

## ADJUSTING THE PRESUMPTION OF CONSTITUTIONALITY BASED ON MARGIN OF STATUTORY PASSAGE

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### ABSTRACT

*For much of its history, the Supreme Court applied a very strong presumption of constitutionality in favor of federal statutes, striking them down only if convinced the statute was unconstitutional beyond a reasonable doubt. In more modern cases, however, the Court affords a much weaker “presumption of constitutionality” that is closer to a mere tiebreaker, does not apply to all constitutional challenges, and affords only factual, not interpretive deference. This Article argues for adjusting the presumption of constitutionality based on the margin of statutory passage, and setting as the maximum the older, stronger beyond-rational-doubt presumption. Adjusting the presumption based on the margin of passage addresses the concerns behind the “countermajoritarian difficulty.” It is supported by the Constitution’s supermajoritarian structures and theorists’ arguments about the superiority of supermajority enactments. It would improve the Court’s legitimacy by making explicit and legitimate a basis of decision that has been perceived to have influenced the Court’s decision making in key cases. It would also be more objective than various theories advanced to allow the Court to accommodate popular will in constitutional interpretation, and would be easier to implement than legislative proposals to “fix” the countermajoritarian difficulty, because it can be implemented by the Court itself.*

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## INTRODUCTION

This Article argues that the presumption of constitutionality that federal courts apply when reviewing federal statutes should strengthen based on the margin of passage in Congress, rising towards a “Thayerian”<sup>1</sup> maximum at which the Supreme Court would uphold a statute unless it were proven unconstitutional beyond a reasonable doubt. Increasing deference based on the margin of passage would further democratic and majoritarian values, reducing the much-discussed “countermajoritarian difficulty” caused by judicial review by advancing the principle of respect for majority legislation that is one of the main justifications for the presumption of constitutionality. Deferring more to statutes that pass with more votes is also consistent with the Constitution’s own supermajoritarian provisions and supported by academic theories about supermajorities’ and multi-member legislatures’ superior ability to enact good laws and resolve contested constitutional questions. Further, adjusting the presumption based on the margin of passage would improve popular perceptions of judicial legitimacy, both by making the Court more deferential to more popular laws and by explicitly acknowledging as a legitimate basis of decision a factor widely perceived to have tacitly influenced the Court’s decision making in important cases.

Part I explains the background of the “countermajoritarian difficulty” and of the presumption of statutory constitutionality rooted (at least in part) in countermajoritarian concerns. It also introduces the basic idea of an adjustable presumption of constitutionality tied to the margin of statutory passage.

Part II gives arguments for the basic idea that the presumption of constitutionality gets stronger with the margin of statutory passage. Part III considers how an adjustable presumption of constitutionality could work, arguing for a maximum Thayerian presumption requir-

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<sup>1</sup> James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

ing the Court to uphold a statute unless proven unconstitutional beyond a reasonable doubt and including significant deference to Congress's constitutional interpretation, and a minimum mere-tiebreaker presumption without interpretive deference. Part III also considers when the presumption would apply and in what types of cases it might make the most difference. In particular, Part III limits the application of the proposal to those areas where the Court currently applies a presumption of constitutionality, which excludes challenges based on claimed violations of fundamental rights or claimed invidious discrimination against discrete minorities.

Part IV responds to potential objections, including arguments that such an approach would be non-textual or unprecedented, problems with ascertaining the margin of passage for federal statutes, and skepticism about the chances that the Supreme Court would embrace such a rule. Part V concludes by discussing possible future areas of inquiry.

## I. THE COUNTERMAJORITARIAN DIFFICULTY AND THE PRESUMPTION OF CONSTITUTIONALITY

### A. *The Countermajoritarian Difficulty*

The countermajoritarian difficulty is very familiar—indeed, it is generally acknowledged and sometimes bemoaned as the “central obsession” of constitutional scholarship over the past half-century.<sup>2</sup> The basic concern is that allowing unelected judges to overturn the acts of elected legislatures frustrates democratic principles and the Constitution's preference for republican lawmaking.<sup>3</sup> Alexander Bickel coined the phrase “countermajoritarian difficulty” to describe this problem.<sup>4</sup> Since Bickel, legal theorists have debated extensively whether there is really a problem and (if there is) about how it might be solved, resolved, dissolved, or ameliorated.

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<sup>2</sup> See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) (“The ‘countermajoritarian difficulty’ has been the central obsession of modern constitutional scholarship.”); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1709 (1998) (“Contemporary constitutional law is preoccupied with the antidemocratic nature of judicial review.”). The following discussion attempts to briefly summarize the debates over the countermajoritarian difficulty, not comprehensively describe them.

<sup>3</sup> See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–18 (1962); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2596 (2003) (“At bottom it often seems to be a claim . . . that when judges invalidate governmental decisions based upon constitutional requirements, they act contrary to the preferences of the citizenry.”).

<sup>4</sup> See BICKEL, *supra* note 3, at 33.

Theories of the difficulty, and related attacks on the principle of judicial review, have taken several forms. These have included textual arguments that judicial review is illegitimate because it is not mentioned in the Constitution<sup>5</sup> and originalist arguments that judicial review is illegitimate because it was not contemplated by the Framers or ratifiers and deviates from the model of popular constitutionalism that prevailed when and shortly after the Constitution was ratified.<sup>6</sup> Other critics have argued more modestly that even if judicial review is theoretically legitimate, the Court has wrongly increased how often it uses the power—from very rarely during its first century<sup>7</sup> to much more frequently today, especially since the 1960s and perhaps accelerating even further in the last two decades.<sup>8</sup>

Beyond arguments that the Constitution does not (or did not originally) authorize judicial review, countermajoritarian criticisms also include philosophical arguments that judicial review is unjustifiable because it is procedurally illegitimate and not demonstratively substantively superior to legislative deliberation as a way of resolving contested issues about rights and constitutional interpretation.<sup>9</sup>

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5 *E.g.*, Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 16 (1981) (“[T]he weight of evidence does not support the view that the framers, who had taken the extraordinary step of adopting a [written] constitution as a species of positive law, intended the judiciary to have such broad authority [of judicial review].”).

6 *E.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7 (2004); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 5–6 (2001) (describing how the early Supreme Court took the modest position that its interpretations were not to be superior to the interpretations by the other branches and demonstrating that the idea of judicial supremacy was not popular in the early nineteenth century).

7 The Court struck down only two federal statutes as unconstitutional before the Civil War. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 432 (1856) (holding that the Missouri Compromise Act was unconstitutional); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803) (finding that a section of the Judiciary Act of 1789 was unconstitutional). For an early academic expression of this concern, see Joseph L. Lewinson, *Limiting Judicial Review by Act of Congress*, 23 CALIF. L. REV. 591, 591 (1935) (stating that the Court’s invalidation of four federal statutes in 1934 was an unprecedented “mortality rate”). *But see* Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1257–58 (2009) (arguing that the standard story is wrong and that antebellum invalidation of federal statutes was actually more robust than generally thought).

8 *See* Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 74 (2003) (“This recent burst of decisions invalidating federal statutory provisions [by the Rehnquist Court], particularly by bare-majority rule, is historically anomalous.”).

9 *See, e.g.*, RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY* 2–3 (2007); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) (“[Judicial review] is politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordi-

Defenses of judicial review, or denials of the countermajoritarian difficulty, have similarly taken several forms. Originalist criticisms have been countered by scholars arguing that judicial review was indeed envisioned by the Framers from the beginning.<sup>10</sup> Others have argued there can be no countermajoritarian problem because the Constitution's structure (which was itself ratified by democratic processes) specifically anticipates, or requires, judicial review.<sup>11</sup> To the extent that judicial review is undemocratic in the present, that is a "feature, not a bug."<sup>12</sup> Beyond arguments based in the Constitution's text or history, others have justified the power because of its tendency to protect important values—such as keeping the political process open to all, safeguarding the fundamental rights enshrined in the Constitution, or preserving federalism restrictions. They have suggested correspondingly that judicial review should be limited to or heightened for challenges that implicate these values.<sup>13</sup>

Outside the realm of theory, scholars have also argued that the theoretical concern about countermajoritarianism is empirically invalid because the Court does, in fact, conform itself (perhaps with some

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nary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.”).

- <sup>10</sup> E.g., Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 892 (2003) (“[W]e believe that modern scholars who insist that the Founders never authorized judicial review of federal statutes are mistaken.”); see also Thayer, *supra* note 1, at 132–34 (tracing the evolution of judicial review in state constitutions prior to and just after the Founding).
- <sup>11</sup> See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1380 (1997) (arguing that the Constitution, and the mechanism of judicial review, are designed “to remove a series of transcendent questions from short-term majoritarian control”).
- <sup>12</sup> Cf. Mark Tushnet, *Abolishing Judicial Review*, 27 CONST. COMMENT. 581, 582 n.6 (2011) (emphasizing that, under Tushnet’s proposal for abolishing judicial review, “the fact that Congress might expressly authorize actions that courts exercising the power of judicial review would find unconstitutional is a feature, not a bug”).
- <sup>13</sup> E.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (arguing that judicial review’s proper role is correcting failures of democratic representation); Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1709 (2008) (“[T]he strongest case for judicial review . . . [is that] errors that result in the underenforcement of rights are more troubling than errors that result in their overenforcement, and judicial review may provide a distinctively valuable hedge against errors of underenforcement . . .”). Compare Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 64 (2012) (criticizing the Roberts Court’s disdainful skepticism of the political process as particularly dangerous because it is combined with a narrow construction of key enumerated powers); with Steven G. Calabresi, *The Constitution and Disdain*, 126 HARV. L. REV. F. 13, 14 (2012) (responding to Karlan with an argument that judicial review in federalism cases is not countermajoritarian because the Court is merely umpiring between federal and state majorities).

lag) to majority political preferences, and so actually is itself a democratic, majoritarian institution.<sup>14</sup> Some have contended that judicial review is not countermajoritarian because it is a “politically constructed” phenomenon assented to and encouraged by the elected branches of the government and, therefore, not meaningfully undemocratic.<sup>15</sup> Others have argued that the antidemocratic concerns driving the countermajoritarian difficulty are unfounded because Congress itself, or the constitutional system more generally, distort and thwart actual majoritarian policy preferences.<sup>16</sup> Indeed, some argue that the Court can even serve as an outlet to effect majority preferences thwarted by countermajoritarian flaws in the representativeness of Congress or inherent in the Constitution’s republican structure.<sup>17</sup>

Among those who feel that the difficulty is real, theorists have proposed a wide variety of solutions to solve, resolve, or dissolve the difficulty. These often include proposals to limit the scope of judicial

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<sup>14</sup> See, e.g., Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263–64 (2010) (suggesting that Justices’ views generally track public opinion); Friedman, *supra* note 3, at 2606 (“[T]he wealth of existing evidence suggests that most of the time judicial decisions fall within the range of acceptability that one might expect of the agents of popular government.”); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96 (1993) (finding that Supreme Court opinions track public preference with a 5–7 year time lag). But see, e.g., Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 117 (arguing that the modern majoritarian view of the Court has been pushed to unrealistic and troubling extremes and that the Court has stood dramatically, in some instances, against majoritarian views).

<sup>15</sup> See generally, e.g., KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 363–64 (2008) (collecting and summarizing literature on the challenges to the countermajoritarian perception of the relationship between Justices and elected officials).

<sup>16</sup> Scholars arguing that Congress is itself countermajoritarian focus on political polarization, defects in representation resulting from political gerrymandering, and problems arising from the influence of special interests. See Graber, *supra* note 15, at 373–75 (describing countermajoritarian problems with Congress and the President). Countermajoritarian critics of the constitutional structure focus on the Electoral College, the nonmajoritarian, federal structure of the Senate, and the onerous requirements for amending the Constitution under Article V. E.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) (describing both the theoretical and practical ramifications of the Senate’s disproportionate representation); Graber, *supra* note 15, at 376–79 (reviewing arguments that American electoral institutions suffer from these and other countermajoritarian problems).

<sup>17</sup> See Graber, *supra* note 15, at 373 (“If . . . an off-center president is more conservative than the general public and a malapportioned Senate is more liberal than [sic] the general public, then courts may actually improve the democratic performance of governing institutions.”).

review or to make it more difficult for courts to exercise that power to overturn statutes.<sup>18</sup> Some theorists argue for limiting or revising judicial review in a way favoring the theorist's policy preferences by limiting or increasing its application in certain substantive areas of law.<sup>19</sup> Others have made more neutral proposals for overall structural limitations on how the Supreme Court exercises the power—such as requiring more than a bare majority vote before the Court can overturn a statute or allowing Congress, by supermajority vote, to override judicial invalidation of a statute.<sup>20</sup> Theorists of reform have also made more drastic proposals to abolish judicial review altogether.<sup>21</sup> Of these proposals, however, none have been generally accepted as satisfactory by commentators, much less adopted by Congress or endorsed by the courts. And, the prevailing view is that judicial review is sufficiently well-entrenched that it is not going anywhere.<sup>22</sup>

One reason for this is that the Court itself does not seem to share any of the more radical concerns about the countermajoritarian

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18 *E.g.*, Caminker, *supra* note 8, at 97–101 (examining a six-vote requirement for the Court to invalidate a statute as a “corporate” mechanism of deference that could replace or supplement the “atomistic” mechanism of Thayerian deference); *see generally* Maurice S. Culp, *A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States*, 4 IND. L.J. 386 (1929) (collecting and categorizing examples of proposals to limit the Court's judicial review authority up to 1929).

19 *See, e.g.*, Caminker, *supra* note 8, at 73 (considering supermajority requirements for the Supreme Court's invalidation of statutes as a response to the power of the “Federalism Five,” a group of Justices particularly aggressive in their exercise of judicial review over federal statutes challenged on federalism grounds); Fallon, *supra* note 13, at 1730–31 (arguing that judicial review should be limited in areas where there are conflicts between assertions of fundamental rights); *see also* Randy Barnett, *The Disdain Campaign*, 126 HARV. L. REV. F. 1, 11 (2012) (criticizing these approaches as “restraint for thee, but not for me”).

20 *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 117, 321 (1996) (arguing for a constitutional amendment allowing Congress to override decisions of the Supreme Court); Caminker, *supra* note 8, at 78 (suggesting exploration of a congressional imposition of a supermajority rule on the Court); Joseph L. Lewinson, *Limiting Judicial Review by Act of Congress*, 23 CALIF. L. REV. 591, 595–98 (1935) (considering whether Congress could take away the Court's jurisdiction to declare laws unconstitutional); *see generally* Culp, *supra* note 18 (collecting various proposals to limit the power of judicial review made during the first 140 years of the Nation's history).

21 *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154–76 (1999); Tushnet, *supra* note 12, at 581 (proposing a constitutional amendment to abolish judicial review by forbidding courts from reviewing the constitutionality of any act of Congress).

22 *E.g.*, ETHAN LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 70 (2004) (“[J]udicial review is here to stay.”).



problem potentially caused by judicial review.<sup>23</sup> Since *Marbury v. Madison*,<sup>24</sup> the Court itself has justified the practice as rooted in the Court's own duties and role under the Constitution.<sup>25</sup> Moreover, the modern trend is for the Court to be less deferential to elected legislatures, in terms of how frequently (and how ideologically) it invalidates statutes for unconstitutionality.<sup>26</sup>

While the Court itself has not engaged in extensive theoretical discussion about the countermajoritarian difficulty, it has frequently acknowledged the dangers inherent in exercising its power to overturn the acts of elected legislators.<sup>27</sup> And, the Court has developed a variety of ways to limit its exercise of that power—including doctrines like constitutional avoidance,<sup>28</sup> jurisprudential approaches such as “judicial minimalism,”<sup>29</sup> and practices of selectivity in deciding which cases to take.<sup>30</sup> Among these self-restraining doctrines is the presumption of constitutionality that the Court affords to federal statutes.<sup>31</sup> This presumption of constitutionality is the main focus of this Article and is examined further in Part I.B.

At the same time, however, the Court also has expressed concerns about bowing to political pressure when considering (and reconsidering) its decisions, and has indicated that altering its rulings based on

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<sup>23</sup> See, e.g., Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 534–38 (2012) (arguing that there are no current Supreme Court Justices following a jurisprudential philosophy of strong deference to Congress).

