A Critique of Judicial Supremacy

David Chang
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I. INTRODUCTION

Judicial supremacy posits that (i) the Supreme Court has ultimate authority to interpret the Constitution's meaning; (ii) the Court's constitutional decisions should be taken as binding on, and by, all other governmental actors—including Congress and the President; and (iii) only by amending constitutional text can the electorate supersede the Court's declarations of constitutional law. Judicial supremacy has motivated political and scholarly concern about the "countermajoritarian" nature of judicial review. It has inflated the stakes in selecting...
Supreme Court Justices. And it is nowhere to be found in the Constitution's text.

This article evaluates judicial supremacy from the perspective of ordinary voters—individual members of the contemporary electorate otherwise empowered to enact legislation through its presidential and congressional representatives. I take this perspective because the individual voter is the ultimate and authoritative decisionmaker for two foundational events of constitutional policymaking. First, when the President, the Congress, and state legislatures join to create constitutional texts—the formal subjects of judicial review—they are accountable to voters throughout the national electorate. Second, when the President and the Senate select Supreme Court Justices—the individuals who exercise the powers of judicial review—they are accountable to voters throughout the national electorate. Thus, the individual voter's perspective should be a critical focus for anyone concerned about the proper relationship between judicial review and majoritarianism.

I begin with an issue of basic political self-interest. Judicial supremacy does not deny the right of American voters to supersede Supreme Court decisions by amending the Constitution's text. But why should the electorate have to change constitutional text, and satisfy the tortuous processes of article V, to override a

6. While not formally involved in article V amendment processes, the President is a major participant in the politics of constitutional amendment. See infra notes 306-09 and accompanying text (discussing President Bush's political initiative for "constitutional amendment to protect the flag"). Bruce Ackerman has proposed new procedures for formal constitutional amendment in which the President would play a crucial role. See Ackerman, Transformative Appointments, 101 Harv. L. Rev. 1164, 1182 (1988).

7. Cf. M. Perry, The Constitution, the Courts, and Human Rights 4 (1982) [hereinafter Perry I] (judicial review is in tension with axiom of "electorally accountable policymaking"). But see M. Perry, Morality, Politics, and Law 164 (1988) [hereinafter Perry II] (suggesting earlier view of axiomatic electorally accountable policymaking was mistaken). I do not take an external perspective that evaluates majoritarianism and accountability as a moral principle. Instead, I take an internal perspective that evaluates accountability as a practical good for political competitors in a largely given majoritarian structure. For further examination of this starting point, see infra notes 44-58 and accompanying text.

8. Those traditionally concerned with the countermajoritarian difficulties of judicial review focus on the majoritarian roots of the policies that courts deem "unconstitutional." See, e.g., A. Bickel, The Least Dangerous Branch 16-23 (1962). In this article, I begin with the foundations of constitutionalism that are themselves majoritarian. Cf. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1045-49 (1984).
constitutional decision of the Court with which they disagree? Why not, for example, a system in which Congress and the President together may "correct" the Supreme Court's interpretations of constitutional meaning by statute—a regime of congressional supremacy?  

From the voters' perspective, the relative merits of judicial supremacy and congressional supremacy for interpreting constitutional texts depend on evaluating differences in results and political processes under each regime. Judicial supremacy, congressional supremacy, or some alternative regime, makes sense only as a mechanism for maximizing the likelihood that whatever function voters might want judicial review to serve will, in fact, be served. Because judicial supremacy applies only to the Court's interpretation of constitutional texts, goals for judicial review—and, therefore, reasons for judicial supremacy—should depend on justifications for constitutional supremacy.


10. This is the essential question even when courts invalidate state policies. When the Supreme Court decides that states may not prohibit abortion or adopt affirmative action plans, for example, it establishes national standards that restrict congressional discretion as well as state discretion. Given prevailing practices and premises about judicial review, Congress may not repeal or dilute limits on state discretion as defined by the Supreme Court in the name of the Constitution. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 318 (1851) ("If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner reconvey to the states that power."); see also Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) ("[C]ongress' power under § 5 is limited to adopting measures to enforce the guarantees of the [Fourteenth Amendment]; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 199 (1980) ("When the Supreme Court invalidates state (or private) action under the initial sections of the thirteenth, fourteenth, or fifteenth amendments, ... these decisions may not be overturned by ordinary federal legislation."); Chang, Conflict, Coherence, and Constitutional Intent, 72 Iowa L. Rev. 753, 778 n.81 (1987). Thus, given my starting point—a focus on the national electorate's authority to create constitutional provisions, enact federal legislation, and select Supreme Court Justices—as well as uncontested notions of federal supremacy, I accept that state legislatures should not have interpretive supremacy over federal courts. Indeed, as Dean Brest has noted, given federal supremacy, "[w]hatever the scope of Congress' constitutional decisionmaking authority, ... it is implausible that a state legislature could properly contradict a federal decision." Brest, Congress as a Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine, 21 Ga. L. Rev. 57, 68 n.28 (1986). Furthermore, I do not question the need for a single body with supreme authority to interpret constitutional provisions and, therefore, whether the President may properly refuse to execute a law because he believes it unconstitutional. Cf. Lee, The Provinces of Constitutional Interpretation, 61 Tul. L. Rev. 1009, 1015 (1987) (presidential refusal to execute law based on perception of unconstitutionality is inconsistent with separated powers and represents prescription for anarchy).

11. One might, however, posit that justifications for constitutional
The principles of constitutional supremacy posit that (i) constitutional text may not be enacted, repealed, or amended by Congress;\(^1\) and (ii) constitutional provisions supersede conflicting national legislation. The second element of constitutional supremacy requires some process for determining whether national legislation does conflict with the requirements of constitutional text. Either judicial supremacy or congressional supremacy could provide such a process. Thus, the second element of constitutional supremacy restates the question: Why judicial supremacy?

The first element of constitutional supremacy imposes limits on the discretion of the national electorate's representatives beyond those imposed by judicial supremacy: The national electorate may not change or create constitutional text by ordinary article I legislative processes, but may do so only by extraordinary article V amendment processes.\(^2\) Thus, again from the voters' perspective, a more fundamental question: Rather than a regime of constitutional supremacy, why not statutory supremacy—a regime in which "constitutional" text has the same status as statutory text enacted by Congress? Why not a regime in which Congress and the President together may enact whatever legal texts they want, including, for example, amendments to the text of the first amendment, or even amendments to the legislative processes and structures prescribed in article I?\(^3\) In short, toward determining supremacy should depend on justifications for judicial supremacy. See infra note 366. Yet, such an argument would run against American history, as principles of constitutional supremacy were employed (through the distinctions between article I and article V) before notions of judicial review, let alone judicial supremacy, were developed and accepted.

\(^1\) See U.S. CONST. art. V; infra notes 14, 15 & 43.

\(^2\) See U.S. CONST. art. VI; infra note 44. These two principles of constitutional supremacy distinguish constitutional provisions from congressional legislation, because Congress does have discretion to enact, repeal and amend statutes.

\(^3\) The national electorate both creates constitutional provisions that limit congressional and local discretion, U.S. CONST. art. V., and selects the Supreme Court Justices who will "interpret" and enforce those provisions that limit legislative discretion, U.S. CONST. art. I. I am not now interested in distinctions between article V policymaking and article I policymaking beyond the greater difficulty of acting under the former than the latter. For a discussion of other significant differences between article I and article V policymaking, see infra note 202; note 248 and accompanying text.

\(^4\) Under congressional supremacy, Congress would have authority, for example, to enact a statute "correcting" the Supreme Court's "interpretation" of the due process clause in Roe v. Wade, 410 U.S. 113 (1973). But because of constitutional supremacy, Congress would not be able to repeal the due process clause itself. Furthermore, congressional supremacy as I consider it would not have Congress reversing the results of a particular case, but changing legal prin-
the merits of judicial supremacy in interpreting constitutional texts, voters might ask: Other than to overturn Supreme Court decisions, why make public policy with "constitutional" texts, immune from legislative revision, rather than with ordinary legislative texts?

Although the national electorate might choose to circumscribe ordinary legislation by creating new constitutional provisions, the political system today uses the principles of constitutional supremacy primarily by applying them to aging constitutional texts created by people generations ago. Toward understanding how this "intertemporal difficulty" affects the relative merits of constitutional supremacy and statutory supremacy from the perspective of voters today, one must begin with otherwise analogous circumstances in which the passage of time is irrelevant.

Thus, Part II of this article will bypass the complexities of intergenerational decisionmaking by considering the merits of constitutional supremacy from the perspective of those who actually create constitutional texts. Why might political competitors wish to make national policy by creating constitutional provisions rather than by enacting ordinary congressional legislation? By answering this question, I can consider how people who have created new constitutional provisions would define ideal goals for judicial review— their preferred brand of constitutional "interpretation." By identifying ideal definitions of "interpretation," I can then consider whether judicial supremacy or congressional supremacy is a better mechanism for inducing government officials to fulfill each ideal.

In Part III, the article will return to contemporary political practice. I reintroduce intertemporal issues by asking whether and why it makes sense for members of the national electorate

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16. See Ackerman, supra note 8, at 1046.
17. I introduce the idea of constitutional representation—that Justices, in "interpreting" constitutional provisions, should endeavor to make the same decisions the electorate would make if it were engaged in extraordinary constitutional politics toward creating constitutional texts. See infra text accompanying notes 63-66, 90-94 & 106-08.
today to apply the principles of constitutional supremacy to aging texts, rather than either (i) to create new supreme texts or (ii) to establish a regime of statutory supremacy. By answering this question, I can consider ideal definitions of constitutional "interpretation" for the national electorate today.\textsuperscript{18} I can then consider whether an "interpretive" regime of judicial supremacy or congressional supremacy can better achieve these ideal definitions of "interpretation" and, therefore, better serve the electorate's reasons for applying principles of constitutional supremacy to the Constitution's aging texts.\textsuperscript{19}

This article reaches a conclusion to which many might react with discomfort: While voters have good reason to exploit the principles of constitutional supremacy to define a category of supreme legal text that cannot be modified by ordinary political processes, an ethic of judicial supremacy in interpreting those supreme texts is surprisingly problematic.\textsuperscript{20} I suggest that from

\textsuperscript{18} I suggest the same "interpretive" ideal for the electorate today as for those who actually create their own constitutional provisions—constitutional representation: identifying the choices voters would make if engaged in extraordinary constitutional politics. See supra note 17 and accompanying text; infra text accompanying notes 144-48, 175-82, 193-94 & 207-18. This approach provides a method for understanding and resolving the "intertemporal difficulty" involved in applying aging constitutional provisions to contemporary social conflict. See, e.g., Ackerman, supra note 8, at 1045-49; Chang, supra note 10, at 784-94; Kahn, Reason and Will in the Origins of American Constitutionalism, 98 YALE L.J. 449, 451, 517 (1989) (originalism is phase in constitutional development that ultimately denies real (present) popular sovereignty). Thus, the "interpretive" goals generated by this analysis might supplant (or, more likely, exacerbate) the "interpretivism" versus "noninterpretivism" dilemma. See generally, e.g., Perry I, supra note 7, at 11. For a comparison of constitutional representation with other theories of interpretation, see infra notes 149-74 and accompanying text.


\textsuperscript{20} Cf. P. Dimond, The Supreme Court and Judicial Choice: The Role of Provisional Review in a Democracy 11-20 (1989) (advocating judicial finality for issues of political process and representation reinforcement; congressional override for other issues); Conkle, Nonoriginalist Constitutional Rights and the Problem of Judicial Finality, 13 HASTINGS CONST. L.Q. 9, 9-23 (1985) (advocating judicial finality for "originalist" decisions and power of Congress to override "nonoriginalist" decisions for "human rights" issues); Dimond, Provisional Review: An Exploratory Essay on an Alternative Form of Judicial Review, 12 HASTINGS CONST. L.Q. 201, 201-02, 229-38 (1985) (same as P. Dimond, supra); Sandalow, Judicial Protection of Minorities, 75 MICH. L. REV. 1162, 1188 (1977) (advocating judicial deference to congressional choices that reflect a deliberate and broadly based political judgment). I question judicial supremacy for all issues of constitutional interpretation and, indeed, suggest that it is equally problematic, if not
the perspective of the national electorate, judicial review supplemented by congressional supremacy—an ethic that Congress has authority to supersede the Court's constitutional interpretations by statute—might well better secure the benefits that constitutional supremacy can provide.

more so, with respect to originalist decisions. For further evaluation of the relationship between originalism and judicial supremacy, see infra text accompanying notes 149-53 & 234-35.

21. At the same time, however, I argue that an ethic of congressional supremacy should not necessarily induce congressional eagerness to exercise that authority. Indeed, that so many probably will be so uncomfortable with the idea of congressional supremacy suggests that the power, even if recognized, would be cautiously employed. Nevertheless, I suggest that the electorate might well benefit from a reallocation of institutional responsibility for making constitutional law. See infra text accompanying notes 219-20; notes 240 & 244; cf. R. Nagel, Constitutional Cultures 3 (1989) (courts should do less, thereby invigorating political resolution of constitutional issues). Professor Nagel's argument suffers the flaws of all arguments for judicial deference—the benefits of judicial decisionmaking are silenced. See infra text accompanying notes 266-68, 277-92 (losses from judicial deference); notes 250 & 348 (same); note 362 (losses from Michael Perry's option of withdrawing federal jurisdiction). Congressional supremacy, in contrast, retains judicial review as a good, while serving Professor Nagel's goal of public responsibility for constitutional law through interaction between the Court and Congress.

22. I will consider judicial "life-tenure" in passing, but the subject will not be of central concern. A recent symposium has addressed this issue at length. See Bell, Principles and Methods of Judicial Selection in France, 61 S. Cal. L. Rev. 1757 (1988) (process of judicial selection should be tailored to needs of varying judicial functions); Gavison, supra note 19; Grodin, Developing a Consensus of Constraint: A Judge's Perspective of Judicial Retention Elections, 61 S. Cal. L. Rev. 1969 (1988) (discussing the dangers of eliminating judicial elections); Schauer, Judging in a Corner of the Law, 61 S. Cal. L. Rev. 1717 (1988) (society may want some political decisions made by people with life-tenure position and other political decisions made by representatives elected every few years); Shapiro, supra note 19; Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, 61 S. Cal. L. Rev. 1735 (1988) (concluding that merit selection of appellate judges should be based on judicial intelligence, integrity, and wisdom); Thompson, Judicial Retention Elections and Judicial Method: A Retrospective on the California Election of 1986, 61 S. Cal. L. Rev. 2007 (1988) (advocating retention of California's judicial election process if campaigning can be controlled); Tushnet, Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers, 61 S. Cal. L. Rev. 1669 (1988) (problems associated with elected legislative branch serving extended terms not present in judicial branch since judges must offer rational justification for decisions); see also Ross, The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment, 35 Vill. L. Rev. 1063 (1990) (comprehensive history of efforts to abrogate life-tenure and analysis of Judicial Councils Reform and Judicial Conduct and Disability Act of 1980). I ultimately suggest, however, that life-tenure is not as problematic as judicial supremacy and, indeed, in conjunction with congressional supremacy, can promote the benefits that voters might want constitutional supremacy to provide. See infra note 359; see also Seidman, Ambivalence and Accountability, 61 S. Cal. L. Rev. 1571, 1575 (1988) (legislative power to correct judicial decisions does not necessarily imply propriety of electing judges).
II. JUDICIAL REVIEW FOR PEOPLE WHO CREATE CONSTITUTIONAL TEXTS

A. Why Constitutional Supremacy?

1. To Perpetuate an Extraordinary Political Advantage

During Reconstruction, while the defeated Southern states remained unrepresented in Congress, the Northern electorate's "Congress" passed the Civil Rights Act of 1866 toward ensuring that its own notions of racial justice governed the entire nation. With Southern participation, the legislation probably could not have been passed. In enacting the bill without the participation of the Southern states, a majority among the Northern electorate determined that their values of racial justice were more important than was their white Southern neighbors' right to shape public policy.

But the North's Republican majority faced a problem. With the prospect of Southern readmission to Congress, many Northerners feared that they would lose their status as an unchallenged congressional majority governing issues of racial morality. Racial justice would again become a matter for open conflict and accommodation with the South, as it had been before the Civil War. The Civil Rights Act of 1866 might be eroded. Addi-

23. The 11 rebel states regained representation in Congress only after ratification of the fourteenth amendment in 1868. See W. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 93-94 (1988). Even then, representation was shaped by the North's military reconstruction of the Southern electorate. It was not until the mid-1870s that the Southern electorate reverted to its antebellum nature. See infra text accompanying notes 79-87.

24. The Act protected blacks from discrimination in making contracts, owning and transferring property, and enjoying the protection of a state's criminal laws. President Andrew Johnson vetoed the bill, in part on the ground that such policies could not be made by a "Congress" in which 11 states were not represented. See J. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 70 (1902).

25. See id. at 63 (discussing Northern Republican perception that Southern state governments reconstructed by President Johnson "were consciously developing freedmen's codes which would not differ greatly from their old slave codes").

26. Charles Fairman has suggested that President Andrew Johnson's plan for reconstruction would have left the Southern states "subject to no additional restraints beyond the abolition of slavery," and, indeed, able to join with Northern Democrats to press Southern concerns in Congress. "For a people defeated in their rebellion, what more could be asked?" 7 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION 3 (Supp. 1988); see also J. BURGESS, supra note 24, at 31-41 (describing Johnson's reconstruction plan).

27. Some apparent supporters of racial equality were less fearful that Congress might repeal civil rights legislation, even after the antebellum Southern
tional legislation toward enforcing its provisions against inevitable Southern recalcitrance might be blocked.

The fourteenth amendment is widely viewed as an effort by the North’s Republican majority to frame as constitutional mandates the policies underlying the Civil Rights Act of 1866. Strengthened by the principles of constitutional supremacy, these policies theoretically would be immune from erosion by Congress. Thus, even after the wrong-headed Southern electorate regained representation in Congress, Northern policies of racial justice would persist and supersede any conflicting legislation that the Congress endeavored to enact.

electorate regained its political strength. Oregon Senator George H. Williams, for example, later nominated by President Grant to succeed Chief Justice Chase, offered a substitute for the fifteenth amendment that simply would have given Congress discretion to create voting rights by statute. See H.R. 402, 40th Cong., 3d Sess. (1869). In favor of such a measure, in his view, was greater flexibility in meeting unforeseen intrusions on the right to vote. See CONG. GLOBE, 40th Cong., 3d Sess. 900 (1869).

28. As one historian has noted,

It is certainly not strange that the Republicans should have feared that the Democrats of the North . . . would soon be found fraternizing with the Senators and Representatives from the reconstructed “States,” and that it was their duty to secure “perpetual ascendancy of the party of the Union,” before admitting the Senators and Representatives from these “States” to participate in public power.

J. BURGESS, supra note 24, at 54 (emphasis added); see also C. BLACK, THE PEOPLE AND THE COURT 131-32 (1960) (“The debates on the Fourteenth Amendment . . . express the thought that the Amendment was being adopted, in part, because of a desire to put its guarantees out of the reach of future Congresses.”); J. BURGESS, supra, at 74 (“[T]here was but one thing to do, and that was to enact, and secure the adoption of, another amendment to the Constitution covering these points, while the power to do so still existed.”); P. DIMOND, supra note 20, at 41 (Republicans wished to insulate policies of 1866 Act from erosion by future Congresses); W. NELSON, supra note 23, at 3 (differing views about fourteenth amendment converge on Northern electorate’s desire to secure certain policies against future erosion); id. at 47 (fourteenth amendment a means to undermine “political power of disloyal groups that had brought the war about”); id. at 55 (framers wished rights protected by Constitution rather than Congress to ensure judicial enforcement “even if Congress fell under Democratic control”); id. at 61 (“The Fourteenth Amendment must be understood as the Republican party’s plan for securing the fruits both of the war and of the three decades of antislavery agitation preceding it.”); id. at 95 (quoting Arkansas newspaper charging Republicans with attempt to perpetuate power “of the temporary majority of a section of the Union”).

29. Another means toward perpetuating the Republicans’ notions of racial justice was the loyalty oath. One early such measure, prescribed by President Lincoln, required oaths to faithfully support, protect, and defend the Constitution of the United States . . . and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void, by Congress or by decision of the Supreme Court . . . .

J. BURGESS, supra note 24, at 10. The two provisos concerning repeal by Con-
Under article V of the Constitution, however, amendment required ratification by three-fourths of the states. As Southern values were the very reason that the Northern Republicans needed a constitutional amendment, so Southern participation in the amendment process could have blocked its ratification. The North's Republican majority was able to secure ratification, however, by placing the Southern governments under military rule and making ratification the price for readmission to Congress.

This analysis of the fourteenth amendment suggests that one portion of the electorate might seek to exploit the principles of constitutional supremacy by creating constitutional provisions to perpetuate an extraordinary political advantage over another portion of the electorate. Implicit in this motive for creating supreme constitutional provisions are three necessary components. First, those seeking to create such a constitutional provision must care more about achieving certain policy results than about their weakened opponents' "right" to shape public policy. Second, that portion

progress and invalidation by the Supreme Court revealed the Northern electorate's problems: How to ensure that a Congress in which the South was readmitted did not repeal or otherwise undermine protection for the newly freed slaves, and how to ensure that the Supreme Court did not invalidate such measures as unconstitutional.

30. See supra note 9 and accompanying text.

31. Other than Tennessee, all the Southern state governments reconstructed under President Johnson's plan rejected the fourteenth amendment shortly after the elections of 1866. See J. Burgess, supra note 24, at 106.

32. After 10 of the 11 rebel states had rejected the amendment by early 1867, Congress replaced President Johnson's reconstructed governments with its own regime of military rule. See J. Burgess, supra note 24, at 112. Congress then passed measures that made ratification of the fourteenth amendment by each Southern state, and by three-fourths of the United States, a condition for readmission to Congress. Id. at 121-22; see also M. Mantell, Johnson, Grant, and the Politics of Reconstruction 101 (1973).

33. Professor Nelson reports one Republican's claim of willingness "to sacrifice almost anything to keep the democratic party out of power" and unwillingness "to see it in power again while I live." W. Nelson, supra note 23, at 46. If members of the Northern electorate were willing to deny their Southern opponents a right to shape public policy, how did they feel about each other? Some, like Thaddeus Stevens, were far more committed to racial equality than others, like Representative James Wilson of Iowa, who did not believe that the amendment should proscribe racial segregation. See, e.g., R. Berger, Government by Judiciary 118-19 (1977). But both Stevens and Wilson lacked the political clout to deny each other's right to shape public policy. Thus, with respect to the precise content of the Civil War amendments, Stevens and Wilson were opponents; with respect to the question of whether some version of Northern values regarding racial justice should be framed in the Constitution to exploit an extraordinary political advantage over the South, Stevens and Wilson were valued allies without conflict. It is possible, but not necessarily true, that Stevens would have chosen to deny even his Northern allies the right to shape public policy, toward more precisely achieving his own notions of racial justice, if he had enjoyed the
of the electorate must be sufficiently powerful to enact its preferences as a constitutional mandate by preventing its opponents' participation. A desire to perpetuate an extraordinary political advantage is mere fantasy without a political advantage to exploit. Third, the political advantage must be temporary. If a group will enjoy tomorrow the same political advantage in ordinary legislative politics that it enjoys today in both legislative and constitutional politics, it need not resort to constitutional supremacy to serve its interests. It need not endure the trouble and risks of constitutional politics, because its political power in the legislature serves just fine.

2. To Secure the Benefits of Political Self-Constraint

Toward generating a second reason for creating supreme constitutional texts, put aside the foregoing motive by assuming that a majority of voters either (i) believe that all voters have an equal right to shape public policy; or (ii) acknowledge each other's undeniable power to shape public policy—whether by enacting statutes or creating constitutional texts. Now consider two additional assumptions.

First, political competitors believe that during times of extraordinarily thoughtful decisionmaking, they would be better able to identify moral ideals or practical concerns that are criti-

power to do so. Yet any increment toward his own racial ideals that he could have achieved by denning Wilson's right to shape public policy might not have been worth compromising a concern—if he had one—that people should have an equal right to shape policy. Cf. R. Dahl, Modern Political Analysis 18-19 (1963) (discussing relationships between conflict and consensus in government). Stevens never faced this problem, however, because he never enjoyed such power—he had to compromise. See infra note 44 and accompanying text.

34. See Chang, supra note 10, at 775-82 (analyzing risks of creating constitutional provisions and of judicial review for those provisions when electoral majority's concerns can be achieved with ordinary legislation).

35. Theories of interest group politics view constitutional provisions "as designed to protect groups sufficiently powerful to obtain constitutional protection for their interests." Landes & Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875, 893 (1975). In arguing that courts should interpret statutes according to their original meaning, Landes and Posner view as mere "detail" whether the interest group is a majority of the voting population. Id. For my purposes, however, this variable is fundamental. It seems unlikely that a minority, however interested and active, could prevail against majoritarian sentiments in the high stakes, high visibility politics of constitutional ratification, see infra note 48—except under extraordinary circumstances such as those following the Civil War. See supra notes 23-32 and accompanying text. Furthermore, whether the "interest group" is a minority or majority is critical for determining whether, and why, it is sensible to make policy by creating a constitutional provision or statute. See infra text accompanying notes 183-91.
cally important in general and over time.\textsuperscript{36} Such values might involve allowing someone to speak his mind, even though his message is offensive;\textsuperscript{37} or treating convicted felons as human beings, even though their crimes are disgusting;\textsuperscript{38} or requiring the federal government to balance the budget, even though each voter would like more spent on his own preferences.\textsuperscript{39}

Second, most members of the electorate are unwilling and unable to commit themselves to such political thoughtfulness on an everyday basis. In Bruce Ackerman's terms, they are \textit{private citizens}: \textit{private} to the extent that they wish to be apart from society, to go to work, to raise a family, to watch "The Honeymooners," and \textit{citizens} to the extent that they wish to be a part of society, to influence the lives of others, or to convince others not to influence their own.\textsuperscript{40} Thus, values identified during times of extraordinarily thoughtful decisionmaking might seem less pressing on an everyday basis and are, therefore, vulnerable.\textsuperscript{41}

Given these assumptions, voters might choose to create supreme constitutional texts to constrain their own careless ex-

\textsuperscript{36} See R. Dahl, supra note 33, at 66 (discussing Hobbesian view of dichotomous human nature encompassing both passion and reason); The Federalist No. 55, at 346 (J. Madison) (C. Rossiter ed. 1961) (human nature comprised of both depravity and virtue).

\textsuperscript{37} Cf. Texas v. Johnson, 491 U.S. 397 (1989) (state may not punish flag burning because of disagreement with ideas expressed). The flag burning issue has been the subject of a proposed response by both constitutional amendment and congressional legislation. See infra text accompanying notes 306-21.

\textsuperscript{38} Cf. Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty may be imposed if administered in nonarbitrary way); Furman v. Georgia, 408 U.S. 238 (1972) (arbitrary administration of death penalty cruel and unusual).


\textsuperscript{40} See Ackerman, supra note 8, at 1033-34; see also R. Dahl, supra note 33, at 57 (people have different degrees of dedication to politics).

\textsuperscript{41} One can draw analogies from everyday life. For example, a person might have conflicting desires to eat rich foods and to lose weight. He might decide to favor the goal of losing weight, but generally can do so only after extraordinary reflection and ritual—whether in the form of a New Year's resolution, purchasing a diet book, or joining (and paying for) a weight loss program. Without such efforts, the more pressing desire to eat overwhelms the vulnerable (yet preferred) desire to lose weight. See Chang, supra note 10, at 771-74. Certain reasons for attending church provide another example a bit closer to the text's analysis of reasons for creating constitutional provisions. Even a person who embraces her religion's precepts about how to live, how to think, and how to treat others, might fail to live up to them because of competing preferences and impulses. Toward reinforcing her higher concerns, she goes to church and listens to a sermon that reminds her of ideal behavioral norms and goads her to conform. It is through this extraordinary effort that one's higher ideals are identified. Because competing concerns are expressed and felt more impulsively and reflexively, the higher ideals are vulnerable to the pressures of everyday living. Id.
cesses, errors, or omissions in everyday legislative politics. If so, the electorate would want to make "constitutional" policy immune from legislative erosion to enforce a greater commitment to certain values, identified during episodes of extraordinarily thoughtful politics, than they can trust themselves, and their legislative representatives, to respect in the relative carelessness of everyday political competition.42 I have elsewhere characterized this motive for creating supreme constitutional provisions as the desire for political self-constraint.43

3. To Ensure Optimal Legislative Accountability

The most fundamental issue for evaluating the relative merits of constitutional supremacy and statutory supremacy is whether

42. Speaking of the revolutionary period, Gordon Wood suggested that "fear of themselves actually underlay all of the Americans’ foolish contrivances—their perpetual constitutions, their special conventions, and their use of instructions—and was involving them in all sorts of tangled contradictions." G. Wood, The Creation of the American Republic 1776-1786, at 378 (1969). Indeed, constitutionalism as extraordinarily thoughtful politics is an element of the general rise of republicanism in constitutional scholarship. See, e.g., Ackerman, supra note 8; Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043 (1988); Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman I]; Michelman, Law’s Republic, 97 YALE L.J. 1493 (1988); [hereinafter Michelman II]; Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1599 (1988). This type of constitutionalism comports with another word in vogue—prudence, or practical wisdom. See, e.g., Perry II, supra note 7, at 181; Solum, supra note 22, at 1752 ("Practical wisdom is the virtue that enables one to make good choices in particular circumstances."). Both republicanism and prudence can be viewed from an elitist perspective, as does Michelman, or a populist perspective, as do Ackerman and Amar. As my focus is on ordinary voters—the electorate ultimately responsible for creating constitutional provisions, enacting legislation, and selecting Supreme Court Justices—I am now resting with the populist camp. See infra text accompanying notes 169-73, 547-50 (relating liberal republicanism and judicial review toward political self-constraint).

43. See Chang, supra note 10, at 767-74. A notion of political self-constraint is implicit in Alexander Hamilton’s justification for the supremacy of constitutional choices over legislative choices:

Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions.

The Federalist No. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961) (footnote omitted and emphasis added); see also The Federalist No. 71, at 432 (A. Hamilton) (C. Rossiter ed. 1961) ("When . . . the interests of the people are at variance with their inclinations, . . . the persons whom they have appointed to be the guardians of those interests [should] withstand the temporary delusion in order to give them more time and opportunity for more cool and sedate reflection.").
an established legislative process should be free to restructure itself.\textsuperscript{44} Thus, in fully analyzing why a majority of the national electorate might choose to make policy in supreme constitutional texts rather than in ordinary legislation, one must consider factors that voters might weigh in structuring their mechanisms for making public policy.\textsuperscript{45}

Although voters might decide to compete in a direct democracy, most would reject such an intensely participatory process for at least two reasons. First, such political combat would occupy a

\textsuperscript{44} Statutory supremacy eliminates a distinction between "constitutional" text, immune from revision by ordinary legislative processes, and ordinary legislative texts. It supposes that the established legislative process may enact, amend, or repeal any legal text, including one that changes the legislative process itself. See supra text accompanying notes 14-15.

\textsuperscript{45} Just as voters disagree about good policy, they will disagree about the best structures for legislative and constitutional politics. Thus, political competitors must somehow establish a rule by which they determine the rules under which they create their Congress and any supreme constitutional provisions purporting to limit congressional discretion. Both historically and theoretically, identifying an ultimate rule of recognition is a matter of improvisation in response to prevailing social and political forces. See Ackerman, supra note 8, at 1057-65 (historical approach); Greenawalt, The Rule of Recognition and the Constitution, 85 Mich. L. Rev. 621 (1987) (theoretical approach); see also H.L.A. Hart, The Concept of Law 98-99 (1961) (rules of recognition often not stated but shown in the way in which other rules are identified); H.L.A. Hart, Essays in Jurisprudence and Philosophy 338-43 (1983) (Kelsen's doctrine presupposed norm underlying legal system's perceived validity); H. Kelsen, Pure Theory of Law 193-204 (M. Knight trans. 1967) (legal norms are valid because they are created in manner determined by presupposed "basic norm").

I make the following assumptions about the prior, improvised, informal rule of recognition. First, a prior and informal rule of recognition will reflect both the respective power that political competitors possess to vindicate their concerns and their views about the rights of others to shape public policy. Second, people believing that each has an equal right to shape public policy will view each other as comprising an authoritative electorate. A primary, informal rule of recognition within such a group will likely reflect a one-person, one-vote mechanism coupled with a principle of majority rule. Under such a rule, the majority might choose anything from a majoritarian legislative mechanism to a monarchy. Third, even people who deny each other's equal moral right to shape public policy, yet who possess approximately equal power, and whose differences are not so great as to undermine the cohesiveness of community, will view each other as an authoritative electorate. A primary, informal rule of recognition within such a group also will likely reflect a one-person, one-vote mechanism coupled with a principle of majority rule. Fourth, and critically important, the choice for statutory supremacy or constitutional supremacy will be made under the same primary, informal rule of recognition. In other words, even if not all people are equally influential in shaping public policy, the same power relationships govern when creating the legislative mechanism and when creating the legislature's relationship, if any, to principles of constitutional supremacy. Indeed, this was the case with the founding of 1787, as article I (congressional discretion) and article V (procedures for amendment) and article VI (requirement that statutes be made "in pursuance of" the Constitution) all were created by the prior, improvised rule of recognition reflected in article VII (ratification procedures).
great amount of their time. Some people might view a publicly-oriented life as ideal, but most—the private citizens—seem more concerned with insular and personal pursuits.46

Representative government can provide an efficient substitute for direct democracy. By relying on accountable representatives to make public policy, voters need not devote so much attention to achieving their public objectives. To ensure accountability, however, voters must be concerned about competitive political power: not only each other’s influence over the government,47 but also the extraordinary power given to their representatives.48 Thus, the electorate might endeavor to define voting rights, specify limited terms of office and procedures for elections,49 and create rights to information about governmental per-

46. See Ackerman, supra note 8, at 1033-34 (discussing private citizenship); see also R. DAHL, supra note 33, at 60 (“An individual is unlikely to get involved in politics if he places a low valuation on the rewards to be gained from political involvement relative to the rewards to be expected from other kinds of human activity.”).

