two people who need to meet in New York City get together without communicating with each other? Relying on a survey he conducted, Schelling concluded that each person would do best by arriving at Grand Central Station's information booth at noon.[110]

Suppose, though, that both people know that it is impossible to meet there, perhaps because construction has closed the area. They might not succeed in meeting if each tried to get as close as possible to Grand Central Station's information booth at noon: one might be at the corner of Madison Avenue and 42nd St. while the other waited at the corner of Sixth Avenue and 42nd St. If they gave up on Grand Central Station as a focal point, however, their second choice of meeting place might again be the same.

The difficulty in this example arises because of an ambiguity in the direction "try to get as close to Grand Central Station's information booth as possible." If both people interpret it to mean, "given our mutual desire to meet, locate the place, other than the information booth, that my partner is most likely to think a sensible place to meet," they might choose the same place once more.[111] But, if one or both interpret the direction to mean, "get as physically close to the information booth as possible," they may end up missing each other.

Why, then, might someone interpret the directive in this geographical way? Perhaps because she has become "anchored" to the geographical definition in the first effort to locate a meeting place.[112] Although one might revert to the policies underlying the attempt to meet, having once chosen a meeting place, that location

109. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 57 (1960).

110. As Schelling acknowledged, the "obviousness" of this solution may have arisen because he conducted his survey in New Haven, Connecticut. *Id.* at 55 n.1.

111. The second choice might be similar in some sense to the first choice, for example, if they chose the information booth at Penn Station, or they might be quite different, for example, if they chose the Cloisters; the latter choice might arise if each thought, "the first choice is impossible; what's the *farthest* thing from that I can think of?"

112. On the anchoring phenomenon, see RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 41-42 (1980) ("[O]nce subjects have made a first pass at a problem, the initial judgment may prove remarkably resistant

anchors the search for an alternative by providing the starting point for the search.

A judicial decision invalidating a statute can be analogized to the unavailable Grand Central Station information booth. Legislators would prefer to have the invalidated legislation. If they cannot have that, they may take the decision as the anchor for what they do next. They may try to get as close as possible to what they enacted in the first place, within the limits the court sets, defining "as close as possible" to mean "departing as little from what we already did" rather than "accomplishing as many of our prior policy goals as we can." So, for example, the French legislature responded to the Constitutional Council's nationalization decision by enacting a new compensation formula rather than choosing to redefine the nature or scope of the nationalization program. That choice, however, may have resulted in worse policy, again from the French legislature's own point of view, than if they had abandoned the nationalization program entirely[113] or if they had restructured it substantially.[114]

The judicial decision might become an anchor for a number of reasons. First, like the Grand Central Station information booth, it provides an obvious place to begin a reconsideration of the invalidated policy. If it was at all complex, the invalidated statute embodied a number of compromises. Restructuring the program might require reopening all the compromises. Working from the judicial decision, in contrast, legislators may be able to reopen only relatively few. Second, legislators, in order to conserve legislative energy, may stop as soon as they develop a policy just within the limits the court decision establishes. Third, the judicial decision may provoke annoyance: legislators may want to demonstrate their disagreement with the courts by reenacting a statute that is as similar as possible to the one the court invalidated.[115]

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to further information, alternative modes of reasoning, and even logical or evidential challenges.").

113. For example, the new compensation formula so substantially increased the amount needed to pay for nationalization that it may well have impaired the government's economic recovery program.

114. For example, it might have made better policy sense to adopt the compensation formula the Council required and then work out which industries to nationalize, given the constraint that nationalization's cost should not exceed what the original plan would have cost under the unconstitutional compensation formula.

115. This may explain why the bargaining breakdown takes the judicial decision as the anchor rather than the obvious alternative, the status quo that would exist if the legislature did nothing in response to that decision.

However these bargaining breakdowns occur, they produce legislation that is less desirable than it could be, even within the limits the courts have established. Notably, the breakdowns have this effect *because* of judicial review. In this sense, as Thayer argued, policy distortion does result from judicial review.

Minimal judicial review, though, is only one response to this difficulty. There is an alternative response: judicially articulated norms so clear that legislators will never even propose their most preferred policy because they know it is unconstitutional. Without an initial invalid proposal, legislators have nothing to become anchored to and thus will immediately move to their second preference.[116]

Clarity might be a theoretically attractive solution to the problem of policy distortion caused by bargaining breakdown,[117] but it may not be achievable in practice. Legal realists and their successors claim that legal rules cannot achieve a great deal of clarity: they are riddled with exceptions; the system of rules taken as a whole contains counter-rules that can be deployed to introduce confusion; and skilled lawyers can bring into high relief background rules that had previously been taken for granted. Whatever might be said about the validity of the most comprehensive versions of such claims, the realist claim is likely to have a fair amount of force in the constitutionally freighted areas to which legislators direct their attention.[118] Moreover, the Supreme Court has the opportunity to articulate clear rules only when presented with actual legislation, and no matter how clear the rules then are, the invalidated law remains available as an anchor for policy distortion.

Finally, clarity in constitutional rules, which might reduce the problem of policy distortion, could increase the problem of democratic debilitation. Unclear constitutional rules provide opportuni-

116. This is why a practice of obtaining advisory opinions might not be an adequate response to the problem of policy distortion. A properly framed request for such an opinion is likely to be based on a legislative proposal that has reached a relatively advanced stage, with sufficient political support to be close to enactment if a favorable advisory opinion is obtained. If the advisory opinion is against the proposal's constitutionality, still it will have been in a sufficiently concrete form to serve as an anchor for future proposals.

117. It might provide additional support for a jurisprudence of rules rather than standards. Kathleen Sullivan has argued that it is unclear that the two types of jurisprudence actually produce other results claimed for them. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22 (1992). One might wonder whether a jurisprudence of rules would have the effect described here.

118. For a suggestion along these lines, see Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY (forthcoming 1995).

ties for the public to discuss the Constitution's meaning.[119] Where the Court insists that the meaning it has given the Constitution is crystal-clear, the public may find itself entirely removed from the domain of constitutional discourse.

Education and clear rules resulting from the exercise of more-than-minimal judicial review might reduce the scope of the problem of policy distortion. Of course, so too would minimal judicial review.[120]

II. The Notwithstanding Clause and the Problem of Democratic Debilitation

Minimal judicial review has also been suggested as a method of dealing with the problem of democratic debilitation. That problem occurs when the public and their democratically elected representatives cease to formulate and discuss constitutional norms, instead relying on the courts to address constitutional problems. A constitutional democrat might be concerned about democratic debilitation for two reasons. First, in transferring responsibility for articulating constitutional norms from the public and their representatives to the courts, more-than-minimal judicial review may diminish the public's attachment to the Constitution and, more important, to the norms they might themselves find in the Constitution. Second, to the extent that the courts' articulation of constitutional norms ought to have some connection to the public's views, democratic debilitation may deprive the courts of information they should find useful.[121] The Canadian experience with judicial review provides interesting insights into the problems of democratic debilitation and the potential difficulties of dealing with the prob-

119. As discussed earlier, unclear rules need not have that effect. They may instead lead the public to disregard what the Court says, on the ground that they cannot understand it. *See supra* text accompanying notes 62-66.

120. Such review might introduce its own "distortion" if legislators come to believe that policies the courts will hold to be constitutionally permissible are affirmatively desirable for that reason alone. For this form of distortion to occur, a legislator who thinks a statute is misguided as a matter of policy would be persuaded to vote for it because she was convinced that the courts would uphold it. The scenario is possible, but I wonder how frequently it occurs.

121. One might note here the death-penalty and flag-burning controversies. To the extent that the Court's Eighth Amendment jurisprudence makes central "evolving standards of decency," Trop v. Dulles, 356 U.S. 86, 101 (1958), the public reaction to the Court's invalidation of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972), was relevant to its revalidation of capital punishment in Gregg v. Georgia, 428 U.S. 153 (1976). The example would be more persuasive if one were confident that the reenactment of death penalty laws resulted from a considered public judgment about what its present standards of decency were, rather than from mere disagreement with the *policy* resulting from *Furman.* For a discussion of the flag-burning controversy, see *infra* text accompanying notes 185-88.

lem effectively without sacrificing more-than-minimal judicial review.

