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A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society

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A JOB FOR THE JUDGES: THE JUDICIARY AND THE CONSTITUTION IN A MASSIVE AND COMPLEX SOCIETY†

*Neil K. Komesar**

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We have reached the 200th anniversary of our Constitution. Predictably, we still argue about its meaning and about the role of the judiciary in interpreting it. There are a wide variety of views and often heated debates about these questions. Yet, for all the appearance of breadth, this debate in its entirety seems out of touch with central features of constitutional law and the role of the courts in making it.

Today's theories of judicial review rely on a variety of images — judges reasoning toward moral evolution¹ or deliberating civic virtue² or discovering higher principles³ or perfecting the process⁴ or seeking and following the plan laid out by the Framers.⁵ There is grandeur in these images. Yet, however attractive, these images belie the struggle and reality of human decisionmaking in a complex society. To imagine that the Framers established a detailed plan which modern judges can simply discover and apply trivializes the complexity and difficulty of making a Constitution. Imagining courts as the central font of national principles, civic virtue, or moral evolution ignores the severe limitations of the judiciary. Deliberation and contemplation, no matter how attractive as attributes of individual decisionmaking, fit poorly in the much different world of societal decisionmaking.

It is time for constitutional analysts to form constructs faithful to the realities of constitutional decisionmaking. We live in an immense and complex society. Our public decisions are made by complicated processes in which voters, interest groups, lobbyists, and the press interact with legions of legislators, administrators, and other public employees.

These governmental processes produce countless government decisions. No matter how aggressive the courts or grandiose the constitutional theory only a tiny percentage of these governmental actions can ever be seriously reviewed by the judiciary. Whatever the fears of the proponents of judicial restraint, the judiciary is a societal deci-

1. See, e.g., Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985); Perry, *Noninterpretative Review in Human Rights Cases: A Functional Justification,* 56 N.Y.U. L. REV. 278 (1981).

2. See, e.g., Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29 (1985).

3. See, e.g., Fiss, *The Supreme Court, 1978 Term — Foreword: The Forum of Justice,* 93 HARV. L. REV. 1 (1979).

4. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* (1980).

5. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Bork, *The Impossibility of Finding Welfare Rights in the Constitution,* 1979 WASH. U. L.Q. 695.

sionmaker already severely constrained by its physical limits. Moral evolution, discovery of national principles, and the search for civic virtue — whatever those terms mean — are not dominated by the judiciary because they cannot be.⁶

Yet, on rare occasions, the federal judiciary plays a significant role in societal decisionmaking. These rare occasions define what we call constitutional law and are themselves defined by a basic institutional choice: the courts decide that they and not some other societal decisionmaker should resolve the substantive issue in question. From this vantage point, the study of constitutional law becomes the study of this institutional choice, which, in turn, means the study of alternative societal decisionmakers, their comparison and matching. The judicial role is defined by asking when a constrained and fragile judiciary should substitute its decisions for a sometimes badly malfunctioning political process.

The task facing judges is daunting. Before judges ever reach the various analyses proposed by most constitutional commentators, they already must have made broad-based and sweeping determinations allocating most decisions elsewhere. Even among the relatively small number of decisions in which judges take preliminary interest, they must continuously order and reorder the priorities for the use of their limited resources as needs for and strains upon those resources become more evident. The judiciary, like other societal institutions, must and does make difficult and debatable institutional choices even if judges do not always express or even recognize them. The central task for constitutional scholars is to make these choices clearer and to help judges and others to understand them and make them better.

This article attempts that task by exploring the elements of institutional choice in constitutional law. Part I takes an overview of the general division of decisionmaking responsibility between the political processes and the courts. It also examines the failures of existing theories to take account of this division of responsibility. Part II identifies two theories of political malfunction — those circumstances in which political processes are subject to significant doubt or distrust and, therefore, prime candidates for judicial review. Part III examines the characteristics — limits, biases, and abilities — of the judiciary and the potential for judicial response to the political malfunctions dis-

6. Physical capacity is not the only limit on judicial activity. Limits on judicial ability and institutional power also are important. Physical limits are not easily defined and are subject to complex interactions with considerations of judicial ability and the tractability of the societal issue involved. These questions will be considered in Part III.A *infra*.

My point here is that considering only physical limits, the judiciary cannot shoulder the heroic tasks suggested by these theories. This point is explored further in Part I *infra*.

cussed earlier. It explains why various forms of judicial response are more appropriate for some types of political malfunction than for others. The result is an overview of judicial response which provides insights into what constitutional law is and can be.⁷

This article and two previous ones show that institutional analysis is essential but largely ignored in present constitutional scholarship.⁸ This article confronts the task of building such an analysis, a task complicated by a number of factors. Lack of data and of existing discourse means that identifying the relevant characteristics of the key decisionmakers and matching their relative abilities with given societal issues is treacherous, and that applications of the theory to specific constitutional questions must too often be based on impressions and intuitions. The task is also complicated by the inevitable interplay between the choice of institutions and the choice of societal goals. Institutional function and malfunction must be defined in terms of some set of goals. In turn, whether any set of goals is sensible, attainable, or attractive depends on how it operates through real world institutions.

In order to show the importance of institutional analysis, this article inevitably makes assumptions about institutional abilities and societal goals. Many of the more controversial choices are considered at length in the body of the article.⁹ I have found the particular conceptions of institutional failure and comparison presented here, as approximate and rough as they are, very useful in understanding constitutional law, history, and commentary. But these particular conceptions are secondary. I am primarily interested in showing that careful analysis of institutional choice is essential for any constitutional theory no matter what its underlying perception of societal

7. The proposed analysis is used here for both positive (descriptive) and normative (prescriptive) purposes. Institutional forces are powerful enough that they force their way into judicial opinions and decisions. As such, institutional analysis is important in understanding what judges say and do. That does not mean, however, that the institutional analysis and choices made by judges are always or even usually above criticism. Therefore, institutional analysis enters into criticism and prescription as well as description and prediction.

8. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984) [hereinafter *Taking Institutions Seriously*]; Komesar, *Back to the Future — An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191 (1987) [hereinafter *Back to the Future*].

9. For the purposes of this article, for example, I have defined institutional function and malfunction in terms of the representation of the interests, desires, and preferences of the people. I am aware that such a choice of goals is unattractive to many analysts. Indeed, on some levels of analysis it is unattractive to me. As I explain in the body of the article, this specification of goals is, in part, the product of the inability of those who oppose preference to articulate alternative definitions of goals, let alone their institutional implications. Respect for citizen desires has important claims for a place in any definition of societal goals. Whatever its failings as a complete definition, I believe it serves sufficiently for present purposes. This subject is more fully explored in Part II.C *infra*.

goals, and that such an analysis must pay serious attention to basic features like physical resources and institutional size, the complexities of aggregate or collective decisionmaking, and the comparative nature of institutional choice. In this vein, the particular analytical conceptions and applications which follow are not meant to be the last word on the subject. Quite the opposite, they are meant to open the inquiry.

I. BASIC CONTEXTS

Before turning to an examination of the political process and the judiciary as alternative decisionmakers, we must briefly describe two contexts which are basic to the analysis which follows. The first is the institutional context — an overview of the division of responsibility between the judiciary and the political process. The second is the intellectual context — a brief review of the scholarly approaches to constitutional analysis. These two contexts are related and the failings of many theories lie in their incompatibility with the simple and noncontroversial overview of societal decisionmaking presented here.¹⁰

Very few governmental decisions have any serious potential for judicial scrutiny. Even at the height of the era of economic due process — the era of the greatest, or at least the broadest, judicial activism — only a tiny fraction of governmental action was actually subject to serious judicial review let alone at risk of invalidation. As a general matter, the courts pose no threat to most governmental resolutions of societal issues.

This limited judicial role is often ascribed to the questionable legitimacy of judicial dominance in a democracy. Evaluation of this common theme requires some subtlety. The terms of the Constitution and the writings surrounding its framing reveal considerable distrust of democracy and majoritarianism on the part of the Framers¹¹ — a distrust which played an important role in the construction of our Constitution and which, in turn, is central in the analysis of political malfunction which follows. Yet consistent with the theme of this article, the Framers were faced with constrained institutional choices and, in the end, they chose democratic forms even though they encumbered this democracy with skewed patterns of representation, screened it by elite electors, and balanced and checked it by various branches and

10. The critique of existing theories presented here is a brief review of the critiques presented previously in *Taking Institutions Seriously*, *supra* note 8, and *Back to the Future*, *supra* note 8. The critiques of the searchers for principles and fundamental rights can be found in *Taking Institutions Seriously*, *supra* note 8, at 425-40, and in *Back to the Future*, *supra* note 8, at 210-16. The critique of Ely's theory can be found in *Taking Institutions Seriously*, *supra* note 8, at 398-425. The critique of the originalists can be found in *Back to the Future*, *supra* note 8, at 194-210.

11. See Part II.D *infra*.

levels of decisionmaking. As such, majoritarianism remained and remains an essential component of our Constitution. The significant weight given majoritarianism by Framers who understood and feared its dangers makes judicial dominance an uncomfortable proposition.¹²

Beyond arguments about legitimacy, however, judicial dominance of societal decisionmaking is simply physically impossible. It boggles the mind to even imagine the judiciary seriously examining all governmental action. Government (aside from the judiciary) has grown much faster than the judiciary.¹³ Massive long-term governmental

12. Majoritarianism can take several meanings here. In general, it simply means majority rule — by one more than half. But it can refer to larger necessary majorities such as the two-thirds or three-quarters requirements which occasionally surface in the Constitution.

In theoretical work on collective decisionmaking, the term majority is really anything less than unanimity. In the field of public choice, a crossover between political science and economics, there has been a great deal of work done on the positive (descriptive) and normative (prescriptive) implications of less than unanimous collective choice mechanisms (majoritarianism). As a general matter, majoritarianism is always faced with the danger of cycling or intransitivity. This means that choice *A* can be preferred to choice *B* and *B* to *C* without it necessarily meaning that *A* will be chosen over *C*. Such cycling presents problems for the translation of citizen preference into collective action because it means that choice can be governed by how the issue is posed to the collective decisionmaker. In our example, *A* may win if paired with *B* but lose if paired with *C* although *B* would win if paired with *C*. Cycling and its normative implications for collective choice is the core of the famous Arrow Impossibility Theorem. See generally K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). The implications of cycling, both normative and positive, are nicely laid out in Dennis Mueller's excellent summary of public choice theory, D. MUELLER, PUBLIC CHOICE (1979).

The possibility of cycling is disturbing in a nonunanimous system and raises questions, at least in theory, about the reliance on nonunanimous collective choice inherent in our societal preference for majoritarianism. For present purposes, we can escape this quandary by taking as given the present system with its significant reliance on nonunanimous choice (majoritarianism). Any analysis of judicial review, as opposed to global constitutional reform, would have to take such a situation as given.

But, even if we were to move to the rarified world of global reform, majoritarianism would in all likelihood prevail at least for a large and complex society. Majoritarianism is flawed, but the alternatives — unanimity or dictatorship — seem worse. In particular, unanimity is unattainable in most instances. Indeed if it were unattainable for even a small percentage of societal decisions and nonunanimous choice had to be allowed in, such nonunanimous choice would quickly spread unless there was some way to specify property rights or other designations of those areas which were off limits to majoritarianism. As I have argued elsewhere, such initial specifications are highly unlikely if not impossible in real world constitution-making. See *Back to the Future*, *supra* note 8, at 198-99. We will return to this theme when we examine the "civic virtue" analysts. See Part II.C *infra*.

As a general matter, majoritarianism is an inherent part of our collective decisionmaking and would likely be so even if we opened the scope of inquiry to global constitutional reform. The issue here is the role of nonmajoritarian (less majoritarian) mechanisms like the judiciary in a system which is largely if sometimes uncomfortably built on majoritarianism.