<sup>24</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>25</sup> But see Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case,”* 38 WAKE FOREST L. REV. 375, 376–77 (2003) (noting that *Marbury* was not commonly cited by the Court as authority for the power of judicial review prior to 1887).

<sup>26</sup> See Caminker, *supra* note 8, at 84–85 (tracing the decline from very strong “Thayer” deference to something much less today); Posner, *supra* note 23, at 522–35 (describing the popularity of Thayer’s theory of judicial restraint and the eventual end of the Thayerian tradition). See also discussion *infra* Part I.B.

<sup>27</sup> E.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (“It is not our job to protect the people from the consequences of their political choices.”).

<sup>28</sup> See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder (*NAMUDNO*), 129 S. Ct. 2504, 2513 (2009) (describing how the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case).

<sup>29</sup> Chief Justice John G. Roberts, Jr., Commencement Address at Georgetown University Law Center (May 21, 2006) (“If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.”).

<sup>30</sup> See, e.g., H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 6 (1992) (noting the Court’s nearly complete power to set its own agenda).

<sup>31</sup> See, e.g., *Pollock v. Williams*, 322 U.S. 4, 30 (1944) (Reed, J., dissenting) (“The presumption of constitutionality of statutes is a safeguard wisely conceived to keep courts within constitutional bounds in the exercise of their extraordinary power of judicial review.”).

such pressure would harm the Court's legitimacy.<sup>32</sup> And, as a practical matter, the Court's enthusiasm for invalidating federal statutes as unconstitutional does not seem to have diminished significantly in recent years—if anything, it may have increased.<sup>33</sup>

This Article accepts the twin premises that there is a countermajoritarian difficulty and that judicial review is so firmly entrenched in the constitutional order that it is here to stay for the foreseeable future. This Article, therefore, does not seek to add to the extensive debates over whether there actually is a countermajoritarian problem, but its argument for adjusting the presumption of constitutionality based on statutory margins is most likely to appeal to those who think that there is. Specifically, this Article focuses on the argument that if there is a countermajoritarian difficulty, it is more difficult when the margin of statutory passage is larger. If judicial review is questionable or illegitimate because it thwarts popular will, the thwarting is worse, and more undemocratic, when a larger majority in Congress supports the statute's passage. This point is developed further in Part II.

This observation leads directly to this Article's suggestion for a responsive adjustment to the doctrine: the Supreme Court should adjust the presumption of constitutionality that it applies to federal statutes so that it is stronger for statutes passed by larger margins. Adjusting the presumption of constitutionality in this way would more effectively limit the potential antidemocratic harms caused by the Court's exercise of its power of judicial review. In the next Subpart, this Article summarizes the history, content, and contradictions of the Supreme Court's doctrine of the presumption of constitutionality for federal statutes, as the second piece of background for the main argument.

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32 *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (“[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”).

33 The Supreme Court declared 159 statutes unconstitutional, in whole or in part, between 1789 and 2002—about .75 per year overall, but about .02 per year pre-1865, and 1.14 per year post-1865. *See* S. Doc. No. 108-17, at 2117–59 (2004) (listing and describing these 159 federal statutes held unconstitutional and the basis for their invalidation). Since 2002, the Court has declared an additional nine statutes unconstitutional, in whole or in part—about one per term. *See* Thomas M. Keck, *Why Does the Supreme Court Invalidate Federal Statutes?*, MAXWELL SCH. OF SYRACUSE UNIV., [http://faculty.maxwell.syr.edu/tmkeck/Book\\_1/federal\\_statutes.htm](http://faculty.maxwell.syr.edu/tmkeck/Book_1/federal_statutes.htm) (last updated June 27, 2013) (updating research on why federal statutes have been struck down). *See also* Caminker, *supra* note 8, at 74 (noting that from 1995 to 2002, the rate of Supreme Court invalidation of federal statutes increased significantly, as did the proportion of those decisions decided by a bare 5-4 majority).

### B. *The Presumption of Constitutionality*

The Supreme Court has long applied a presumption of constitutionality in favor of federal statutes, but the presumption has both weakened and narrowed over time.

The presumption of constitutionality is often classified under the broader heading of “judicial restraint,” together with other principles like “judicial minimalism”—the idea that a court should decide cases as narrowly as possible, in ways that are incompletely theorized<sup>34</sup>—and doctrines like “constitutional avoidance”—the rule that a court should, when possible, avoid answering difficult constitutional questions by disposing of cases on non-constitutional grounds.<sup>35</sup> As discussed above, these theories and doctrines are designed to restrain the Court’s exercise of judicial review because of concerns about the countermajoritarian dangers inherent in that power.

Since its early days, the Court has applied some sort of a presumption of constitutionality in favor of both federal and state statutes, although the specific label “presumption of constitutionality” only was applied later.<sup>36</sup> At the most basic level, the presumption of constitutionality simply means that in evaluating the constitutionality of a statute, the Court will afford some deference to the statute, and the party challenging the statute will bear some burden of proof to show its unconstitutionality.

The Court’s opinions, as well as academic explanations of the presumption of constitutionality, have justified it, at least in part, by the principle of deferring to the will of legislative majorities.<sup>37</sup> That is,

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<sup>34</sup> *E.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 9 (2001).

<sup>35</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”); *see, e.g.*, F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1448 n.2 (2010) (grouping the presumption of constitutionality together with other restraining doctrines such as constitutional avoidance).

<sup>36</sup> The first use of the specific phrase “presumption of constitutionality” was in *In re Kemmler*, 136 U.S. 436, 442 (1890), where it was used to describe the application of the presumption by a state court. The first use of the phrase by a Justice describing it as a doctrine of the Court was in *The Pipe Line Cases*, 234 U.S. 548, 575 (1914), where Justice McKenna referred to “the presumption of constitutionality to which all legislation is entitled . . . .” The first case in which a majority of the Court used the specific phrase in actually applying the presumption is *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–58 (1931)—but in doing so, it cited, in a footnote, cases stretching back to *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883).

<sup>37</sup> *See, e.g.*, *Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 157 (1919) (“There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people . . . .”); Caminker, *supra* note 8, at 83–86 (describing three reasons for the

the presumption has roots in the same concerns about unelected judges invalidating elected legislatures' enactments that animate the perceived counter-majoritarian difficulty.<sup>38</sup> In addition, the Court and theorists also justify the presumption on the grounds that Congress has an independent duty to consider the Constitution when it legislates; that by passing a statute, Congress has presumptively concluded that it is indeed constitutional; and that the Court should give some deference to this conclusion.<sup>39</sup> As explained further in Part II, both of these justifications support adjusting the presumption of constitutionality so that it strengthens as the margin of statutory passage gets larger.

While the justifications offered for the presumption of constitutionality seem to have remained fairly constant, the application of the presumption has changed throughout the Court's history—weakening and narrowing in several significant ways.

First, the strength of the presumption has weakened. This weakening is suggested both by shifts in the language that the Court has used to describe the presumption and by the significant modern increase in the rate at which the Court has invalidated federal statutes. In earlier cases, the Court applied a very strong presumption, frequently framed as requiring that the invalidity of the statute be shown beyond a reasonable or "rational" doubt<sup>40</sup> or requiring a "clear showing" of unconstitutionality.<sup>41</sup> Until the early twentieth century, this

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presumption given by Thayer himself, and four others given by scholars in more recent work); Hessick, *supra* note 35, at 1469–72 (describing the "democratic accountability" rationale as one purpose of the presumption); Thayer, *supra* note 1, at 144, 151, 156.

38 The Court also presumes state statutes constitutional, but that presumption is beyond the scope of this Article.

39 See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (justifying the presumption based on Congress's right and duty to "make its own informed judgment on the meaning and force of the Constitution").

40 See *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."); *Ogden v. Saunders*, 25 U.S. 213, 270 (1827) ("It is but a decent respect due to the . . . legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt."); see also Hessick, *supra* note 35, at 1457 n.48 (collecting examples of the Court employing the beyond-a-reasonable-doubt standard for constitutionality questions); Thayer, *supra* note 1, at 140–49 (collecting early cases from the Supreme Court and state courts articulating and applying the beyond-a-reasonable-doubt version of the presumption).

41 *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1871) ("A decent respect for a coordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress . . ."); Kramer, *Foreword: We the Court*, *supra* note 6, at 79 ("Judicial review was . . . a power to be employed cautiously, only where the unconstitutionality of a law was clear beyond doubt . . .").

very strong presumption of constitutionality was treated by the Court as venerable and unquestionable: “This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.”<sup>42</sup>

Over time, however, the Court has become less enthusiastic about proclaiming that the presumption is strong,<sup>43</sup> and appeals to the strength of the presumption have become increasingly relegated to dissenting opinions.<sup>44</sup> The modern Court will occasionally describe the presumption as requiring as much as a “plain showing that Congress has exceeded its constitutional bounds,”<sup>45</sup> but the “beyond rational doubt” formulation has disappeared. Moreover, at times, some Justices on the modern Court seem to view the presumption as a mere tiebreaker that will only prompt a vote to uphold the statute if other considerations are in equipoise.<sup>46</sup> In general, most agree that the trend has been away from the strongest, Thayerian form of deference to Congress.<sup>47</sup> And, empirical assessments of trends in the

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<sup>42</sup> *Adkins v. Children’s Hosp.*, 261 U.S. 525, 544 (1923).

<sup>43</sup> For example, while there are nine majority decisions between 1931 and 1984 describing the presumption of constitutionality afforded federal statutes as “strong,” see, for example, *United States v. Watson*, 423 U.S. 411, 416 (1976), as well as many earlier decisions applying the beyond-a-rational-doubt version, no majority decisions since 1984 mention a “strong” presumption of constitutionality.

<sup>44</sup> See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 267 (1995) (Stevens, J., dissenting) (wishing to uphold a statute’s constitutionality except in the “clear and urgent case”); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 327 (1987) (Stevens, J., dissenting) (describing a strong presumption of constitutionality); *Shapiro v. Thompson*, 394 U.S. 618, 675 (1969) (Harlan, J., dissenting) (“Congressional enactments come to this Court with an extremely heavy presumption of validity.”); *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 93 (1958) (Frankfurter, J., dissenting) (“This is so because of the very weighty presumption of constitutionality that I deem is essential to attribute to any Act of Congress.”).

<sup>45</sup> *United States v. Morrison*, 529 U.S. 598, 607 (2000).

<sup>46</sup> See, e.g., *Smith v. Doe*, 538 U.S. 84, 110 (2003) (Souter, J., concurring) (“What tips the scale for me is the presumption of constitutionality normally accorded a State’s law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur in the Court’s judgment.”); see also Caminker, *supra* note 8, at 115 (“[In the Rehnquist court,] the boilerplate ‘presumption of constitutionality’ has apparently become a meaningless mantra.”).

<sup>47</sup> See, e.g., Caminker, *supra* note 8, at 86 (“[A] succinctly phrased ‘presumption of constitutionality’ is all today’s Congress gets [under modern doctrine].”); Timothy P. O’Neill, *Harlan on My Mind: Chief Justice Roberts and the Affordable Care Act*, 3 CALIF. L. REV. CIRCUIT 170, 177–80 (2012) (identifying the second Justice Harlan as the Court’s last practitioner of full Thayerian deference); Posner, *supra* note 23, at 546 (“[Thayerism’s] judicial demise is attributable to the exuberant activism of the Warren Court . . .”).

Court's invalidation of statutes (analyzing how frequently, and for what reasons) seem to also support this view.<sup>48</sup>

Second, the scope of application of the presumption has narrowed in two different ways. One is that the modern presumption has become limited to questions of evidentiary support and does not extend to questions of interpretation. Under the earlier, stronger presumption doctrine, the Court applied a presumption of constitutionality in favor of the statute on both interpretive and fact questions.<sup>49</sup> Now, however, the application of the presumption seems to be largely limited to giving the statute the benefit of the doubt on questions of constitutional fact-finding, with no interpretive deference.<sup>50</sup>

Relatedly, the Court seems to have reduced the scope of the presumption of constitutionality by limiting the substantive areas of constitutional law where it applies.<sup>51</sup> This retraction and its extent are more debatable or unclear. The Court does still sometimes assert that the presumption of constitutionality applies in "all" cases.<sup>52</sup>

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<sup>48</sup> As noted above, *supra* note 7, the Court invalidated only two federal statutes as unconstitutional between 1789 and 1865. Scholars have suggested that the pace and nature of invalidation accelerated significantly under the Warren Court. See Lee Epstein & William M. Landes, *Was There Ever Such a Thing as Judicial Self-Restraint?*, 100 CALIF. L. REV. 557, 569–77 (2012) (finding that Justices appointed pre-1952 hesitated to strike down laws regardless of ideological agreement, while those appointed post-1952 have been opportunistic in their restraint); Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737 (2012) (arguing, based on an empirical study, that the Roberts Court is not especially activist for the post-1969 era). But see Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 599 (2012) ("[I]t may be that the true inception of judicial activism was at the end of the Civil War, not the opening of the Civil Rights era.")

<sup>49</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (requiring a "strong conviction of . . . incompatibility" between Constitution and law); Hessick, *supra* note 35, at 1457 n.48 (providing other examples).

<sup>50</sup> See *Morrison*, 529 U.S. at 616 n.7 ("It is thus a 'permanent and indispensable feature of our constitutional system' that 'the federal judiciary is supreme in the exposition of the law of the Constitution.'" (internal citations omitted)); Hessick, *supra* note 35, at 1449.

<sup>51</sup> See Caminker, *supra* note 8, at 85 (describing the Court's division of the "constitutional terrain" into areas of strong and weak deference, starting roughly with its decision in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

<sup>52</sup> E.g., *United States v. Watson*, 423 U.S. 411, 442 (1976) (Marshall, J., dissenting) ("[I]t is true as well, as the Court observes, that a presumption of constitutionality attaches to every Act of Congress."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (suggesting that all acts of Congress are entitled to a presumption of constitutionality). Some suggest that the Court does apply the presumption to all cases, in the basic sense of giving the challenger the burden of proof, but "how high" the burden is—i.e., how *strong* the presumption of constitutionality is—is "not consistent" between different types of constitutional challenges, or even from case to case. See Orin KERR, *More on the Presumption of Constitutionality*, VOLOKH CONSPIRACY (June 30, 2011 12:12 p.m.), <http://www.volokh.com/2011/06/30/more-on-the-presumption-of-constitutionality>.

However, these assertions seem to be made frequently in procedural contexts, such as when the Court reverses lower court refusals to stay injunctions of federal statutes on the theory that the presumption of constitutionality tips the balance of harms towards staying the injunction pending appeal.<sup>53</sup>

Moreover, the Court has repeatedly and explicitly stated in the mid-to-late-twentieth century that the presumption is weakened, is lessened, or does not apply in many different contexts—including challenges involving fundamental rights, separation-of-powers issues, rights to political representation, and equal-protection challenges involving the rights of minorities.<sup>54</sup> Indeed, in certain contexts, such as First Amendment challenges to content-based speech restrictions, the Court has made clear that the presumption not only does not apply, but is actually reversed.<sup>55</sup> Thus, the uncontested or unqualified appli-

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Others contend that the Court frequently simply does not apply the presumption at all. See Ilya Somin, *The Presumption of Constitutionality Revisited*, VOLOKH CONSPIRACY (June 30, 2011 1:06 p.m.), <http://www.volokh.com/2011/06/30/the-presumption-of-constitutionality-revisited> (“[T]he Court routinely ignores the presumption in cases where it strikes down federal laws.”).