47. One can return to the political dynamics underlying formation of the original, pre-formal rule of recognition. See supra note 45. If a voter believes that each individual has an equal right to shape public policy, he will want no more influence over representatives than his opponents have. If, however, a voter is less concerned about his opponents’ right to shape public policy than about achieving his own notions of justice, he might hope to have extra control over representatives—perhaps by denying opponents a right to vote. This desire is meaningful only to the extent that one has the power to succeed. If all voters press equally for as much influence as possible over the creation of public policy, they will create a legislative machine that acts as if each believed in democracy as a matter of morality. These bases for both a moral commitment to majoritarianism and a resigned acceptance of majoritarianism in the legislative structure parallel later analysis of one’s ideal “interpretive” behavior for judges in giving meaning to legal provisions. See infra note 143 (distinguishing between individual’s community-oriented “interpretive” goal and selfishly-oriented “interpretive” goal).

48. See The Federalist No. 51, at 323 (J. Madison) (C. Rossiter ed. 1961) (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”); cf. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 242-43 (1986) (constitutions designed to inhibit active minorities from transforming preferences into law at expense of passive majorities). During constitutional creation, more people who otherwise would be politically passive might vigilantly address themselves to public policy, thus preventing more politically obsessed people from disproportionately shaping law. Id. at 246-47 (high stakes of constitutional creation provide incentives for free riders to become active participants); cf. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1690 (1984) (original constitutional concern to prevent capture of government by factions). Ronald Dworkin refers to competitive relationships among members of the electorate as “horizontal” issues of power and to the relationship between the electorate and officials as “vertical” issues of power. See Dworkin, What is Equality? Part 4: Political Equality, 22 U.S.F. L. REV. 1, 9 (1987).

49. See, e.g., G. Wood, supra note 42, at 273 (expressing profound distrust
formance and rights of access to governmental decisionmakers.

Although no legislative structure can ensure equal accountability to each voter, many could approximate this goal. For example, both a unicameral legislature subject to annual elections, and a bicameral legislature subject to elections every decade, can reflect a one vote per person principle. Thus, the sort of legislative structure that political competitors choose must be a function of concerns other than their competitive relationship to each other. In other words, in determining their preferred legislative structure, voters must decide not simply that the legislature should be equally accountable to each citizen’s values and preferences, but also what kind of accountability each wants the legislature to have.

Recognizing different types of accountability suggests a second reason for rejecting direct democracy. Even if voters otherwise had the energy and inclination to participate so intimately in shaping public policy, they might choose a representative legislature if they distrust their own anticipated behavior in everyday politics. Voters might be concerned that they will not make

in the legislature, James Iredell suggested in 1776 that “there can be no check on the Representatives of the people in a democracy, but the people themselves . . . by having their elections very frequent, at least, once in a year”) (emphasis added).

50. See, e.g., A. Meiklejohn, Free Speech and Its Relation to Self-Government 93-95 (1988); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20 (1971) (“Constitutional protection should be accorded only to speech that is explicitly political.”).

51. See, e.g., Dworkin, supra note 48, at 8-17 (discussing unattainable factors necessary for all citizens to have equal influence in making public policy). Public choice theory rests on the inevitability that different people will have unequal influence on governmental policy. See, e.g., Farber & Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 875 (1987) (discussing disproportionate impact of special interests upon legislative process); Kalt & Župan, Capture and Ideology in the Economic Theory of Politics, 74 Am. Econ. Rev. 279 (1984); Landes & Posner, supra note 35, at 876 (economic analyses used to reconcile “a conception of the political-governmental process that emphasizes the importance of interest groups in the formulation of public policy” with notion of independent judiciary); see also infra note 243 (further discussion of public choice theory).

52. Cf. Gavison, supra note 19, at 1620 (“Two senses of accountability may be distinguished: accountability to, identifying those to whom the judge is answerable, and accountability for, identifying the norms governing the judge’s conduct.”).

53. James Madison made this point. He recognized that “the people are the only legitimate fountain of power.” The Federalist No. 49, at 313 (J. Madison) (C. Rossiter ed. 1961). Yet he also suggested that in a government too closely connected with the people, “[t]he passions, . . . not the reason, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.” Id. at 317 (emphasis in original).
well-considered judgments about public policy on an everyday basis—that they will give excessive attention to short-term personal interests and inadequate attention to long-term and general interests. Voters might be concerned that their reflexive judgments about public policy made as private citizens will not reflect the careful judgment by which important questions should be resolved. Thus, a majority among the national electorate would wish to provide its congress with a structure that itself serves political self-constraint.

54. Cf. Amar, supra note 42, at 1085 (republican representation can improve quality of public deliberation); Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 34 (1985) (“The structural mechanisms would insulate representatives, to a greater or lesser degree, from constituent pressures, in the hope that they will deliberate more effectively on the public good.”). Sunstein suggests that this view rejects pluralist premises—for example, that there is no meaningful concept of public good. Corporate decisions for political self-constraint are not necessarily any less consistent with an agnostic view about the public good than is any other public decision. Pluralists do not deny that any given individual can have a personal view of the public good. Thus, rather than some externally conceived and defined notion of public good, choices for political self-constraint might reflect compromise among each individual’s view that the public good will be better served by making policy in a supreme constitutional provision rather than a statute. Cf. supra notes 42-43 (self-constraint as imperfect linking of republicanism and pluralism).

55. Madison expressed a concern for political self-constraint in suggesting that people might respond to the problem of majority faction through choices they make in structuring their representative government. In The Federalist No. 10, Madison defined “faction” as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” The Federalist No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961). Madison suggested that far better than direct democracy, a principle of republican representation can provide a safeguard against majority faction while preserving majority rule. He noted that the effect of representative government would be to “enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” Id. at 82. Thus, Madison would have the voter, each otherwise empowered in a direct democracy, choose a system of representative government to improve the chances of achieving public policy that each, in the long run, will view as good. This is political self-constraint through the legislative structure. See also The Federalist No. 57, at 350-51 (J. Madison) (C. Rossiter ed. 1961) (“The aim of every political institution is, or ought to be, first to obtain for rulers men who posses most wisdom to discern, and most virtue to pursue, the common good of the society . . . . The elective mode of obtaining rulers is the characteristic policy of republican government.”); The Federalist No. 71, at 432 (A. Hamilton) (C. Rossiter ed. 1961) (when “interests of the people are at variance with their inclinations,” the executive should “withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection”); Ackerman, supra note 8, at 1025 (structure of government can hinder ill-considered and temporary efforts to “endanger the principles of the American Revolution”). Madison then noted that even these potentially wise legislators might stray from their mission of carefully making public policy con-
The foregoing suggests that voters might choose to structure their legislature toward achieving a goal of optimal legislative accountability. The concern for accountability suggests a fear that the representatives a voter has fought to elect might not do what he wants them to do. The representatives might fail the voter by giving more weight to his opponents' concerns than to his own, or by not caring about the voter's concerns at all. The concern for optimal accountability suggests a concern for political self-constraint: legislators should not respond too closely to the electorate's latest whims.

Both concerns support a decision to define legislative structures and processes in supreme constitutional texts. Doing so promotes accountability by undermining the legislature's discretion to change its structure in a way that removes itself from popular control. Similarly, to the extent that protecting a right to criticize governmental performance can prevent representatives from entrenching themselves in power, voters would do well to frame this right in supreme constitutional texts, immune from legislative revision.

To the extent that the legislative structure is designed to secure the benefits of political self-constraint—to ensure optimal accountability—voters also would do well to define the legislative mechanism in supreme constitutional texts. Doing so could deter changes in the legislative structure that do respond to present (but ill-considered) electoral preferences. Voters might fear, for example, that they someday could impulsively decide to transform their bicameral legislature into a unicameral one, or to shorten their representatives' terms from six years to one, or to limit the number of terms their representatives can serve. Thus, the electorate's values and interests. He suggested, therefore, that voters must have mechanisms for keeping their representatives accountable to electoral concerns. The Federalist No. 10, at 82 (J. Madison) (C. Rossiter ed. 1961). Thus, the desire for political self-constraint through the legislative structure does not eliminate a voter's desire to keep the legislature accountable. It merely establishes the kind of accountability she views as ideal. See also G. Wood, supra note 42, at 209 (nearly all states adopted bicameral legislature; upper houses "were to be the repositories of classical republican honor and wisdom, whose superior talent and devotion to the common good would be recognized and rewarded by the people"); id. at 409-10 (sense that problems of 1780s existed because legislatures were too representative); id. at 556 (senate justified as body of "weight and wisdom" to "check the inconsiderate and hasty proceedings of the first branch"); Dougan & Munger, The Rationality of Ideology, 32 J.L. & Econ. 119, 124 (1989) (length of term in office inversely proportional to legislator's ability to stray from constituent preferences).
torate might choose to prevent their future legislatures from vindicating these anticipated whims by strengthening present, (presumably) more reflective, and (presumably) better public judgments with the principles of constitutional supremacy, by framing their deliberate choices in supreme constitutional texts.56

Indeed, the notion of optimal legislative accountability provides further insight about constitutional supremacy (versus statutory supremacy) as a route to political self-constraint. A voter who supports framing the legislative structure as a constitutional mandate because he doubts not only his representatives’ integrity, but also his own judgment, supposes that the legislative structure might provide an inadequate measure of political self-constraint toward its own preservation. Similarly, a choice to protect other policies in supreme constitutional texts—whether about religion, or racial discrimination, or criminal justice—supposes a desire to achieve more political self-constraint than the legislative structure itself can provide.57 Choices for political self-constraint, therefore, can be made along a continuum between the competing concerns of self-distrust and self-determination.58

4. To Overturn Supreme Court Decisions

Voters also might seek to create supreme constitutional texts to overturn Supreme Court “interpretations” with which they disagree.59 This motive for creating constitutional provisions, however, presumes judicial supremacy—that the electorate can overturn the Court’s views about constitutional mandates only by constitutional amendment, and not by legislative action. This

56. Cass Sunstein’s characterization of the federalists’ view of representation suggests that the motive of political self-constraint can shape the form of legislative accountability that the electorate chooses. “For the federalists, politics was to be deliberative in a special sense. . . . The result was a hybrid conception of representation, in which legislators were neither to respond blindly to constituent pressures nor to undertake their deliberations in a vacuum.” Sunstein, supra note 54, at 46-47.
57. Cf. Tushnet, supra note 22, at 1680 (“If Congress could not act unjustly because it was paralyzed, there would be no need for judicial review.”). Yet there would be need for some affirmative policymaker.
58. This continuum of political self-constraint is represented by the relationship between The Federalist No. 10 (discussed supra note 55) and The Federalist No. 78 (discussed supra note 43).
59. See, e.g., U.S. Const. amend. XXVI (overturning Oregon v. Mitchell, 400 U.S. 112 (1970), where Court invalidated congressional statute granting right to vote to citizens eighteen years and older); see also Texas v. Johnson, 491 U.S. 397 (1989) (state may not punish flag burning because of disagreement with ideas expressed). A movement for a constitutional amendment developed in response to this decision. See infra text accompanying notes 308-11.
motive for making policy by creating supreme constitutional texts rather than ordinary statutes should be put aside as question-begging, because the task at hand is to derive justifications for judicial supremacy from reasons for constitutional supremacy.

B. *Why Judicial Supremacy?*

Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them.  

This section will derive ideal conceptions of constitutional "interpretation" from the perspective of political competitors who have just created constitutional texts and who must choose judges to enforce them. It will show that each of the three motives for creating constitutional provisions—(i) perpetuating an extraordinary political advantage; (ii) securing the benefits of political self-constraint; and (iii) ensuring optimal legislative accountability—implies a distinctive definition of ideal "interpretation." Finally, it will consider whether judicial supremacy or congressional supremacy might better ensure that judges achieve each "interpretive" ideal.

1. **Selecting Justices to "Interpret" Constitutional Texts Intended to Perpetuate an Extraordinary Political Advantage**

   a. The "Interpretive" Ideal: Constitutional Representation

   In creating the fourteenth amendment, the Northern electorate sought to perpetuate an extraordinary political advantage over the South. By framing their values as supreme constitutional texts without meaningful Southern participation, representatives of Northern voters hoped to prevent white

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60. This remark was made by Bishop Hoadly in 1717 in a sermon for the King. *See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 152 (1899).* Charles Evans Hughes made a similar point when he said, "We are under the Constitution, but the Constitution is what the judges say it is." *L. Fisher, CONSTITUTIONAL DIALOGUES 5 (1988).* So did Franklin Roosevelt, when he said, "[An] amendment like the rest of the Constitution is what the Justices say it is rather than what its framers or you might hope it is." *G. Gunther, CONSTITUTIONAL LAW 130 (11th ed. 1985)* (quoting radio address by President Roosevelt, Mar. 9, 1937).

61. *Cf. Gavison, supra* note 19, at 1619 ("Our criteria for [judicial] choice and accountability will reflect our answers to some normative questions (e.g., what are 'good' judicial decisions) . . .").

62. *See supra* notes 23-35 and accompanying text.
voters from affecting national policies of racial justice once the Southern electorate regained formal representation in Congress.

This motive suggests, at least from the perspective of the Northern majority, an ideal definition of "interpretation": In giving meaning to the amendment, the Supreme Court should have acted as if it were the Congress in which the Northern electorate reigned supreme. This "interpretive" ideal takes the underlying motive for creating supreme constitutional text to its logical conclusion, for it asks judges to make the same decisions that the once extraordinarily powerful electorate would make if it still had the power to deny its opponents the right to shape public policy. So viewed, the "interpretive" task is no less creative—and no less subservient to a self-proclaimed authoritative electorate—than is the legislative. Indeed, so viewed, the judicial task of

63. Public response to President Grant's nomination of Caleb Cushing to replace Chief Justice Chase in 1874 is illuminating. Cushing was known to have had sympathies for the Confederacy. According to the New York Times, he had supported the Dred Scott decision and had advocated slavery. It concluded: "When we get a Chief Justice of secessionist proclivities... the entire proceedings of Congress since the war may be called in question.... We can only regard the present game of blindness' bluff... with surprise and mortification." 7 C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, Part Two 63-64 (1987) (citing New York Times, Jan. 10, 1874). Fairman reports similar editorials from other Republican newspapers: for example, from the Boston Transcript, "does the Government feel quite sure... that Mr. Cushing is entirely sound on the question of civil rights, which will be carried to the Supreme Court?"; from the New York Evening Post, "for the past ten years he has not been at all in sympathy with the pronounced policy of the republic"; from the Cleveland Herald, "not a safe man." Id. at 65. In a letter to his brother-in-law, Justice Miller suggested a political compromise with the Court that should have pleased those with the sentiments that these newspapers expressed: Cushing's "appointment was considered an insult to the Bench by every man on it except [Nathan] Clifford, who is himself... a life-long bitter Democrat." Id. at 72. Clifford had been appointed by President Buchanan in 1858.

64. Abraham Lincoln expressed such a view: "we wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders... [W]e must take a man whose opinions are known." See Friedman, Tribal Myths: Ideology and the Confirmation of Supreme Court Nominees (Review Essay), 95 Yale L.J. 1283, 1297 (1986). Though never explicitly articulated, this creative notion of constitutional representation fairly describes Senator Charles Sumner's approach to issues arising under the Civil War amendments. In debate over the Civil Rights Act of 1875 with the more legalistic Senator Carpenter of Wisconsin, Sumner suggested that the Declaration of Independence was "' loftier, more majestic, and more sublime' than the Constitution," and "of greater dignity and force than the Constitution." C. Fairman, supra note 63, at 162, 168. Sumner's measure to prohibit racial discrimination in churches was "simply setting up the Declaration of Independence in its primal truths, and applying them to churches as to other institutions." Id. at 168; see Cong. Globe, 42nd Cong., 2d Sess. 821-28 (1871); Cong. Globe, 41st Cong., 2d Sess. 2422-30, 2746-53 (1870). Congressional efforts to curtail the Supreme Court's jurisdiction to determine the constitutionality of Reconstruction measures also sug-
“interpretation” is much the same task that each voter would like his legislators to perform in creating statutes: to represent his preferences.

This ideal of judicial behavior may be referred to as constitutional representation. Here, constitutional representation would have differed from congressional representation to the extent that the Court endeavored to represent only the Northern electorate’s preferences, after Congress once again represented the national electorate, including white Southern voters.

65. Professor Nelson’s characterization of the framers’ views underlying the fourteenth amendment is consistent with the idea of a fluid, constitutional representation. The framers, he suggests, “continued to make . . . use of the old antebellum ideas, in part, perhaps, because the old imprecision . . . enabled them to retain the support of political coalitions whose individual members shared an agreement only about vague ideas, not about specific programs.” W. Nelson, supra note 23, at 38-39; see also id. at 47 (Republican desire not so much to perpetuate personal rule as to perpetuate progressive policies); id. at 55 (framers wished rights protected by Constitution rather than Congress to ensure judicial enforcement “even if Congress fell under Democratic control”). Thus, this ideal of constitutional representation can explain the vague language of section one. The vague language gave a judge with the Northern electorate’s orientation sufficient latitude to declare Northern preferences as constitutional law. Cf. id. at 61-62 (explaining amendment’s vague language as reflecting an exhortive rather than regulatory purpose).

66. Thus, from the perspective of those who voted for the fourteenth amendment, a Justice ideally would have acted as if he were representing their preferences—not as of 1868, but at the moment of judicial decision. In Bruce Ackerman’s terms, this “interpretive” ideal would have the Supreme Court act as if it were a continuous “rump ‘Congress.’” See Ackerman, supra note 8, at 1066; Chang, supra note 10, at 832 n.266 (viewing fourteenth amendment as serving desire to disable Southern electorate rather than promote political self-constraint establishes ideal judicial behavior as acting like “continuing rump Congress.”). As those who created the fourteenth amendment died and were replaced by their progeny, however, justifying some definition for ideal judicial behavior must have become problematic indeed. See infra text at notes 172-89 (“interpretive” options for aging constitutional provisions originally intended to perpetuate a temporary political advantage); cf. Chang, supra note 10, at 843 n.306 (who are “the people” of 1872?); id. at 846 n.318 (“the people” of 1896?); id. at 850 n.325 (“the people” of 1954?); id. at 863 n.370 (“the people” of 1987?); id. at 865 n.376 (same).
b. Judicial Supremacy as a Mechanism for Ensuring Accountability to the Ideal of Constitutional Representation

i. The Case for Judicial Supremacy: Toward Limiting the Authority of Reinvigorated Opponents

Even if the Supreme Court had acted as if it were representing those who comprised the Northern electorate in 1868, the Radical Republicans truly could have perpetuated their extraordinary political advantage over the South only to the extent that the Court’s interpretation of supreme constitutional meaning could not have been violated by Congress. Under congressional supremacy, judicial “interpretations” of the Civil War amendments would have been subject to congressional correction, and Southern voters would have gained a measure of control over national racial policy.67 Thus, a majority of Northern voters would have had some reason to prefer judicial supremacy. Indeed, without judicial supremacy in this context, Northern voters could have expected to gain little beyond what they had achieved by enacting the Civil Rights Act of 1866.68

ii. The Case Against Judicial Supremacy: Reinvigorated Opponents, Fallible Judges, and Undeniable Power

Judicial supremacy could have served a Northern voter’s goal of perpetuating his extraordinary political advantage only to the extent that Justices in fact identified the choices that the Northern electorate would have made if it still governed without Southern participation. Yet like any other unaccountable governmental servant, a Justice wielding the powers of judicial supremacy might commit two transgressions.69 First, a Justice might make a good faith error even while endeavoring to serve the Northern electorate throughout.

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67. Indeed, the Radical Republicans tried to forestall the reinvigoration of white Southern power as long as possible by placing conditions on the franchise. Despite these best efforts, however, the antebellum Southern power structure could not have been forever forestalled. The Southern electorate degenerated through the 1870s from its reconstructed state to one far more resembling that of 1860. See J. Burgess, supra note 24, at 198-99.

68. See supra text accompanying notes 23-32. While Professor Nelson suggests that the framers thought that Congress, not the courts, would be the main enforcer of the fourteenth amendment, he acknowledges that § 1 of the amendment was aimed at judicial enforcement in anticipation of congressional failure. See W. Nelson, supra note 23, at 122, 145.

69. See supra text accompanying notes 47-50; note 49.
rate's preferences. Second, a Justice might reject the role of serving altogether. A Justice might have rejected the "interpretive" goal of identifying the Northern electorate's preferences and instead have chosen to exploit the extraordinary ability to shape public policy that the judge's public office offers.

It could not have been an easy task to make the decisions that a majority of Northern voters would have made if they still enjoyed an extraordinary political advantage over the South. Such speculative decisionmaking essentially would have asked Justices to act like common law courts with respect to the Northern electorate. But unlike the ordinary relationship between community and common law court, the Northern electorate lacked a formal mechanism to express itself toward legislatively correcting undesirable "common law" judgments.

Furthermore, even in the short term, when the Northern electorate's extraordinary political advantage enabled it to stack the Court with hand-picked Justices, Northern voters hardly could have ensured that their Justices would choose the "intervening common law". 

70. Cf. supra note 55 (discussing Madison's concern for optimal governmental accountability).

71. At best, Justices who wanted to act like common law courts with respect to the Northern electorate, to the exclusion of the Southern electorate, might have referred to congressional debate and votes, to determine how the representatives from the Northern states voted. This would have provided at least some evidence of the Northern electorate's preferences.

72. Because judges are, in general, less effective gauges of majoritarian sentiment than legislatures, the common law is subordinate to statutes. Cf. G. Calabresi, A COMMON LAW FOR THE AGE OF STATUTES (1982) (arguing that contemporary statutory law should supersede contemporary common law, but that courts should supersede aging, "out of phase" statutes with contemporary common law). Yet even legislators can make mistakes while trying to serve the electorate's preferences. See, e.g., Dougan & Munger, supra note 55, at 128-32.

73. Indeed, because the white Southern electorate was, actually or in effect, absent from Congress between 1861 and 1875, the Northern electorate had the opportunity to install their preferred Justices, without having to bow to obnoxious Southern notions of racial justice. To a Supreme Court that then consisted of 10 members, President Lincoln made five appointments: Noah H. Swayne, Samuel F. Miller, and David Davis in 1862, Stephen J. Field in 1863, and Salmon P. Chase in 1864. President Johnson made no appointments to the Court, largely because Congress passed legislation reducing the number of Justices in order to prevent him from making any appointments. See 4 THE SUPREME COURT IN AMERICAN LIFE: THE RECONSTRUCTION COURT 1864-1888, at xi, 12 (R. Fridlington ed. 1987) [hereinafter THE RECONSTRUCTION COURT]. This action itself can be viewed as reflecting Congress's ideal of constitutional representation. Toward the end of Reconstruction, President Grant made four appointments to the Court: William Strong and Joseph P. Bradley in 1870, Ward Hunt in 1872, and Morrison Waite in 1874 (replacing Chase as Chief Justice). Thus, during the South's exclusion from Congress, the Northern electorate had the opportunity to install eight of the 10 sitting Supreme Court Justices without meaningful participation by the ante-bellum Southern electorate.
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Protected by life-tenure and the powers of judicial supremacy, a Supreme Court Justice has extraordinary access to public power—more than even Thaddeus Stevens had. Thus, for a Justice to have chosen the "interpretive" goal of constitutional representation on behalf of the Northern electorate, two conditions must have been satisfied. First, the Justice must have accepted that Southern weakness was properly exploited in order to vindicate some vision of racial justice shaped in the image of the Northern electorate-at-large. At the same time, the Justice must have believed that the Northern electorate's weakness with respect to the Justice's own extraordinary power was not properly exploited.

Some people might think this way. Yet to acknowledge that democracy can be subordinated to other personal values and preferences when one has the power to do so—as did the Radical Republicans by creating the fourteenth amendment—is to beg the question: Why ever respect a choice of some electorate that claims to be authoritative, when that choice differs from the concerns of

74. See, e.g., United States v. Reese, 92 U.S. 214 (1875). In Reese the Court invalidated crucial portions of the Enforcement Act of 1870, which would have punished people for obstructing any citizen from voting, or acting to qualify to vote, on the ground that Congress purported to reach all wrongful obstructions of voting rights—rather than simply obstructions "on account of race," to which Congress's discretion under the fifteenth amendment apparently was limited. Id. at 217-21. In his opinion for the Court, Chief Justice Waite rather clearly rejected any notion of helping the bygone Republican electorate vindicate its preferences. Waite said, "we must take these sections of the statute as they are . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." Id. at 221 (emphasis added). Thus, Waite's reasoning not only led him to fail to reach "wrongful denials" other than those motivated by race; by invalidating the relevant provisions, the Court—the supposed mechanism by which the Republicans might have perpetuated their extraordinary political advantage—thwarted the Republican desire to prohibit racial discrimination in voting. Indeed, in dissent, Justice Hunt suggested that the invalidated provisions were intended to address only racial denials, and that any ambiguity was the result of bad drafting. Id. at 241-45 (Hunt, J., dissenting); see also C. FAIRMAN, supra note 63, at 278 (agreeing with Justice Hunt).

75. Cf. Solum, supra note 22, at 1751-52 ("One of the virtues of judging is suppressing one's political or moral preferences and deciding on the basis of the law.... [A]ppellate judges should have a special fidelity to the law."). This begs the question of what "the law" is. Especially for constitutional provisions created by one portion of the electorate to perpetuate an extraordinary political advantage over another portion, any notion of judicial fidelity requires a judge's choice to serve a minority of the electorate who could not have enacted their "law" in question without the benefits of military victory. Indeed, to recognize any "law" requires a judge to apply her own rule of recognition reflecting her own notion of an authoritative master. Cf. Dworkin, The Forum of Principle, 96 N.Y.U. L. Rev. 469, 474-75 (1981) (any theory of interpretation implies an underlying rule of recognition).
an individual who has the power to vindicate his own concerns? The Northern electorate played a dangerous game by acknowledging that it is sometimes justifiable to subordinate democracy to particular policy ends, while giving judges the power, if not the "right," to subordinate Northern values to the judges' own policy ends.76

Beyond this, whether hand-picked by Northern voters or not, the Reconstruction Justices could not have lived forever. Once the South regained its place in Congress, it was inevitable that the Court would be reformed with Justices chosen by a national electorate in which the South, with all of its obnoxious views, would have been as much a participant as it was to be in enacting national legislation.77 Thus, however well judicial supremacy might (or might not) have served the Northern electorate's interests

76. See, e.g., Freund, Appointment of Justices: Some Historical Perspectives, 101 HARV. L. REV. 1146, 1156 (1988) (hazards in judicial selection as means to make public policy include unforeseen issues, changes in nominee's views); Friedman, supra note 64, at 1291-302 (judicial performance over time difficult to predict). But see L. TRIBE, GOD SAVE THIS HONORABLE COURT 76 (1985) (judicial performance generally predictable). Professor Friedman cites the legal tender issue as an example of unpredictability. Two of five Lincoln appointees voted to invalidate the Legal Tender Act, even though Lincoln had selected Justices with the legal tender issue specifically in mind. See Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869).

77. After Chief Justice Chase died in 1873, for example, many advised President Grant to elevate an Associate Justice, and fill that vacancy with a Southerner. See C. FAIRMAN, supra note 63, at 10-23. Although there were indications of a Democratic resurgence, as the New York elections of 1873 suggested, the Republicans still dominated the Senate. See N. ORNSTEIN, T. MANN & M. MALBIN, VITAL STATISTICS ON CONGRESS 1889-1910 table 1-18 (1990) (43d Congress, 1873-1875, comprised of 19 Democrats and 54 Republicans; 42d Congress, 1870-1875, comprised of 17 Democrats and 57 Republicans). Thus, Grant was able to nominate, and the Senate to confirm, Morrison Waite of Ohio. Waite had been "a thoroughgoing Radical" as early as 1862. C. FAIRMAN, supra note 63, at 78. By 1877, however, Reconstruction had ended. The Hayes-Tilden election of 1876 signalled the resurgence of the antebellum Southern power structure. See, e.g., R. DAHL, supra note 33, at 84. Thus, when President Hayes faced a vacancy created by the resignation of David Davis (a Lincoln appointee), and three years later, another vacancy by William Strong (a Grant appointee), he turned to the South. Two primary candidates were Benjamin Bristow and John Harlan—both Republicans, to be sure, but both also of Kentucky. See C. FAIRMAN, supra note 63, at 504. Harlan was chosen. Of the two, he was far more the reluctant Republican, having opposed both the Emancipation Proclamation, as "a direct interference, by a portion of the States with the local concerns of other States," and the thirteenth amendment, as based on a "dangerous" principle that "may eventuate in the destruction of our present form of government," and because it would "destroy the peace and security of the white man in Kentucky." Id. at 499, 567. He also supported McClellan for President against Lincoln in 1864. Id. at 499. It was only after a schism in his church over slavery in the early 1870s that Harlan, following his Reverend, joined the Republican cause. Id. Bristow, in contrast, fought for both Lincoln's re-election and ratification of the thirteenth amendment. Id. at 20. When Hayes faced his next Supreme Court
when their own Justices were on the Court, the North’s ability to ensure that the “interpretive” ideal of constitutional representation was fulfilled had to degenerate once Justices became, at least in part, the South’s Justices as well.\footnote{78}

iii. A Case Against Creating Supreme Constitutional Texts Toward Perpetuating a Temporary Political Advantage

Just as the remnants of Reconstruction were about to dissolve, Congress passed the Civil Rights Act of 1875,\footnote{79} which provided broad protection against racial discrimination.\footnote{80} A Northern voter who supported the bill, however, might have feared that it would not long survive a potential alliance between Northern and Southern Democrats.\footnote{81} Anticipating this sort of vacancy, with the resignation of William Strong, he also turned to the South—this time, Georgia. \textit{Id.} at 522.

78. Justice Harlan’s nomination continues to be instructive. Justice Miller revealed that Senator Edmunds of Vermont and Senator Conkling of New York were deeply troubled about John Marshall Harlan:

\begin{quote}
The Senate Judiciary Committee are making great trouble about Harlan’s nomination. Edmunds \ldots \textit{[has]} called on me about it. As far as I can learn Edmunds, Conkling and Howe are disposed to make protracted inquiry into his fidelity to the constitutional amendments and the reconstruction acts of Congress. \ldots \textit{I think} this both unwise and unjust. Harlan is as true a man I have no doubt to the constitutional amendments as any man from a Southern State, who may have doubted the wisdom of some of them when they passed.\end{quote}

C. FAIRMAN, \textit{supra} note 63, at 518 (citing C. FAIRMAN, \textit{MR. JUSTICE MILLER AND THE SUPREME COURT 1869-1890}, at 369-70 (1939)) (emphasis added and footnotes omitted). Republicans anticipated that Southern-oriented judges might well thwart national racial policies, as the Civil Rights Act of 1866 provided for criminal penalties against state judges who rendered judgments undermining a federally protected right. \textit{See} W. NELSON, \textit{supra} note 23, at 105-06.

79. \textit{See} M. KONVITZ & T. LESKES, A CENTURY OF CIVIL RIGHTS 90-91 (1961) (describing five-year congressional battle to enact the legislation); \textit{infra} note 80.

80. Section one of the Act provided:

\begin{quote}
\textit{[A]ll} persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.\end{quote}

Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336 (1875). In the view of its principal sponsor, Senator Charles Sumner of Massachusetts, the bill would do all that had to be done in order to ensure his vision of “equal rights in this Republic.” \textit{Cong. Globe}, 42d Cong., 2d Sess. 3180-90 (1872).

81. The Act was among the last gasps of the Northern electorate’s efforts to exploit their temporary political advantage over the white Southern electorate. In both the South and the North, the Democrats had made significant gains in the elections of 1874. Some of the Northern electorate had tired of fighting with the South over race and other issues emerged. \textit{See}, \textit{e.g.}, W. NELSON, \textit{supra} note 23, at 149; \textit{see also} C. FAIRMAN, \textit{supra} note 63, at 156, 180. \textit{But see infra} note 82.
cist retrogression, a majority of Northern voters created the fourteenth amendment toward perpetuating their extraordinary political advantage.

These voters' concerns would have been well served if the Supreme Court had declared the Civil Rights Act's policies to be constitutionally mandated. This would have been a plausible exercise of constitutional representation, as the legislation was, in fact, a choice that the Northern electorate made while still enjoying an extraordinary political advantage.\(^{82}\) Protected by judicial supremacy, this policy would have been immune from congressional erosion.

Interesting speculation, perhaps, but far from what actually occurred. The Supreme Court never declared that the provisions of the Civil Rights Act of 1875 were constitutionally mandated; instead, in the Civil Rights Cases, it determined that the Act was constitutionally prohibited.\(^{83}\) Thus, Northern Republicans lost their law not by action of their reinvigorated political opponents, but by a decision of the very Justices who were supposed to entrench their law. This was constitutional representation turned upside down.\(^{84}\)

* * *

The Civil Rights Cases raise doubts about the extent to which people can effectively perpetuate an extraordinary political ad-

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82. However much the elections of 1874 might cast doubt on the Northern electorate's continuing commitment to racial equality, the pattern of response to the Civil Rights Cases by the Northern states is striking. After the Supreme Court's decision, 16 Northern states passed virtually identical legislation: Connecticut, Iowa, New Jersey and Ohio in 1884; Colorado, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Nebraska and Rhode Island in 1885; Pennsylvania in 1887; Washington in 1890; Wisconsin in 1895; and California in 1897. See G. Stephenson, Race Distinctions in American Law 121 (1910). But for the Supreme Court's decision, and absent congressional action repealing the Civil Rights Act of 1875, such state-by-state legislation would have been unnecessary—and other states that did not pass such legislation for themselves would have been governed by the apparent preferences of the Northern electorate's majority.

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

84. The Court's decision might be viewed as serving the values of the Northern electorate only if (i) they had desires for political self-constraint related to federalism and (ii) those concerns outweighed their desire to perpetuate their political advantage for concerns of racial justice. This is unlikely, however, for the motive of perpetuating an extraordinary political advantage necessarily implies a rejection of respect for local decisionmaking. Cf. W. Nelson, supra note 23, at 104-09 (opponents of fourteenth amendment and Civil Rights Act of 1866 raised federalism objections); id. at 114-16 (proponents argued amendment would intrude on discretion only of Southern states that denied basic racial equality); id. at 197 (Northerners had conflicting desires to restrain South from racial discrimination while retaining nation's federal structure).
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vantage by creating supreme constitutional texts. Two competing forces undermine any possibility of keeping Justices accountable to this “interpretive” goal of constitutional representation. On the one hand, a voter’s Justices must be insulated from the power of his reinvigorated political opponents. On the other hand, the voter’s Justices must be induced not to stray from the task of identifying the choices he and his allies would make if they still enjoyed their extraordinary political advantage. While judicial supremacy might address the first problem, it intensifies the second. Furthermore, because the motive of perpetuating an extraordinary political advantage anticipates the loss of extraordinary political power, there can be no effective way to address the second problem of ensuring perpetual judicial accountability. Thus, one might question whether even those with the present power to deny their opponents the right to shape public policy should bother seeking to perpetuate that extraordinary political advantage by creating supreme constitutional provisions at all.