13. In 1980 the total expenditure of the federal judiciary was about \$564 million. See FISCAL SERVICE, BUREAU OF GOVERNMENT FINANCIAL OPERATIONS, U.S. DEPT. OF THE TREASURY, TREASURY COMBINED STATEMENT OF RECEIPTS, EXPENDITURES AND BALANCES OF THE UNITED STATES GOVERNMENT 13 (1980) [hereinafter 1980 U.S. ACCOUNTS]. While the data in 1980 U.S. ACCOUNTS makes it difficult to calculate administrative costs for Congress, the executive branch, and the federal administrative agencies, a conservative estimate yields a figure in excess of \$94 billion — over 160 times the budget for the judiciary. See *id.* at 110-24, 132-508. In 1925, the analogous figures were approximately \$19 million for the judiciary, see DIVISION OF BOOKKEEPING AND WARRANTS, U.S. TREASURY DEPT., COMBINED STATEMENT OF THE RE-

programs like national defense, welfare, criminal justice, and education are administered by enormous agencies that employ millions of people. These programs produce reviewable action at a virtually uncountable rate.¹⁴ The physical capacity of the courts to review governmental action is simply dwarfed by the capacity of governments to produce such action.¹⁵

A central role for majoritarian decisionmaking and the severe limits on judicial resources do not, however, preclude a serious or important judicial role. The judiciary has the resources with which to review a significant, if relatively small, subset of governmental decisions and has done so especially in the past century. Our affection for democratic forms has been tempered throughout our history with

CEIPTS AND DISBURSEMENTS BALANCES, ETC., OF THE UNITED STATES 131 (1925) [hereinafter 1925 U.S. ACCOUNTS], and \$424 million for the political branches, *see id.* at 40-253, the latter approximately twenty-two times the size of the former. In other words, the administrative budget of the political branches had grown more than seven times as fast as the budget of the judiciary.

Although the most dramatic source of the difference is the growth in administrative agency budgets, *compare* 1980 U.S. ACCOUNTS, *supra*, at 140-508, with 1925 U.S. ACCOUNTS, *supra*, at 49-253, even the figures for Congress and the executive proper dwarf those for the courts. In 1980, that figure was over \$1.25 billion, or more than twice the judicial budget. *See* 1980 U.S. ACCOUNTS, *supra*, at 110-24, 132-38. In 1925, the budget for the federal judiciary (excluding expenditures for penal institutions) was only about thirty percent less than the administrative budget for Congress and the executive. *See* 1925 U.S. ACCOUNTS, *supra*, at 47-48, 131.

14. For example, the number of laws passed in a session provides some measure of legislative activity by federal and state governments. During the 98th Congress, 623 Public Laws were passed. CLERK OF THE HOUSE OF REPRESENTATIVES, 98TH CONG., 2D SESS., CALENDARS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AND HISTORY OF LEGISLATION 19-53 (1983). Approximately 70,000 bills were enacted by the fifty states during the 1983-1985 legislative sessions. *See* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 114-20 (1986-1987) (sum of the numbers in the tables therein). No similar compilation of data exists for local governments.

No complete measure of federal administrative activity is available, although the number of documents published annually in the *Federal Register* for incorporation into the *Code of Federal Regulations* provides some indication of federal rulemaking capacity. In 1986, 4,589 documents were published (5,154 in 1984 and 4,853 in 1985). Telephone interview with Internal Records Office, Federal Register, National Archives (June 1987). The quantity of state and local administrative regulations has not been reported. The number of informal, reviewable decisions by federal, state, and local agencies is unknown but probably "runs in the hundreds of millions or billions annually." K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 8 (1975).

15. For some indication of the strains of broad-based judicial review consider the discussion of the era of economic due process in Part III.A *infra*.

Of course, if one imagined that the judiciary could deal with vast sets of issues by some simple sweeping solution, physical capacity would not seem such a limit. Some types of issues may be more tractable — conducive to sweeping solutions. We will discuss the interaction between tractability and judicial response subsequently. *See* Part III.A *infra*. It is, however, a flight of fancy to imagine that the judiciary can issue broad maxims that would suffice as serious judicial review of the vast, diverse, and complex mass that is governmental decisionmaking.

There is, of course, no fixed limit on the size of the federal judiciary. The difficulties ascribed to physical limits might be swept away by increasing the size of the judiciary. But, given the tasks of review described previously, that increase would have to be very dramatic to negate the general point that physical limits are important in understanding constitutional law. Such changes seem such a remote possibility that they are ignored here.

fears and doubts. As we shall see, variations in the strain on judicial resources and the degree of doubt about the political processes help define the small subset of issues in which the judiciary will dominate.

The picture of societal decisionmaking presented here is simple: The political process is the dominant decisionmaker; the judiciary occasionally dominates, but is usually dormant.¹⁶ I have not yet attempted to describe (let alone prescribe) the borders between the small enclaves of judicial activism and the larger terrain of judicial passivism. Virtually all constitutional observers would have to agree with this loose description of judicial activity. It also seems loose enough to command general acceptance even as prescription. Judicial activity could be increased to include the tasks desired by the most activist legal commentator without violating this picture.

Yet, many existing theories of judicial review are based on conceptions which are inconsistent with even this simple picture. These theories often envision the judiciary as the institution entrusted with the revelation and protection of long-term principles, and public values.¹⁷ But public values, moral issues, and principles are implicated in all important societal issues, and do not differentiate among societal issues in any way which would define a set of issues for the judiciary to decide. If the courts are the major arbiters of public values, moral concerns, and basic principles and these are present for all important societal issues, the judiciary must dominate societal decisionmaking, with a minor and undefined role assigned the political process. Such a position violates the simple overview presented earlier.

