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THE ANNOYING CONSTITUTION: IMPLICATIONS FOR THE  
ALLOCATION OF INTERPRETIVE AUTHORITY

FREDERICK SCHAUER\*

ABSTRACT

*Constitutional constraints often restrict unwise or immoral official policies and actions, but also often invalidate laws and other official acts that are sound as a matter of both morality and policy. These second-order side constraints—or trumps—on even official acts that are sound as a matter of first-order policy reflect deeper or longer-term values, and they are central to understanding the very idea of constitutionalism. Moreover, once we see the Constitution as restricting not only the unsound and the unwise but also the sound and the wise, we can understand why expecting those whose sound ideas and policies are nevertheless unconstitutional to impose those constraints on themselves is psychologically and politically unrealistic. Judicial interpretive supremacy can be justified, therefore, not only by the positive virtues of authoritative settlement, but also by the negative virtues of precluding officials from enforcing and interpreting constitutional constraints on themselves.*

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## INTRODUCTION

Many bad policies are constitutionally permissible. And many good policies are constitutionally impermissible. The former category is obvious, and few would doubt the constitutionality of, for example, lowering the speed limit on interstate highways to forty-five miles per hour, or abolishing the National Park Service. But the existence of the latter category is often less salient, and it is easy—too easy—to associate unconstitutionality with outcomes that are also defective on moral or policy grounds. State-enforced *de jure* segregation of the public schools is unconstitutional,<sup>1</sup> but, the Constitution aside, it is also immoral and bad policy. So too with confessions extracted by physical coercion,<sup>2</sup> regulations enacted with the express purpose of disabling a particular religion,<sup>3</sup> and much else.

Although many actions of government and its officials are indeed both unconstitutional and unsound on moral or policy grounds, on closer examination we discover many other actions, sound as a matter of morality and policy, that are nevertheless unconstitutional. Or, to put it another way, a careful look at the full breadth of constitutional decisions reveals that the realm of justified unconstitutionality is occupied not only by the immoral and the unwise, but also by actions that are—but for their unconstitutionality—largely justifiable on both moral and policy grounds. The history of American constitutional law is consequently replete not only with bad policies struck down in the name of the Constitution, but also with good policies adopted by well-intentioned policymakers and politicians that have suffered the same fate, and properly so.<sup>4</sup>

Once we recognize that the Constitution serves not only to keep bad governments and bad governors from doing bad things, but also attempts to keep, in the service of deeper or longer-term values,

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1. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

2. See *Brown v. Mississippi*, 297 U.S. 278, 279, 287 (1936) (holding that confession extracted “by brutality and violence” violates the Due Process Clause of the Fourteenth Amendment).

3. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (invalidating ordinance enacted with express “animosity” toward a particular religion).

4. See *infra* Part I.

good governments and good governors from doing good things,<sup>5</sup> some of the traditional debate about the allocation of constitutional interpretive authority is seen in a different light. Insofar as constitutional law imposes second-order<sup>6</sup> or side constraints<sup>7</sup> on first-order wise policies, we can appreciate that expecting politicians, policy-makers, and their constituents to set aside their own sound policy preferences in the service of less obvious, less immediate, and possibly less congenial goals is, although not impossible, highly unlikely, for reasons that are both political and psychological. Judicial interpretive supremacy emerges, therefore, as a potentially justifiable approach not because of some inherent superiority of the courts, and not (only) because the courts may be well-situated to perform a valuable settlement function in the face of moral, political, legal, and constitutional disagreement,<sup>8</sup> but also because the alternatives to judicial interpretive supremacy may impose upon the political branches of government tasks they cannot reasonably be expected to perform. In what follows I hope to explain and support the conclusions I have thus far done no more than announce.

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5. Cf. KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 25 (Benjamin Nelson ed., Harper Torchbooks 1968) (1962) (urging that we replace a concern for who our rulers should be with a concern for organizing “our political institutions so that bad or incompetent rulers ... cannot do too much damage” (emphasis omitted)). Popper’s focus is, in important respects, the mirror image of my focus in this Article, but the point is still that wise institutional design involves weighing the expected (in the statistician’s sense of expected value) harms and costs that might come from empowering bad officials to make bad decisions against the expected harms and costs that might come from disabling good officials from making good decisions.

6. On the notion of second-order considerations (and thus of second-order constraints), see the description and analysis in Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 *ETHICS* 5 (1999); see also JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 35-40 (Oxford University Press 1999) (1975) (explaining second-order reasons as reasons that operate on other reasons); Stephen R. Perry, *Second-Order Reasons, Uncertainty, and Legal Theory*, 62 *S. CAL. L. REV.* 913, 913-19 (1989) (same).

7. On the idea of a side constraint, see *infra* text accompanying notes 19-21.

8. I have argued as much previously. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *HARV. L. REV.* 1359, 1377-81 (1997) (observing that the settlement function of law may provide one reason in favor of judicial interpretive supremacy); see also Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *CONST. COMMENT.* 455, 471-77 (2000) (same).

## I. THE ANNOYING CONSTITUTION

Some decades ago, Ronald Dworkin famously described rights as “trumps.”<sup>9</sup> In choosing this characterization, Dworkin sought to describe, more or less accurately in my view, a world in which most governmental decisions were made on policy grounds.<sup>10</sup> Some of these decisions might involve a systematic cost-benefit analysis,<sup>11</sup> but most policy decisions emerge from a less formal assessment of which policy will most increase the aggregate welfare either of the population as a whole or of some particular constituency. For Dworkin, the basis for many of these decisions is a utilitarian calculation aimed at identifying the policies that will produce the greatest net welfare (or, for some utilitarians, pleasure or happiness).<sup>12</sup> We can broaden this claim to understand it as maintaining that the normal policy decision is a consequentialist one seeking to maximize good consequences under some conception of which kinds of good (or bad) consequences are to count in the consequentialist calculus.<sup>13</sup>

Dworkin was not especially concerned with the subtleties of consequentialist or utilitarian policy analysis.<sup>14</sup> Instead, he stressed

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9. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi, 188-93 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; see Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984); see also RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 329 (2011) [hereinafter DWORKIN, *JUSTICE FOR HEDGEHOGS*].

10. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 9, at 191-93.

11. See generally, e.g., MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 2-3 (2006); CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2002); Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371, 1371-72 (1998); Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153-57 (2000).

12. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 9, at 95. On the varieties of utilitarianism, see *THE CAMBRIDGE COMPANION TO UTILITARIANISM* (Ben Eggleston & Dale E. Miller eds., 2014); Dan W. Brock, *Recent Work in Utilitarianism*, 10 AM. PHIL. Q. 241, 253-61 (1973).

13. Utilitarianism is the subset of consequentialism presupposing that utility is the consequence to be maximized. But other consequentialisms seek to maximize consequences other than utility. See generally Walter Sinnott-Armstrong, *Consequentialism*, *STAN. ENCYCLOPEDIA PHILOSOPHY*, <http://plato.stanford.edu/entries/consequentialism> [<https://perma.cc/7HAK-9FNB>] (last revised Oct. 22, 2015).

14. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 9, at xi-xii.

the idea that rights serve as a check—or trump—on even genuinely welfare- or utility-maximizing policies.<sup>15</sup> With respect to many applications, the idea is fundamentally sound. Even if suppressing a minority religion, for example, would make the majority happier or richer, it would still be the wrong thing to do precisely because individual freedom of religion will trump even genuinely welfare-maximizing policies. Freedom of religion as an individual right is thus an instance, under Dworkin’s conception of rights as trumps, of something that cannot be withheld even if depriving some people of that right will make most people, in the aggregate, happier or in some other way better off.<sup>16</sup> So too, he argued, with rights to freedom of speech, with the rights of criminal defendants, and—for him, most importantly—with rights to equality.<sup>17</sup> It is simply wrong, he insisted, for a majority to make things worse for a racial or ethnic minority even if doing so would make the majority better off.<sup>18</sup>

Dworkin’s idea of rights as trumps uses different language to label what the philosopher Robert Nozick had earlier described as “side constraints.”<sup>19</sup> The idea is similar. Side constraints limit, from an external or outside perspective, what can be pursued internally by application of some form of consequentialism.<sup>20</sup> Side constraints intrude themselves, making impermissible actions or policies that might be justifiable on utilitarian or other consequentialist grounds absent the side constraint.<sup>21</sup>

Although both Dworkin and Nozick focused on rights, the idea of second-order trumps or side constraints is even more broadly applicable. Most importantly here, it is applicable to a vast swath of

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15. For a more technical development of this idea, which sometimes goes under the name of “threshold deontology,” see Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CALIF. L. REV. 323, 343-47 (2008).

16. See DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 9, at 345-46.

17. See *id.* at 329-31.

18. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 9, at 96, 146-47.

19. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26-53 (1974). Similar ideas are found in JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 153-54 (1990); and JUDITH JARVIS THOMSON, *Some Ruminations on Rights*, in RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 49, 52-55 (William Parent ed., 1986).

20. See NOZICK, *supra* note 19, at 29-33, 39, 51-52.

21. See Zamir & Medina, *supra* note 15, at 325-26 (“The pursuit of good consequences is subject to constraints. Certain acts are inherently wrong and are therefore impermissible even as a means to furthering the overall good.”).

constitutional law. Although constitutions constitute governments and their component parts<sup>22</sup> and empower those component parts to take actions of various kinds,<sup>23</sup> constitutions also typically play an important role, by establishing rights and otherwise, in *limiting* governments in exactly the way that Dworkin and Nozick have in mind. To put it differently, constitutions impose second-order constraints on even sound first-order policies or other governmental decisions. Constitutions thus not only attempt to keep racists, sexists, power-grabbers, dissent-suppressors, rogue police officers, bribe-takers, and other similarly undesirable officials from taking undesirable actions or adopting undesirable policies. They also, as previewed above,<sup>24</sup> constrain wise, well-meaning, and astute governmental officials from pursuing in good faith policies that can genuinely be expected to have advantageous outcomes for the population at large.

The virtues of this side-constraint aspect of constitutional constraint may not always be obvious, but constitutions disable wise and well-intentioned officials and institutions from doing what seem to be good things for multiple reasons. Sometimes, perhaps most often, constitutions do so in the service of individual rights—individual rights against the majority and not for the benefit of the majority.<sup>25</sup> And at other times they do so because the stability provided by constitutions may preclude actions and policies that look advantageous in the short-term but may have longer-term negative consequences,<sup>26</sup> or because keeping a constitution functioning is itself often a valuable long-term consequence that demands the

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22. For example, Congress is not only regulated by the Constitution, but is also created by it. U.S. CONST. art I, § 1. Without the Constitution, there would be no Congress, just as without the constitutive rules of football, there would be no touchdowns. On constitutive rules generally, see JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33-34 (1969); see also JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 27-29 (1995). For application of the idea to constitutional law, see Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 986 (2009).

23. See, e.g., U.S. CONST. art. I, § 8 (listing the powers of Congress); *id.* art. III, § 2 (empowering federal courts to decide cases and controversies arising under the Constitution, laws, and treaties of the United States).

24. See *supra* text accompanying note 4.

25. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 9, at 133; see also THE FEDERALIST NO. 51 (James Madison).

26. And hence the ubiquity of “slippery slope” arguments in constitutional law. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 368-69 (1985).

invalidation of actions that seem to be right for the immediate circumstances but which nevertheless violate that constitution.<sup>27</sup>

Examples of the phenomenon just described are rampant. When courts enforce the so-called dormant Commerce Clause, for example, they say to the states that even those policies designed in good faith to assist a state's residents and industries—and which may often actually assist those residents and industries—are nonetheless unconstitutional because of the larger constitutional interest in a single national market.<sup>28</sup> When bipartisan congressional measures aimed at adapting a 1787 document to the realities of modern legislative life are invalidated, the Supreme Court treats compliance with the formal requirements for legislative validity as a side constraint on what would otherwise seem to be a wise and efficient legislative approach.<sup>29</sup> And when the Supreme Court holds that some seemingly valuable policy measure is beyond Congress's power under the Commerce Clause,<sup>30</sup> it again imposes second-order constraints of power limitations (or of jurisdiction, in the nontechnical sense) on what might appear to be wise and even needed first-order policies.

The foregoing examples each involved federalism or separation of powers constraints, but more commonly such constraints will come from individual rights—specifically, individual rights against majoritarian decision-making and against majoritarian welfare

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27. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 9, at 106-07.

28. See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265, 277 (1984) (invalidating a tax differential designed to assist the Hawaiian indigenous fruit wine industry); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (striking down a New Jersey statute aimed at limiting the quantity of solid and liquid environmentally harmful waste disposed in New Jersey landfills).

29. See *INS v. Chadha*, 462 U.S. 919, 954, 958-59 (1983) (invalidating a seemingly efficient "one-House veto" for failure to comply with Article I's bicameralism and presentment requirements); see also *Clinton v. City of New York*, 524 U.S. 417, 420-21, 448-49 (1998) (invalidating the Line Item Veto Act on similar grounds); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275-76 (1991) (holding that delegating legislative power to an administrative board of review violated bicameralism and presentment requirements).

30. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586-93 (2012) (holding that individual mandate portion of the Patient Protection and Affordable Care Act exceeded congressional power under the Commerce Clause); *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (invalidating the Violence Against Women Act on Commerce Clause grounds); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (invalidating Gun-Free School Zones Act as beyond Congress's commerce power).

maximization.<sup>31</sup> In *Palmore v. Sidoti*, for example, a likely well-meaning judge who plausibly feared that a white child in 1983 Florida might have a more stressful and otherwise difficult childhood growing up in a mixed-race household than he would with his white father proceeded on that basis to award custody to the father.<sup>32</sup> Nevertheless, the Supreme Court ruled unanimously, and seemingly easily, that taking race into account in a custody proceeding, even for apparently benign and well-intentioned purposes, was plainly impermissible under the Equal Protection Clause.<sup>33</sup> Similarly, the Court held in *Orr v. Orr* that a statistically justified differential between men and women for purposes of granting alimony, and for purposes of ensuring that women were adequately provided for after divorce, was invalidated as impermissible gender discrimination, again despite the fact that the legislature's motives were seemingly benign, and despite the fact that Alabama's statute rested on a sound (at least at the time) statistical basis.<sup>34</sup>

Not surprisingly, the effect of individual rights as side constraints or trumps on sound or efficient policies arises with considerable frequency with respect to issues of criminal procedure. Most generally, it is at least plausible that the privilege against self-incrimination itself is of this character,<sup>35</sup> especially if we understand it as often (even if far from always) excluding relevant and reliable evidence in criminal prosecutions and thus impeding a community interest in crime control. And insofar as the Fourth Amendment's warrant requirement and limitation on searches and seizures<sup>36</sup> even more often serve to exclude reliable and sometimes necessary evidence,<sup>37</sup> the Fourth Amendment too can be seen as an entirely

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31. I use "majoritarian" loosely, recognizing that legislative and official action often responds to intense preferences by a minority of the population. See Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 142-43 (2000); Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1393-94 (2009).

32. See 466 U.S. 429, 430-31 (1984).

33. See *id.* at 430-34.

34. See 440 U.S. 268, 281-83 (1979).

35. See U.S. CONST. amend. V; see also Emily Rebekkah Hanks, Note, *Body Language: Should Physical Responses to Interrogation Be Admissible Under Miranda?*, 11 VA. J. SOC. POL'Y & LAW 89, 120 (2003) (describing Justice Powell's majority opinion in *Jenkins v. Anderson*, 447 U.S. 231 (1980), as recognizing the "social costs of the Fifth Amendment").

36. See U.S. CONST. amend. IV.

37. See Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 23 (1988) (acknowledging the costs of the Fourth Amend-

justifiable individual rights side constraint on the state's also justifiable interest in convicting the guilty and ensuring a greater degree of community safety.<sup>38</sup>

More concretely, consider the line of cases strengthening the Sixth Amendment's confrontation requirement,<sup>39</sup> and especially *Hammon v. Indiana*.<sup>40</sup> In *Hammon*, as in many post-*Crawford* domestic violence cases,<sup>41</sup> the requirement of confrontation was held to preclude testimony by a police officer about a victim's complaint because of the nonappearance of the victim at trial, despite the fact that such nonappearance is a disproportionately frequent phenomenon in domestic violence situations.<sup>42</sup> *Hammon* is thus an apt example of a side constraint rendering impermissible a seemingly welfare-maximizing act by a good faith public servant, but arguably doing so in the service of the larger and longer-term values that the Sixth Amendment's confrontation requirement is designed to serve.

The side constraints imposed on criminal prosecutions illustrate well the constitutional constraints on otherwise sound policy decisions or public acts, but perhaps not nearly as well as a host of cases

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ment).

38. Eliminating either the privilege against self-incrimination or the warrant requirement, or both, would almost certainly increase the number of innocent people convicted. But it would likely increase the number of guilty people convicted as well. And although the utilitarian calculation would be complex and contested, it is plausible to assume that such an approach (as well as lessening the existing requirement of proof beyond a reasonable doubt) would be welfare-enhancing in the aggregate, questions of individual rights aside. Cf. *In re Winship*, 397 U.S. 358, 359 (1970) (questioning the use of a reasonable doubt standard in juvenile proceedings). See generally LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY (2006); Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008).

39. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (ruling the Sixth Amendment is violated any time a "testimonial statement" is admitted without opportunity for cross-examination). Most recent is *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015), which continued the testimonial statement test but narrowed the category of statements that are considered testimonial.

40. 547 U.S. 813, 829-30 (2006) (decided along with *Davis v. Washington*, 547 U.S. 813 (2006)).

41. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749-50 (2005); Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 2-3 (2006).

42. *Hammon*, 547 U.S. at 829-34; see Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & LAW 89, 100 (1997).

arising under the First Amendment's Speech and Press Clauses.<sup>43</sup> Here the existing doctrines protect Klansmen who advocate racial violence,<sup>44</sup> cross-burners who wish to intimidate African-Americans,<sup>45</sup> neo-Nazis who seek to intimidate Holocaust survivors,<sup>46</sup> distributors of the virtual child pornography often used by pedophiles to entice young children into sexual acts,<sup>47</sup> purveyors of films and video recordings of animal torture,<sup>48</sup> individuals who seek to cause emotional distress to the families of deceased soldiers,<sup>49</sup> video game companies that profit from providing to minors the virtual experience of rape and murder,<sup>50</sup> and countless other undesirable individuals offering equally undesirable messages. Typically those who would restrict the speakers and their messages are not the dissent-suppressing or power-hoarding officials who also feature prominently in the history and theory of the First Amendment.<sup>51</sup> Rather, they are responsible legislative, executive, and law enforcement figures seeking to enhance the general welfare, or seeking to respond to particular injuries suffered by particular segments of the population, and seeking to do it through acts and policies that generally would, the First Amendment aside, achieve precisely that

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43. See U.S. CONST. amend. I.

44. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam) (protecting Klan leader who called for acts of "revengeance" against African-Americans and Jews).

45. See *Virginia v. Black*, 538 U.S. 343, 347-48 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992); see also Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197.

46. See *Collin v. Smith*, 578 F.2d 1197, 1205-06 (7th Cir. 1978); *Village of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 24 (Ill. 1978). The American Nazi Party proposed the neo-Nazis' march (which never took place, despite their victory in court) in Skokie precisely because of its large population of Jews in general and Holocaust survivors in particular. See Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 629 (1985).

47. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002); Chelsea McLean, Note, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL'Y 221, 232 (2007).

48. See *United States v. Stevens*, 559 U.S. 460, 481-82 (2010); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 86.

49. See *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

50. See *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 799 (2011).

51. Cf. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 580 (1983) (interpreting *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936), as invalidating tax on newspapers because it was imposed as retribution against newspapers for criticism of the state government). See generally STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999).

goal. Yet despite the well-intentioned, often well-targeted, and equally often potentially effective nature of these policies, the First Amendment as currently interpreted prohibits their implementation, and thus once again acts as a side constraint or trump on what would otherwise be public welfare-enhancing official actions.

This is not the place to evaluate the wisdom of these various constitutional side constraints, either as a matter of conformity with original constitutional intentions or original meaning, or as a matter of less originalist judicial interpretation of the relevant constitutional provisions. Plainly, some of the decisions just cataloged are controversial, and many people would think some of them plainly wrong. Still, not all of the cases just described are wrong, and most of these examples illustrate side constraints wisely and properly applied to invalidate otherwise valuable acts and policies. In this respect, perhaps the best characterization of many of these constraints, at least from the perspective of the policymakers and officials they constrain, is that they are *annoying*. If you are a government official or legislator and you have in mind a good policy, or if you desire to take some seemingly desirable action, then it would certainly seem annoying when some side constraint intrudes and tells you that you cannot do what looks like the right thing and looks like what your constituents believe is the right thing. And thus, as long as at least some of these examples represent a constitutional regime in which second-order constraints limit what can be done even in the genuine service of the public good, the central problem remains of how such annoying second-order constraints can be implemented.

## II. ENFORCING RULES ON ONESELF<sup>52</sup>

On the assumption that at least some—and probably most—of the annoying side constraints just described are justifiable despite the annoyance they cause to the policymakers and policy implementers they constrain, the question then turns to the issue of how these constraints should be interpreted and enforced.

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52. See Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985).

It is at this point that the central problems of constitutional interpretive authority arise. Given that the overwhelming majority of the rules and principles just described emerge not directly from (virtually) inescapable constitutional text,<sup>53</sup> they are, by and large, the product of judicial interpretations of the text. But because the question of who should interpret that text is precisely the matter at issue, the question, then, becomes whether these side constraints, or anything even resembling them, would emerge either from interpretation of the text by the executive or legislative branches of the federal government or the states,<sup>54</sup> or from, in some way, the population at large.<sup>55</sup>

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53. Compare, for example, the two-witness requirement in prosecutions for treason, U.S. CONST. art. III, § 3, the minimum age and citizenship requirements for the offices of President, Vice-President, Senator, and Member of the House of Representatives, *id.* art. I, §§ 2-3; *id.* art. II, § 1, and the extension of the franchise to women, *id.* amend. XIX, and eighteen-year-olds, *id.* amend. XXVI. For a longer list and analysis of such examples, see Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). For a challenge to the claim of inescapability of clear text, see Mark V. Tushnet, Comment, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 688 n.24 (1985).

54. That is, from a departmentalist approach. On departmentalism generally, see Neal Devins & Louis Fisher, Essay, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (arguing that departmentalism may cure the strife created by judicial exclusivity); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004) (proposing a limited form of departmentalism to support judicial review when executive or legislative interpretation would be efficient and prudent); Joseph Landau, *Presidential Constitutionalism and Civil Rights*, 55 WM. & MARY L. REV. 1719 (2014) (examining the President's role in interpreting the Constitution, especially on the issue of civil rights); Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380 (1988) (suggesting that the Supreme Court's authority to dictate constitutional principles has recently increased needlessly); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (arguing that the President has the same authority as the Supreme Court to interpret the Constitution, especially on matters relevant to the executive branch); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1541-42 (2005) (book review) (de-emphasizing the importance of judicial review); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) (challenging common criticisms of departmentalism); John Yoo, *Judicial Supremacy Has Its Limits*, 20 TEX. REV. L. & POL. 1, 6-7 (2015) (comparing the constitutional authority of judgments issued by the Court with that of presidential pardons).

55. The reference here is to so-called popular constitutionalism. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that popular constitutionalism was the dominant interpretative theory throughout much of American history); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (suggesting that less reliance on judicial supremacy could be more reflective of the will of the people); Joseph Blocher, Response, *Popular Constitutionalism and*

I have described the side constraints at issue as constraints on consequentialist-inspired policies or welfare maximization more generally, but it is now time to be more concrete. Specifically, constitutional side constraints typically constrain the decisions of particular governmental decision makers or decision-making institutions. The side constraints tell police officers and school officials what they cannot do; they tell legislators what legislation they cannot enact; and they tell Presidents and lesser executive officials what policies they are prohibited from pursuing and what acts they are prohibited from taking. The question presented by departmentalism is thus whether these various officials and institutions are the appropriate individuals and institutions to interpret the Constitution in such a way as to limit their own powers, constrain their own authority, and trump their own ability to pursue the policies that they and their constituents deem best.

I want to set aside the important possibility that public officials under a departmentalist understanding would impose fewer constraints (as compared to under current doctrine) in the name of the Constitution on their own powers and policies than now exist and that this would be a desirable, or at least acceptable, consequence. It is more than plausible to suppose, for example, that, in offering his iconic defense of departmentalism in 1986,<sup>56</sup> then-Attorney General Edwin Meese III understood that the nonjudicial bodies—the executive, Congress, and the legislative and executive institutions of the states—that he preferred as constitutional interpreters would reach dramatically different conclusions from then-existing doctrine

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*the State Attorneys General*, 122 HARV. L. REV. F. 108 (2008) (positing that the people's power to elect state attorneys general—and thereby influence the enforcement of the Second Amendment—is a form of popular constitutionalism); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197 (2013) (using gay marriage cases to demonstrate the role that lower federal courts play in popular constitutionalism); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003) (relying on social science research to argue that judicial constitutional decisions tend to track popular opinion on constitutional issues); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (arguing that the Court's perception of constitutional values should be shaped by popular perceptions); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004) (framing judicial supremacy and popular constitutionalism as symbiotic constructs that, together, shape American constitutional law).

<sup>56</sup> See generally Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

with respect to displaying the Ten Commandments in public schools, one of his principal examples.<sup>57</sup> But there is no indication that he believed that such conclusions would diverge very much, if at all, from the first-order policy decisions that would have been reached by the same bodies. In other words, Attorney General Meese likely recognized the substantive doctrinal implications of his departmentalist stance and likely was comfortable with those implications as a matter of first-order substance.<sup>58</sup> Similarly, some of today's defenders of departmentalism, especially in the context of executive authority, likely believe that a less constrained executive would be desirable,<sup>59</sup> just as some of today's defenders of departmentalism and popular constitutionalism, especially in the context of individual equality rights, likely believe that the courts are producing the wrong substantive results.<sup>60</sup> These scholars can thus be understood less as arguing that nonjudicial bodies are best at determining which constraints to apply and how to apply them, and more as arguing that fewer constraints on executive or legislative decisions would in some contexts be good as a matter of first-order substance. Thus, Mark Tushnet, as part of his argument against judicial supremacy, acknowledges that, with respect to the First Amendment, nonjudicial bodies would likely produce a less

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57. *See id.* at 988.

58. I make no claim about intentions and motives, whether Meese's or others. That is, I do not claim that Attorney General Meese (or any other departmentalist or popular constitutionalist) has adopted a departmentalist stance in order to promote certain first-order substantive outcomes, as opposed to adopting departmentalism for outcome-independent institutional, historical, or interpretive reasons. For what it is worth, however, my own view is that there is nothing wrong with adopting a view about constitutional interpretation or constitutional interpretive authority in light of expectations about the first-order political or moral proclivities of the likely occupants of various roles in the intermediate or long term. *See generally* Frederick Schauer, *Neutrality and Judicial Review*, 22 *LAW & PHIL.* 217, 219 (2003). One can believe that there are good (and bad) first-order moral principles, and that the selection of legal and constitutional models can and should be based on their ability, instrumentally, to achieve good moral results in the intermediate or long term, and need not believe that views about legal or constitutional design have some sort of substantive primacy.

59. *See* Prakash & Yoo, *supra* note 54, at 1541-42; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 234-35 (2001) (interpreting the Constitution as granting the executive branch expansive powers over foreign affairs); John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld, 2005-2006 CATO SUP. CT. REV.* 83, 84 (criticizing the Court for refusing to defer to the executive and legislative branches in habeas corpus decisions during the Bush Administration).

60. *See* Post, *supra* note 55, at 8.

constraining version of the First Amendment, but that such an outcome would not necessarily be for the worse.<sup>61</sup>

The argument against some side constraints (or for significantly fewer constraints) is, however, different from the question about which body might be best at both locating and applying genuine side constraints on official action. We need to distinguish, in other words, the question of whether constraint in general or particular side constraints are a good thing from the question about who, assuming that constraint in general or particular side constraints are valuable, is best able to enforce those constraints. And it is precisely at this point in the analysis that the heading of this section, and the Thomas Schelling article on which it is based,<sup>62</sup> becomes most germane. Schelling was analyzing the quite common phenomenon in which we wish to impose side constraints on our own immediate actions and on our own short-term desires.<sup>63</sup> We wish to lose weight, for example, and believe that consuming less sugar, or less bacon, or fewer carbohydrates, or fewer calories, or whatever, will help us achieve that goal. So we make a rule for ourselves. Only 1800 calories a day, say, or no bread, or no dessert, or bacon only once a week, or something of that order.<sup>64</sup> But then we are tempted to break the rule, perhaps because we are, we tell ourselves, especially hungry at this moment, or that this is an especially important occasion, or that our mothers will be offended if we do not take a second helping of their famous chocolate cake.<sup>65</sup> And it is Schelling's point that, in the face of these kinds of short-term pressures and desires, rules will often give way, typically assisted by various rationalizations.<sup>66</sup> And thus he concludes that making rules for oneself is more likely to be effective if assisted by an external enforcement mechanism.<sup>67</sup>

I focus on Schelling largely because the title of his article is so apt. But the problem he addresses has been known for millennia, often under the label of *akrasia*, or weakness of the will.<sup>68</sup> Making

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61. See TUSHNET, *supra* note 55, at 52-53.

62. See Schelling, *supra* note 52.

63. See *id.* at 357-61.

64. See *id.* at 364.

65. See *id.* at 364-65.

66. See *id.* at 373 (describing the process of rule breakdown).

67. See *id.* at 372-73.

68. See Sarah Stroud, *Weakness of Will*, STAN. ENCYCLOPEDIA PHILOSOPHY, <http://plato>.

rules for ourselves is simply the more crystallized version of the broader problem of knowing at one level what is good for us—or good to do—in the long term, but being unable to do it in the face of immediate pressures or desires to the contrary.

When we shift from eating to governing, or from dieting to constitutional constraint, things become even more difficult. And one of the reasons for this is that the constrained official often disagrees with the substance of the constraint. In the standard dieting, or smoking, or exercise, or saving for old age examples, the constrained decision maker agrees that it would be good in the long term to diet, to stop smoking, to exercise, to save more, and so on. But she is, or fears she will be, unable to do in the short run what she knows is right in the long run. On the other hand, suppose that we disagree with the content of the constraint—our doctor tells us to give up red meat, but we believe that taking vitamins, and not abstaining from red meat, is the key to good health; or we are told by the government to turn down our thermostats in order to help the environment and combat climate change, but we believe that the key to these outcomes is to restrict commercial flying and not burden individual householders. In such cases the problem identified by Schelling and others is exacerbated.

Or perhaps it is just a different problem. Now it is not simply that it is difficult to enforce on ourselves what we know to be good rules. Rather, it is that it is hard—verging on impossible—to enforce on ourselves what we believe to be bad or at least less good rules. In such cases the importance of external coercion becomes especially important, and thus, in the constitutional context, the possibility that these external side constraints can be self-enforcing is especially remote.<sup>69</sup> Part of the argument against departmentalism or popular constitutionalism, therefore, is that such approaches do not contain external enforcement mechanisms. These approaches differ from ones that see courts as precisely the external enforcement mechanisms *on* legislatures and the executive, for the external enforcement drops out when we contemplate the possibility that

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stanford.edu/entries/weakness-will [https://perma.cc/3338-5A6V] (last revised Jan. 16, 2014).

69. See Frederick Schauer, Lecture, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1902 (2013).

legislatures and the executive could enforce side constraints on themselves.

### III. FROM ENFORCEMENT TO INTERPRETATION

But now let us step back. Yes, it is challenging for officials and policymakers to enforce on themselves those second-order rules that they believe are sound in theory but difficult to apply to themselves in practice. And yes, it is substantially more challenging for officials and policymakers to enforce on themselves those second-order rules they believe are misguided or perverse. But what about the task of interpretation—of determining what the rules are in the first instance?

Although a few parts of the constitutional text are tolerably clear by themselves, it remains the case that most instances of American constitutional interpretation initially<sup>70</sup> involve the interpretation of more or less vague constitutional text: “Commerce ... among the several States”;<sup>71</sup> “the freedom of speech”;<sup>72</sup> “unreasonable searches and seizures”;<sup>73</sup> “cruel and unusual punishments”;<sup>74</sup> “Privileges” and “Immunities”;<sup>75</sup> “due process of law”;<sup>76</sup> “equal protection of the laws”;<sup>77</sup> and so on. Moreover, and as discussed above, an important part of American constitutionalism has traditionally involved interpretations of such provisions that front-line policymakers, officials, and legislators will perceive as annoying. That is, a significant part of American constitutionalism has seen courts interpreting such vague clauses in ways that constrain even the good faith and genuinely sound policy judgments of a wide range of policymakers and officials.<sup>78</sup> Under such circumstances, then, is there any reason to believe that these policymakers and officials will interpret the Constitution in such a way as to constrain themselves, typically for

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70. That is, putting aside questions about the interpretation of precedents.

71. U.S. CONST. art. I, § 8.

72. *Id.* amend. I.

73. *Id.* amend. IV.

74. *Id.* amend. VIII.

75. *Id.* art. IV, § 2; *id.* amend. XIV, § 1.

76. *Id.* amends. V, XIV, § 1.

77. *Id.* amend. XIV, § 1.

78. *See supra* Part I.

reasons of distrust of their own abilities and inclinations?<sup>79</sup> Will the police officer, not constrained by a century of Fourth and Fifth Amendment case law, decide that she needs to *create* rules to guard against her own overaggressiveness in the enforcement of the law?<sup>80</sup> And if this possibility seems fanciful, it is only a small step to recognizing the almost-equivalent fancifulness of expecting self-enforcement from legislators and high executive officials. Will members of Congress interpret the bicameralism and presentment provisions in such a way as to make it difficult for them to pursue what they perceive to be wise policies? Will officials interpret the First Amendment in a way that takes account of the phenomenon of the slippery slope,<sup>81</sup> and thus tells them that they should not do what they think is right now for fear that it will lead them to do something that is not right in the future? Will legislators and executives (and trial judges) interpret the Equal Protection Clause in a way that guards against their own implicit as well as explicit racism?

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79. In *Democracy and Distrust*, John Hart Ely famously built much of a comprehensive constitutional theory around distrust of officials, at least when the power and positions of those officials were at issue. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 106, 112, 120 (1980). Given that, according to Ely, significant parts of First and Fourteenth Amendment doctrines, among others, implicated this issue, see *id.* at 94-98, we can ask whether Ely (or anyone else) believed or believes that executive and legislative officials can systematically be trusted to interpret such constitutional provisions in a way that would reflect this distrust of self-protecting governments and government officials.

80. A very large question, one that is relevant here but that raises issues far larger than can be addressed in this (or any other) single Article, is whether, as a matter of institutional design, we should prefer separate institutions to represent different goals, or whether more unified or domain-focused institutions should take account of conflicting goals within their own domains. To make this issue more concrete, consider the tension between, at times, commercial growth and environmental protection. One way to deal with the issue would be to have the agency in charge of, say, forests deal with the commercial as well as the environmental aspects of forestry. Another way would be to have a department of commerce and a department of environmental protection and have the two agencies with potentially conflicting goals negotiate those conflicting goals in the context of forests, and much else. The point seems especially germane in the context of the police. Do we expect police departments themselves to be able to pursue the goals of law enforcement, crime control, and protection of Fourth and Fifth Amendment rights? Or do we expect police departments to treat law enforcement and crime control as their primary goals, subject to Fourth and Fifth Amendment constraints interpreted and enforced by courts and departments of internal affairs, including devices of enforcement such as discipline and the exclusionary rule?