Section 33 of the Canadian Charter authorizes Canadian legislatures, at the provincial and national levels, to override specific guarantees of individual rights. Section 33 states that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature . . . that the Act or a provision thereof shall operate notwithstanding a provision included in" the Charter's provisions dealing with fundamental freedoms, legal rights, and equality rights. These declarations can be in effect for no longer than five years, the maximum period a government remains in power without going to the people in an election campaign, but they can be renewed indefinitely.[122]

Mary Ann Glendon has argued that section 33 is one of the elements of the Charter showing "how, even in a country within the Anglo-American legal orbit, rights can appear in strong, but not absolute, form."[123] Michael Perry has suggested that section 33 might provide one solution to the problem of democratic debilitation by offering "an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive constitutional issue *and* an opportunity for electorally accountable officials to respond, in the course of ordinary politics, in an effective way."[124] As is usually true in comparative exercises, the story is more complicated than such summary descriptions suggest.

Section A provides an overview of the political situation in Canada that gave rise to section 33 and offers insights into a possible limited interpretation that it might have been given. This section goes on to explore the implications that limited interpretation would have on constitutional review and the problem of democratic debilitation. Section B then examines the power of the U.S. Congress to regulate the jurisdiction of federal courts and puts forth possible reasons why it has not served a function similar to section 33. Section C looks at how the Canadian Supreme Court eventually applied and interpreted section 33 in a way inconsistent with the

122. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33.

123. GLENDON, *supra* note 11, at 39.

124. Perry, *supra* note 5, at 158; *see also* Taber v. Maine, 45 F.3d 598, 610 (2d Cir. 1995) (Calabresi, J.) (drawing an analogy between § 33 and strained statutory interpretation, designed to alert Congress to "constitutional dangers" which can be overridden by clear statement); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?, 196-201 (1994) (discussing the desirability of adopting the "Canadian innovation" in the United States); Perry, *supra* note 5, at 159 ("Adopting the Canadian innovation would significantly enhance, not diminish, the constitutional and moral responsibility of the people.").

limited interpretation offered in section A and examines some of the causes and effects of this broad interpretation. Section D deals with the ability of section 33 to change outcomes of legislatively determined policy decisions and examines the possibility that the educative value of judicial review might serve as an impetus for policy changes. Section E concludes that the political forces that produced section 33 may have foreordained its failure and goes on to argue that the Canadian experience may call into question the practicability of the "notwithstanding clause" approach to the problem of democratic debilitation generally.

A. *Section 33's Background and How It Might Have Been Interpreted*

Canada's Prime Minister — and former law professor — Pierre Trudeau proposed to patriate the Canadian Constitution, that is, to establish a legal regime in which all constitutional questions could be resolved within Canada itself instead of requiring agreement from Great Britain. Trudeau believed that a properly functioning constitutional system required a written constitution subject to the control of the people themselves. He also hoped that patriation would provide the occasion for adopting a bill of rights and for resolving Canada's persistent language issue in favor of a nationally guaranteed bilingualism. Although the concept of patriation was not politically controversial, Trudeau's project met substantial opposition, in large part because of concern about the nature of the constitution that Trudeau proposed to patriate. Leaders of Canada's provinces believed that Trudeau wanted to patriate the constitution in order to increase the power of the national government. Further, these leaders were suspicious of a system of entrenched rights that was inconsistent with the Canadian tradition of parliamentary supremacy.[125] Finally, the precise scope of the rights to be entrenched was itself controversial.[126]

Initially, the opposition focused on the means by which the people of Canada could request patriation. Opponents argued that the national government could not request patriation alone but had to get the provinces to request it as well. Extensive political negotia-

125. *See* Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version,* 18 U. MICH. J.L. REF. 51, 64-65 (1984). This is so, even though the tradition of parliamentary supremacy incorporated respect for certain fundamental rights. A system in which such rights are habitually respected, however, is different from one in which they are legally guaranteed.

126. *See* DALE GIBSON, THE LAW OF THE CHARTER: GENERAL PRINCIPLES 30-39 (1986).

tions proved fruitless, and the participants looked to the Canadian Supreme Court for a solution. That court refused to provide one. Its decision appeared to split the difference. The court held that as a matter of law the national government could request patriation even without the consent of the provinces, but it also held that doing so without a substantial — though not unanimous — measure of provincial consent would violate an apparently nonlegal constitutional convention.[127]

This decision, or nondecision, led to another round of political bargaining. At the final session in November 1981, eight provinces continued to oppose patriation. The Canadian Supreme Court's decision meant that the national government could *legally* request patriation on its own, but it also meant that the national government *politically* required the agreement of a substantial number of the provinces. The eight provincial leaders insisted that the new Canadian constitution could not be amended unless all provinces agreed, and they objected to the inclusion of a bill of rights; Trudeau believed that a unanimity requirement was a recipe for disaster and that a constitution without a bill of rights was hardly worth adopting.

Further negotiations resulted in a formula for amending the constitution that required unanimity for some important amendments but allowed less than unanimous provincial consent for others.[128] Saskatchewan's premier, a social democrat influenced by the traditional hostility toward entrenched bills of rights in the European and especially British left,[129] proposed a provision allowing legislative overrides of constitutional guarantees. Prime Minister Trudeau signed on after proposing a five-year time limit for overrides. The result of this proposal, section 33, was "[t]he dynamite that finally broke the political log jam."[130]

Section 33 allayed enough concern so that the Charter was adopted in 1982, although Quebec refused to accede to it, at least in

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127. *In re* Amendment of the Constitution of Can., 125 D.L.R.3d 1, 89-103 (Can. 1981).

128. *See* Katherine Swinton, *Amending the Canadian Constitution: Lessons from Meech Lake,* 42 U. TORONTO L.J. 139, 140-44 (1992) (describing the six amending formulas).

129. *See* MICHAEL ZANDER, A BILL OF RIGHTS? 47-52 (3d ed. 1985) (discussing leftist opposition to proposals for a British bill of rights).

130. GIBSON, *supra* note 126, at 124; *see also* MANDEL, *supra* note 12, at 75 (Section 33 "was conceded by the federal government to the opposing provinces as the price for agreement to the constitutional package."); CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM 199-200 (1993); Weiler, *supra* note 125, at 80 n.97 (explaining that the court decision "put considerable pressure on both sides to return to the bargaining table for one final attempt at settlement").

part because section 33 did not apply to language rights.[131] By allowing legislatures to override the Charter's entrenched provisions, the clause reconciled the existence of entrenched rights with the tradition of parliamentary supremacy. In addition, to the extent that courts were expected to enforce the rights conferred in the Charter, section 33 meant that "the last word would belong to the legislatures rather than the courts."[132] The national Minister of Justice, for example, defended the clause on the relatively narrow ground that it would allow legislatures to deal with "absurd" court rulings.[133] At the same time, however, the political setting in which section 33 developed meant that its theoretical underpinnings were not well-developed.[134]

As a textual matter, section 33 lent itself to a narrow reading.[135] Two limitations immediately suggest themselves. First, in a system in which judicial review is routine, one might naturally read the clause to require that legislative overrides be retrospective. That is, the clause could be read to allow an override only with respect to a legislative provision that the courts had already held to be inconsistent with the Charter's rights-protecting provisions.[136] Otherwise, the textual argument goes, the legislative provision does not operate "notwithstanding" the Charter's other provisions; where there is no prior declaration of unconstitutionality, the legislative provision operates, so far as the legislature knows, in a manner entirely consistent with the Charter.

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131. Because of the Supreme Court's holding that substantial consent was only a convention and not a legal requirement, the Charter could become legally effective without Quebec's consent.

132. Roger Tassé, *Application of the Canadian Charter of Rights and Freedoms, in* THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 65, 103 (Gérald A. Beaudoin & Ed Ratushny eds., 2d ed. 1989).

133. GIBSON, *supra* note 126, at 125; *see also* Tassé, *supra* note 132, at 102-03.

134. Manfredi notes that § 33 was not analyzed by the same process, a joint committee on the constitution, that examined the Charter's other provisions. *See* MANFREDI, *supra* note 130, at 200.

135. *See* Lorraine Weinrib, *Learning to Live with the Override,* 35 MCGILL L.J. 541, 569 (1990) ("The exceptional quality of the override suggests a narrow reading.").

136. *See* Perry, *supra* note 5, at 158 (citing Brian Slattery, *A Theory of the Charter,* 25 OSGOODE HALL L.J. 701, 742 (1987), and Donna Greschner & Ken Norman, *The Courts and Section 33,* 12 QUEEN'S L.J. 155, 188-97 (1987)); *see also* Jeffrey Goldsworthy, *The Constitutional Protection of Rights in Australia, in* AUSTRALIAN FEDERATION: TOWARDS THE SECOND CENTURY 151, 174-75 (Gregory Craven ed., 1992) (Section 33 "is thus posed as a power to override the Charter itself, rather than judicial interpretations of the Charter, and this must make its exercise more difficult to justify. . . . There is surely no need for an override clause to convey this impression, which is, at least from the legislature's point of view, erroneous.") In Ford v. Quebec, [1988] 2 S.C.R. 712, 745-47 (Can.), the Supreme Court of Canada discussed under the heading of "retrospectivity," whether an override provision could apply to legislation adopted in the nine-week period between the Charter's effective date and the date of the override's enactment; that is not what I am concerned with here.