A variant of the "searcher for principle" role — the "protector of fundamental rights or values" role — has found its way into constitutional jurisprudence. Judges are enamored of the notion of "fundamental rights." They tell us that if legislation impinges on these rights, then strict scrutiny is applied.¹⁸ This support from the judiciary has in turn promoted great interest in "fundamentalness" on the

16. Throughout this article, I contrast the judiciary with the political process. This division is meant to reflect the distinction between reviewer and reviewed. In that sense, the political process includes executive, legislative, and administrative decisionmakers at the federal, state, and local levels (and even state courts). I do not mean to suggest that all of these various processes are identical in such attributes as their tendency to malfunction or the form of malfunction. The relevant issue will always be the characteristics of that portion of the political process whose decision is under review. Nor do I mean to suggest that the judiciary is not, from some vantage points, part of the political process. The analysis here is concerned with judicial review, and for those purposes the judiciary stands in contrast to the rest of the political process whose actions it reviews.

17. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 23-28 (1962); Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Fiss, *supra* note 3, at 5-17.

18. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

part of scholars.¹⁹

The concept, however, cannot be taken seriously as a means of defining the judicial role. In its most direct form, it defines a judicial role which clearly violates the basic divisions of societal decisionmaking set out previously. If fundamental means important or basic, then the doctrine would give the most central societal decisionmaking to the judiciary, not the legislature. In a complex and vast society like ours, that would likely mean that the judiciary would operate on a scale way beyond its existing physical capacity and with an authority totally inconsistent with our basic notions.²⁰

The image of the judiciary as the determiner of fundamental values or long-term principles, a favorite among judges and commentators, simply does not fit the task for which it is most often used: defining the role of judicial review. The central theme of this article is that this role can only be defined by considering the relative ability of the courts and the political process to resolve societal issues, a difficult task.

Two alternative theories exist, however, which suggest shortcuts to this difficult task. First, John Ely's theory of judicial review allocates decisionmaking by simply dividing societal issues into two types — process and substance — and allocating process issues to the judiciary and substance issues to the political process. Ely strongly criticizes fundamental rights analyses like the ones just discussed for calling upon the courts to make basic societal value judgments.²¹ According to Ely, these value judgments are the business of the political process. The judiciary's only task is to make sure that political decisionmakers abide by the rules of the game. Courts must enforce these rules of the game because the players (the legislators) cannot police themselves.²² The courts should concern themselves with the *process* of making value judgments, not with the value judgments themselves. Ely's identification of two separate spheres facilitates a simple institutional allocation of societal issues: render unto the political process that which is

19. See, e.g., Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

20. It is quite clear that the courts actually use the term fundamental in ways unrelated to any common sense meaning. The Supreme Court's list of fundamental subjects excludes many of the most important in any society. Omitted are not only education, housing, and basic sustenance, but also peace and war, environmental concerns, and, in general, the use of most of those resources (material and human) that seem crucial to our welfare — societal or individual. The Supreme Court has made clear that societal importance is not the bench mark of what is "fundamental" — a message not very difficult to read into the observed pattern of their decisions. The use of fundamental rights in constitutional jurisprudence is examined and critiqued in Part III.B.2 *infra*.

21. J. ELY, *supra* note 4, at 43-72.

22. See *id.* at 101-03.

the political process' (substance) and render unto the courts that which is the courts' (process).

But this neat split of issues with its underlying idea that judicial review can take place without judicial value judgments is based on a basic misconception.²³ It reflects a recurrent theme that the decisions made by courts and legislatures are somehow different. It may be that courts and legislatures — or more broadly, the judiciary and the political process — decide differently. Indeed this article supposes that they do. But that does not mean that they operate on different issues. Judicial review is judicial reconsideration of an issue already decided by another societal decisionmaker. When that reconsideration leads to invalidation of the governmental action, the courts are remaking social policy. Courts are operating as alternative societal decisionmakers.

Ely's belief that reaction to problems in the political process should be important in defining the judicial role is one I share. But judicial concern about political malfunction does not free the judiciary from having to make societal decisions and, therefore, basic value judgments. Political malfunction only defines one element in the allocation of societal decisionmaking. An adequate analysis of this allocation also requires consideration of the ability of the judiciary to make (or remake) these societal decisions. The issues Ely terms "process" may have special attraction for the courts because their correct determination improves the political process. But these issues like any other societal issues demand value judgments and, therefore, pose questions about relative institutional ability which cannot be resolved by Ely's simple dichotomy.²⁴

Originalism offers a second "easy way" around the difficulties of institutional choice. According to originalism, no one in the present generation needs to choose among societal decisionmakers since those choices were already made by the Framers. There is, of course, the institutional choice whether to be bound by the decisions of the Framers or to remake that decision now. Much of the debate about originalism involves the question of whether the original intent should be followed. But that debate is largely pointless.

On virtually all important issues of institutional choice or substantive results, the Constitution and the intent of the Framers remain

23. There are several problems with Ely's analysis. These problems, along with the virtues of Ely's approach, are discussed in *Taking Institutions Seriously*, *supra* note 8, at 398-425. Other aspects of Ely's theory are considered in Part II.C *infra*.

24. This issue is considered at length in Part III.B.1 *infra*.

equivocal.²⁵ The brief text of the Constitution offers little detail on institutional allocation; most of the detailed provisions of the Constitution concern institutional design. Nor will an examination of the surrounding records yield unequivocal results.

Answers from the past are unavailable for many reasons. The logistics of record keeping and the identification of relevant views among conflicting statements provide problems. Problems in the use of language, no doubt tempered by the Framers' desire not to bind future generations unnecessarily, also led to equivocal results.²⁶ Perhaps most important, constitution framing in the American experience is a collective enterprise. The original Constitution was the product of group decisionmaking — the Philadelphia Convention and the state ratifying conventions. In turn, the Civil War amendments were the product of Congress and the state legislatures. Collective intent is extremely difficult if not impossible to define, let alone unequivocally establish in a particular instance. Like the analysis of other large processes, the analysis of constitution framing, an example of aggregate decisionmaking, forecloses simple extrapolation from individual decisionmaking and harbors the possibility for counterintuitive results.²⁷ Despite the continuous assertion that original intent dictates results, careful analysis indicates otherwise.