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85. In giving themselves near “absolute authority to interpret” the Civil War Amendments, with life-tenure and the enforcement authority of judicial supremacy, those Justices truly became the lawgiver, as Bishop Hoadly warned, and not the Northern electorate “who first wrote” those constitutional provisions. See supra note 60. It was ultimately for those Justices, not for Northern voters, to decide whose values would be served.

86. See supra text accompanying notes 69-71.

87. The Civil Rights Cases of 1883 were just part of a series of Supreme Court decisions that more than likely violated the ideal of constitutional representation from the perspective of a Northern electorate that wanted to perpetuate its temporary political advantage over its white Southern neighbors. Indeed, “of the six acts of Congress held unconstitutional by the Waite Court, three were acts guaranteeing rights to black Americans.” The Reconstruction Court, supra note 73, at xii. Furthermore, the Court invalidated an 1869 (i.e., Reconstruction) Louisiana statute that prohibited racial segregation in public conveyances. See Hall v. DeCuir, 95 U.S. 485 (1877). The Court viewed the legislation as a violation of the dormant commerce clause—an inordinate local intrusion on the free flow of interstate commerce. Id. at 488-90. Once again, then, rather than protect the Republicans’ efforts to perpetuate an extraordinary political advantage against enemies reinvigorated in Congress—or, indeed, a reinvigorated antebellum electorate within Louisiana—the Supreme Court was the instrument of the Republicans’ defeat. This irony is intensified by a case in which the Court upheld against a dormant commerce clause claim an 1888 Mississippi post-reconstruction statute that required racial segregation in public conveyances. See Louisville Ry. v. Mississippi, 133 U.S. 587 (1890). As Justice Harlan intimated in dissent, the DeCuir and Louisville decisions were embarrassingly inconsistent. Id. at 593-95 (Harlan, J., dissenting). Again, the Court was the instrument not of perpetuating the Republicans’ ideology of racial justice, but of thwarting it. See also supra note 74 (discussing Reese).
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2. Selecting Justices to "Interpret" Constitutional Texts Intended to Secure the Benefits of Political Self-Constraint

a. The "Interpretive" Ideal: Constitutional Representation

By creating constitutional provisions for political self-constraint, voters agree that public policy should respect certain ideals to a greater extent than they can trust themselves to pursue in ordinary politics. The predicate for creating such constitutional provisions is debate and resolution that the electorate views as unusually thoughtful. Framed in supreme constitutional texts, the fruits of these extraordinary political labors are protected from being changed by congressional representatives. Thus, voters wish the benefits of the best politics they have ever pursued to persist once politics returns to the mundane.

This analysis suggests an ideal definition of "interpretation." Each voter might conclude that in giving meaning to constitutional mandates created with the motive of political self-constraint, judges ideally should replicate the electorate's extraordinarily thoughtful constitutional politics. Ideally, judicial "interpretation" would yield the same decisions voters would reach if they were engaged in the same sort of extraordinarily reflective constitutional politics through which they made actual choices for political self-constraint.

88. See supra note 42 and accompanying text.
89. See supra text accompanying notes 36-43. Indeed, in a better world, voters would not need to make special choices during the extraordinary politics of constitutional decisionmaking. In a better world, their politics would always be as good as they are during the debate that leads to constitutional choices for political self-constraint. Cf. infra note 92.
90. This assumes that each voter acknowledges the others' equal right to shape public policy or inevitable power to shape public policy—whether in creating constitutional provisions, national legislation, or selecting Supreme Court Justices—and, therefore, foreswears any desire to deny his opponents' rights to shape public policy. See supra text accompanying notes 35-36, 45-47.
91. This is a variation on the classical notions of interpretation developed by Alexander Hamilton in The Federalist No. 78 and by Chief Justice John Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In the view of Hamilton and Marshall, who were part of a generation that created a constitution, the goal of constitutional "interpretation" should be to identify the choices that "the people" have made in constitutional politics. In the view presented here, the ideal goal in constitutional "interpretation" should be to identify the choices that voters would make if still engaged in extraordinary constitutional politics. Thus, for the generation that both creates constitutional text and installs judges to "interpret" that text, there is little distinction between my view and standard originalism. Cf. Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980) (problems in resolving issues that framers did not consider); Dworkin, supra note 75, at 482-97 (same). However, significant differences do develop as new generations live under aging constitutional provisions. See infra text accompanying notes 137-48. For a comparison of constitutional
Thus, after creating supreme constitutional provisions for political self-constraint, a voter would want judges to represent her preferences—not her ordinarily conceived, everyday preferences, but those preferences that can be identified only after extraordinary reflection. This ideal of judicial behavior is another version of constitutional representation. Under this version, constitutional representation would differ from congressional representation to the extent that the Court represents the electorate's extraordinarily thoughtful decisionmaking intended to constrain everyday politics, while Congress represents the electorate's everyday politics intended to be constrained.

representation with other theories of interpretation, see infra text accompanying notes 149-74.

92. Indeed, in a more ideal world, politics would always be better than it is during actual constitutional politics. In a more ideal world, each voter would be smarter, more moral, more in touch with God, or better according to any number of criteria that people might deem relevant to politics. Accepting this ideal notion of politics, one might devise an ideal definition of "interpretation" that would have judges identify choices the electorate would make if voters were smarter, more moral, more in touch with God, than they can ever hope to be. This proposition could provide a populist justification for advocates of judicial activism who otherwise are unconcerned with electorate preferences that compromise constitutional "rights." See, e.g., R. Dworkin, Law's Empire 413 (1986) ("[Law] is an interpretive, self-reflective attitude addressed to politics in the broadest sense. . . . [It] makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances."); R. Epstein, Takings: Private Property and the Power of Eminent Domain 24-31 (1985) (advocating more active judicial protection of private property based on "internal intellectual integrity" of fifth amendment takings clause); Michelman, Forward: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986) (traces of democracy found in reflective deliberation and voting among Justices). This conception of a political ideal and concomitant "interpretive" ideal might seem beguiling. Yet it is ultimately unrealistic, for it would have voters choosing to delegate broad decisionmaking authority without a clear, convincing set of criteria by which they could identify judges who are themselves smarter, more moral, or more in touch with God, than the voters can ever hope to be. That political opposites such as Dworkin and Epstein might employ the better-than-reality-ever-could-be ideal of politics and "interpretation" vividly illustrates this point. Indeed, even putting aside the improbability of agreement about who should serve as Guardians, there remains an improbability that a voter would choose to give her own preferred Guardians powers of judicial supremacy. Even one who goes to Church and who trusts her minister sufficiently to consider his exhortations would be rare indeed to trust that minister enough to give him authority to make decisions governing her life. Cf. infra text accompanying notes 322-37 (discussing Brown).

93. As with provisions intended to perpetuate an extraordinary political advantage, see supra text accompanying notes 62-66, this suggests a political foundation for "interpretation" and, therefore, for the selection of Justices. Cf. Monaghan, The Confirmation Process: Law or Politics?, 101 Harv. L. Rev. 1202, 1203, 1207 (1988) (appointment of Justices should be viewed as political).

94. One could characterize the motive of securing the benefits of political self-constraint as a desire to perpetuate a temporary political advantage. Here, however, the temporary political advantage is not one of power against political
b. Judicial Supremacy as a Mechanism for Ensuring Accountability to the Ideal of Constitutional Representation

i. The Case for Judicial Supremacy: Toward Limiting the Authority of Careless Politics

In satisfying this “interpretive” ideal of constitutional representation—by identifying the choices the electorate would make if extraordinarily thoughtful—courts would be making decisions with which most voters might reflexively disagree. Because Congress is the forum in which these more reflexive political impulses are vindicated, congressional supremacy might seem problematic. In contrast, judicial supremacy would preclude Congress from trumping judicial decisions that otherwise would serve the electorate’s concerns for political self-constraint.  

ii. The Case Against Judicial Supremacy: The Power, Prerogatives, and Fallibility of Judges

Insulating judicial decisions from the popular impulses expressed in everyday legislative politics, however, does nothing to keep judges accountable to the “interpretive” goal of identifying choices the electorate would make if engaged in extraordinarily reflective constitutional politics. Indeed, voters must account for two potential problems. First, the “interpretive” ideal of constitutional representation asks judges to pursue a difficult exercise enemies, but of one’s better self against one’s ordinary self. While the electorate that creates constitutional provisions for perpetuating an extraordinary political advantage is displaced by an electorate that includes newly invigorated opponents, the electorate that creates constitutional provisions for political self-constraint is displaced by an inferior version of itself. Both seek to perpetuate the otherwise ephemeral authoritative electorate by charging judges with the task of identifying the choices that the constitutional electorate would make if it still existed. Thus, the ideal of constitutional representation asks judges to act as if they were an electorate that once existed, and once made decisions, but that could not sustain itself indefinitely.

95. Cf. THE FEDERALIST No. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961) (judicial independence protects enduring principle from erosion by momentary political impulse). Hamilton earlier suggested that without the “complete independence of the courts . . . all the reservations of particular rights or privileges would amount to nothing.” Id. at 466. Indeed, appointment of judges for limited terms, subject to reappointment, would make them beholden to voters in the forums of ordinary, everyday politics. This section suggests that such reasoning is flawed as applied to judicial supremacy, if not life-tenure. See also Chang, supra note 10, at 880-81 (suggesting similar argument in Marbury flawed). Indeed, it is unclear whether Hamilton intended his notion of judicial independence to encompass judicial supremacy as well as life-tenure. See infra note 103.
in speculation. Second, judges must choose this "interpretive" goal. As people with extraordinary access to public power, judges might be more concerned with their own values than with those of the voters. If judges make mistakes while trying to serve constitutional representation, or make constitutional decisions according to some other "interpretive" ideal, the electorate's concerns of political self-constraint are not served; intrusions on

96. This assumes a text with open-ended and indeterminate meaning—a reasonable premise to the extent that one cannot make decisions that anticipate every possible future issue. Cf. Schauer, supra note 22, at 1721-22 (discussing Bentham's ideal of determinate legal code and Hart's proposition of textual indeterminacy). Using past constitutional choices from which to infer the choices that the electorate would make today if engaged in constitutional politics assumes that voters have not changed their minds about what is important. It also assumes a workable evidentiary connection between those past choices and present preferences. I have elsewhere called this the premise of constitutional continuity. See Chang, supra note 10, at 790-94. The premise of constitutional continuity becomes more vulnerable when applied beyond those who have actually created their own constitutional provisions, toward those who live under aging constitutional provisions created by past generations. Id. at 843 n.306, 847 n.318, 850 n.325, 865 n.370, 864 n.374, 865 n.376; see infra note 197 and accompanying text.

97. See, e.g., A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 105 (1978) (judges tempted to use powers for personal notions of justice). Some feared, for example, that Robert Bork had undergone a convenient "confirmation conversion"—changing his expressed views to placate opponents while reserving his real preferences for resurrection once his seat on the Court was secured. See, e.g., Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 423 ("I do not want this . . . being a confirmation conversion. That is going to be a question in the minds of a number and that is why I am going into such detail.") (remarks of Sen. Leahy); id. at 437 ("What troubles me as I hear your testimony after having studied your writings and your opinions, is the very significant and pronounced shifts . . . The concern I have is, where's the predictability in Judge Bork?") (remarks of Sen. Specter). After all, to a significant extent, it is within the power of each judge to choose the "interpretive" goal he will pursue. Cf. Maltz, Foreword: The Appeal of Originalism, 1987 UTAH L. REV. 773. Professor Maltz, much like Owen Fiss, posits that judges almost always at least believe that they are acting within the constraints of their role—that they are serving some master, that they are acting in a neutral and impartial way. Id. at 782; see also id. at 784 (for judges to pursue their personal values would be "inconsistent with [their] self-images"). While it is undoubtedly true that judges are strongly influenced by clear conventions, it is not necessarily true that they have internalized those conventions as part of self-image. A judge might do what is expected to maintain his credibility (power) in anticipation of those issues for which those conventions have unclear implications and, therefore, impose relatively weak constraints on judicial discretion. Furthermore, there are so many "conventions" available to judges—so many ways of characterizing decisions that have some degree of intellectual respectability—that a judge might well maintain his "neutral" self-image simply by picking the interpretive "convention" that yields his preferred result. Indeed, Professor Maltz acknowledges that "nonoriginalist constitutional analysis allows judges and commentators at least to appear" to be "neutral" while seeing "their own views of justice embodied in the law." Id. at 788 (emphasis added).
legislative discretion would be unwarranted from the voters' perspective.98

Thus the dilemma of judicial accountability: To subject judicial decisions to congressional correction seems to make constitutional law vulnerable to those relatively careless political forces that the notion of political self-constraint seeks to supersede. Yet to give judges the power of judicial supremacy is to manifest trust in fallible individuals to an extent that would be unthinkable if they were called "legislators" rather than "judges."99 Can one somehow resolve the tension between a concern for political self-constraint (because voters feel good reason to distrust themselves) and a concern for ensuring judicial accountability (because voters have good reason to distrust judges)?

iii. The Case for Congressional Supremacy: Re-evaluating the Dichotomy Between the Electorate's Better Constitutional Selves and Worse Congressional Selves

This analysis has assumed a stark dichotomy between the thoughts and behavior of voters during everyday congressional politics and during the constitutional politics underlying choices for political self-constraint. This assumption is, perhaps, unrealistic for at least two reasons. First, voters are likely to be neither

98. Michael Perry argues that the Court, rather than Congress, can better serve goals of "interpretivism"—identifying choices made by the framers. See Perry I, supra note 7, at 16-17. While Perry recognizes that the President and Congress have "incentives . . . to ignore constitutional limits on federal power," he says nothing about what, if any, incentives judges have to enforce the constitution in an "interpretivist" way—or, indeed, in any way that subordinates the judges' preferences for those of some authoritative electorate. See id. It seems more reasonable to suppose not that judges will act in a "disinterested" way, but that they have their own agendas and perceptions that might not correspond with those of a majority among the voters.

99. Hamilton denied that the Constitution would make "the legislative body . . . themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments." See The Federalist No. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961). Rather, "[i]t is far more rational to suppose that the courts were designed to be an intermediary body between the people and the legislature . . . to keep the latter within the limits assigned to their authority." Id.; see also Amar, supra note 42, at 1056-57 (discussing framers' distrust of legislators). But see Monaghan, supra note 93, at 1212 (judicial unaccountability from life-tenure a "dubious policy"); Tushnet, supra note 22, at 1684 ("[I]n removing judges from the pressures exerted by Congress, (which is acting as a majority faction), life-tenure creates the possibility that the judges would themselves become an oppressive minority faction."). I suggest, however, that while these latter concerns are applicable to judicial supremacy, life-tenure can serve ideals of political self-constraint under a regime of congressional supremacy. See infra note 959.
angels while engaged in extraordinarily thoughtful constitutional politics, nor devils while engaged in everyday politics. Rather, though she might deploy them differently, a voter carries the same values and impulses in both forums. She is the same person whether making choices for political self-constraint or for enacting ordinary legislation. Second, although a voter's concerns for general principle and political ideals might lose a measure of prominence once constitutional politics ends, they need not be irrevocably lost. These concerns were the bases of her extraordinary choices for political self-constraint and, like any memory, remain latent within her, a potential to be drawn out and reinforced.100

Thus, a voter's deficiency in everyday politics is not in being so removed from her own values of political self-constraint that she would wantonly choose to violate them. Rather, the voter's deficiency is in being insufficiently attuned to these ideals during the pressures and momentary passions of everyday legislative decisionmaking. Able to recall her own choices for political self-constraint once reminded of them, the voter can choose to respect them.101

100. Bruce Ackerman sees a greater independence between contemporaneous constitutional politics and ordinary politics. He suggests that "in its fixing its sights upon a higher lawmaking victory, [a political movement] diverts its energy from the lower lawmaking track, passing upon the chance for cheaper victories that may further the more immediate interests of its followers." Ackerman, supra note 8, at 1041. Yet one diverts energy from tax policy, for example, whether one pursues gender discrimination policies in the forum of constitutional politics or that of ordinary legislation. Thus, displacement of tax victories with gender discrimination victories is largely irrelevant to the central question considered in this section: Why make policy by creating constitutional provisions rather than by enacting ordinary legislation? Indeed, once the choice is made to pursue issues of gender discrimination, doing so through the higher "lawmaking" track could well facilitate victories on the same issues in the everyday legislature. Convincing a state legislature to ratify the Equal Rights Amendment, for example, could have facilitated adoption of a similar state measure—statutory or constitutional. See supra notes 80 & 82 (discussing enactment of state legislation prohibiting racial discrimination based on Civil Rights Act of 1875). Furthermore, political leaders concerned with political self-constraint wish to transform, in Ackerman's terms, private citizens into private citizens. See Ackerman, supra note 8, at 1033-34. To the extent that they are successful, the electorate's memory of its private citizenship can be a lasting benefit in the forum of everyday politics, as suggested in the text. See infra text accompanying notes 100-04.

101. Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In McCulloch, Chief Justice Marshall implied that deference to a congressional judgment might be appropriate because "[t]he power now contested was exercised by the first Congress elected under the present constitution." Id. at 401. Thus, many of those who framed the Constitution also chose to create the national bank challenged as unconstitutional. See also Brest, supra note 10, at 83-84 (early Con-
This analysis suggests a solution to the dilemma of judicial accountability. If voters can trust themselves to give adequate weight to their constitutional ideals of political self-constraint once reminded, a correct judicial determination of unconstitutionality would be safe under congressional supremacy. There would be no need to give judges the power to make unremediable de-
gresses extensively debated constitutional questions. Yet if those who partici-
pated in creating constitutional provisions were perfectly trustworthy to stay within bounds, it would not have made sense to accord judges any special en-
forcement authority at all. Indeed, if this were true, Chief Justice Marshall in Marbury should have determined that the Supreme Court lacked authority to question the constitutionality of § 13 of the Judiciary Act of 1789. After all, Marbury was decided within a generation from the time that “the people” of the United States engaged in constitutional politics and made their constitutional choices. Cf. supra note 91. Thus, Marshall’s approach in Marbury and McCulloch to congressional decisionmaking was inconsistent. Essential to evaluating the two prongs of inconsistency is the subject addressed in the text—specifically, the extent to which a legislature does represent the electorate’s current preferences, and the extent to which those preferences, after having made constitutional choices, can reflect their own concerns for political self-constraint. Judicial re-
view tempered by congressional supremacy, however, assumes that Congress might fail to reflect constitutional concerns in ordinary legislation, but more likely can do so in response to judicial suggestions of unconstitutionality.

102 Paul Brest argues that Congress has shown itself unlikely to engage in effective constitutional interpretation. See generally, Brest, supra note 10. Yet this view begs a definition for effective constitutional interpretation. For more on Brest’s views about congressional supremacy for aging constitutional provisions, see infra note 244. Some have gone even further, suggesting that Congress makes policy not by seeking the public good, but by “selling” legislation to the highest bidder. See, e.g., Easterbrook, Statutes’ Domains, 50 U. Chi. L. Rev. 533, 548 (1983); Landes & Posner, supra note 35, at 877 (recognizing legislative “deals” made by effective interest groups). But see Farber & Frickey, supra note 51, at 883 (criticizing extreme conclusions of some public choice theorists); Sunstein, supra note 54, at 48-49 (legislators can engage in thoughtful deliberation without being unduly influenced by interest groups). This criticism of legislative decisionmaking posits two basic flaws: first, that the legislature is inadequately representative to the extent that interest groups are minority factions and, sec-

ond, that the legislature is inadequately thoughtful to the extent that interest groups single-mindedly pursue narrow and short-term objectives. See Sunstein, supra note 54, at 32-34.

Judicial review supplemented by congressional supremacy can address each of these difficulties. First, by striking down a governmental policy and inviting congressional response, the Court will have raised an issue to greater public scrutiny. The electorate-at-large, theretofore perhaps politically passive, will have a visible opportunity to evaluate an issue that otherwise was resolved by normal governmental processes (assumedly) captured by narrow interest groups. Second, if judicial invalidation of governmental policy is subject to congressional revision, interest groups themselves will have been given an opportu-


partures from the "interpretive" ideal of constitutional representation; judicial supremacy lacks justification.103

Indeed, judicial review tempered by congressional supremacy could serve as a warning that the electorate's own constitutional ideals might have been compromised. It would provide Congress with the occasion to reconsider issues, framed in constitutional terms by the Supreme Court, giving each voter the opportunity to think about the decisions she would make if again engaged in formal constitutional politics. Thus, the electorate would be encouraged to recreate the constitutional politics through which it created the constitutional text now being interpreted, and thereby to perpetuate the benefits of its extraordinarily thoughtful constitutional politics.104 And this, after all, is the

103. As the framers' position on the existence of judicial review is unclear, their views on judicial supremacy are even more so. James Madison once seemed to reject vesting any branch with "interpretive" supremacy. See Fisher, Constitutional Interpretation by Members of Congress, 63 N.C.L. REV. 707, 710 (1985) (quoting 1 ANNALS OF CONG. 495 (J. Gales ed. 1789) (remarks of Madison)). Hamilton's The Federalist No. 78 might be read as suggesting otherwise, see supra note 43, but even it is ambiguous about judicial supremacy. Hamilton noted that while "independence of the judges" is necessary to guard against baneful influences among the people, such influences "speedily give place to better information, and more deliberate reflection." The Federalist No. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis added). If it is true that the electorate's bad judgement is temporary, and that it is able to correct itself simply with more deliberate reflection, a regime of judicial review tempered with congressional supremacy would seem to be appropriate—at least so far as choices for political self-constraint are concerned. Furthermore, one must confront a deeper question that accounts for the "intertemporal difficulty": What is the relevance of their views about judicial supremacy for any given voter today? See infra text accompanying notes 136-48.

104. One who embraces an interest group theory of Congress's (non)deliberative processes might object to congressional supremacy as a route to a hopelessly incoherent constitutional law. See, e.g., Easterbrook, supra note 102, at 547-48. The value of coherence, however, is itself debatable. While some see law as a quest for moral coherence or "integrity," it is also undeniable that constitutional provisions themselves are created by politics, and often reflect intricate compromise. Compare R. Dworkin, supra note 92, at 225-75 with Chang, supra note 10, at 833-45; see also infra note 366 (discussing priority of constitutional politics versus judicial review).

Apart from the value of coherence, it is hardly clear that congressional supremacy would yield a body of constitutional law that is significantly less coherent (perhaps more accurately, more incoherent) than the constitutional law generated over the past two centuries. Indeed, some suggest that interest groups affect congressional deliberation in a far more limited way than that perceived by radical public choice theorists. For example, "group influence is likely to be strongest when the group is attempting to block . . . legislation; when the group's goals are narrow and involve low-visibility issues; when the group has substantial support from other groups and public officials." Farber & Frickey, supra note 51, at 887 (footnotes omitted). This characterization of interest group influence should allay some fears of those who trust courts more than Congress to make constitutional law. To the extent that interest groups block
ideal of community decisionmaking that the notion of political self-constraint seeks to achieve.\textsuperscript{105}

3. Selecting Justices to "Interpret" Constitutional Texts Intended to Ensure Optimal Legislative Accountability

a. The "Interpretive" Ideal: Constitutional Representation

Voters, we have seen, might build their legislative structure with two goals in mind: accountability and political self-constraint. The first seeks to keep representatives tied to electoral preferences so voters need not be as jealously vigilant about public policy as in a direct democracy. The second seeks to keep representatives sufficiently removed from the latest electoral whims that they can exercise independent, publicly-oriented judgment.\textsuperscript{106} Both goals are served by framing the legislative structure in supreme constitutional texts. Constrained by the principles of constitutional supremacy, representatives may not change the legislative structure toward either insulating themselves from electoral retribution or serving the majority's own ill-considered judgments about how public policy should be made.\textsuperscript{107}

Furthermore, if interest group influence is greatest for narrow, low-visibility issues, it is likely to be relatively weak for proposed legislation reversing the Supreme Court under congressional supremacy—to the extent that overturning the Court is viewed as a sober, extraordinary occasion. This is especially likely to be true for issues that underlie the most controversial Supreme Court opinions. Finally, when interest groups need and gain the support of other forces and institutions, public decisionmaking is more inclusive and, therefore, more likely representative of the electorate-at-large. As Professors Farber and Frickey have observed:

Faith in deliberative congressional resolution of sensitive issues is not entirely misplaced, particularly when courts assist the deliberative process through structural and procedural review . . . that shift[s] the burden of inertia to those seeking to reimpose the invalidated decision . . . . Considering the ease of killing legislation and the difficulty of passing it, these consequences of a suspensive veto are significant.\textsuperscript{108}

\textit{Id.} at 923.

105. This resolution is far from perfect. Compounding the significance of the electorate's fading memories, new people will enter the political community who never focused on the virtues of political self-constraint by engaging in extraordinarily thoughtful constitutional politics. Inevitably, the entire political community will consist of people who never debated and struggled with the notion of political self-constraint. I confront their plight in the next major section, where I consider whether, and why, voters should allow their constitution to grow as old as has the Constitution. Analysis of this truly long-term context will have much to say about the moderately long-term situation in which one portion of the electorate has fading memories of choices for political self-constraint, and another has no memories at all.

106. See supra text accompanying notes 44-55.

107. See supra text accompanying notes 53-58.
Each motive for exploiting constitutional supremacy carries its own interpretive ideal. To the extent that the electorate has created constitutional provisions seeking to maximize legislative accountability, voters would want Justices to make the decisions the electorate would make if engaged in extraordinarily vigilant politics toward ensuring that power-hungry governmental functionaries do not separate themselves from voter preferences. To the extent that constitutional provisions reflect concerns for political self-constraint, voters would want Justices to make the decisions the electorate would make if engaged in extraordinarily thoughtful debate about the processes of public policymaking.  

Each "interpretive" ideal is a version of constitutional representation.

b. Judicial Supremacy as a Mechanism for Ensuring Accountability to the Ideal of Constitutional Representation

i. The Case for Judicial Supremacy: Toward Limiting the Authority of Power-Hungry Officials

Congressional supremacy might be problematic in this context because it would empower Congress to overturn judicial interpretations of constitutional provisions designed to ensure Congress's accountability. Congressional authority to reverse Supreme Court "interpretations" of constitutional mandates intended to protect those who criticize government, or seek access to government information, for example, could facilitate legislative entrenchment. Judicial supremacy would make it more difficult for renegade legislators to implement policies that detach themselves from electoral scrutiny and retribution.

108. See supra text accompanying notes 88-94 ("interpretive" ideal for provisions concerned with political self-constraint). If, for example, a wave of popular euphoria prompts the electorate to make some person Emperor-for-Life, a majority of voters would be served if Justices interpreted provisions intended to ensure optimal legislative accountability in a way that reflects the choices the electorate would make if engaged in formal constitutional politics today, toward protecting their better selves from their worse selves. Cf. U.S. Const. amend. XXII (decision to limit Presidents to two elected terms after Franklin Roosevelt elected four times).

ii. The Case Against Judicial Supremacy: When Are Constitutional Provisions Intended to Police the Voters’ Legislature, and When Are They Intended to Police the Voters Themselves?

Constitutional provisions designed to ensure optimal legislative accountability are intended both to curb legislative corruption and to promote political self-constraint.110 Previous analysis has questioned the merits of judicial supremacy for “interpreting” constitutional provisions intended to secure the benefits of political self-constraint.111 Thus, voters might deem it best to establish congressional supremacy with respect to constitutional issues implicating concerns of optimal legislative accountability, but to accord judges the powers of judicial supremacy with respect to issues implicating concerns of optimal legislative accountability.

This allocation of interpretive authority would be problematic, because it begs the question of whether Congress or the Court has supreme authority to draw the “interpretive” line between those provisions and circumstances for which Congress enjoys the powers of congressional supremacy and those for which the Court enjoys the powers of judicial supremacy. Congress and the Court might develop three behavioral patterns for answering this question. First, they could engage in a perpetual competition yielding ad hoc determinations of final “interpretive” authority issue by issue. Second, the competition might settle into a prevailing ethic of judicial supremacy across the board—as now exists in the American constitutional scheme. Third, it might settle into a prevailing ethic of congressional supremacy across the board.

An ad hoc pattern of perpetual competition not only could drain institutional energies, but also could yield haphazard results without established principles under which debate about final “interpretive” authority would be conducted.112 Furthermore, if voters accept that there are significant problems with judicial authority.

110. See supra text accompanying notes 45-58.
111. See supra text accompanying notes 96-105.
112. Yet desirability depends on the kind of interbranch struggle Congress and the Court would create. Careful and open consideration of motives for exploiting the principles of constitutional supremacy—whether perpetuating a temporary political advantage toward denying one’s opponents the right to shape public policy, securing the benefits of political self-constraint, or ensuring legislative accountability—can enhance public decisionmaking, as will reconsideration of the particular challenged governmental action. See infra text accompanying note 131. On the other hand, stalemate, tension, and gamesmanship undermine the chances that this careful and open public debate will occur.
supremacy for "interpreting" constitutional provisions intended to secure the benefits of political self-constraint, they hardly would want to establish a universal ethic of judicial supremacy. Perhaps we can refine the earlier analysis suggesting the desirability of judicial supremacy for enforcing constitutional provisions intended to ensure legislative accountability.\footnote{1} If judicial supremacy is unnecessary or undesirable for this purpose, the electorate could safely establish congressional supremacy for resolving all questions arising under their newly created constitutional texts designed to ensure \textit{optimal} legislative accountability.

\begin{flushleft}[1] Bright Lines and Predictable "Interpretations": Judicial Supremacy as Unnecessary
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Many constitutional provisions by which voters might try to ensure legislative accountability would likely be framed in specific terms. Consider, for example, terms of office for representatives. Suppose that voters have created a unicameral legislature and specified a term of six years for its members. Suppose further that the legislature passed a statute increasing terms of office to eight years. Surely, this would be unconstitutional, for "six years" means \textit{six years}, doesn't it?

Of course it does, at least in this sense: If one asked any person on the street, she would agree that "six years" means \textit{six years}. Furthermore, based on pervasive and traditional notions of "plain meaning,"\footnote{114} one can hardly imagine that any judge would find it to mean anything else—even if she were deeply committed to the "interpretive" ideal of constitutional representation and open to the possibility that the choices made in constitutional politics last year are not necessarily the choices voters \textit{would make} if engaged in constitutional politics today.\footnote{115}

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\textsuperscript{113} See supra text accompanying note 109.
\textsuperscript{114} See, e.g., Johnstone, \textit{An Evaluation of the Rules of Statutory Interpretation}, 3 U. Kan. L. Rev. 1, 12-13 (1954) (although one can posit that all words are inherently ambiguous, "the degree of ambiguity is likely to be substantial only in limited \ldots sets of situations."); Jones, \textit{The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes}, 25 Wash. U.L.Q. 2 (1939) (discussing traditional application of plain meaning rule and cases which have disregarded it.); cf. Nutting, \textit{The Ambiguity of Unambiguous Statutes}, 24 Minn. L. Rev. 509, 521 (1940) (meaning of statutory words "will generally accord with the 'meaning' which would be attached to the words by ordinary persons, but in some cases a different result may be reached because of considerations of equity or policy which, in the minds of the courts, are controlling"); Schauer, \textit{Formalism}, 97 Yale L.J. 509, 528-31 (1988) (rules stated in language with clear meaning to legal and lay communities can generate determinate legal outcomes).
\textsuperscript{115} Pursuing goals of constitutional representation, however, one can
Indeed, one can hardly imagine that legislators would even attempt to extend their terms of office from six to eight years, precisely because the Constitution specifies terms of "six years." It would be still more incredible that a legislature given the powers of congressional supremacy would pass legislation overturning a judicial determination that the "eight years" statute violates the bright-line "six years" constitutional text. Thus, such bright-line texts would appear to be as self-enforcing as any legal texts could be. To the extent that bright-line texts are self-enforcing, judicial supremacy is unnecessary.116


Other provisions that voters might create toward ensuring legislative accountability must be drawn with far less precision.117 For example, provisions guaranteeing rights to criticize and to receive information about governmental performance cannot be as precisely framed as those establishing terms of office for legislators and executives. Thus, the "interpretive" ideal of constitutional representation, rather than the obvious meaning of words to any person on the street, can be the benchmark for determining the proper meaning of these provisions.

Yet at least for some issues, the value of ensuring legislative accountability can provide clear guidance not only for judges who speculate that voters today, if they engaged in true constitutional politics, might choose a different, but equally specific, term of office for legislative representatives. See, e.g., Oreskes, Bush Backs Move For Limiting Terms of U.S. Lawmakers, N.Y. Times, Dec. 12, 1990, at A1, col. 6 ("President Bush has decided to push for a constitutional amendment to limit the number of terms for members of Congress . . ."). But given the apparent clarity of the constitutional language, it is difficult to imagine a judge daring to find that a "six years" provision actually allows eight years, or, indeed, that a unicameral legislature provision actually allows transfer of all legislative authority to an Emperor-for-Life—even though the decisions voters made yesterday are not necessarily the decisions they would make today if engaged in formal constitutional politics.

116. As Professor Schauer has observed, the fact that Ronald Reagan was seldom mentioned as a possible presidential candidate in 1988 is a "legal event" reflecting the clear and broadly understood meaning of the twenty-second amendment. See Schauer, supra note 22, at 1719; see also Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 Yale L.J. 821, 853-59 (1985) (arguing that some provisions have uncontroversial meaning that lends legitimacy to provisions with indeterminate meaning); Grodin, supra note 22, at 1974 (results sometimes compelled by clear language, not logic, because "any judge would feel like a damned fool trying to justify a different result"); Schauer, supra note 22, at 1725-34 (clarity of applicable law deters disputes); Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1985).

117. See supra note 96 (impossibility of determinate legal codes).
endeavor to identify choices the electorate would make today if engaged in constitutional politics, but also for legislators who might wish to entrench themselves in power. For example, assume that the political community consists of three identifiable groups with approximately equal political power: die-hard and closed-minded Roosevelt Democrats, die-hard and closed-minded Reagan Republicans, and open-minded, wavering Independents. A majority of voters almost certainly would determine, in the name of accountability, that a government staffed by Republicans should not pass a law prohibiting people from articulating Democratic viewpoints. Not only would die-hard Democrats make this determination; so would Independents who recently voted Republican but who can imagine voting Democratic in the future. The Independents would want to preserve the opportunity to change their minds. Thus, it is a matter of simple self-interest for a majority at any given time to assert that people have the right to criticize government and to have information about their governmental functionaries. At least within a range of orthodoxy, for groups with significant political power, the idea is deeply rooted, widely accepted, viscerally felt, and not at all subtle. Rather than a value of political self-constraint that emerges only after extraordinarily careful deliberation, this is a value of political self-preservation sprung by a hair trigger.


119. A similar analysis will suggest that for a majority of the national electorate at any given time, it does not make sense to exploit the principles of constitutional supremacy toward denying one's opponents the right to shape public policy in Congress. See infra text accompanying notes 175-91; see also Chang, supra note 10, at 775-82 (given stable national electorate, political self-constraint, rather than desire to thwart preferences of one's political competitors, is more plausible motive for successfully creating constitutional provisions). This is to be contrasted with the plausibility that, for a minority of the national electorate that happens to enjoy an extreme but temporary political advantage over political rivals, it might make sense to seek constitutional mandates toward thwarting congressional discretion in anticipation of their opponents' reclaimed political power. Even for them, however, the difficulty of perpetuating a temporary political advantage in practice counsels against trying to do so. See supra text accompanying notes 69-87.

120. Professor Amar has made the point: "Because each American sees herself in the minority on some issues, each is likely to embrace some general idea of 'minority rights' out of self-interest, if nothing else." Amar, supra note 42, at 1096. While Amar quite correctly notes that this self-interest justifies only some limited idea of minority rights, others have suggested that fear of being in a minority should lead people to protect "minority rights" well beyond the mainstream. See, e.g., J. Rawls, A Theory of Justice (1971). Significantly, Rawls's view is generated only by denying individuals knowledge of their actual circum-
Because a majority of voters can clearly voice their interests, a majority of legislators would not likely attempt to suppress ideas within a range of orthodox political disagreement.\textsuperscript{121} For similar reasons, even if the legislature enacted such a statute, it would be still more difficult for a majority of legislators to overturn a court's determination that the value of accountability had been violated. Again, judicial supremacy is unnecessary to vindicate the choices for legislative accountability that the electorate would make if engaged in constitutional politics today.\textsuperscript{122}


Consider, however, laws suppressing the expression of viewpoints farther removed from the center of political ideology. It is less clear whether a majority of voters would want to prohibit the

\textsuperscript{121} The Alien and Sedition Acts of 1798 provide a singular example of an effort to suppress an opposing faction within the range of political orthodoxy. See 1 C. \textsc{Warren}, \textsc{The Supreme Court in United States History} 215 (1936). That this effort failed in the face of outraged political opposition—even in the absence of judicial review—supports the proposition that one facet of political orthodoxy cannot suppress another. That the effort was unique in American history supports the proposition that one facet of political orthodoxy likely will not even attempt to suppress another.

\textsuperscript{122} Legislators might gerrymander electoral districts or manipulate census figures, hoping to perpetuate their political power. Such methods for perpetuating the present power structure are both more subtle and perhaps more effective than prohibiting the major opposition party's right to criticize. Thus, legislators might seek to violate the majority's preference for a fluid electoral process—where here the majority includes members of the opposition parties and temporarily convinced members of the current governing party—if they think they can get away with it. This is not to say, however, that judicial supremacy will serve better than congressional supremacy or, indeed, that judicial supremacy is desirable at all. Courts have been deferential to states on matters of districting. Indeed, it is likely that the high stakes of judicial invalidation that necessarily accompany the powers of judicial supremacy explain the prevalence of judicial deference. See infra text accompanying notes 250-53. Thus, the theoretical check of judicial supremacy is meaningless because it is not used. Under congressional supremacy, courts might well be more willing to scrutinize these sorts of state and federal legislative maneuvers toward determining whether concerns for optimal legislative accountability have been violated. See infra text accompanying notes 268-72 & 283-85.
government from suppressing the viewpoints of Communists, the Ku Klux Klan, child pornographers, or, indeed, flag burners, than that they would want to prohibit the government from suppressing the viewpoints of mainstream Democrats or Republicans—at least in the name of legislative accountability. Extremist values offend; they cause harm. More importantly, a majority of voters could not imagine adopting those values in the future. Thus, allowing expression of these offensive views does nothing to maximize the extent to which electoral preferences are reflected in legislative policy. Indeed, laws suppressing extremist viewpoints are more likely to reflect the present majority's impulses than to reflect any legislators' efforts to perpetuate themselves in office against their constituents' will.

Thus, a better explanation for a majority's choices, if any, to protect extremist speech, is a desire for political self-constraint. Though a voter is offended by their ideas, though he cannot imagine ever being persuaded by their ideas, he might wish to protect the Communists' or Klansmen's speech because he values their interests in individual fulfillment through speech, or because he views tolerance per se as an extraordinarily important political value. As previously suggested, however, if political self-constraint is a voter's reason for constitutionally prohibiting laws that forbid expression of obnoxious views, then judicial supremacy is counterproductive. 

123. This is the paradox of extremist speech. See, e.g., L. Bollinger, The Tolerant Society 12-42 (1986) (constitutional protection of extremist speech difficult to justify).

124. For example, after the Civil War's end, but before congressional Reconstruction, "Southern intransigence . . . took the form of denying freedom of speech to those who attacked Southern ways." W. Nelson, supra note 23, at 42.

125. See supra text accompanying notes 36-43.


127. See generally L. Bollinger, supra note 123.

128. See supra text accompanying notes 125-27; see also L. Bollinger, supra note 123, at 12-42 (protection of extremist speech difficult to justify); Schauer, Must Speech Be Special?, 78 Nw. U.L. Rev. 1284, 1289-92, 1305-06 (1983) (because self-fulfillment value can justify protecting much more than speech, it is weak justification for protecting speech).

129. Hamilton's skeptical view of a constitutionally protected free press does not support judicial supremacy. See The Federalist No. 84, at 514 (A. Hamilton) (C. Rossiter, ed. 1961) (free press depends on public opinion); see also supra note 103 (suggesting The Federalist No. 78 does not necessarily support judicial supremacy). Similar considerations apply to more subtle structural con-
iii. The Case for Congressional Supremacy

The foregoing suggests that congressional supremacy is unlikely to undermine electoral concerns for legislative accountability, which most likely are served by bright-line constitutional texts and the broadly uncontested core of fuzzy-line provisions. Furthermore, where the implications of the accountability value are unclear—where electoral concerns are more likely for political self-constraint with respect to the processes of making public policy—congressional supremacy would better promote the "interpretive" ideal of identifying the choices voters would make if engaged in extraordinarily thoughtful politics.

By explicitly adopting congressional supremacy for all constitutional issues, voters could avoid the risk not only that Congress and the Court would gradually develop an ethic of judicial supremacy, but also that Congress and the Court would have messy and unproductive confrontations over which institution has final "interpretive" authority with respect to any given constitutional clause or issue. This is not to say Congress and the Court would avoid confrontation altogether. On the contrary, the point of judicial review supplemented by congressional supremacy is precisely to encourage constructive interaction between Congress and the Court. Yet rather than evoking a sense of constitutional crisis, the interbranch struggle arising under congressional supremacy should focus attention on the merits of challenged policy, the merits of the Supreme Court's rationale for finding the policy constitutionally invalid, and the merits of subsequent congressional reconsideration. By focusing debate on the merits of policy, judicial review supplemented by congressional supremacy can enrich the "ordinary" political process and make it more like the extraordinary politics ideally underlying the creation of supreme constitutional text.

* * *

cerns such as the delegation of legislative power to procedures and institutions other than those prescribed in supreme constitutional texts. If such constitutional issues implicate concerns for political self-constraint, judicial supremacy is inappropriate. If they implicate concerns for preventing legislative entrenchment and corruption, judicial supremacy might be desirable. See infra text accompanying notes 200-13 (same issue for people relying on aging provisions). In this event, however, the desirability of judicial supremacy must be discounted by the improbability that the Court will find the legislature to have acted unconstitutionally. See infra text accompanying notes 250-53 (judicial supremacy encourages judicial deference).

130. See supra text accompanying notes 114-22.
131. See infra text accompanying notes 241-49, 268-72, 283-92 & 298-305.
This evaluation of judicial supremacy from the perspective of voters who have created their own constitutional texts yields three significant conclusions. First, while judicial supremacy seems necessary to perpetuate an extraordinary political advantage, it is not sufficient. Indeed, it is doubtful whether people can perpetuate an extraordinary political advantage by creating constitutional provisions. In the short term, they will lack control over their hand-picked Justices; in the longer term, as they lose their competitive edge, their opponents will regain influence not only in enacting legislation but also in selecting Justices. Second, congressional supremacy is a better route than judicial supremacy toward constitutional representation for people who have created constitutional provisions designed to secure the benefits of political self-constraint. Third, for constitutional provisions designed to ensure optimal legislative accountability, “bright-line” texts and core values generate uncontroversial “interpretive” answers and can be effectively enforced through congressional supremacy. Controversial “interpretive” questions more likely reflect concerns for political self-constraint and, therefore, should be resolved through congressional supremacy. Thus, congressional supremacy seems a better method than judicial supremacy for achieving the “interpretive” goals of people who seek political benefits from the principles of constitutional supremacy by creating their own constitutional texts.

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III. JUDICIAL REVIEW FOR PEOPLE WHO RELY ON AGING CONSTITUTIONAL TEXTS

This section will consider why voters today limit congressional discretion with aging constitutional texts rather than (i) create new constitutional provisions, or (ii) abandon constitutional supremacy altogether in favor of statutory supremacy. By explaining why the electorate today exploits the principles of constitutional supremacy in this way, one might define ideal versions of constitutional “interpretation,” and determine whether judicial supremacy or con-

132. See supra text accompanying notes 69-76 & 79-87.
133. See supra text accompanying notes 77-78.
134. See supra text accompanying notes 100-05.
135. See supra text accompanying notes 123-29.
136. For a definition of “statutory supremacy,” see supra text accompanying notes 14-15 & note 44.
gressional supremacy is a better mechanism for ensuring that Justices fulfill those “interpretable” ideals.

A. Why Constitutional Supremacy with Aging Constitutional Texts?

1. Ancestor Worship: A Self-Contradictory Justification

Reverence for ancestral heroes might be a reason for limiting congressional discretion with aging constitutional texts.\(^{137}\) If a voter wishes society to be governed by the choices made in past constitutional politics, rather than those that would be made in congressional or constitutional politics today, her “interpretable” ideal might look like Raoul Berger’s strict originalism: \(^{138}\) to identify the specific compromises wrought by the framers and ratifiers of each constitutional provision. \(^{139}\) Alternatively, it might resemble Chief Justice Rehnquist’s and Henry Monaghan’s more speculative version of originalism: to identify the choices that the framers and ratifiers would make if they were able to make decisions about the world today. \(^{140}\)

\(^{137}\) Cf. Ackerman, \textit{supra} note 8, at 1046; Shapiro, \textit{supra} note 19, at 1566 (originalism is one version of viewing law as coming “from above”; majoritarianism is another). Ackerman seems to define ancestor worship as judicial invalidation of a later legislative decision simply because it is inconsistent with an earlier one. While this scenario might suggest ancestor worship by the judiciary, it does not necessarily reflect ancestor worship by the electorate-at-large. For present purposes, ancestor worship is more properly viewed as a desire by the present electorate to remain governed by the past.

\(^{138}\) See generally R. Berger, \textit{supra} note 33.

\(^{139}\) People might create constitutional provisions to control future generations. See Perry II, \textit{supra} note 7, at 142 (constitutional amendment is dramatic way for present to speak with future); Ackerman, \textit{supra} note 8, at 1039 (during constitutional politics, “the democrat has a means of amplifying the voice of the People in a way that will arrest attention for a long time to come”); Levinson, \textit{Law as Literature}, 60 Tex. L. Rev. 373, 376 (1982) (purpose of constitutional control to preserve particular vision held by constitutional founders and prevent its overthrow by future generations). The question now asked concerns whether those subsequent generations want to be bound by past choices and, if so, why. A desire by the past to control the future can be satisfied only by cooperation from the future. See Chang, \textit{supra} note 10, at 787.

\(^{140}\) Justice Jackson articulated—and criticized—both versions of the originalist’s “interpretable” ideal: “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from material almost as enigmatic as the dreams Joseph was called upon to interpret for the Pharaoh.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J. concurring). Focusing on what the framers and ratifiers wanted (or would want) begs the question of whether they wished their decisions and their interpretable ideal to govern later generations. Cf. Bobbitt, \textit{Constitutional Fate}, 58 Tex. L. Rev. 695, 700 (1980) (noting John Adams’ view that founders sought to create written constitution to provide expression of fundamental values to which later generations could refer); Brest, \textit{The Misconceived Quest for the Original Understanding}, 60 B.U.L. Rev. 204, 209-21 (1980) (originalism must account for framers’ “interpretable intent”); Maltz, \textit{supra} note 97, at 796.
Yet for several reasons, ancestor worship is a self-contradictory reason for voters to rely on aging texts, rather than (i) to create new constitutional provisions of their own, or (ii) to abandon constitutional supremacy altogether in favor of statutory supremacy. First, if a voter identifies James Madison or Thaddeus Stevens as his ancestral hero, and wishes to be governed by the constitutional provisions they created, the voter makes his own choice. This choice must rest on the voter's own evaluations of the quality of each potential hero's thought. Thus, those who idolize the framers pursue their own values; they simply label their own values with some personified precedent. One does not avoid responsibility for making public policy by choosing to be an ancestor worshipper.

Second, if voters today wish to be governed by the values of those viewed as particularly wise, it does not make sense to limit the focus to Madison or Stevens. Indeed, voters might prefer constitutional provisions reflecting the wisdom not only of James Madison, but also that of other respected figures—whether Mohammed, Sigmund Freud, or Martin Luther King. Madison might have been wise, but perhaps not wise in all things; perhaps he gave less attention to other heroes' wisdom than a voter views as ideal; perhaps he could not have given adequate attention to the wisdom of a voter's other heroes because they had not yet been born.


142. This observation applies to issues not yet experienced, as well as to heroes not yet born. Consider, for example, abortion. Madison and Stevens simply did not focus their wisdom on abortion as a social issue. See W. Nelson, supra note 23, at 6 (framers of fourteenth amendment never considered abortion issue). Even if they had, because of changes in sexual mores and gender roles, abortion could not have had the same significance in their social context as it has in society today. Cf. Board v. Board of Educ., 347 U.S. 483, 492-93 (1954) ("[W]e cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation."); A. Bickel, supra note 8, at 102-03 (seeking framers' intent as dispositive of present constitutional controversies is "wrong question"); id. at 110 ("[O]ur own reasoned and revocable will, not some idealized ancestral compulsion . . . moves us forward."); Brest, supra note 140, at 223 (originalism unworkable for resolving modern constitutional conflicts); Chang, supra note 10, at 784-88 (relevant values for constitutional interpretation are those of people today); Sunstein, supra
Third, Madison was not alone in 1787; Thaddeus Stevens was not alone in 1868. Their views were compromised by competition with their political opponents. Thus, even if Madison or Stevens were a voter’s ideal, by choosing to apply the principles of constitutional supremacy to aging provisions, and to the “original understanding” of those provisions, the voter has delegated to Madison’s and Stevens’ opponents, and the political power they happened to enjoy at the time, authority to determine the extent to which his heroes’ preferences are reflected in public policy.

Thus, from the perspective of voters today, ancestor worship is not a convincing reason for applying the principles of constitutional supremacy to aging constitutional texts. One must look elsewhere to justify, or explain, an aging Constitution.

2. Laziness and Inertia: Deriving “Interpretive” Ideals of Constitutional Representation for Voters Today

The laziness and inertia of private citizenship reflect concerns that compete with a voter’s desire to maximize the extent to which his preferences are reflected in public policy. An unwilling note 42, at 1563 (unclear why framers’ values should matter to contemporary constitutional controversies).

143. Analysis in the previous section should suggest the extent to which any view of “original understanding” must depend upon other factors, e.g., whether those who created the provision held selfish or community-oriented “interpretive” ideals, and upon choices that judges necessarily must make about whose values to pursue and why. See supra notes 33, 47 & text accompanying notes 69-70. The concern for ensuring judicial accountability suggests that much of the meaning ultimately given to a newly created constitutional provision in application must be a function of continuing power relationships in practical politics. So viewed, any “original understanding” is far less significant than is continuing competition, at any given moment, to resolve continuing issues in one’s own preferred way. See supra text accompanying notes 69-87.

144. Bruce Ackerman’s treatment of the private citizen conflates two variables that should be viewed separately: first, the energy that one is willing to commit to making public policy and second, the extent to which one pursues “public regarding” concerns or “selfish” concerns when devoting energy to public policy. Ackerman attributes three characteristics to the private citizen—apathy, ignorance and selfishness. Ackerman, supra note 8, at 1034. Apathy and ignorance are functions of the energy one is willing to commit to public policy; selfishness relates to the extent to which one pursues “public regarding” concerns when devoting energy to public policy. Cf. Michelman I, supra note 42, at 21-23 (republicanism and pluralism are distinguishable not by energy people commit to public policy, but by quality of political debate); Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1694 (1984) (interested political actors might exercise political power to serve both selfish and publicly-oriented ends). I attribute only apathy and ignorance to the private citizen, and define him by the energy he is willing to commit to politics. The private citizen is one who is willing to devote energy to the formation of public policy—including
ingness to devote so much energy to politics, to sacrifice more insular concerns, can explain why voters today do not create their own constitutional provisions. Yet such private citizenship does not suggest that voters are uninterested in attaining the benefits that constitutional supremacy can provide. Otherwise, it would make no sense to place limits on congressional discretion with the principles of constitutional supremacy. Thus, the laziness and inertia of private citizenship do not vitiate the ideal of having constitutional provisions reflecting one's own preferences to the greatest extent possible.

This explanation for the infrequency of constitutional politics, despite a desire to attain the benefits of constitutional supremacy, suggests that if constitutional politics were much less bothersome, a majority among the national electorate would create their own constitutional provisions—toward perpetuating a temporary political advantage, securing the benefits of political self-constraint, or ensuring optimal governmental accountability. This explanation further suggests that because constitutional politics is too bothersome, voters hope that the Constitution can provide some second-best substitute for the supreme provisions that they would create if it were easier to do so.

Indeed, this explanation for aging constitutional provisions suggests the "interpretive" ideal that voters today would like

choices to exploit the principles of constitutional supremacy. Furthermore, for purposes of my analysis, the energies of citizenship might be directed in either selfish or public-regarding ways. Limiting the focus in this way makes sense given my rationale for using the private citizen idea—to explain why voters might seek to limit congressional discretion by applying the principles of constitutional supremacy to aging constitutional texts, rather than to create new ones of their own. Thus, the private citizen might wish to exploit the principles of constitutional supremacy to perpetuate a temporary political advantage, secure the benefits of political self-constraint, or ensure optimal legislative accountability. Indeed, one should avoid adjectives such as "selfish" or "public-regarding" as question-begging. For example, are people who wish to achieve their preferences about abortion at the cost of denying their opponents' right to shape public policy acting in a "public-regarding" or a "selfish" way? On the one hand, they are pursuing policies they view as morally correct; thus, their efforts, at least from this perspective, have a "public-regarding" aura. On the other hand, they are pursuing controversial policies at the expense of democracy—at the expense of their opponents' desire to vote their own morality.

145. Unlike the antifederalists, most people do not seem to view public-spirited politics as among the worthiest of pursuits. See, e.g., G. Wood, supra note 42, at 500 (antifederalists of 1787 retained Republican ideology of 1776); id. at 53 ("The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their [1776] Revolution."); Sunstein, supra note 54, at 35-38 (antifederalists valued unselfish, publicly-oriented participation in politics as route to happiness); cf. supra note 144.
Supreme Court Justices to perform. But for the hard work, a majority among voters today would create their own constitutional provisions. Previous analysis has suggested that voters who create constitutional provisions would articulate the “interpretive” ideals characterized under the rubric of constitutional representation. Thus, voters today should articulate the very same “interpretive” ideals of constitutional representation for their aging, second-best constitutional provisions— to identify choices they would make if engaged in constitutional politics. If voters could find judges to fulfill this “interpretive” ideal, the electorate could thereafter effortlessly serve their reasons for exploiting constitutional supremacy—whether perpetuating a temporary political advantage, securing the benefits of political self-constraint, or ensuring optimal legislative accountability—as if they actually had engaged in constitutional politics and created their own constitutional texts.

3. Constitutional Representation Versus Other Interpretive Theories: The Living Electorate’s Perspective

a. Originalism

Originalism would have the Court’s interpretations of constitutional meaning remain static, despite a substantial evolution of social values and institutions. Rather than an ideal of identifying choices today’s electorate would make if engaged in formal constitutional politics, the originalist would identify choices that past electorates actually made in constitutional politics. See supra text accompanying notes 62-66 (provisions intended to perpetuate extraordinary political advantage); supra text accompanying notes 88-94 (provisions intended to secure benefits of political self-constraint); supra text accompanying notes 106-08 (provisions intended to ensure optimal legislative accountability).

146. See supra text accompanying notes 62-66 (provisions intended to perpetuate extraordinary political advantage); supra text accompanying notes 88-94 (provisions intended to secure benefits of political self-constraint); supra text accompanying notes 106-08 (provisions intended to ensure optimal legislative accountability).

147. One might have a selfish, personal ideal, yet be unable to achieve it in practice because one’s opponents are pursuing their own selfish ideals. Together, such voters would generate a compromise, corporate ideal and select a compromise judge. See supra notes 33, 45; infra text accompanying notes 175-91.

148. Cf. Lee, supra note 10, at 1011 (“The [Supreme] Court does not sit as a continuous constitutional convention. It is the Constitution itself—and not the pronouncements of the justices—that is the supreme law of the land.”). But why is the Constitution the “supreme law of the land”? Surely not simply because it says so. It is the supreme law of the land to the extent that the bulk of society accepts or endorses the proposition. I have endeavored to consider why people should accept or endorse that proposition. Why should people wish to exploit the principles of constitutional supremacy by applying them to aging constitutional texts?

149. Raoul Berger has acknowledged that “[h]ad it fallen to me . . . to decide some of the ‘substantive due process’ and ‘equal protection’ cases ab initio, I
cantly, however, the originalist does not deny the essence of constitutional representation as the ultimate benchmark for generating constitutional meaning: the Constitution should reflect social changes and the present electorate's political values, but only through formal amendment. 150

Yet it is only when a court's originalist decisions become intolerably removed from contemporary political reality that voters could possibly be induced to overcome laziness and inertia and overturn judicial doctrine by creating their own constitutional provisions. So viewed, the costs of originalism are remarkable. On the one hand, only through years of ever-increasing judicial deviation from the choices voters today would make if engaged in constitutional politics will the national electorate gain sufficient incentive to overcome laziness and inertia, respond to the need for more relevant uses of constitutional supremacy, and create its own constitutional provisions. 151 On the other hand, it is precisely to avoid the hard work and high stakes of formal constitutional politics that voters apply the principles of constitutional supremacy to aging texts, rather than create new ones of their own. Thus, not only does originalism promise years of "interpretive" failure; 152 it promises, when its "interpretive" results be-

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150. See id. at 353-54; R. Bork, The Tempting of America 143 (1990).

151. An originalist might claim that the failure to amend past constitutional choices implies public acceptance of those choices. See, e.g., R. Berger, supra note 33, at 396 (departure from originalism undermines article V process for amendment); Monaghan, Our Perfect Constitution, 56 N.Y.U. L. REV. 353, 376 (1981) ("Our legal gründnorm has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.") (emphasis in original). This claim is weak for several reasons. First, the electorate is simply unaware of the "original intention" underlying the Constitution's provisions. Second, given this lack of awareness, failure to amend the Constitution at best reflects acquiescence to the Court's "interpretations" of the Constitution's meaning. Cf. Amar, supra note 42, at 1079 (failure to amend constitution suggests "basic (even if not perfect) contentment" with "constitutional status quo"). This "constitutional status quo" includes both text and judicial gloss. Thus, failure to amend supports Justice Brennan's decisions as well as Justice Rehnquist's. See Chang, supra note 10, at 789 n.111. Third, a discontinuity between original intent and contemporary values underlying constitutional amendment could develop only over a period of time. Thus, as suggested in the text, if courts did enforce the original understanding, constitutional amendment would be evidence of a long period in which judicial review failed to reflect the choices the national electorate would make if engaged in extraordinarily thoughtful constitutional politics today.

152. Thus, I disagree with Michael Perry that interpretive (i.e., originalist) judicial review is easily justified as "legitimate," while the legitimacy of noninter-
come so utterly deviant, to force voters to devote the extraordinary effort to formal constitutional politics that they presumably hope to avoid.\(^{158}\)

b. Conventional Morality

Harry Wellington has suggested that in making constitutional law, courts should “translate conventional morality into legal

pretive (i.e., nonoriginalist) judicial review is far more problematic. To serve the framers' values (Perry's "interpretivism," see Perry I, supra note 7, at 10-11), is not necessarily to serve the constitutional values that voters would pursue today if engaged in constitutional politics. See infra text accompanying notes 234-44; infra note 237. Indeed, even Perry's own axiom of legitimacy as electorally accountable policymaking raises serious questions about the legitimacy of interpretivism. See Perry I, supra note 7, at 125. Institutions that serve the values of past electorates do not necessarily serve the values of the present electorate, and "electoral accountability" implies concern for the present. Thus, Perry's professed strongest justification for noninterpretive review—"[i]f in fact the framers had authorized the judiciary to exercise (some sort of) noninterpretive review," id. at 24—is not strong at all. The question must instead be about the choices that the present electorate, if engaged in extraordinary constitutional politics, would make about proper judicial behavior.

Perry's search for a "functional justification for noninterpretive [judicial] review," id. at 7, differs from my inquiry in at least two other important respects. First, Perry does not define the perspective from which "function" is evaluated. I explicitly take the perspective of political competitors who can endeavor to affect public policy in different political forums. Second, by questioning all judicial review, rather than just noninterpretive review, I am led to seek "functional justifications" not just for a method of judicial review, but for constitutional supremacy itself. In short, my inquiry seeks "functional justifications" for institutional arrangements more fundamental than different versions of judicial review, and does so from the perspective of political competitors pressing their own values.

158. Even accepting all of this, one might argue that originalism at least best serves the "rule of law." See, e.g., R. Berger, supra note 33, at 283-99. A judge who speculates about the choices voters today would make if engaged in constitutional politics arguably has more latitude than one who seeks to identify the original meaning of constitutional provisions. By requiring judges to remain bound by relatively clear "interpretive" rules, originalism at least predictably limits judicial discretion. Id. at 283-99. But "there is a profound difference between the rule of law and submission to any particular institution's understanding of what that law requires, unless of course one adopts a catholic view of law, which identifies it with the utterances of a specific institution." Levinson, Could Meese Be Right This Time?, 61 Tul. L. Rev. 1071, 1076 (1987). Indeed, a goal of predictably limiting judicial discretion argues against originalism as well, because the most predictably restrictive rule would be the elimination of judicial review.

Judicial review makes sense only as a means to an end. If the end is constitutional representation, the pertinent question must be what provides the best means: originalism with judicial supremacy; or originalism with congressional supremacy; or speculative inquiry into contemporary values with judicial supremacy (or congressional supremacy); or even the abandonment of judicial review altogether.
principle."

Justice Goldberg and Harlan pursued such an approach in *Griswold v. Connecticut* by referring to dominant national traditions and practices in evaluating the constitutionality of Connecticut's quirky law prohibiting the use of contraceptives. Similarly, Justice White examined national values as suggested by prevailing state legislation in concluding that laws criminalizing homosexual sodomy are not unconstitutional.

Among three of the dominant modes of "interpretation" positing a "living" Constitution whose meaning develops outside of article V processes, the notion of conventional morality is most rooted in dominant political consensus. By referring strictly to prevailing traditions and practices that people pursue in everyday living and prevailing policies that voters choose in everyday politics, this approach loses sight of the special benefits voters might wish to achieve by creating supreme constitutional texts—reasons for making law by extraordinary constitutional politics rather than by ordinary legislation. Thus, while conventional morality might keep judicially-declared constitutional law more in step with the times than can originalism, it also transforms the nation's constitutional law into national common law.

c. "Living" Principle

Among those who advocate departure from the original understanding by focusing on the coherent development of moral "principle" are Ronald Dworkin and Michael Perry. Professor Dworkin argues that judges should seek "integrity"—a consistent adherence to principle—rather than "checkerboard solutions" that accommodate conflicting principles or compromise principle


155. 381 U.S. 479 (1965).

156. *Id.* at 486-87, 493 (Goldberg, J., concurring); *id.* at 501-02 (Harlan, J., concurring); see Chang, *supra* note 10, at 819-25.


158. The other two dominant modes of interpretation positing a "living" Constitution are "living principle" and "liberal republicanism." For a discussion of "living principle," see *infra* notes 160-68 and accompanying text. For a discussion of liberal republicanism, see *infra* notes 169-73 and accompanying text.


160. For a discussion of Dworkin's theories, see *infra* notes 161-64 and accompanying text. For a discussion of Perry's theories, see *infra* notes 165-68 and accompanying text.
to "expediency." He justifies this proposition with a quasi-majoritarian argument:

[M]any of us, to different degrees in different situations, would reject the checkerboard solution not only in general and in advance, but even in particular cases if it were available as a possibility. We would prefer either of the alternative [principled] solutions to the checkerboard compromise.

Dworkin's view is vulnerable because it is demonstrably false that people prefer coherent moral positions with which they entirely disagree to "checkerboard" solutions with which they partially agree. The original understanding of the fourteenth amendment was a checkerboard. Both pro-choice and pro-life activists fight vigorously about every case that might marginally weaken or strengthen Roe v. Wade. To the extent that Dworkin does care what "we" think, assuming that "we" means the citizenry-at-large, an insistent pursuit of moral coherence (beyond choices "we" would make if engaged in extraordinary constitutional politics) is wrong.

Professor Perry argues for judicial development of constitutional principle without regard to majoritarian sentiment. While he suggests that the American people are committed to moral development as a community, Perry insists that "answers to human rights questions are right (or not) independently of what a majority of Americans happen to believe, either in the short-term or in the long-term." Thus, Perry suggests that a judge should not pursue "majoritarian beliefs as to what the relevant aspiration requires," but "should rely on her own beliefs as to what the aspiration requires." Perry's view is vulnerable because every provision of the

161. See R. Dworkin, supra note 92, at 178-85.
162. Id. at 182.
165. See Perry I, supra note 7, at 98-102, 111.
166. Id. at 111.
167. Perry II, supra note 7, at 149. Perry asks, "why should judicial review be majoritarian? For the nonoriginalist no less than for the originalist, judicial review is a deliberately countermajoritarian institution." Id.: cf. id. at 4 (constitutional adjudication should be "a species of deliberative, transformative politics"—"distinct from a politics that is merely manipulative and self-serving"); id. at 121 (same); id. at 151-60 (same).
Constitution was created by representatives of a *majority* of the eligible electorate; every Supreme Court Justice was approved by representatives of a *majority* of the eligible electorate. Perry bows to this electoral perspective to some extent in suggesting that Americans are committed to moral development as a community. But if Perry believes that the views of the American citizenry are significant for justifying his brand of constitutional “interpretation,” he must rely on Dworkin’s vulnerable premise that “we” prefer an entirely wrong position of coherent principle to a partially right moral checkerboard. If Perry and Dworkin do not truly believe that the Court’s constitutional decisions should (somehow) be rooted in majoritarian choice, then they have strayed far from the political foundation of American constitutionalism.

d. Liberal Republicanism

Cass Sunstein articulates four principles of “liberal republicanism”: political deliberation, equality of political actors, agreement as the basis for public policy, and participatory citizenship. Bruce Ackerman focuses on processes of formal constitutional amendment as reflecting an ideal of engaged electoral policymaking. Both Sunstein and Ackerman seem to conceive liberal republicanism in terms similar to the notion of political self-constraint presented in this article: policymaking that is publicly-oriented in an extraordinary way and rooted in the electorate-at-large.

Liberal republicanism is less a theory of constitutional interpretation than an ideal conception of the processes by which public policy should be made. Sunstein does not prescribe guidelines

168. In his discussion of *Roe*, Perry seemed to shift to a perspective closer to the one I advance here. Criticizing *Roe*, but advocating a narrower invalidation of the Texas anti-abortion statute, Perry argued that the Court should have found a constitutional right to abort a fetus (i) to save the life of the mother, (ii) when the pregnancy was caused by rape or incest and the fetus is not yet viable and (iii) when the fetus is genetically defective and would live a “short and painful” life. *Id.* at 175. He advocated this view “[b]ecause it is most unlikely that abortion legislation failing to provide even for those relatively narrow exceptions would be enacted or maintained in contemporary American society.” *Id.* This is not an approach seeking the judge’s personal view of moral aspiration; rather, this is an approach based on a realistic evaluation of the political deliberation in which voters today would engage.


170. See Ackerman, *supra* note 8, at 1053-56.

for vindicating an ideal of liberal republicanism through judicial review.\textsuperscript{172} Ackerman does so only with the notion of “structural amendment,” which is less a theory for interpreting old constitutional provisions than a prescription for making and interpreting new constitutional provisions by non-article V political processes.\textsuperscript{173}

* * *

Originalism is deficient because it focuses on the wrong electorate and, in so doing, prescribes judicial failure until a new electorate is driven to create its own constitutional text and its own original understanding. Conventional morality is deficient because it focuses on the wrong category of values and, in so doing, transforms constitutional courts into common law courts. “Living” principle is deficient because it focuses on no electorate at all and, in so doing, denies electoral rights and responsibilities for making constitutional law. Liberal republicanism is deficient, despite prescribing an ideal attitude about public policy for today’s electorate, because it provides little guidance for interpreting aging constitutional provisions.