- 53 See, e.g., *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, Circuit Justice) (staying the district court order declaring the act unconstitutional because “[t]he presumption of constitutionality which attaches to every Act of Congress” tips the scales in favor of a stay); see also *Walters v. Nat’l Assoc. of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice); *Marshall v. Barlow’s, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, Circuit Justice).
- 54 See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 506–507 (1977) (Burger, C.J., dissenting) (summarizing the modern limits on the presumption, suggesting that it does not apply when “the very legitimacy of the composition of representative institutions is at stake,” to “legislation endangering fundamental constitutional rights, such as freedom of speech, or denying persons governmental rights or benefits because of race” or to legislation “directly impinging on the basic tripartite structure of our Government”); see also, e.g., *Carolene Prods. Co.*, 304 U.S. at 152 n.4 (suggesting that “[t]here may be narrower scope for operation of the presumption of constitutionality” when legislation appears to conflict with enumerated rights, restricts political processes, or is rooted in “prejudice against discrete and insular minorities”). Sometimes, the Court suggests instead that the presumption is merely weakened in these contexts. See *Poe v. Ullman*, 367 U.S. 497, 545 (1961) (“Where, as here, we are dealing with what must be considered ‘a basic liberty,’ [t]here are limits to the extent to which the presumption of constitutionality can be pressed . . . .” (internal citation omitted)).
- 55 The Court has, at times, flatly stated—as a truism—that the presumption is reversed in cases involving “fundamental rights.” See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (“It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional.”). There are definitely contexts, such as speech restrictions, where the Court actively applies a presumption of unconstitutionality rather than of constitutionality. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (“[T]he Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality . . . .” (internal citation omitted)); *United States v. Playboy*

cation of the modern presumption is limited to a smaller “core”—such as when the Court considers whether a piece of federal social or economic legislation has exceeded Congress’s enumerated powers under the Constitution or violates equal protection in a challenge subject only to rational-basis review.<sup>56</sup> This Article focuses on cases within this “core” where the modern presumption applies unquestionably and without qualification.

When the presumption does clearly and fully apply, it is not insurmountable.<sup>57</sup> However, the presumption does increase the chances that the statute will be upheld, and at least sometimes, for some Justices, the presumption of constitutionality is itself the determinative factor behind a vote to uphold a statute.<sup>58</sup>

Among scholars, while the countermajoritarian difficulty has received constant, ample attention, the presumption of constitutionality is somewhat less theorized.<sup>59</sup> However, several commentators have written both descriptively and normatively about the presumption—describing what the Court has been doing and arguing about how strong the presumption should be and how to rationalize its application.<sup>60</sup>

As to both descriptive and normative academic efforts, the seminal article is James Bradley Thayer’s 1893 paper, *The Origins and Scope of the Doctrine of American Constitutional Law*.<sup>61</sup> In his article, Thayer collected and synthesized cases on the presumption of constitutionality from the Court’s first century.<sup>62</sup> He also articulated a vision of how the presumption of constitutionality should operate. In Thayer’s

Entm’t Grp., Inc., 529 U.S. 803, 816 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”).

<sup>56</sup> See, e.g., Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 753–54 (1982) (“It is established beyond peradventure that ‘legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . .’” (quoting *Hodel v. Indiana*, 452 U.S. 314, 323 (1981))); *United States v. Morrison*, 529 U.S. 598, 607–15 (2000) (applying a presumption of constitutionality when examining the scope of congressional power under the Commerce Clause in the context of the Violence Against Women Act of 1994).

<sup>57</sup> E.g., *Morrison*, 529 U.S. at 607.

<sup>58</sup> *Smith v. Doe*, 538 U.S. 84, 110 (2003) (Souter, J., concurring) (“What tips the scale for me is the presumption of constitutionality normally accorded a State’s law.”).

<sup>59</sup> See, e.g., 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, 76 (1994) (“Perhaps because on its face the doctrine appears so unassuming, the ‘presumption of constitutionality’ doctrine has not engendered anything like the wrath that has befallen other Supreme Court dogma.”).

<sup>60</sup> See *infra* notes 61–70 and accompanying text.

<sup>61</sup> Thayer, *supra* note 1.

<sup>62</sup> *Id.* at 155 (“I am not stating a new doctrine, but attempting to restate more exactly and truly an admitted one.”).



view, the presumption was (and should be) a very strong one, under which the Court should not invalidate a statute unless its unconstitutionality was “so clear that it is not open to rational question” or “unconstitutional beyond a reasonable doubt.”<sup>63</sup> Under this approach, the presumption would operate as a “thumb on the scale” and might lead a judge to uphold a statute even if he had a fairly strong belief that it might be unconstitutional.<sup>64</sup>

Larry Kramer has argued that Thayer’s theory was itself an evolution of the earlier model of popular constitutionalism, under which the primary duty and authority to interpret the Constitution was reposed in the people themselves.<sup>65</sup> In his view, Thayer’s theory substituted for the earlier vision of the primacy of the people in constitutional interpretation, a related vision of the primacy of the people’s representatives.<sup>66</sup> But, like that older vision, its “main concern . . . was to reassert that primary authority to interpret the Constitution is outside the courts and that judicial authority to declare statutes unconstitutional is, at most, a subordinate, secondary check.”<sup>67</sup>

Today, few scholars, and no Justices, favor an explicitly Thayerian approach.<sup>68</sup> Instead, as the Court’s application of the presumption seems to have gotten weaker, many academic theorists have moved from recognizing and advocating a very robust presumption of constitutionality to advocating a much weaker presumption, or advocating dispensing with the presumption entirely. Randy Barnett, for ex-

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<sup>63</sup> Thayer, *supra* note 1, at 144, 151.

<sup>64</sup> Posner, *supra* note 23, at 537 (“Thayer wanted judges to place a thumb on the scale, so that . . . the statute would have to be upheld unless no reasonable person could doubt its invalidity.”); Thayer, *supra* note 1, at 144 (stating that the Court cannot invalidate a statute “merely because it is concluded that upon a just and true construction the law is unconstitutional”).

<sup>65</sup> See Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 621 (2012) (“Thayer was not making a new argument. He was, rather, reasserting an older, Jeffersonian notion that primary authority to interpret the Constitution lies with the people and not with courts.”); see also PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 86–87 (1992) (“Thayer perceives judicial review as weakening the responsible exercise of popular sovereignty.”).

<sup>66</sup> Kramer, *supra* note 65, at 628.

<sup>67</sup> Kramer, *supra* note 65, at 628 (emphasis omitted).

<sup>68</sup> See Posner, *supra* note 23, at 533 (“There are few academic Thayerians anymore and no apostles of restraint on the current Supreme Court.” (footnote omitted)); see also Posner, *supra* note 23, at 534 (noting that “there are no orthodox Thayerians” currently on the federal bench, but identifying two court of appeals judges who come close). One scholar who has recently seemed to endorse Thayerian deference (or something similar) is Adrian Vermeule, who has argued for very substantial judicial deference to congressional constitutional lawmaking. See ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (2009); see also Posner, *supra* note 23, at 533 n.55 (describing Vermeule, along with Mark Tushnet and Robin West, as three of the “few” extant academic Thayerians).

ample, argues that the presumption of constitutionality is unconstitutional and should be replaced by a contrary “presumption of liberty” under which federal statutes are presumptively invalid.<sup>69</sup> Barnett is not alone in arguing that the presumption of constitutionality is suspect and should be scrapped altogether.<sup>70</sup> The Court, however, has not shown any inclination to take up these suggestions by explicitly abolishing or reversing the presumption of constitutionality, even if it has been accused of effectively doing so in practice.<sup>71</sup> More narrowly, other scholars have argued that the presumption should be revisited or reduced in specific substantive contexts.<sup>72</sup>

Andrew Hessick has argued that the presumption of constitutionality, as currently applied, is misguided because it functions mainly as a doctrine of factual deference towards congressional statutes and does not result in judicial deference to legislative interpretations of the Constitution.<sup>73</sup> In Hessick’s view, the rationales supporting the presumption of constitutionality better justify a presumption of constitutionality that results in the current deference to congressional interpretations of the Constitution than one that results in factual deference to federal statutes.<sup>74</sup>

Descriptively, several notable scholars and judges think that the current Court is reaching new depths (or heights) of non-deference to Congress. Judge Richard Posner has argued that Thayerianism is essentially a dead-letter on the current Court, attributing this to the rise of constitutional theory and the sense of certainty it promotes.<sup>75</sup> In Posner’s view, Thayerian deference failed because it was replaced by the rise of constitutional theory and increased confidence in the

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69 RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 60 (2004).

70 *See, e.g.*, Burke, *supra* note 59, at 76 (“[T]he doctrine is contrary to the principles underlying the theory of constitutional government and poses a formidable obstacle to the safeguarding of individual liberty.”). Thayer, in contrast, argued that the presumption was liberty-promoting because searching judicial review would actually weaken popular commitment to liberty and engagement with the Constitution. Thayer, *supra* note 1, at 155–56 (“Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.”).

71 *See* Karlan, *supra* note 13, at 13.

72 *See, e.g.*, Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 *TEX. L. REV.* 1203, 1206 (2006) (arguing against the application of the presumption to Commerce Clause-based criminal legislation).

73 *See generally* Hessick, *supra* note 35 (classing the presumption of constitutionality together with other restraining doctrines such as constitutional avoidance).

74 *See generally* Hessick, *supra* note 35; *see also infra* Part III.B (agreeing with Hessick’s arguments about extending interpretive deference).

75 Posner, *supra* note 23, at 535–36.

ability of theory to answer questions of constitutional interpretation.<sup>76</sup> Pamela Karlan has argued that the Roberts Court, especially in its most recent term, displays active hostility to Congress and democratic processes in general, amounting to a default suspicion of unconstitutionality.<sup>77</sup> Others have argued, however, that the Court's most recent Term—and, in particular, Chief Justice John Roberts' vote in *National Federation of Independent Business v. Sebelius*—are actually examples of the exercise of an increased, nearly Thayerian level of deference.<sup>78</sup>

This Article's arguments are situated in the context of the modern Court's narrowing and weakening of the presumption and in the literature observing and commenting on that trend. The argument is not concerned with whether the presumption should exist at all or when the presumption should apply, but instead with how it should apply in the core areas, where it clearly and unqualifiedly applies under current doctrine. The basic argument is that when the Court applies a presumption of constitutionality in favor of a federal statute, it should explicitly apply a stronger presumption in favor of the statute when the margin of passage is larger, increasing to a maximum level of extremely robust, Thayerian, beyond-rational-doubt deference.

## II. ARGUMENTS FOR ADJUSTING THE PRESUMPTION OF CONSTITUTIONALITY BASED ON MARGIN OF STATUTORY PASSAGE

Against the background of debates over the countermajoritarian difficulty and the evolutions in the doctrine of the presumption of constitutionality, this Part argues for adjusting the strength of the presumption of constitutionality based on the margin of statutory passage.

### A. *Furthering Democratic Values and Popular Constitutionalism*

The first and most compelling justification for adjusting the presumption of constitutionality to strengthen with the margin of statu-

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<sup>76</sup> Posner, *supra* note 23, at 546 (“If they *knew* a statute was unconstitutional they’d have to strike it down even in Thayer’s account; and the modern theorists have proved (though only to their own satisfaction) that they can tell judges which outcomes in constitutional cases are correct and which incorrect.”). Kramer, in contrast, attributes the decline of Thayerism to the rise of judicial supremacy in the 1960s and the decline of the older, Jeffersonian model of popular constitutionalism that inspired Thayer’s vision of the presumption of constitutionality. See Kramer, *supra* note 65, at 621.

<sup>77</sup> Karlan, *supra* note 13, at 29 (“[T]he Roberts Court has lost faith in the democratic process.”).

<sup>78</sup> See O’Neill, *supra* note 47, at 171 (arguing that Chief Justice Roberts’ decision in the Affordable Care Act case was an example of Thayerian deference).

tory passage is that it furthers democratic values in a way that is responsive to the countermajoritarian difficulty. This argument rests on the basic premise that if it is troublingly undemocratic for a federal court to strike down a duly enacted federal statute, this is more troublingly undemocratic to do so the larger the margin by which the statute passed. That is, the larger the margin of passage, the larger the proportion of the people (as represented in Congress) whose will is thwarted by invalidating the statute. For statutes passed by a narrow margin, in contrast, the antidemocratic concern is less.

Inherent in the democratic principles underlying the Constitution is not just the idea that a bare majority should be respected because it represents the will of the people, but also the idea that larger majorities more strongly represent the will of the people, and are entitled to more sway.<sup>79</sup> Since the essence of the countermajoritarian concern is that it is problematically undemocratic for unelected judges to overturn a law supported by a majority of the public, the problem becomes greater for laws passed by a larger percentage of representatives because more of the public is being thwarted.<sup>80</sup> Thus, as the margin of passage gets larger, the argument gets stronger for deferring to the people's view that legislation is necessary (and constitutional).<sup>81</sup>

Since the antidemocratic concern becomes greater for statutes passed by larger margins, the Court should adjust its presumption of constitutionality to apply it more strongly as the margin gets larger. Conversely, when a statute passes by a narrow margin, there is reduced concern about thwarting the legislative expression of the popular will because the popular will is more equivocal. The presumption of constitutionality should be weaker.

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<sup>79</sup> This theoretical and philosophical principle is reflected in the Constitution's provisions providing special powers to congressional supermajorities. See *infra* Part II.B; Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363, 369 (1998) (“[T]he Constitution’s supermajority requirements should more accurately be viewed as mechanisms which reinforce notions of popular sovereignty . . .”).

<sup>80</sup> This is more obviously and directly true with respect to the House, since the Senate is itself a countermajoritarian institution because its federal structure leads to disproportionate representation. See, e.g., LEVINSON, *supra* note 16, at 49–62. But even in the Senate, a smaller majority is less likely to represent the popular will. Indeed, a narrow Senate majority often represents less than even a bare majority of the population. See Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 1007 (2013) (noting that in thirty-four percent of the filibusters between 1991 and 2010, the majority supporting cloture actually represented less than half of the national population).

<sup>81</sup> See, e.g., Kramer, *supra* note 65, at 634 (criticizing judicial supremacy and arguing for reviving popular constitutionalism).

This is consistent with one of the Court's own primary rationales for applying the presumption of constitutionality—respect for democratic lawmaking.<sup>82</sup> Since the presumption of constitutionality is rooted (at least in part) in deference to legislative expressions of majority will, the deference should be greater when the majority is larger.

Even for those who defend the legitimacy of judicial review on the basis of imperfections in our representative system,<sup>83</sup> this argument should still have some force. Although there are problems in our federal system's mechanism for translating popular will into legislative action, these issues become less salient the larger the legislative majority—a statute that passes overwhelmingly is more likely to reflect the popular/democratic will.<sup>84</sup> And, for statutes passed by narrower margins, these concerns are more trenchant—there is a greater chance that a statute narrowly passed will fail to reflect the popular will, either because of structural defects in our system of representation<sup>85</sup> or sometimes because of shenanigans<sup>86</sup> undertaken to narrowly effect the passage of a particular bill.<sup>87</sup> Thus, strengthening the presumption of constitutionality based on the margin of passage actually

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82 See *supra* notes 37–38; Hessick, *supra* note 35, at 1462–67 (describing and summarizing cases advancing this rationale for the presumption).

83 See *supra* notes 15–17.

84 Cf. Waldron, *supra* note 9, at 1391 (“The system of legislative elections is not perfect either, but it is evidently superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary.”).

85 See, e.g., Terri Peretti, *An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY* 127 (Kenneth D. Ward & Cecilia R. Castillo eds., 2006) (arguing that legislation reflects majority public opinion only “roughly 55 to 65 percent of the time”).

86 Such as logrolling, arm-twisting, or enticement through earmarks. See, e.g., Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1339–48 (2000) (examining desirability of legislative logrolling from perspectives of “equality, efficiency, and inalienability”); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 523–24 (2009) (arguing for a rule of statutory construction that would reject statutory interpretations proposed by “special interests” when those interpretations would confer benefits not disclosed by Congress’s own earmark-disclosure rules).

87 For example, if one is concerned about special interests’ power to persuade members of Congress to vote contrary to their constituents’ preference (and thinks that the courts should correct such deformations), this concern would diminish for statutes passed by larger margins because it is harder for special-interest lobbies to subvert legislative supermajorities (or near-supermajorities) than bare majorities. See John O. McGinnis & Michael Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 458–59 (1999) (arguing that when special interests generally favor additional spending, a supermajority rule may more closely reflect majority sentiment on spending than majority rule).

accommodates arguments that judicial review is justified based on flaws in our democratic processes.

A larger margin of passage not only reflects a larger democratic majority inherently entitled to more deference, but also reflects a stronger assertion by Congress (and by representation, the people themselves) that the statute is constitutional. Another of the Court's primary justifications for applying a presumption of constitutionality (besides respect for democratic majorities) is that the premise that Congress considers the Constitution when it legislates and that the Court should give some deference to Congress's belief that the statute it has passed is constitutional.<sup>88</sup> Beyond the Court's assertion, there is also some evidence to support this premise that Congress does consider the constitutionality of the statutes it passes, although the point is contested.<sup>89</sup> Indeed, as of the 112<sup>th</sup> Congress, the House

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<sup>88</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) (“The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one . . . .”); *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 . . . . Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.”); Hessick, *supra* note 35, at 1462–68 (discussing this “due respect” rationale); Hanah Metchis Volokh, *Constitutional Authority Statements in Congress*, 65 FLA. L. REV. 173, 182 (2013) (noting that under current doctrine, “[t]he act of passing the statute, alone, is seen as a congressional statement that the statute is constitutional in Congress’s opinion”).

<sup>89</sup> See, e.g., Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 62–65 (1986) (examining Congress’s duty to consider constitutionality when legislating); Lee Epstein, *Who Shall Interpret the Constitution?*, 84 TEX. L. REV. 1307, 1310 (2006) (reviewing NEAL DEVINS & KEITH E. WHITTINGTON, EDs., CONGRESS AND THE CONSTITUTION (2005)) (arguing that, based on some of the work collected in the reviewed book, “Congress may not be as wanting as some skeptics seem to think” when it comes to seriously engaging in constitutional interpretation); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) (analyzing Congress’s duty to interpret the Constitution and its performance of that duty using three specific examples); Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127, 150 (2004) (concluding, based on two surveys of Congress members taken in 1956 and 1999–2000, that at both times, “a plurality of . . . respondents favor independent congressional analysis of constitutional questions while also asserting that Congress examines constitutional questions in a bona fide way”); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 657–58 (2000) (describing scholarship on non-judicial branches’ power and duty to interpret the Constitution); Volokh, *supra* note 88, at 186–212 (discussing the role of constitutional authority statements in the work of congressional constitutional interpretation); Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367 (2011) (arguing that members of Congress did consider constitutionality when passing the ACA). For arguments that Congress does not seriously consider constitutionality, see, for example, Neal Devins, *Why Congress Did Not Think About the Constitution When Enacting the Affordable Care Act*, 106 NW. U. L. REV. 261 (2012) (arguing that Con-

formally requires a “constitutional authority statement” for each bill, explaining which constitutional power supports it.<sup>90</sup>

If Congress does consider the Constitution when it legislates (as the Court presumes and some evidence suggests), a larger margin of passage indicates that Congress has more confidently asserted a belief that the law is constitutional. Since the judicial presumption of constitutionality is based in part on the assumption that Congress will perform its duty and exercise its ability to consider constitutionality before enactment, federal courts should apply a stronger presumption of constitutionality when Congress has more unequivocally endorsed the statute’s constitutionality.<sup>91</sup>

Exercising a stronger presumption in favor of larger legislative majorities is also consistent with the Constitution’s structures and principles.<sup>92</sup> The Constitution expressly empowers supermajorities in several ways. Two of the most notable are that a two-thirds vote of Congress allows proposing a constitutional amendment and overriding a presidential veto.<sup>93</sup> The Constitution thus empowers supermajorities of the people’s representatives to initiate a change of the Constitution itself, and to override the prerogatives of other branches. The underlying principle is that larger majorities of the people (through their representatives) should have more power to make policy and change the meaning of the Constitution.<sup>94</sup> By analogy, the size of the voting majority that approves a given statute can and should inform the Court’s assessment of whether a statute has been sufficiently proven to be unconstitutional, whether a statute contradicts the meaning of a particular constitutional provision, and wheth-

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gress did not seriously consider and debate the constitutionality of the Affordable Care Act before passing it); Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737 (2011) (arguing that party polarization is responsible for the decline in congressional consideration of the constitutionality of statutes and in the necessary constitutional fact-finding to support statutes).

<sup>90</sup> H.R. Res. 5, 112th Cong. (2011) (adopting rules for the 112th Congress, including the Constitutional Authority Statement requirement); Volokh, *supra* note 88, at 186–212.

<sup>91</sup> For the objection that it is naïve to presume that members of Congress in fact do consider constitutionality when they vote, see *infra* Part IV.D.

<sup>92</sup> Cf. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839 (1991) (“[W]e must ground all methodological commitments in the Constitution before we can recognize them as legitimate.”).

<sup>93</sup> Others include impeachment convictions (two-thirds Senate majority), treaty ratification (two-thirds Senate majority), U.S. CONST. art. II, § 2, cl. 2, and restoring to Civil War rebels the ability to hold United States public office (two-thirds of each house), U.S. CONST. amend. XIV § 3.

<sup>94</sup> See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 705 (2002) (“[T]he central principle underlying the Constitution is governance through supermajority rules.”).

er the Court should reconsider, overrule, or limit its own constitutional-interpretation precedents in order to uphold the statute.

The argument is not that larger legislative majorities actually can amend the Constitution without following the formal amendment process,<sup>95</sup> but merely that when the Court considers difficult questions about whether a federal statute is unconstitutional, it can and should consult the margin of statutory passage in deciding that question, in addition to its own doctrines and theories of constitutional interpretation. And the Constitution's own formal mechanisms for privileging supermajorities implicitly support this approach.

*B. Qualitative Superiority of Supermajority Enactments—Better Laws and Better Assessments of Constitutionality*

Deferring more to larger majorities through a stronger presumption of constitutionality is not only warranted by democratic principles, it is also warranted because a statute passed by a larger majority is actually more likely to be a superior law, and also to be constitutional. That is, while the first argument in favor of an adjustable presumption is simply that larger majorities have a stronger claim to deference because they are larger, this argument focuses on the point that larger majorities are more likely to be right—either about the quality of the legislation itself or about its constitutionality.

A substantial body of scholarship has argued that supermajority decisions are better than bare majority decisions. Among the leading scholars making this argument are John McGinnis and Michael Rappaport, who have argued in a series of articles that supermajority rules, like the ones that governed the ratification and amendment of the Constitution, tend to produce superior results in terms of the quality of legislation, as well as answer difficult questions about constitutional rights and structure.<sup>96</sup> Since supermajority rules produce

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<sup>95</sup> The theory is thus more limited than arguments like those of Bruce Ackerman, who has argued that in important “constitutional moments” the people can act to fundamentally change the structure and meaning of the constitution. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1052 (1984) (arguing that the New Deal “moment” resulted in the “legitimation of the activist welfare state”).

<sup>96</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 98 *GEO. L.J.* 1693, 1702 (2010) (arguing that supermajority rule is “the voting rule most conducive to generating a good constitution”); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 *NW. U. L. REV.* 383, 385 (2007) (arguing for originalism on the theory that the supermajority rules under which the clauses were originally enacted were likely to have resulted in the most desirable provisions.); McGinnis & Rappaport, *supra* note 94, at 805 (“The Constitution binds us because the double super-



better results, the Court should be more careful before overturning laws passed by larger votes—the Court should presume more strongly that these laws are constitutional because they are more likely to be of higher quality, and to be correct in how they address or resolve difficult questions about the limits of constitutional rights and structure.

Further, other leading scholars, such as Cass Sunstein and Adrian Vermeule, have argued that the Court should defer to majority legislation because, as the product of “many minds,” legislatures have certain epistemic advantages over courts.<sup>97</sup> While these arguments are not unqualified,<sup>98</sup> and also not specifically focused on the size of the enacting majority, they can support this Article’s argument. As the majority grows larger, it becomes more likely that the legislature’s judgment is epistemically sound and less likely that it is the product of “information pathologies” such as informational cascades or polarization in deliberative processes.<sup>99</sup> Therefore, the argument for judicial deference is stronger.

These same arguments about the advantages of supermajority decisions can also be applied to the specific question of Congress’s own assessment of a statute’s constitutionality under prevailing doctrine. That is, because supermajority decisions are superior to bare-majority decisions, not only is it more likely that the legislation is better, it is also more likely that Congress is right about whether the statute is constitutional. This secondary argument does presume that Congress actually considers the constitutionality of statutes before passing them.<sup>100</sup> But, as noted above, the presumption-of-constitutionality doctrine is based, at least partially, on Court’s assumption that Congress does consider the Constitution when it legislates.<sup>101</sup> And, there is evidence that Congress does see itself as having an independent duty to consider the Constitution when it legislates.<sup>102</sup> Since the doc

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majoritarian requirements of formation and amendment ensures that its provisions generally have higher quality than ordinary legislation.”); McGinnis & Rappaport, *supra* note 87, at 401 (arguing that supermajority rules are better than bare majority rules for making spending decisions).

97 CASS SUNSTEIN, *A CONSTITUTION OF MANY MINDS* (2009); Vermeule, *supra* note 68, at 82 (“[C]urrent legislatures are the decisionmakers in the best position, insofar as epistemic considerations are concerned, to oversee common-law constitutionalism.”).

98 See SUNSTEIN, *supra* note 97, at 212.

99 See, e.g., Cass R. Sunstein, *The Law of Group Polarization*, in *DEBATING DELIBERATIVE DEMOCRACY* 80 (James S. Fishkin & Peter Laslett eds., 2003); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71 (2000).

100 Note, however, that the main argument does not.

101 See *supra* note 88.

102 See *supra* note 89.

trine is based on the assumption that Congress considers the Constitution when it legislates, it should also acknowledge that Congress's assessment is more likely to be correct for statutes that pass by larger margins.

### C. Improved Judicial Legitimacy

Applying an adjustable presumption tied to margin of passage would also improve judicial legitimacy. The Court has expressed concerns about exercising its power of judicial review in ways that preserve or promote the Court's legitimacy.<sup>103</sup> Further, popular approval of the Court—perhaps a proxy for public perception of the Court's legitimacy—is currently at an all-time low.<sup>104</sup> So, it is important to consider whether adjusting the presumption of constitutionality might improve the Court's legitimacy in the public's eyes, in particular because the Court itself would be more likely to do so if the Justices believed that it would be legitimacy-enhancing rather than legitimacy-destroying.<sup>105</sup>

Applying an adjustable presumption of constitutionality would improve and preserve judicial legitimacy in two ways. The first is that the Court's legitimacy would improve because it would be less likely to strike down very popular statutes. Since judicial review is somewhat controversial and can be perceived as antidemocratic, courts striking down duly-enacted statutes can be, and often are, perceived as acting illegitimately. And, just as the countermajoritarian problem increases with the margin of passage,<sup>106</sup> so too does the perception of

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<sup>103</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867–68 (1992) (explaining the importance of adhering to prior decisions exercising the power for preserving the Court's legitimacy); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (“It is not our job to protect the people from the consequences of their political choices.”).

<sup>104</sup> Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 8, 2012, at A1 (“Those findings are a fresh indication that the court's standing with the public has slipped significantly in the past quarter-century . . .”); Sam Baker, *High Court's Approval Rating Hits New Low Ahead of Health Ruling*, THE HILL, (May 1, 2012, 1:08 PM), <http://thehill.com/blogs/healthwatch/legal-challenges/224799-approval-of-supreme-court-hits-new-low-as-politically-charged-cases-loom> (“Public opinion of the Supreme Court is at an all-time low . . .”); Meghashyam Mali, *Poll: Supreme Court's approval rating drops below 50 percent for first time*, THE HILL, (June 25, 2013, 8:51 AM), <http://thehill.com/blogs/blog-briefing-room/news/313407-poll-supreme-courts-approval-drops-below-50-percent> (“The Supreme Court's favorability rating has dropped below 50 percent for the first time . . .”).

<sup>105</sup> For a response to the objection that adjusting the presumption of constitutionality based on margin of passage would actually undermine judicial legitimacy by making it seem that the Court caves to political pressure, see discussion *infra* Part IV.C.

<sup>106</sup> See *supra* Part I.A.

illegitimacy. That is, a court striking down legislation endorsed by an overwhelming majority of the people's representatives is more likely to be unpopular and viewed as acting illegitimately.<sup>107</sup> Conversely, when the statute passed narrowly, the portion of the populace that will consider the Court illegitimate in striking it down is likely to be smaller.<sup>108</sup> Adjusting the presumption of constitutionality based on the margin of passage would address this problem because it will make the Court less likely to strike down statutes passed by overwhelming margins, and so produce fewer critical hits to the Court's legitimacy.

To this, a critic might respond that deferring more to more popular laws is exactly what the Court already does, precisely because of concerns about judicial overreach and loss of legitimacy.<sup>109</sup> However, if so, it is better that the Court admit as much, which is the second way that incorporating the margin of passage into the presumption of constitutionality would improve judicial legitimacy—by alleviating perceptions of illegitimacy arising when the Court's articulated reasons do not contain the perceived *real* reason for its decision.

On several occasions in the Court's history, it has been perceived that the Court has declined to strike down statutes precisely because they were very popular or part of a legislative program that commanded substantial majority support.<sup>110</sup> It has also been proposed that the Court hesitated in these instances specifically because of

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107 This does presume that actual popular will correlates with margin of statutory passage, but even critics of the representativeness of Congress do seem to conclude that there is some connection between the two. See, e.g., Peretti, *supra* note 85, at 127.

108 This is based on the assumption that on average, someone who supported a statute or policy is more likely to see invalidation as not only wrong, but illegitimate, while someone who opposed it is less likely to fret about the legitimacy of the Court's decision to invalidate a statute they disagree with on policy grounds.

109 See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. LAW 279, 286 (1957) (arguing that over time, "lawmaking majorities generally have had their way"); see also *supra* note 15 (collecting other examples of this argument).

110 Perhaps the most famous example is the "switch in time that saved nine" of *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). A more recent example is *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009). See, e.g., Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 218 (speculating that the Court's avoidance ruling in *NAMUDNO* may have been motivated by "fears that full-blown constitutional pronouncement would harm its legitimacy"). See generally John Ferejohn & Pasquale Pasquino, *The Countermajoritarian Opportunity*, 13 U. PA. J. CONST. L. 353, 354 (2010) (noting the phenomenon of cases "in which the United States Supreme Court has appeared to back down in the face of political pressures or threats"). If *NAMUDNO* was indeed motivated by fears about overturning a popular statute, however, the Court overcame those fears in fairly short order when it took the further step of striking down Section 4(b) of the Voting Rights Act in the most recent Term. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

concerns about being perceived as illegitimate—invalidating policies preferred by large majorities. Since the Court has limited political capital as the “least dangerous branch,”<sup>111</sup> it must, for institutional reasons, be careful about striking down widely popular legislative (or executive) acts.<sup>112</sup> Moreover, there has been a substantial literature, especially in political science, devoted to arguing that there is no countermajoritarian problem at all because the Court absorbs and accommodates itself to majoritarian political preferences.<sup>113</sup>

Yet, decisions perceived as rooted in judicial consciousness of popularity (as reflected in vote margin) generally have not expressly acknowledged the popularity of the statutes as part of the reasoning supporting the decision. This may create a different sort of perception of illegitimacy: that the Court is acting illegitimately in the sense of being disingenuous, or motivated by institutional selfishness and self-preservation.<sup>114</sup> If the Court were to apply an adjustable presumption of constitutionality tied to margin of statutory passage, these perceptions could be alleviated. A Court which decided to uphold a statute against constitutional challenge (in part) because it was very popular could say so and rely on that fact as a legal reason for its decision.<sup>115</sup> If considering the amount of popular support for an enactment—and not just the fact of statutory passage—became a legitimate *legal* reason, then the gap between realist and formalist explanations for the Court’s actions and motivations could be helpfully lessened.<sup>116</sup>

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111 THE FEDERALIST NO. 78 (Alexander Hamilton).

112 See, e.g., Hasen, *supra* note 110, at 218; Michael Ariens, *A Thrice-Told Tale, Or Felix the Cat*, 107 HARV. L. REV. 620, 631 (1994) (describing the prevailing assessment of the *West Coast Hotel* “switch in time” as motivated by the Court’s political fears).