There are no simple shortcuts around the difficult questions surrounding the allocation of societal decisionmaking. By a gradual process of accretion, the federal judiciary has acquired an increasingly significant role in this allocation. The rest of this article attempts to construct an analytical framework capable of understanding and improving these allocative decisions which form the core of constitutional law. The analysis builds on themes which have already surfaced such as the importance of resource constraints and the degree of distrust of popular government.

The formulation proposed here is, in concept, quite simple. Judges should, and to a significant extent do, consider the relative ability of the political process and the judicial process to resolve the societal issue in question. Because so much must be left with the political process, a heavy presumption of control by the political process will inevi-

25. This subject is considered at length in *Back to the Future*, *supra* note 8, at 194-210. The treatment here is a brief recap of that analysis.

26. Such problems of language are discussed in *Back to the Future*, *supra* note 8, at 198-203.

27. Prominent among these is the possibility of cycling discussed earlier. See note 12 *supra*. Such occurrences throw substantial doubt even on some of the most substantially documented assertions of original intent. See *Back to the Future*, *supra* note 8, at 203-10 (examining Raoul Berger's assertions about the fourteenth amendment).

tably result. One consideration in overcoming this presumption is the degree of malfunction in the political process.

The existence and severity of political malfunction, however, is only part of the institutional balance which defines judicial review. The issue is the *relative* ability of the judiciary to rework the societal issues involved, requiring us to scrutinize the judicial alternative also. Like the analysis of the political process, the analysis of the judiciary must recognize the systemic character of the adjudicative process. In the rest of this article I will construct a theory of political malfunction and match it with the potential for judicial response.

II. POLITICAL MALFUNCTION

Theories of political malfunction should be able to integrate those features of political decisionmaking which have traditionally troubled people, and be sophisticated enough to recognize the complexity of decisionmaking in our society. They must be simple and intuitively appealing without totally suppressing complexity and the existence of counterintuitive features. The two simple conceptions presented here capture basic impressions of political malfunction common both today and throughout our constitutional history. Yet they also comprehend the systemic nature of societal decisionmaking, which goes beyond the intentions, purposes, or desires (good or evil) of government officials to recognize a complex variety of interactions between these officials and the general populace or subgroups (constituencies) within that populace.

A. *The Spectrum and the Poles: Fear of the Many and Fear of the Few*

Two visions of political malfunction — one stressing fear of the many and the other stressing fear of the few — coexist in our traditional views of government. At various times and by various parties, one or the other of these conceptions has been envisioned as the sole or paramount evil. In fact, however, both conceptions are viable representations of serious political malfunction applicable to different but important instances of political decisionmaking. These polar conceptions and their different spheres of relevance form the core of the theory of political malfunction employed here.²⁸

Recent scholarship by John Ely and Bruce Ackerman about the

28. I refer to the conception of political malfunction which stresses the undue influence of the majority at the expense of the minority as "majoritarian bias" and the conception which stresses the undue influence of the minority at the expense of the majority as "minoritarian bias."

famous *Carolene Products* footnote underscores the importance of both of these polar conceptions as well as the conflict between them. *United States v. Carolene Products Co.*²⁹ was one of a set of cases which marked the end of the era of economic due process and ushered in the modern trend of easy validation of economic regulation. The case is most important, however, not for what it decided — that a federal ban on the sale of milk substitute was valid — but because of what it announced it had not decided. In footnote four, the Court declared that it was not deciding to retire from serious judicial review of all types of legislation.³⁰ Legislatures may be given wider leeway but they were not given *carte blanche*.

In the third paragraph of the footnote, the Court expressed special concern about statutes where “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”³¹ In his theory of judicial review discussed earlier, John Ely hews closely to the position of the *Carolene Products* Court.³² He uses the conditions set out in the footnote to define malfunction of the political process and with it the role of constitutional judicial review. His approach echoes strongly the Court’s concern about the treatment of “discrete and insular minorities.”

In a recent article, Bruce Ackerman argued that this conception of legislative malfunction, if it ever correctly captured the dominant form

29. 304 U.S. 144 (1938).

30. Footnote four reads:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 297 U.S. 233; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra*; on interferences with political organizations, see *Stromberg v. California*, *supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; or whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 152 n.4 (some citations omitted).

31. 304 U.S. at 153 n.4.

32. J. ELY, *supra* note 4, at 73-104.

of legislative malfunction, fails to do so now.³³ In his view, the insularity and discreteness which characterizes racial and religious minorities has become a political virtue allowing these groups to more easily organize and influence political decisions. Thus, he contends that today judicial concern should shift to nondiscrete and noninsular groups where dispersion and assimilation make organization and adequate representation difficult. In particular, Ackerman points to such groups as women and the poor. Ackerman's theory represents a well-articulated alternative to such *Carolene Products*-based theories as that of John Ely.

Although there are serious problems with both Ackerman's and Ely's analyses,³⁴ the work of these two constitutional scholars highlights the ongoing significance of these two polar conceptions of political malfunction and the tension between them. This tension between

33. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

34. The form of political malfunction Ackerman articulates is much broader and much older than he indicates. The overrepresentation of concentrated minorities was a major concern in the framing of the Constitution, in the Jacksonian era, and in the post-Civil War period. See note 53 *infra*. This concern was influential in shaping judicial review during the era of economic due process where there was significant judicial distrust of legislation like that considered in *Carolene Products* (the case, not the footnote). Indeed the classic example of a dispersed and unorganized group is consumers, who are damaged by a political bias in favor of those well-organized minorities of producers we have come to call special interests.

The unseen lineage and breadth of this form of political malfunction seriously reduces the cogency of Ackerman's position on judicial review. For example, he extols the wisdom of the *Carolene Products* Court in breaking from the era of economic due process. This position is the shared gospel of virtually all modern constitutional scholars: the era of economic due process was bad. Yet this bad era focused at least part of its attention on special interest legislation. When that era ended and a greater presumption of constitutionality was reestablished, the change provided a great deal more breathing room for the very bias which concerns Ackerman. See J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 74-75 (1977). The potential for overrepresentation of discrete minorities in the form of special interest legislation remains high today. The conception of the legislative process Ackerman points to in asserting that women and the poor need greater protection also means that consumers and taxpayers need even greater protection.