Second, the clause rather naturally reads as if legislative overrides must be discrete. That is, in a single statute, a legislature can override only with respect to provisions of *that* very statute. The clause, after all, says that the legislature may declare "in *an* Act . . . that *the* Act . . . shall operate notwithstanding."[137]

Further, these narrow readings seem to be consistent with the proposition that section 33 was designed to accommodate entrenched rights and parliamentary supremacy. The narrow construction would mean that "the legislative decision to enact an override clause is taken with full knowledge of the facts, thereby encouraging public discussion of the issues raised by the use of such a clause."[138] The public would know, that is, that its legislature was about to deprive it or some part of it of entrenched rights, and as a result, political opposition to overriding those rights or political support for the group to be disadvantaged might be mobilized. As Paul Weiler put it, "[i]n a society sufficiently enamored of fundamental rights to enshrine them in its constitution, invocation of the *non obstante* [notwithstanding] phrase is guaranteed to produce a lot of political flak."[139]

The image of an informed electorate serving as a check on the legislative decision to override is consistent, as well, with the five-year limit on the override's effect. No matter what the circumstances under which an override was enacted, a renewal would occur only after the government faced an election in which the override could be an issue.

Finally, it might be suggested that a constitution with an override provision actually protects fundamental rights more effectively

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137. *See* Weiler, *supra* note 125, at 90 n.114 ("Both the wording and the spirit of § 33 . . . seem to require a specific judgment by the legislature about each law it wishes to override."). It would seem unsound to interpret § 33 to require another form of targeting, the identification in the override itself of the precise Charter provisions the legislation was to override. *But cf.* GRUNDGESETZ [Constitution] [GG] art. 19 (1) (F.R.G.) ("In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such law . . . must name the basic right, indicating the Article concerned."). That would generate further litigation, as challengers contended that the enactment was inconsistent with some Charter provision not specified in the statute invoking § 33. For reasons that are not apparent to an outsider, the litigation discussed later in this article focused on this probably untenable version of the specificity requirement; the Canadian Supreme Court dealt with the argument in the text in three sentences. *Ford,* [1988] 2 S.C.R. at 743. Its analysis referred back to its conclusion, early in the decision, that § 33 imposed only requirements of form and that interpreting its formal requirements in light of "the continuing importance of legislative supremacy" or "the seriousness of a legislative decision to override guaranteed rights and freedoms" was not "particularly relevant or helpful" because such a construction "import[ed] into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case." *Ford,* [1988] 2 S.C.R. at 740.

138. Tassé, *supra* note 132, at 105-06.

139. Weiler, *supra* note 125, at 81-82.

than one without it. John Whyte, who offered relatively mild criticisms of section 33, argued that constitutional rights are placed at risk in two situations: "[W]hen legislatures neglect to calculate the extraordinary impact of legislative measures on particular individuals" and when, out of "fear and distaste," the majority makes a "facile and overstated" assessment of the risks of inaction.[140] Courts can intervene in the first situation, when the legislature acts unthinkingly; they are unlikely to do much in the second situation because they are likely to share the majority's presuppositions. When section 33 is invoked, the legislature overrides constitutional rights deliberately, not unthinkingly; the presence of such a provision in a constitution cannot affect the first situation. In the second situation, there is little hope for constitutional protections anyway. Occasionally, though, as Whyte points out, judges can stand apart from their society because of their traditions, professional orientation, and independence, and so there is some marginal gain in having judicial review.[141]

A similar marginal gain may be available from a notwithstanding clause. Such a clause might make more visible the consequences of what the legislature proposes to do and thereby might make it more difficult for the legislature to do it. That very visibility and deliberation that accompany the decision to invoke section 33, however, may also ensure that the legislature actually does carefully assess the relevant competing interests more effectively than it had done when it enacted the statute in the first place. Of course, a notwithstanding clause can also make things worse in those cases where the courts would invalidate the legislation but are precluded from doing so by an override provision, for example, where the legislature's reconsideration of the competing interests remains unbalanced.

The narrow interpretation of section 33 links the entrenched rights directly to the political process. Consider the implications of interpreting section 33 to require targeted and retrospective overrides, in the senses described earlier. A proposal to invoke section 33 would be tied to a single enactment, thus drawing public attention to the fact that the legislature proposed to enact a statute notwithstanding the individual rights provisions of the Charter. Further, the proposal would be a reaction to an authoritative deci-

140. John Whyte, *On Not Standing for Notwithstanding*, 28 ALBERTA L. REV. 347, 355 (1990).

141. *Id.* at 355-57.

sion specifying that its predecessor enactment did indeed violate one of those provisions.

Court invalidation of a proposal on the grounds that it violates entrenched rights creates important political considerations. Analysis of whether a statute violates Charter rights proceeds in two steps.[142] First, the court must decide whether the statute constitutes a limitation on a protected right. If it does, the court must then decide whether the limitation is "demonstrably justified in a free and democratic society."[143] That is, judicial invalidation implies that the court has concluded that the limitation is *not* demonstrably justified in a free and democratic society.

What does a proposal to override such an invalidation imply? It may be helpful to identify three possibilities.[144] First, is *bolstering:* The legislature may attempt to bolster its prior enactment by providing a better "demonstration" of the statute's justification. It may, for example, compile a more extensive investigative record, attempting to provide the demonstration the court requires.[145] Second, is *disagreement on justification:* The legislature may express its disagreement with the court's assessment of the adequacy of the already available demonstration. It may contend that the court failed to give proper weight to the considerations the court itself identified and that when those considerations are given appropriate weight, the enactment is demonstrably justified. Third, is *disagreement on democracy:* The legislature may express its disagreement with the court's characterization of what a "free and democratic" society is. That is, the legislature may agree that, given the court's characterization of a free and democratic society, the enactment is indeed not demonstrably justified, but it may conclude that the court's characterization was erroneous.

In all three situations, the public through its representatives has the opportunity to engage in a focused discussion of the characteristics of a free and democratic society. On this account, section 33 allows judicial review to coexist with majoritarian decisionmaking

142. *See, e.g.,* Regina v. Oakes, [1986] 1 S.C.R. 103, 129 (Can.).

143. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

144. A fourth possibility is that the legislature disagrees with the court's determination of what constitutes a guaranteed right or freedom.

145. One might wonder whether a legislature pursuing this course would actually have to invoke § 33. If the enhanced demonstration succeeds, the new statute would survive judicial review. The legislature might prefer to avoid the cost of relitigation by invoking § 33 under these circumstances, although presumably the proposal's opponents would use its supporters' reluctance to subject their enhanced "demonstration" to judicial scrutiny as another ground for criticism.

in a way that contributes to enhancing the public's understanding of democratic values and constitutional norms.

In addition, the mere existence of the section 33 power may strengthen judicial review.[146] Michael Mandel, a severe critic of the Charter on the ground that it puts into legal form — and into the hands of lawyers — controversies that ought to be handled openly through politics, reported the comments of the clause's critics who begrudgingly acknowledged that "governments can be 'thrown out' for exercising" their powers under the clause and that invoking the clause "will be a red flag for opposition parties and the press . . . [which] will make it difficult for government to override the Charter."[147] Or, as phrased more generously by John Whyte, it "means, first, that what were once political problems have been transformed into legal problems but, second, that when political interests are sufficiently compelling these issues can revert to being resolved through political choice."[148]

A Charter enthusiast, in contrast, pointed out that the process has two faces. "It is probably true," according to Dale Gibson, "that a government would be taking a considerable political risk by introducing, in normal circumstances," overriding legislation, but the existence of the clause, particularly when it is interpreted narrowly, might strengthen judicial review by alleviating judicial concern about acting contrary to majority views. "[J]udges may safely assume . . . that their vigilance will not frustrate the democratic process,"[149] and they might therefore invalidate legislation more readily than they would if they knew that the only response available to the public was a constitutional amendment.[150] For one who admires the political process but who thinks that some rights deserve greater protection than they are likely to get in ordinary politics, section 33 might seem to be a useful way of setting in motion an

146. This argument was suggested to me by passages in Weinrib, *supra* note 135, especially at 567-69, although she does not make it in precisely these terms.

147. MANDEL, *supra* note 12, at 76 (citations omitted).

148. Whyte, *supra* note 140, at 351.

149. GIBSON, *supra* note 126, at 125-26.

150. Conceivably, § 33 might lead judges to invalidate legislation less frequently than they would in its absence. Judges might fear public repudiation of their views, perhaps because it would cast them in a bad light. It is not clear to me why judges would have that reaction to an override, which they could equally well see as an exercise of a constitutional power on par with their own. In the Canadian context, those who criticized § 33 as incompatible with judicial review did not invoke this concern but focused instead on the more obvious points that § 33 allowed the same majority that enacted a statute to override a judicial decision finding it unconstitutional and that such a process was not what most people thought was meant by constitutionally entrenched rights.

extraordinary sort of majoritarian politics in which the claims of the community and the claims of rights would both get their due.

Suppose a court invalidates a statute, and a legislative effort to override the decision fails. That might occur for a number of reasons, but prominent among them are likely to be three: (1) that a substantial number of people agree with the court's interpretation of the Charter; (2) that a substantial number of people agree that the court's decision is more acceptable than either the statute invalidated or any alternative statute that might take its place; and (3) that a substantial number of people accept a norm of political behavior according to which court decisions should be repudiated only if the decisions are egregiously wrong.[151] The political culture then can take the failure to override as an indication of popular support for the court decision. To adapt a phrase from Thomas Reed Powell, the failure to invoke section 33 is a way in which the people can be "silently vocal";[152] their inaction demonstrates their agreement with the court's decision. Without the section 33 power, the people have no way to express that agreement.[153]

Section 33 thus appears to offer a method of creating a system of more-than-minimal judicial review while eliminating or reducing the problem of democratic debilitation. Section 33, on this account, might actually invigorate majoritarian politics by providing the people and their representatives with a way of engaging in direct discussion of constitutional values in the ordinary course of legislation.

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151. Peter Russell observes that after the Canadian Supreme Court invalidated the nation's criminal prohibitions on abortion, "the aroused and losing group went immediately to the parliamentary lobby to press for legislative redress" but that there was no "inclination on the part of the politicians to use the override." Peter H. Russell, *Canadian Constraints on Judicialization from Without,* 15 INTL. POL. SCI. REV. 165, 171 (1994). Instead, the government proposed to amend the abortion statutes in a manner it contended would make them consistent with the court's decision. It was not able to muster sufficient support for the new statute, however, and the court decision stood unmodified. *See infra* text accompanying note 188.

152. Thomas Reed Powell, *The Still Small Voice of the Commerce Clause, in* 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (Maurice H. Merrill et al. eds., 1938), *quoted in* LAURENCE TRIBE, CONSTITUTIONAL CHOICES 34 (1985).

153. Except by refusing to amend the constitution, as happened in the flag-burning episode. Where, as in the United States, constitutional amendments require supermajority support, the inference from the people's "silence" is weaker than it would be where a simple majority could reject the court's position. The proposed flag-burning amendment received more than a majority in the House of Representatives but failed because it did not receive the required two-thirds support. The vote was 254 in favor, 177 against. Strikingly, however, even the vote five days later in the Senate could not keep the amendment process on track; there too the proposed amendment failed to gain the required margin, with 58 Senators in favor and 42 against. *See* Robert Justin Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis,* 45 U. MIAMI L. REV. 19, 29 (1990). Under these circumstances, perhaps the fact that more than 40 Senators voted against the proposed amendment should carry somewhat more weight than it would had the vote been legally consequential.

B. *A U.S. Analogue to Section 33*

Although Michael Perry offers section 33 as a "Canadian innovation,"[154] the present U.S. Constitution has provisions that might have operated like section 33.[155] These are the provisions authorizing Congress to control the jurisdiction of the federal courts, including the Supreme Court.[156] Broadly interpreted, these provisions might foreclose judicial consideration of constitutional challenges to legislation, just as section 33 does. As is well understood, however, the power to regulate jurisdiction has never served as a significant limit on the power of judicial review. The reasons may shed some light on the distinctiveness of U.S. constitutionalism, as well as on the problem of democratic debilitation.

Structurally, the power to regulate jurisdiction differs from the section 33 power in several ways. When used, the power to regulate jurisdiction has no necessary time limit. In Canada the majority can check the use of section 33 because a government must stand for election before a notwithstanding statute expires. It is essentially impossible to have such a check on the power to regulate jurisdiction in the United States because terms in the U.S. Senate are staggered.

In addition, only Congress can exercise the power to regulate jurisdiction, and it can regulate only the jurisdiction of the federal courts.[157] That creates enormous difficulties in enacting a provision that truly insulates a statute from constitutional challenge in some courts. One can devise interpretations of the power to regulate jurisdiction that might allow Congress to enact such provisions, but a recalcitrant Supreme Court could develop at least equally plausible interpretations that make doing so quite difficult.[158] Of course, if

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154. Perry, *supra* note 5, at 156.

155. *See* Weiler, *supra* note 125, at 84 n.104.

156. *See* Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1286-91. Massey collects and describes much of the extensive literature on Congress's power to regulate jurisdiction.

157. Massey suggests that the United States has a version of a "state override" power to the extent that the Supreme Court interprets the Constitution's substantive provisions in light of what states have done. *Id.* at 1273-84; *see e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion) (relying in part on state enactment of death penalty statutes after Furman v. Georgia, 408 U.S. 238 (1972), as justification for upholding the new death penalty statutes). The Court in these cases interpreted the Constitution to permit the state's actions, however; the states do not, at least in theory, make their laws effective notwithstanding the fact that they violate substantive constitutional provisions.

158. The arguments are familiar from the literature, and I merely list them here. (1) Drafting a statute that a recalcitrant court cannot interpret as continuing to authorize judicial review is quite difficult. *See, e.g.*, Drummond v. Acree, 409 U.S. 1228 (1972). (2) Eliminating *federal* judicial consideration of a constitutional question preserves the possi-

the Supreme Court is not recalcitrant, it is unclear why one needs to restrict its jurisdiction. In contrast, a Canadian legislature desiring to insulate its actions from judicial scrutiny merely has to utter the words contained in section 33.

The simplicity of section 33 has another advantage if it is to be an effective device for overcoming the problem of democratic debilitation. Every Canadian can readily understand what section 33 means and what it means for a legislature to invoke it. It is in that sense transparent. The power to regulate jurisdiction, in contrast, is opaque.[159] No one knows what it really means, and using it to insulate legislation from judicial review seems anticonstitutional in some deep sense.

Finally, section 33 was constitutionally significant in a way that the power to regulate jurisdiction is not. The insertion of section 33 into the Charter was an essential condition for its adoption, and, again, politically aware Canadians knew that it was so. Invoking it could not therefore be anticonstitutional.[160] At least to today's public, the power to regulate jurisdiction is an obscure, technical part of the Constitution. Using it to accomplish a politically signifi-

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bility of *state* judicial consideration. State courts may take the Supreme Court's most recent pronouncement as authoritative, thereby "freezing" the law in a manner contrary to the aims of those who restricted federal court jurisdiction. Even if some state courts do not take the law as frozen, some may reach the same conclusion the Supreme Court did, thereby reducing the political benefit of restricting federal jurisdiction. (3) In some contexts, legislators find it convenient to seek judicial assistance in enforcing their enactments. It is unclear whether Congress can ask the courts' assistance while denying them the authority to consider constitutional questions that arise from the exercise of *judicial* power. This problem is most acutely presented, of course, where Congress enacts an arguably unconstitutional criminal law. The preceding "state court" problem arises here as well. (4) If Congress attempts to get around the preceding problem by authorizing detention without judicial assistance and then attempts to insulate that detention from judicial review, a serious problem under the Suspension Clause obviously arises. (5) Some jurisdiction-regulating statutes may violate *other* constitutional provisions. All are vulnerable to challenges that they create a regime in which certain constitutional rights are treated unequally, which can with some difficulty be developed into an argument against their constitutionality on equality grounds.

None of the arguments against the constitutionality of restricting judicial review are unanswerable, though some are stronger than others. They do show, however, that enacting an effective restriction on judicial review by regulating jurisdiction is not easily accomplished.

159. *Cf.* Weiler, *supra* note 125, at 84 n.104 (calling the power to regulate jurisdiction "an even cruder and less suitable instrument than formal amendment" because Congress need not "address, squarely and deliberately, an issue of constitutional policy" when using that power).

160. An analogy might be the constitutional provision barring Congress from regulating the importation of slaves before 1808, U.S. CONST. art. I, § 9, cl. 1. As an essential condition for the adoption of the Constitution, that provision was a definitive answer to anyone who might have tried to invoke Congress's power to regulate foreign commerce in support of a ban on importing slaves before 1808.

cant end, like insulating controversial legislation from judicial review, would be a sophistical manipulation of words.[161]

C. *Applying and Interpreting Section 33*

As legislation and litigation proceeded under the Charter, section 33 did not overcome the problem of democratic debilitation in a system with vigorous judicial review. The retrospective interpretation, which, as I have argued, would have served to focus public debate on the invalidated policy and potential legislative override, was the first element of the limited interpretation to go. A lower court held that the Charter's guarantee of freedom of association protected the right of public employees to engage in a strike.[162] Before the country's highest court had expressed its view on that question,[163] the Saskatchewan government enacted a back-to-work law ending a strike and used section 33 to insulate the law from judicial review. According to Mandel, the government suffered no adverse political consequences from using section 33 in this prospective manner.[164]

The reaction of the Quebec legislature, however, posed a more serious threat to the narrow interpretation of the clause. Nine weeks after the Charter was proclaimed, the Quebec parliament enacted a general "notwithstanding" statute. The technique was ingenious. The legislature repealed every statute in force and immediately reenacted every one, along with a statute that invoked section 33 with respect to them all and indeed with respect to all statutes that it would thereafter adopt. The validity of this approach to section 33 came before the Supreme Court of Canada in *Ford v. Quebec (Attorney General)*.[165]

The case involved one of the province's more sweeping attempts to preserve its Francophone cultural identity: a statute, known

161. I should note, however, that the visible role of § 33 in the Charter's adoption has some drawbacks. Some Canadians viewed it as a raw political deal, fundamentally inconsistent with the point of the Charter. MANDEL, *supra* note 12, at 75-76. For such critics, invoking it in significant cases would merely confirm their judgment that the Charter was fatally flawed by § 33.

162. Saskatchewan v. Retail, Wholesale & Dept. Store Union, [1987] 1 S.C.R. 460 (Can.).

163. The Canadian Supreme Court ultimately rejected the lower court's interpretation of the Charter. Saskatchewan v. Retail, Wholesale & Dept. Store Union, [1987] 1 S.C.R. 460 (Can.); Public Serv. Alliance v. The Queen, [1987] 1 S.C.R. 424 (Can.); *In re* Public Serv. Employee Rel. Act, [1987] 1 S.C.R. 313 (Can.).

164. *See* MANDEL, *supra* note 12, at 77. Whyte, *supra* note 140, at 354, treats this as an example rather than an evasion of the retrospective interpretation, which he defines as dealing with "situations in which a court has already struck down the legislative provision that is being granted legislative immunity."

165. [1988] 2 S.C.R. 712 (Can.).

throughout the litigation as Bill 101, requiring that all public signs and commercial advertising in the province be only in French. The Quebec legislature included an override provision in the statute when it was reenacted after the Charter's adoption. Businesses that wanted to post signs in French and English challenged the statute; Ford, the lead appellant in the Canadian Supreme Court case, ran a shop in which she sold wool and was told that she had to take down her sign that said "Laine — Wool" because it violated the statute. The challenge rested on Charter provisions guaranteeing the right of free expression, but such a provision would be unavailing if the override provision was upheld.

The plaintiff businesses argued that the override provision "did not sufficiently specify the guaranteed rights or freedoms which the legislation intended to override."[166] Like other "clear statement" arguments, this one ultimately rested on the idea that when a legislature does something as serious as overriding otherwise applicable constitutional protections, it ought to follow procedures that are sufficient to bring into public view precisely what is at stake. In that way, the argument goes, the constitutional protections will be overridden only after the public duly considers precisely what is at stake.

The Supreme Court of Canada, however, rejected this argument, saying that section 33 "lays down requirements of form only."[167] The court said that requiring the statute to specify the constitutional provisions to be overridden would amount to a substantive requirement. It suggested that requiring specificity would be unreasonable in situations, likely to be common, where the legislature could not reasonably be expected to anticipate which of the Charter's many provisions might be invoked to challenge its statute.[168]

Because of some procedural aspects of the case that are irrelevant to my discussion here,[169] the court went on to hold that the

166. [1988] 2 S.C.R. at 737.

167. [1988] 2 S.C.R. at 740; *see* Weinrib, *supra* note 135, at 551 ("The judgment offers little reasoning for these conclusions."). It may be that the decision reflects the gravitational pull of traditional ideas of parliamentary supremacy.

168. Indeed, one might add, a legislature that specified the provisions to be overridden might fear that a court unsympathetic to its statute on the merits would inflate an otherwise frivolous — but not overridden — constitutional challenge into a decision against the legislation. In addition, the court might have suggested that to the extent that it adopted a rule saying that the provisions to be overridden had to be identified with sufficient specificity, the decision of whether a "notwithstanding" statute was "sufficiently" specific would inevitably have a substantive component.

169. The court held that the sign law violated § 3 of the Quebec Charter of Human Rights and Freedoms, which states that "[e]very person is the possessor of the fundamental

sign law did indeed violate constitutional guarantee of free expression: freedom to use one's language was encompassed by the guarantee of free expression.[170] The court's analysis made it clear that the sign law would be unconstitutional under the Charter once the override's five-year term expired in February 1989,[171] less than two months from the date the *Ford* decision was announced. Three days after the *Ford* decision was announced, Quebec premier Robert Bourassa announced his government's intention to introduce a new sign law that would incorporate a notwithstanding provision.[172]

The Canadian Supreme Court's decision would appear to be inconsistent with one part of the political account of section 33 that I have offered, under which the point of the clause is to make it politically costly to override constitutional protections. Under the *Ford* decision, rather routine and indeed quite unfocused "notwithstanding" statutes satisfy the requirements of section 33. At this point, though, it is important to distinguish between the political costs of using the section 33 power and the political costs of adopting the substantive legislation. Even without constitutional protections of entrenched rights, some legislative proposals will be controversial on the merits because they infringe on the values that entrenched

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freedoms, including freedom of conscience . . . [and] freedom of expression." R.S.Q., ch. C-12, § 3 (1988) (Can.). The parallel provision of the Canadian Charter provides that "everyone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression . . . ." CAN. CONST. (Constitution Act, 1982) Pt. I (Canadian Charter of Rights and Freedoms), § 2(B). An override provision did not protect the sign law against the provisions of the Quebec Charter.

170. In light of the interpretation of § 33, with which the opinion opened, the only effect of the decision on the merits was to make it quite clear that otherwise valuable rights were indeed being overridden, a proposition that probably needed no support anyway. A scholar of U.S. constitutional law can hardly avoid hearing echoes of John Marshall's "split the difference" strategy in Marbury v. Madison, 5 U.S. 137 (1803), here. The Canadian Supreme Court managed to say that the Quebec legislature had denied rights that many believe to be fundamental, without actually confronting the legislature with a decision to which it had to respond.

171. *See e.g., Ford,* [1988] 2 S.C.R. at 767 (interpreting the relevant portions of the Quebec and Canadian Charters in tandem), 768-71 (interpreting similarly as to provisions dealing with permissible justifications for infringing guaranteed rights).

172. A new override was needed because the general override had expired at the end of its five-year term. Bourassa's liberal government, unlike its separatist predecessor, was not inclined to continue its predecessor's general opposition to the Charter.

The new law, Bill 178, was somewhat less restrictive than Bill 101. It allowed the use of English in interior signs but continued to prohibit its use on exterior signs. Bourassa may have believed that this new proposal would avoid the constitutional problems the Supreme Court had found with Bill 101. *See* Stéphane Dion, *Explaining Quebec Nationalism, in* THE COLLAPSE OF CANADA? 77, 93-94 (R. Kent Weaver ed., 1992) (suggesting that Bourassa believed Bill 178 to be an acceptable compromise). If so, he would have been invoking § 33 to "bolster" an enactment rather than to disagree with either the court's assessment of justification or its concept of democracy.

rights *would* protect if the system had such rights.[173] If we add entrenched rights *and* the override power to the system, the same controversies will arise on the merits. The argument for section 33 is that legislatures will incur some special costs, beyond those associated with adopting controversial legislation, when they use their power to override constitutional protections. Anglophones in Quebec and elsewhere in Canada objected to the sign law on the merits; indeed, three anglophone members of the Quebec government resigned to protest the new law.[174] The degree to which the protests were directed at section 33's invocation, as opposed to the statute's substance, though, is unclear.

Does the *Ford* interpretation of section 33 undermine the argument that special political costs will attend the invocation of an override? Perhaps it does. A provincial legislature is unlikely to incur serious marginal costs within the province for using its section 33 power because it can do so with the ordinary low-level public attention that occurs in connection with every statute.[175] Overriding court decisions may have been particularly easy in Quebec, which had its own judicially enforceable bill of rights nearly equivalent to the Charter. The people of Quebec thus could get almost all of the benefits of a bill of rights without feeling that one had been imposed on them from the outside.

Outside the province, however, the situation differed. Quebec's expansive use of the notwithstanding clause did draw public attention to the significance of overriding constitutional protections. It was not the Quebec public that noticed, though; it was the public in the rest of Canada.

Here the political context of the *Ford* litigation plays a central role.[176] As the *Ford* litigation proceeded through the courts, the Canadian national government attempted to reach a new accommodation with Quebec in what was known as the Meech Lake Accord,

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173. So, for example, free speech considerations can be invoked in the British Parliament as a ground for opposing a proposal, even though Great Britain lacks entrenched protection for free speech.

174. *Quebec Signs Ruling Sparks Furor*, Facts on File World News Digest, Dec. 23, 1988, *available in* LEXIS, Nexis Library, World File.

175. Even so, Bourassa did suffer some defections — the resignation of three cabinet ministers — because he introduced the new sign bill that included a § 33 override. MANFREDI, *supra* note 130, at 202.

176. One observer regretted Quebec's blanket use of the override power while noting that it reflected the province's disagreements with the Charter as a whole. The sign-law controversy encapsulated the cultural, political, and therefore constitutional differences between Quebec and the rest of Canada; the blanket override was only a symptom. William Black, *A Walk Through the Charter*, *in* RIGHTING THE BALANCE: CANADA'S NEW EQUALITY RIGHTS 69 (Lynn Smith et al. eds., 1986).

the key — though in many ways largely symbolic — provision of which would have embedded in the Canadian constitution the statement that Quebec "constitutes within Canada a distinct society."[177] By the time of the *Ford* decision, the national government, Quebec's legislature, and all but two provincial parliaments had agreed to the Accord's provisions.

Some thought that under the "distinct society" clause, Quebec's sign law would be constitutional without regard to the section 33 power.[178] Under these circumstances, Quebec's use of a blanket override power, even if permissible under *Ford,* somehow seemed like a dirty pool. To those elsewhere in Canada who already had misgivings about the Meech Lake Accord, the override was just another example of Quebec's overreaching.[179] The *Ford* decision and Bourassa's response affirmed that concern, and "from this point on 'there was virtually no chance that the Meech Lake Accord would be ratified.' "[180]

The Canadian provinces failed to adopt the Meech Lake Accord for many reasons,[181] but one was surely that people elsewhere in

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177. Meech Lake Accord, § 2(1)(b), *reprinted in* PETER W. HOGG, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED 11 (1988). According to one annotation, this provision

> neither confers power nor denies power. It will be relevant only where other constitutional provisions are unclear or ambiguous, and where reference to the ideas of linguistic duality or distinct society would help to clarify the meaning. It is difficult to identify constitutional provisions that are unclear or ambiguous in that way. Subsection (1) should probably be seen as an affirmation of sociological facts with little legal significance.

HOGG, *supra* at 12; *see also* Roderick A. Macdonald, . . . *Meech Lake to the Contrary Notwithstanding (Part I),* 29 OSGOODE HALL L.J. 253, 272-73 (1991) (describing but not endorsing this interpretation of the "distinct society" clause).

178. *See* KATHERINE E. SWINTON, THE SUPREME COURT AND CANADIAN FEDERALISM: THE LASKIN-DICKSON YEARS 353 (1990) ("The best interpretation of the distinct society clause is that it would not . . . 'trump' section 1, but work with it — that is, Quebec's limitations on rights would have to be demonstrably justified in a free and democratic society, albeit one that is distinct culturally and linguistically."); Macdonald, *supra* note 177, at 274 (citing "Bourassa's own peculiar statement . . . that, if the *Meech Lake Accord* had already been ratified, the Quebec government would not have needed to invoke the notwithstanding clause").

179. The day after Bourassa presented the new sign bill, the Premier of Manitoba, one of the two provinces that had not ratified the Meech Lake Accord, declared that he would not push for the Accord's ratification (with the three-year time limit quite near) "until Quebec changed its language policy." *Quebec Signs Ruling Sparks Furor, supra* note 174, at 957D3.

180. Russell, *supra* note 151, at 167 (quoting PATRICK MONAHAN, MEECH LAKE: THE INSIDE STORY 164 (1991)).

181. For an overview of the failure, see SWINTON, *supra* note 178, at 350-52, and Patrick J. Monahan, *After Meech Lake: An Insider's View,* 22 OTTAWA L. REV. 317, 326-54 (1990). The requirements for amending the Charter as the Meech Lake Accord would have were stringent: every provincial legislature was required to ratify the amendments within a three-year period. *See* Frank M. Lowrey, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity,* 41 EMORY L.J. 223, 250 n.141 (1992) (describing the amendment requirements). As Monahan argues, the unanimity requirement and the time limit exacerbated the bargaining situation in which the politicians found themselves: each province

Canada thought Quebec was pushing too hard for special rights. To the extent that its legislature's use of a blanket override was inconsistent with the expectations about how the power to override would be used, as expressed in the debates over the Charter's adoption, Quebec may indeed have incurred a distinctive political cost attributable to its use of override power, independent of the costs incurred by adopting the sign law itself. According to one observer, the invocation of section 33 "undermined political support for the Meech Lake Accord outside Quebec, dealing a fatal blow to its chances for ratification."[182]

D. *Section 33 and Other Responses to the Problem of Democratic Debilitation*

Perhaps the outcome of the experience with section 33 was predictable, as positive political theory might suggest.[183] Consider the sequence of decisions in constitutional adjudication. (1) A legislature adopts a statute by a majority vote. (2) A court decides that the statute is unconstitutional. (3) Some process — constitutional amendment or a section 33 override — is available to override the court decision. If the decision-rule at stage 3 is no different from the decision-rule at stage 1 and — importantly — if there are no changes in preferences in the legislature between stage 1 and stage 3, we should expect that at the end of the day, the statute will be in effect; the same majority that enacted the statute in the first place will override the court's decision.[184]

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had a veto, which meant that each could insist on linking otherwise unrelated issues; the time limit placed a premium on delay, in the hope that an intervening provincial election would lead at least one province to refuse to ratify. Further, the Accord was negotiated in secrecy and under severe pressure from then-Prime Minister Brian Mulroney. *See* B. Jamie Cameron, *An Outside View of Meech Lake: The Inside Story*, 2 SUP. CT. L. REV. 545, 549 (1991) (reviewing PATRICK J. MONAHAN, MEECH LAKE: THE INSIDE STORY (1991)) ("Prime Minister Mulroney held the ten premiers 'hostage' for almost a week until agreement to ratify the Accord was reached."). The process itself diminished the public's willingness to accept the Accord.

182. MANFREDI, *supra* note 130, at 202. This may however refer to the use of § 33 with respect to the sign law, not the blanket override.

183. For expositions of positive political theory, see William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 477 (1992); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INTL. REV. L. & ECON. 263 (1992); and McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992). These articles develop a positive theory of statutory interpretation that is more complex than the one needed here.

184. Indeed, there may be reason to think that the vote for a § 33 override might ordinarily be *larger* than the original vote: some legislators might be willing to vote for a statute with a guaranteed expiration date but not for one of indefinite duration.

In contrast, if repudiating a judicial decision requires more than a majority, we can expect that some statutes that received a majority vote would not survive the supermajority requirement. The U.S. experience with anti-flag-burning statutes seems an obvious example. Substantial majorities in both the House of Representatives and the Senate voted for the Flag Protection Act of 1989. A proposal to amend the Constitution to override the Supreme Court's invalidation of the Act secured more than a majority but less than the required two-thirds vote in the House of Representatives.[185]

On closer examination, the flag-burning episode illuminates the Canadian experience as well. After the Supreme Court's first flag-burning decision, the Republican administration proposed, not a new statute, but a constitutional amendment.[186] The Democratic congressional leadership did not want to put the amendment to a vote and proposed a new statute as an alternative, holding out the possibility of a vote on an amendment if that proved necessary. Most observers believed that the Democratic leadership opposed a constitutional amendment but feared that, in the heat of the moment, it might receive the required supermajority. Apparently, the leadership hoped that by the time the Supreme Court rejected their proposed statute, if it did, passions would have cooled and the legislature would not adopt a constitutional amendment.

Why would the passage of time matter so much, though? Similarly, how could proponents of section 33 believe that it could make a difference in outcomes, given that a majority could enact a statute overriding a court decision? The answer is obvious: in both situations, proponents hoped that preferences would change between stage 1 and stage 3.

In the flag-burning episode, the preference change might have occurred indirectly. The Democratic leadership may have thought that some representatives and senators would vote for a constitutional amendment, not because they believed it wise constitutional policy, but because they feared retaliation at the polls. As time passes, the voters' views about the desirability of a flag-burning amendment might not change, but its importance relative to other issues might decline. A voter who thought in 1990 that, taking everything into account — including a candidate's vote against a flag-burning amendment — he should vote against the candidate, might decide in 1992 that the candidate's stance on other issues was

185. *See supra* note 153.

186. ROBERT S. GOLDSTEIN, SAVING "OLD GLORY": THE HISTORY OF THE AMERICAN FLAG DESECRATION CONTROVERSY 205 (1995).

enough to justify a vote for her, even though the voter continued to believe that the candidate's vote against a constitutional amendment was wrong.[187]

There is another source of preference change worth noting, the court decision itself. Certainly proponents of section 33 believed that a court decision might educate the public in constitutional values, persuading some who supported the statute that it was indeed inconsistent with their commitment to more fundamental values. Similarly, in the flag-burning episode, the Democratic leadership may have hoped that passions would cool, not in the sense that other issues would displace flag burning, but rather in the sense that the public would reflect on the values of speech and nationhood at stake and would conclude that their sense of national unity could be sustained without infringing so severely on the values promoted by the First Amendment. Here the change in preferences between stage 1 and stage 3 occurs *because of* what happens at stage 2.[188]

There are, of course, other techniques of educating the public. Scholars in the United States, for example, have written of the Supreme Court's educative role.[189] One might be skeptical of how effective the Supreme Court's lessons can be, however, when the public has no choice but to go along with the Court's decisions unless they can mobilize the special majority required to amend the Constitution. Proponents of section 33 might have believed, in contrast, that public knowledge that ordinary majorities could override courts' decisions would enhance the educational effect of their decisions.

Alexander Bickel argued that some of the techniques he identified as the "passive virtues" could be used to educate the public.[190]

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187. I am not sure that this should be described by the simple term *preference change* because neither the voter's preference nor the representative-candidate's preference on the issue of adopting a flag-burning amendment has changed; the voter continues to want an amendment, and the representative-candidate continues to oppose an amendment. The phenomenon, I believe, arises from the fact that in a system of representative democracy, voters are presented with choices between packages of policies, embodied in competing candidates, and they must decide which is the most attractive package, in circumstances where it is unlikely that any candidate will offer a package containing all and only those policies the voter prefers.

188. This account of § 33 provides additional support for what I have called the retrospective interpretation of the notwithstanding clause. *See supra* text accompanying notes 135-39.

189. *See, e.g.*, Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127. For my views on this proposition, see Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENTARY 215 (1994).

190. *See* BICKEL, *supra* note 2, at 111-13.

So, for example, the Court could invoke notions of desuetude to put to today's public the question of whether it wished to continue to enforce a statute that seemed to the Court inconsistent with contemporary values. It could also construe statutes to avoid constitutional doubts, again to put to the public the question of whether it truly believed that the purposes the statute served were so important that trenching on constitutional values was justified.[191]

Perhaps the language issue in Quebec was so important that even an endogenous preference change induced by the Canadian Supreme Court's decision invalidating the sign law could not shift enough votes to prevent enactment of a statute overriding the decision.[192] Or, perhaps, the ability of a constitutional court to educate is smaller than proponents of section 33 and other techniques of public education through judicial decision have hoped.[193]

E. *Conclusion: Institutional Innovation and More-Than-Minimal Judicial Review*

The story of the Canadian constitution continues to unfold and the precise arrangements that Quebec and what I have so far called the rest of Canada — but which might end up being called Canada *tout court* — will reach remain to be determined. After the Meech Lake Accord failed, Canada's prime minister attempted to blame its failure not on Quebec but on section 33 itself, the "fatal flaw of

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191. *Id.* at 143-56, 181-83.

192. The U.S. Department of State implicitly criticized the sign law in its 1993 Human Rights Report, Department of State Dispatch (Feb. 1994) (including reference to the law in the section on "respect for civil liberties," which enumerates arguable violations of human rights). On March 31, 1993, the United Nations adopted the critical views of the sign law expressed by its Human Rights Committee, which found the law to violate guarantees of free expression. The Committee requested information within six months on "any relevant measures" taken in connection with the Committee's views. *See Report of the Human Rights Committee,* U.N. GAOR, Hum. Rts. Comm., 48th Sess., Supp. No. 40, at 91, U.N. Doc. A/48/40 (1993). The override provision of Bourassa's sign law expired in 1993, and a new sign law was adopted on June 18, 1993. It provides that signs may be in both French and English if "French is markedly predominant" and authorizes the government to promulgate regulations allowing signs in French only or where French need not be predominant, "in another language only." Act to Amend the Charter of the French Language, Bill 86, 1993, Chapter 40, Quebec National Assembly, Second Session, 34th Legislature.

193. For proposals aimed at least in part at improving the U.S. Supreme Court's ability to educate the public, see JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 111-24 (1992), and ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 137-42 (1989) (referring to "the capacity of the Court's doctrines to serve as vehicles of communication").

The problem of democratic debilitation arises because constitutional norm-articulation is centralized in the courts rather than distributed among numerous civic institutions. Perhaps, then, the Canadian constitutional experience shows the impossibility of sustaining a system in which the power of constitutional norm-articulation is not centralized. If so, educational responses to the problem of democratic debilitation would be even more valuable.

1981, which reduces your individual rights and mine."[194] No longer seen as a way of avoiding problems of democratic debilitation, section 33 came to be seen as inconsistent with the idea of judicially enforceable constitutional rights. Like the power to regulate jurisdiction in the U.S. Constitution, section 33 may no longer be a significant part of the Canadian Charter. Something like a convention against its use may have emerged,[195] precisely because the political costs of invoking the power turned out to be too great. This is analogous to the convention in the United States against using the power to regulate jurisdiction to insulate significant constitutional issues from judicial review.[196] Effectively, then, the Canadian system may include only the possibility of amending the constitution by a supermajority, not the possibility of majoritarian control of constitutional interpretation.

The reason for the apparent emergence of the convention in Canada may shed some light on broader issues of constitution making and the problem of democratic debilitation. As one commentator put it, "Canadians experienced a use of the notwithstanding clause that they found outrageous before they experienced a Supreme Court decision of equivalent political unpopularity."[197] I have argued that the notwithstanding power is more attractive than the power to regulate jurisdiction as a response to the problem of democratic debilitation because of its visibility and importance in the constitutional compromise. Yet, the political setting in which section 33 emerged may mean that it did not become an element of Canadians' constitutional consciousness at all. It was inserted into the Charter as part of a compromise that papered over arguably the most important issue in Canadian constitutional life — the status of Quebec.[198] It was discredited, at least in part, because it was used in connection with precisely that issue.[199]

Canada's experience with the notwithstanding clause suggests that institutions designed to address the problem of democratic debilitation by making it possible to deal with that problem visibly

194. MANFREDI, *supra* note 130, at 202.

195. ANDREW HEARD, CANADIAN CONSTITUTIONAL CONVENTIONS: THE MARRIAGE OF LAW AND POLITICS 147 (1991).

196. *See supra* text accompanying notes 154-61.

197. MANFREDI, *supra* note 130, at 204.

198. *See* Weiler, *supra* note 125, at 54-60 (discussing the centrality of the language issue, particularly in Quebec, in Canada's constitutional life). Section 33 itself did not address the language issue because language rights are not covered by § 33, but the notwithstanding clause made it possible for the nation to adopt the Charter without Quebec's agreement.

199. Ironically, it was used by a province that had refused to accede to the Charter as a whole.

may fail *because* of their visibility. The characteristic that makes the institution attractive may make it impossible to function effectively. As Paul Weiler has noted,

> By taking the initiative . . . before the Charter had time to put down roots in Quebec political life, and by making use of the *non obstante* formula a matter of legislative routine, the Parti Québécois [which enacted Bill 101, the initial sign law] was able to remove the political hazard of invoking the formula for particular laws, thus frustrating the entire scheme of the Charter.[200]

This "accident of history"[201] in the Canadian experience actually may be built into the institution of a *non obstante* formula in the following way.