From the voters’ perspective, the essential question for judicial enforcement of aging constitutional provisions must concern a majority’s aspirations—not their everyday preferences, but their constitutional aspirations. This is the essence of constitutional representation. The task remains to determine how best to ensure that judicial review does yield the decisions voters would make if engaged in extraordinary constitutional politics.\textsuperscript{174}

\textsuperscript{172} Sunstein does tentatively prescribe various aspirations as consistent with values of liberal republicanism. See Sunstein, supra note 42, at 1578 (increased sensitivity to concerns of federalism); id. at 1579 (more vigorous rationality review); id. at 1580 (more judicial challenges to conventional morality like Roe); id. at 1585 (invigorating the voices of disadvantaged groups (blacks, women, handicapped, gays)). But he provides little guidance on how, when, and to what extent courts should promote such values. Courts might still intrude wrongly on legislative decisionmaking, thereby undermining the republican value of self-determination by the citizenry, or wrongly fail to challenge legislative thoughtlessness, thus undermining the republican value of deliberation. See id. at 1587.

\textsuperscript{173} See Ackerman, supra note 8, at 1053-56 (political activity in 1986 elections responded to Supreme Court by “structural amendment” of the Constitution); infra note 265 (evaluating Ackerman’s “structural amendment”).

\textsuperscript{174} Attaching the “interpretive” ideal of constitutional representation to aging provisions fails to serve the republican valuation of political activity: that politics enriches life and ennobles individuals. Cf. Sunstein, supra note 54, at 37 (“Jefferson proposed that the Constitution should be amended every generation, partly to promote general attention to public affairs.”). Thus, even if judges successfully achieved constitutional representation with aging provisions, government will have become a public policy machine without the republicans’
B. Why Judicial Supremacy?

This section considers whether a regime of judicial supremacy can achieve the “interpretive” ideals of constitutional representation toward fulfilling each motive voters might have for applying the principles of constitutional supremacy to aging constitutional texts: (i) perpetuating a temporary political advantage, (ii) securing the benefits of political self-constraint, or (iii) ensuring optimal legislative accountability.

1. “Interpreting” Aging Constitutional Texts Toward Perpetuating a Temporary Political Advantage

a. Ideals of Constitutional Representation and the Case for Judicial Supremacy

Like a majority among the Northern electorate in 1868, a voter might have certain values that she views as more important than her opponents’ democratic right to shape public policy. For example, one might care so much about a woman’s right to choose an abortion, a fetus’s right to life, or affirmative action, that she wishes to deny others the right to vote their contrary preferences. Such a voter might wish for Supreme Court Justices who will “interpret” aging constitutional provisions by representing her personal preferences while ignoring those of her opponents. Voters who succeed in finding such Justices might want to give them the powers of judicial supremacy toward achieving national public policy unattainable in, and untouchable by, Congress.

This psychology of trumping Congress describes a prevailing attitude about constitutional “interpretation,” judicial review, and the selection of Supreme Court Justices. For example, President Reagan often argued that the Constitution, properly interpreted, not only permits laws restricting access to abortions, but also itself prohibits abortion, because a fetus is a “person” for purposes of the fourteenth amendment. Diametrically op-

cherished human soul. Cf. Michaelman I, supra note 42, at 76-77 (republican politics best reflected within Supreme Court). I will suggest, however, that this deficiency would be mitigated if judicial review were supplemented by congressional supremacy. See infra text accompanying notes 241-46, 346.

175. See supra text accompanying notes 23-35.

176. See, e.g., Seidman, supra note 22, at 1577 (“Vindication of the person’s own [political] preferences might appear more likely if at least some government officials were shielded from pressures generated by the misguided majority.”); supra notes 67-68 and accompanying text.

177. President Reagan remarked: “I believe that until and unless someone
posed, the American Civil Liberties Union (ACLU) has argued that the Constitution, properly interpreted, prohibits laws that restrict access to abortions.\textsuperscript{178} Another example: the Reagan Administration argued that the Constitution prohibits affirmative action programs that have an "unfair" impact on "innocent" whites.\textsuperscript{179} Diametrically opposed, the ACLU has argued that the Constitution, properly interpreted, not only permits laws using racial classifications to compensate for the effects of past racial discrimination, but also prohibits policies having an "unfair" discriminatory impact on blacks\textsuperscript{180}—essentially a position that a certain measure of affirmative action is constitutionally mandated.\textsuperscript{181}

Thus both President Reagan and the ACLU would like to establish national norms governing abortion and affirmative action through judicial review and in the name of the Constitution, when they lack the political clout to enact their preferred policies in Congress. Their attitude is one of constitutional representation toward denying their opponents' right to shape public policy—the same ideal of constitutional representation held by Thaddeus Stevens and the Northern electorate when they created the fourteenth amendment to perpetuate an extraordinary political advantage over their less enlightened political opponents.\textsuperscript{182}

can establish that the unborn child is not a living human being, then that child is already protected by the Constitution, which guarantees life, liberty, and the pursuit of happiness to all of us." Debate Between the President and Former Vice President Walter F. Mondale in Louisville, Kentucky, 2 PUB. PAPERS 1441, 1451 (Oct. 7, 1984); see also id. at 1021, 1115.


\textsuperscript{179} See Shenon, Meese Sees Racism in Hiring Goals, N.Y. Times. Sept. 18, 1985, at A16, col. 5 ("The idea that you can use discrimination in the form of racially preferential quotas, goals and set-asides to remedy the lingering social effects of past discrimination makes no sense in principle; in practice, it is nothing short of a legal, moral, and constitutional tragedy.") (quoting former Attorney General Meese). In Meese's view, affirmative action programs are unconstitutional because the Civil War amendments were intended to make the Constitution "officially colorblind." \textit{Id}. Racial "classifications are wrong when they are used by Government to bestow advantages on whites and men; they have no greater claim of morality when the tables are turned." \textit{Id}.

\textsuperscript{180} See W. DONAHUE, supra note 178, at 81.

\textsuperscript{181} See id. (South Carolina chapter argues bar examination unconstitutional because of discriminatory impact on blacks).

\textsuperscript{182} Cf. Ackerman, supra note 6, at 1175 (Bork nomination "a desperate effort by a lame-duck President to impose a constitutional program that had otherwise failed to gain the support of Congress").
b. The Improbabilities of Constitutional Representation and the Case Against Judicial Supremacy

From 1861 through 1874, the Northern electorate that created the fourteenth amendment also could install Supreme Court Justices without meaningful competition from the antebellum white Southern electorate.\textsuperscript{183} Despite this extraordinary political advantage, however, Northern voters could not keep the Court accountable to their values in the short term, let alone a generation hence.\textsuperscript{184} Thus, previous analysis suggested that it might not make sense even for those who do have an extraordinary political advantage to seek to perpetuate that advantage by creating supreme constitutional provisions.\textsuperscript{185}

For several reasons, voters today must face even greater difficulty in denying their opponents' right to shape public policy by selecting Supreme Court Justices to exercise the powers of judicial supremacy. First, unlike the Northern electorate of 1868, voters today lack an extraordinary political advantage to exploit. In selecting Supreme Court Justices to "interpret" aging constitutional texts, Republicans must compete with Democrats, and the John Birch Society must compete with the ACLU, just as they must compete in enacting congressional legislation. This is not to say that there are no momentary political advantages to be exploited. It is to suggest, however, that any such advantages reflect the cycles of ordinary politics. The advantage that might enable conservatives to put Judge Bork on the Court today is the sort of advantage that liberals might enjoy four years hence—and with it, the power to respond to Robert Bork with Laurence Tribe. Voters who are part of a contemporary majority—whether the ACLU Democrats in the 1960s or Ronald Reagan Republicans in the 1980s—are, at best, in a position analogous to the Northern electorate after it lost its extraordinary political advantage over the white Southern electorate.\textsuperscript{186}

\textsuperscript{183} From 1861 through 1868, Southern states were not represented in Congress at all. Although the Southern states regained their formal representation after the fourteenth amendment's ratification in 1868, Congress's efforts to reconstruct the Southern electorate greatly weakened the antebellum power structure. It was not until the election of 1874 that the Republicans' domination began to weaken significantly. See supra note 81.
\textsuperscript{184} See supra text accompanying notes 69-87.
\textsuperscript{185} See supra text accompanying notes 79-87.
\textsuperscript{186} Richard Friedman attributes to Laurence Tribe the motive of trying to fill the Court with like-minded Justices and argues its ineffectiveness. Tribe's . . . goal is to ensure that . . . the Court is composed of Justices who think the way he does . . . . If Tribe is in the minority, as I suspect,
Second, because no portion of the electorate today is disenfranchised, unlike the Southern electorate of 1868, it is unlikely that voters could install even one predictable ideologue (like Bork or Tribe) on the Court to insulate policies supported by majorities today from future erosion. On the one hand, if a congressional majority with respect to a given issue is permanent and unchallengeable, there would be no need for Justices to protect relevant statutes from congressional erosion; the motive of perpetuating a temporary political advantage is inapplicable. On the other hand, if a congressional majority is unstable and temporary, it might include some people who are inexorably committed to the policy, but also must include others who are only tentatively committed. Those who are only tentatively committed would be reluctant to bind their own discretion to change their minds.\textsuperscript{187} Thus, a significant conclusion: For a majority among the national electorate with respect to controversial issues at any given time—those temporarily in a minority and those temporarily in the majority who might change their minds—the goal of binding congressional discretion toward perpetuating a temporary political advantage and, therefore, judicial supremacy as a means toward attaining that goal, make little sense.\textsuperscript{188}

Third, even if a voter is part of a political minority who are inexorably committed to some policy and who want to exploit a temporary alliance with more casual dilettantes, it follows from the foregoing that these minority ideologues must find a judicial candidate who might perform their "interpretive" ideal of constitutional representation, but whose commitment to that ideal is not so obvious as to frighten temporary allies. This would be a

\textsuperscript{187} See supra text accompanying notes 117-22. This proposition does not apply to the motive of political self-constraint for limiting congressional discretion. See supra text accompanying notes 36-43, 88-105, 123-29; infra text accompanying notes 193-99; see also Chang, supra note 10, at 774-82.

\textsuperscript{188} See Seidman, supra note 22, at 1577 (trumping legislature against majority's preferences "has no force at all with the majority that disagrees"). The Bork nomination provides an example. Friends and foes viewed Robert Bork as a judicial candidate with hard ideological contours. His prospective service on the Court easily provoked intense passions. Anthony Kennedy's friends were fewer and his foes were far less moved because he was so much more of an enigma than Bork. Bork failed; Kennedy sits on the Court.
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risky enterprise, because such potential Justices might be not only less committed in appearance to the policy at issue, but also less committed in fact.189

Fourth, even if a minority of the national electorate who are inexorably committed to some policy (i) could hand-pick some Justices and (ii) could predict how those Justices will vote, it is still not clear that these voters will be served by constitutionalizing their preferences and removing issues from congressional purview. Over the long run, their opponents, members of a minority who are inexorably dedicated to other policies, might respond by selecting Justices toward perpetuating their own cyclical political advantages. By matching short-term "successes," minority ideologues might do no better than simply trade issues, resolved in the name of constitutional supremacy by a Supreme Court exercising the power of judicial supremacy.190 Thus, even for a committed ideologue, endeavoring to perpetuate this sort of ordinary political advantage makes sense only if he cares more about the issues that his own Justices manage to constitutionalize than about the issues that his opponents' Justices will manage to constitutionalize.191

189. See Freund, Appointment of Justices: Some Historical Perspectives, 101 Harv. L. Rev. 1146, 1156 (1988) (hazards in judicial selection as route to make public policy include unforeseen issues, changes in nominee's views); Friedman, supra note 64, at 1291-302 (Justice's performance over time difficult to predict). President Bush's nomination of the unknown, and largely unknowable, David Souter reflected this strategy, to the dismay of those who wish to preserve Roe v. Wade. See, e.g., Sullivan, Bush's Supreme Court Red Herring, N.Y. Times, July 29, 1990, § 4, at 19, col. 1 ("There was a 'litmus test' . . . on abortion: the President looked for the candidate that would turn the litmus paper no visible color at all."); see also Lauter & Ostrow, And Then There Were 2 and Finally 1—Souter, L.A. Times, July 25, 1990, at A1, col. 3 (Souter's intellect was persuasive factor in President's selection of Souter over Judge Edith Jones, "[b]ut even more important was his lack of a 'paper trail' on controversial issues.").

190. Lino Graglia argues that while "the Left" has been able to enact its policies through judicial activism, "the Right can have no similar expectation," because of the purportedly liberal orientation of academia and the media. See Graglia, supra note 186, at 73-74. Nevertheless, the Court's decisions limiting local discretion to pursue affirmative action programs can well be characterized as effective judicial activism from "the Right." See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (restricting local discretion to set aside percentage of public contracts for minority business enterprises); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (restricting local discretion to pursue affirmative action goals in lay-off provision of collective bargaining agreement); see also Chang, Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?, 91 Colum. L. Rev. 790, 810-21 (1991).

191. The analysis must be refined a bit if one focuses on Ackerman's periods of "transformative appointments." See Ackerman, supra note 6. Suppose, for example, that one political party has an opportunity to appoint a controlling majority of the Supreme Court—such as the Roosevelt Democrats and the Rea-
This analysis suggests that from the perspective of ordinary voters, selecting Supreme Court Justices to “interpret” aging constitutional texts toward perpetuating an ordinary political advantage makes little sense. For a majority at any given time—those opposed to the policies that committed ideologues wish to mandate as constitutional law plus those temporarily in favor of such policies who might change their minds—the motive is self-defeating. For minorities of committed ideologues temporarily empowered by an alliance with wavering moderates, the goal makes good sense, but effective means are largely unattainable.


While no one today has enough power to create constitutional provisions toward perpetuating an extraordinary political advantage, the electorate can engage in extraordinarily thoughtful politics toward securing the benefits of political self-constraint. Voters have not done so, however, because of laziness and inertia. Thus, the electorate relies on aging constitutional texts as a second-best source of evidence from which Justices might identify the choices voters would make if engaged in extraordinarily thoughtful constitutional politics today.¹⁹²

Previous analysis concluded that if voters actually did create their own provisions for political self-constraint, they could serve the “interpretive” ideal of constitutional representation better with congressional supremacy than with judicial supremacy.¹⁹³ Given the possibility of judicial misbehavior in rejecting the ideal of constitutional representation, or error even while endeavoring to serve that ideal, the electorate needs some mechanism for

¹⁹² See supra text accompanying notes 139-43. It would be equally implausible—at least for a majority of the electorate at any given time—for people to be Roosevelt or Reagan worshippers as a basis for giving Roosevelt or Reagan Justices the powers of judicial supremacy. See supra note 139, text accompanying notes 117-22.

¹⁹³ See supra text accompanying notes 144-48.

¹⁹⁴ See supra text accompanying notes 100-05.
keeping judges accountable.\textsuperscript{194} By supposing that voters would retain meaningful memories of their extraordinary constitutional politics—that a voter remains latently sensitive to her own concerns for political self-constraint—one could conclude that the electorate would not choose through Congress to overturn a judicial "interpretation" that rings true as a better judgment made in formal constitutional politics. Furthermore, with congressional supremacy, voters could overturn a judicial "interpretation" that deviated from their "interpretive" ideal of constitutional representation.\textsuperscript{195}

This justification for congressional supremacy does not apply to members of the national electorate today. Voters today have no memories of choices for political self-constraint to recapture. They have not engaged in formal constitutional politics about the broad range of issues the Supreme Court faces. They have neither seriously considered whether and why political self-constraint might be a good idea, nor identified specific values that should be specially protected. Thus, without memories of choices for political self-constraint to recapture, voters today seem to have far less reason to trust themselves to keep judges accountable to the "interpretive" ideal of constitutional representation than they would if they actually had engaged in their own extraordinarily thoughtful constitutional politics.\textsuperscript{196}

At the same time, however, aging constitutional texts provide less effective evidence for Justices to fulfill an "interpretive" ideal of constitutional representation today than they provided for the Justices chosen by the voters who actually created those provi-

\textsuperscript{194} See supra text accompanying note 99.

\textsuperscript{195} See supra text accompanying notes 100-05.

\textsuperscript{196} Indeed, one can question the competence of Presidents and Senators to evaluate judicial candidates and judicial philosophies. Yet as Professor Carter has suggested, "This is no knock on Senators; it is, if anything, a knock on the notion that something as obscure and subtle as 'judicial philosophy' is a sensible measuring stick for use in the essentially political process of selecting judges." Carter, supra note 116, at 1195. This point is also implicit in Professor Schauer’s view that for such divergent "interpretive" approaches as positivism, realism, and Dworkinism, there is no determinate result for controversial legal questions. "Instead," he notes, "the decision is likely to require, under any of a number of now popular theories of adjudication, recourse to the political, economic, social, cultural, and moral norms of the milieu in which the judge operates." Schauer, supra note 22, at 1731; cf. Perry I, supra note 7, at 100 ("Executive and especially legislative officials tend to deal with fundamental political-moral problems, at least highly controversial ones, by reflexive reference to the established moral conventions of the greater part of their particular constituencies.") (emphasis in original); Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 744 (1982) (interpretation determined by expectations of "interpretive community").
sions. Indeed, it is hardly clear why, and how, aging provisions provide any basis for a judge to identify choices the electorate today would make if engaged in extraordinarily thoughtful politics. Beyond this, with each passing year, disputes about proper methods of constitutional interpretation, and proper answers to specific constitutional issues, further undermine any common understanding of what judicial review is, or should be.

Thus, a dilemma: Voters today have less reason than do people who create constitutional texts to trust both themselves and their judges to vindicate the electorate's concerns for political

197. I have elsewhere posited that a past electorate's constitutional choices can reflect the present electorate's constitutional values. See Chang, supra note 10, at 792. While a premise of "constitutional continuity" is necessary for fulfilling ideals of constitutional representation by reference to aging constitutional provisions, it is problematic as an "interpretive" device for several reasons. First, it assumes that judges today can determine which constitutional provisions were enacted with a motive for political self-constraint, which to perpetuate an extraordinary political advantage, which to ensure optimal legislative accountability, and which as a result of some combination of the three. A mistake could have far-reaching consequences. See id. at 830-70 (examining implications of viewing fourteenth amendment as originally intended to secure benefits of political self-constraint); id. at 892 n.266 (implications of viewing fourteenth amendment as originally intended to perpetuate an extraordinary political advantage). Second, even if one assumes that the tenth amendment's concern for federalism, for example, was framed toward securing the benefits of political self-constraint, but see infra note 262, one can recite a litany of changes from 1787 or 1868 to 1991—changes in attitudes, composition of the electorate, the nature of the economy, technology, America's global role, among many others. One must wonder whether these changes, given a premise of constitutional continuity, are merely superficial or instead are deeply meaningful for fulfilling the "interpretive" ideal of constitutional representation. If meaningful, how and why? See Chang, supra note 10, at 794-807 (unsatisfactory attempt to address these questions and to generate specific "interpretive" answers from a premise of constitutional continuity toward an ideal of constitutional representation). Third, although the framers and ratifiers of aging constitutional provisions never focused on abortion and, therefore, never made extraordinarily thoughtful policy about abortion, it hardly follows that voters today, if engaged in extraordinarily thoughtful constitutional politics, would not make choices for political self-constraint about abortion. One can be extraordinarily thoughtful about any issue, and if extraordinarily thoughtful, one's choices might be different from those made carelessly in everyday politics. Whether the electorate's extraordinary thoughtfulness about abortion would yield a pro-choice policy, a pro-life policy, or a pro-federalism policy, however, seems an unanswerable question. See infra text accompanying notes 293-303. Fourth, the foregoing has assumed that a judge would choose to adopt the "interpretive" ideal of constitutional representation, and generated from the probabilities of good faith error a need for some mechanism to keep judges accountable to that ideal. Yet judges might fail to serve electoral concerns not only by error, but also by design. See supra text accompanying notes 73-76 & 96-98. It hardly needs stating that there is intense disagreement about what approaches for constitutional interpretation are best—originalism, conventional morality, "living" principle, liberal republicanism, something in between or beyond. Even within each approach, there are disagreements about specific results in specific controversies.
self-constraint. Toward mitigating this dilemma, one might consider other options by which these constitutional concerns might be served. For example, voters could overcome laziness and inertia to create a new Constitution. In doing so, the electorate could develop an essential self-awareness they now lack. Voters (and their representatives) would have memories of their own better politics, and thereby could replace judicial supremacy with congressional supremacy as a mechanism to ensure that their own concerns for political self-constraint are effectively vindicated. Yet this option requires a level of political activity that, apparently, most voters would rather avoid.\(^{198}\)

A second option would take aging texts as they are and determine whether judicial supremacy or congressional supremacy is the less imperfect “interpretive” regime to serve concerns for political self-constraint. I will argue that enforcing aging constitutional provisions through judicial review supplemented by congressional supremacy is the better option.\(^{199}\)

Before this, however, we must finish considering whether judicial supremacy can serve a voter’s reasons for exploiting constitutional supremacy—for deviating from statutory supremacy—by relying on aging constitutional texts. Thus, we turn to the third motive for exploiting constitutional supremacy: ensuring optimal legislative accountability.

3. “Interpreting” Aging Constitutional Texts Toward Ensuring Optimal Legislative Accountability

a. Bright Lines and Predictable “Interpretations”: Judicial Supremacy as Irrelevant

Previous analysis of issues facing people who create their own constitutional provisions to ensure optimal legislative accountability\(^{200}\) suggested that bright-line texts could be essen-

\(^{198}\) See supra text accompanying notes 144-45. In the controversy over burning the flag, some have argued that one should not tamper with the Constitution. Cf. infra text accompanying notes 320-21. If accepted by a majority, this argument reflects fear that present political activity might not be undertaken with sufficient care. Thus, recognition of one’s own unwillingness to make sufficiently thoughtful political decisions, combined with concerns for political self-constraint, can explain the aging Constitution.

\(^{199}\) See infra text accompanying notes 215-337.

\(^{200}\) A voter’s concern for optimal legislative accountability encompasses how much influence over public policy he (and his opponents) will have, as well as what kind of influence over public policy he (and his opponents) will have. The first criterion reflects a concern for conflict and political competition; the second criterion reflects a concern for political self-constraint. See supra text accompanying notes 44-55.
tially self-enforcing.\textsuperscript{201} For voters today, those same bright-line provisions, though now aging, are similarly self-enforcing. “Six years” is probably as definite a statement today as in 1787. Judicial behavior in “interpreting” those provisions, and congressional behavior in complying with them, is also predictable. Thus, not only would Bork and Tribe likely treat the “six years” provision the same way on the Court; so too do Jesse Helms and Edward Kennedy in Congress. To the extent that Justices and members of Congress are fungible for issues governed by bright-line provisions, judicial supremacy and congressional supremacy are fungible.\textsuperscript{202}

b. Fuzzy Lines, Core Values, and Predictable
“Interpretations”: Judicial Supremacy as Unnecessary

Given consensus about the first amendment’s core political concerns,\textsuperscript{203} one can confidently predict at least some “interpretations” that judges would make to ensure legislative accountability. For example, no matter who sits as a Supreme Court Justice, the first amendment will be “interpreted” as prohibiting the gov-

\textsuperscript{201} See supra text accompanying notes 114-16.

\textsuperscript{202} This is not to say that the predictable judicial behavior necessarily will serve an “interpretive” ideal of constitutional representation. It is not necessarily true that voters today would choose a six-year term for Senators if they were creating constitutional provisions to ensure optimal legislative accountability, nor that voters would choose a bicameral legislature, a Senate representing states equally, or, indeed, an amendment process with a strong states’ rights bias. See, e.g., Amar, supra note 42, at 1071. Thus, the only realistic way in which voters today can improve the extent to which the system vindicates the bright-line choices they would make if engaged in constitutional politics is actually to overcome laziness and inertia, engage in constitutional politics, and create their own bright-line provisions. Yet voters also must decide that doing so is worth the effort. Cf. supra notes 144-48 and accompanying text (laziness and inertia explain aging Constitution).

\textsuperscript{203} See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (first amendment might be viewed as “primarily an instrument to enlighten public decisionmaking in a democracy”); New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (speech protected “to the end that government may be responsive to the will of the people”) (quoting Stromberg v. California, 283 U.S. 359, 369 (1932)); Roth v. United States, 354 U.S. 476, 484 (1957) (speech protected “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); L. Bollinger, supra note 125, at 43-50 (core speech values concern democratic self-government); P. Dimond, supra note 20, at 81 (first amendment protects political expression “essential for self-government in a representative democracy”); T. Emerson, supra note 126, at 7 (free speech promotes consent of governed); A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 16-17 (1960) (free speech necessary for popular control of government); Bork, supra note 50, at 20 (Constitution should be deemed concerned only with explicitly political speech).
erning party from silencing the opposition party, because this is a relatively uncontested implication of a presumed concern for ensuring legislative accountability.\textsuperscript{204}

To the extent that there are uncontested implications of core values underlying vaguely drawn provisions originally intended to ensure optimal legislative accountability, judges will behave as if they were “interpreting” a bright-line provision. Indeed, to the extent that uncontestable “interpretations” reflect a present consensus, only the most extraordinary of circumstances could induce Congress to violate them in the first instance,\textsuperscript{205} let alone

\begin{quote}
\textsuperscript{204} See supra text accompanying notes 117-22. There are so many Democrats, so many Republicans, and, perhaps more significantly, so many “independents” who are sometime-Democrats and sometime-Republicans that, at any given time, a majority among the electorate would want to protect the opposition party’s right to criticize the governing party. The opposition party, of course, would want to protect its right to criticize the governing party, and the “independent” sometime-governing party would want to protect the opposition party’s right to criticize the governing party, because these “independents” know that they might want to change their minds and join the opposition party in the future. Cf. \textit{Perry I}, supra note 7, at 79 (though denying existence of consensus for issues that occupy judicial attention, recognizing that “if there were anything approaching a consensus as to . . . speech . . . rights . . . , the judiciary would likely have a severely diminished role in defining . . . such rights, because the consensus . . . would presumably be reflected in . . . legislative and executive action.”). Perry does not, however, deny the existence of a consensus about the sort of issue addressed here. As he has observed:

\begin{quote}
[1]It is fanciful to suppose that incumbents would often protect their incumbency by conspiring to deny to the electorate access to that basic store of information and ideas essential to the evaluation of the main features of public policy and performance. It is difficult to imagine such a conspiracy in contemporary American political culture—and among incumbents who have, after all, mutually antagonistic interests. Id. at 81 (footnote omitted); see also Buckley v. Valeo, 424 U.S. 1, 14 (1976) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”); Mills v. Alabama, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of . . . [the First] Amendment was to protect the free discussion of governmental affairs . . . includ[ing] discussions of candidates . . . .”).
\end{quote}

\textsuperscript{205} See supra note 121 and accompanying text (discussing Alien and Sedition Acts). Although an advocate of congressional supremacy for many issues of constitutional interpretation, Professor Dimond would retain judicial supremacy for “representation-reinforcing values.” See P. DIMOND, supra note 20, at 79-88. Dimond views accountable representation not only as unambiguously valuable, but also as a value limiting only “the process of national lawmaking” rather than “the substantive policies that Congress determines to enact into law.” Id. at 87. Dimond illustrates a case for judicial supremacy with a hypothetical situation in which Congress prohibits disruptive demonstrations against presidential speeches and authorizes the states to legislate similarly with respect to gubernatorial speeches. A case arises when the acts are applied to abortion protesters. Id. at 97-100. Dimond’s analysis is flawed because, as suggested in the text, some issues of representation-reinforcement have relatively uncontroversial answers while others are complex and deeply contestable. For the former issues,
choose to overturn a judicial determination that this congressional effort was unconstitutional. Although Jesse Helms might try to silence Robert Mapplethorpe, not even he could think of silencing Edward Kennedy. Joseph McCarthy’s excesses were roundly repudiated, and even he claimed to be concerned only about enemies of consensus ideology. To the extent that there is a consensus about core values, therefore, judicial supremacy and congressional supremacy are, again, fungible.206

c. Fuzzy Lines, Ambiguous Values, and Unpredictable “Interpretations”: Judicial Supremacy as Undesirable

Some issues of optimal legislative accountability go beyond the uncontestable meaning of bright-line provisions and the consensus implications of core values. Rulemaking by administrative agencies, for example, neither clearly falls within the category of “legislative powers” vested in the Congress by article I, nor clearly violates consensus implications of core values underlying the legislative process.207 Similarly, because it lacks both bright-line boundaries and underlying values with sufficiently expansive implications, the first amendment’s category of “speech” generates controversy among voters and judges about whether its protections extend to pornography, Klan propaganda, or flag judicial supremacy is unnecessary; for the latter, it is undesirable. Dimond’s anti-protest hypothetical is designed to evoke a sense of horror at the possibility that such a law could be re-enacted under congressional supremacy. Yet precisely because it can evoke such a sense of horror, the scenario is just as implausible as re-enactment of the Alien and Sedition laws. As applied to Klansmen rather than abortion protesters, however, the hypothetical is more plausible, but the “right” representation-reinforcing answer is far less clear. Thus, as the necessity of judicial choice in the absence of clear interpretive answers undermines judicial supremacy in other contexts, as Dimond acknowledges, so it does for contestable issues traditionally classified within the first amendment’s rubric. Cf. id. at 18-20, 153-56.

206. As with predictable “interpretations” of the “six years” provision, predictable “interpretations” of the aging first amendment’s protection of speech must still be examined to determine whether, in fact, they will serve the electorate’s ideal of constitutional representation. See supra note 202. The basis for uncontestable “interpretations” of the first amendment’s protection of speech is a postulated consensus about implications of a broadly based concern for ensuring optimal legislative accountability. See supra notes 203-06 and accompanying text. Here, unlike for a bright-line provision, there is a political foundation for judicial decisionmaking to better ensure that the goal of constitutional representation is fulfilled.

burning.\textsuperscript{208} Laws apparently intended to limit the influence of pressure groups,\textsuperscript{209} corporations,\textsuperscript{210} and the wealthy\textsuperscript{211} are also ambiguously related to an ideal of optimal accountability. Previous analysis has suggested that such subtle questions concerning optimal legislative accountability reflect concerns for political self-constraint through, and with respect to, the legislative structure.\textsuperscript{212}

\* \* \*

We are led back to the dilemma and the question with which the previous section ended. The dilemma: Given the inevitability of judicial error, concerns for political self-constraint are best vindicated by people who have created constitutional provisions of their own and retained the powers of congressional supremacy. By relying on aging provisions, however, voters today have both less reason to trust a Justice’s “interpretive” decisions, and less reason to trust the electorate’s own political judgment, than would voters who have engaged in extraordinarily thoughtful constitutional politics. The question: As a second-best alternative to creating new constitutional provisions to secure the benefits of political self-constraint, would it be better to retain judicial supremacy in “interpreting” aging constitutional texts, or would judicial review supplemented by congressional supremacy better enable voters today to approach the ideal of identifying the choices they \textit{would} make if engaged in extraordinarily thoughtful constitutional politics?\textsuperscript{213}

\textsuperscript{208} Consensus rationales for ensuring optimal accountability do not apply well to extremist speech. \textit{See supra} text accompanying notes 123-29.


\textsuperscript{211} \textit{See}, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating federal law restricting political expenditures by individuals, groups and candidates).

\textsuperscript{212} By self-constraint \textit{through} the legislative structure, I mean to suggest Madisonian arguments for longer rather than shorter legislative terms and for a bicameral rather than unicameral legislative structure. \textit{See supra} notes 51-55 and accompanying text. By self-constraint \textit{with respect to} the legislative structure, I mean to suggest a rationale for framing the legislative structure as a constitutional mandate—in case the measure of self-constraint provided \textit{through} the legislative structure is not enough to deter voters from choosing thoughtlessly to change the legislative structure. \textit{See supra} text accompanying notes 56-58.

\textsuperscript{213} Professor Seidman has argued that a judicial task of maintaining democracy cannot justify unaccountable judges. “[A]n independent judiciary in-
C. Why Congressional Supremacy?

If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.214

1. The Essential Question: Would Judicial Supremacy or Congressional Supremacy Better Serve Goals of Political Self-Constraint?

Based on the foregoing analysis, one can simplify matters by reducing from three to one the relevant motives for exploiting the principles of constitutional supremacy. The motive of denying political opponents the right to shape public policy in Congress by perpetuating a temporary political advantage can be put aside as senseless for a majority among the national electorate,215 and as a dangerous gamble for a minority of ideologues.216 Furthermore, in choosing between judicial supremacy and congressional supremacy, voters can view concerns for optimal legislative accountability essentially as concerns for political self-constraint. The meaning of bright-line provisions and the implications of core values are likely to be largely uncontested—viewed similarly whether by Robert Bork, Laurence Tribe, Jesse Helms, or Edward Kennedy. When meaning is contestable and, therefore, the identity of the decisionmaker affects the content of decisions, the underlying concern is likely to be for optimal legislative accountability—that is, for political self-constraint with respect to the legislative process.217

Thus, the following analysis will consider the relative merits of judicial supremacy and congressional supremacy against a

\footnotesize{tent on pursuing 'representation reinforcement' could not avoid choosing a theory of democracy that was itself controversial. But without some democratic check, we would have no assurance that the judiciary's theory of majoritarianism was itself supported by a majority." Seidman, supra note 22, at 1586; cf. supra note 205 (discussing Professor Dimond's view). 214. Abraham Lincoln, First Inaugural Address, Mar. 4, 1861, reprinted in G. Gunther, supra note 60, at 24. 215. See supra text accompanying notes 183-88. 216. See supra text accompanying notes 189-91. This is not to say that no one would choose to take this gamble. See supra notes 190-91 and accompanying text. 217. See supra text accompanying notes 56-58, 123-29.}

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benchmark of constitutional representation for concerns of political self-constraint—from the perspective of voters who choose not to create their own constitutional provisions, but instead to rely on aging texts created by others long since dead. Would judicial review supplemented by congressional supremacy identify choices the electorate would make if engaged in extraordinarily thoughtful constitutional politics better than judicial review insulated by judicial supremacy? After addressing this question through a series of case studies, I will consider the relative merits of judicial supremacy and congressional supremacy against a benchmark of other theories for constitutional interpretation—originalism, conventional morality, "living" principle, and liberal republicanism. Would judicial supremacy or congressional supremacy better ensure that each of these "interpretive" ideals is fulfilled?

2. The Benchmark: Constitutional Representation and Case Studies

Constitutional politics toward securing the benefits of political self-constraint differs from ordinary politics in three significant ways: first, extraordinary vigilance—the electorate is focused on issues that otherwise might be ignored; second, extraordinary thoughtfulness—the electorate considers issues more broadly, deeply, and systemically than the manner in which they address issues in everyday politics; and third, extraordinary electoral roots—more of the electorate is more involved in making public policy than in everyday politics.218 Voters make choices for political self-constraint because they expect that the decisions they reach in extraordinarily vigilant, thoughtful, and electorally rooted politics will be better than the decisions they reach in everyday politics.

When the Court reviews policies made by Congress or its proxies, the national electorate's representatives have been sufficiently vigilant to notice an issue and respond with policy. When the Court reviews policies made by states and localities, the national electorate's representatives have made no relevant policy. Congress might have chosen not to make policy in the relevant context. More likely, however, Congress simply has not been sufficiently vigilant about relevant issues to determine whether national policy should govern and, if so, what that policy should be.

Whether examining a national law, or a state law that governs

218. See supra text accompanying notes 42-43, 107-08.
in a vacuum of national choice, the Court might strike down policies as "unconstitutional"—which, from the perspective of constitutional representation, means that the policy is not that which the electorate would choose if engaged in extraordinarily thoughtful constitutional politics—or the Court might defer to the primary decisionmaker. These two potential outcomes suggest that judicial review might deviate from constitutional representation for concerns of political self-constraint in two ways: (i) an erroneous invalidation of a policy that voters would decide to leave intact, if they engaged in extraordinarily thoughtful constitutional politics, and (ii) an erroneous refusal to invalidate a policy that voters would decide to supersede, if they engaged in extraordinarily thoughtful constitutional politics. I next consider whether judicial review under congressional supremacy or judicial supremacy can better avoid, and compensate for, the possibilities for each type of "interpretive" error in the context of specific constitutional cases.

a. A Preliminary Note: Congressional Supremacy Does Not Preclude Congressional Deference to the Court

Despite judicial supremacy, the Court generally defers to Congress and state legislatures in determining the constitutionality of challenged policies.219 Similarly, congressional supremacy need not mean that members of Congress should, or will, feel free to enact statutes modifying or overturning the Court's constitutional decisions. Indeed, the same notions that underlie present conceptions of judicial supremacy—for example, the Court's special capacity to make constitutional decisions—can induce congressional caution in responding with legislation. Although I argue that prevailing ideas about such a special judicial capacity are overdrawn, I also will suggest that under congressional supremacy, judicial decisionmaking would play an essential role in constitutional representation warranting a good measure of deference from Congress. Thus, as judicial deference to legislatures under judicial supremacy reflects concerns about erroneously overturning a valid majoritarian choice, congressional deference to the Court under congressional supremacy would reflect concerns about erroneously violating values the electorate would respect if engaged in extraordinarily thoughtful constitutional politics.

219. I will later suggest that the Court follows this course because of judicial supremacy. See infra text accompanying notes 250-53.
b. Evaluating the Constitutionality of National Policies

i. Addressing the Possibility of an Erroneous Invalidation

Responding to a perceived need for more pervasive and intricate national standards and following an ideology of government by experts, Congress began to delegate rulemaking authority to executive agencies during the first quarter of the twentieth century. Although many believed that executive rulemaking undermined the constitutionally designed separation of powers, the New Deal Court eventually settled on a posture of deference to these congressional choices. Nevertheless, even today, "[t]he wisdom and constitutionality of these broad delegations are matters that still have not been put to rest." Indeed, Congress itself was apparently uncomfortable with executive rulemaking, for it devised the "legislative veto," which empowers one or both Houses to veto a specific rule promulgated by the executive branch under broadly delegated rulemaking authority.

In *INS v. Chadha*, a divided Supreme Court determined that legislative vetoes are unconstitutional. Chief Justice Burger's majority opinion found that the Constitution specifies certain procedures for enacting measures having a "legislative character

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222. See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (invalidating authority delegated to administrative agencies to prescribe and enforce codes governing industry).

223. See infra text accompanying notes 255-60.


and effect,'" and that the legislative veto is not among them. The Chief Justice adopted an originalist approach, basing his conclusion on the framers' reasons for requiring the House of Representatives and the Senate and the President to participate in enacting legislation.

Justice White's dissent reflected far more an attitude of constitutional representation than did the majority opinion. He focused on changes in national lawmaking since the time of the framers' decisions—for example, the pervasive delegation of rulemaking authority to the executive. While Justice White consequently was more sanguine than the Chief Justice about the constitutionality of such legislative vetoes, he was also more unsure that any "interpretive" answer could be deemed correct:

If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. But, the constitutionality of the legislative veto is anything but clear-cut. The issue divides scholars, courts, Attorneys General, and two other branches of the National Government.

... That disagreement stems from the silence of the Constitution on the precise question.

Thus, he counseled deference to Congress's choices in the face of such "interpretive" doubt.

226. Id. at 952 (quoting S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897)).
227. Id. at 958-59. The veto device challenged in Chadha empowered one House of Congress to overturn a prior executive determination that individual aliens, otherwise deportable under the Immigration and Naturalization Act, qualified under statutory criteria for a "suspension" of deportation proceedings and continued residence in the United States. Id. at 925.
228. Id. at 944-51. Mark Tushnet sees Burger's opinion as reflecting a "plain meaning" approach. See Tushnet, supra note 22, at 1689-90. I quarrel with this characterization of the opinion, as the Chief Justice resorted not just to "plain meaning," but to the framers' policies underlying the text they employed. See Chadha, 462 U.S. at 946-51.
229. Justice White's analysis was, in fact, inapplicable to Chadha because § 244(c)(2) of the Immigration and Naturalization Act was not a broad and vague delegation of rulemaking authority to the executive, but a provision containing relatively narrow and clear criteria for the executive to apply. See Chadha, 462 U.S. at 967 (Powell, J., concurring).
230. Justice White observed: "If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art[icle] I as prohibiting Congress from also reserving a check on legislative power for itself." Id. at 986 (White, J., dissenting).
231. Id. at 976-77 (White, J., dissenting).
232. See id. at 974 (White, J., dissenting) ("The Court has frequently called
A CRITIQUE OF JUDICIAL SUPremacy

No one who frames the "interpretive" issue in terms of constitutional representation could be confident of reaching a "correct" decision, precisely because the electorate has not engaged in extraordinarily thoughtful constitutional politics to determine the desirability of either the veto mechanism or the underlying broad delegations of rulemaking authority to the executive. Extrapolating from the decisions made by the framers to determine the constitutional decisions voters today would make is an exercise in indeterminate speculation.283

Yet from the perspective of voters today, Chief Justice Burger's originalism is even more problematic. Asking whether legislative vetoes fit the framers' choices ignores that the original constitutional design has been substantially changed, if not distorted, by precisely those broad delegations of rulemaking authority to which many legislative vetoes were responses. Indeed, in general, the originalist would have constitutional meaning remain static, despite otherwise significant social changes.284 From the perspective of constitutional representation, therefore, originalism must posit not only that voters today would adopt the same constitutional rules as did those who actually created those provisions in quite different circumstances, but also that in choosing such rules under different circumstances, voters would make quite different constitutional decisions—different value judgments—than did the framers. Thus, rather than a premise of constitutional continuity, originalism requires a premise of discontinuity.285

Despite these specific problems with Chief Justice Burger's originalism, and despite the general problem of "interpretive" indeterminacy,286 judicial supremacy requires that Chief Justice attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress . . . .' (quoting Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring)); id. at 984 (White, J., dissenting) (Congress may rely on its experience and reason "to accommodate its legislation to circumstances") (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 415-16 (1819)).

283. Justice Brennan has acknowledged as much. In a speech at Georgetown University, he said: "It is arrogant to pretend that from our vantage point we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." Johnson, Restoring Balance to the Scales of Justice, Wash. Post, Oct. 20, 1985, at A3, col. 3.

284. See supra notes 149-53 and accompanying text.


286. Professor Schauer has suggested that for most, if not all, controversial issues that survive from filing a complaint to pressing an appeal, "both sides can make more or less equivalent legally plausible arguments from the positive law." See Schauer, supra note 22, at 1726-27. Professor Dimond also has constructed
Burger's *Chadha* opinion circumscribes national policy regarding legislative vetoes. Despite its vulnerability as "interpretation" and its controversial status as policy, it is law governing Congress. The issue must be largely closed.

If judicial review were supplemented by congressional supremacy, however, judicial invalidation of legislative vetoes essentially would issue a challenge to Congress: Accept the ruling and abandon legislative vetoes, or reverse the Court's "interpretation." Congress might pass legislation responding to the Court's decision by amending or reversing the Court's declaration of governing constitutional principles. Such a statute would supersede the Court's opinion as the "precedent" upon

his argument for "provisional judicial review" (congressional supremacy) in large part on the premise that "people . . . [should] be skeptical of claims that the Constitution provides a single, simple answer for every question." P. Dimond, *supra* note 20, at 20 (emphasis in original).

237. Professor Conkle implies that because it is an originalist decision, Chief Justice Burger's opinion should be protected with judicial finality. See Conkle, *supra* note 22, at 14-15. At the same time, Conkle suggests that judicial finality is problematic, and should be abandoned, with respect to nonoriginalist review—at least for "individual rights" issues. *Id.* at 11. However, because originalist interpretations often conflict with nonoriginalist interpretations, a prior question must be when, if ever, originalism is good interpretation. See *supra* text accompanying notes 149-53. Whether and when originalism is appropriate is itself a question of "interpretation," and as such can be resolved either in an originalist way or a nonoriginalist way. See Chang, *supra* note 10, at 784-96 (nonoriginalist way); Powell, *supra* note 140 (originalist way); *supra* text accompanying notes 144-48. The nationalization of moral policy may be a primary benefit emerging from nonoriginalist review of individual rights cases. See Conkle, *supra* note 21, at 26-30. But this benefit conflicts with an originalist view of federalism. Thus, the proposal of judicial finality for originalist decisions and congressional supremacy for nonoriginalist decisions is untenable.

238. In fact, Congress has continued to employ legislative vetoes despite *Chadha*. See Tolchin, *The Legislative Veto, An Accommodation That Goes On and On*, N.Y. Times, Mar. 31, 1989, at A11, col. 1. This practice challenges judicial supremacy and raises questions about the extent to which Congress does accept the principle. I do not doubt that judicial supremacy might be vulnerable in practice. See, e.g., *infra* text accompanying notes 309-13 (Biden flag statute challenges judicial supremacy). But this possibility does not undermine the importance of determining the desirability of judicial supremacy versus an ethic of congressional authority to contradict Supreme Court "interpretations" of the Constitution. Such an analysis will suggest either that Congress should feel more free to contradict Supreme Court opinions or should refrain from doing so. For a suggestion that any legislative response under congressional supremacy must explicitly address relevant judicial precedent, see *infra* notes 241 & 244.

239. Congressional supremacy could require developing new congressional institutions and procedures—for example, "a special committee in each house developing traditions of deliberative, dispassionate, and (relatively) nonpartisan consideration of constitutional issues." Brest, *supra* note 10, at 1092; see also D. Morgan, CONGRESS AND THE CONSTITUTION: A STUDY IN RESPONSIBILITY 351-57 (1966).
which future relevant cases would be decided. Alternatively, Congress might pass no responsive legislation at all.\textsuperscript{240} If so, the Court’s opinion would continue to govern.\textsuperscript{241}

Under judicial review supplemented by congressional supremacy, the best decisionmaking attributes of both the Court and Congress can be joined to simulate the three special characteristics that distinguish constitutional politics toward political self-constraint from everyday legislative politics: extraordinary vigilance, extraordinary thoughtfulness, and extraordinary electoral roots.

The nature of litigation helps provide extraordinary vigilance. Issues of public policy that otherwise might be overlooked are easily raised by litigants and, therefore, brought to the attention of authoritative policymakers. For example, to the extent that Congress enacted the Immigration and Naturalization Act

\textsuperscript{240} As the Court now has rules for deference to Congress, see \textit{infra} notes \textsuperscript{255-60} and accompanying text, congressional supremacy suggests that Congress should develop rules for deference to the Court. \textit{Cf.} Seidman, \textit{supra} note \textsuperscript{22}, at 1587 (people can and do defer to experts even while not giving them final authority to decide). An example of such a rule of deference might be to give more weight to a unanimous judicial decision than to a 5-4 decision.

\textsuperscript{241} Thus, congressional supremacy would require that governmental institutions reflect, respect, and respond to new ethics. First, Congress should actively consider enacting direct responses to Supreme Court opinions. \textit{See} Brest, \textit{supra} note \textsuperscript{10}, at \textsuperscript{98} (Congress lacks strong tradition of constitutional decisionmaking). Second, the Supreme Court should defer to such legislative responses. \textit{See id.} at \textsuperscript{76}. Whether the Court should defer to all relevant responses, only to explicit congressional responses, only to explicit and thoughtful (defined procedurally) responses, only to explicit and thoughtful (defined substantively) responses, etc., should also be analyzed from the perspective of constitutional representation. Dean Brest suggests that if Congress sought to respond to the Court’s constitutional decisions, then the Court should defer only if "Congress develops systematic and trustworthy procedures of constitutional decisionmaking"—by which he means not so much an extraordinarily thoughtful consideration of the merits of competing policies, but more traditional and pseudo-judicial approaches to constitutional "interpretation." \textit{See id.} at \textsuperscript{103}. Because I question the viability of traditional notions of "interpretation," by courts let alone by Congress, I would reject Brest’s particular standard, if not the principle that Congress’s responsive legislation satisfy some procedural standard of extraordinary thoughtfulness. \textit{Cf.} P. Dimond, \textit{supra} note \textsuperscript{20}, at \textsuperscript{85} (Court has applied clear statement rule when Congress compromises constitutional concerns); L. Tribe, \textit{American Constitutional Law} \textsuperscript{316-17} (2d ed. 1988) (Court has applied clear statement rule when federal statute reaches to outer limit of commerce power and would conflict with state institutional interests); Farber & Frickey, \textit{supra} note \textsuperscript{51}, at \textsuperscript{917-19} (existing doctrines requiring legislative deliberation); Linde, \textit{Due Process of Lawmaking}, \textsuperscript{55} Neb. L. Rev. \textsuperscript{197} (1976) (advocating judicial doctrine to improve legislative processes); Sandalow, \textit{supra} note \textsuperscript{20}, at \textsuperscript{1189} (courts should defer to political decisions reflecting deliberate judgment by representative institutions). For further discussion of Dean Brest’s view of congressional competence to engage in constitutional "interpretation," see \textit{infra} note \textsuperscript{244}.
without considering whether legislative vetoes compromise values underlying the separation of powers doctrine, Mr. Chadha's lawyers helped focus public attention on potentially important issues that otherwise would have been ignored.

The nature of judicial decisionmaking helps provide extraordinary thoughtfulness. Judges can shape an understanding of issues as they relate to putative constitutional values. Relatively insulated from the pressures of give-and-take legislative politics, and constrained to write opinions that satisfy standards of reason, judges can help ensure that such constitutional values are not forgotten. Thus, Chief Justice Burger's opinion in Chadha helps frame the merits of legislative vetoes from the perspective of traditional concerns for separated powers. Justice White's dissent frames the issues from a more contemporary perspective, but one still guided by similar concerns for separated powers.

Finally, the nature of responsive congressional decisionmaking could help provide extraordinary electoral roots. Congress's second look would be closer to the ideal of extraordinarily thoughtful constitutional politics than was the Court's review of the initial congressional choice, for Congress's "interpretive" decision would be political. Far more than the Court's, Congress's decision would be constitutional representation. To the extent

242. Some might object to equating Congress with voters, or with "the People." See T. Lowi, supra note 221, at 68-72 (President and Congress identify with, and vote for, different interest groups rather than broadly conceived majorities); G. McConnell, supra note 220, at 339 ("[A] substantial part of government in the United States has come under the influence or control of narrowly based and largely autonomous elites."); Amar, supra note 42, at 1079-85 (arguing that Congress is inadequately majoritarian). Bruce Ackerman argues that "we must systematically reject the idea that when Congress (or the President or the Court) speaks during periods of normal politics, we can hear the genuine [constitutional] voice of the American people." Ackerman, supra note 8, at 1027 (emphasis in original). However valid these observations might be, they are hardly arguments against congressional supremacy. To question Congress's representativeness should not lead one toward less representative judicial supremacy, but toward more representative options for constitutional policymaking. See supra notes 48-58 and accompanying text; cf. Farber & Frickey, supra note 51, at 911-13 (advocating political process reform rather than heightened judicial review to cure perceived defects in legislative representation).

Significantly, Ackerman acknowledges that the Court, as well as Congress, is a poor proxy for true constitutional politics. See Ackerman, supra note 8, at 1027. But true constitutional politics must be episodic. See id. at 1040, 1050 (noting that after intense political activity achieves its goal (e.g., an amendment), "most private citizens . . . inevitably will [find] that they have better things to do with their time than continue the political struggle at fever pitch"). Any "interpretive" regime must therefore be imperfectly representative and imperfectly deliberative. The challenge for voters today is to identify an interpretive regime that best approximates the decisions the electorate would make if engaged in
that Chief Justice Burger’s opinion successfully identifies values the electorate would pursue in extraordinarily thoughtful constitutional politics, it should ring true, and influence Congress’s second look.\textsuperscript{243} To the extent that the Court has sought to protect concerns that voters would not favor in extraordinarily thoughtful constitutional politics—if, for example, Justice White’s observations ring true—congressional supremacy would allow the electorate’s representatives to correct the Court’s mistake.\textsuperscript{244}

\textit{extraordinarily thoughtful constitutional politics. See supra text accompanying notes 144-48.}

\textsuperscript{243} This is not inconsistent with a focus on interest groups underlying economic theories of legislation and public choice theory. “Interest group theory treats statutes as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups.” Macey, \textit{supra} note 48, at 227. “Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes.” Landes & Posner, \textit{supra} note 35, at 877. Thus, public choice theory raises questions about the \textit{representativeness} and the \textit{quality} of legislative decisionmaking. \textit{See supra} note 51. While such theories of legislation find political capital in resources other than the vote, they do not necessarily deny that interest groups might spend their resources to support legislation serving “legitimate, public-regarding, noneconomic goals.” Macey, \textit{supra} note 48, at 228. The recognition that the “publicly articulated purpose [of a statute] will almost invariably be a public-regarding purpose” suggests that electoral accountability remains a significant influence on legislative behavior, because clearly articulated factional purposes could induce the otherwise quiet members of the public to mobilize in opposition. \textit{See id.} at 250-53. Nevertheless, such public choice theory suggests that the bulk of interest group activity seeks wealth transfers at the expense of other groups and, therefore, “that politicians can advance their own private interests by . . . helping enact legislation that transfers wealth from groups with high information and transaction costs to groups with low information and transaction costs.” \textit{Id.} at 229-30. Viewing “public-regarding” policies as superior to interest group policies, Macey advocates methods of statutory interpretation that temper the latter by, for example, enforcing the general language of a statute rather than by examining a legislative history which might indicate specific targets and beneficiaries of the legislation. \textit{See id.} at 236-40 (criticizing view that judges should consider the “deals . . . struck in cloakrooms” in seeking proper enforcement of statutes). Macey’s analysis of judicial and legislative interaction in the statutory context to encourage “public-regarding” policies might be applied to a judicial and legislative interaction for constitutional “interpretation”—which, as I have suggested, should seek a representative determination of the extraordinarily thoughtful choices the electorate \textit{would} make if engaged in constitutional politics today. \textit{See supra} text accompanying notes 144-48.

\textsuperscript{244} Dean Brest suggests that if Congress may “subvert judicial doctrine,” it may do so only if, “after engaging in independent constitutional interpretation, Congress determines that the doctrine is legally incorrect.” Brest, \textit{supra} note 10, at 59. “Congress must engage in independent constitutional interpretation.” \textit{Id.} at 80. By suggesting that such “interpretation” requires not only facility with constitutional text, history, structure, and precedents, but also “disinterested” decisionmaking, Dean Brest concludes that Congress is, at least for now, institutionally incapable of validly overturning a judicial finding of unconstitutionality. \textit{See id.} at 82, 103; \textit{see also Perry I, supra} note 7, at 16, 19 (Congress lacks impartiality necessary to interpret Constitution); Mikva, \textit{How Well Does Con-
Thus, while the Court’s opinions can provide Congress’s second look with some of the extraordinary vigilance and thoughtfulness that voters anticipate in true constitutional politics, the choices ultimately emerging from the processes of congressional supremacy are more the voters’ own, as they would be in the extraordinarily thoughtful politics through which constitutional provisions for political self-constraint ideally are created. To the extent that legislators are cautious about exercising the powers of congressional supremacy, and sensitive to the Court’s role in providing extraordinary thoughtfulness, the goal of constitutional


Dean Brest’s analysis is problematic for several reasons. First, he seems to rely on a surprisingly technical notion of “legal” correctness and “interpretation.” Yet the notion of constitutional representation is more political than technical and, indeed, even speculative. It is questionable whether courts can effectively pursue that “interpretive” ideal. Even without resort to any notion of constitutional representation as an ideal, it is hardly novel to question protestations of technically correct “interpretive” results. See Schauer, supra note 22, at 1731-32 (appellate review does not involve technical legal skills so much as require “recourse to the political, economic, social, cultural, and moral norms” of society). Thus, contrary to Dean Brest’s view, the judicial point of departure is not sacrosanct. Second, Dean Brest’s observation that Congress is not sufficiently “disinterested” to overturn judicial determinations of unconstitutionality attributes to courts a virtue they do not necessarily possess, and transforms into a vice a characteristic of congressional decisionmaking that is, in fact, a virtue. As judges are hardly “disinterested” in the controversial issues they resolve in the name of constitutional law, Dean Brest again paints a rosier picture of the judicial point of departure than it deserves. More importantly, although congressional decisionmaking is expressly political and interested, so are the politics of constitutional ratification and, therefore, the choices voters today would make if engaged in constitutional politics. Indeed, Congress itself has drafted many of the constitutional provisions so revered by proponents of judicial review. Cf. Fisher, supra note 109, at 718 (“Constitutional law often turns on factfinding and the balancing of conflicting values. Members of Congress can make important contributions in both areas.”); id. at 732 (Congress’s constitutional judgments “compare favorably to those announced by the courts”). Third, courts might develop rules for reviewing congressional review, perhaps requiring certain indicia that Congress has, in fact, engaged in extraordinarily thoughtful decisionmaking, before the Court would need to defer to Congress’s “interpretive” statute. See supra notes 240-41.

245. This function of the Court would provide good justification for maintaining judicial life-tenure under a regime of congressional supremacy. See infra note 359. The new system might also encourage even greater judicial activism, to mitigate Congress’ errors of omission, because the Court’s errors of commission could more easily be remedied. See infra text accompanying notes 268-72, 283-86.

246. Some might fear that constitutional law under congressional supremacy would be less coherent than under judicial supremacy. But not only is the value of coherence debatable; it is by no means certain that congressional supremacy would, in fact, generate a constitutional law significantly less coherent than that heretofore developed by the Court. See supra note 104.
representation—simulating extraordinarily vigilant and thoughtful politics—can indeed be approached.

Given the indeterminate meaning of aging constitutional texts, it is, perhaps, only by the processes of "interpretive" decision-making that voters today can hope to attain the choices the electorate would make if engaged in true constitutional politics.247 Some might doubt, however, whether congressional response can achieve this ideal of constitutional representation.248 Indeed, one might question the extent to which congressional decision-making can be either truly representative or truly thoughtful.249 But the issue is not whether judicial review supplemented by congressional supremacy replicates true, formal constitutional politics. My suggestion is more modest: that congressional supremacy is the less imperfect of two options.

ii. Addressing the Possibility of an Erroneous Refusal to Invalidate

Constitutional representation can be as badly compromised by erroneous refusals to invalidate congressional choices as by erroneous invalidations.250 Yet since the New Deal struggle over

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247. As Professor Sandalow has suggested, "The central problems in devising a satisfactory theory of judicial review is . . . to define and justify the process by which societal norms should be constructed for the purpose of giving content to constitutional law." Sandalow, supra note 20, at 1185.

248. Even enacting a constitutional amendment—or failing to do so—under article V procedures might not necessarily yield the decisions voters today would make if engaged in extraordinarily thoughtful constitutional politics, for the most extraordinary thoughtfulness would have the electorate consider its own rules for constitutional ratification, i.e., article V itself. Cf. Amar, supra note 42, at 1099 ("[A]ny political process that weights some Americans . . . more than others . . .—as does Article V . . .—is legitimate only if that process itself is approved by, and is subordinate to, a process which weights all Americans equally.").

249. See supra notes 102, 242. Professors Farber and Frickey reach a contrary conclusion even after carefully considering public choice theory conceptions of problematic congressional behavior:

Congress is not merely the reflection of private political power. Faith in deliberative congressional resolution of sensitive issues is not entirely misplaced, particularly when courts assist the deliberative process through structural and procedural review. To be sure, judicial invalidation under this approach constitutes only a suspensive veto. Yet even that shifts the burden of inertia to those seeking to reimpose the invalidated decision, highlights the perceived unfairness of the decision, and, because of the passage of time, often presents the issue to a legislature constituted somewhat differently from the one that made the original decision. Considering the ease of killing legislation and the difficulty of passing it, these consequences of a suspensive veto are significant.

Farber & Frickey, supra note 51, at 923 (footnote omitted).

250. But see R. Nagel, supra note 21, at 22-26 (judicial deference gives to
delegation and federalism, the Supreme Court has taken an especially deferential posture when reviewing the constitutionality of congressional acts. One can trace this deference to judicial supremacy. From fear of erroneously invalidating a congressional choice, the Supreme Court risks erroneously upholding a congressional choice.

During this century, the Supreme Court has taken three approaches to constitutional federalism. First, through the early New Deal, the Court struck down many congressional statutes in the name of federalism. The Depression notwithstanding, and against the judgments of the President and Congress about how other institutions responsibility for making constitutional law. Nagel’s position ignores that other institutions, at least without interaction with judicial decision-making, generally are incapable of the extraordinary thoughtfulness and vigilance that constitutionalism toward political self-constraint seeks to promote.


Even when using racial classifications, otherwise subject to close (if somewhat ill-defined) judicial scrutiny, Congress has enjoyed the Court’s deference. See, e.g., Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3008 (1990) (“It is of overriding significance in these cases that the FCC’s minority ownership programs have been specifically approved—indeed, mandated—by Congress.”); Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (racial classification must be examined “with appropriate deference to Congress”). The Court has looked far more critically at affirmative action programs designed by states and localities. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-506 (1989) restricting local discretion to set aside percentage of public contracts for minority business enterprises; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282-84 (1986) (restricting local discretion to adopt affirmative action program in lay off provision of collective bargaining agreement); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978) (restricting state discretion to adopt affirmative action program in university admissions policies); see also Chang, supra note 190.

James Bradley Thayer made the point: “The courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate. And, again, they must not act unless the case is so very clear, because the consequences of setting aside legislation may be so serious.” Thayer, supra note 60, at 150; see also J. ELY, DEMOCRACY AND DISTRUST 41 (1980) (“If a principled approach to judicial enforcement of . . . the Constitution’s open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation’s commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them.”); L. HAND, THE BILL OF RIGHTS 1-30 (1958) (questionable foundation for judicial review demands cautious exercise of presumed judicial power to invalidate legislation); Conkle, supra note 20, at 34-36 (finality of constitutional decisions induces cautious judicial inaction).

See, e.g., Carter, 298 U.S. at 293-97 (national wage and hour standards applied to mining industries); Schechter, 295 U.S. at 549-51 (national wage and hour standards applied to poultry industry); Hammer v. Dagenhart, 247 U.S. 251, 273-77 (1918) (national fair labor standards governing employment of children).
to invigorate national economic health, the Court denied the national electorate its congressionally-expressed preferences. **Second**, perhaps in response to the political turmoil generated by this restrictive view of Congress’s authority, the Court broadened its definition of Congress’s discretion. The process culminated in *United States v. Darby,* where a unanimous Court determined that Congress could, under the commerce clause, enact statutes regulating “commerce”—defined essentially as the “shipment interstate of goods” or “activities intrastate which . . . affect interstate commerce”—“*w*hatever *t*heir *m*otive and *p*urpose.”

Although the possibility of judicial intervention for the sake of federalism remained, it was widely perceived as insignificant. **Third,** by its decision in *Garcia v. San Antonio Metropolitan Transit Authority,* the Court today has deemed federalism to be essentially a political question, wholly within Congress’s discretion, based on the view that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limita-

255. 312 U.S. 100 (1941).
256. Id. at 115, 118.
257. Id. at 115 (emphasis added). National discretion is far greater under a commerce clause understood as permitting regulation for any purpose, rather than one understood as permitting regulation for limited purposes—for example, only for purposes of promoting economic health and development.

A restrictive, purpose-oriented approach for defining the scope of Congress’s discretion against claims of federalism-based limits is suggested in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall announced: “*S*hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.” *Id.* at 423 (emphasis added). In a pre-*Darby* case, the Court had articulated a purpose-oriented principle defining the scope of Congress’s discretion under the commerce clause: “[T]he power to regulate commerce is the power to enact ‘all appropriate legislation’ for ‘its protection and advancement’; to adopt measures ‘to promote its growth and insure its safety’; ‘to foster, protect, control and restrain.’” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (citations omitted). Though this principle could be distorted toward *Darby’s* endorsement of congressional regulations, “[w]hatever their motive and purpose,” it was articulated in a context limited to commercial purposes. Hence it was far more a principle respecting local discretion than that which evolved in *Darby* and that which signaled the death of constraint altogether in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

258. For example, Attorney General Robert F. Kennedy stated during Senate hearings on the Civil Rights Act of 1964, “I think that there is an injustice that needs to be remedied. We have to find the tools with which to remedy that injustice. . . . The commerce clause will obtain a remedy and there won’t be a problem about the [constitutionality].” G. Gunther, supra note 60, at 159.
tions on federal power.”

Thus, Congress is now the exclusive guardian of this putative constitutional concern; federalism is not an issue for judicial review.

What decisions about federalism would the national electorate make if engaged in extraordinarily thoughtful constitutional politics today? Perhaps, like the framers, voters would conclude that local decisionmaking is a value that weighs against establishing national standards—that governmental diversity serves freedom; heterodoxy creates options; options forestall unhappy citizens’ perceptions of tyranny—and, therefore, that one should think twice about these benefits of local decisionmaking before establishing national standards. Voters alternately might conclude that local decisionmaking serves no value that should weigh against establishing national standards. What is right is right,

260. Id. at 552.

261. Indeed, major antifederalist currents against the Constitution were notions of community, participation and autonomy within a small and local realm. See The Anti-Federalist Papers and the Constitutional Convention Debates 275-77 (R. Ketcham ed. 1986) (Brutus’s first essay). Concern for one’s neighbors was essential for good public decisionmaking, but possible only on a small scale, in relatively homogeneous circumstances, like a family. Cf. Sunstein, supra note 42, at 1556 (“[R]epublican belief in deliberation about the common good is most easily sustained when there is homogeneity and agreement about foundations.”). These values would be compromised by a national government—through expanding the community beyond recognition; through bringing together (though not unifying) diverse interests and perspectives; through creating more incentive for conflict and more chance to lose. See G. Wood, supra note 42, at 499-502. Thus, one might suppose that responding to these ideas, the framers and ratifiers of the Constitution acted with a motive of political self-constraint in choosing to protect concerns of federalism with the principles of constitutional supremacy. Because the benefits of local government—the costs to local values imposed by national government—could be overlooked in the pressures and passions of everyday congressional decisionmaking, the Congress was to be vested with only certain enumerated powers. But see infra note 262 (suggesting federalism might have reflected desire by recalcitrant minority to perpetuate an extraordinary political advantage). Furthermore, federalism involves issues of when it is right for one group (the nation) to impose its will on another (a state). This, it seems to me, involves not only questions of raw power, but also subtle questions of political morality. But see J. Choper, supra note 10, at 201-03 (federalism issues concern practicality rather than principle).

262. Yet the tenth amendment, as well as the Senate’s structure, originally might have reflected a desire by minority states to perpetuate an extraordinary political advantage, e.g., by exploiting the desire of majority states to win the minority’s participation. Cf. Amar, supra note 42, at 1069-71 (provision requiring state’s consent before loss of equal suffrage in Senate may be overridden by non-article V amendment procedures devised by “We the People”). If so, then the “interpretive” implications would be even more complex—requiring a determination of what past choices by a minority to perpetuate a temporary political advantage imply about the choices a majority of voters today would make if engaged in extraordinary constitutional politics about federalism. See supra note 197.
and should govern New York as well as Georgia, Georgia as
well as New York. Here, as elsewhere, "interpretive" indeter-
minacy reigns.

The Darby and Garcia approaches to constitutional federalism
raise the potential "interpretive" error of failing to strike down
national policies that the national electorate, if engaged in ex-

263. See, e.g., Ga. Code Ann. § 16-6-2 (1988) (prohibiting consensual " sod-
statute as applied to homosexuals).

264. New York courts have struck down sodomy statutes as violating the
New York Constitution. See, e.g., People v. Onofre, 72 A.D.2d 268, 272-73, 424
N.Y.S.2d 566, 569, aff'd on other grounds, 51 N.Y.2d 476, 415 N.E.2d 936, 434

265. Bruce Ackerman would have the Court interpret the national political
activity that culminated in the elections of 1936, i.e., debate about the New Deal
provisions, as comprising a "structural amendment" of the Constitution, estab-
lishing a new, unrestrictive policy on federalism. See Ackerman, supra note 8, at
1053-56. His "structural amendment" is an effort to link constitutional inter-
pretation with contemporary politics, while maintaining a distinction between ordi-
nary national politics and extraordinary constitutional processes. See id. at 1027-
31. Although my own enterprise in this article might be similarly characterized,
one should recognize a critical distinction between my suggestion of congres-
sional supremacy as a route to constitutional representation and Ackerman's
modified processes for constitutional amendment as a means of linking judicial
behavior with contemporary politics. Ackerman focuses on reforming the
processes of formal constitutional amendment, while I focus on the processes of
interpreting formally intact and progressively aging constitutional provisions.
This line is blurred for Ackerman's 1936 "structural amendment"—as that
"amendment" was "ratified" without a formal text. See Amar, supra note 42, at
1091; Chang, supra note 10, at 824 n.233. Nonetheless, Ackerman is rather in-
sistent that he views 1936 as true amendment rather than simply as a basis for new
interpretation. See Ackerman, supra note 8, at 1056. In a later effort, however,
he was unambiguously concerned with formal constitutional amendment. See
Ackerman, supra note 6, at 1182 (proposing modified processes for formal con-
stitutional amendment).

Whether the "structural amendment" is viewed as a true, formal amend-
ment or as a method for interpreting intact and aging texts, Ackerman's linkage
of interpretation to contemporary electoral politics is far more limited than the
linkage would be under congressional supremacy. Ackerman would have the
Court find a "structural amendment" only after political struggle of a sort so
extraordinary that he finds only one example in United States history. He also
characterizes the fourteenth amendment as a "structural amendment," despite
its ratification by formal article V processes. See Ackerman, supra note 8, at 1063-
69. For discussion of the different issues involved in the fourteenth amendment
and the 1936 elections as "structural amendments," see Chang, supra note 10, at
824 n.233, 830 n.255. It seems to me that the "structural amendment" is no
solution to the problematic disjunction between judicial interpretation and con-
istitutional politics—or, at least, a solution so rarely available that the pervasive
problems of judicial interpretation remain largely undisturbed. Whether viewed
as an interpretive method or as a new species of constitutional amendment, the
"structural amendment" is at least as rare as article V amendment has been. As
the existence of the article V option provides inadequate assurance that judicial
decisions will satisfy an ideal of constitutional representation, so, it seems to me,
does Ackerman's "structural amendment."
traordinarily thoughtful constitutional politics, would decide do not justify undermining the benefits of local decisionmaking. Such deference essentially destroys the benefits of judicial review, for the Court not only fails to measure challenged policies against putative constitutional concerns; it fails even to articulate relevant constitutional values by which legislators should feel themselves constrained. With such deference, the extraordinary vigilance and thoughtfulness that the Court otherwise could provide toward simulating true constitutional politics are lost altogether.

Under congressional supremacy, however, there would have been less incentive for this sort of deference. The Court could have retained federalism as a meaningful constitutional value, as part of judicial doctrine. Thus, the potential concern for federalism could be less lost than under judicial supremacy; the ideal of constitutional representation would be better approached as judicial review (more than meaningless deference) helps simulate

266. When the Court took a hostile posture to congressional legislation, striking down much of the early New Deal response to the Depression, it risked the potential "interpretive" error of striking down national statutes that the national electorate, if then engaged in extraordinarily thoughtful constitutional politics, would have decided were sufficiently important to justify intruding on the benefits of local decisionmaking. For an analysis of how congressional supremacy can mitigate this error, see supra text accompanying notes 299-49.

267. See infra text accompanying notes 288-92.

268. A judicially articulated doctrine of constitutional federalism, even if deferentially enforced, could guide legislative decisionmaking far more than the view that federalism is merely a political question. For example, in debates about the Civil Rights Act of 1964, members of Congress explicitly considered whether they would violate constitutional federalism by voting for the legislation under the commerce clause. In answering this question, they referred to Supreme Court doctrine. Given Darby, members of Congress were advised that they would act permissibly under the commerce clause, so long as the subject was commerce, no matter what the object (purpose) of their regulation might be. See G. GUNTER, supra note 60, at 159-62 (testimony of Attorney General Robert F. Kennedy during Senate Hearings on Civil Rights Act of 1964). But if the Court had retained the commerce clause doctrine devised in Jones & Laughlin, members of Congress would have been advised that the act would be permissible only if their major object was economic. Unless a putative constitutional principle is judicially articulated, legislators are unlikely to consider respecting it. The Garcia abandonment of constitutional federalism as a political question not only eliminates the possibility of judicially invalidating a statute on tenth amendment grounds, but also diminishes the chances that members of Congress themselves can give the issue due deliberation. On the other hand, the Jones & Laughlin approach articulates principles limiting congressional discretion while applying those principles deferentially. It minimizes the possibility that a court will invalidate a statute on tenth amendment grounds, but provides an articulated putative constitutional principle of federalism that Congress can choose to respect on its own. This difference is significant to the extent that one views the essence of constitutional decisionmaking as extraordinarily thoughtful politics. See supra text accompanying notes 96-43, 192-99 & 215-18.
the vigilance and thoughtfulness of constitutional politics, while the opportunity for congressional evaluation and response helps simulate the electoral roots of constitutional politics.

This is not to suggest that unbridled judicial activism would be proper under congressional supremacy. While the costs of "erroneous" judicial declarations of national policy in the name of the Constitution would be mitigated, they cannot be eliminated. Neither is it to suggest, however, that Congress should be eager to overturn the Court's decisions under congressional supremacy. Rather, members of both the Court and Congress should evaluate the other's decisions according to the strengths and weaknesses each institution can bring to the task of constitutional representation. Thus, toward serving the ideal of political self-constraint in a context of congressional supremacy, judges would need to develop new guidelines for deference in their initial review of national policies. Members of Congress would need to debate principles of deference to the Court's declarations of constitutional principle. Such mutual consideration of underlying institutional capacities can enhance decisionmaking about specific substantive policies and thereby promote the extraordinarily thoughtful decisionmaking that is the goal of political self-constraint.

269. Even given congressional supremacy, the Court must develop principles suggesting when deference is appropriate and when it is not. See supra notes 240-41; infra text accompanying note 270; see also infra note 285.

270. It is a matter of no small consequence that Congress must rouse itself from the inertia that seems to have been part of its original design if it is to exercise the prerogatives of congressional supremacy. It is a matter of no small consequence that voters, in evaluating their representatives' "interpretive" decisions, must devote more attention to public policy than under judicial supremacy. "Erroneous" judicial declarations of national policy in the name of the Constitution might well not be corrected by a Congress that sees little political capital in acting. See J. Choper, supra note 10, at 16-24 (structure of Congress inhibits action); Amar, supra note 42, at 1078-79 (arguing that presentment and bicameralism are countermajoritarian).

271. To the extent that this greater judicial activism would mitigate the erroneous failure to invalidate congressional choices, it also would increase the chances for erroneous invalidations of congressional choices. See infra text accompanying notes 281-83 (same point for judicial review of local policies). "Interpretive" indeterminacy suggests, however, that results cannot be the basis for choosing among different institutions of judicial review or different people to serve in those institutions. To the extent this is true, one must evaluate the process by which those results are reached. See infra text accompanying notes 283-86 (same point for judicial review of local policies).

272. Similar problems with judicial deference arise when the Court examines national policies implicating individual rights. For example, a sharply divided Court held that an Orthodox Jewish rabbi was not denied his first amendment rights by an Air Force regulation that prohibited him from wearing
c. Evaluating the Constitutionality of State Policies

i. Striking an Optimal Balance Between the Erroneous Invalidation and the Erroneous Refusal to Invalidate

In *Griswold v. Connecticut*, the Court invalidated a Connecticut statute that prohibited people from using, or counselling the use of, contraceptives.273 Justice Douglas's majority opinion recognized a constitutional right of privacy that includes a married couple's interest in using contraceptives.274 Justices Black and Stewart each wrote dissenting opinions acknowledging, respectively, that the Connecticut law was "offensive" and "unwise," but emphasizing the lack of constitutional foundation on which to invalidate the statute.275

Would a majority among the national electorate today, if engaged in extraordinarily thoughtful constitutional politics, choose to establish a national standard protecting a right to use contraceptives? On the one hand, as even the dissenters implied, Con-

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274. Id. at 485. Justice Douglas found the right of privacy in the "penumbras" emanating from the guarantees of the Bill of Rights. Id. at 484. Justice Goldberg joined the majority opinion, but wrote a separate concurring opinion, joined by Chief Justice Warren and Justice Brennan, that derived a right of privacy from the "traditions and [collective] conscience of our people." Id. at 493 (Goldberg, J., concurring). Justices White and Harlan each concurred in the judgment in separate opinions. For an analysis of the relationship between *Griswold* and *Hardwick*, see Chang, supra note 10, at 808-25.

275. *Griswold*, 381 U.S. at 507-10 (Black, J., dissenting); id. at 527, 530-31 (Stewart, J., dissenting). The dissenting opinions were originalist in scope—rooted in, and limited by, history. See id. at 509 (Black, J., dissenting) (courts should "stick to the simple language of the First Amendment in construing it"); id. at 529-30 (Stewart, J., dissenting) (discussing original intent of ninth amendment). For an analysis of originalism's inadequacies for purposes of constitutional representation, see supra text accompanying notes 149-53.
necticut's law might well deeply offend a national majority. Perhaps voters would establish a national norm if they were vigilant about public policy—as they would be if engaged in extraordinarily thoughtful constitutional politics. On the other hand, if voters also accounted for concerns of federalism in an extraordinarily thoughtful way, they might choose not to impose their views as a national standard. Again, "interpretive" indeterminacy prevails. Thus, Griswold potentially represents the erroneous establishment of national policies preempting local discretion.

In O'Lone v. Estate of Shabazz, the Court considered whether New Jersey prison officials violated the free exercise clause by requiring Muslim inmates to adhere to a work schedule that prevented them from attending Jumu'ah, a weekly Muslim service. Chief Justice Rehnquist's majority opinion adopted a standard of review deferential to state prison officials and held that the free exercise clause was not violated. Justice Brennan, for four dissenters, argued that the majority had ignored the Constitution's purpose "to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing." Justice Brennan concluded that "[o]ur objective in selecting a standard of review is therefore not, as the Court declares, ['t]o ensure that courts afford appropriate deference to prison off-

276. The Senate Judiciary Committee focused on this matter during the Bork confirmation hearings. One might infer from exchanges between the Senators and the nominee that most believed that states should not be free to prohibit the use of contraceptives. See, e.g., Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 114-21, 149-51, 240-43, 182-84 (1987) (questioning by Senators Biden, Kennedy, Hatch and Simpson). If so, Griswold has served the national electorate's values. See Chang, supra note 10, at 819. Without it, Congress probably would never have addressed the issue, and Connecticut might well have retained its offensive law. Thus, judicial review provided a vigilance about public policy that congressional government alone would lack. While the Senate had occasion to review, evaluate, and potentially control the Supreme Court's disposition of the issue through such rare and inefficient mechanisms as the Bork confirmation hearings, congressional supremacy would provide a method for a more engaged electoral review of the Court's disposition of issues that otherwise would escape national attention. See supra text accompanying notes 239-42; infra note 291.


278. Id. at 345.

279. Id. at 349, 353. Chief Justice Rehnquist stated, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. at 349 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). In form and in substance, this inquiry amounts to the extreme deference employed in most cases applying mere rationality review under the equal protection clause.

280. Id. at 356 (Brennan, J., dissenting).
Thus, he employed a non-deferential balancing approach that, in form and substance, amounted to the "strict scrutiny" applied in many fundamental rights cases. It is conceivable that voters today, if engaged in extraordinarily thoughtful constitutional politics, would consider prisoners' interests in free religious exercise unimportant and, therefore, would have no impulse to displace New Jersey's policy. It is also conceivable that voters might sympathize with the religious claims of prisoners, yet, on balance, respect values of local autonomy. Finally, it is conceivable that voters would decide that religious free exercise is a particularly important component of sound prison policy, warranting national standards preempting local discretion. Here, as with most constitutional questions that survive from complaint to Supreme Court review, the merits are controversial and the correct "interpretive" results are indeterminate. Thus, Shabazz potentially represents the erroneous refusal to establish national policies preempting local discretion.

As judicial review of congressional choices might become less deferential under congressional supremacy than it tends to be under judicial supremacy, so judicial review of state policies could be similarly affected. If so, congressional supremacy can redress the error of which Shabazz is a possible example: the erroneous refusal to establish national policy. Yet by encouraging greater judicial intrusiveness, congressional supremacy could exacerbate the error of which Griswold is a possible example: the erroneous intrusion on values of federalism. Furthermore, despite congressional supremacy, natural legislative inertia might preclude congressional responses restoring the level of state discretion that voters today would choose to respect if engaged in

281. Id. (Brennan, J., dissenting) (quoting majority opinion) (emphasis in original).

282. See id. at 358-59 (Brennan, J., dissenting) (degree of scrutiny should depend on nature of right, type of activity being restricted, and extent of restriction) (citing Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985) (Kaufman, J.)). Judicial supremacy is especially problematic when the basis for judicial decisionmaking is a "balancing" of competing values. Balancing begs such questions as whose values to balance and how to calibrate a scale for balancing. See Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 972-83 (1987) (highlighting analytic and operational problems balancing presents). But see Perry II, supra note 7, at 149 (judge should enforce personal notion of community's proper moral aspiration). For a criticism of Perry's view, see supra text accompanying notes 165-68.

283. See supra text accompanying notes 266-68.
extraordinarily thoughtful (and vigilant) constitutional politics. Thus, although congressional supremacy could redress the potential Griswold error once committed better than judicial supremacy, it also could encourage more potential Griswold errors, some of which would be left unremedied.

This suggests a trade-off. Judicial supremacy poses a greater risk of erroneously refusing to establish national standards that voters would choose if engaged in extraordinarily thoughtful constitutional politics. Congressional supremacy poses a greater risk of erroneously intruding on local discretion that voters would choose to respect if engaged in extraordinarily thoughtful constitutional politics. Identifying the error that voters would rather avoid (if they confronted the question in an extraordinarily thoughtful way) is itself an issue of constitutional representation and, therefore, a matter of indeterminate speculation. In this sense, judicial supremacy and congressional supremacy cannot be evaluated according to the substance of the policies each would generate.

284. The structure of Congress, after all, was originally intended to protect concerns of federalism by inhibiting congressional action. See J. Choper, supra note 10, at 26 (commenting that either house of Congress may defeat a bill, and senators representing only 15% of population can block federal action). Such structures—and legislative inertia in general—could similarly operate to inhibit congressional responses toward restoring state discretion, thus preventing decisions which favor federalism. Dean Calabresi has analyzed problems of legislative inertia in responding to judicial efforts to serve contemporary community values by invalidating or “updating” legislation in a common law, rather than constitutional, capacity. See G. Calabresi, supra note 72, at 72-80, 120-45.

285. It is not necessarily true that Justices will become less deferential in evaluating state policies under congressional supremacy. If judicial behavior remains the same, then congressional supremacy can mitigate the erroneous establishment of national standards, see supra text accompanying notes 236-46, 273-76, and the establishment of erroneous national standards, see supra text accompanying notes 293-303, while leaving the erroneous failure to establish national standards unaddressed. In the end, whether Justices become less deferential, how much less deferential, and under what circumstances less deferential, will depend on their judgments about the continuing constitutional significance of federalism. With the goal of constitutional representation, this should be a matter of determining whether voters today, if engaged in extraordinarily thoughtful constitutional politics, would more often decide to establish national standards or to leave matters to local discretion.

286. During debates preceding the Constitution's framing, some proposed a congressional power to invalidate offensive state legislation. This was rejected as being too nationalistic. See G. Wood, supra note 42, at 525-26. It is reasonable to suggest, however, that federalism is far less important today than it was to the framers and ratifiers of 1787—or even those of 1868. More today than in 1787, the national community is viewed as primary; issues are viewed as national; culture and perspective are formed as national. See J. Choper, supra note 10, at 191-93 (regional heterodoxy more perceived than real); Ackerman, supra note 6, at 1180 (national perspective developed through Civil War; accelerated
Yet results are not the only basis by which to evaluate the rival "interpretive" regimes. Congressional supremacy still promises three process-oriented benefits discussed in other contexts. First, with more active judicial review both encouraged and tempered by congressional supremacy, the Court could confront the inevitable competition between concerns for federalism and concerns for the best governing national policy. This contrasts favorably with both congressional silence, born of the national inertia in which judicial review of state policies necessarily occurs,\textsuperscript{287} and the know-nothing deference of Chief Justice Rehnquist's \textit{Shabazz} opinion, induced by the high stakes of judicial supremacy. Thus, more active judicial review encouraged by congressional supremacy could help to simulate the extraordinary \textit{vigilance} of constitutional politics. Issues otherwise ignored would be confronted.\textsuperscript{288}

Second, the judicial focus on constitutional norms historically acknowledged as fundamentally important helps these processes of constitutional policymaking to simulate the extraordinary \textit{thoughtfulness} of constitutional politics. While Justice Brennan in \textit{Shabazz} could have focused national political attention on values of religious free exercise, for example, Chief Justice Rehnquist might have focused attention on values of federalism. Because of the judicial deference induced by the high stakes of judicial supremacy, however, the competition between concerns of federalism and concerns of religious free exercise in this context was left entirely unexamined by any accountable representative of the national polity, let alone examined in an extraordinarily thoughtful way.

Finally, the nature of congressional resolution under congressional supremacy helps to simulate the \textit{electoral roots} of constitutional politics. Although legislative inertia would inhibit

\ \ \ through New Deal); Brest, \textit{supra} note 10, at 75 n.54 (prevalent notion that values of federalism are less important today). \textit{How much} less significant concerns for federalism are, however, remains the indeterminate issue of constitutional representation. \textit{Cf. supra} text accompanying notes 261-65 (discussing possible positions that national electorate could take on issues of federalism).

\textsuperscript{287} \textit{See} Mikva, \textit{supra} note 244, at 609-10 ("Congress is a reactive body unable to enact legislation until the problem at hand reaches crisis proportions.") (footnote omitted). This observation cuts two ways: in favor of greater judicial activism, because Congress cannot (or will not) address issues that voters \textit{would} wish to consider if engaged in extraordinarily vigilant and thoughtful politics; and against greater judicial activism, because Congress cannot easily correct judicial errors.

\textsuperscript{288} \textit{Cf.} PERRY I, \textit{supra} note 7, at 152-54 (litigation of institutional reform cases can bring to public attention issues otherwise ignored).
statutory responses that, ideally, should be enacted, any debate is intrinsically valuable.\textsuperscript{289} The mere acknowledgment of congressional authority to overturn the Court’s “interpretations,” even when that authority is not exercised, could have both symbolic and practical value in lending majoritarian legitimacy to the Court’s decisions. Furthermore, when Congress overcomes its inertia and enacts responsive legislation, constitutional issues will have been resolved by accountable representatives of the national electorate, just as constitutional provisions themselves are framed and ratified by accountable representatives of the national electorate.\textsuperscript{290}

Thus, while Chief Justice Rehnquist’s approach would protect federalism (and risk the erroneous refusal to establish national standards) through congressional inertia and judicial deference, greater judicial activism supplemented by congressional supremacy would reduce erroneous refusals to establish national standards (and risk undermining federalism) by promoting conscious choice—the Court’s choice or Congress’s choice. As either choice is surely more thoughtful than inertial know-nothingness, and ultimately subject to Congress’s nationally accountable judgment, the processes by which constitutional policy are made could better approximate extraordinarily thoughtful constitutional politics.\textsuperscript{291} In the end, because successful constitutional representa-

\textsuperscript{289} The intrinsic worth of public discourse is a central proposition in the recent prominence of republicanism in constitutional scholarship. See, e.g., B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 8-19 (1980) (proposing conversational paradigm for generating ideas of justice); Ackerman, supra note 8, at 1022 (describing higher-track politics characterized by appeals to public good evaluated by mobilized citizenry); Michelman II, supra note 42, at 1495 (republicanism emphasizes deliberative functions of politics); Sunstein, supra note 42, at 1589 (noting importance of disagreement and dialogue in republican theories); Sunstein, supra note 48, at 1691 (republican model is “town meeting, where decisions are made during a process of collective self-determination”); cf. Michelman I, supra note 42, at 76-77 (judicial plurality “is for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom”). Michelman’s republicanism here is more elitist, focused on dialogue among Supreme Court Justices rather than within the electorate. See also PERRY I, supra note 7, at 152-56 (deliberative politics valuable as means to gain knowledge of self and others).

\textsuperscript{290} Under article V, constitutional provisions are reserved by representatives, whether Congress or a convention, and are ratified by representatives, whether state legislatures or special state conventions. See U.S. CONST. art. V.

\textsuperscript{291} The Court’s “dormant” commerce clause jurisprudence provides an example. Justice Stone suggested that when the Court invalidates a state policy as excessively burdensome on interstate commerce, it may be pursuing “the presumed intention of Congress” rather than a constitutional mandate. See Southern Pac. Co. v. Arizona, 325 U.S. 761, 767-69 (1945). One might question why the Court should act as Congress’s quasi-legislative front; indeed, one might
tion must be defined in terms of process—making the decisions that voters today would make if engaged in extraordinarily thoughtful constitutional politics—it is perhaps only by better approaching the processes of constitutional politics that voters can hope to approach their ideal results.292

ii. Redressing the Establishment of Erroneous National Policies

A court might commit a third possible “interpretive” error within the spectrum between the erroneous establishment of national policies and the erroneous refusal to invalidate offensive local policies. It might correctly invalidate a local policy that voters would decide to displace if engaged in extraordinarily thoughtful constitutional politics, yet create the wrong national policy.

Consider Roe v. Wade as a potential example of this “interpretive” error.293 Justice Blackmun, for a majority of seven, held that the due process clause of the fourteenth amendment protects a right of privacy which “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”294 After finding this right, he invoked the familiar judicial balance called “strict scrutiny.” Weighing the woman’s privacy interest against state interests in protecting health and “potential life,” Justice

argue that the “dormant” commerce clause involves an unconstitutional delegation (or arrogation) of legislative power to (or by) the Court. Cf. Schoenbrod I, supra note 224, at 1224-48, 1283-90 (arguing against delegation of legislative power to executive). But several arguments support this relationship between Court and Congress that parallel my rationale for judicial review tempered by congressional supremacy. First, Congress is not sufficiently vigilant to notice state and local policies that might unduly burden interstate commerce. Litigation provides an easier mechanism by which government may notice potential issues of public policy than does the legislative process. Second, the Court can devise a reasoned, coherent theory for resolving an issue of public policy. Third, Congress’s power to correct the Court’s “common law” commerce clause policy provides ultimate electoral control. While legislative inertia might make congressional response difficult, it is probably easier for Congress to notice and respond to an offensive judge-made commercial policy than to notice and respond to the entire range of state and local policies that might unduly compromise national commercial concerns.

292. Based on the proposition that the results of “interpretation” are indeterminately creative, Professor Sandalow has posited that the essence of constitutional decisionmaking is the deliberative processes from which constitutional law emerges, rather than the substance of those decisions. See Sandalow, supra note 20, at 1184-85.

293. Roe might also be an example of the erroneous establishment of national policies that compromise values of federalism.

Blackmun determined that the state may not regulate abortion during the first trimester of pregnancy; may regulate abortion for the sake of maternal health during the second trimester; and may prohibit abortion altogether for the sake of the fetus during the third trimester.\textsuperscript{295}

If voters today engaged in extraordinarily thoughtful constitutional politics to establish some national standard governing abortion, would they choose the policies imposed by Justice Blackmun in \textit{Roe}? Few would deny that if any issue of constitutional representation is indeterminate, this one is.\textsuperscript{296} Given such indeterminacy, judicial supremacy is problematic, for it protects as governing constitutional law a judgment that has no firm basis as sound "interpretation."\textsuperscript{297}

In contrast, rather than having to wait nearly two decades for the Court to hand the abortion issue back to the political process—a development suggested by \textit{Webster}\textsuperscript{298}—voters would have had authority to strike their own balance far sooner under a regime of congressional supremacy.\textsuperscript{299} Given a healthy measure of

\textsuperscript{295} \textit{Id.} at 164-65. Recently, Chief Justice Rehnquist, joined by Justices White and Kennedy, indicated an inclination to strike a different balance among these competing considerations. \textit{See} \textit{Webster} v. \textit{Reproductive Health Servs.}, 492 U.S. 490, 517-21 (1989) (plurality opinion of Rehnquist, C.J.).

\textsuperscript{296} \textit{See supra} text accompanying note 164; \textit{see also} Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 \textit{Yale L.J.} 920 (1973). While Ely allows that "[w]ere I a legislator I would vote for a statute very much like the one the Court ends up drafting," he believes that \textit{"Roe} lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine." \textit{Id.} at 926, 943.

\textsuperscript{297} Justice Blackmun’s methodology, relying in part on century-old common law, "logic," and biology, was hardly well-suited to satisfying the ideal of constitutional representation. \textit{See} \textit{Roe}, 410 U.S. at 132-36, 163. Logic is meaningless except as a means toward effectuating values. Biology might be a matter of fact, but the facts of biology can relate differently to the values of different people. Furthermore, there is little reason to believe that century-old common law reflects values of the national electorate today—whether their ordinary legislative values or their extraordinary constitutional values. The dissenters’ answer was based on a methodology similarly ill-suited to constitutional representation. Justice Rehnquist limited his opinion to original intent. \textit{See id.} at 173 (Rehnquist, J., dissenting) (majority "eschew[ed] the history of the Fourteenth Amendment"). Justice White’s dissent in a companion case was also mired in originalism. \textit{See} \textit{Doe} v. \textit{Bolton}, 410 U.S. 179, 221-22 (1973) (White, J., dissenting) ("nothing in the language or history of the Constitution" to support Court’s view that Constitution encompasses special solicitude for liberty to choose abortion). For an argument that originalism poorly serves the "interpretive" ideal of constitutional representation, see \textit{supra} text accompanying notes 149-55.

\textsuperscript{298} \textit{See} \textit{Webster}, 492 U.S. at 521 (plurality opinion of Rehnquist, C.J.) ("[T]he goal of constitutional adjudication is surely not to remove . . . [controversial] issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them.").

\textsuperscript{299} Professor Bickel noted that with judicial supremacy, "the ultimate, fi-
congressional deference to the Court, the political judgment made by Congress responding to Roe, regardless of its substance, more likely could have better reflected the choices that voters in 1973 would have made if engaged in extraordinarily thoughtful politics than did Blackmun’s opinion, or White’s, or Rehnquist’s. As the years passed, voters might have remained satisfied with their “interpretive” response; they might not have. With congressional supremacy, Congress could have passed new

300. See supra text accompanying notes 219, 271-72.

301. Congressional response could be radically different from Justice Blackmun’s opinion—for example, establishing a national norm prohibiting abortion based on viewing the fetus as an entity worthy of protection. If Congress did make this choice in exercising its powers of congressional supremacy, it would be difficult to argue that the Court’s opinion, rather than Congress’s “interpretive” statute, more likely reflects the choices voters today would make if engaged in extraordinarily thoughtful constitutional politics. Congress’s decision, after all, would be not only a national political decision, but also an extraordinarily thoughtful one—compared with ordinary congressional politics—like constitutional politics itself. This view is consistent with Sunstein’s version of “liberal republicanism.” See Sunstein, supra note 42, at 1574-76. While a republican perspective (more than one of pluralism or of hopelessly victimized minorities) might suggest that some views “are better than others,” the proof of the better view comes “through discussion with those initially skeptical.” Id. at 1574. Thus, a process of public discussion and resolution, more than one of judicial imposition, satisfies republican notions of reflective self-government. Id. at 1579-80 (republican rights emerge from deliberative politics rather than from pre-political natural law). Michelman has a more outcome-specific view of republicanism and, therefore, is satisfied with the “traces” of popular republicanism found among a dialogic (and liberal-activist) Supreme Court. See Michelman 1, supra note 42, at 73-77.

302. Reasons supporting this proposition should, by now, be familiar. First, in presenting an issue for Congress’s consideration, the Court’s decision, better than Congress’s erstwhile inaction, helps national policymaking to simulate the extraordinary vigilance of constitutional politics. Second, Justice Blackmun’s opinion, as well as the dissents, provides a relatively comprehensive, if not coherent, point of departure on the merits of the abortion issue. Any congressional response can simulate the extraordinary thoughtfulness of constitutional politics better than did the failure of consideration reflected in the absence of any national policy at all. Finally, Congress’s response can be closer to constitutional politics than was the Court’s initial determination because Congress’s resolution is political in an electorally accountable way—as is constitutional ratification itself. This is particularly significant given Justice Blackmun’s self-acknowledged “interpretive” method of balancing competing concerns. Congressional response under a system of congressional supremacy seems far more likely to satisfy the “interpretive” ideal of constitutional representation than does Justice Blackmun’s gut reaction. Cf. Aleinikoff, supra note 282, at 982 (criticizing prevalent judicial balancing where the “weights” of competing interests “are asserted, not argued for”); id. at 1004 (judicial balancing turns constitutional law into decisionmaking no better than that in ordinary politics).
legislation, reflecting experience gained and lessons learned, to supersede its first “interpretive” statute. Indeed, even if Congress did not act again, congressional supremacy need not have precluded the Court from striking down Congress’s first “interpretive” response after a decade or so, posing the constitutional issue to the national electorate once again, based on a judgment that voters then would have created a different abortion policy if engaged in extraordinarily thoughtful constitutional politics.303

* * *

The foregoing analysis suggests that toward serving concerns of political self-constraint, judicial review can better serve ideals of constitutional representation under congressional supremacy than under judicial supremacy—not only for people who create constitutional provisions of their own,304 but also for people who rely on aging constitutional texts. The “interpretive” ideal of constitutional representation seeks to replicate decisions that voters would make if engaged in constitutional politics. Constitutional politics toward political self-constraint embodies three essential elements—electoral roots, extraordinary vigilance, and extraordinary thoughtfulness.305

Better than judicial review insulated by judicial supremacy, judicial review supplemented by congressional supremacy could simulate all three elements. Ultimate congressional resolution of constitutional questions would provide electoral roots. The judicial opinions to which Congress would respond—with a likely measure of healthy deference to the Court—challenge established policy and would help provide extraordinary thoughtfulness. A reduction in the paralytic judicial deference inspired by judicial supremacy would improve the extent to which otherwise unexamined policies become subject to extraordinarily thoughtful scrutiny and, therefore, would provide extraordinary political vigilance.

The point is obscured when there is no clear notion of what “interpretation” should be. Yet by framing ideal “interpretation”

303. Cf. G. Calabresi, supra note 72, at 2, 7 (common law courts should supersede statutes believed no longer to reflect community values). On an issue such as abortion, ferment seems inevitable; strife and change likely. In the end, the transition from Roe to Webster suggests that judicial supremacy might delay change, but not prevent it. Judicial supremacy might simply have delayed the day when voters learn practical lessons about the abortion controversy that must be learned.

304. See supra text accompanying notes 88-105.

305. See supra text accompanying notes 241-42.
as a replication of constitutional politics—identifying choices the electorate would make if engaged in extraordinarily thoughtful constitutional politics—and by viewing judicial supremacy and congressional supremacy as alternative mechanisms for ensuring accountability to this ideal of constitutional representation, congressional supremacy seems to emerge as the better option.

d. Special Cases

i. The Flag: Congressional Supremacy and the Preservation of Exhortatory Constitutional Texts

The recent controversy about flag burning provides a unique context in which to consider the relative merits of judicial supremacy and congressional supremacy. In *Texas v. Johnson*, the Supreme Court decided that a state may not criminalize expressive flag burning if the state’s purpose is to “preserv[e] the flag as a symbol of nationhood and national unity.” President Bush pressed for a constitutional amendment to supersede the Court’s judgment. Congress, led by Senator Biden, pursued legislation to protect the flag.

The President openly acknowledged that his concerns were content-motivated and, therefore, inconsistent with the Court's opinion in *Johnson*. Thus, by seeking a constitutional amendment, he acted in a manner consistent with judicial supremacy. Although Senator Biden professed a content-neutral concern with the flag as a physical entity, his argument for legislation was indistinguishable from President Bush’s content-motivated argument for a constitutional amendment: The flag is a special and revered symbol that must be protected. To the extent that

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307. Id. at 410-20.
308. See Remarks by the President Announcing the Proposed Constitutional Amendment on Desecration of the Flag, 1 PUB. PAPERS 831-33 (June 30, 1989) [hereinafter Remarks] (the proposed text: “The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States.”).
309. S. 1338, 101st Cong., 1st Sess., 135 CONG. REC. 15,067 (1989) (“Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than $1,000 or imprisoned for not more than one year.”).
310. See Remarks, supra note 308, at 832-33 (The flag is “one of our most powerful ideas. And like all powerful ideas, if it is not defended, it is defamed.”).
Senator Biden claimed to have acted consistently with the Johnson opinion, his approach also remained within the bounds of judicial supremacy. By acting with the very motive that the Court declared unconstitutional, however, Senator Biden sought to exercise powers Congress would possess only under a regime of congressional supremacy. Senator Biden’s legislation passed, while President Bush’s amendment died.

Under congressional supremacy, there would have been no need for Senator Biden’s disingenuous denial that his bill directly contradicted the Court’s opinion. Indeed, congressional supremacy would encourage open and direct legislative responses to judicial decisions as legitimate. Furthermore, under congressional supremacy, congressional legislation that, unlike the Biden statute, openly and directly responded to Johnson would have been spared the fate of the Biden statute—invalidated by the Court in United States v. Eichman.

Thus, one might argue that the flag burning controversy sug-

... is draft a bill that is ‘content neutral.’”) (statement of Sen. Biden). In introducing this legislation, however, he explained, “The flag is truly the nation’s most revered and profound symbol, representing what this country stands for. That is why... just two days after the Supreme Court handed down its flag decision, I stood on this floor and offered a bill to amend the federal flag burning law...” Id. at 12-14.

312. In reaching his decision for the Johnson Court, Justice Brennan rested on the “bedrock principle” that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Johnson, 491 U.S. at 414. Chief Justice Rehnquist dissented, reaching his conclusion without significant reference to constitutional text, the framers’ intent, or judicial precedent. See id. at 421-35 (Rehnquist, C.J., dissenting). Rather, he looked outside the usual confines of his (self-proclaimed) originalism and sought to measure the deeply felt values of the national electorate today. He noted:

[M]illions of Americans regard [the flag] with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

Id. at 429 (Rehnquist, C.J., dissenting).

313. 110 S. Ct. 2404 (1990). In a 5-4 decision, Justice Brennan found that “[a]lthough the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted interest is ‘related to the suppression of free expression.’” Id. at 2408 (citing Texas v. Johnson, 109 S. Ct. 2533, 2547 (1989)).

A requirement that congressional response to Supreme Court opinions be open and direct to carry the authority of congressional supremacy would encourage Congress to deliberate more seriously about the issue at hand—toward simulating the concern for general principle that is more prominent in extraordinarily thoughtful politics. See supra notes 239-41, 244. Thus, a statute that did openly and directly contradict the Court might not have been so easy to enact as was Senator Biden’s duplicitous measure.
gests at least one context in which judicial supremacy is better than congressional supremacy as a route to constitutional representation: Because judicial supremacy required the national electorate to pursue the Bush route of constitutional amendment to override the Court’s flag policy—a proposed amendment that did not even approach ratification—voters were less likely than they would be under congressional supremacy to create an ill-considered policy. Actual constitutional politics is, by definition, a better route to extraordinarily thoughtful decisions than Congress’s pseudo-constitutional politics would be.\textsuperscript{314}

Although congressional supremacy would indeed encourage the inferior electoral route (responsive congressional legislation) to overturning unpopular constitutional decisions by the Court, it is important to remember that under judicial supremacy, the better electoral route (ratification of constitutional amendments) has been successfully completed only four times in the nation’s history.\textsuperscript{315} For those infrequent circumstances when voters actually would respond to a Supreme Court decision by formal constitutional amendment, the electorate might well construct a policy more likely to reflect extraordinarily thoughtful choices than if it acted simply with responsive congressional legislation.

Yet when the electorate’s representatives consider, but fail to ratify, formal constitutional amendment in response to a judicial

\textsuperscript{314} See supra text accompanying notes 241-47. It should be emphasized that the Biden statute was not an example of the open and direct response to judicial review envisioned by the pseudo-constitutional politics of congressional supremacy. See supra note 313 and accompanying text.

One might object that neither President Bush’s politics of constitutional amendment nor Senator Biden’s politics of congressional legislation were extraordinarily thoughtful at all—that both epitomized the reflexive and demagogic politics about which Alexander Hamilton warned when justifying judicial review. See The Federalist No. 78, at 469-70 (A. Hamilton) (C. Rossiter ed. 1961); supra note 43. Most lawyers have been indoctrinated in Justice Brennan’s perspective. Upon reflection, one might conclude that there is more to Chief Justice Rehnquist’s position than the lawyer’s traditional view allows—at least from the perspective of constitutional representation. In this case, Chief Justice Rehnquist’s approach was better suited to constitutional representation than Justice Brennan’s. In an ironic role reversal, it was the Chief Justice, not Justice Brennan, who sought the actual values of “millions and millions of Americans,” rather than referring acontextually to the framers, constitutional text, or precedent. See supra text accompanying notes 123-29 & 208 (discussing extremist speech from perspective of constitutional representation).

decision—as in the flag controversy—the Court’s decision remains vulnerable against a benchmark of constitutional representation. That the electorate’s representatives began, but failed to complete, the article V process cannot be taken to validate the Court’s judgment as having successfully identified a choice the electorate would make in constitutional politics. Indeed, if the dissenting Justices in Johnson and Eichman had prevailed, there might well have been talk of an article V response to restore the integrity of the first amendment that would have fared no better than did President Bush’s failed proposal. Thus, failure to complete article V processes can mean no electoral decision at all, or, perhaps, a general reluctance to change constitutional text, rather than endorsement of specific decisions the Court might have made.

More common are circumstances in which the electorate would not consider, let alone create, a responsive constitutional amendment under judicial supremacy, but might consider openly and directly responsive legislation under congressional supremacy. Such electoral inertia under article V presents the issue this article confronts: Can the Court’s decisionmaking under judicial supremacy or Congress’s openly and directly responsive decisionmaking under congressional supremacy—neither of which is article V decisionmaking—better approximate the electorate’s ideal of an extraordinarily thoughtful constitutional deliberation that does overcome inertia and does yield decision. Previous analysis has suggested that congressional response under congressional supremacy would more likely yield the choices voters would make if engaged in extraordinarily thoughtful constitutional politics than is the ill-guided “interpretive” decisionmaking of unaccountable Justices.316 Thus, in general and over time—when the electorate is entirely inert under article V and even when it begins, but fails to complete, decisionmaking under article V—congressional supremacy can yield the better approximation of constitutional representation.

Is it more important to better approximate constitutional representation for that vast body of issues that do not generate the sort of intense consensus required to satisfy article V’s amendment procedures, or for that small set of exceptional issues that might generate such political energy as to overcome the article V

316. See supra text accompanying notes 239-49. Again, the Biden statute was not openly and directly responsive. See supra note 313 and accompanying text.
barrier to formal constitutional amendment? For me, answering this question is relatively easy. Unless there is something special about the issues that would generate responsive constitutional amendment—so special that having actual constitutional deliberation rather than responsive congressional deliberation is critically important—judicial supremacy and congressional supremacy should be evaluated for the general rule rather than for the rare exception. At least three of the four situations in which the national electorate has overturned the Court by amending the Constitution—sovereign immunity, federal income taxation, and the minimum voting age—would hardly seem to qualify as exceptions so special as to supersede the significance of all other constitutional cases combined. And the fourth, slavery, was resolved not by extraordinarily thoughtful constitutional politics, but with the force of war. Indeed, for this issue, from today’s perspective, a route toward overturning *Scott v. Sandford* easier than either war or constitutional amendment probably would seem a better option.318

Some commentators, including Professors Ackerman and Amar, have recently addressed the problems of “interpreting” the aging Constitution by focusing on the processes for constitutional amendment. Amar wrote: “In considering modes of updating our fundamental law, our choice need not be limited to the Article V amendment process versus freewheeling judicial review, ... for there is a third ... possibility: constitutional amendment by direct appeal to, and ratification by, We the People of the United States.”319 This possibility suggests that formal constitutional deliberation need not be as rare as it has been under article


318. The analysis tracks my reasons for suggesting that originalism is a bad route to constitutional representation. While originalism, more than other theories of interpretation, would likely create greater incentive for formal constitutional amendment, it would do so only because the Court’s anachronistic “interpretations” would increasingly deviate from the choices voters today would make if engaged in constitutional politics. See supra notes 149-53 and accompanying text. In general, the better the system approaches constitutional representation, the less voters need to consider formal constitutional amendment; with successful constitutional representation, the choices voters would make if engaged in extraordinarily thoughtful constitutional politics are being made through other means.

319. Amar, supra note 42, at 1044. Akhil Amar has suggested several alternatives to article V procedures, including (i) ratification of a congressionally proposed national referendum by a mere majority of the national electorate and (ii) proposal and ratification by majorities of national conventions. See id. at 1044-45 & 1066. Bruce Ackerman also has suggested a modified process for formal constitutional amendment. See Ackerman, supra note 6, at 1182.
V. If so, then I have proposed a false tension between congressional supremacy versus judicial supremacy as the general rule, and formal constitutional amendment as the rare exception.

Yet to provide for electoral rejection of unpopular Supreme Court decisions by facilitating the amendment of constitutional text could produce a Constitution that looks more like a hodgepodge of conflicting principles and policies than a declaration of aspirations for political self-constraint. Indeed, many were concerned that President Bush's flag amendment would dilute the symbolic function of the first amendment: at risk was the power of simple and general commands, issued in an authoritative voice, to induce popular consideration of, and respect for, principle. Ironically, with an increase in formal constitutional politics that tinkers with constitutional text toward overturning the Court's decisions, the Constitution could become less a device of political self-constraint to influence popular consideration of contemporary issues, and more a diary of momentary political debates. Thus, in evaluating congressional supremacy versus easier constitutional amendment as a popular check on judicial review, voters must determine whether the goals of political self-constraint are better served by relegating the resolution of specific issues to judicial opinions and responsive congressional statutes, or by elevating the resolution of so many more specific controversies to the status of constitutional text itself.

ii. Brown v. Board of Education

Brown presents the ultimate challenge to any theory of constitutionalism and judicial review. Indeed, my arguments suggesting the superiority of congressional supremacy for a majority among the national electorate today beg questions about

320. Cf. R. Nagel, supra note 21, at 128-31 (doctrinal formulae employed by courts to resolve constitutional cases obscure relevant values and lack intuitive appeal).

321. Choosing the best route toward constitutional amendment depends in large part on confronting this article's fundamental question: Why constitutional supremacy rather than statutory supremacy? See supra text accompanying notes 23-59 & 137-48. Why have a two-track process for lawmaking? Only by answering this question can one determine how each track should work. (This choice also depends significantly on factors that determine a pre-formal, ad hoc rule of recognition. See supra note 45.) Furthermore, as I have suggested throughout this article, whether voters leave the aging Constitution intact, create new provisions pursuant to article V, or create new provisions by other procedures, they still must decide on the best available interpretive regime—judicial supremacy, congressional supremacy, or some other alternative.

whether, and how, issues of racial segregation might have been differently resolved if the Supreme Court had not enjoyed the powers of judicial supremacy.

From the perspective of voters today, Brown would most undermine congressional supremacy if each of the following three propositions is true. First, Congress (and the President), representing the will of the national electorate in 1954, would have reversed the Court's decision by statute. Second, a majority among the national electorate in 1991 oppose racial segregation and support Brown. Third, Brown, as enforced through judicial supremacy, was necessary for this evolution in national attitudes about racial discrimination.

If each of these conditions is true, Brown challenges more than congressional supremacy as a route to constitutional representation; it challenges the notion of constitutional representation itself. If each condition is true, it may be that the Court's constitutional "interpretations" should reflect policies that a majority of the contemporary electorate would reject even in extraordinarily thoughtful politics (the first condition), but that a future generation would embrace (the second and third conditions).

Deriving from Brown this modified "interpretive" ideal, and a concomitant support for judicial supremacy, is problematic for several reasons. First, racial segregation in public education might still have been successfully invalidated under a regime of

323. This "interpretive" ideal could not be vindicated under congressional supremacy. It is threatened even by the specter of Supreme Court decisions being overturned by article V constitutional politics. Alexander Bickel seemed attracted to this ideal of "interpretation." Referring to Brown, he said, "the Court's principles are required to gain assent, not necessarily to have it." A. Bicket, supra note 8, at 251 (emphasis added). John Ely has criticized this notion on several grounds. First, the Supreme Court is not particularly qualified to predict "progress." See J. Ely, supra note 253, at 69-70. Second, to govern the present by the values of the future is as undemocratic as governing the present by the values of the past. See id. at 70. Ely's second criticism, however, does not give Bickel his due. The matter as I have stated it and, I believe, as Bickel conceived it, is not simply one of "predicting" progress, but of making progress, where progress is defined from the future's perspective. The present must decide whether it wishes to suffer in being governed by values that will prevail in the future, but whether it wishes to suffer in creating a society for which the future will be thankful. Nevertheless, Ely's first criticism is applicable to this "interpretive" ideal of making progress: The Court seems not particularly well-suited to identify those issues and choices that a future generation would embrace, but that would be rejected by the present generation even in extraordinarily thoughtful constitutional politics.
congressional supremacy. The Court might have waited for a President who could be relied upon to veto any resolution Congress might have enacted restoring state discretion to segregate. Indeed, Brown itself might have survived under congressional supremacy. Congress might not have passed a resolution overturning the Court's decision; even if Congress did act, President Eisenhower might have exercised his veto authority.

Second, political activity between 1954 and 1964 yielded profound changes in the national electorate's attitudes about race. By 1964, Congress not only was an ally of Brown; it had passed the Civil Rights Act of 1964, which some feared the Court would invalidate for going too far in prohibiting racist policies and practices. While it is possible that such political change would not have occurred but for Brown and judicial supremacy, the radi-

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324. See, e.g., R. Nagel, supra note 21, at 5 (Brown reflected dominant national culture).

325. It is perhaps significant that John F. Kennedy was elected President while expressing sympathy with Brown's principle of desegregation during the campaign of 1960. See A. Bickel, supra note 8, at 268.

326. If so, Brown would have been delayed at least seven years. While the delay would have been problematic, actual desegregation had to await real changes in attitudes. Cf. Keyes v. School Dist., 413 U.S. 189, 191-200 (1973) (Denver district maintained segregated schools 19 years after Brown); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 5-13 (1971) (North Carolina school board had not desegregated schools 17 years after Brown); Green v. County School Bd., 391 U.S. 430, 432-38 (1968) (Virginia county had not desegregated schools 14 years after Brown).

327. The Eisenhower administration did file an amicus brief advocating that the "separate but equal" doctrine be overruled and systems of segregated public schools be invalidated. See L. Fisher, supra note 60, at 18. There were strong reasons other than racial morality for dismantling America's racial apartheid. "America could not fight world communism and appeal to dark-skinned peoples in foreign lands if it maintained racial segregation in its own school system. The executive branch made the Court mindful of these realities." Id.; see also Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 117-19 (1988) (Truman and Eisenhower administrations used desegregation issue in Cold War competition with Soviet Union for Third World influence). Eisenhower was far less enthusiastic about Brown when speaking to domestic audiences. See A. Bickel, supra note 8, at 265. His justification for supporting the Court's subsequent affirmations of Brown rested more on judicial supremacy than on his agreement with the decision. See id. at 266; cf. Cooper v. Aaron, 358 U.S. 1, 18-19 (1958) (unanimously affirming Brown and stressing duty of state officials to uphold interpretation of fourteenth amendment). Nevertheless, judicial supremacy allowed Eisenhower to have his cake and eat it too. If he had to choose between one or the other under congressional supremacy, he might well have exercised statesmanlike leadership. Cf. Amar, supra note 42, at 1101 (irresponsibility results when responsibility is not imposed); Thayer, supra note 60, at 155-56 (given more responsibility, institutions can act more responsibly).

328. See, e.g., G. Gunther, supra note 60, at 159 (Attorney General Kennedy expressing fear that Court would invalidate antidiscrimination legislation passed under § 5 of fourteenth amendment).
cal change in political orthodoxy during just one decade suggests that forces of social change were already present and could not long have been forestalled. Brown was as much a product of these forces as it was a catalyst. While judicial supremacy might have stifled some resistance, pro-Brown political activity would have continued even if Congress had exercised the powers of "interpretive" supremacy to overturn Brown. Protracted politics, at least as much as the Court's injunctions, changed attitudes so considerably in the decade after 1954.

Finally, even if all three conditions of this Brown scenario are true, voters today should not necessarily adopt the modified "interpretive" ideal. Perhaps there are no Brown-like issues left in American politics. Even if voters think there might be such issues, a majority might not be willing to sacrifice the discretion

329. Under congressional supremacy, the Brown scenario might have played out like this: By 1964 Congress could have enacted legislation repealing its repudiation of Brown, or broadened the Civil Rights Act with provisions governing school desegregation. Alternatively, the Court might have decided another case like Brown, presenting the constitutional challenge to Congress once again. For a similar analysis of Roe, see supra notes 298-303 and accompanying text.

330. While the Court's opinion would no longer have been an authoritative basis for injunctive force, its moral force would have remained as political capital, perhaps inspiration, for those opposed to segregation. They could then have struggled against segregation with equal, and perhaps greater, force. Cf. Chang, supra note 10, at 880-85 (Supreme Court opinions are force for political influence).

331. By this I mean judicial determinations that a majority among the national electorate would reject in constitutional politics today, but that a future generation would embrace. See supra text preceding note 323.

332. Abortion might be such an issue, but one wonders whether the Brown-like disposition would conform to Roe or instead create national policy to protect a fetus from abortion. See supra note 301.

333. There is at least one sense in which Brown was the last issue of its type. If overturned under congressional supremacy, Brown would have fallen to a coalition of Southern Democrats and Northern conservatives—precisely the coalition that the Radical Republicans feared in endeavoring to perpetuate their extraordinary political advantage through the fourteenth amendment. So viewed, Brown is the last great episode of the Civil War. In this context, constitutional supremacy and judicial supremacy are employed not to promote concerns for political self-constraint, but to deny one's opponents a right to shape public policy. If judicial supremacy was necessary for the fall of Southern segregation, Brown suggests that the Northern electorate's majority was able to perpetuate a temporary political advantage on this issue. Does this suggest the desirability of judicial supremacy for those who wish to perpetuate a temporary political advantage? The answer is still unambiguously "no" from the perspective of the national electorate's majority. See supra text accompanying notes 183-91. From the perspective of the Northern electorate's majority, the answer depends on two propositions. First, Brown's resolution could not have been attained without judicial supremacy. Second, benefits gained from Brown's resolution through judicial supremacy are worth more than losses incurred when opponents manage to
to pursue present concerns—such as, ironically, affirmative action programs\(^{384}\)—in order to give future generations the satisfaction of a moral development for issues that might have Brown's status.\(^{355}\) If so, the modified version of constitutional representation should be rejected, and, with it, judicial supremacy as well.

Brown remains troubling.\(^{336}\) But it is only from Brown, and the possibility of future cases like it, that a majority among voters today should find a significant challenge to an "interpretive" ideal of constitutional representation and its implementation through

benefit from judicial supremacy. The first proposition is questionable. See supra text accompanying notes 322-30. The second must be viewed in the light of each individual's value scheme. Nevertheless, in making that judgment, it might be helpful for Brown's proponents to consider the present Court's decisions several restricting local discretion to pursue affirmative action programs. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-506 (1988) (restricting local discretion to set aside percentage of public contracts for minority business enterprises); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282-84 (1986) (restricting local discretion to adopt affirmative action program in lay off provision of collective bargaining agreement); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978) (restricting state discretion to adopt affirmative action program in university admissions policies).

334. See supra note 333. For a critical examination of the Court's recent conservative judicial activism in restricting legislative discretion to adopt affirmative action programs, see generally Chang, supra note 190.

335. As Professor Seidman has suggested with respect to Brown itself, "It is not obvious to everyone that Brown . . . was worth the cost of Lochner, Korematsu, and Plessy." Seidman, supra note 22, at 1577 (footnotes omitted). This point is more powerful as applied to issues that might have Brown's status.

336. The busing remedy might have been more vulnerable under congressional supremacy than Brown itself. Busing was widely unpopular and affected both Northern and Southern communities. See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 452-54 (1979) (Ohio); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (North Carolina). Congress might well have acted to prohibit busing as a remedy for judicially-determined violations. Once Brown and the evil of purposeful segregation are accepted, however, it easily follows that some remedy for past transgression is required. Whether a remedy is required, and for what, presents the moral concern. Whether busing is the best remedy is not so much a moral issue as a practical one. Remedies other than busing are available and are arguably superior. See, e.g., Milliken v. Bradley, 433 U.S. 267, 280-88 (1977) (upholding order for remedial educational programs and funding); cf. Chang, The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process, 63 B.U.L. Rev. 1, 38-45 (1983) (advocating educational programs tailored to needs of students to supplement or replace busing). Indeed, there is a growing movement within the black community advocating schools designed expressly for black males to redress a pattern of disproportionate failure and underachievement. See Kantrowitz & Springen, Milwaukee Plans Two Schools for Blacks, Newsweek, Oct. 15, 1990, at 67. Given the continuing debate about how best to cure the effects of purposeful racial segregation, a continuing dialogue between the Court and Congress under congressional supremacy could have been more productive than the judicially crafted approach that may become extinct as more courts find that past violations have been "cured." See, e.g., Board of Educ. of Okla. City v. Dowell, 111 S. Ct. 630 (1991).
congressional supremacy. I am inclined to view Brown as unique. The issue of racial equality has not only a special moral status in American society, but also the unique history of having spawned a civil war. At any rate, however troublesome one case is for any given theory of constitutionalism, it is, perhaps, more troublesome to construct a theory of constitutionalism around one case.337 For now, one might simply conclude that even if congressional supremacy is not the best approach for the extreme exception, it seems best tailored for the general rule.

3. The Benchmark: Other Theories of Constitutional Interpretation

The foregoing has suggested that congressional supremacy better serves the “interpretive” ideal of constitutional representation than does judicial supremacy. Because many concerned with judicial review might reject the notion of constitutional representation—that constitutional law should reflect decisions the electorate today would make if engaged in extraordinarily thoughtful constitutional politics—this section will examine the implications of congressional supremacy for traditionally prominent theories of constitutional interpretation.

a. Originalism

At first glance one might suppose that judicial supremacy would better achieve originalist interpretation, because judges are arguably better suited than legislators for identifying and acting upon the original understandings of constitutional provisions.338 But the Court’s performance over two centuries reveals that judicial supremacy cannot ensure originalist interpretation, if only because so few judges have embraced originalism as their benchmark.339 Furthermore, as I have previously suggested, originalism is properly rejected, at least from the electorate’s perspective today.340 Thus, however better judicial supremacy might be toward achieving originalist review should be irrelevant in determining whether judicial supremacy or congressional supremacy is the better “interpretive” regime from the perspective of voters today.

337. See R. Nagel, supra note 21, at 4.
338. See Perry I, supra note 7, at 16-17; Brest, supra note 10, at 82, 103.
339. See, e.g., R. Berger, supra note 33, at 411-18 (acknowledging that most constitutional decisions are nonoriginalist); R. Bork, supra note 150, at 155-59 (same); Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 727 (1988) (same).
340. See supra text accompanying notes 149-53.
b. Conventional Morality

Conventional morality envisions judicial review more as the creation of national common law than as an interpretation of constitutional law.\textsuperscript{341} Congressional supremacy can serve an "interpretive" ideal of conventional morality better than judicial supremacy for two reasons. First, to the extent that congressional supremacy mitigates the pressures for judicial deference, procedures for making public policy can more vigilantly ensure that local policies are not out of step with national values and that old policies are not out of step with contemporary values.\textsuperscript{342} Second, under congressional supremacy, when the Court erroneously strikes down state or national policies based on putative norms that offend the national electorate's morality, Congress could respond with legislation that does reflect national consensus. Under judicial supremacy, a court decision out of step with conventional morality is insulated from revision. Thus, as a legislature's statute supersedes a common law court's precedent, congressional supremacy makes sense for a theory of "constitutional" interpretation that seeks conventional morality.\textsuperscript{343}

c. "Living" Principle

"Living" principle seeks a coherent vindication of moral principles arguably rooted in constitutional history.\textsuperscript{344} As with originalism, one might suppose that judicial supremacy can serve "living" principle better than can congressional supremacy. Congressional supremacy empowers the electorate's representatives to compromise principle by "correcting" judicial decisions that have pursued the coherent implications of certain values farther than voters can tolerate.

Yet, for several reasons, constitutional moralists can conclude that congressional supremacy need not substantially undermine the extent to which judicial review serves their ends, or even that congressional supremacy might promote their ends. First, "living" principle is controversial as a method of constitutional interpretation and, therefore, is imperfectly served even under ju-

\textsuperscript{341} See supra note 159 and accompanying text.

\textsuperscript{342} For an examination of such questions framed as issues of common law, rather than constitutional law, see generally G. Calabresi, supra note 72.

\textsuperscript{343} For the suggestion that conventional morality is deficient as a theory of constitutional interpretation, precisely because it would transform the nation's constitutional law into a national common law, see supra text accompanying note 159.

\textsuperscript{344} See supra text accompanying notes 160-68.
d. Liberal Republicanism

Congressional supremacy can serve liberal republicanism better than can judicial supremacy. Under congressional

345. See Graglia, supra note 186, at 67. Professor Graglia notes: Dworkin and Epstein are equally enthusiastic about judicial intervention in the political process; they differ only in that Dworkin would have the Supreme Court enact Rawls’ egalitarian program because it is required by natural law and therefore the Constitution, whereas Epstein would have the Court enact Robert Nozick’s libertarian program on a similar basis.

Id.

supremacy, judicial review would help to simulate the extraordinary vigilance and thoughtfulness of constitutional politics, and would stimulate the electorate-at-large, as represented in Congress, to deliberate authoritatively about issues otherwise left neglected. Referring to Cass Sunstein’s four characteristics of liberal republicanism, one can conclude that congressional supremacy could promote (i) more political deliberation among (ii) more equal political actors, (iii) leading to more agreement underlying public policy, (iv) all in a stronger atmosphere of participatory citizenship. In contrast, judicial supremacy promotes a sense of alienation from public policy and undermines electoral responsibility for making constitutional law.

While constitutional representation—choices the electorate would make if engaged in extraordinarily thoughtful politics—seems an ideal description of the substantive policies that would emerge from true liberal republicanism, congressional supremacy seems an ideal mechanism (or, at least, one better than judicial supremacy) for achieving the processes of liberal republican policymaking. This should hardly be surprising, as there is much of liberal republicanism in the idea of political self-constraint. To the extent that constitutional representation serves the electorate’s ideals of political self-constraint better than other “interpretive” theories, and to the extent that congressional supremacy serves constitutional representation better than judicial supremacy, advocates of liberal republicanism should find their concerns better served by congressional supremacy as well.

IV. Conclusion

This article has questioned the merits of judicial supremacy

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347. See Sunstein, supra note 42, at 1547-58 (discussing republican conceptions of politics in terms of these four characteristics); supra text accompanying notes 169-73.

348. The ideal of constitutional representation toward concerns for political self-constraint seriously undermines Professor Nagel’s effort to reestablish electoral responsibility for constitutional law through more pervasive judicial deference. See generally R. Nagel, supra note 21. While deference might make governing law more electorally rooted, it does nothing to make it more thoughtful. In contrast, congressional supremacy retains the distinction between extraordinary constitutional decisionmaking and ordinary policymaking by recognizing an essential role for judicial review while giving the electorate ultimate responsibility for evaluating and making constitutional law. See supra text accompanying notes 266-67 & 287-88 (judicial deference can thwart electoral vigilance).

349. See supra text accompanying notes 169-73.

350. See supra text accompanying notes 36-43.
from the perspective of the American voter. From this perspective, the article examined whether the political processes that the electorate must satisfy to supersede an interpretation of constitutional text by the Supreme Court should be the same processes that the electorate must satisfy to create constitutional text. By examining why voters might wish to make policy by creating supreme constitutional texts rather than by enacting ordinary congressional legislation, the article sought to develop ideal views of how such constitutional provisions should be "interpreted," and to determine how well judicial supremacy serves these "interpretive" ideals.

The common denominator of all motives for creating supreme constitutional texts (other than to overturn a Supreme Court decision) is a relationship to public decisionmaking in constitutional politics better than one's relationship to public decisionmaking in everyday politics—better through extraordinary power,\textsuperscript{351} extraordinary thoughtfulness,\textsuperscript{352} or extraordinary vigilance.\textsuperscript{353} Voters who have created supreme constitutional texts hope to perpetuate the extraordinary aspect of their constitutional politics after having returned to everyday politics; they hope that policy will continue to reflect choices they would make if still engaged in constitutional politics. Similarly, voters who rely on aging constitutional texts hope to attain the extraordinary aspect of public decisionmaking they would enjoy if they created supreme constitutional provisions of their own.\textsuperscript{354} In short, voters seek constitutional representation.

For a majority among voters today, only the goal of extraordinary thoughtfulness through political self-constraint is relevant in choosing between judicial supremacy and congressional

\textsuperscript{351} People who create constitutional provisions to deny their opponents' ability to shape public policy in Congress seek to exploit extraordinary but temporary political power—a competitive advantage that they will not enjoy tomorrow. See supra text accompanying notes 23-35.

\textsuperscript{352} People who create constitutional provisions to secure the benefits of political self-constraint seek to exploit extraordinary but temporary thoughtfulness and devotion to public policy—a public-oriented thoughtfulness that will be overwhelmed by their more pressing private concerns tomorrow. See supra text accompanying notes 36-43.

\textsuperscript{353} People who create constitutional provisions to ensure optimal legislative accountability seek to exploit an extraordinary but temporary level of direct control over public policy—a vigilance that will be relinquished to representative functionaries who will make day-to-day governmental decisions while enjoying opportunities to serve their own ends rather than those of their employers. See supra text accompanying notes 44-55.

\textsuperscript{354} See supra text accompanying notes 144-48.
supremacy as a route to constitutional representation.355 For these voters, judicial supremacy is the less productive device. Judicial supremacy protects judicial decisionmaking no more likely to reach correct "interpretive" results than a coin toss, and it promotes a measure of paralytic deference that leaves the products of everyday politics unchallenged in too many contexts. Judicial review supplemented by congressional supremacy, on the other hand, could encourage decisionmaking processes more thoughtful than everyday politics,356 more vigilant than everyday politics,357 and more accountable than naked judicial review.358 These processes, better than policymaking under judicial supremacy, simulate the extraordinarily thoughtful politics that constitutionalism seeks to perpetuate.

Yet judicial supremacy and congressional supremacy are not the only options. Voters might consider, for example, (i) retaining judicial supremacy and abandoning life-tenure;359

355. See supra text accompanying notes 215-17.
357. See supra text preceding note 245; text accompanying notes 247, 268-72 & 286-88.
359. Defining an "interpretive" ideal for a Justice's performance can be employed toward defining the judicial term of office: "during good Behaviour." See U.S. Const. art. III. That the term so often is called "life-tenure" suggests an absence of criteria by which to evaluate judicial performance successfully. See sources cited supra note 22. James Madison suggested that there is, indeed, a relationship between electoral accountability and good behavior: "[A republican] government . . . derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." The Federalist No. 39, at 241 (J. Madison) (C. Rossiter ed. 1961). It should not seem too odd to link a definition of "good behavior"—of ideal "interpretive" behavior—to the electorate. Constitutional representation maintains the essence of popular sovereignty and constitutionalism by asking for the choices the national electorate would make if engaged in constitutional politics.

Life-tenure has been a point of focus for those concerned about judicial accountability. See supra note 22. My analysis of congressional supremacy suggests, however, that life-tenure, and the personal security for a judge that goes along with it, can be a constructive force toward constitutional representation. See supra note 245 and accompanying text. To the extent that the choices voters would make in constitutional politics are different from the choices made in everyday politics, voters would want some part of the "interpretive" process to be capable of making decisions different from those made by elected representatives. Independent judicial review provides an element of extraordinary thoughtfulness that legislative politics often lacks. To subject judges to the pressures of re-election would undermine the possibilities for the dialogic tension (between court and legislature) from which congressional supremacy can approximate choices the electorate would make if engaged in extraordinarily thoughtful constitutional politics. See Grodin, supra note 22, at 1980 (former California justice admitting that concern for retention election might have affected his decisions on bench); Seidman, supra note 22, at 1585-87, 1599-1600
(ii) adopting congressional supremacy while requiring a supermajority within Congress to override a Court decision;\(^{360}\)

(iii) adopting congressional supremacy while requiring Congress to wait one year (or two, or more) before it can enact responsive legislation;\(^{361}\)

(iv) determining whether Congress’s structure truly does provide optimal legislative accountability;\(^{362}\)

(v) exercising Congress’s authority to curtail federal court jurisdiction;\(^{363}\)

(judges will behave differently depending on whether appointed for life-tenure, appointed but subject to removal, or elected); cf. Landes & Posner, supra note 35, at 883 (noting that independent judiciary may use statutory interpretation to enforce “contracts” between legislators and interest groups).


361. This option would discourage a heated rush to judgment and create an opportunity for extended reflection and debate—as in constitutional politics itself. At the same time, however, it would extend the period during which a possibly erroneous judicial decision retains its status as governing law.

362. See supra note 284.

363. Michael Perry has justified a relatively creative, “noninterpretive” judicial review as consistent with electorally accountable policymaking, based on Congress’ power to make exceptions to the Supreme Court’s appellate jurisdiction. See Perry I, supra note 7, at 128. This solution is problematic for several reasons. First, if Congress does restrict the Court’s appellate jurisdiction in response to unpopular judicial decisions, it will have eliminated judicial review altogether in future political disputes about relevant issues. While Perry’s democratic safety-valve would silence the Court’s voice in certain contexts, congressional supremacy retains judicial review—and with it, the Court’s constructive role in promoting the extraordinary vigilance and extraordinary thoughtfulness to which voters would aspire in making constitutional choices for political self-constraint. Cf. id. at 157-59 (valuing Court’s ability in prison reform litigation to raise otherwise ignored issues for public scrutiny, while advocating congressional power to “enact legislation withdrawing [such cases] from the federal courts’[] jurisdiction”). Second, given these high stakes of eliminating judicial review altogether for certain issues, it is hardly clear that Congress would readily choose to exercise its exceptions clause power. Thus, the Court’s judgments would remain intact, even when unpopular, and even when Congress might choose to reverse specific decisions given a regime of congressional supremacy. Thus, Perry must explain why this particular balance of popular control over judicial intervention is the optimal route toward his ideal of the national community’s moral development. Why is article V, or other formal procedures for constitutional amendment, an inadequate popular control to legitimize noninterpretive review, while congressional supremacy promotes excessive popular control, and the article III exceptions power is just right? See id. at 127, 133-95. Third, Perry still embraces originalist review as plainly valid, and not subject to the control of Congress under its article III power. Id. at 133. Aside from the problems of identifying originalist limits on “noninterpretive” review, see supra notes 152 & 237, there remain the basic problems that (i) the framers’ preferences are not necessarily those that voters today would choose if engaged in extraordinarily thoughtful constitutional politics; and (ii) courts are not infallible in identifying what those preferences are. Perry later retreated from his commitment to electorally accountable policymaking and more unambivalently embraced noninterpretive review. See Perry II, supra note 7, at 164 (premise that accountable policymaking is a value prior to all others was mistaken). It seems to me that Perry has moved in the wrong direction. At least for questions about
(vi) determining whether article V provides the best procedures for constitutional amendment.364

A search for the best "interpretive" regime, rather than the less imperfect of just two options, would be an inquiry well worth pursuing.365 Any other option, I suggest, should be evaluated by subjecting it to the same analysis this article has applied to judicial supremacy and congressional supremacy. Those concerned about the proper relationships among constitutionalism, majoritarianism, and judicial review should consider how well any "interpretative" regime can approach an ideal of constitutional representation: identifying the decisions that voters today would make if engaged in extraordinarily thoughtful constitutional politics.366

the nature of the governmental system, choices must (somehow) be attributable to the electorate-at-large. Such is my task in taking the perspective of voters comprising the national electorate today.

364. As previously noted, Bruce Ackerman and Akhil Amar have questioned the merits of article V procedures for constitutional amendment. See supra note 319 and accompanying text.

365. For example, when Pennsylvania's electorate was creating a constitution after the Declaration of Independence, some proposed "that at the expiration of every seven . . . years a Provincial Jury shall be elected, to inquire if any inroads have been made in the Constitution, and to have power to remove them." See G. Wood, supra note 42, at 292 (emphasis in original) (quoting pamphlets circulated at that time). Pennsylvania was one of the more radically egalitarian and majoritarian states during the revolutionary period. Id. at 226-37. This proposal eventually was adopted. Id. at 399.

366. If one remains uncomfortable with constitutional representation and congressional supremacy, it could be that one is uncomfortable with the idea of constitutional democracy. See Michelman II, supra note 42, at 1508-10. If a majority of the electorate would reject constitutional representation and congressional supremacy, however, then the premise with which this article began—that justifications for judicial supremacy depend on justifications for constitutional supremacy—must be reexamined. See supra text accompanying notes 322-35 (discussion of Brown). If, from the perspective of a national majority, justifications for constitutional supremacy depend on justifications for judicial supremacy, rather than the other way around, then the processes of judicial decisionmaking must be viewed as the primary good and the processes by which constitutional provisions are created are at best merely an imperfect way to provide judges with the vaguest sort of guidance; at worst, they are a withering governmental appendage. Such a version of constitutionalism not only would suggest that the electorate distrusts itself so much that it seeks Platonic guardians, but also that through two centuries of practice, the practical and normative relationships between constitutional texts and judicial review have been reversed.