I am not asserting that women and the poor do not have special claims for protection or that if they are to be given a special place we must return to the era of economic due process. We will consider that subject later in the article. I am asserting that a theory of judicial review based solely on a conception of political malfunction which stresses the problems of dispersion and lack of organization will not provide the route to the positions Ackerman advocates. Even if the theory of political malfunction Ackerman proposes were better tailored to achieve the results he seeks, however, it would be problematic because it is based solely on the existence of political malfunction. As such it, like Ely's theory, is single institutional rather than comparative institutional. A complete institutional analysis requires that we also consider the limits on the judiciary. As we shall see, variation in the ability of the judiciary rather than political malfunction explains the stronger case for gender relative to economic due process. Analysis of judicial ability also helps explain why, despite the seriousness of bias against dispersed majorities, judicial review does and should remain concerned with protection of discrete and insular minorities. As we shall see, there are also reasons to envision the political malfunction associated with gender and poverty as quite different. See Part III.B.2 *infra*.

The problems with Ely's theory have been discussed at length in *Taking Institutions Seriously*, *supra* note 8, at 398-425. Other aspects have been considered in Part I *supra*, and will be considered in Part II.C *infra*.

majoritarian bias and minoritarian bias provides a way to understand our constitutional tradition by exposing the character of distrust of the political process at any given time and over time. Neither of these polar forms of political malfunction dominates all times or all aspects of any one time. That these conceptions of political malfunction have both a long history and an intuitive appeal today warns against eliminating either characterization from institutional analysis. Ackerman and Ely fail to understand this. This article will focus on those factors which make one or the other of these forms of malfunction more likely in a given setting. The ensuing sections examine these conceptions, their basic settings, their traditions and history, and their parameters and determinants.

B. *The Spectrum: A Closer Look at the Definition of the Polar Conceptions and a Search for Determinants*

When de Tocqueville used the phrase "tyranny of the majority" or Madison spoke of the deleterious effect of majoritarian factions, they did not explain the mechanics of these evils. Although we can sense the problems inherent in suggestive phrases like tyranny of the majority or special interest legislation, it is not as easy to spell out those elements which define, let alone produce, these skewed allocations of influence.³⁵ What constitutes majoritarian or minoritarian bias? When is it more likely that we will have majoritarian rather than minoritarian bias? This section explores these questions beginning with a brief description of minoritarian and majoritarian bias, which relates both forms of malfunction to the same skewed distribution of impacts or effects. It then examines the factors which make one or the other of these biases more likely.

1. *Minoritarian and Majoritarian Bias Defined*

Minoritarian bias supposes an inordinate power of the few at the expense of the many. The power of these few stems from better access to the seats of power through personal influence, organization, information, or sophistication. In our society, influence can be gained by identifying important political figures and delivering what those political figures want. The terms of trade may be as crass as graft or as innocent as information. Honest public servants commonly lack the information they need for decisionmaking. Educating these decisionmakers is a route to influence. Elected officials can also be influ-

35. Since 1980, over fifty law review articles have employed some variant of the phrase "tyranny of the majority." None define it.

enced by promises of campaign contributions or threats of negative media.

Graft, propaganda, and political support take organization and resources. Here a majority, each of whose members suffers only a small loss from a government action, can be at a significant disadvantage to a minority with large per capita gains. If the per capita loss is low enough, members of this majority may not even recognize it. Envision a social program which would produce ten million dollars in benefits spread over ten individuals but which imposed one hundred million dollars in losses spread over ten million people. Though total costs easily outstrip total benefits, it is entirely plausible that the program would be implemented without opposition. The loss is so small per capita that members of the majority may lack the incentive even to recognize the existence of the legislation, or that they may be harmed by it.

Even if a member of the majority knows of the proposed legislation and recognizes its dangers, the low personal stakes limit the motivation to expend resources aimed at influencing the outcome. Each individual has small incentive to spend time or money in organizing the efforts of others. Such efforts are further frustrated by the limited likelihood that other members of the majority will respond. These other members may not recognize the dangers in the proposed legislation, and therefore expenditures must be made to educate them. If they do understand, they will be inclined to "free ride": they may refuse to contribute supposing that others will carry the load. When free riding becomes pervasive, no one contributes and the position goes unrepresented. In turn, the prospect that others will free ride and the expenditure of resources necessary to overcome it may well discourage any efforts to activate the dormant majority.³⁶

Majoritarian bias can be defined as an opposite response to the same skewed distribution of impacts which characterized minoritarian bias. The difference lies in our suppositions about the political process. If we suppose that everyone understands and votes their interests then, in a political process which counts votes for or against but which does not consider the severity of impact or the intensity of feeling about the issue, a low-impact majority can prevail over a high-impact minority even though the majority will gain little and the minority is harmed greatly. The power of the many lies simply in their numbers and the bias arises because the few are disproportionately harmed.

36. See generally M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

2. *Determinants of Bias*

These two quite different conceptions of the political process display two quite different modes of influence. Greater organization is the political advantage of the group with more concentrated impacts; more votes is the political advantage of the group with more dispersed impacts. Both biases seem to share a common context — a skewed distribution of impacts. The same distribution of impacts (small per capita on one side and large per capita on the other) can cause severe problems of vastly different sorts depending on the assumptions one makes about the workings of the political process. Different settings or contexts have different potential for these biases. In this section, we examine those factors which make one bias more likely than the other.

a. Information, organization, and the choice of bias. The costs of obtaining information about relevant issues and the costs of organizing efforts to influence government decisions are important in determining the likelihood of a given bias. Factors which increase information or organization costs make minoritarian bias more likely. Factors which decrease information and organization costs increase the chance of majoritarian bias. For example, more information and sophistication is necessary to recognize, understand, and address more complex issues. In this connection, continuing or long-term exposure to an issue provides an advantage. Those who have dealt with an issue often acquire information and sophistication which the recently exposed must now obtain.