113 See *supra* notes 14, 109.

114 See Liptak & Kopicki, *supra* note 104 (“Just one in eight Americans said the justices decided cases based only on legal analysis.”). Similar criticisms were leveled heavily at Chief Justice Roberts by critics disappointed with his vote in the *Sebelius* case. See, e.g., Gregory P. Magarian, *The Lawlessness of Sebelius* 26–27 (Aug. 9, 2012) (unpublished paper), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=gregory\\_magarian](http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=gregory_magarian) (speculating that Roberts’ *Sebelius* vote, if motivated by a desire to preserve the Court’s institutional authority, failed in doing so).

115 In addition, a Court that *invalidated* a statute passed by large margins would do so only after explicitly applying a very strong presumption in its favor based on its popularity, which in turn might reduce the perception that the Court was thwarting a large majority for merely political reasons.

116 The counterargument—that it would be harmful for the Court to be seen to be openly bowing to “political pressure” in arriving at its decisions—is addressed in Part IV.C.

*D. Decreased Reliance on Subjective Extraconstitutional Theorizing, Policy Preferences, and Opportunistic Rhetoric of Restraint*

A further advantage of applying an adjustable presumption based on margin of statutory passage is its relative objectivity, which could produce a more direct fidelity to democratic principles and popular constitutionalism than some other theories seeking to palliate the countermajoritarian problem. In attempting to address the problems created by the countermajoritarian difficulty, many theorists have devised various frameworks or concepts designed to explain or lay a path for alternate forms of constitutional change driven by the legislatively-expressed popular will. Examples include Bruce Ackerman's theory of "constitutional moments"<sup>117</sup> or Eskridge and Ferejohn's theory of "super statutes," under which certain statutes can be assessed to be particularly important and thus particularly deserving of judicial deference based on factors besides the statutory text itself.<sup>118</sup>

The disadvantage of these sorts of theories, though, is that they require necessarily subjective and extraconstitutional assessments of factors outside the statute itself. Constitutional moments theory requires assessing history and politics to judge whether a given period or legislative program is a constitutional moment or just "normal politics."<sup>119</sup> And the "super-statute" theory requires subjective determinations about whether the statute embraces a lofty goal and whether it has been subsequently embraced by the public.<sup>120</sup> These sorts of assessments invite the theorist (or the jurist) to pick statutes based on policy preferences and then acclaim them as sufficiently "momen-

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117 I ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, *supra* note 95 (distinguishing between periods of normal politics, and moments of constitutional politics—such as the Framing, Reconstruction, and the New Deal—when the People mobilize to resolve issues of great constitutional and political import).

118 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215 (2001) (arguing that a statute is "super" when it (1) "seek[s] to establish a new normative or institutional framework for state policy," (2) "over time 'stick[s] in the public culture, and (3) has "a broad effect on the law"). These theories may not be aimed solely at the counter-majoritarian difficulty, but both are arguments that certain sorts of statutes or legislative programs should receive more judicial deference because they are more authentically representative of popular will. They are not the only theories in this vein—examples are legion—but they are particularly well-thought out, and influential, and so make good foils for the argument.

119 See Ackerman, *The Storrs Lectures: Discovering the Constitution*, *supra* note 95, at 1055–56 ("[C]onstitutional moments . . . allow[] Americans to place a constitutional meaning upon a sustained series of electoral victories and legislative successes that is very different from the meaning ordinarily attached to any single episode of normal politics.").

120 Eskridge & Ferejohn, *supra* note 118, at 1217.

tous” or “super” based on a motivated reading of the relevant history and currents of popular opinion.

Looking to the margin of passage, in contrast, removes filters of subjective assessments about the historical popularity, importance, or policy wisdom of an enactment and gives the Court an objective indication based purely on the actual degree of representative democratic endorsement. It allows the Constitution to be treated as somewhat flexible, or “living,” but lets the organic evolution be driven by objective evidence of legislatively expressed popular will rather than the preferences of judges or theorists.<sup>121</sup>

Similarly, the Court itself has proceeded through phases in terms of which constitutional rights or provisions it enforces more rigorously. The Court went from rigorous enforcement of the Commerce Clause in the *Hammer v. Dagenhart*<sup>122</sup> era to almost total nonenforcement of that restriction for decades,<sup>123</sup> with a resurgence under the Rehnquist Court in cases like *United States v. Lopez*<sup>124</sup> and *United States v. Morrison*,<sup>125</sup> followed by a retreat under the Roberts Court in cases like *Gonzales v. Raich*<sup>126</sup> and a limited revival in *National Federation of Independent Business v. Sebelius*.<sup>127</sup> Federalism limitations were almost entirely unenforced through judicial invalidation of federal statutes before the Rehnquist Court began vigorously policing federalism limits,<sup>128</sup> only to cease expanding, and arguably retreat, under the late Rehnquist<sup>129</sup> and early Roberts Court<sup>130</sup>.

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121 *Contra, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 44–45 (1997) (“[T]he most glaring defect of Living Constitutionalism . . . is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution.”); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 639, 695 (1976) (condemning the version of living constitutionalism that prescribes that “nonelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so”).

122 247 U.S. 251 (1918).

123 *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942).

124 514 U.S. 549 (1995).

125 529 U.S. 598 (2000).

126 545 U.S. 1, 9 (2005) (holding that Congress had power, under the Commerce Clause, to outlaw home-grown marijuana).

127 132 S. Ct. 2566, 2587 (2012) (stating that the Affordable Care Act was beyond Congress’s Commerce Clause powers).

128 *See, e.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (invalidating provisions of the Americans with Disabilities Act as exceeding Congress’s power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (invalidating provisions of Age Discrimination in Employment Act as exceeding Congress’s power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress may not abrogate a state’s sovereign immunity from suit in its own courts);

Through these sorts of evolutions, the Court's decisions about which rights to privilege and which restrictions to enforce robustly have been driven by the Justices themselves. It could be argued that these changes are democratic, because the Justices are nominated and confirmed by representative actors, because they are drawn from the people themselves and so share popular opinions about constitutional evolution, or because they are aware of and respond to popular opinion.<sup>131</sup> However, this sort of second-order representativeness is suspect, especially in the modern era, as Justices serve long past the departure of the representative officials who nominated and confirmed them and are ever more narrowly drawn from the ranks of former federal appellate judges with elite pedigrees.<sup>132</sup> Further, there have been many instances in the Court's history when shifts in the hierarchy or importance of various constitutional rights and prohibitions seem to have originated from the Court itself, not from democratic pressures.<sup>133</sup>

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Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 628 (1999) (holding that patent legislation could not be upheld as valid congressional abrogation of state sovereign immunity pursuant to Congress's powers under Section 5 of the Fourteenth Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate state sovereign immunity through exercise of its Commerce Clause powers); Printz v. United States, 521 U.S. 898 (1997) (striking down as unconstitutional provisions of the Brady Handgun Violence Prevention Act that "commandeered" state law enforcement officers); New York v. United States, 505 U.S. 144 (1992) (holding that the "take title" provision of the radioactive-waste statute violated the Tenth Amendment).

129 See, e.g., Tennessee v. Lane, 541 U.S. 509 (2004) (upholding provisions of the Americans with Disabilities Act as validly abrogating state sovereign immunity through Congress's powers under Section 5 of the Fourteenth Amendment); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding provisions of the Family and Medical Leave Act of 1993 as valid abrogations of state sovereign immunity through Congress's powers under Section 5 of the Fourteenth Amendment).

130 See Christopher Banks & John Blakeman, *Chief Justice Roberts, Justice Alito, and New Federalism Jurisprudence*, 38 PUBLIUS: J. OF FEDERALISM 576, 576 (2008) (concluding, based on a review of the Roberts Court's federalism decisions, that it is uncertain whether the Court will as vigorously police federalism restrictions as the Rehnquist Court).

131 See *supra* notes 14, 119.

132 See Karlan, *supra* note 13, at 5 (arguing that the fact that none of the Court's current members have any experience as elected officials may be responsible for their disdain for legislative enactments); Pildes, *supra* note 14, at 117.

133 Examples of this, in my opinion, would include the Court's vigorous enforcement of economic restrictions during the *Lochner* era (prior to the *West Coast Hotel* climbdown), see, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); the Warren Court's criminal-procedure revolution, see, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); the Rehnquist Court's federalist revival, see, e.g., *New York v. United States*, 505 U.S. 144 (1992); and the Roberts Court's revival of the Second Amendment as an enforceable limit on government firearm restrictions, see, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Even for those who believe that judicial review is an essential check on the majority's power to infringe others' constitutional rights, it seems far less desirable that choices about which rights to privilege should also be made in a countermajoritarian, unrepresentative fashion. Applying an adjustable presumption of constitutionality based on the margin of passage would let the people's representatives speak about which constitutional restrictions should be considered more or less important at a given time. It gives more latitude to statutes passed by a larger margin when reviewed for compliance with the constitutional text as construed by the evolving doctrines of the Supreme Court. Or, at a minimum, incorporating a presumption of constitutionality based on the margin of passage might inject some democratic responsiveness into these undemocratic evolutions.

Further, adopting an adjustable presumption of constitutionality tied to the objective indicia of the margin of passage might also check the trend for the Justices to use judicial restraint mainly as a rhetorical tool, while actually voting to invalidate statutes essentially on ideological lines.<sup>134</sup> A statute passed by a larger margin would command more deference and one by a narrower margin less—so there would be some objective standard on which to peg the Court's changing statements and applications of the principle that the Court should give federal statutes a presumption of constitutionality somewhere between beyond a rational doubt and the benefit of the doubt.

#### *E. Practical Virtues of Easier Adoption*

Finally, the proposal for an adjustable presumption has the practical virtue that it could be implemented solely by the Court itself. Proposals for ameliorating the countermajoritarian difficulty by statute or constitutional amendment rarely seem to generate great support, with a few limited exceptions, and none has actually been enacted into law.<sup>135</sup> It thus seems that, even if very innovative, these

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<sup>134</sup> See Epstein & Martin, *supra* note 48, at 737 (arguing that the empirical evidence indicates that since 1969, Justices generally vote to uphold or invalidate statutes based on ideological preferences); Kramer, *supra* note 65, at 634 (arguing that it is harmful that judicial deference has become essentially "a rhetorical tool used opportunistically by pretty much all of the Justices").

<sup>135</sup> For a summary of the history of such efforts, including a description of several "waves" of enthusiasm for somehow restricting judicial review, see Caminker, *supra* note 8, at 115. On the obstacles raised by Article V to any such change actually happening, see, for example, LEVINSON, *supra* note 16, at 159–166; Sanford Levinson, Op-Ed., *Our Imbecilic Constitution*, N.Y. TIMES, May 29, 2012, at A23 ("But if one must choose the worst single part



sorts of external proposals have a small chance of ever being enacted.<sup>136</sup> It is much more likely that the Court itself would or could evolve its jurisprudence of constitutional adjudication to incorporate a concept of an adjustable presumption of constitutionality,<sup>137</sup> just as it has already evolved or adjusted the presumption for other reasons.<sup>138</sup> Further, since many of the Court's most controversial decisions invalidating federal statutes are 5-4 decisions, it would only require one Justice to adopt the approach for it to potentially make a significant difference in outcomes. Thus, the argument described above has the additional virtue of easier practical implementation.

In summary, courts can and should adjust the presumption of constitutionality so that it is stronger for statutes passed by larger margins. Doing so would promote democratic values and popular constitutionalism in a less subjective way than jurist- or theorist-driven constitutional evolution, cohere with the Constitution's supermajoritarian principles and provisions, and improve the judicial legitimacy of the Supreme Court. The next Part considers how such an adjustable presumption might work and when it might apply

### III. APPLYING AN ADJUSTABLE PRESUMPTION OF CONSTITUTIONALITY

If it makes sense to exercise a stronger presumption of constitutionality in favor of statutes passed by larger margins in Congress, it becomes necessary to consider how and when the principle might be applied. The "how" discussion focuses on describing maximums and minimums for an adjustable presumption of constitutionality, both in terms of the strength of the presumption and in terms of the size of the margin required to trigger them. The "when" discussion explains that the adjustable presumption would apply only in the core of cases where the Court currently uncontestedly applies the presumption and offers some thoughts about the types of cases in which applying an adjustable presumption might make a difference.

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of the Constitution, it is surely Article V, which has made our Constitution among the most difficult to amend of any in the world.").

136 See, e.g., Vermeule, *supra* note 68 (arguing for changing the American system of lawmaking so that Congress can pass "liquidating statutes" codifying certain interpretations of the Constitution).

137 For a response to the objection that while it might be easier for such a proposal to be implemented by the Court itself, it also makes it more improbable because the Court would never rein in its judicial supremacy, see *infra* Part IV.F.

138 See *supra* Part I.B.

A. *How an Adjustable Presumption Could Work*

To see how the Supreme Court might apply an adjustable presumption of constitutionality to federal statutes, it is helpful to start by defining limits. There are two questions to answer here: (1) what are the strongest and weakest presumptions of constitutionality that should be applied, and (2) what are the maximum and minimum margins of passage to associate with those limits.

At its weakest, the presumption should be no weaker than the presumption as applied by the modern Court. While the doctrinal content of the presumption in its current form is not clear,<sup>139</sup> it seems that the current Court at least sometimes applies the presumption of constitutionality as a mere tiebreaker, akin to a preponderance burden of proof, so that when the evidence is in equipoise, the statute receives the benefit of the doubt.<sup>140</sup> It also seems clear that the Court currently does not consider that the presumption calls for any particular deference to Congress's *interpretation* of the Constitution (in contrast to evidentiary issues relating to whether a statute is constitutional). This, then, would be the lower limit of the adjustable presumption—both since it is the weakest form of the presumption described in the Court's cases and since it seems to be the weakest form of deference that still can qualify as a presumption.<sup>141</sup>

On the other end, there is the maximum—the presumption at its strongest. Probably the strongest articulation of the presumption is Thayer's view (drawn from the Court's earlier cases) that the Court should not overturn a statute unless it can be shown to be unconstitutional beyond a reasonable doubt.<sup>142</sup> This is what shall be the maximum strength of the adjustable presumption of constitutionality. Here, again, this seems to be the strongest formulation of the presumption that has been offered while still qualifying as a presumption rather than an absolute command to uphold the statute.<sup>143</sup> Moreover,

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<sup>139</sup> See *supra* Part I.B.

<sup>140</sup> See, e.g., *Smith v. Doe*, 538 U.S. 84, 110 (2003) (Souter, J. concurring) ("What tips the scale for me is the presumption of constitutionality normally accorded a State's law.").

<sup>141</sup> It might be possible to imagine weaker formulations, but the mere-tiebreaker formulation has the twin virtues of being already present in the Court's cases and of being fairly easy to understand and apply.

<sup>142</sup> Thayer, *supra* note 1, at 140.

<sup>143</sup> It might be possible to imagine even stronger descriptions of the presumption that would still qualify as merely a presumption, but the Thayerian presumption has the virtue of familiarity—it has been around as an academic and theoretical concept for over 100 years, it has even older roots in the Court's own cases, and it has been engaged with by later scholars and theorists as a maximum of possible deference to Congress. See, e.g., Caminker, *supra* note 8, at 115; Posner, *supra* note 23, at 521–23.

Thayer's formulation itself was drawn from cases from the Court's first century,<sup>144</sup> so it has the additional virtue of being supported by precedent, which could be important for convincing the Court that it would be legitimate to adopt it. Extreme Thayerian deference has fallen out of favor,<sup>145</sup> but it could and should be revived, at least as a limit to which judicial deference should approach as the margin of statutory passage approaches the maximum—a Thayerian limit for the presumption of constitutionality.

At this maximum strength, the presumption would operate as a “thumb on the scale” that could prompt the Court to uphold a statute even if it has significant doubts about its constitutionality.<sup>146</sup> This would extend to requiring a very high level of evidentiary proof to demonstrate that a particular statute fails to pass the tests for constitutionality prescribed by the Court's doctrines and a very low bar for evaluating the sufficiency of supportive congressional fact-findings in areas where the Court's doctrines have evolved to require them. Further, at this maximal level, the presumption would extend not only to factual deference, but also to questions of interpretation.<sup>147</sup> That is, for a statute passed by a sufficiently large majority, the Court would also defer to Congress's interpretation of the Constitution (as reflected in the statute) and potentially reconsider or disregard the Court's own interpretations of constitutional texts arising out of the Court's own doctrines or theories.<sup>148</sup>

So, the presumption would adjust in strength from a minimum of mere-tiebreaker factual deference, with no interpretive deference, to a maximum presumption requiring proof of invalidity beyond a reasonable doubt, including a strong degree of interpretive deference to Congress.

Tying these limits to points on the spectrum of margin of statutory passage, the minimum would be a statute passed by a razor-thin, one-

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144 See, e.g., *Sinking-Fund Cases*, 99 U.S. 700 (1878) (each applying a reasonable-doubt formulation of the presumption); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

145 See *supra* Part I.B.

146 See Posner, *supra* note 23, at 537 (describing the Thayerian presumption in these terms).

147 See Hessick, *supra* note 35, at 1450–67 (advancing arguments that, in general, the justifications for the presumption of constitutionality more strongly support interpretive deference than factual/evidentiary deference); see also *infra* Part III.B (examining reasons for extending interpretive deference).

148 See, e.g., Posner, *supra* note 23, at 537 (explaining how a Thayerian presumption could lead an originalist Justice to uphold a statute even if contrary to the “best” originalist interpretation of the Constitution); Thayer, *supra* note 1, at 150 (“[T]he ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.”).

vote margin in both houses.<sup>149</sup> Thus, the presumption would be weakest, and deference limited to a mere tiebreaker at equipoise, for statutes that barely squeak through.

As to the maximum—the limit at or beyond which the strongest version of the presumption would apply—there are at least two natural possibilities. One would be the unanimous statute. Unanimous passage is as much representative or democratic endorsement as a statute can get and so would be an easy definition for the limit at which the strongest, Thayerian presumption of constitutionality would apply.

The better approach, however, would be to set the maximum at supermajority passage (in both Houses).<sup>150</sup> There are good structural arguments for this approach: a Congressional supermajority is enough to propose a constitutional amendment<sup>151</sup> and to override a Presidential veto.<sup>152</sup> Larger vote margins in Congress have no formal effect under the Constitution—that is, there is nothing that a unanimous Congress can do that a supermajority Congress cannot. Therefore, it should be enough to trigger the strongest possible presumption of constitutionality when a supermajority of both Houses votes to pass a statute.<sup>153</sup>

Statutes actually passed by unanimous or near-unanimous votes are more rare, so if the strongest presumption were limited to those statutes, it would have less practical effect. The proposal to adjust the presumption of constitutionality is intended to actually increase the deference given to very popular statutes (for the reasons discussed above in Part II), and having the maximum presumption kick in at supermajority approval would further this goal.

<sup>149</sup> Theoretically, the narrowest possible margin of passage would be a statute passed by one vote in the House, and by a tiebreaking Vice-Presidential vote in the Senate. Since the proposal is for an adjustable presumption, however, the potential difference between a 51-49 Senate vote and a 51-50 Senate vote is not critical. As for the possible problems arising from discrepancies in the vote margin between the two houses, and some thoughts about solutions to these problems, this is discussed further *infra* Part IV.E.

<sup>150</sup> By supermajority, I mean a two-thirds supermajority of voting members, as referred to in the Constitution. For a discussion of different ways to count the “denominator” for majority votes and possible consequences of different approaches, see Adrian Vermeule, *Absolute Voting Rules* (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 103, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=791724](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=791724).

<sup>151</sup> U.S. CONST. art. V.

<sup>152</sup> U.S. CONST. art. I, § 7, cl. 3.

<sup>153</sup> See *supra* Part II.B (justifying the adjustable-presumption argument by reference to the Constitution’s supermajoritarian provisions and scholarship arguing for the superiority of supermajoritarian requirements).

Between the extremes, the scale—the amount of deference—would slide. This Article does not define exactly the scale or the levels of deference applying at different points. The idea of an adjustable presumption is simply to nuance the application of the presumption of constitutionality in a way that is sensitive and responsive to concerns about the antidemocratic, countermajoritarian difficulty caused by judicial review using the objective indicator of the margin of statutory passage. The workings of the sliding scale in intermediate cases could be worked out case by case.

With that said, one natural midpoint between the two extremes of minimal, tiebreaker deference and maximal, Thayerian deference would be some sort of “clear showing” deference. This might come into play when a statute was passed by a relatively large margin even if not a unanimous or supermajority vote. And here, again, there is precedent for this formulation of the presumption of constitutionality in the Court’s cases.<sup>154</sup>

*B. When the Adjustable Presumption Would Apply and Potentially Make a Difference*

This Article argues only for the application of an adjustable presumption of constitutionality in the core cases where it is clear that a presumption of constitutionality applies with full force under current doctrine, without being weakened, lessened, or inverted.<sup>155</sup> Examples within this core would include social or economic legislation which is challenged on equal protection grounds or as being beyond Congress’s enumerated powers under the Constitution.<sup>156</sup> But the adjustable presumption, as described in this Article, would not apply in areas such as challenges based on fundamental rights, enumerated rights, or discrimination against discrete minorities, since the Court has said that the presumption does not apply with full force (or perhaps at all) in such areas.<sup>157</sup>

However, for present purposes, this Article does argue for (and endorse others’ arguments for) expanding the scope of the presumption beyond current doctrine in one significant way—the presumption should extend not only to fact questions, but also to questions of constitutional interpretation. In particular, Andrew Hessick’s argu-

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<sup>154</sup> *Hodel v. Indiana*, 452 U.S. 314, 332 (1981).

<sup>155</sup> See discussion *supra* Part II.B (discussing areas outside this core, where the Court does not apply the presumption).

<sup>156</sup> See discussion *supra* Part II.B.

<sup>157</sup> See discussion *supra* Part II.B.

ment is correct that the application of the presumption of constitutionality should be extended (or, really, returned) to apply not only to factual determinations about the evidence required to invalidate a statute, but also to questions of constitutional interpretation that arise in the course of adjudicating constitutional challenges.<sup>158</sup> In addition, below are thoughts on when and how the strong, Thayerian form of the presumption might prompt the Court to reconsider doctrine or let theory yield to the expression of popular endorsement.

The presumption has the most limited impact when a statute is challenged as violating a specific, express constitutional restriction. For example, if Congress unanimously passed a statute immediately raising its compensation, even the very strong presumption of constitutionality would not save the statute because the constitutional restriction<sup>159</sup> is so clear, and the operative legal test is not based on judge-made doctrines and glosses grafted onto the text. There could be no “rational doubt”<sup>160</sup> that the law violates the constitutional restriction. Therefore, even the very strong presumption would be overcome.

Instead, the adjustable presumption would have more effect in areas where constitutional powers and guarantees are more open-ended and indeterminate, and the actually decisive rules in any given case will be doctrines and tests formulated by the Court as glosses or interpretations on the Constitution. Examples would include such issues as determining whether legislation is “necessary and proper” to execute Congress’s enumerated powers,<sup>161</sup> whether legislation is within Congress’s powers under the Commerce Clause,<sup>162</sup> whether legislation passed pursuant to Section 5 of the Fourteenth Amendment is within Congress’s powers to pierce state sovereign immunity,<sup>163</sup> or whether congressional legislation violates the Establishment Clause.<sup>164</sup>

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158 See Hessick, *supra* note 35, at 1460 (noting the difference between the current “presumption of constitutionality” and Thayerian, interpretive deference); Hessick, *supra* note 35, at 1461–94 (arguing that the reasons for the presumption support interpretive deference more than factual or evidentiary deference).

159 U.S. CONST. amend. XXVII.

160 Thayer, *supra* note 1, at 142 n.1.

161 U.S. CONST. art. I, § 8, cl. 18; *see, e.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586–91 (2012).

162 U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, *Sebelius*, 132 S. Ct. at 2591–93; *United States v. Lopez*, 514 U.S. 549, 551 (1995).

163 U.S. CONST. amend. XIV, § 5; *see, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

164 U.S. CONST. amend. I; *see, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (considering but not deciding the question whether the Congressional Pledge of Allegiance Act violates the Establishment Clause). This Article takes questions under the Establishment Clause to be questions about Congress’s powers rather than questions about

Put more generally, there would be a wide scope for application of the adjustable presumption, including in some of the most hotly contested areas of statutory and constitutional interaction in recent years.<sup>165</sup> So, the adjustable presumption would apply in many cases that matter.

In these more open-ended areas, applying an adjustable presumption of constitutionality would offer an alternative to placing singular faith in specific theories of interpretation. Rather than making very close calls based strictly on the contested application of an interpretive theory, Justices instead could look outside the theory to give weight to the degree of popular endorsement conveyed by the margin of statutory passage.<sup>166</sup>

Another major way the adjustable presumption would apply would be in affecting the Court's application of stare decisis and its willingness to revisit its prior decisions and doctrinal tests. The Court's application of stare decisis is inconsistent—it has no firm rules about when to follow its own precedents (and, if it did, it would not be bound to respect them).<sup>167</sup> The Justices sometimes accuse each other of “faux judicial restraint” that consists of pretending to adhere to precedents while essentially rewriting them.<sup>168</sup> Scholars similarly trace how the Court can gut prior decisions and lines of precedent under the guise of purporting to respect them.<sup>169</sup> Thus, the Court has room to be flexible in applying its prior cases.

So, when a statute passes by a wide margin, but seems to run afoul of the Court's prior cases, the Court should be most willing to revisit its own precedents. The main reasons, as indicated above, are that

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infringement on the fundamental rights of citizens and therefore properly within the “core” the adjustable presumption of constitutionality described by this Article would apply. This, however, is an unconventional position.

165 For example, the Commerce Clause and Taxing Power as construed in *Sebelius*, 132 S. Ct. at 2566, or the Voting Rights Act renewal that was struck down by the Court in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

166 See *infra* Part IV.A (discussing room for an adjustable presumption alongside theories such as originalism).

167 See, e.g., Vikram David Amar, Morse, *School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 637, 648 (2009) (“In some respects, all of the Justices can be accused of inconsistency in their invocation of stare decisis.”).

168 See *Berguis v. Thompson*, 130 S. Ct. 2250, 2272 (2010) (Sotomayor, J., dissenting) (claiming that the majority “overrules *sub silentio* an essential aspect” of *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 498 n.7 (2007) (Scalia, J., concurring in part and concurring in judgment) (“This faux judicial restraint is judicial obfuscation.”).

169 Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 108 (1991) (noting ways in which “the Court can destroy a precedent without overruling it”).

the countermajoritarian concern is at its strongest when a statute has passed by a large margin and that a wide margin of passage indicates both a strong majority will in favor of the legislation and a vocal assertion from the coordinate branch that the legislation is constitutional.<sup>170</sup>

This should especially be the case where the Court's doctrines have developed elaborately out of relatively simple and open-ended constitutional texts. One example would be the Court's jurisprudence under the Establishment Clause. This area is notoriously difficult, vexed, and productive of serial judicial tests designed to implement the constitutional rule.<sup>171</sup> These tests are generally not derived from the constitutional text itself. This does not make them inherently wrong or illegitimate—they represent the Court's efforts to translate the Constitution's broad guarantees into rules of specific application in individual cases. But, it is in areas like this, where the argument is strongest, that acts of Congress passed by overwhelming majorities should prompt the Court to review and revisit its own doctrines, operating as a wake-up call to the Court to reexamine the doctrinal tests it has crafted in an attempt to translate constitutional text into rules of decision.<sup>172</sup>

#### IV. OBJECTIONS AND RESPONSES

This Part now considers some of the many objections that might be leveled at the proposal to adjust the presumption of constitutionality based on the margin of statutory passage and attempts to show

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<sup>170</sup> For the contrary argument—that the Court should be most adamant about sticking to decisions that are the *most* unpopular—and a response, see *infra* Part IV.C.

<sup>171</sup> See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that the display of the Ten Commandments on the grounds of the Texas State Capitol did not violate the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (finding that the Establishment Clause prohibited public school students from being exposed to “nonsectarian” prayer given by school-selected clergymen at a graduation ceremony); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding two statutes providing state aid to church-related elementary and secondary schools to be violative of the Establishment Clause). Each of these involved challenges to state acts, not congressional statutes, but the same tests have been applied in Establishment Clause challenges to Acts of Congress. See, e.g., *Salazar v. Buono*, 559 U.S. 700 (2010) (considering the constitutionality of a congressional enactment addressing the Mojave Memorial Cross); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (considering the constitutionality of the “under God” language in the Pledge of Allegiance added by a near-unanimous act of Congress in 1954).

<sup>172</sup> Hessick, *supra* note 35, at 1466 (“These laws provide opportunity for the Supreme Court to reconsider its precedents and allow for the continued development of constitutional law.”); Thayer, *supra* note 1, at 150 (“[T]he ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.” (emphasis omitted)).



that they are unfounded, can be accommodated, or require only limited exceptions.

A. *An Adjustable Presumption of Constitutionality Would Be Untethered from Text and Original Meaning*

An initial objection is that applying an adjustable presumption would be illegitimate because constitutional adjudication is and should be determinate, without reference to external factors such as the margin of passage. The Constitution has a fixed content, and the Court's duty is to (a) ascertain what the Constitution allows, (b) ascertain what the statute means, and (c) determine whether B is within A.<sup>173</sup> Any presumption or “thumb on the scale” is therefore simply illegitimate and contrary to the rule-of-law principles at the core of the American constitutional republic.

But, the claim that the Constitution always has a determinate meaning is wrong. Constitutional adjudication is indeterminate—not in all or perhaps even most cases, but in a fair number of the ones that make it to the Supreme Court, and usually in the most difficult and politically charged ones.<sup>174</sup> Judicial interpretations of what the Constitution allows, as well as jurisprudential theories of how to interpret the Constitution, observably vary widely over time, and also within the Court at any given time.<sup>175</sup> Interpretive pluralism has been widely acknowledged and sometimes celebrated.<sup>176</sup> While constitutional theorists (and some Justices) put forth one particular interpretive theory or subtheory as the only legitimate way to read the Consti-

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173 See Karlan, *supra* note 13, at 41 (arguing that the Roberts Court's approach to judicial review is essentially that of *United States v. Butler*, 297 U.S. 1, 62 (1936), in which the Court asserted that what it does is to “lay the article of the Constitution which is invoked beside the statute which is challenged’ in order ‘to decide whether the latter squares with the former.’”).

174 See, e.g., Caminker, *supra* note 8, at 83 (noting, as one of Thayer's arguments for his deferential standard, that “many constitutional questions have more than one reasonable answer”).

175 See, e.g., JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 4–5 (2005) (“There is no law of constitutional interpretation.”). Compare ANTONIN SCALIA, *supra* note 121, with STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 3 (2006) (“[C]ourts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts.”).

176 E.g., PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THE THEORY OF THE CONSTITUTION* 1–119 (1982) (describing six modalities of constitutional interpretation: (1) structural, (2) textual, (3) ethical, (4) prudential, (5) historical, and (6) doctrinal); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) (identifying five types: (1) text, (2) Framers' intentions, (3) purposive arguments, (4) precedent, and (5) policy arguments).

tution, the Supreme Court, taken collectively, rarely (if ever) applies only one analytical mode to read the Constitution, and the predominant mode of analysis applied by the Court changes over time.

In addition, even within dominant theories, there is significant indeterminacy that could accommodate majority views as expressed in legislation enacted by large majorities of the people's representatives. To take the example of Originalism,<sup>177</sup> the theory was originally offered as a means to restrict judges perceived to be freewheeling, but it is acknowledged now that taking Originalism seriously results in less constraint on judicial behavior, at least in the sense of restraining judges from invalidating democratic acts.<sup>178</sup> As the theory shifted from "original intent"<sup>179</sup> to "original public meaning,"<sup>180</sup> and forked into various subtheories, including the new "living originalism,"<sup>181</sup> it has gained adherents at the expense of coherence. Sometimes, sufficient historical materials are simply lacking or conflicting enough that they allow drawing two different supportable interpretive conclusions.<sup>182</sup> Even when there are ample materials, in application, Originalism can produce two different answers from two different Justices.<sup>183</sup>

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177 Originalist theory is a useful example since that theory (specifically, the "original public meaning" subtheory) is currently quite popular in academic discourse. See, e.g., Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 (2009) ("In this 'new and improved' form, originalism has (mainly) carried the day: 'We are all originalists now.'" (quoting Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia, and Its Intellectual Incoherence*, NEW REPUBLIC, May 5, 1997, at 26)). There are still, however, prominent and assertive deniers. E.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 2 (2009) ("That original intents and meanings matter is not enough to render originalism true.").

178 See, e.g., Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004) (tracing the evolution from "old originalism" grounded in twin goals of restraining judicial discretion and deference to legislative majorities to a "new originalism" that "does not require that judges get out of the way of legislatures . . . [but] requires that judges uphold the original Constitution—nothing more, but also nothing less").

179 Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO L.J. 713, 720 (2011).

180 *Id.* at 721, 729.

181 See *id.* at 725–30 (discussing the evolution of Originalist theory from a focus on "the actual, subjective, and narrow to the hypothetical, objective, and abstract."). See generally JACK BALKIN, *LIVING ORIGINALISM* (2009).

182 See, e.g., Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161, 1161 (examining *Hyllon v. United States*, 3 U.S. (3 Dall.) 171 (1796), as a "real example of the impossibility of a New Originalist interpretation when the historical materials provide clear evidence of equally plausible but conflicting meanings" and suggesting resorting to "Old Originalism's" focus on Founders' intent as a solution).

183 For example, in *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729 (2011), Justice Scalia concluded that violent video games sold to minors are protected speech based, at least partially, on "what James Madison thought about violence." Transcript of Oral Argument at 17, *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (2010) (No. 08-1448); see also

Since constitutional interpretation is debatable and shifting, with arguments about what interpretive theory to apply and about particular results under a single theory, there is ample room for deference to the democratic will, specifically in the form of a presumption of constitutionality that increases based on the margin of statutory passage.<sup>184</sup> In determining what the Constitution means, especially when the answer is inconclusive, the people themselves should have an *on-going* say, and the main mechanism that the Constitution allows is through their elected representatives.<sup>185</sup> When a statute is approved by an overwhelming margin of voters, the people, through their representatives, are vocally asserting that the act is (or should be) within the bounds of the Constitution, and courts should respect this assertion by applying a stronger presumption of constitutionality.

Thus, adopting a presumption of constitutionality that increases with the margin of statutory passage would allow a democratic voice in constitutional interpretation and application, but in a nuanced way, that would most strongly check the Court when the popular voice is strongest. It is important to distinguish this, then, from a “Living Constitution” theory that allows judges to update the meaning of constitutional texts based on their own ideas about what the Constitution should allow given modern realities.<sup>186</sup> To the extent

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*Brown*, 131 S. Ct. at 2736 (focusing on the lack of any “longstanding tradition” of “restricting children’s access to depictions of violence”). Justice Thomas, in contrast, concluded that the statute was constitutional because “the founding generation would not have understood ‘the freedom of speech’ to include a right to speak to children without going through their parents.” *Id.* at 2759 (Thomas, J., dissenting). *Brown* is a particularly salient example because Thomas and Scalia are generally perceived to broadly agree on interpretive methodology, political preferences, and actual results. See also *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Justice Scalia’s majority opinion and Justice Stevens’s dissent arriving at opposite conclusions about the original meaning or understanding of the Second Amendment).

184 Cf., e.g., Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 167–68 (2012) (reviewing JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) and JACK M. BALKIN, *LIVING ORIGINALISM* (2011)) (describing an approach to originalism that allows a “construction zone” that can accommodate other values or approaches “when the original meaning of the text is vague or open-textured”).

185 See, e.g., Thayer, *supra* note 1, at 144 (“[T]he constitution often admits of different interpretations; that there is often a range of choice and judgment; . . . in such cases the constitution . . . leaves open this range of choice; and that whatever choice is rational is constitutional.”). Admittedly, in Thayer’s view, at its strongest, the deference should extend even to cases in which a particular interpretive theory does produce a likely answer, so long as the judge is not sure that it is correct “beyond a rational doubt.” See Posner, *supra* note 23, at 537; Thayer, *supra* note 1, at 144. For the argument that the presumption of constitutionality should extend not only to factual adjudication, but also to interpretive deference, see *supra* Part III.B.

186 See SCALIA, *supra* note 121, at 44–45; Rehnquist, *supra* note 121, at 695.

that an adjustable presumption allows for constitutional evolution or flexibility, it would be driven by the people's representatives, rather than the courts.<sup>187</sup>

A related objection would be the textual argument that it is illegitimate to give a stronger presumption of constitutionality to more popular laws because the Constitution requires only bicameral majority passage and the president's signature.<sup>188</sup> Any rule that gives more force to statutes based on exceeding that threshold, therefore, violates the Constitution itself.<sup>189</sup> But, the argument is not that a narrowly passed statute is not law or "less law" than an overwhelmingly passed one. It is instead about an analytical approach the Court should apply to validly enacted laws when facing difficult questions about whether they are constitutional.

Further, judicial review is itself extratextual. The Constitution prescribes no rules or guidelines for how it should be exercised or how to interpret the Constitution.<sup>190</sup> Specifically, the presumption of constitutionality itself is extratextual.<sup>191</sup> Thus, objections to the argument based on the idea that the Constitution has a fixed textual meaning would bar applying a presumption of constitutionality at all. If the courts' duty is simply to ascertain the meaning of the Constitution (by text or original intent) and evaluate the statute accordingly, then there should be no room for a presumption one way or another. Certainly, this argument has been made—for example, Randy Barnett has argued that Originalism requires no deference to legislative acts and even that a countervailing "presumption of liberty" should be adopted under which statutes are presumed to be invalid.<sup>192</sup>

But, this does not seem to be the view taken by the Court. The Court has said that it does presume congressional acts to be constitutional.<sup>193</sup> Additionally, the Court already exercises discretion in deciding when to apply the presumption (generally based on the type of constitutional challenge being asserted).<sup>194</sup> There is thus no princi-

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187 See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009) (arguing that living constitution theory "is not primarily addressed to judges but to all citizens").

188 U.S. CONST. art. I, § 7.

189 Cf. Burke, *supra* note 59, at 76–77 (arguing that the presumption of constitutionality is itself illegitimate for these reasons).

190 See, e.g., RUBENFELD, *supra* note 175, at 4–5.

191 Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 793 (1997) (criticizing the presumption of constitutionality because it is "extratextual").

192 BARNETT, *supra* note 69, at 229, 260.

193 See *supra* Part I.B.

194 See *id.*

pled reason that if the Court is going to apply the presumption, it should not apply it in an improved way by adjusting it based on the margin of statutory passage. Further, as discussed, the Court has frequently been perceived as arriving at its decisions with an unacknowledged eye on the popularity of the statute under review, so it is better for the Court to acknowledge as much in its opinions.<sup>195</sup>

Another textualist objection would be that looking at vote counts would amount, in a way, to an impermissible inquiry into legislative intent beyond the plain meaning of the statutory text.<sup>196</sup> But, the proposed adjustable presumption does not necessarily turn on what any individual member, or the collective of “yea”-voting members, thought about the bill. It rests, only in part, on the existing assumption that Congress collectively does consider the Constitution when it legislates.

### *B. An Adjustable Presumption Would Be Unprecedented*

Despite the justifications for an adjustable presumption of constitutionality discussed above, the federal courts have never explicitly resorted to vote counting as an analytical framework for deciding how much deference to give a statute. This does not mean that it would be completely unprecedented to rely on the margin of passage, however. At various times, the Court or individual Justices have referred to “overwhelming” margins of passage as carrying analytical, or at least rhetorical, weight that should prompt more deference to, or more evidence before invalidating, a statute.<sup>197</sup> Moreover, the po-

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<sup>195</sup> See *supra* Part II.C.

<sup>196</sup> See, e.g., SCALIA, *supra* note 121, at 31 (“I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.”); Frank H. Easterbrook, *The Role of Original Intent in Statutory Interpretation*, 11 HARV. J.L. & PUB. POL’Y 59 (1988) (criticizing judicial reliance on legislative intent in statutory interpretation).

<sup>197</sup> See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803, 1823–24 (2010) (Alito, J., concurring) (“[I]t is noteworthy that Congress, in which our country’s religious diversity is well represented, passed this law by overwhelming majorities . . . .”); *United States v. Booker*, 543 U.S. 220, 292, 294 (2005) (Breyer, J., dissenting) (pointing to overwhelming votes in favor of Sentencing Guidelines as demonstrating the Court’s error in holding that they should not be binding); *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966) (noting, in opinion upholding the Voting Rights Act of 1965, that “the verdict of both chambers was overwhelming”); see also *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (“The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.”); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 394 (2000) (“And although majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attested to the perception relied upon here: ‘[A]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.’”); *Edwards v. Aguillard*, 482 U.S. 578, 621 (1987) (Scalia, J., dissenting) (“Although

litical branches have also endorsed the idea that the Court should defer especially to statutes that pass with substantial majority support.<sup>198</sup>

On the other hand, some Justices—particularly in recent years—have affirmatively rejected the idea that the degree of support for the statute should produce any greater judicial deference.<sup>199</sup> But, the modest point here is simply that it would not be entirely unprecedented to consult the margin of statutory passage as a relevant fact affecting how strongly the Court should presume that a statute is constitutional.

Further, the fact that the courts have not historically proclaimed the importance of the margin of passage in applying a very strong presumption of constitutionality does not mean that there is no historical precedent for a very robust presumption. Instead, although resort to the margin of passage has not been an explicit analytical tool, the Court for much of its history was far more deferential in its review of all federal statutes than it has been in modern times.<sup>200</sup> Although the power of judicial review to invalidate federal statutes was asserted as early as *Marbury v. Madison*, the practice of actually invalidating federal statutes for unconstitutionality was quite rare, and the rhetoric used to describe the presumption of constitutionality was a much more robust “beyond a rational doubt.”<sup>201</sup> Thus, in the past, the Court seemed to apply a stout presumption of constitutionality to all statutes. Incorporating an adjustable presumption of constitu-

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the Establishment Clause, including its secular purpose requirement, was of substantial concern to the legislators, they eventually voted overwhelmingly in favor of the Balanced Treatment Act . . . .”); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1034 (9th Cir. 2010) (“[G]iven the margins by which the 2002 Act passed, it is clear that virtually all of the members of Congress agreed we had misinterpreted the purpose of the words ‘under God.’”).

198 See, e.g., Michael A. Memoli, *Obama: Overturning healthcare law would be ‘extraordinary step,’* L.A. TIMES, Apr. 2, 2012, <http://articles.latimes.com/2012/apr/02/news/la-pn-obama-confident-supreme-court-will-uphold-healthcare-law-20120402> (quoting President Obama’s statement that it would be an “extraordinary step” for the Court to overturn a law passed “by a strong majority of a democratically elected Congress”). The House majority actually was narrow, but the point is the President’s rhetorical appeal to the strength of the majority vote as a ground for backing down the Court.

199 See, e.g., *Salazar*, 130 S. Ct. at 1841 n.12 (Stevens, J., dissenting) (“[I]f we were debating whether Congress had a religious purpose in passing the transfer statute, *I would contest the relevance of the vote count to that inquiry . . . .*” (emphasis added)); Transcript of Oral Argument at 51, *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322) (Justice Scalia suggesting that a unanimous or near unanimous vote should be a cause for particular skepticism, not particular deference); Transcript of Oral Argument at 47, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) (same).

200 See Posner, *supra* note 23, at 534 (tracing the evolution from extreme deference to the current state in which there are “no orthodox Thayerians” on the federal bench).

201 See *supra* Part I.B (tracing the weakening and narrowing of the presumption).

tionality based on the margin of statutory passage would revive this level of deference in a limited way and swing the pendulum back towards heightened deference for those statutes that deserve it most, for the reasons explained above.

*C. An Adjustable Presumption Would Harm Judicial Legitimacy by Making It Appear That the Court Bows to Public Pressure*

An objection to the argument for increased legitimacy<sup>202</sup> would be that adopting a presumption of constitutionality that increases based on the margin of passage would actually decrease the Court's legitimacy because it would create a perception—that the Court was responding or caving in to public pressure—that the Court was behaving as a political actor. The best articulation of this argument by the Court itself was in *Casey*, in which the Court explained at length why adherence to unpopular precedents is especially important to preserve the legitimacy of the Court: “[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”<sup>203</sup> If the Court started looking at the margin of passage when reviewing statutory constitutionality, the argument would run, it would lose legitimacy in the eyes of the public because it would be seen as bowing to “mob rule” rather than making neutral rulings based on what the Constitution really says.

There are a few responses to this objection. One is that there is not really any good reason to think that the people would think less of the Court for upholding a popular statute, even if doing so required revising or overruling the Court’s own precedents. To the contrary, the evidence of recent polls seems to indicate that popular opinion of the Court is diminished by the perception that members of the Court decide cases based on their own political preferences, for extra-legal reasons, in defiance of the majority will.<sup>204</sup>

Another is that since considering the margin of passage would be brought in to the family of legitimate analytic considerations—on the theories of respect for majoritarianism and for the strength of Congress’s own assessment of the statute’s constitutionality—there actual-

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<sup>202</sup> See *supra* Part II.C.

<sup>203</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992). This is the “double-down” theory of stare decisis—if a decision proves unpopular, the Court must be especially committed to the prior precedent for fear that it will be perceived as weak if it caves and overrules itself.

<sup>204</sup> See *supra* note 104 (describing two recent polls reflecting historically low approval of the Court).

ly would be less danger of the Court being perceived as having illegitimately caved to public pressure.<sup>205</sup> Considering public pressure would (and should) be a legitimate constitutional argument—at least in the limited sense of the will of the people as expressed in a statute overwhelmingly adopted according to prescribed constitutional procedures by the people’s duly elected representatives.<sup>206</sup> Thus, adopting an adjustable presumption of constitutionality based on the margin of passage would improve, not undermine, the Court’s legitimacy with the public.

*D. Margin of Passage Is Not a Good Proxy for Congressional or Popular Endorsement of Constitutionality (Hasty Statutes and Omnibus Bills)*

A further objection is that applying a blanket adjustable presumption would be impracticable or unwise because of the many variables that can affect the number of votes for a particular statute, or a particular provision in a statute, has received. This objection has at least two distinct aspects. One is a general objection: if members of Congress actually do not consider the constitutionality of legislation when voting for it, then there should not be any deference to a larger majority’s vote to pass the legislation based on the theory that it reflects a more vocal assertion by the people’s representatives of the legislation’s constitutionality. The second is a more specific objection that, even if Congress generally considers constitutionality when it passes legislation, there are many instances when it does not consider the constitutionality of specific pieces of hastily passed legislation, or of specific provisions in much more wide-ranging bills, which later become the subject of specific constitutional challenges.<sup>207</sup>

As to the general objection, the first response is that the arguments for applying an adjustable presumption of constitutionality do not depend solely on the argument that Congress has specifically

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<sup>205</sup> See *supra* Part II.C.

<sup>206</sup> “Public pressure” could also take the form of opinion polls or speech criticizing the Court’s decision. But, I do not argue that the Court could or should legitimately consider these forms of public pressure in deciding how to apply the presumption of constitutionality. See Or Bassok, *The Two Countermajoritarian Difficulties*, 31 ST. LOUIS U. PUB. L. REV. 333 (2012) (identifying a “second countermajoritarian difficulty” in the form of the Court’s rulings contradicting majority preferences as expressed in political polls). Instead, if there are defects in how well Congress’s acts reflect popular opinion, popular pressure should be exerted to cure those defects directly.

<sup>207</sup> See *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (“The rational and practical force of the presumption is at its maximum only when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved.”).



considered a statute's constitutionality before passing it. Instead, as discussed above, there are several arguments for applying such a presumption independent of such consideration—such as democratic concerns inherently raised by thwarting the will of large majorities, the Constitution's own privileging of supermajorities, and academic arguments that supermajorities tend to produce superior laws.<sup>208</sup> These arguments suggest that, even if Congress does not explicitly consider constitutional interpretation when it legislates, passage of a statute by a large majority vote reflects a strong democratic opinion that the statute should be adopted, and that the Constitution allows it.

Further, while not uncontroversial, there is significant evidence that Congress does indeed consider the constitutionality of legislation that it enacts.<sup>209</sup> Moreover, the Court itself assumes as much—this is one of the substantial bases for the Court's practice of affording a presumption of constitutionality to federal legislation.<sup>210</sup> Thus, as a general matter, it does not seem incorrect to apply an adjustable presumption of constitutionality based, at least in part, on the theory that Congress considers constitutionality when it legislates and that a larger margin of statutory passage reflects a more ringing endorsement of a statute's constitutionality.

To the extent that the objection needs to be accommodated further than this response, it would be sufficient to allow that the presumption could be rebutted, or overcome, by a specific showing that Congress legislated with affirmative disregard for the constitutionality of the statute.<sup>211</sup> This would be a difficult showing to make—it will be the rare occasion where Congress passes a statute saying “the Constitution be damned.” But, it might come into play in an instance where Congress legislates in specific defiance of a constitutional restriction as interpreted by the Court.<sup>212</sup> This leads into a discussion of two par-

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208 See *supra* Part II.A.

209 See *supra* notes 88–89.

210 See *supra* note 88.

211 There is significant debate about what materials may be legitimately consulted to ascertain congressional intent. See *supra* note 196. Without wading into that discussion, under this Article's argument, it would be a rare case where the Court should second-guess Congress's level of consideration of constitutionality and that very strong evidence should be required. For a contrary argument—that Congress should say more about constitutional interpretation, and that the Court should scrutinize these statements, see Volokh, *supra* note 88, at 212–222.

212 One example would be Congress's attempt to override *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), by passing the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993). The Court struck down RFRA, in part, in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

ticular types of instances in which examining the background and legislative history of the statute might be relevant to the application of the adjustable presumption.

### 1. *Hasty Statutes*

One such instance is legislation passed quickly in a time of crisis and perhaps without serious consideration given to its constitutionality. Two notable recent examples are enactments passed in the wake of the September 11, 2001 terrorist attacks to respond to urgent national security concerns raised by that event: (1) the Authorization for Use of Military Force,<sup>213</sup> which has been cited by the government as authority for many of the steps taken in the so-called “War on Terror” that have been the subject of significant constitutional challenges, and (2) the USA PATRIOT Act<sup>214</sup>, which was also passed to address domestic issues related to national security and which has been subjected to many constitutional challenges in the courts. Critics have charged that these enactments were passed in a panic, without due consideration to their constitutionality.<sup>215</sup> In the context of this Article’s arguments for an adjustable presumption of constitutionality, these could be offered as examples of instances where the Court should not defer more substantially to statutes passed by very large margins because the Court should not bend the Constitution to accommodate hasty, panicked responses to crises.

One main response to this objection is simply to deny its substantive force—when Congress acts quickly and overwhelmingly to respond to an urgent national crisis, the argument for deference is at its highest, not lowest.<sup>216</sup> As the threat recedes and the defects in the legislation become more apparent, public pressure will mount to

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213 Pub. L. 107-40, 115 Stat. 124-25 (Sept. 14, 2001). Approved three days after 9/11, the AUMF passed the House 420-1 and passed the Senate unanimously.

214 Pub. L. 107-56, 15 Stat. 272 (Oct. 26, 2001). The Patriot Act passed the House 357-66 (84%) on Oct. 24, 2001 and passed the Senate 98-1 on Oct. 25, 2001.

215 *E.g.*, Press Release, Senator Rand Paul, Senator Rand Paul’s Letter of Opposition to the Patriot Act (Feb. 15, 2011), *available at* <http://paul.senate.gov/record.cfm?id=331164> (“Congress instead hastily passed a long-standing wish list of power grabs like warrantless searches and roving wiretaps . . . . It is not acceptable to willfully ignore the most basic provisions of our Constitution—in this case—the Fourth and First Amendments—in the name of ‘security.’”).

216 *Cf.*, *e.g.*, WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) (tracing the history of incursions on civil liberty during wartime).

change or repeal the unwise legislation.<sup>217</sup> In addition, to the extent that hasty statutes are challenged for infringing on individuals' fundamental rights, such as Fourth Amendment rights, the adjustable presumption as described in this Article would not apply, since those challenges would be outside the modern "core" of the presumption of constitutionality.<sup>218</sup>

Beyond these responses, the objection should be accommodated only by a limited adjustment in the form of allowing the presumption to be rebutted or overcome only by a specific showing that Congress hastily passed the legislation in affirmative disregard of its obligation to consider constitutionality. Not much evidence would be required to show that constitutionality was considered in passing the legislation and, therefore, that the presumption should apply.

## 2. *Omnibus Bills*

A second specific instance in which the presumption arguably should not apply would be when the challenged statutory provision was passed as a small, perhaps obscure part of a much larger bill. Here, the argument would be that when a challenged provision was included as an afterthought or overlooked part of a much broader bill, it cannot be said to have been specifically considered by Congress and vetted for passing constitutional muster. That is, the fact that a provision was in a statute that passed by an overwhelming margin has very little to say about Congress's opinion of a particular provision's constitutionality when that provision was a small and unimportant part of a much larger bill.<sup>219</sup>

There are several responses to this objection. First, it does not go to the core of the argument. That is, even if some statutory challenges might fall subject to this problem, it would not go to all of them. Some statutes, at least, are subject to significant deliberation before their enactment and are enacted with serious consideration and de-

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<sup>217</sup> Currently, the rising and bipartisan voices of criticisms of the spying policies of American intelligence agencies suggest that public opinion may (hopefully) be shifting towards repeal of some of the excesses of the Patriot Act and secret surveillance courts.

<sup>218</sup> See *supra* Part III.B.

<sup>219</sup> Justice Stevens leveled essentially this criticism in *Salazar v. Buono*, criticizing the concurrence's suggestion that Congress's attempt at a solution to the Mojave Cross dispute was entitled to deference and respect because "a provision tucked silently into an appropriations bill" differs from "a major statute debated and developed over many years," and "[o]ne cannot infer much of anything about the land-transfer provision from the fact that an appropriations bill passed by an overwhelming majority." *Salazar v. Buono*, 130 S. Ct. 1803, 1840, 1841 n.12 (2010) (Stevens, J., dissenting).

bate about whether they are constitutional.<sup>220</sup> In those instances, the arguments for an adjustable presumption of constitutionality based on the margin of passage would still apply with full force. Second, the Court does not generally look behind legislative votes to determine whether a particular part of a statute really was supported by every legislator who voted for the statute. Further, the argument depends only in part on the premise that Congress must be assumed to carefully consider constitutionality when it legislates.<sup>221</sup> As argued above, the mere fact of endorsement by a very large majority should itself prompt the Court to afford substantial deference to a statutory provision.<sup>222</sup>

Finally, to the extent that the objection does have force, it could be accommodated in judicial development and application of the adjustable presumption. That is, the presumption could be perhaps rebutted by a showing that the provision under attack was added as an afterthought or without significant deliberation by Congress. Congress, in response, could be more systematic about engaging in constitutional interpretation when it legislates.<sup>223</sup> Or, a provision added by a specific amendment to a wide-ranging piece of legislation could be examined to determine the vote margin by which that particular amendment was added, and that could be factored into the analysis of how strongly the court should presume that the statute is constitutional.

*E. There Is No Single Margin of Passage Because of Bicameral Discrepancies*

Another practical objection would be based on the observation that statutes can, and do, pass by different margins in the two houses of Congress, posing difficulties for a theory that adjusts the presumption of constitutionality based on *the* margin of statutory passage in Congress. This raises questions about which margin should matter more and what version of the presumption should apply when, for example, the House passes a piece of legislation by a supermajority and the Senate passes it by only a few votes.

There are a few responses to this objection. One is that this objection would only carry weight when the statutory margin of passage

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<sup>220</sup> See *supra* notes 88–89.

<sup>221</sup> Only the argument made in Part II.B, *supra*, relies directly on this assumption; those in II.A and II.C–E do not.

<sup>222</sup> See *supra* Part II.A.

<sup>223</sup> See Volokh, *supra* note 88, at 212–22 (discussing and suggesting improvements in the use of constitutional authority statements as a tool to demonstrate congressional constitutional deliberation).

differs significantly between houses and so does not defeat the core of the argument. It would be useful to know how often there is a substantial difference in the margin of passage between the House and Senate, and whether there are any systematic trends in the discrepancy.<sup>224</sup>

As for those cases in which there is a meaningful difference between the margin of passage, a few responses or accommodations could be made. One would be simply to afford a presumption based on the highest (or lowest) margin of passage between the two houses. Tying the presumption to the highest margin of passage would tend to afford more deference to federal statutes, tying it to the lowest less.<sup>225</sup> Another would be to only apply the maximum-strength version of the presumption if both houses passed the statute by greater than two-thirds majorities.

An alternative approach would be to privilege the margin of passage in the House over that in the Senate. The virtue of this approach would be to tie the presumption afforded to the statute to the vote in the more democratically representative house, which would be responsive to critics who attack the Senate as a backwards, undemocratic institution.<sup>226</sup> The problem would be that it would give more interpretive weight to House votes than Senate votes, which would at least be in tension with the Constitution's bicameralism requirements, which mostly do not distinguish between the two houses' powers and abilities in passing legislation.<sup>227</sup> For that reason, I would not favor this approach.<sup>228</sup>

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<sup>224</sup> This would be the margin measured by percentages, and not raw vote numbers.

<sup>225</sup> Since this Article endorses the theory out of a preference for more deference to federal statutes, I would favor the former approach, but it is not necessary to adopt that approach in order to accept the basic argument.

<sup>226</sup> See, e.g., LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 16, at 58.

<sup>227</sup> There are exceptions, most notably the House's sole power to originate spending bills. U.S. CONST. art. I, § 7, cl. 1. But generally, our system is not like ones those (like the United Kingdom's) where the more representative house has much more power to enact legislation and the less representative house has a merely advisory role.

<sup>228</sup> In addition, it may be that the Senate is actually not as unrepresentative in practice as its theoretical critics contend. One recent study suggests, in the limited context of examining filibusters between 1991 and 2001, that at least on average the number of Senate votes cast in favor of cloture (54.5) roughly corresponds to the share of the population (54.9%) represented by Senators voting for cloture. See Eidelson, *supra* note 80, at 1004. *But see id.* at 1005 (noting particular examples of filibusters where a minority thwarted the representatives of 60% or more of the national population).

*F. An Adjustable Presumption of Constitutionality Would Never Be Applied Because the Court Would Not Voluntarily Limit Its Own Interpretive Supremacy*

Finally, there is the simple, practical objection that even if the theory is nice, it is essentially irrelevant because the Court is very unlikely to adopt and endorse any doctrine that tends to limit its own powers to invalidate federal statutes. As Judge Posner points out, there are no Thayerians on the Court now,<sup>229</sup> and some Justices in particular might be actively hostile to the notion of a doctrine that defers more to statutes passed by larger margins.<sup>230</sup> Thus, there is simply no chance, the argument would run, that the Court would ever choose to limit itself by increasing the amount of deference that it affords to statutes passed by Congress, because all of the members of the Court—despite their varying policy preferences and commitments—enjoy having the power to impose those preferences and commitments through judicial review.

There is some truth to this objection, but also a few reasons to think it is not fatal. One is that, as Judge Posner points out—the fall in judicial restraint followed a rise. That is, the level of deference afforded by the Court has demonstrably altered over time, and the fact that it has declined does not mean that it can never again rise. Current Justices might be convinced that popular views on interpreting the Constitution—as reflected in the votes of their representatives—should be deferred to when expressed overwhelmingly; or new Justices who think so could be appointed.<sup>231</sup> Even if there are no Thayerians now—that is, no Justice who defers to all statutes to that extreme degree—it is possible that one current Justice might accept, or some new Justice might embrace, that at the unanimous or supermajoritar-

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<sup>229</sup> Posner, *supra* note 23, at 537.

<sup>230</sup> In the oral arguments in *NAMUDNO v. Holder*, for example, Justice Scalia took the overwhelming votes for renewing the Voting Rights Act as cause for *suspicion*, not deference. Transcript of Oral Argument at 51, *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322) (“You know, the—the Israeli Supreme Court, the Sanhedrin, used to have a rule that if the death penalty was pronounced unanimously, it was invalid, because there must be something wrong there.”). In the follow-on case, *Shelby County v. Holder*, Justice Scalia went even further, suggesting specifically that the unanimous Senate and near-unanimous House votes to renew Section 5 of the Voting Rights Act should be suspect because they reflected “a phenomenon that is called perpetuation of racial entitlement.” Transcript of Oral Argument at 47, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

<sup>231</sup> Several scholars have criticized the fact that, since Justice O’Connor, the Court has had no members who have held elected office. *See, e.g.*, Karlan, *supra* note 13, at 5 (“[T]he current Supreme Court is the first in U.S. history to lack even a single member who ever served in elected office.”); *see also* VERMEULE, *supra* note 68, at 123–25 (arguing for including non-lawyers on the federal bench).

ian extreme, Thayerian deference could be appropriate. And, since many, if not the most recent, controversial invalidations of federal statutes have been accomplished by bare 5-4 majorities on the Court,<sup>232</sup> one Justice's adoption of the approach could be enough to change voting results.<sup>233</sup>

#### CONCLUSION

This Article has argued that the presumption of constitutionality that the Supreme Court affords to federal statutes should and can be adjusted so that it strengthens based on the margin of statutory passage. Increasing the strength of the presumption based on the margin of statutory passage ameliorates countermajoritarian concerns about the judicial invalidation of duly enacted federal statutes in a way that is consistent with the majoritarian justifications for the presumption of constitutionality. It draws support from the Constitution's own privileging of supermajority enactments, as well as academic theories about supermajorities' superior ability to enact good laws and resolve major constitutional questions. And, it could improve judicial legitimacy both by improving judicial deference to more popular statutes and by making explicit the Court's widely perceived tacit consideration of the level of popular support for legislation.

This Article has also attempted to show how the presumption could be adjusted to increase with the margin of passage, and when the adjustable presumption should be applied. The presumption, at the minimum, would consist of a mere tiebreaking tool, with no interpretive deference for statutes passed by razor-thin margins. It would strengthen through a middle ground requiring a clear or plain showing of unconstitutionality and affording some degree of interpretive flexibility. And, it would rise to a Thayerian maximum for statutes passed by a supermajority of both houses, at which the presumption would require upholding a statute, unless it can be shown

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<sup>232</sup> See *supra* notes 124–128 (listing several of these decisions).

<sup>233</sup> For example, it has been suggested that Chief Justice Roberts's vote in *Sebelius*, which did determine the result, was a switched vote and also that it was a modern-day instance of maximal, Thayerian deference. See O'Neill, *supra* note 47, at 171 (suggesting that Roberts's vote was Thayerian); Jan Crawford, *Roberts switched views to uphold health care law*, CBS NEWS (July 1, 2012), [http://www.cbsnews.com/8301-3460\\_162-57464549/roberts-switched-views-to-uphold-health-care-law](http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law) (suggesting Roberts switched); see also Caminker, *supra* note 8, at 87 (“[E]ach Justice gets to decide individually how much (if any) weight to give to the presumption of constitutionality in any given case . . . . Thus, the norm of Thayerian deference operates by . . . Justices acting atomistically . . .”).

to be unconstitutional beyond a reasonable doubt and include a significant degree of interpretive deference directing the Court to bend or alter its own constitutional doctrines to accommodate the statute under review.

Finally, this Article has attempted to show that many of the main possible objections to the argument either are unfounded, can be accommodated by case-by-case development of the application of the presumption, or require only limited exceptions or modifications to the application of the adjustable presumption.

The argument opens up several areas for future inquiry. One is to examine whether the adjustable presumption should apply even where the Court currently weakens or reverses the presumption, such as challenges involving enumerated or fundamental rights. Another is to investigate empirically whether the Court in fact defers more to statutes based on margin of statutory passage—which would support making this tacit practice explicit by adopting an adjustable presumption. Another is to investigate the bicameralism objection—is there a significant, systemic discrepancy in margin of passage between the House and Senate, and if so, which margin should weigh more in determining how strong the presumption of constitutionality should be? Finally, further research could investigate whether the arguments for applying an adjustable presumption of constitutionality to federal statutes also apply to state statutes, or for deferring more to executive actions of more popular presidents.