81. See *supra* note 26 and accompanying text.

The problem is exacerbated if we add the public—the constituents—to the equation. On the assumption that many officials, and especially elected ones, are highly, even if not exclusively, responsive to the voting public,<sup>82</sup> then the question shifts: Can or do members of the public set aside their first-order policy, moral, or other preferences in the service of second-order constitutional values? And if this is the question, then there is little reason for optimism about the ability of the public to do just that. There are, of course, the familiar anecdotes. Members of Congress, who presumably are generally adept at understanding and responding to public opinion, appear to have had little hesitation in voting to criminalize flag desecration, even in the face of evidence that such an action was almost certain to be declared unconstitutional.<sup>83</sup> Similarly, when Congress amended the Communications Act to ban nonobscene but sexually explicit “dial-a-porn” services,<sup>84</sup> it could not have avoided knowing that the statute was plainly unconstitutional, as became clear with the unanimous Supreme Court decision in *Sable Communications of California, Inc. v. FCC*, with Justice White, not known for fervent enthusiasm for First Amendment claims, writing for the Court.<sup>85</sup> And consider also the events leading up to *Dickerson v. United States*, which not surprisingly demonstrated that public concern for the constitutional rights of criminal defendants was not much different from public concern for the rights of flag burners or purveyors of telephonic sex services.<sup>86</sup>

Although these are cherry-picked examples, what little serious academic research has been done on the topic produces a similar result. When experimental subjects were given a choice between their first-order policy or political preferences and constitutional

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82. There is a vast literature on congressional motivation, but among the classics stressing voter responsiveness and a desire for reelection are RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 31 (1978); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 14-16 (1974).

83. See generally *United States v. Eichman*, 496 U.S. 310, 313-15 (1990) (doomed in light of *Texas v. Johnson*, 491 U.S. 397, 420 (1989)).

84. See Pub. L. 98-214, § 8(b), 97 Stat. 1467, 1469-70 (adding subsection 223(b) to 47 U.S.C. § 223 (Supp. V 1982)), *invalidated by Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

85. 492 U.S. at 116.

86. See 530 U.S. 428, 432 (2000) (holding unconstitutional a congressional effort to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)).

rules seemingly negating those preferences, the subjects strongly tended to choose their preferred policy outcomes and ignore the constitutional constraints, and this turned out to be the case even for law students and law clerks.<sup>87</sup> And these results are consistent with other studies showing that outcome preferences in particular situations dominated rule-based preferences, even for law students and lawyers.<sup>88</sup>

In the face of such evidence, the empirical underpinnings of departmentalism,<sup>89</sup> and even more of the once-fashionable popular constitutionalism,<sup>90</sup> turn out to be remarkably fragile. Insofar as departmentalism (and, *a fortiori*, popular constitutionalism) is not simply an indirect way of advocating less constraining constitutional doctrines,<sup>91</sup> it appears to rest on the belief that legislators, executives, and public officials of all varieties have the ability to interpret the Constitution to make its constraints on those very officials robust, and then to enforce those constraints on themselves.<sup>92</sup> Alas,

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87. See Joshua R. Furgeson et al., *Behind the Mask of Method: Political Orientation and Constitutional Interpretive Preferences*, 32 LAW & HUM. BEHAV. 502, 509 (2008); see also Joshua R. Furgeson et al., *Do a Law's Policy Implications Affect Beliefs About Its Unconstitutionality? An Experimental Test*, 32 LAW & HUM. BEHAV. 219, 225 (2008).

88. See N.J. Schweitzer et al., *Rule Violations and the Rule of Law: A Factorial Survey of Public Attitudes*, 56 DEPAUL L. REV. 615, 633 (2007); N.J. Schweitzer et al., *The Effect of Legal Training on Judgments of Rule of Law Violations* (Mar. 5, 2008) (unpublished paper presented to the American Psychological Association, Jacksonville, Florida) (on file with author).

89. See *supra* note 54.

90. See *supra* note 55. I say "once-fashionable" to suggest (or predict) that popular constitutionalism may become less acceptable to legal academics if and as Supreme Court decisions become more substantively congenial to that group. But the point is also that some of the enthusiasm for popular constitutionalism may have waned with the realization that public nonexpert rhetoric explicitly connecting political arguments with the language of the Constitution was important for the Tea Party Movement, for the public objections to the Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), and for some of the public antipathy to the Affordable Care Act. See, e.g., Jared A. Goldstein, Essay, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. 1807, 1818-19 (2011); Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 850, 866 (2011); Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 99-100 (2013); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108-14 (2009); Ilya Somin, Essay, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300, 304 (2011).

91. See *supra* text accompanying notes 59-62.

92. See, e.g., Johnsen, *supra* note 54, at 112.

there appears to be little evidence to support that belief, and considerable evidence to the contrary.<sup>93</sup>

#### IV. INTERPRETATION AND MOTIVATED REASONING

The problem of executive and legislative constitutional interpretation is magnified once we take account of what psychologists describe as “motivated reasoning”<sup>94</sup> and the related but not identical phenomenon of “confirmation bias.”<sup>95</sup> The idea, increasingly part of the legal as well as the psychological literature,<sup>96</sup> is that, even with respect to factual rather than normative matters, a person’s normative or outcome preferences will significantly influence what they perceive, how they perceive it, and how they evaluate it.<sup>97</sup> Just as opposing tennis players, for example, will have different views about whether on the same shot the same ball was on or outside the line—views that track their interests and preferences—so too do we now know that much the same phenomenon pervades our decision-making lives.<sup>98</sup>

The lessons of the research on motivated reasoning for questions of interpretation should be clear. We can expect generally, albeit of course not universally, that legal and constitutional interpreters, at least of texts (or cases or lines of cases, for that matter) that are

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93. See, e.g., *supra* notes 82-88 and accompanying text.

94. See Ziva Kunda, *The Case for Motivated Reasoning*, 108 *PSYCHOL. BULL.* 480, 495 (1990); see also David M. Bersoff, *Why Good People Sometimes Do Bad Things: Motivated Reasoning and Unethical Behavior*, 25 *PERSONALITY & SOC. PSYCHOL. BULL.* 28, 37 (1999); Mason Richey, *Motivated Reasoning in Political Information Processing: The Death Knell of Deliberative Democracy?*, 42 *PHIL. SOC. SCI.* 511, 516-17 (2012).

95. See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. GEN. PSYCHOL.* 175, 191-92 (1998); Keith E. Stanovich, Richard F. West & Maggie E. Toplak, *Myside Bias, Rational Thinking, and Intelligence*, 22 *CURRENT DIRECTIONS PSYCHOL. SCI.* 259, 259 (2013).

96. See, e.g., EILEEN BRAMAN, *LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING* 29-31 (2009); Joshua Fergusson & Linda Babcock, *Legal Interpretation and Intuitions of Public Policy*, in *IDEOLOGY, PSYCHOLOGY, AND LAW* 684, 688-89 (Jon Hanson ed., 2012); Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 *JUDGMENT & DECISION MAKING* 407, 408-09 (2013); Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *HARV. L. REV.* 1, 7-8 (2011).

97. See sources cited *supra* note 95.

98. Cf. *supra* notes 87-88 and accompanying text.

open to interpretation,<sup>99</sup> will interpret the text in a way that is consistent with their first-order substantive preferences.<sup>100</sup> And thus when we are talking about interpreters interpreting a constitutional text that limits their own powers, we can expect that this process of what we might call “self-interpretation” will produce interpretations that systematically remove those constraints that are inconsistent with the interpreters’ preferences about their own powers. Or, more simply, we can expect that interpreters interpreting the constitutional provisions that constrain and annoy them will incline towards interpretations that remove the annoyances.

In important respects, none of this is new. For centuries, a core principle of the English doctrine of natural justice—close to the American idea of procedural due process—has been the principle of *nemo debet esse iudex in propria causa*—no man should be judge of his own cause.<sup>101</sup> And if we apply this maxim to the question of departmentalism, the lesson is that there may well be good reasons not to let officials determine the scope and strength of the very principles that are designed to constrain those officials’ own actions. Implicit in departmentalism, arguably even more than in popular constitutionalism,<sup>102</sup> is that officials can be trusted to make decisions about the “cause” of their own powers and the limitations that have been or are to be put on those powers.<sup>103</sup> The ancient *nemo debet* maxim, however, as well as modern psychological research and insights from political economy, appear to suggest otherwise.<sup>104</sup>

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99. See *supra* notes 70-77 and accompanying text.

100. See *supra* notes 78-86 and accompanying text.

101. See, e.g., *Dr. Bonham’s Case* (1610), 77 Eng. Rep. 638, 652; 8 Co. Rep. 113b; D.E.C. Yale, *Iudex in Propria Causa: An Historical Excursus*, 33 CAMBRIDGE L.J. 80, 80 (1974). For the interesting suggestion, relevant to this Article, that the principle has not been applied to American administrative agencies and that such agencies routinely determine their own jurisdiction and the constraints on it, see Adrian Vermeule, Essay, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 399 (2012).

102. Under a genuine popular constitutionalism, which may or may not exist in reality, the people might have much more of a desire to constrain their elected officials and other government employees than those officials and employees have a desire to constrain themselves. See, e.g., Post & Siegel, *supra* note 55, at 1027-32.

103. See, e.g., Johnsen, *supra* note 54, at 106.

104. See Zamir & Medina, *supra* note 15, at 366; *supra* notes 87-88, 96-97 and accompanying text.

## CONCLUSION: BACKING INTO JUDICIAL SUPREMACY

Larry Alexander and I have argued that courts may be better suited than legislators or executives to preside over the settlement function of the law—that is, the law’s ability to provide authoritative (even if not final) resolution of conflicting moral claims.<sup>105</sup> In many respects this might be understood as a positive argument for judicial interpretive supremacy. It is, after all, an argument that stresses something at which courts might be comparatively good.

By contrast, the argument in this Article is largely negative. The argument here is not very much about why courts in general and the Supreme Court in particular would be good at interpreting the Constitution, and especially the constitutional side constraints imposed on the states, on the executive, and on Congress. Rather, the argument stresses that there is reason to believe that the states might not be very trustworthy to adjudicate the limits on their own powers,<sup>106</sup> that legislators might not be particularly able to fairly interpret and determine the constraints on congressional authority, and that Presidents and those who work for them might have an interest in understanding their powers broadly and the limitations on those powers narrowly.<sup>107</sup> All of this suggests the negative argument for judicial interpretive supremacy. Just as Winston Churchill memorably opined that democracy is the worst system of government, with the exception of all of the others,<sup>108</sup> so too is it more than plausible to believe that courts are at best flawed interpreters of the Constitution and flawed candidates to interpret the Constitution for

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105. *See supra* note 8.

106. As long ago noted by Justice Story in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816).

107. I do not deny, of course, that the same pathologies might affect the courts when they are determining the scope of their own powers. But in addition to the fact that most of the side constraints in the Constitution are constraints on the states, on Congress, and on the executive, and not so much on the judiciary, there is some reason to believe that courts on occasion can make rulings that limit rather than expand their own jurisdiction and power. *See* Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 809-10 (2005).

108. “[D]emocracy is the worst form of Government except all those other forms that have been tried from time to time.” Winston Spencer Churchill, Speech to the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897-1963, at 7563, 7566 (Robert Rhodes James ed., 1974).

everyone, but that they are likely less flawed than any of the other candidates for the job. Judicial interpretive supremacy may indeed be the worst form of constitutional fidelity and enforcement, but it may still be superior to all of the others.