Constitutions in general consist of institutional arrangements designed to provide a framework for the resolution of political issues over the long term. The outlines of those long-term issues may be only dimly discerned when the constitution is adopted, and constitution makers do their best to put in place institutions that will do the best that can be done with whatever problems arise. Simultaneously, however, constitution makers face ordinary political problems in the present day, and frequently they may have to address those problems as a condition for securing the constitution's adoption. They have three strategies for dealing with such pressing problems. First, they may simply resolve them, adopting the kind of political solution already available through the use of existing political institutions. Second, they may relegate those problems to the new institutions they create, hoping that those institutions will do no worse in resolving them than the preexisting institutions did. Third, they may defer their resolution, in the hope that time will make those particular problems go away.

Consider here two provisions in the U.S. Constitution. Article VI, Section 1 provides for the assumption by the United States of debts incurred by the states during the war and confederation periods; that was an ordinary political compromise, of the first sort. Article I, Section 9 bars Congress from exercising its enumerated power over interstate and foreign commerce to prohibit "the migration or importation of such persons as any of the States now existing shall think proper to admit" until 1808 but authorizes Congress to impose a tax of up to $10 on each such person. This compromise represents the third approach. The controversy over congressional regulation of the interstate slave trade was deferred

200. Weiler, *supra* note 125, at 90.

201. MANFREDI, *supra* note 130, at 204.

until 1808, by which time, the Framers apparently hoped, the issue would have changed so that it could be resolved through ordinary political means.

If the deferred issue does not change, as the slavery issue did not, or if it ends up not being deferred at all, as the language issue in Canada was not, the compromises on that issue, designed to secure adoption of the constitution, may well fail. A provision like a notwithstanding clause makes the overall process particularly vulnerable in dealing with those pressing political problems that have, under the second approach, simply been relegated to the new institutions. Such a provision allows politicians to take the issue *away from* the new institutions, leaving them to be handled by the process that did not resolve it in a satisfactory way before the constitutional revision.

Other problems might also prevent the use of a *non obstante* approach. Ideally, a provision like the notwithstanding clause would not be used until the public generally accepted the legitimacy of judicial review. Two problems with that ideal strategy arise, though. Unlike the ban on congressional action until 1808, the notwithstanding clause did nothing to assist the political branches in deferring consideration of divisive issues regarding Quebec's status.[202] That is, the strategy of deferral will work only if the political system collaborates in deferring the contentious issue, which would seem unlikely, or if the constitutional system forces its deferral.

If, however, the use of the notwithstanding power were delayed, a second problem would arise. As time passes, the notwithstanding clause or parallel institutions designed to address the problem of democratic debilitation would become less visible. They would come to resemble the power to regulate jurisdiction, and invoking them might seem contrary to understandings of constitutionalism that would have developed during the period when these institutions were not utilized.

The preceding suggestions may be too bleak, however. In Canada, the drafters of the Charter explicitly embedded ordinary politics within their fundamental constitutional arrangements, expecting that ordinary politics would interact with constitutional

202. The compromise that produced § 33 necessarily allowed the provinces to invoke the notwithstanding power, which meant that a recalcitrant province, as Quebec was, was quite likely to use it quickly, compounding the problem that the clause lacked a deferral provision. *See id.* at 205 ("In modern federal systems, sub-national governments have come to be perceived as the principal threat to rights and liberties, and analysts who might be willing to concede the legitimacy of section 33 to respond to decisions [invalidating national legislation] . . . would not accept the legitimacy of provincial overrides.").

concerns in ways that would ultimately benefit the society overall. In one dimension, their expectations seem to have been defeated. Section 33 did affect the politics of constitutional arrangements, though not in the way the drafters seem to have anticipated. Yet, the text and history of section 33 would have supported an interpretation different from the one the Canadian Supreme Court gave it in *Ford.* Had the court chosen a different interpretation, the course of constitutional development might have been different as well.[203] In another dimension, the drafters' expectations have neither been fulfilled nor defeated because the ultimate constitutional settlement involving Quebec remains to be reached. When it is, we may be able to decide whether section 33 and its attempt to make ordinary politics and constitutional law penetrate each other did indeed benefit the society.

That examination will then raise once again Thayer's concern about the impact of judicial review. He may have been correct in believing that more-than-minimal judicial review contributed to democratic debilitation. That is different from establishing that minimal judicial review will revitalize or enhance constitutional consciousness among the public. For, in the presence of minimal judicial review, the public and its representatives may simply enact what they know they can get away with doing. That is not a prospect that Thayer would have found encouraging.

Conclusion: Minimal Judicial Review as a Response to the Problems of Policy Distortion and Democratic Debilitation

I have argued that Thayer and Bickel correctly noted the problems of policy distortion and democratic debilitation associated with judicial review. I have also argued that the contours of those problems are more complex than they might seem. It is not clear to me, for example, how often misunderstandings of judicially articulated norms or bargaining breakdowns due to a judicial decision lead to policy distortions. My sense of how the U.S. constitutional system operates, though, is that the problems of policy distortion and democratic debilitation are serious enough at least that constitutional theorizing cannot stop, as it generally has, with demonstra-

203. To an outsider, it is not obvious why the court chose the interpretation it did, although Bruce Ackerman has suggested in conversation that the court's decision reflected the lingering pull of the model of parliamentary supremacy that the Charter as a whole rejected but that § 33 could be understood to endorse. On this view, *Ford* was an interpretive mistake because the court failed to read § 33 in light of the rejection of the model of parliamentary supremacy.

tions that more-than-minimal judicial review does not raise the problem of democratic displacement.[204]

If they are problems to which a constitutional system ought to respond, how might it do so? Despite claims made for it, the Canadian notwithstanding clause did not prove to be a means by which democratic discussion of constitutional norms could be promoted within a system also authorizing judicial review. Thayer's alternative, of course, was to give judicial review a very narrow scope.

Minimal judicial review does, almost by definition, provide a wider domain within which legislators and the public have an opportunity to articulate constitutional norms. To the extent that they seize that opportunity, minimal judicial review is a successful response to the problem of democratic debilitation. It is not an entirely adequate response to the problem of policy distortion, however. If courts rarely invalidate statutes, they provide few focal points that might lead to bargaining breakdowns. But, by itself, giving judicial review a minimal scope cannot reduce misunderstanding as a source of policy distortion.[205]

Experience with constitutions in other countries suggests that Thayer and Bickel were right in identifying problems associated with judicial review and not merely with the forms of U.S. constitutionalism. For democratic constitutionalists, the problems Thayer and Bickel placed on the agenda remain serious ones, perhaps so

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204. The question of the extent to which more-than-minimal judicial review contributes to democratic debilitation is at bottom an empirical one. Others might describe what I have called *debilitation* as evidence of people's satisfaction with the operation of our constitutional system or might argue that debilitation, to the extent it exists, arises from cultural sources or from features of our society rather than from our constitutional structure. Here I suggest only that the empirical claim has some intuitive appeal. To investigate it more fully, one might want to examine either the experience in nations with constitutions but no judicial enforcement or the experience in the United States before the emergence of more-than-minimal judicial review. For some evidence on the latter, see DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966), and David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791,* 61 U. CHI. L. REV. 775 (1994). My judgment is that these materials provide some support for the proposition that explicit legislative attention to constitutional norms was higher in the past than it is now.

Empirical analysis is further complicated by the possibility that constitutional norms may be so deeply embedded that legislators never advert to them explicitly but refrain from proposing laws that would conflict with such norms. That is the form of Herbert Wechsler's classic argument about the way in which Congress respects constitutional norms concerning federalism. *See* HERBERT WECHSLER, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49 (1961); *see also* CHOPER, *supra* note 41, at 52-55, 185-88. For a recent skeptical examination of Wechsler's argument, see Larry Kramer, *Understanding Federalism,* 47 VAND. L. REV. 1485, 1503-14 (1994).

205. Giving judicial review a minimal scope might exacerbate the legitimation problem, *see supra* note 120, the extent of which I have suggested however is not troublingly large.

serious that their solution — giving judicial review a minimal scope — deserves renewed attention.[206]

206. We might also benefit from discussion of alternative institutional arrangements. *See* PERRY, *supra* note 124, at 201. For example, restructuring the judicial system to subject judges to more direct political control might alleviate the problems of policy distortion and especially democratic debilitation. In this connection, it may be worth noting that modern constitution makers seem strongly inclined to reject life tenure for judges on constitutional courts in favor of relatively long nonrenewable terms. Full exploration of this observation would of course require examination of different traditions in judicial training and selection, the choices made between abstract or concrete review, and the like.