The experience necessary to identify and react to social issues does not always or even usually emanate from a careful, calculated immersion in a subject. Basic cultural institutions such as religious and ethnic associations provide common background which make some societal distinctions or issues more familiar. Basic divisions and distinctions like ethnicity, race, and gender evolve into simple symbols which, in turn, create easy association and interest in issues directly involving them. These simple symbols and associations provide basic building blocks for cognition which make attempts to inform or organize a group easier.

The importance of information underscores the power and importance of the media. In a society with a growing population and ever more complex and changing technology, the influence of the media increases. Issues flagged by the media or by public figures who gain the attention of the media are issues about which the public has "easy access." Media attention and political malfunction can interact in a number of ways. Media manipulated by concentrated interests be-

comes just another channel for minoritarian bias. On the other hand, investigative reporting which uncovers information hidden from the general public by politicians or special interests helps correct minoritarian bias. Easy availability of information to a majority who would not otherwise understand an issue or even perceive its relevance to them severely lessens the probability of minoritarian bias.³⁷

Effective influence also requires understanding the process of influence itself. Some government processes are more accessible than others. The larger the number of decisionmakers, the more complex their procedures, and the more physically remote they are, the more difficult it is to understand how the process of influence works and the more expensive it is to use it. High-paid, professional lobbyists have knowledge and contacts which they sell to those who wish to influence the process. Less accessible processes require more expertise and, in turn, stress the need for organization and the pooling of funds in order to accumulate or purchase this expertise.³⁸

The important element here is the *degree* of complexity, understanding, and access and, in turn, the *degree* of advantage for concentrated interests. This advantage varies with subject matter, jurisdiction, and the characteristics of the decisionmaker. The more the general public understands and the more accessible the process of influence, the less the advantage of concentrated over dispersed interests. As the advantage of concentrated groups lessens and dispersed groups increases, we see a trade-off between the danger of minoritarian bias and the danger of majoritarian bias.

b. Mixed biases and the case of the catalytic subgroup. We have thus far treated the majority as though each member had the same per capita impact. Dropping this assumption reveals an important potential ingredient in activating the majority. Subgroups within the otherwise low per capita majority may have per capita impact high enough to provide members of this subgroup with sufficient incentive to educate and activate the less interested members of the majority. A concentrated subgroup capable of awakening the dormant majority has a potent source of political clout unavailable even to better informed, organized, and funded minorities — the threat of a majoritarian uprising. Whether and to what extent such a subgroup can actually activate the majority depends on the factors we have already discussed. In es-

37. We will return to the role of the media in the correction or aggravation of political malfunction in our consideration of the role of first amendment protection. See Part III.B.1 *infra*.

38. As we shall see, conflict over such structural elements which determined the accessibility of federal political officials fueled the debates over the original Constitution. See Part II.C *infra*.

sence, the concentrated subgroup operates as a catalyst increasing the probability of activating the majority.

3. *Majoritarian Bias and the Characteristics of Protected Minorities*

Significant judicial concern about mistreatment of politically weak minorities, foreshadowed in the *Carolene Products* footnote discussed previously, surfaces in modern equal protection law with its focus on well-defined racial, ethnic, and religious minorities. A similar concern for politically disadvantaged minorities is patent in the notion of majoritarian bias employed in this article. But the criteria used by the courts to define the need for minority protection — discreteness, insularity,³⁹ and immutability⁴⁰ — appear quite different from the characteristics of majoritarian bias stressed here — an active majority and a disproportionately harmed minority. Despite initial appearances, however, strong links exist between those characteristics traditionally stressed by the courts and the likelihood of severe majoritarian bias as defined in this article. Although a full examination of the judicial treatment of minorities must wait until we have more fully explored the limits and potentials of the judiciary, exploration of these links here provides a better understanding of the conceptions of political malfunction just presented.

Given the skewed distribution of impacts, the more discrete, insular, and immutable the minority, the more likely the existence of a stable majority willing to suppress the minority. Because majoritarian bias supposes large per capita costs for the minority with much lower per capita benefits for the majority, slipping into minority status carries dire results. In such a situation, members of the majority would want to feel secure that the significant negative impacts of this government action did not apply to them. To reassure members of the majority, the disadvantaged minority would have to be clearly defined. In other words, these minorities would have to be safe targets.

Discrete, insular, and immutable minorities are safe targets. By definition, discrete groups are easily delimited and identified — perhaps even physically identifiable. The clear criteria associated with discreteness promise less error in administration and greater security for members of the majority. Insularity limits interaction with the majority, minimizing the chance that negative impacts will indirectly spill over to the majority. Insular groups are often geographically local-

39. *See, e.g.,* *Graham v. Richardson*, 403 U.S. 365 (1971); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

40. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

ized, making it easier to target effects without fear of spillover.⁴¹

A group can be immutable in two senses — entry and exit. As the term is commonly employed, it denotes the inability to escape a given classification. If someone is black, they stay black. As such any damage which befalls the group falls on its members forever; it cannot be avoided. This usage is consistent with the idea of gaining benefits by picking on a safe target. Exclusion from jobs or other opportunities works most effectively for the majority if the members of the minority cannot escape to the majority.

Immutable can also mean that a category cannot be entered. In this sense, a completely immutable group is the safest target of all since there is no probability that a member of the majority will suffer the disadvantages. Some categories such as race and gender are immutable in both senses. Others, such as alienage, are immutable only in the second sense, but that is sufficient to make them a safe target.

Insular, discrete, and immutable minorities are in danger because a majority, if it were politically active, would be willing to impose disproportionate burdens on them which it would not as freely impose if members of that majority faced a substantial risk of bearing these burdens.⁴² As such, disproportionate burdens on minorities, one of the conditions for majoritarian bias, is closely linked with insularity, discreteness, and immutability.

Majoritarian bias, however, also requires a politically active majority. The distinctions and divisions which define traditional minorities ease the task of activating the usually dormant low-impact majority. The more familiar a classification or source of difference the easier it is to draw the dormant majority's attention and move it to act. Discreteness and insularity contribute here: strong, clear distinctions simplify communicating with and organizing the majority. Ethnic, religious, and racial differences are simple and traditional sources of definition. People, exposed to these simple symbols at an early age, recognize and react to them easily. Simple symbols decrease the costs of communication, information, and organization, thereby making it more likely that the majority will be active rather than dormant. When these sim-

41. When the *Carolene Products* Court chose the phrases "discrete and insular" to define minorities in need of judicial protection, Nazi racism was on the rise in Europe. Jews, a traditional minority, were ghettoized and forced to wear identifying badges, and so became easily identifiable safe targets for dismissal from jobs, confiscation of property, and extermination. Had the threat of such severe mistreatment been more diffuse, it would have not been nearly so politically tolerable to the German people.

42. See *Railway Express Agency v. New York*, 336 U.S. 106, 111 (1949) (Jackson, J., concurring).

ple symbols also define safe targets, political figures can tap majority support.

Thus, the criteria used to identify traditional minorities also identify severe instances of majoritarian bias. Disproportionate impacts require safe targets. Such safety is greatest when the target is discrete, insular, and immutable. Activating a dormant majority is made easier by the simple symbols inherent in traditional categories like race, religion, ethnicity, and gender.

C. *The Focus on Systemic Representation*

The conceptions of political malfunction I have set out picture governmental decisionmakers as large and complex institutions in which the interaction of many forces or influences determine outcomes. Decisions are made by large systems rather than a few government officials. Political malfunction is defined by failures of representation in a system as a whole. This emphasis on the larger system better reflects the realities of governmental decisionmaking than approaches which focus only on the characteristics of official actors such as legislators. As such the conception employed here differs significantly from several existing constitutional theories which define political malfunction in terms of the mental states of government officials.

John Ely's theory of judicial review is the preeminent example of an analysis built around a conception of political malfunction which stresses the importance of the mental states of government officials. This conception is particularly important to Ely's analysis of equal protection law. For Ely, the essence of political malfunction is illicit motivation on the part of governmental officials in the form either of direct animosity to a given group or self-serving stereotypes which degrade this group. Ely offers a simple hypothetical to make his point.⁴³ A platoon leader is given the task of choosing three men for dangerous duty. If the leader chooses on a random basis or on the basis of some characteristics appropriate to the task, the choice would be considered fair. If, on the other hand, the leader chooses based on personal animus or self-serving stereotypes, the choice would be considered unfair and inappropriate. The central feature of political malfunction, Ely would argue, is the motivation of the government decisionmaker.

In contrast, the conception of political malfunction presented in this article emphasizes forces permeating the entire political process, such as voting rules, jurisdictional size, or characteristics of the popu-

43. J. ELY, *supra* note 4, at 137-39.

lation (especially those concerned with the issue). Voters, lobbyists, and others of influence are as important as legislators. Once one considers the implications of these systemic forces, a conception of political malfunction based on the personal animus or stereotyping of legislators seems too limited a basis for defining political malfunction. A closer look at Ely's simple hypothetical shows why.

Suppose we were aware of a platoon leader who hated or stereotyped the children of his immediate superiors. We might consider this unfair or inappropriate, but would we call for external review and control? Incentives already in place make it unlikely that the platoon leader would base his selection on these mental states. In fact, the examples Ely uses to show his theory at work in constitutional law always involve judicial protection for minorities or other groups who are politically underrepresented in the larger system. Ely's theory, however, defines a much broader set of persons in need of protection than do his examples. Legislators differ from and may dislike or prejudice people who are not underrepresented in the general political process. Most legislators are not extremely wealthy. Most are not or have not been farmers or members of labor unions. Legislators may well envy and despise the rich and hold simplistic and demeaning views of laborers or farmers. But these groups are usually able to defend themselves within the political process. Farmers and union members are a powerful voting block. The wealthy are a concentrated group likely to be able to influence the political process through such channels as political contributions, graft, or lobbying. These groups do not need protection outside of the political system because animus toward these groups by governmental officials is controlled by factors within the system. Ely's theory calls for such protection.

Legislator animus or stereotyping also seems a dubious necessary condition for political malfunction. Legislation which severely harms a racial minority underrepresented in the larger political process seems the product of a political malfunction whether passed by kindly legislators who, wishing to stay in office to do good on other subjects, reluctantly voted for it, or by voting automatons simply serving as conduits for the desires of their constituents, or by racist legislators venting their own hatred and racial stereotypes. We might view some of these legislators as better or worse people. But their personal attractiveness is not the primary issue. The issue is or ought to be the chance that a group will be seriously underrepresented in the political process as a whole.

Hateful legislators whose desires run counter to the forces of influence *within* the political system are likely to be controlled by that sys-

tem itself. On the other hand, if systemic forces create a strong tendency toward either of the malfunctions we have identified, the presence of hateful legislators is only a convenience. Recall that we are building conceptions of political malfunction in order to aid in the difficult decision of how to allocate the scarce resource of judicial review. The conceptions we construct should emphasize those elements which will be least likely to be corrected within the political process. In my view, those elements are systemic.⁴⁴

Another set of constitutional theories of judicial review also focuses on the mental states of government officials. The authors of these theories stress the failure of government officials to concern themselves about values higher than individual private interest. Phrases like "deliberation" and "civic virtue" permeate these theories.

Cass Sunstein's theory of the judicial role in public law is the most developed of these theories.⁴⁵ In Sunstein's view, political malfunction, and therefore the judicial role, are defined by the failure of legislators to go beyond selfish concerns — theirs or those of their constituents — to deliberation of a higher public interest. Sunstein argues that his theory most closely captures the views of James Madison. We will address that argument subsequently.⁴⁶ But, taken on its own, Sunstein's basic institutional analysis suffers from the same problems as Ely's, in addition to problems inherent in the vision of judges as the determiners of general principles or the searchers for morality or moral evolution.

Governmental failure to deliberate seems an unworkable sufficient condition for judicial review. Very little governmental action is the product of removed, neutral, public-interest deliberation. