RETHINKING THE PRESUMPTION OF CONSTITUTIONALITY

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One of the judiciary's self-imposed limits on the power of judicial review is the presumption of constitutionality. Under that presumption, courts supply any conceivable facts necessary to satisfy judicially created constitutional tests. The Supreme Court has given three reasons for the presumption: to show due respect to legislative conclusions that their enactments are constitutional, to promote republican principles by preventing courts from interfering with legislative decisions, and to recognize the legislature's institutional superiority over the courts at making factual determinations. This Article argues that the presumption does not sensibly implement these reasons. It further argues that these reasons equally, if not more strongly, support judicial deference to legislative interpretations of the Constitution, and consequently that courts should revisit their refusal to defer to such interpretations.

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INTRODUCTION

A central tenet of constitutional law is that the judicial power to declare a statute unconstitutional is an exceptional one, which should be used only when "unavoidable."[1] It is therefore hardly surprising that federal courts have placed limits on their power of judicial review. One of the principal limitations is the presumption of constitutionality.[2] Under that presumption, courts assume facts necessary to satisfy constitutional tests developed by the courts.[3] Thus, for example, when a court reviews legislation for reasonableness, the presumption of constitutionality requires the court to assume facts necessary to establish the reasonableness of the law. The presumption, in other words, involves a form of factual deference.

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1 *See* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944); *see also* Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (describing the decision to declare legislation unconstitutional as "the gravest and most delicate duty that this Court is called on to perform").

2 Examples of other self-imposed limitations include the doctrines of constitutional avoidance and of deciding cases on statutory grounds when possible, *see* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347–48 (1936) (Brandeis, J., concurring), and the refusal to consider constitutional arguments made by one to whom application of a statute is constitutional, *see* United States v. Raines, 362 U.S. 17, 21–22 (1960).

3 Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934) ("[I]f any state of facts reasonably can be conceived that would sustain [the challenged legislation], there is a presumption of the existence of that state of facts . . . .").

At the same time that federal courts defer on questions of fact to the legislature, they have largely refused to defer on questions of constitutional interpretation. Although judges occasionally deferred in the eighteenth and nineteenth centuries to legislative interpretations of the Constitution, in more recent times the courts have abandoned that practice. Relying on the statement in *Marbury v. Madison*[4] that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[5] courts have taken the position that the judiciary has sole interpretative authority over the Constitution.[6]

The refusal to defer on questions of constitutional interpretation is difficult to square with the courts' ready acceptance of the presumption of constitutionality.[7] Courts have based the presumption of constitutionality on three reasons: to show due respect to the judgments of legislators, who are bound by an oath to support the Constitution; to promote democracy by preventing courts from interfering with decisions rendered by the elected legislature; and to take advantage of the legislature's superior institutional design. None of these reasons provides a principled basis for adopting a factual presumption of constitutionality but refusing to defer to legislative interpretations of the Constitution. The only possible exception is the institutional advan-

4 5 U.S. (1 Cranch) 137 (1803).

5 *Id.* at 177.

6 *See* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("It is . . . a 'permanent and indispensable feature of our constitutional system' that 'the federal judiciary is supreme in the exposition of the law of the Constitution.'" (quoting Miller v. Johnson, 515 U.S. 900, 922–23 (1995))).

7 For debate over whether courts should defer to legislative interpretations of the Constitution, compare, for example, JOHN HART ELY, DEMOCRACY AND DISTRUST 101–04 (1980) (discussing a judicial model that defers unless the lawmaking system is malfunctioning); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 301–02 (2002) (noting how the Court consistently displaces congressional constitutional interpretation with its own); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 128–30 (2001) (discussing how the Rehnquist Court did not acknowledge congressional constitutional interpretation), with, for example, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 224–69 (2004) (arguing that the current doctrine of presuming constitutionality violates the Ninth Amendment and should be replaced by "presumption of liberty" that protects all unenumerated rights equally); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362–63 (1997) (discussing the concept of judicial nondeference); Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 275–77 (1993) (discussing the "departmentalist" system of multibranch interpretation of the Constitution); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1274–79 (1996) (discussing the view that the Court's constitutional interpretation is arguably constrained by the political branches).

tage of the legislature. But the advantages courts possess in interpreting the Constitution are limited to technical constitutional questions. Many constitutional issues involve questions of social policy, which the legislatures, because they are more in touch with social norms than are the courts, arguably have the advantage in resolving.

This Article argues that the reasons underlying the presumption of constitutionality more logically justify judicial deference to legislative interpretations of the Constitution, and that, if courts are to afford the current presumption of constitutionality, they should also defer to legislative interpretations of the Constitution. It proceeds in four parts. Part I describes the presumption of constitutionality and contrasts it with a scheme of deference to the legislative interpretations of the Constitution. Part II describes the reasons given by the Supreme Court for the presumption of constitutionality and evaluates whether those reasons logically support the presumption. It concludes that those reasons do not justify the presumption in its current form. The reasons justify deference to the legislature only when the legislature has in fact considered the factual question presented to the courts, but under the current presumption, the courts supply facts regardless whether the legislature considered the factual question at hand. Part II further demonstrates that the Court's reasons for the presumption of constitutionality more logically support judicial deference to legislative interpretations of the Constitution, instead of the factual deference occasioned by the presumption of constitutionality. In so arguing, Part II does not attempt to resolve the basic question whether courts should defer at all to the legislature. Instead, it shows that, accepting the reasons for the presumption of constitutionality—as the courts themselves do—the courts should adopt a scheme of deference to legislative interpretations of the Constitution.[8]

Part III addresses other potential reasons why the courts might not defer to legislative interpretations of the Constitution, and ultimately concludes that none of the arguments justify withholding judicial deference to legislative interpretations of the Constitution while at the same time affording the presumption of constitutionality. Part IV discusses some ways of reconciling the doctrines of deference with the reasons given for deference. It suggests that courts should reduce the scope of factual deference under the presumption of constitutionality. Instead of supplying facts to sustain legislation, the courts should defer on factual matters only when the legislature has in fact made factual findings. At the same time, courts should expand defer-

8 Although beyond the scope of this Article, similar arguments may apply to interpretations rendered by the executive branch in signing a bill into law.

ence to legislative interpretations of the Constitution. When the legislature has offered an interpretation of the Constitution, courts should afford some level of deference to that interpretation.

I. The Deferential Forms of Judicial Review

Many have stressed that courts should exercise their power of judicial review sparingly. In *Federalist No. 78*, for example, Alexander Hamilton stated that the courts should overturn only those laws that were "contrary to the manifest tenor of the Constitution"[9] and consequently created an "irreconcilable variance"[10] with the Constitution. Similarly, the Supreme Court has repeatedly maintained that the judiciary may invalidate statutes "only upon a plain showing that Congress has exceeded its constitutional bounds."[11]

These statements reveal a sense that, in exercising their power of judicial review, courts should not independently judge the constitutionality of legislative enactments. Instead, they should defer to legislative judgments about the constitutionality of an act. Thus, even if a court might conclude based on its own judgment that an act is unconstitutional, it should nevertheless sustain that act out of deference to the legislature, unless the constitutionality of the act is patently clear.[12]

But the recognition that courts should defer to legislative judgments of constitutionality does not establish *how* courts should implement that deference. Deference comes in many forms. Courts can defer on findings of law, findings of fact, or applications of law to fact.[13] Each form of deference is distinct; affording one type of deference does not require affording other types of deference.[14] Courts of

9 The Federalist No. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

10 *Id.* at 435

11 *Morrison*, 529 U.S. at 607; *see also* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436 (1827) (stating that "the presumption is in favour of every legislative act"); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (stating that a court may declare an act of a legislature unconstitutional only when "[t]he opposition between the constitution and the law [is] such that the judge feels a clear and strong conviction of their incompatibility with each other").

12 *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 Cornell L. Rev. 656, 665 (2000) ("Judicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different from one it would otherwise reach.").

13 *See* Paul Horwitz, *Three Faces of Deference*, 83 Notre Dame L. Rev. 1061, 1072–78 (2008) (describing the different types of deference).

14 For each type of deference, the degree of deference that a court may afford also varies. Courts may defer absolutely, accepting another's decision without ques-

appeals, for example, ordinarily defer to findings of fact rendered by trial courts, but they afford no deference to trial court conclusions of law.[15] Under current law, courts assessing the constitutionality of statutes defer to legislatures on questions of fact but not on matters of law.

A. Factual Deference

In constitutional adjudication, the principal form of deference that courts provide to legislatures is a form of factual deference. That deference is known as the presumption of constitutionality. Under the presumption, in evaluating the constitutionality of legislation, courts assume facts necessary to satisfy the constitutional test under which the legislation is being evaluated.

The presumption commonly arises in cases evaluating legislation for reasonableness.[16] Article I of the Constitution provides that Congress may enact any law "necessary and proper" to execute the powers delegated by the Constitution.[17] In *McCulloch v. Maryland*,[18] the Supreme Court held that federal legislation satisfies this "necessary

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tion. Or they may afford some lesser degree of deference, such as treating another's decision as a thumb on the scales, *see, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (treating agency interpretations as persuasive authority), or refusing to upset another's decision unless there is good reason to do so, *see, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (treating reasonable agency interpretations as binding).

15 Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 14 (2008) ("De novo review is generally reserved for questions of law, and clear error review for factual findings."). One notable exception is that appellate courts review findings of fact in the First Amendment context de novo. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984) ("Judges . . . must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . .").

16 *See* Gonzales v. Raich, 545 U.S. 1, 28–29 (2005) ("The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity."); Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 198 (2001) ("[T]he party challenging the statutory withholding scheme . . . bears the burden of demonstrating its constitutionality."). Although the presumption ordinarily arises in the application of reasonableness tests, it is not limited to that context. Courts applied it to other fact-based tests for assessing the constitutionality of legislation. *See* Henry Wolf, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 21 (1924).

17 U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States").

18 17 U.S. (4 Wheat.) 316 (1819).

and proper" requirement if Congress reasonably concludes in enacting the legislation that the legislation implements one of its delegated powers.[19] Whether legislation reasonably implements a government power depends on the state of the facts justifying the legislation.[20] For example, a restriction on the possession of marijuana does not reasonably implement Congress's power to regulate interstate commerce if there is no interstate marijuana market. *McCulloch* explained that, for a law to be constitutional, not only must it be a reasonable means of implementing Congress's power, but Congress must in fact have been motivated by a desire to implement that power.[21]

The presumption of constitutionality operates to supply the facts necessary to establish a law's reasonableness. Under the presumption, courts will sustain legislation if Congress *could have* reasonably concluded that its legislation implements one of its delegated powers. The facts justifying the legislation need not actually exist, nor must they be the actual basis motivating legislature to enact the law; all that is necessary is that a rational legislator *could have* reasonably thought that they exist.[22] Thus, to return to the previous example of Congress prohibiting the possession of marijuana, even if Congress enacted the prohibition on the possession of marijuana for improper reasons, and

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19 *Id.* at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

20 *See* 1 Laurence H. Tribe, American Constitutional Law § 8-3, at 1346 (3d ed. 2000) (describing the *Lochner*-era Court's requirement of an actual justification in fact for economic regulations); Wolf, *supra* note 16, at 6 ("[I]t must first be informed as to the truth of some question of fact which the statute postulates or with reference to which it is to be applied; and the validity of the legislation depends on the conclusions reached by the court with reference to this question of fact.").

21 *See McCulloch*, 17 U.S. (4 Wheat.) at 423 (explaining that if Congress were, "under the pretext of executing its powers, [to] pass laws for the accomplishment of objects not entrusted to the government," those laws would be unconstitutional). Thus, under *McCulloch*, Congress could not enact legislation prohibiting the interstate sale of marijuana on the ground that marijuana is dangerous to health, because the protection of health is not justified by any power delegated to Congress.

22 *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (stating that a law is constitutional "if there is any reasonably conceivable state of facts that could provide a rational basis" for its enactment); Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934) (holding that "if any state of facts reasonably can be conceived that would sustain" the challenged legislation, then "there is a presumption of the existence of that state of facts"). Nor is it necessary that speculated facts provide a perfect justification for the statute. So long as the speculated facts justify a substantial portion of the coverage of the law, the courts will sustain the law as constitutional. Flemming v. Nestor, 363 U.S. 603, 612 (1960) ("[I]t is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply.").

even if marijuana never in fact crossed state lines, courts would sustain the legislation because Congress *could have* rationally believed that marijuana crossed state lines and forbidden the possession of marijuana as a means to regulate the interstate market.[23] The presumption thus expands the power of Congress beyond that originally authorized by *McCulloch*.[24]

The presumption applies to state laws as well. Since the late nineteenth century, federal courts have reviewed most state legislation challenged under the Due Process Clause and the Equal Protection Clause under a reasonableness standard.[25] Courts ask whether the state legislation reasonably implements a legitimate government interest.[26] As with federal laws, the presumption of constitutionality obviates the need for a court to evaluate the facts to determine whether a state law is a reasonable means of achieving a legitimate government interest. Under the presumption, a court assumes any facts necessary to establish the reasonableness of a state law.[27] So long as the court can conceive of a set of facts establishing the reasonableness of the legislation, it will uphold the law. (Of course, the reasonableness standard does not apply to all legislation challenged under the Due Process and Equal Protection Clauses. Courts apply a heightened

23 *See* Gonzales v. Raich, 545 U.S. 1, 32–33 (2005) (upholding Congress's regulation of the possession of marijuana).

24 Two examples illustrate the point. First, the Supreme Court has held that Article I authorizes Congress to impose taxes only for the reason of raising revenue, as opposed to as a means to regulate. *See* Veazie Bank v. Fenno, 75 U.S. 533, 541 (1869). But the Court has directed courts, in determining the constitutionality of tax legislation, not to examine the legislature's motives; instead, under the presumption of constitutionality, courts must assume that the tax law is enacted for the constitutionally valid purpose of raising revenue if it does in fact raise revenue. *See* McCray v. United States, 195 U.S. 27, 54 (1904). Second, in *Flemming*, the Court invoked the presumption in considering whether a statute unconstitutionally imposed "punishment" without providing the protections of the Sixth Amendment. *Flemming*, 363 U.S. at 617. The Court explained that a statutory disability constitutes a punishment only if its purpose is to target the individual, not to regulate an activity. *See id.* The Court refused to read the statute as unconstitutionally imposing a punishment, stating that the presumption required the assumption that Congress enacted the statute to regulate activity. *See id.*

25 *See* BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION 196 (1942).

26 *See, e.g.*, Lochner v. New York, 198 U.S. 45, 56–57 (1905) (addressing whether maximum-hour regulations for workers at bakeries reasonably promoted government interest of protecting public safety).

27 *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990) (stating that a court "must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding'" (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981))).

standard in reviewing legislation that infringes fundamental rights or discriminates against suspect or quasi-suspect classes.)[28]

Although courts occasionally invoked the presumption of constitutionality as early as 1876,[29] it did not become firmly entrenched in the law until the 1930s.[30] During the early twentieth century, courts often substituted their factual conclusions regarding the reasonableness and necessity of laws for those of the state legislatures. For example, in *Lochner*, the Court rejected New York State's factual conclusion that a law limiting the hours a baker may work promoted public health.[31] Litigation therefore often focused on whether the factual conditions justified legislation, as demonstrated by the briefs filed by Louis Brandeis that recounted facts instead of legal argument to justify social legislation.[32] The presumption of constitutionality was one of the means by which the Court abandoned the *Lochner* line of cases. In a series of cases in the 1930s the Court explained that it would no longer evaluate the facts to determine the reasonableness of laws; instead, the Court said, when constitutionality depends on questions of fact, "if any state of facts reasonably can be conceived that would sustain [the challenged legislation], there is a presumption of the existence of that state of facts."[33]

B. Legal Deference

While the Court has been willing to afford extreme deference to legislatures on factual matters, the Court has been unwilling to provide similar deference to the legislature regarding legal questions under the Constitution. Aside from a small set of now-overturned decisions,[34] the Court has consistently stated since its decision in

28 *See, e.g.*, Vacco v. Quill, 521 U.S. 793, 799 (1997).

29 *See* Munn v. Illinois, 94 U.S. 113, 132 (1877) (stating that the Court "must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed").

30 *See* Walton H. Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1073, 1074–75 (1931) (arguing that the presumption did not gain traction until the 1931 decision *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co*, 282 U.S. 251 (1931)).

31 *See Lochner*, 198 U.S. at 57 ("Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week.").

32 Ruth Bader Ginsburg, Muller v. Oregon*: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 361–65 (2009) (discussing how the factual detail in Brandeis's brief determined the outcome in *Muller v. Oregon*, 208 U.S. 412 (1908)).

33 Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

34 In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), for example, the Court stated that the judiciary should defer to Congress's interpretation of Section 5 of the Fourteenth Amendment. *See id.* at 648–49 (stating that the Fourteenth Amendment empowers Congress to abrogate more than "only those state laws that the judicial

Cooper v. Aaron[35] that it has the ultimate authority to interpret the Constitution,[36] and it consequently has not deferred to constitutional interpretations rendered by legislatures.[37]

The reason that the Court has not afforded deference to the legislature on the meaning of the Constitution is not that the Constitution is susceptible to only one reading, thereby obviating the need for deference. Many provisions of the Constitution are ambiguous, and reasonable minds may disagree over the meaning of those provisions. Under a scheme of judicial deference to the legislature's interpretation of the Constitution, this space for disagreement limits the power of judicial review. Courts could nullify only those acts that are based on implausible constructions of the Constitution.[38] When the Constitution admits of more than one interpretation, the courts could defer to the legislature's interpretation of the Constitution so long as it is reasonable.[39]

Instead, the Court has based its ultimate authority to interpret the Constitution on the statement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say

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branch was prepared to adjudge unconstitutional"). But the Court abandoned that doctrine in *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

35 358 U.S. 1 (1958).

36 *See* United States v. Morrison, 529 U.S. 598, 617 n.7 (2000) (describing the "Court" as "the ultimate expositor of the constitutional text"); Baker v. Carr, 369 U.S. 186, 211 (1962) (stating that the Supreme Court is "ultimate interpreter of the Constitution"); *Cooper*, 358 U.S. at 18 (proclaiming "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"); *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."); *City of Boerne*, 521 U.S. at 529 (rejecting deference to legislative interpretations of the Constitution on the ground that "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V").

37 *See* Barkow, *supra* note 7, at 302 ("[T]he unmistakable trend is toward a view that all constitutional questions are matters for independent judicial interpretation and that Congress has no special institutional advantage in answering aspects of particular questions."); Kramer, *supra* note 7, at 129 ("[W]hat Congress thinks about the Constitution carries no formal legal weight in the eyes of the Rehnquist Court, and has only so much practical weight as the Justices think it deserves (which typically turns out to be not much)."); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 56 (2005) ("Judicial modesty [i.e., deference to the legislature] is not the order of the day in the Supreme Court.").

38 *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 892 (2003) (describing such a scheme).

39 *See* 1 WESTEL WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 42 (2d ed. 1929).

what the law is."[40] As others have noted, this reasoning is unpersuasive.[41] Nothing about *Marbury*'s statement requires that the judiciary have the authority to render independent judgments on the meaning of the Constitution. If the Constitution itself assigns the power to interpret to the legislatures and limits the authority of the courts to second guess those interpretations, the duty of the courts is to follow the interpretation rendered by the legislature.[42]

Indeed, before the twentieth century, judges frequently intimated that they should defer to interpretations of the Constitution rendered by both state legislatures and Congress. In *Fletcher v. Peck*,[43] for example, Chief Justice Marshall stated that for the Court to declare an act of a state legislature unconstitutional "[t]he opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other" and that the power should not be exercised "in a doubtful case."[44] Justice Chase similarly stated that "if [he] only doubted" whether a law was constitutional, that doubt would be reason for him "to receive the construction of the Legislature."[45] Likewise, Justice Paterson stated that for the "Court to pronounce any law void, it must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative application."[46] And Justice Washington stated that, if he "could rest [his] opinion in favour of the constitutionality of the law . . . on no other ground than this doubt . . . that alone would . . . be a satisfactory vindication of it."[47] It was a common refrain through the nineteenth century that "in no doubtful case" should a court "pronounce a legislative act to be contrary to the [C]onstitution."[48]

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40 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Morrison*, 529 U.S. at 616 n.7 ("[B]ut ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."); *Cooper*, 358 U.S. at 18 (basing judicial supremacy on *Marbury*).

41 *See* Barkow, *supra* note 7, at 301; Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 9 (1983).

42 *See* David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 658 n.77 (1982) ("[I]t would be quite consistent with a judicial duty to declare the law to find that the law commits to Congress the decision whether it has acted within its powers."); Monaghan, *supra* note 41, at 9.

43 10 U.S. (6 Cranch) 87 (1810).

44 *Id.* at 128; *accord* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436 (1827) (stating that "the presumption is in favour of every legislative act").

45 Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796).

46 Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800).

47 Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827).

48 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819) ("[T]his court has expressed the cautious circumspection with which it approaches

As explained in seminal a law review article by James Bradley Thayer,[49] these cases revealed a narrow scope of judicial review under

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the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the [C]onstitution."); *see also* Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 615 (1899) ("[A]n act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute . . . ."); Union Pac. R.R. v. United States, 99 U.S. 700, 718 (1879) (stating courts could not declare an act void "except in a clear case" and that "[e]very possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt"). *See generally* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 222–27 (1995) (recounting these and other cases). State courts adopted a similar view in evaluating whether state laws passed muster under the federal their respective state constitutions. *See, e.g.*, Syndics of Brooks v. Weyman, 3 Mart. (o.s.) 9, 12 (La. 1813) ("We reserve to ourselves the authority to declare null any legislative act which shall be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt."); Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. (7 Pick.) 344, 474 (1829) (stating that "acts of the legislature must be presumed to be constitutional, unless the contrary [construction] can be made very clearly to appear"); *Ex parte* McCollum, 1 Cow. 550, 564 (N.Y. Sup. Ct. 1823) ("[B]efore the Court will deem it their duty to declare an act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt."); Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811) ("It must be remembered however, that for weighty reasons, it has been assumed as a principle in construing constitutions, by the Supreme Court of the *United States*, by this court, and every other court of reputation in the *United States*, that an act of the legislature is not to be declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."); Byrne's Adm'rs v. Stewart's Adm'rs, 3 S.C. Eq. (3 Des. Eq.) 466, 476 (1812) ("[I]t is the duty of the legislators as well as of the Judges to consult this and conform their acts to it, so it ought to be presumed that all their acts are conformably to it, unless the contrary is manifest."); Kemper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 61 (1793) ("[T]he violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws, which might be productive of much public good."); *see also* Dearborn v. Ames, 74 Mass. (8 Gray) 1, 21 (1857) (Thomas, J., concurring) ("I assent to the opinion expressed by the other justices, upon the single ground that the act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void.")

49 *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) ("It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,?so clear that it is not open to rational question."); *see also* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1224 (1978) ("Thayer's contribution was to draw together the threads of the rule's articulation and defense from a wide range of sources, and bestow on them his powerful endorsement."). Thayer's theory of deference influenced a number of important judges, including Holmes, Brandeis, Frankfurter, and Hand. *See* Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 26 (2007). Indeed, Justice Frankfurter called it the single most important constitutional law article ever pub-

which courts would overturn legislation only if it was based on a clearly mistaken, irrational interpretation of the Constitution.[50] According to Thayer, the reason for this deference was not that the legislature's interpretation was necessarily correct; rather, it reflected a limit on judicial review: Even if a legislative interpretation of the Constitution was erroneous, the courts had no power to set that interpretation aside, so long as it was plausible.[51]

To be sure, despite the frequent professions of deference, courts did not always appear to defer to legislative interpretations of the Constitution. Indeed, in neither of the first two cases in which the Supreme Court invalidated an act of Congress, *Marbury v. Madison* and *Dred Scott v. Sandford*,[52] did the Court mention the presumption. Nor did the presumption prevent the Supreme Court from striking down state laws during the nineteenth century.[53] Still, on numerous occasions the courts did afford interpretive deference,[54] and it was not until more recent times that courts ceased all together from doing so.

The presumption of constitutionality does not fill the gap left by the judiciary's refusal to afford Thayerian deference to legislative interpretations of the Constitution, because although they have occa-

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lished. FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 299–301 (Harlan B. Phillips ed., 1960).

50 *See* Thayer, *supra* note 49, at 144.

51 *See id.* at 150 ("[T]he ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not."); *see also* Sager, *supra* note 49, at 1223 (stating that Thayer's rule "is not founded on the idea that only manifestly abusive legislative enactments are unconstitutional, but rather on the idea that only such manifest error entitles a court to displace the prior constitutional ruling of the enacting legislature").

52 60 U.S. (19 How.) 393 (1857).

53 In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), for example, the Court struck down a state law because it violated the prohibition on states imposing imposts or duties on exports and conflicted with Congress's power regulate commerce. Although the Court said that there is a "presumption is in favour of every legislative act," the Court did not exhibit any deference to the state legislature. *Id.* at 436. Instead, it declared the law unconstitutional based on its own assessment that the state law did not fall within the text or purpose of the prohibition on imposts and conflicted with Congress's commerce power. *See id.* at 437–38, 449. Similarly, in the *Dartmouth College* case, after reciting the presumption of constitutionality, the Court struck down a state law seizing Dartmouth College based on its own independent assessment of whether a corporate charter fell within the contracts clause. *See Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 629.

54 *See, e.g.*, United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896) (invoking presumption of constitutionality in rejecting challenge to the federal government's condemnation of land); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128–29 (1810) (invoking presumption of constitutionality in rejecting constitutional challenge to state law).

sionally been conflated,[55] the two forms of deference are quite distinct. Under Thayerian deference, the courts ask whether the Constitution is reasonably subject to the interpretation put on it by the legislators. Under the presumption, by contrast, courts do not consider the rationality of the legislature's interpretation. Instead, a court applies its own interpretation of the Constitution, and it asks whether there is a conceivable set of facts that would justify the law given that interpretation. Thus, the current presumption affords some degree of judicial deference to the legislature while at the same time allowing the judiciary to retain control over the interpretation of the Constitution.[56]

The difference in the two forms of deference can be seen in *United States v. Lopez*.[57] That case considered whether the Commerce Clause authorized the federal law banning the possession of handguns within 1000 feet of a school.[58] In resolving the question, the Court did not consider whether Congress could have interpreted the Commerce Clause to authorize the law. Instead, the Court offered its own interpretation, concluding that the Commerce Clause authorizes Congress to regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce, and (3) economic activities that substantially affect interstate commerce.[59] The Court did, however, apply the presumption of constitutionality, albeit implicitly. In striking down the law, the Court explained that, given this three-part test, there was no set of facts justifying the ban on handguns near schools.[60] Had the Court deferred to congressional interpretation, the result may have

55 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) (equating Thayerian review with the presumption of constitutionality and the rational basis test); *see also* I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1211 n.21 (D.C. Cir. 1984) (describing Thayer's article as a "celebrated discussion of the presumption of constitutionality"); BICKEL, *supra* note 42, at 37–39; Dorf, *supra* note 38, at 892–95 (discussing the two ideas interchangeably as examples of "judicial restraint"); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 967 n.63 (2007) (praising Thayer's "classic statement of the grounds for the presumption of constitutionality").

56 *See* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 87–105 (2001).

57 514 U.S. 549 (1995).

58 *See id.* at 551.

59 *See id.* at 558–59.

60 *See id.* ("[P]ossession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."); *see also id.* at 562–63 ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.").

been different. Congress could rationally interpret the Commerce Clause more broadly than the Court did, construing the Clause to authorize federal regulation of not only economic but also of noneconomic activities that substantially affect interstate commerce.[61]

II. Reasons for the Presumption

The Constitution does not explicitly command the presumption of constitutionality. Instead, courts have premised the presumption on three separate structural reasons. First, the presumption shows due respect to legislators, who are bound by an oath to support the Constitution. Second, it promotes republican principles by preventing courts from interfering with decisions rendered by the elected legislature. Third, the presumption recognizes the legislature's institutional superiority over the courts: Courts defer to legislative determinations of facts because the legislature is better equipped than courts to resolve those facts.

These reasons provide a shaky foundation for the presumption of constitutionality. Some of the reasons arguably do not justify judicial deference at all,[62] and to the extent that they do merit deference, they do not support the scope of deference embodied by the presumption of constitutionality but instead call for deference that is narrower or broader than the current presumption employed by the courts.

More significantly, the reasons for deference given by the courts do not logically support both the courts' acceptance of the factual deference embodied by the presumption of constitutionality and their rejection of deference to legislative interpretations. The reasons underlying deference equally, if not more strongly, support Thayerian

61 *See, e.g.*, *id.* at 623–24 (Breyer, J., dissenting) (arguing that the Commerce Clause could rationally be interpreted to authorize regulation of noneconomic activities). The Court similarly applied the presumption in *Gonzales v. Raich*. There, in determining that the Commerce Clause authorized Congress's ban on the possession of marijuana, the Court asked only whether any conceivable set of facts justified the law under the Court's interpretation of the Commerce Clause. *See Gonzales v. Raich*, 545 U.S. 1, 19 (2005) ("Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.").

62 Many scholars have criticized the reasons underlying deference. *See* Randy E. Barnett, Restoring the Lost Constitution 224–52 (2004); David M. Burke, *The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 Harv. J. L. & Pub. Pol'y 73, 83–153 (1994); James R. Rogers, *Why Expert Judges Defer to (Almost) Ignorant Legislators: Accounting for the Puzzle of Judicial Deference*, *in* Institutional Games and the U.S. Supreme Court 24, 27–33 (James R. Rogers et al. eds., 2006).

deference.[63] The only potential exception is the institutional advantage rationale. Many have argued that courts are superior to the legislature at resolving issues of constitutional interpretation because courts do not face the same social pressures as legislatures. But that advantage is not as significant as one might think, given that the courts have generally interpreted the Constitution in ways that correspond to contemporary social norms.

A. The Due Respect Rationale for the Presumption

Article VI of the Constitution requires state and federal legislators to take an oath to uphold the Constitution.[64] Fulfilling this obligation requires each legislator to vote in favor of only those acts that he believes to be constitutional.[65] According to the Court, "due respect for the decisions of a coordinate branch of Government" demands that the judiciary not second guess these determinations of constitutionality.[66] The basis for this deference is not simply that the legislature has taken the oath to uphold the Constitution. Were that enough, courts would defer to constitutional interpretations rendered by any government employee, from legislators through janitors, since

63 Another explanation for deference is simply that the Court will not strike down legislation that conforms to the policy preferences held by a majority of the Court. *See* Rogers, *supra* note 62, at 33. Although this theory may explain *why* in some cases the courts do defer, it does not explain the doctrines of deference themselves.

64 Article VI provides, "Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI.

65 *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997) ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."); 1 ANNALS OF CONG. 500 (Joseph Gales ed., 1834) (1789) (Statement of Rep. James Madison) ("[I]t is incontrovertibly of as much importance to this branch of the Government as to any other, that the Constitution should be preserved entire. It is our duty . . . .").

66 United States v. Morrison, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring) (calling for presumption on the ground that the Supreme Court "is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government"); *see also* Field v. Clark, 143 U.S. 649, 672 (1892) (noting that legislation that passes Congress should receive deference if the law is "authenticated . . . in conformity with the Constitution").

every employee must take an oath to support the Constitution.[67] Rather, the judiciary's respect for Congress is based on the fact that Congress is a "coordinate" government body,[68] equal in rank and power to the federal judiciary;[69] and its respect for state legislatures rests on the federalism principles that the federal judiciary should not unduly interfere with the state governments.[70]

Although frequently invoked by the courts, the due respect rationale does not justify the scope of the presumption. Under that rationale, the presumption is both too narrow and too broad. It is too broad because if the basis for deference is that the legislature has already exercised constitutional judgment, courts should defer only when the legislature has in fact exercised that judgment.[71] But legislators often vote for laws without considering their constitutionality, or at least the particular constitutional question that eventually emerges before the courts.[72] And sometimes legislators even vote for laws that they affirmatively believe to be unconstitutional.[73] Courts have not

67 Article VI provides that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI.

68 *Morrison*, 529 U.S. at 607 ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

69 Judicial respect also avoids conflict with Congress, which has substantial means of punishing the judiciary. Congress can decide whether to freeze or to increase judicial salaries and how much money to appropriate for staff and facilities. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 885–87 (1975). Similarly, Congress can regulate the judicial workload by expanding or contracting federal jurisdiction, or by altering the number of judges. *See id.*; Thomas W. Merrill, *Pluralism, the Prisoner's Dilemma, and the Behavior of the Independent Judiciary*, 88 NW. U. L. REV. 396, 397–401 (1993). Judges may expect that they will be rewarded if they uphold legislation, and be punished if they strike legislation down.

70 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) ("Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality . . . .").

71 *See* Horwitz, *supra* note 13, at 1140–42 (discussing the "gap" between constitutional interpretation and implementation); Frederick Schauer, *Deferring*, 103 MICH. L. REV. 1567, 1575–77 (2005) (same).

72 Indeed, President Franklin Roosevelt suggested that members of Congress should not even consider questions of constitutionality in enacting legislation, but should focus solely on matters of policy. *See* Letter from President Franklin D. Roosevelt to Congressman Samuel B. Hill (July 6, 1935), *in* 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297–98 (Samuel I. Rosenman ed., 1938).

73 A recent example is Senator Arlen Specter's vote in favor of the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified as amended at 28 U.S.C. § 2241(c) (2006)), which stripped the federal courts of jurisdic-

drawn any distinctions among these statutes in applying the presumption.[74] In *United States Railroad Retirement Board v. Fritz*,[75] for example, the Court relied on the presumption in rejecting an equal protection challenge to an act that eliminated pension benefits for former rail employees who had ceased working for the railroads before 1974.[76] Although nothing suggested that Congress had considered whether the discrimination ran afoul of the Equal Protection Clause, the Court reasoned that Congress could have concluded that those who worked in the rail industry after 1974 were more likely to return to the railroad industry.[77]

At the same time, the presumption is too narrow under the due-respect rationale. Federal courts have created exceptions to the presumption for legislation potentially infringing fundamental rights or potentially discriminating against suspect or quasi-suspect classes.[78] But if legislators take their oath seriously, they should draft legislation that adequately protects those values as well.[79]

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tion to hear habeas petitions filed by enemy combatants detained in Guantanamo Bay. Although denouncing the law as "patently unconstitutional," Senator Specter supported the law on the ground that immediate legislation was necessary and that the courts would "clean . . . up" any unconstitutionalities. *See* Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 S.M.U. L. REV. 281, 283 (2008).

74 *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 187 (1997).

75 449 U.S. 166 (1980).

76 *See id.* at 171–72.

77 The Court explained that it was "'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.'" *Id.* at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)). It was equally irrelevant that the members of Congress might be "unaware of what [the statute] accomplished." *Id.*

78 *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 506–07 (1977) (Burger, C.J., dissenting) (stating that the presumption of constitutionality does not apply with equal force where the legitimacy of the composition of representative bodies is at stake). Some decisions do suggest that the courts should defer even to legislative judgments that may infringe fundamental rights, *see* Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (stating that the Court affords "'great weight to the decisions of Congress'" even when the legislation implicates the First Amendment or the Equal Protection Clause (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973))), though this has decidedly not been the case in practice.

79 *Cf.* Dennis v. United States, 341 U.S. 494, 539–42 (1951) (Frankfurter, J., concurring) (arguing that the presumption should apply to legislation potentially infringing on First Amendment rights). Justice Scalia has noted that the presumption also does not apply to statutes implicating separation of powers. *See* Morrison v. Olson, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting). This exception is easier to defend under the due respect rationale, because Congress has an interest in expanding its own power at the expense of the judiciary.

If due respect to the legislature's constitutional judgment is the basis for deference to the legislature, it should not result in the presumption of constitutionality. Under that presumption, courts assess legislation by asking whether the legislature could have identified facts that would justify the legislation under the *judiciary's* interpretation of the Constitution.[80] Focusing on whether facts satisfy the relevant court interpretation rests on the assumption that, in taking the oath, legislators pledge to support not the Constitution, but the courts' interpretation of the Constitution.

But nothing in the oath suggests that legislators are to support the judiciary's interpretation of the Constitution instead of the Constitution itself.[81] Nor does any other provision of the Constitution state that legislators must treat judicial interpretations of the Constitution as equivalent to the Constitution. And there are good reasons not to read such a provision into the Constitution.[82]

To start, as a descriptive matter, the Supreme Court itself has acknowledged on occasion, that judicial interpretations of the Constitution are not necessarily equivalent to the Constitution. For example, the Court has explained that some judicially created constitutional rules—such as that established by *Miranda v. Ari-*

80 *See supra* Part I.

81 *See* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 121–22 (1993) (recognizing that the argument from the Oath Clause depends on what the Constitution requires).

82 Most scholars have concluded that judicial interpretations of the Constitution are not the same as the Constitution itself. *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1318 (2006) ("[C]onstitutional theories . . . are often theories that implicitly accept the permissibility of a disparity between constitutional meaning and implementing doctrine); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2 (1975) (calling "the impression that every detailed rule laid down [by the Court] has the same dignity as the constitutional text" an "illusion"). Of those who have taken the contrary position, some have argued, not that the Constitution is indeed what the Court says, but instead that as a practical matter judicial interpretations are equivalent to the Constitution since interpretations functionally limit or extend the enforcement of constitutional rights. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885–87 (1999) (describing remedial equilibration as the definition of a constitutional right such that the right cannot exist apart from the remedy permitted to redress violation of that right). Others, such as Professors Schauer and Alexander, have suggested that the Constitution should be what the Court says it is, but their argument is not based on any special claim of the judiciary. *See* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 457–58 (2000). Instead, they argue that it is desirable to have a single institution settle constitutional questions, and that that institution may as well be the Court. *See id.* They do not explain, however, why that single institution should be the judiciary instead of the legislature. *See id.*

zona[83]—go beyond the requirements of the Constitution.[84] Moreover, legislatures have not treated constitutional pronouncements by the Supreme Court as equivalent to the Constitution. Legislatures routinely enact laws that conflict with, or at least are strongly in tension with, constitutional rulings by the Supreme Court. Examples include the various state laws authorizing the death penalty following *Furman v. Georgia*,[85] the federal law against flag burning following *Texas v. Johnson*,[86] the federal restriction on indecent communication over the internet following *Sable Communications of California, Inc. v. FCC*,[87] and the federal ban on partial-birth abortions following *Stenberg v. Carhart*.[88]

More important, as a normative matter, requiring legislatures to treat judicial pronouncement on the Constitution as the Constitution poses the risk of stagnating constitutional law and memorializing bad constitutional rulings. Evolution and development of constitutional law depends in part on legislators enacting laws that conflict with Supreme Court rulings. These laws provide opportunity for the Supreme Court to reconsider its precedents and allow for the continued development of constitutional law.[89] Indeed, the Court itself has

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83 384 U.S. 436, 444 (1966) (holding that before interrogating individuals in custody, law enforcement must inform the individual of the right to remain silent and the right to an attorney).

84 *See* Chavez v. Martinez, 538 U.S. 760, 772 (2003) (explaining that judicial "[r]ules designed to safeguard a constitutional right . . . do not extend the scope of the constitutional right itself").

85 408 U.S. 238 (1972); *see generally* Kennedy v. Louisiana, 128 S. Ct. 2641, 2651 (2008) (listing the various state laws contradicting *Furman*).

86 491 U.S. 397 (1989). Following *Johnson*, Congress enacted the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (2006)), which the Court struck down in *United States v. Eichman*, 496 U.S. 310 (1990).

87 492 U.S. 115 (1989). Following *Sable*, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133–36 (codified as amended at 47 U.S.C. § 223 (2006)), which the Court struck down in *Reno v. ACLU*, 521 U.S. 844 (1997).

88 530 U.S. 914 (2000). Following *Stenberg*, Congress enacted the Partial-Birth Abortion Ban Act of 2003, Pub. L. 108-105, § 3(a), 117 Stat. 1201, 1206 (codified at 18 U.S.C. § 1531 (2006)), which the Court upheld in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

89 An example is *Gonzales v. Carhart*, in which the Court upheld the federal ban on partial-birth abortions. Alexander and Schauer argue that the legislature's refusal to adhere to the Court's constitutional rulings—which they call "legislative disobedience"—is not necessary for the Court to have an opportunity to reconsider constitutional doctrines, stating that "it takes only an individual dissatisfied with the existing law to set in action the process that will give the Supreme Court the opportunity to change its mind." Alexander & Schauer, *supra* note 7, at 1386. But this is not always so. It is difficult, for example, to imagine a scenario giving rise to a ruling that laws

implicitly recognized these benefits by refusing to impose any penalties on legislatures that pass laws that conflict with the Court's precedents.[90]

Finally, focusing on whether the legislature identified facts satisfying the Court's interpretation of the Constitution raises a practical ordering problem. If a legislature enacts legislation before the Court interprets the relevant constitutional provision, the presumption requires that the legislature have acted for reasons consistent with the Court's later interpretation.[91] There is no reason to think that the legislature is a particularly good oracle at predicting the Court's doctrinal developments.[92]

If due respect to the legislature's constitutional judgment is the basis for the presumption of constitutionality, the more logical form of the presumption is that courts should defer to the legislature's interpretation of the Constitution. The thrust of the comity argument is that, because of his oath, a legislator will vote for legislation only if he determines that the legislation is constitutional. Determining whether legislation is constitutional does not involve simply the act of applying law to fact. It requires the antecedent step of interpreting the Constitution itself.[93] If the rationale for deference is the judicial respect for the legislature's constitutional judgment, courts presuma-

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outlawing abortion are constitutional that does not involve legislative disobedience. The Court would have occasion to issue that ruling only if a state enacted a statute outlawing abortion, in defiance of its rulings in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973). In any event, legislative disobedience is a strong catalyst for constitutional change.

90 Supreme Court of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 732 (1980) (acknowledging that state legislators enjoy common-law immunity from liability for their legislative acts); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (Black, J., concurring) (recognizing both legislative immunity and its traditional limits).

91 Consider, for example, the Court's suggestion in *United States v. Lopez*, 514 U.S. 549 (1995), that Congress must provide factual findings to justify statutes based on the Interstate Commerce Clause, or the Court's conclusion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that the Eleventh Amendment prohibits injunctive actions against state officers for violations of federal law when Congress has provided a scheme to remedy such violations. Neither doctrine existed at the time Congress enacted the statutes that those cases overturned.

92 Indeed, Professors Garrett and Vermeule argue that, in a system under which the legislature is asked to predict how the Court will rule, the legislature will simply do what it thinks is best. *See* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1293 (2001).

93 *Cf.* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 914 (1990) (stating that the power "[t]o apply the rules includes the power to interpret them").

bly should respect a constitutional interpretation as much as the application of that interpretation to a particular statute.[94]

One may object that this deference runs afoul of the same argument against legislative deference to judicial interpretations of the Constitution. Just as the Constitution does not require legislatures to treat judicial interpretations of the Constitution as binding, the courts should not treat the legislature's interpretation as binding. Instead, courts should evaluate for themselves the constitutionality of a law.

But there are good reasons to think that judicial deference to legislative interpretations is less problematic than legislative deference to judicial interpretations. To start, judicial deference does not pose the same ordering problem presented by legislative deference. Courts consider the constitutionality of legislation only after the legislature has considered the constitutionality of that legislation. Nor does judicial deference pose the problem of stagnation of the law. To the extent that legislatures are not bound by their prior interpretations, legislatures may correct constitutional errors more easily than courts.[95]

In any event, my goal is not to prove that, based on first principles, courts should defer to legislative interpretations of the Constitution. Rather, my point is simply that, *if* courts defer to legislatures because of respect for constitutional judgments, they should defer to constitutional interpretations and not simply to factual determinations. And under the presumption of constitutionality, courts do *not* evaluate for themselves the constitutionality of legislation; they defer to the legislature's constitutional judgment.[96]

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94 In the 1800s, justices invoked the due respect rationale to justify deference to legislative interpretations of the Constitution. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (Washington, J.) ("It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the [C]onstitution is proved beyond all reasonable doubt."); *id.* at 312 (Thompson, J.) ("For it cannot be presumed that [Congress] would have expressly ratified and sanctioned laws which they considered unconstitutional.").

95 To be sure, requiring judicial deference to legislative constitutional interpretations may raise other problems, which are addressed in Part III, but on balance those problems are less significant.

96 One might argue that judicial respect to the legislature is due only to the extent that such respect is consistent with judicial supremacy of constitutional interpretation. But that argument amounts to nothing more than a claim that the Court should respect only constitutional conclusions with which they agree—which cannot be squared with the presumption of constitutionality.

B. The Democratic Accountability Justification for the Presumption

The democratic accountability justification for the presumption of constitutionality is that, in a democratic form of government, policy decisions should be made by the legislators who are accountable to the people through elections.[97] Aggressive judicial review undermines this accountability by allowing the policy preferences of the judiciary to displace the policy preferences of the democratically accountable legislators. The effects of that review are not limited to the statute at hand. Because of the difficulty in overturning judicial decisions, a decision that wrongly declares legislation unconstitutional may inhibit similar future legislation. By contrast, the consequence of wrongly upholding legislation is much more limited. If the people disapprove of legislation, they may replace their representatives in Congress, and the new representatives may enact more popular laws. Courts accordingly should restrain themselves from intervening, the Supreme Court has said, and allow poor decisions to be worked out through the democratic process.[98]

As with the due-respect rationale, there is reason to think that the democratic-accountability rationale does not provide a solid basis for any judicial deference to the legislature on constitutional matters.[99] Those criticisms aside, the democratic accountability rationale does

97 ELY, *supra* note 7, at 74.

98 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) (justifying the presumption on the ground that "'[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted'" (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979))); Gregg v. Georgia, 428 U.S. 153, 175 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity."); Horwitz, *supra* note 13, at 1083 (addressing the "separate community doctrine" in which courts give deference to congressional decisions "that implicate constitutional rights"). Similar reasoning underlies the deference afforded to agency interpretations of statutes. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865–66 (1984) (commanding deference on the ground that agencies, unlike courts, are "accountable to the people" through the President).

99 One criticism of the argument is that the reason for an independent judiciary is to act as a check on the majority by allowing the judiciary to exercise independent judgment in reviewing the constitutionality of legislation. Requiring the judiciary to defer to the democratic branches undermines that structure. The judiciary's independence no longer operates to ensure that the judiciary exercises its independent judgment but instead is used as a reason to require the judiciary to defer to the branches that the judiciary is supposed to check. Rogers, *supra* note 62, at 27–28. The argument has some force, but one must remember that an independent judicial review is not necessary to preserve the judiciary's role of checking the majority. Any

not logically support the scope of the presumption of constitutionality. The thrust of the rationale is that the legislature should be held accountable to the electorate for its actions. Supplying factual findings to support legislation does not accomplish this goal. By supplying factual findings for the legislature, the judiciary may actually reduce legislative accountability by providing justifications for a law that the legislature did not consider.

If democratic accountability is the basis for judicial deference to the legislature's constitutional determinations, the judiciary's deference should not be limited to the modern presumption of constitutionality. The point of the democratic accountability argument is that elected legislators should make policy determinations, and the courts should not substitute their own policy preferences through the Constitution.[100] But courts may introduce their policy preferences just as easily through constitutional interpretation as they can through the determination whether the factual threshold for a constitutional standard is satisfied in a particular case. *Miranda v. Arizona*[101] provides an example. The members of the Warren Court imposed their policy preference against custodial interrogation by interpreting the Fifth Amendment to forbid such interrogation unless the police inform a suspect of his rights.[102]

Indeed, deferring to legislative interpretations of the Constitution better promotes democratic accountability than the current presumption of constitutionality. The current presumption limits the

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form of review—even deferential review, so long as the deference is not absolute—places limits on the political branches.

Moreover, the fact that the people may replace those legislators who support unpopular laws does not necessarily protect the Constitution. Unconstitutionality does not imply unpopularity. Many laws are popular despite being unconstitutional, and many laws are constitutional but unpopular. Legislatures thus have good reason to push the constitutional envelope, and sometimes cross the line, to enact popular legislation, and will not suffer any ill consequences (and indeed might be praised) for doing so. Consider, for example, legislation against flag burning or barring partial birth abortion. For more on this point, see Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 92–94 (1995).

100 Michael A. Livermore & D. Theodore Rave, *Conversation, Representation, and Allocation: Justice Breyer's Active Liberty*, 81 N.Y.U. L. REV. 1505, 1510 (2006) (book review) ("[A]ctive liberty suggests that courts should tread lightly where democratically accountable political officials are making policy—especially policy of first impression. Courts should avoid interfering in this process out of respect for the democratic aim of the Constitution and the role of the political branches in facilitating a nationwide deliberation on possible policy alternatives.").

101 384 U.S. 436 (1966).

102 *See id.* at 478–79 (summarizing the Court's "policy preferences" with regard to warnings prior to police interrogation).

Court's ability to develop policy by requiring the Court to assume the facts necessary to satisfy constitutional tests. But the Court still has control over policy determinations to the extent that it has control over the development of the constitutional tests, which apply not only to the case before the court but to all future cases. The Court's Commerce Clause cases illustrate this point. As noted earlier, the Court has interpreted the Commerce Clause to authorize Congress to regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce, and (3) activities that directly affect interstate commerce.[103] Even with the presumption of constitutionality, the Court's narrow doctrinal test substantially limits Congress's ability to implement its policy choices through the Commerce Clause, as cases like *Lopez* and *Morrison* demonstrate. Deference to legislative interpretation would avoid that limitation.

To be sure, the Court's inability to question the factual foundation for an act promotes democratic accountability by ensuring that more legislative policy choices will be sustained. But that is because any restriction on judicial review—including restrictions on jurisdiction, higher burdens of persuasion, or supermajority voting requirements—acts as a way of preserving the policy decisions rendered by Congress. The Court continues to engage in policy determinations by developing constitutional tests; it simply has a limited ability to enforce those preferences against the legislature. Reducing the judiciary's power over determining the meaning of the Constitution therefore promotes democracy.[104]

But this is not to say that the courts should have no role in constitutional interpretation. That is because securing democratic rule is not the only goal of the Constitution. One of the core purposes of a Constitution is to remove some things from the political process.[105] Leaving constitutional interpretation solely to the political bodies would undermine that purpose. Legislators would face no constraints

103 *See* text accompanying *supra* note 59.

104 It bears noting, however, that Thayer did not base his argument for deference on democratic accountability. G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 48 (2005) ("[Thayer's] call for a hands off judicial approach to the decisions of the other branches was not connected to democratic theory . . . .").

105 *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

aside from their own sense of duty[106]—a particularly troubling prospect especially for those provisions of the Constitution, like the First Amendment, that were added precisely to limit legislative power. This suggests that courts should have some role in constitutional interpretation to ensure that the legislature does not interpret away a constitutional provision.[107] But at the same time, there is a concern that the courts may use constitutional interpretation to implement their own policy preferences. Combined, these two concerns suggest that courts should play a role in interpretation, just a more limited one.

C. The Institutional Superiority Rationale for the Presumption

The third justification given by the Court for the presumption of constitutionality is the institutional superiority of the legislature. According to the Court, courts should not use the Constitution to second guess the need for legislation, "'[s]ince the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have.'"[108]

This justification for deference is not unique to the presumption of constitutionality. Courts routinely defer to decisions made by others who are in a better position to make decisions. Appellate courts, for example, defer to factual findings rendered by district courts because a district court's findings are based on first hand evaluations of the evidence and witnesses.[109] Similarly, the Court has invoked the institutional advantage of administrative agencies in

106 Without any form of judicial review, legislators could avoid even clear constitutional mandates, such as the prohibition on taxing articles exported from a state. *See* U.S. CONST. art. I, § 9, cl. 5.

107 *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1107–08 (2003) (arguing that courts must engage in independent interpretation of the Constitution in order to identify the authoritative utterances of Congress).

108 Leathers v. Medlock, 499 U.S. 439, 451–52 (1991) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)); Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 510 (1937) ("[C]ourts cannot assume that [a state legislature's] action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action."(citation omitted)); *see also* Minn. Rate Cases, 230 U.S. 352, 465–66 (1913) (indicating that courts are incapable of assessing data necessary to determine constitutionality).

109 *See* Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 759–61 (1982).

establishing doctrines requiring courts to defer to agency interpretations of statutes that they are charged to administer.[110]

But the institutional justification does not readily justify the current presumption of constitutionality. The current presumption entails deference to empirical determinations rendered by the legislature. And legislatures are better equipped than the courts to make the sorts of empirical findings relevant to legislation.[111] Legislatures have more resources than courts to gather information—they have large staffs, general subpoena power, and large institutions such as the Congressional Research Service to facilitate their factfinding—and members of the legislature are more likely to be aware of local issues than judges because of the electoral process.[112]

Judicial deference because of the legislature's institutional advantage makes sense only when legislation is the product of that advantage.[113] Much legislation does not fit this bill.[114] Legislatures often enact legislation without engaging in any factfinding, and even when

110 *See, e.g.*, Chevron U.S.A. Inc., v. Natural Res. Def. Council, 467 U.S. 837, 865–66 (1984).

111 United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) ("The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours." (citation omitted)); *see also id.* at 629–34 (detailing some of the evidence before Congress). Judges are less likely to come to the bench with relevant information because they did not go through the election process. They have virtually no ability to request information from third parties or to order studies. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 173 (2d ed. 1978) ("Courts are institutionally incapable of obtaining the empirical data necessary for making decisions on social policy."). Instead they must rely predominantly on oral arguments and the briefs of parties and amici. *See* Barkow, *supra* note 7, at 240.

112 *See* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–82 (2001) (enumerating ways in which Congress is superior to courts at gathering information); Robert Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 463 (2000) ("The doctrine of rational basis review specifies the 'judicial restraint' that courts should exercise in responding to claims of invidious discrimination. The Court has offered various reasons to explain this judicial restraint. Sometimes the Court has attributed it to a proper deference to legislative factfinding."); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 572 (1990) ("The 'special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 502 (1980) (Powell, J., concurring))).

113 *See* Horwitz, *supra* note 13, at 1101–02; *see also* Vance v. Bradley, 440 U.S. 93, 120–21 n.6 (1979) (Marshall, J., dissenting) ("Given . . . Congress'[s] failure subsequently to focus on the issue, one may question the appropriateness of the extraordinary deference the Court here affords to congressional factfinding").

114 *See* Devins, *supra* note 112, at 1183–84.

legislatures *do* conduct factfinding, the legislative agenda may drive factfinding instead of the other way around.[115] Because of the desire for reelection or to satisfy their own policy preferences, legislators may skew the factfinding process to yield only evidence that supports legislation desired by the legislator.[116]

More than that, to the extent that the legislature does make good-faith findings of fact, it is reasonable to think that those findings focus more on the factual conditions that need rectifying, rather than on whether facts exist justifying the constitutionality of a statute. For example, if members of Congress were contemplating a ban on handguns at high schools, they would likely focus more on whether the ban would reduce gun violence than on how the reduction in violence would impact interstate commerce (at least, that would have been their focus before *Lopez*). In short, in enacting legislation, a legislature is unlikely to have devoted much attention to whether the factual circumstances underlying the legislation satisfy the Court's constitutional tests.[117]

Even assuming that legislators are superior factfinders, this justification does not support the scope of the presumption of constitutionality. The presumption applies regardless whether the legislature has exercised its expertise. Under the presumption, legislatures need not

115 Consider, for example, Congress's legislation banning partial-birth abortions, which Congress supported with factual conclusions that were demonstrably false. *See* Gonzales v. Carhart, 550 U.S. 124, 165–66 (2007) (detailing factual inaccuracies in the Act); *see also* Elizabeth DeCoux, *Does Congress Find Facts or Construct Them? The Ascendance of Politics over Reliability, Perfected in* Gonzales v. Carhart, 56 CLEV. ST. L. REV. 319, 326 (2008) ("[P]olitical considerations have infected fact-finding to an increasing extent, to the point that almost all fact-finding in modern hearings is deliberately shaped so as to accomplish a political goal."); Devins, *supra* note 112, at 1183 ("The lesson here is that legislative choices, including factfinding, are driven by agenda-setters.").

116 Devins, *supra* note 112, at 1183–84; *cf.* Garrett & Vermeule, *supra* note 92, at 1287 n.39 (describing the premise that "certain features of legislative behavior may best be explained *as if* legislators only cared about reelection"). Invoking Condorcet's Jury Theorem, James Rogers suggests that, even if legislators are not particularly good at identifying empirical justifications for legislation, legislatures as an institution are superior to courts, so long as each legislator has above a fifty percent chance of accurately identifying the state of the world. Rogers, *supra* note 62, at 36–38. But this argument does not justify the presumption of constitutionality. Legislators act for policy reasons, not reasons of constitutionality. Their ability to assess facts accurately therefore does not justify the presumption, which assumes that the legislators acted for reasons of constitutionality.

117 There is thus not much basis for the Supreme Court's statement that, even when there is no evidence that members of Congress considered a constitutional question, the decision to enact a law implicitly rests on their determination that the law is constitutional. *See* United States v. Munoz-Flores, 495 U.S. 385, 391 (1990).

make factual findings to support their legislation; instead, courts will supply hypothetical facts supporting legislation. Dreaming up facts requires courts to venture into the realm of factfinding more than it requires the exercise of the legislature's expertise.

Confirming that the legislature's superiority at finding facts does not actually underlie the presumption of constitutionality is that the Supreme Court has refused on occasion to defer to Congress's findings of facts. Consider *Morrison*, in which the Court struck down VAWA, which created a private cause of action for anyone who was the victim of a gender motivated crime,[118] as unauthorized by the Commerce Clause. Although Congress supported the legislation with factual findings that violence against women substantially impacted interstate commerce, the Court found those findings insufficient, stating that "'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question.'"[119]

Many have argued that courts are institutionally superior at constitutional interpretation.[120] Although there is substantial merit to the argument, it is not as strong as it first appears. Although courts ordinarily are thought of as the most frequent interpreter of the Constitution, legislatures may perform constitutional interpretation more frequently. Theoretically, given their oath to support the Constitution, legislators should engage in constitutional interpretation every time that they vote on a statute.[121] Indeed, for some matters, legislatures are the only bodies to consider constitutional questions. For example, Congress has exclusive authority to interpret some constitu-

118 42 U.S.C. § 13981(a) (2006).

119 United States v. Morrison, 529 U.S. 598, 614 (2000) (alterations in original) (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

120 *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 57–59 (2001); *see also* Neomi Rao, *The President's Sphere of Action*, 45 WILLAMETTE L. REV. 527, 547 (2009) (noting the "widely accepted ideas" of "the Supreme Court's institutional advantages with regard to constitutional interpretation").

121 To be sure, although legislatures have an obligation to consider constitutionality in legislation, legislators might not always take that obligation seriously. They may vote on statutes without regard to constitutionality. *See supra* note 73. How often legislators consider constitutional questions in enacting legislation and how often those considerations affect their votes are empirical questions beyond the scope of this Article. But legislatures doubtless consider constitutional questions at least some of the time, and they may do so more frequently than the courts. Moreover, the legislature routinely considers constitutional questions in contexts other than lawmaking. During debates over appointments to the judiciary or other important office, for example, senators regularly discuss constitutional interpretation.

tional provisions, like the Republican Form of Government Clause, the Declaration of War Clause, and the clauses relating to impeachment.[122] Various justiciability doctrines, such as standing, similarly leave constitutional questions to Congress. In *United States v. Richardson*,[123] for example, the Court denied standing to a taxpayer who claimed that Congress's failure to disclose the expenditures of the Central Intelligence Agency violated the Accounts Clause of the Constitution.[124] The Court explained the complaint was a generalized grievance more appropriately resolved by the political branches, and expressly noted that it was possible no one had standing to bring the claim.[125] One can easily think of other examples that would similarly leave federal courts unable to reevaluate constitutional determinations made by state legislatures.[126]

Nor does the legislature lack the capacity to interpret the Constitution. Legislators have a well established capacity to interpret the Constitution. Although many legislators are not lawyers and therefore have no formal legal training in constitutional law, such formal training is not a prerequisite to constitutional deliberation and in any event legislators regularly employ staff with formal legal training.[127]

There are two principal reasons why the judiciary may be superior to legislators at constitutional interpretation. The first is that, even if legislators have the capacity to interpret the Constitution, they do not fulfill that potential capacity. This failure to live up to potential is largely a consequence of judicial review. Knowing that the judiciary will correct whatever constitutional problems arise with legislation, legislators have little reason to hash out constitutional

122 *See* Nixon v. United States, 506 U.S. 224, 226 (1993) (holding that issues relating to impeachment were nonjusticiable political questions); Taylor v. Beckham, 178 U.S. 548, 578–81 (1900) (refusing to hear challenge under Republican Form of Government Clause to the state's resolution of gubernatorial election); Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970) (classifying decisions to go to war as nonjusticiable political questions).

123 418 U.S. 166 (1974).

124 The Accounts Clause provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

125 *Richardson*, 418 U.S. at 179.

126 Consider, for example, a state law that, like the federal Constitution, requires the publication of expenditures by the state government. Just as in *Richardson*, no one would have standing to challenge the state legislature's failure to issue that publication. Of course, depending on state law, it is possible that a state court could have jurisdiction to consider the issue.

127 *See* Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation? Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 502–03 (2009).

issues in enacting legislation. If judicial review were more deferential, legislators would likely take their constitutional obligations more seriously. Indeed, during the more deferential nineteenth century, legislators routinely debated the constitutionality of legislation.[128] More important, the extent of legislative failure to consider constitutional issues is overstated. Although they do so less frequently than during the nineteenth century, legislators do still debate constitutional matters. Consider the debates surrounding the PATRIOT Act and legislation to restrict judicial review of enemy combatants, or the debates over the appointments of Supreme Court Justices and the impeachment of President Clinton.[129] And deliberation may occur even when it is not explicitly recorded. There are many examples of legislation, state and federal, that conflict with Supreme Court rulings. Legislators no doubt are aware of the constitutional implications of the legislation, and their votes likely reflect judgments on the constitutionality of those acts. In short, legislatures are perfectly capable of conducting informed constitutional debates.

In any event, the failure to engage in constitutional deliberations is no reason to refuse to defer to legislative interpretations, given the widespread failure of legislatures to make informed factual findings. Nothing suggests that legislators are worse at fulfilling their duty to interpret the Constitution than they are at fulfilling their duty to find facts supporting legislation. Yet the presumption of constitutionality requires courts to defer to the legislature on factual matters.

The second reason why the courts may be superior at constitutional interpretation derives from the institutional protections from majoritarianism that the Constitution provides to the courts.[130] Legis-

128 *See* Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. Rev. 515, 519 (2009).

129 *See id.* at 530 (providing details on these and other examples); *see generally* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. Rev. 707 (1985) (recounting many examples of Congressional interpretation of the Constitution).

130 Some have also argued that the judiciary is superior to the legislature at constitutional interpretation because the judiciary is arguably a more deliberative body than the legislature. But others have disputed this point, arguing that the legislature provides a forum for more open, public debates that allows for more inputs that may lead to better solutions. *See, e.g.*, Jürg Steiner et al., Deliberative Politics in Action 128–31 (2004) (arguing that publicity changes the character of debate by increasing the quality of argument and the type of justification); Garrett & Vermeule, *supra* note 92, at 1291. Moreover, deliberations in the judiciary today are hardly ideal. Judges rarely flesh out ideas through discussion cases, but instead communicate through the exchange of written memos and opinions, a process that inevitably results in incomplete discussion. Indeed, district court judges do not engage in any deliberation at

latures are not designed to protect constitutional values. Given the electoral process and pressures from interest groups, legislators are apt to be more interested in matters other than abiding by abstract constitutional principles. Consequently, a legislator may view the Constitution as a tool for accomplishing desired results—a tool to be negotiated, stretched, or even disregarded, when necessary.[131] Judges do not face equivalent pressures. The political insulation provided to federal judges through life tenure and salary guarantees allow judges to protect constitutional values in a more consistent and principled way.[132]

But it is hardly clear that this advantage renders the judiciary uniformly superior at constitutional interpretation. First, although the judges might not face political pressures in rendering interpretations, other pressures may influence their interpretations. For example, the effects of a statute in a particular case may skew a court's interpretation of the Constitution to avoid that effect.[133] Moreover, as previously suggested, one reason that legislatures are willing to manipulate the Constitution is that they face little political consequences for their interpretations because of judicial review.[134] If legislatures had the responsibility for interpreting the Constitution, they would face

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all, yet they do not defer on constitutional interpretations. On top of that, deliberation in the judiciary may not be particularly valuable. The value of deliberation is that it promotes the exchange of information, but the members of the judiciary are relatively homogenous, which means that deliberation may not be particularly likely to bear fruit. In any event, that deliberations in the judiciary *now* may be more fruitful than those in the legislature does not mean that they always will be so.

131 Another objection is that legislatures tend to be reactionary bodies, acting only when there is pressing urgency to act, and the need to accomplish immediate results precludes much reflection on constitutional issues. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 38–39 (1999); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609–10 (1983). But courts also act under the time constraints because of the need to resolve cases quickly to avoid prejudicing parties. *See* Devins, *supra* note 112, at 1180.

132 *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 85–86 (1989).

133 This also undercuts to some degree the argument that courts are in a better position to interpret the Constitution because the judiciary has the institutional advantage of being able to address constitutional issues with the benefit of some hindsight to the extent that the ill effects of biased interpretation may offset the benefits of hindsight. *See* Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1697 (2008)

134 It is also worth noting that the same point applies equally to the factual presumption. Any doctrine of deference sustaining legislation will inevitably produce unprincipled law if the legislature itself is unprincipled in making its original decision.

greater political pressures to interpret the Constitution in a principled way.[135]

In addition, even assuming it does have comparative disadvantages, the legislature still might be superior at resolving a number of constitutional questions. Many constitutional issues present issues of social policy.[136] Consider questions like whether the Constitution guarantees the right to privacy, and if so, what forms of privacy;[137] or whether the Constitution allows the federal government to regulate core functions of state governments[138] or permits the federal government to expose states to private suits.[139] Legislators are better suited than judges to decide those questions. Legislators are likely to implement acceptable social policy because they are elected based on their policy views, and they bring a broad diversity of experience and background to the process. Judges, by contrast, are selected based on their legal expertise and are a generally homogenous group—from the well-educated upper-middle class—that does not represent many social views.[140]

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135 Garrett and Vermeule have proposed changes to the legislature to improve its ability to perform constitutional interpretation. *See* Garrett & Vermeule, *supra* note 92, at 1303–30.

136 *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 38–39 (1999); Devins, *supra* note 112, at 1179.

137 Whether there is a constitutional right of privacy has been the subject of much debate in and out of the courts. For its part, the Supreme Court has suggested there is a right to privacy, though it has not identified the source of that right. *Compare* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (basing privacy on "penumbras" of various constitutional provisions), *with* Roe v. Wade, 410 U.S. 113, 153 (1973) (locating privacy in the Fourteenth Amendment). Nor has the Court articulated a theory of the scope or extent of that right; instead, it has examined the right on a case-by-case basis. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) (recognizing privacy right to engage in homosexual conduct); Bd. of Educ. v. Earls, 536 U.S. 822, 830–32 (2002) (finding no privacy right against the collection of urine samples for drug testing at schools); Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (finding no privacy right to assisted suicide); *Roe*, 410 U.S. at 113, 153 (recognizing privacy right to abortion).

138 *See* Printz v. United States, 521 U.S. 898, 918–22 (1997) (prohibiting federal government from commandeering state law enforcement); New York v. United States, 505 U.S. 144, 155–156 (1992) (prohibiting federal government from commandeering state legislatures); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (federal government may regulate state employee wages), *overruling* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

139 *See* Alden v. Maine, 527 U.S. 706, 732 (1999).

140 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 274 (2006); Fallon, *supra* note 133, at 1697 ("Virtually without exception, judges and Justices are well-educated members of the upper or upper-middle classes who have been socialized to accept professional norms. The preference for having a small number of lawyers in robes resolve

To be sure, one may argue that constitutional interpretations should not change with changing norms and therefore that the legislature should not have the power of constitutional interpretation. But the adoption of a particular constitutional view is not a prerequisite to being imbued with the power to interpret the Constitution. That Congress might be prone to adopt one theory—popular constitutionalism—over another—say, originalism—makes it no less qualified to render constitutional judgments than Justices, like Justice Brennan, who have adopted similar views.[141] Moreover, the Court itself has changed constitutional interpretations as times have changed.[142] *Home Building & Loan Ass'n v. Blaisdell*,[143] *Skinner v. Oklahoma*,[144] and *Brown v. Board of Education*[145] are examples. And some doctrines, like whether a search is reasonable under the Fourth Amendment[146] or

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contested questions about individual rights almost inevitably reflects one or another species of antipopulism.").

141 One might think that the legislature is inferior to the Supreme Court at constitutional interpretation to the extent that the legislature's interpretations diverge from those of the Court. But that is not a sound conclusion. The question is whether the legislature or the courts are better at interpretation, and assuming the Court's interpretation is correct is to assume the answer to the question. Hugh Baxter, *A Comment on Mark Tushnet's* Some Notes on Congressional Capacity to Interpret the Constitution, 89 B.U. L. REV. 511, 511 (2009).

142 *See* Calabresi, *supra* note 7, at 272 ("Mr. Dooley's dictum about the Supreme Court's tendency to follow the election returns seems no less apt today than when it was first printed almost a century ago."). Indeed, with the possible exception of Justice Thomas, all the Justices have stated that the Constitution must be updated to take account of contemporary values. Even Justice Scalia has arguably acknowledged this point. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist"). Justice Scalia's allegiance to originalism is out of a concern that the judges not substitute their values for the public's. *Id.* at 863. But this concern applies to a much lesser degree, if it applies at all, when it is the *legislature* that is considering current social norms.

Even for nonpopulist methods of interpreting the Constitution, such as originalism, it is not clear that courts are better at performing that interpretation than legislatures. All methods of interpretation require external information, such as legislative history, social norms, or the historical circumstances surrounding the enactment of the law. Because of their limited resources, courts may be worse than Congress at gathering this information.

143 290 U.S. 398 (1934) (offering a new interpretation of the Contracts Clause).

144 316 U.S. 535, 541 (1942) (recognizing a fundamental right to procreate, thereby overruling *Buck v. Bell*, 274 U.S. 200 (1927)).

145 347 U.S. 483 (1954) (declaring segregation inherently unequal and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

146 *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2641 (2009) (stating that whether a search is reasonable under the Fourth Amendment depends in part on "societal expectations of personal privacy").

whether punishment is cruel and unusual under the Eighth Amendment,[147] explicitly depend in part on current social norms.[148] If constitutional interpretation depends on current social norms, then the body more attuned to current social norms should have at least some interpretive responsibility.

All of this is not to say that the legislature is the optimal body to interpret the Constitution. Rather, the point is that legislatures may be better than the courts at interpreting certain provisions of the Constitution and at employing certain methods of interpretation. More important, given the problems with legislative fact-finding identified above, legislators may be no better at making factual findings relevant to satisfying the Court's constitutional tests than they are at rendering constitutional interpretations. Accordingly, if courts defer to legislative fact-finding because of the legislature's institutional superiority, they should arguably also defer to legislative interpretations of the Constitution.

III. Addressing Other Reasons Against Thayerian Deference

Although the reasons given by the courts for accepting the presumption of constitutionality but rejecting deference to legislative interpretations are unsatisfactory, there may be other justifications for the courts' conduct. The presumption may be based on reasons other than those given by the courts. Or there may be other, overriding concerns that have led courts to reject deference to legislative interpretations of the Constitution, such as that courts are more likely than legislatures to interpret the Constitution to protect individual rights or that deferring to the various legislatures poses the threat of a lack of uniformity in constitutional law.[149] This Part examines those arguments.

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147 Roper v. Simmons, 543 U.S. 551, 561 (2005) (considering "'the evolving standards of decency that mark the progress of a maturing society'" to determine whether punishment is cruel and unusual (quoting Trop v. Dulles, 356 U.S. 86, 101 (1957)).

148 *See generally* Corinna Barrett Lain, *The Unexceptionalism of Evolving Standards*, 57 UCLA L. Rev. 365, 377–400 (2009) (identifying other examples).

149 In enumerating the reasons behind the scope of judicial review, I do not mean to enumerate the reasons for judicial review itself. There are many reasons for judicial review, ranging from the protection of "particular rights or privileges," The Federalist No. 78 (Alexander Hamilton), *supra* note 9, at 434, to providing "an instrument of sober second thought" of political determinations. Herbert Wechsler, Comment, in Government Under Law 134, 137 (Arthur E. Sutherland ed., 1956) (responding to Joseph M. Snee, *Leviathan at the Bar of Justice*, in Government Under Law, *supra*, at 91). The reasons for judicial review do not dictate the scope of that review. *See* Monaghan, *supra* note 41, at 9 ("The judicial duty to decide demands nothing with respect to the *scope* of judicial review . . . .").

A. Other Justifications for the Presumption

There are at least two possible reasons for the presumption of constitutionality other than those offered by the courts. First, the presumption may be based on concerns of administrability. Second, the presumption may serve to legitimate legislatures. Neither reason, however, explains the acceptance or scope of the presumption of constitutionality and the rejection of interpretive deference.

1. Administrability

As Professor Fallon has explained, many constitutional tests reflect the judgment that "it would be too costly or unworkable in practice for courts to enforce all constitutional norms to 'their full conceptual limits.'"[150] Consequently, courts often develop rules that are easily administered and predictable, although they occasionally produce constitutionally erroneous results, instead of difficult-to-administer rules that perfectly implement constitutional norms.[151]

The presumption of constitutionality is arguably the product of administrability concerns because it eases the administration of substantive constitutional rules that depend on the factual circumstances underlying an act. Without the presumption of constitutionality, courts would be required to comb legislative records and gather evidence to determine the constitutionality of an act.[152]

But there are limits to how much a court may legitimately rely on administrability to fashion a constitutional rule. Administrability concerns do not justify ignoring the constitutional principle that a rule is meant to administer. Flipping a coin, for example, is an extremely low-cost way of implementing a constitutional norm, but no one would suggest that it would implement a constitutional norm in an acceptable way. A rule purporting to implement a constitutional norm must first and foremost seek to implement that norm. There is a spectrum of potential rules to implement any given constitutional norm, ranging from the most administrable but least perfect at implementation to the most perfect at implementation, but most costly to administer. Administrability may justifiably guide a court's decision in picking a rule along this spectrum only to the extent necessary to avoid unmanageable costs that would otherwise arise from a less administrable rule.

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150 Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 64 (1997) (quoting Sager, *supra* note 49, at 1221).

151 *See id.* at 64–67.

152 *See id.*

To the extent that administrability is the basis for the presumption of constitutionality, the presumption arguably goes too far in favoring adminstrability, allowing more constitutional errors than are justified. Experience suggests that the costs that would result with a less robust presumption are not prohibitively high. In rational basis challenges, litigants and the courts often delve into the legislative history to see what basis the legislature offered to justify its legislation, and supply additional, speculative justifications only if the justifications offered by the legislature are insufficient.[153] Although they are not always fruitful, the voluntary forays into legislative records show that there may not be a need for a rule protecting courts and litigants from bearing the costs of combing that record.

In any event, that administrability supports the factual presumption does not require the rejection of Thayerian deference. Whether to adopt the factual presumption or Thayerian deference is not an either/or question; courts may adopt both doctrines. Whether to adopt the Thayerian deference depends on whether the costs of administering that rule are too high, and in all likelihood they are not. Thayerian deference would likely be easily administered. Since the Supreme Court's decision in *Chevron*, courts have regularly afforded deference to agency interpretation of statutes without difficulty.[154] Administering Thayer deference would be comparable to administering *Chevron*, since both entail evaluating the reasonableness of an interpretation implementing another law.

2. Preserving the Legitimacy of the Legislature

The presumption of constitutionality may also legitimate the legislature.[155] According to this argument, the presumption promotes the legitimacy of the legislature because it creates the fiction that legislatures considered questions of constitutionality in enacting legislation.[156]

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153 *Compare, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 309 (1964) (asserting that the Court was persuaded by the "voluminous legislative justifications" for the Civil Rights Act of 1964); Morrison 529 U.S. at 614 (examining congressional findings in considering constitutionality of Violence Against Women Act); *with* Lopez, 514 U.S. at 562–63, (seeking to provide justifications for Gun-Free School Zones Act after noting that Congress failed to provide justifications).

154 *See supra* note 110.

155 *See* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1478–80 (2007) (arguing that abandoning the assumption that legislators uphold their oath to support the constitution would undermine legitimacy of legislature).

156 *See id.*

But the courts have not applied the presumption of constitutionality in a way that fosters this legitimacy. In applying the presumption, courts often state that they will supply any facts necessary to sustain a law against a constitutional attack, even if the legislature did not consider those facts.[157] By admitting that they will supply facts not found by the legislature, courts have not created a legitimizing fiction that the legislature is diligently upholding its duty to support the constitution in enacting legislation; instead, the courts cast the legislature as having failed to justify a law's constitutionality and themselves as unable to overturn the law despite that failure.

Nor does the legitimating function cut against Thayer deference. To the contrary, deferring to legislative interpretations would promote legislative legitimacy at least as much as the presumption of constitutionality. By deferring to legislative interpretations, the courts would foster the perception that the legislature addressed constitutional issues in enacting legislation. The courts' willingness to defer to legislative interpretations may also enhance the sense of duty in the legislature to consider constitutional issues in enacting legislation, which in turn would also promote the legislature's legitimacy in the eyes of the public.

B. Other Arguments Against Thayerian Deference

1. Independent Authority to Interpret

Some have argued that no branch of government should defer to another branch's interpretation of the Constitution.[158] According to these so-called departmentalists, all three branches are coequals under the Constitution and, therefore, no one branch's interpretation should control the other branches.[159] These independent interpretations ensure that legislation is enforced only if each of the three branches concludes that the legislation is constitutional.[160]

Although the departmentalist argument has substantial merit,[161] it cannot explain the judiciary's failure to adopt Thayerian deference.

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157 *See Heller*, 509 U.S. at 320–21.

158 *See* Calabresi, *supra* note 7, at 274–76; Lawson & Moore *supra* note 7, at 1274–79.

159 *See* Calabresi, *supra* note 7, at 274–76.

160 *See id.*

161 The argument does face substantial objections, though. That the branches of government have comparable authority under the Constitution does not establish that they have equal interpretive power. As noted above, the Constitution does not assign any interpretive power, and any conclusion about the allocation of interpretive power must be inferred. *See supra* Part II. Moreover, even if the departmentalist argu-

For one thing, the Supreme Court has rejected the departmentalist argument. The Court has consistently maintained that it has ultimate authority to interpret the Constitution.[162] Since the Court has rejected the departmentalist argument, that argument cannot provide a basis for the Court's refusal to defer to legislative interpretations.[163]

More important, the departmentalist argument cannot explain the judiciary's rejection of deference to legislative interpretations, given the judiciary's acceptance of the presumption of constitutionality. Under the presumption of constitutionality, the judiciary does not make an independent judgment of each enactment's constitutionality. Instead, it assumes that the legislature found facts that would support an act's constitutionality, regardless whether the legislature did so or even whether those facts exist.[164] The presumption thus results in courts sustaining legislation that the courts otherwise may have found unconstitutional.

2. Protection of Rights

One might also think that deferring to legislative interpretations of the Constitution risks underenforcement of rights. Because they face reelection, legislators may place more value on satisfying the immediate demands of the public than on protecting personal rights. They accordingly may be willing to sacrifice civil rights for immediate goals, like ending the threat of terrorism.[165] Moreover, because legis-

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ment were correct, deference may still be appropriate. The departmentalist argument contends only that the Constitution does not give any particular branch the unique authority to interpret the Constitution. *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1091–94 (2005); Lawson & Moore, *supra* note 7, at 1278. But being assigned authority to interpret is not the only basis for deference to another decisionmaker. Courts regularly defer to other decisionmakers because of expertise, as in *Skidmore*, or to avoid conflict, as in abstention doctrines. As noted earlier, these reasons also underlie the deference reflected in the presumption of constitutionality. *See supra* Part II.C.

162 *See* Barkow, *supra* note 7, at 309–14 (discussing the Court's "growing distrust of other interpreters of the Constitution). Despite occasional protests, most have accepted this judicial supremacy. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 785 (2009) (describing *Cooper* as an unwarranted assertion of power, but that "[w]ith the passage of time, the illusion of power has become the reality").

163 To be sure, the current system places interpretive authority in the judiciary instead of the legislature. But the point is that it rests on the belief that not all branches have equal interpretive authority.

164 Heller v. Doe, 509 U.S. 312, 320–21 (1993).

165 *See* Calabresi, *supra* note 7, at 272.

latures operate by majority, they may have reduced incentives to protect minority rights.[166]

Like the departmentalist argument, this argument also fails to explain why courts refuse to defer to legislative interpretations but afford legislation the presumption of constitutionality. The presumption of constitutionality also results in courts leaving substantial amounts of rights protection to the legislature. For example, according to many scholars, the Equal Protection Clause expresses the principle that "'[a] state may treat persons differently only when it is fair to do so.'"[167] But the presumption of constitutionality often leaves enforcement of that principle to the legislature. The presumption of constitutionality entails courts assuming the facts necessary to demonstrate that the discrimination was fair (except with respect to statutes that discriminate against a suspect or quasi-suspect class, to which the presumption does not apply).[168]

Nor is it clear that deference to legislatures would result in greater underenforcement of rights than leaving constitutional interpretation exclusively to the courts. Consider Congress's pro-rights interpretation of the Free Exercise Clause in the Religious Freedom Restoration Act of 1993.[169] Indeed, history records many examples of legislatures enacting legislation in response to judicial decisions failing to protect civil rights.[170] Although most of these episodes involve

166 *See* ELY, *supra* note 7, at 73–104. I do not mean to say that the majority has *no* incentives to consider minority rights in enacting legislation. Legislators often enact legislation with an eye towards future legislation, and members of today's minority might be needed to enact tomorrow's legislation. The point is only that the incentives may be reduced.

167 Sager, *supra* note 49, at 1215 (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949)).

168 *See* FCC v. Beach Commc'ns, Inc., 508 U.S. at 307, 313–16 (1993).

169 Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-1 to -4 (2006)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

170 For example, following the Court's rejection of the argument in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 637 (2007), that, in a disparate pay claim under Title VII, the statute of limitations restarts with each inadequate paycheck, Congress enacted legislation overturning that decision. *See* Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). Similarly, Congress amended Title VII to overturn the Supreme Court's decision in *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989), which had held that employers could engage in hiring practices with disparate impacts if they served "legitimate employment goals." *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §3, 105 Stat. 1071, 1071 (codified as amended in 42 U.S.C. § 1981 note (2006)). *See generally* Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097, 2109–12 (2006) (discussing other examples).

statutory, as opposed to constitutional, rights, they illustrate the point that legislatures often protect rights more than courts.

Still, this is not to say that courts must always defer to legislative interpretations of the Constitution that undermine important rights or values. All legal rules have exceptions to accommodate more important rules or values.[171] The current presumption of constitutionality, for example, does not extend to legislation that infringes rights that the Court has deemed fundamental. But most legislation and most constitutional questions do not involve those rights. At the least, in those instances, as in *City of Boerne v. Flores*,[172] where the legislature interprets the Constitution to provide greater rights than those recognized by the courts, deference would be appropriate.[173]

3. Protecting Structure

One might argue that Thayerian deference impermissibly allows the legislature to define the scope of its own power.[174] The Constitution allocates power among the respective branches, and preserving those allocations is essential. Judicial deference to legislative interpretations of the Constitution poses the risk of the legislature interpreting the Constitution in a way that maximizes legislative power at the expense of the judiciary and the executive.[175]

But courts face similar objections. Under the current regime, the courts have control over the scope of their power *and* the power of the legislature. The Court has exercised that power in controversial ways. For example, in *City of Boerne* the Court limited Congress's power to enforce the protections of the Fourteenth Amendment, holding that the Court, not Congress, has the power to determine the scope of rights protected by the Amendment.[176] Similarly, in *Bush v.*

171 *See* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1953 (2008) ("Just as rights, rules, and obligations can serve as reasons for action or decision even if they can be overridden at times by stronger rights, rules, and obligations, sources can also function as authorities without necessarily prevailing over all other sources, or even all other reasons for a decision." (footnote omitted)); Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 416–17 (1993).

172 521 U.S. 507 (1996).

173 *See* McConnell, *supra* note 74, at 188; *cf.* Fallon, *supra* note 133, at 1709 (arguing that judicial review is most easily justified when courts act to protect more rights than legislatures).

174 *Cf.* Lawson & Moore, *supra* note 7, at 1276 (making a similar point with respect to the courts).

175 *Cf.* THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 290 ("In republican government, the legislative authority necessarily predominates.").

176 *See* City of Boerne v. Flores, 521 U.S. 507, 527–29 (1997).

Gore,[177] the Court took it upon itself to determine whether the presidential election was proper, although the Constitution charges Congress with resolving contested presidential elections.[178]

To be sure, the judiciary has developed doctrines of justiciability and abstention to restrict its own power. But the existence and scope of those rules is largely a matter of judicial discretion, and may be expanded and contracted as the Court sees fit. This is apparent from the fluctuating scope of the law of standing,[179] the Court's recent decisions virtually discarding the political question doctrine[180] and narrowing prudential jurisdictional restrictions,[181] and the Court's recent selective disregard of restrictions placed on its jurisdiction by Congress.[182] Arguably, placing the authority to resolve the scope of allocations of power in the hands of the judiciary presents greater threats than leaving that power with the legislature, because the judiciary is not democratically accountable.

4. Settlement and Uniformity

Professors Alexander and Schauer suggest another reason against judicial deference to legislative interpretations of the Constitution: deference would undermine the settlement function of law. According to Alexander and Schauer, the function of law is to settle what must be done.[183] Thayerian deference may undercut this settlement function, because instead of assigning just one arbiter the task of determining what must be done, it leaves that task to Congress and fifty different state legislatures.

It is hardly clear that settling the meaning of the Constitution is a complete virtue. Many scholars have argued that the Constitution protects various interests in a heterogeneous society, and thus there is value in a public dialogue on constitutional meaning to identify and

177 531 U.S. 98 (2000).

178 *See id.* at 104–10.

179 *See generally* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290–99 (2008) (recounting history of changes in standing doctrine).

180 *See* Barkow, *supra* note 7, at 317–19.

181 *See, e.g.*, Marshall v. Marshall, 547 U.S. 293, 312 (2006) (limiting probate exception to federal jurisdiction).

182 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 572–84 (2006) (refusing to apply restriction on federal jurisdiction over enemy combatant cases). *See generally* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 914–25 (2009) (discussing the Court's willingness to bend interpretation of jurisdictional statutes to fit its desire).

183 *See* Alexander & Schauer, *supra* note 7, at 1371–72.

implement those interests.[184] Authoritatively settling the meaning of the Constitution short-circuits that dialogue. Nor is it clear that the judiciary promotes settlement of constitutional meaning. The Supreme Court itself often states that stare decisis carries less weight when it comes to constitutional matters.[185]

In any event, Thayerian deference does not necessarily undermine the settlement function. To the contrary, it may actually promote overall settlement of the law. Most law derives from statutes, not the Constitution. Legislatures enact statutes, but courts implement the Constitution. That different actors have independent control over different aspects of the law potentially leads to uncertainty. Legislatures may enact laws requiring one set of actions, but courts may interpret the Constitution to require a different set of actions. Legislators can only guess when enacting legislation whether the courts will sustain that legislation,[186] and private actors can only guess whether they should comply with the statute or with how they predict the courts will rule. Expanding legislative control over both statutes and the Constitution would reduce that uncertainty, because the institution with primary constitutional authority—the legislature—would have already determined the statute to be constitutional.[187]

To be sure, Thayerian deference might detract from the settlement of the Constitution because there are multiple interpreters who may issue divergent interpretations of the Constitution.[188] But the loss of that settlement may be offset by the gains in settlement of other law. That is especially so because the loss of settlement would not necessarily be extensive. The Supreme Court would still have the

184 *See e.g.*, Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 60–65 (1986); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 45–50 (1987).

185 *See* Arizona v. Gant, 129 S. Ct. 1710, 1722 (2009) ("We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice."); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (noting that the Court had "during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions").

186 *See* VERMEULE, *supra* note 140, at 275.

187 *See id.*

188 Greater settlement problems arise if the courts were to defer to the legislature even when the legislature does not provide an explicit interpretation of the Constitution?that is, if the courts were to uphold legislation if there were a *potential* construction of the Constitution that supported the legislation. In that case, deference would leave the meaning of the Constitution ambiguous. But that problem is avoided if courts defer only when the legislature provides an express interpretation.

power to strike down unreasonable constructions of the Constitution. It would therefore limit the range of lack of settlement.[189]

Moreover, the impact of the reduction of settlement of constitutional meaning may not be particularly significant. That is because, although different legislatures might issue differing interpretations of the Constitution, the interpretations rendered by legislatures would apply only within the areas subject to that legislature's power. If Utah interprets a provision of the United States Constitution to mean *X* and Texas interprets the same provision to mean *Y*, there is no uncertainty of meaning. In Utah the provision means *X* and in Texas it means *Y*. Settlement problems would arise only in the rare situation where a person is subject at the same time to conflicting laws of two different states that are based on differing interpretations of the Constitution. And in that situation, courts should give deference to neither state, since both are equally entitled to it. (A conflict between a state and federal law based on differing, but reasonable, constitutional interpretations would not present a settlement problem, because the federal law would simply preempt the state law, obviating the need to resolve the constitutional dispute.)[190]

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189 *Cf.* United States v. Booker, 543 U.S. 220, 263–65 (2005) (explaining that appellate review for reasonableness achieves some uniformity).

190 There are good reasons for Congress's interpretation to prevail. First, Congress may be superior to state legislatures at constitutional interpretation. Because its members come from across the nation, Congress represents a broader set of viewpoints and social understandings than state legislatures. As *Federalist No. 10* explains, states are more likely than Congress to trample on minority rights because, compared to Congress, states are small, relatively homogenous groups. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 9, at 50. For these reasons, the Court has in the past treated state and federal governments differently with respect to the Constitution. Congress, therefore, is likely a better institution than the state legislatures to render constitutional interpretations that reflect current social norms.

Second, the federal courts may have less cause to afford due respect to the state legislatures. The reason that courts give respect to Congress's interpretation of the Constitution is not simply that Congress has taken the oath to uphold the Constitution. Were that enough, courts would defer to constitutional interpretations rendered by any government employee, including the janitor. *See* 5 U.S.C. § 3331 (2006) (requiring "[a]n individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services," to take such an oath). The reason for respect to Congress's interpretation is that it is a coequal branch with the judiciary. States do not fit that bill.

Third, insofar as courts should defer to legislative interpretations because the Constitution itself assigns the primary responsibility of interpretation to the legislature, Congress's interpretation may trump state interpretations under the Supremacy Clause. That is because, if the Constitution itself commits interpretation to the legislature, legislative interpretations of the Constitution themselves essentially constitute law. *Cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66

A related objection is that differing interpretations result in a lack of uniformity of constitutional meaning. Lack of uniformity is different from lack of settlement. Lack of settlement results when there is no single authority on the meaning of the Constitution; lack of uniformity, by contrast, results where there are multiple authorities on constitutional meaning that each has a limited sphere of power, and those authorities issue different interpretations. Lack of uniformity poses the risk of imposing costs on actors subject to different constitutional interpretations. It also potentially undermines the legitimacy of law. Inconsistency, it is argued, leads to the perception of unequal treatment.

Thayerian deference may indeed lead to a lack of uniformity in constitutional meaning. Instead of a single constitutional interpretation rendered by the Supreme Court applying to the country, there may be fifty different interpretations by the various state legislatures and another by Congress.[191] But uniformity in the law is rare. There are many different sources of law—from local governments through the federal government—and each produces different laws. Lack of uniformity in constitutional law is also relatively common.[192] The circuit courts, district courts, and the various state courts all have the power to address constitutional questions, and they may resolve those questions differently. Although the Supreme Court may intervene to establish a uniform rule, it takes a small number of constitutional cases each year. And even when the Court does intervene, lower courts often distinguish the Court's rulings and in some cases simply disobey the Supreme Court.[193]

(1984) (relying on a similar theory to justify judicial deference to agency interpretations of statutes).

191 One way to avoid this incoherence is to refuse to apply the presumption to state legislation. But this is difficult to justify. The Court has not hesitated to apply the presumption of constitutionality to state legislation. From its earliest days through last Term, the Court has invoked the presumption in evaluating state legislation. Moreover, most of the reasons justifying the presumption with respect to Congress apply equally to the states. The only justification that does not is that the Court should hesitate to overturn the constitutional determination of a coordinate branch of government.

192 *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1612 (2008) (noting inevitable disuniformity in constitutional law given the current judicial structure).

193 Indeed, one article argues that the Supreme Court itself encourages such disobedience. *See* Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 516–47 (2008) (giving three examples where the Supreme Court invited state court disobedience).

More important, a number of constitutional doctrines *themselves* lead to lack of uniformity. The Fifth[194] and Fourteenth Amendments,[195] for example, prohibit the deprivation of property without due process. What constitutes a liberty interest or property interest triggering the clauses' protections is defined by state law;[196] thus different due process protections apply in different states. Another example comes from the obscenity exception to the First Amendment. Whether material is obscene, and thus not protected by the First Amendment,[197] depends on local "'community standards.'"[198] What is obscene in a small conservative town may not be obscene in New York City. These tests themselves suggest that obtaining uniformity in constitutional implementation is not always an end worth achieving. Regional differences may call for different legal rules.[199]

This prevalence of disuniformity in the law, and in particular constitutional law, suggests that disuniformity does not impose unacceptable costs or threats to legitimacy. Indeed, cases like *Chevron* rest on the principle that, when sources of law are reasonably susceptible to different interpretations, each of those interpretations are equally legitimate.[200] People accept the interpretations because they are equally plausible. Thus, to the extent that the Constitution is ambiguous, each reasonable reading warranting Thayerian deference is as legitimate as the other. Indeed, the variable interpretations produced by states and Congress may be beneficial. They may more accurately reflect the preferences of the constituencies, which would promote democratic accountability and mitigate against the countermajoritarian difficulty.[201] To the extent that people feel that they are being

194 U.S. CONST. amend. V.

195 U.S. CONST. amend. XIV, § 1.

196 *See* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2319 (2009) (looking to Alaska state law to determine whether prisoner had liberty interest in demonstrating innocence through new evidence); Bishop v. Wood, 426 U.S. 341, 344–345 (1976) (resorting to state law to define property interest).

197 U.S. CONST. amend. I.

198 Ashcroft v. ACLU, 535 U.S. 564, 574 (2002) (quoting Miller v. California, 413 U.S. 15, 24 (1972)).

199 One could argue that lack of constitutional uniformity imposes unacceptable costs on multistate actors. But those actors routinely face problems of this sort, and those problems are handled through federal statute that displaces state law, not through the Constitution. To the extent intolerable costs result from state legislation based on divergent constitutional interpretations, Congress may intervene to enact a federal standard.

200 *See* Frost, *supra* note 192, at 1588–91.

201 *See id.* at 1589 ("[R]easonable variations in the interpretation of federal law are arguably *more* legitimate than a single, nationwide interpretation . . . .").

unfairly treated under the Constitution, they may seek to correct that problem by contacting their representative or replacing that representative with one who holds a more acceptable constitutional view. Although those efforts may not be successful because of the myriad considerations that go into elections, they are certainly more likely to be successful than any comparable effort to influence the courts.

Finally, lack of uniform interpretation may also have benefits. Most notably, the lack of uniformity promotes experimentation and evolution of constitutional principles. Our federal system is built on the idea of the states serving as laboratories to conduct experiments for social development.[202] Greater leeway in constitutional interpretation facilitates this process.

5. Law and Legitimacy

One final objection to Thayerian deference is that it may undermine the legal legitimacy of the implementation of the Constitution. The theory is that political concerns and not legal analysis will drive legislative interpretations of the Constitution, and the legislature accordingly will change its interpretation of the Constitution whenever it is politically expedient. This process may offend the requirement that law be applied consistently based on principle instead of political or partisan concerns.[203]

There is nothing inherently illegitimate about the legislature as opposed to the courts having interpretive authority over the Constitution. As noted earlier, a number of Constitutional provisions are entrusted exclusively to the legislature, and legislative interpretations of those provisions have not prompted charges of illegitimacy.[204]

Nor does the fact that the legislature may alter the meaning of the Constitution on occasion necessarily deprive those interpretations of legal legitimacy.[205] As Professor Fallon has explained, legal legiti-

202 *See id.* at 1597–98 & n.104; Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2213–28 (1998).

203 *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1820 (2005) (noting that some called *Bush v. Gore* illegitimate on the ground that "the majority breached the requirement that judges must apply legal principles consistently, without regard to the parties or a case's partisan impact").

204 *See supra* note 122 and accompanying text.

205 One doctrinal question that would arise is whether a court should defer to two inconsistent interpretations rendered by the same legislature. On the one hand, the practice seems consistent with the idea that, since the Constitution is without precise meaning, the judiciary should defer to any reasonable interpretation of the Constitution. On the other hand, allowing a legislature to rely on conflicting interpretations to support its laws would threaten the public's perception of the legitimacy of the

macy depends on society's acceptance of a law as authoritative.[206] Once the people acquiesce in the authority of a legal scheme, that law becomes the law of the land. Its social acceptance creates legal legitimacy.[207] With this understanding of legal legitimacy, it seems apparent that a scheme of Thayerian deference would not be legally illegitimate, at least as compared to the judiciary. People may on the whole be more likely to accept interpretations rendered by the legislature than by the courts, because legislative interpretations are more likely to be guided by a desire to satisfy the people.

That the changes to constitutional meaning may be prompted by political concerns does not change the analysis. Administrative agencies, for example, often change interpretation of a statute for political reasons, without any apparent impact on legitimacy.[208] Similarly, courts often alter constitutional doctrine, based on what many perceive to be nothing more than the judges' political opinions.[209] With few exceptions, those changes have not met claims of illegitimacy. Rather, claims of illegitimacy tend to be targeted at the substantive outcome rather than the fact of change in analysis.

IV. DOCTRINAL CONSEQUENCES

As the previous sections suggest, none of the reasons underlying the presumption of constitutionality logically supports the current presumption, and that aside perhaps from institutional advantage, the reasons underlying the presumption equally if not more strongly support deference to interpretation. This suggests two doctrinal changes. First, courts should limit the factual deference it gives to legislatures under the presumption of constitutionality. Second, courts should

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Constitution. On balance, it may be that the legitimacy concerns in that context should require a legislature to pick a particular interpretation.

206 *See* Fallon, *supra* note 203, at 1805 ("With respect to the most fundamental matters, sociological legitimacy is not only a necessary condition of legal legitimacy, but also a sufficient one . . . . The Constitution is law not because it was lawfully ratified, as it may not have been, but because it is accepted as authoritative.").

207 *See id.* at 1804 ("Its sociological legitimacy gave it legal legitimacy . . . .").

208 Indeed, the Supreme Court has stated that "'the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)).

209 *See* Posner, *supra* note 37, at 48 ("It is no longer open to debate that ideology (which I see as intermediary between a host of personal factors, such as upbringing, temperament, experience, and emotion—even including petty resentments toward one's colleagues—and the casting of a vote in a legally indeterminate case, the ideology being the product of the personal factors) plays a significant role in the decisions even of lower court judges when the law is uncertain and emotions aroused.").

defer to constitutional interpretations rendered by the legislature in those instances where the institutional disadvantages of the legislature do not bear on the constitutional question.[210]

A. Reduced Factual Deference

The breadth of the presumption of constitutionality has met substantial criticism,[211] and for good reason. As explained above, the five justifications for deference sensibly support the presumption of constitutionality only when the legislature has actually made factual findings with the relevant constitutional provision in mind. If the reason for the presumption is respect for the legislature's constitutional judgment, courts perhaps should defer only when the legislature has, in fact, determined that the facts underlying the legislation support the law's constitutionality.[212] Otherwise, there is no factual determination warranting the judiciary's respect. If democratic accountability is the reason for the presumption, courts should defer only when legislatures have made factual findings; for a court to supply the factual findings may actually reduce legislators' accountability by providing justifications for a law that the legislature did not consider. If the reason for deference is the legislature's institutional advantage, courts should defer only to those factual conclusions that are the product of that institutional advantage. If the reason for the presumption is administrability, the presumption is not particularly necessary because litigants and courts already voluntarily comb the record to identify legislative reasons. If the reason for the presumption is legitimating the legislature, courts should not supply facts clearly not considered by the legislature; doing so not only highlights the legislature's failure to make relevant factual findings but also risks revealing the disingenuity of the presumption, which would damage the legitimacy of the judiciary as well.

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210 One might argue that requiring actual legislative findings of fact would be inefficient, because if courts strike down legislation based on the legislature's failure to find sustaining facts, the legislature will simply reenact the law with the necessary fact-findings. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1214–15 (1970) (arguing that striking statutes based on incorrect motivation is inefficient since legislature can reenact a statute based on "right" motivation). But this does not justify deference on factual matters; rather, it supports changing constitutional doctrine so that it does not depend on factual deference.

211 *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935) (describing the presumption as requiring courts sitting as "lunacy commissions . . . in judgment upon the mental capacity of legislators . . . .").

212 *See supra* Parts II, III.

Courts, of course, have not limited their deference to facts actually found by the legislature.[213] To the contrary, although courts have continually been willing to supply far-fetched hypothetical justifications to support laws, they often refused to defer to express legislative factual findings. In *Board of Trustees of the University of Alabama v. Garrett*,[214] the Supreme Court considered whether Congress had properly exercised its power under Section 5 of the Fourteenth Amendment in enacting the provision of the Americans with Disabilities Act of 1990 (ADA)[215] that subjected states to suit for discriminating against the disabled.[216] Prior cases had established that such legislation is appropriate only to cure a history and pattern of discrimination by the states. In enacting the ADA, Congress had amassed substantial evidence of state discrimination.[217] But the Court struck the provision down, concluding that these findings were inadequate to establish a history and pattern of discrimination.[218]

Deferring to findings actually made by legislatures and giving less deference to findings not made by the legislature would correct the misalignment between the reasons for deference and the implementation of that deference. Of course, legislatures may generate favorable factual findings by manipulating the hearings and evidence presented before the legislature to support the legislation. But the evidence would provide at least some evidentiary foundation for the enactment, and it would make the legislatures more responsible for the bases for their enactments.[219]

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213 This does not necessarily lead to reduced deference. Courts may adopt doctrinal formulas for constitutionality that do not depend on legislative factual determinations. For example, one could imagine a doctrine for the commerce clause that permits any law that could impact interstate commerce, as opposed to whether Congress could have made that conclusion.

214 531 U.S. 356 (2001).

215 Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

216 *See* Bd. of Trs. v. Garrett, 531 U.S. at 364.

217 Congress held thirteen hearings and created a special task force that held hearings in every state. *See id.* at 389 app. A (Breyer, J., dissenting) (listing the Congressional hearings); *id.* at 391 app. C (providing an inventory of the submissions made by individuals nationwide to the Task Force on Rights and Empowerment of Americans with Disabilities).

218 *See id.* at 370 (majority opinion) (stating that "Congress assembled only . . . minimal evidence of unconstitutional state discrimination").

219 To be sure, if courts strike down legislation based on the legislature's failure to find sustaining facts, the legislature may simply reenact the law with the necessary fact-findings. *See* Ely, *supra* note 210, at 1214. But this does not justify judicial deference to legislative factual findings; to the contrary, it counsels against any factual deference.

Limiting judicial deference on factual matters to instances where the legislature actually renders factual findings may seem to risk giving too much power to the judiciary over the legislature.[220] The reason for this concern is that judicial monitoring might interfere with democratic accountability or undermine the legislature's role as making independent constitutional decisions. But as explained in Part II, democratic accountability and the legislature's independent status justify deference only when the legislature has in fact made the relevant judgment.[221]

All of this is not to say that legislatures necessarily must include factual findings in the record. Legislatures have no obligation to provide explanations for their legislation. When the factual justification for legislation is apparent from the record, it may be appropriate for courts to assume that that fact did indeed motivate the legislation. But when the justifications supplied by the courts for legislation are far from obvious,[222] deference seems less appropriate.[223]

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220 *See* Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 738–42 (1996).

221 Similarly, one might argue that courts should presume that legislatures exercise their fact-finding expertise in making factual findings. That argument is a variation on the due-respect argument and is subject to the same criticisms made above. *See supra* Part II.A.

222 One case where the justification was not obvious is *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980). There, the Court sustained legislation giving retirement benefits to certain railroad employees who had been employed (or otherwise had a connection with) the railroad industry in 1974, but denying those benefits to railroad employees who did not work for the railroads in 1974 (even if that employee had worked before and after 1974 for the railroads). *See id.* at 168–74 (discussing the structure of the "grandfather" clause of the Railroad Retirement Act of 1974, 45 U.S.C. § 231b(h) (1976)). Although Congress offered no justification for the distinction and apparently was not aware of the effect of the statute, *see id.* at 185–86 (Brennan, J., dissenting), the Court justified the distinction on the ground that

> Congress could assume that those who had a current connection with the railroad industry when the Act was passed in 1974, or who returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the Railroad Retirement Act was designed.

Id. at 178 (majority opinion).

223 Justice Stevens has advocated a somewhat similar standard. He has rejected the presumption of constitutionality on the ground that it "sweeps too broadly." FCC v. Beach Commc'ns, Inc., 588 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in the judgment). In his view, instead of supplying any conceivable facts in evaluating legislation, courts should consider the facts that it "may reasonably presume to have motivated" the legislature. *Fritz*, 449 U.S. at 181 (Stevens, J., concurring).

B. Deferring to Interpretations

The reasons underlying the presumption of constitutionality equally if not more strongly support judicial deference to legislative interpretations of the constitution. This suggests that courts should defer to constitutional interpretations rendered by the legislature. The one possible exception, as noted earlier, is on technical constitutional questions. Courts may have an institutional advantage at resolving those questions. But that advantage does not hold where the constitutional issue depends on social norms, because legislatures more accurately represent current social values than courts.

This naturally raises the question of which constitutional issues involve social norms, and which present technical questions of law. The question is not easy to answer. In all likelihood, most constitutional questions depend on social norms. This should be hardly surprising, given the observation that the Supreme Court tends to follow the election returns. Still, some constitutional clauses do seem to present largely technical issues requiring legal training to answer. Consider the Seventh Amendment's prohibition on the reexamination of jury factfinding except as allowed "according to the rules of the common law."[224] What constitutes the rules of the common law seems to be largely a technical question in that answering the question depends on the legal knowledge of the scope and contours of the common law.

The principal problem with affording deference to legislative interpretations of the Constitution is that legislatures have "no obligation to address constitutional questions" explicitly when enacting statutes.[225] When a legislature does not provide a constitutional interpretation in support of legislation, a court reviewing that legislation cannot be sure whether the legislature has even considered the constitutional issue, a prerequisite to the court giving deference to the legislature. Nor can the court even know the interpretation of the Constitution to which it is asked to defer.

Accordingly, judicial deference to legislative interpretations of the Constitution seems appropriate only when it is apparent that the legislature, in enacting legislation, has considered the relevant constitutional provisions and has made interpretive decisions about those provisions[226]—for example, when the legislature has articulated in a

224 U.S. CONST. amend. VII.

225 Tushnet, *supra* note 127, at 502–03.

226 Professor Fallon has noted that it would be "dramatically imprudent for a society that thought its legislature did not currently take rights seriously" to adopt Thayerian deference "in hopeful anticipation that the legislature would thereafter change its ways." Fallon, *supra* note 133, at 1705. This structure, however, does not face that

statute a constitutional interpretation. This is not to say that the interpretation must be explicit. Judicial deference may be appropriate when the court can glean with reasonable certainty the constitutional interpretation underlying legislation.[227] But it is to say that, at the least, courts should defer where the legislature has debated the constitutional issue and included a constitutional interpretation in its legislation (in, for example, a provision stating the sense of the Congress).[228]

An explicit legislative constitutional interpretation would reduce the risk that the legislature's interpretation is driven by expediency rather than principle. A legislator who supports a particular constitutional interpretation will be publicly charged with that constitutional interpretation. This suggests that a legislator will be more likely to take his interpretive task seriously. It also suggests that a legislator may not adopt a radical interpretation in response to the latest public furor. As legislators know, public passions tend to be ephemeral. Consider the outcries against Communists during the middle of the twentieth century.[229] Public fears generated demand for immediate results that were accomplished through constitutionally questionable laws, but that demand faded after a short time, at which point the people tended to disapprove of those laws.[230] Similarly, following the events of September 11th, the public supported strong measures against potential terrorists, but as time passed, the public support for those laws has faded.[231] Accordingly, a legislator has an incentive to

problem because the deference would be appropriate only when there was evidence that the legislature did take rights seriously.

227 Thus, for example, deference may be appropriate if the legislative history clearly established that a particular constitutional interpretation drove a piece of legislation. This may result in legislators inserting statements into the legislative history solely to limit judicial review. But that practice would at least reflect legislative consideration of the constitutional issues.

228 Indeed, the Court itself has recognized the point. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990) ("Given the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,' we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations." (citations omitted) (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985)).

229 *See generally* DAVID CAUTE, THE GREAT FEAR 25–81 (1978) (outlining the anti-Communist hysteria during the Truman and Eisenhower administrations).

230 *See* Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 10–17 (1991) (describing pre– and post–World War II developments in this area).

231 *See* Sheryl Gay Stolberg, *Once-Lone Foe of Patriot Act Has Company*, N.Y. TIMES, Dec. 19, 2005, at A28 ("Polls show that public support for the Patriot Act has waned over time . . . .").

eschew expedient interpretations for the long view, knowing that the constitutional interpretation may haunt him in an election after that furor has passed.

There are other reasons for judicial deference where Congress has provided an explicit interpretation. Affording deference would encourage the legislators to consider the Constitution in enacting laws and consequently to take their constitutional oaths seriously.[232] Because legislators could protect their legislation through constitutional interpretation, legislators would be inclined to do so, and indeed, in the long term may be expected to do so. Affording deference would also promote cooperative development of constitutional law between the courts and the legislatures. Involving both entities would facilitate a dialogue between the two entities on constitutional meaning and values.[233] Under the current structure, the dialogue is stilted because the Court may choose to ignore any constitutional pronouncement offered by a legislature. Requiring courts to defer to reasonable legislative interpretations would require the courts to engage with the legislature in the development of constitutional principles.

Deferring to the legislature on constitutional interpretation also potentially avoids a number of costs. Most obviously, deference to interpretation may reduce litigation costs.[234] If the judiciary has less power to question legislative constitutional interpretations, litigants will have less incentive to resort to the courts to make constitutional arguments. Judicial deference to legislative interpretations would also result in more systemic savings. Under the current regime of exclusive judicial control over constitutional interpretation, constitutional interpretation has far-reaching consequences. A judicial interpretation not only voids the law before it, but because of stare decisis, also prevents future legislation of a similar sort unless an amendment is passed. Insofar as legislatures are not bound by stare decisis, they can simply undo an obstructive interpretation by majority vote.[235]

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232 Many have argued that aggressive judicial review reduces the incentive for the legislature to ensure that the laws it enacts are constitutional; legislatures may simply rely on the courts to correct any constitutional infirmities. *See* Thayer, *supra* note 49, at 155–56; *see also* Tushnet, *supra* note 127, at 504–08 (describing this phenomenon as the problem of "the judicial overhang").

233 *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 112–23 (2000).

234 As Professor Sager has explained, judicial enforcement of certain constitutional norms to their full conceptual limits potentially entails many costs. *See* Sager, *supra* note 49, at 1221–22.

235 Chief Justice Rehnquist also noted that deference to legislative interpretations reduces the distaste of an erroneous interpretation. Without deference, an erroneous interpretation results in the imposition of the view of five justices; but with deference,

Moreover, as Professor Vermeule has explained, deference to legislative constitutional interpretations reduces costs resulting from unpredictability in judicial review.[236] When a constitutional provision is subject to different reasonable interpretations, leaving interpretation solely to the judiciary is inefficient, because the legislature does not know the Court's interpretation and consequently whether it should bother enacting the legislation.[237] Requiring courts to defer to the legislature reduces those costs, because the legislature can be more assured that its legislation will be constitutional.[238] If the legislature does not know the relevant constitutional standard before enacting legislation, it cannot take care to ensure that its legislation is constitutional. State death penalty legislation following *Furman v. Georgia*[239] provides a good example. There, the Court invalidated several death penalty statutes because they provided too much discretion to the jury in making the death determination.[240] Following *Furman*, various state legislatures sought to comply with the ruling by enacting statutes making the death penalty mandatory for certain offenses. The Court subsequently ruled, however, that those statutes violated the Constitution as well.[241]

Despite all this, courts have not deferred to legislative interpretations of the Constitution, even when the legislature has provided an

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the erroneous interpretation is the product of the majority. WILLIAM H. REHNQUIST, THE SUPREME COURT 318–19 (1987).

236 VERMEULE, *supra* note 140, at 274.

237 *See id.*

238 A scheme of deference to legislative interpretations of the constitution would similarly increase the predictability of laws for the public. Judicial interpretations occur after a person has acted; by contrast, legislative interpretations ordinarily occur before a person acts, because laws are generally prospective in nature, so people may conform their behavior to reflect legislative interpretation.

239 408 U.S. 238 (1972).

240 Two justices—Justices Brennan and Marshall—would have barred all capital punishment. *See id.* at 305 (Brennan, J., concurring); *id.* at 371 (Marshall, J., concurring). Justices Douglas, Stewart, and White concluded that the death penalty statute was unconstitutional because it afforded the jury too much discretion. *See id.* at 245 (Douglas, J., concurring) (condemning statute for its "selective and irregular" application); *id.* at 308–10 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed" on a "capriciously selected random handful" of individuals); *id.* at 314 (White, J., concurring) (striking statute because the jury "in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime").

241 *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 285–87 (1976) (invalidating mandatory death penalty enacted in light of *Furman*).

explicit constitutional interpretation. *City of Boerne* provides an example. That case involved a challenge to the Religious Freedom Restoration Act (RFRA), which Congress had enacted in response to the Supreme Court's decision in *Employment Division v. Smith*.[242] In *Smith*, the Supreme Court overturned a line of cases holding that, under the Free Exercise Clause of the First Amendment, generally applicable laws that burden religious exercise are subject to strict scrutiny; instead, the Court held that, so long as they are generally applicable, laws that substantially burden religious exercise do not trigger heightened scrutiny under the Free Exercise Clause.[243] Congress's response in RFRA was to reinstate the strict scrutiny standard abandoned in *Smith*.

Members of Congress explicitly debated whether the strict scrutiny test was the proper interpretation of the Free Exercise Clause,[244] and RFRA explicitly stated that it was interpreting the Free Exercise Clause to entail strict scrutiny.[245] Still, the Court refused to defer to Congress's interpretation, stating that if Congress could alter the meaning of the Constitution, "no longer would the Constitution be 'superior paramount law'" because it could be altered by the legislature.[246]

That reasoning does not justify *City of Boerne*'s rejection of deference. It rests on the assumption that, if the Court were to defer to Congressional interpretations of the Constitution, there would be no limit to Congress's power. But this is hardly so. Deference often varies in strength and scope. The Court's rationale does not explain why the Court should not afford Congress even limited deference under which only justifiable interpretations would receive deference. Moreover, the reasoning in *City of Boerne* equally counsels against the current presumption of constitutionality. The effect of the presumption is to uphold legislation that would otherwise be deemed unconstitutional. By upholding legislation despite its unconstitutionality, the

242 494 U.S. 872 (1990).

243 *See id.* at 886–89.

244 *See* City of Boerne v. Flores, 521 U.S. 507, 515 (1997); McConnell, *supra* note 74, at 186–88.

245 *See* 42 U.S.C. § 2000bb(b)(1) (stating that the Act is designed "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

246 *Boerne*, 521 U.S. at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

presumption places legislation above the Constitution, and treats the Constitution as something less than the "superior paramount law."[247]

Conclusion

One may debate whether the reasons underlying the presumption of constitutionality justify any judicial deference to the legislature on constitutional matters. But if one concludes, as the courts have, that those reasons do justify such judicial deference, that deference should not be limited to factual determinations but should include judicial deference to constitutional interpretations rendered by the legislature as well. The Court, however, has refused to defer to legislative interpretations of the Constitution, but has persistently held that the courts alone have the final word on constitutional meaning.

The disconnect between the reasons for deference and doctrines of deference threatens to undermine the legitimacy of the judiciary. A court's legitimacy stems primarily from the force of that court's reasoning.[248] When reasons given by a court do not logically support that court's conclusion, the judiciary appears to render decisions based on predilection instead of principle. Reducing factual deference and increasing interpretive deference would help to correct that problem.

Altering judicial deference in this way would not lead to a complete change in judicial review as we know it. For example, the judiciary would not necessarily be required to allow the legislature to circumvent the heightened constitutional protections that courts have created for fundamental rights and to prevent discrimination against suspect or quasi-suspect classes. Those heightened protections are a result of the courts' conclusion that the current presumption of constitutionality should not extend to laws infringing on those rights, and the same reasons may counsel against extending judicial deference to legislative interpretations of the Constitution with respect to those rights.

Still, a regime of judicial deference to legislative interpretations of the Constitution would obviously have significant consequences. The legislature instead of the judiciary would resolve most questions over the meaning of the Constitution; the judiciary's task would become to police the perimeters of constitutional meaning. Debates

247 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

248 *See, e.g.*, Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 Geo. L.J. 1283, 1333–34 (2008) ("[T]he primary source of judicial legitimacy lies in reasoned appeals to appropriate legal authority.").

on constitutional meaning would accordingly shift from the courts to the legislature.[249]

A scheme of Thayerian deference would also raise many administrative questions. Would some existing judicial decisions be discarded? How would courts evaluate the reasonableness of a constitutional interpretation? Would it matter whether the interpretation was reasonable at the time of adoption but is now contrary to social norms?

Administrative law may provide a starting point for resolving some of these questions. For example, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[250] holds that courts must defer to reasonable agency interpretations of statutes even after the courts have already rendered an interpretation of that statute.[251] One could imagine a similar structure for constitutional interpretation: courts must defer to reasonable legislative interpretations of constitutional provisions even if those interpretations differ from existing judicial interpretations of those provisions. But there are significant differences between administrative law and constitutional law. For example, poor administrative interpretations are easily corrected by legislation while poor interpretations of the Constitution are not. Moreover, some of the basic foundations of our current legal system—such as the *Erie* doctrine—stem from judicial glosses on ambiguous constitutional provisions. Unraveling those decisions may prove too costly.

Needless to say, designing a rubric of judicial deference to legislative judgments on constitutional matters cannot be done overnight. As with the creation of all judicial structures, it is a scheme to be developed over time, through experience and reflection. Finding the appropriate level of deference will require reflection on the role of the legislature in enacting legislation and of the courts in constitutional cases, as well as experimentation with different doctrines. This Article is merely a starting point for that reflection.

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249 Granting the legislature primary interpretative authority over the Constitution may also accelerate the rate of constitutional change, if the legislature were not to adopt its own doctrine of stare decisis. Although some scholars have argued against more rapid development of constitutional law, *see* CASS R. SUNSTEIN, ONE CASE AT A TIME 8–11 (1999) (arguing that courts should avoid adopting general constitutional principles but instead should resolve cases on narrow grounds), the principal reason is that new constitutional rules may prove to be suboptimal as more information is revealed, and that correcting these errors may prove difficult because of the nature of the judicial process. Allocating constitutional interpretation to the legislature largely avoids this problem to the extent that the legislature does not abide by stare decisis.

250 545 U.S. 967 (2005)

251 *Id.* at 982–83.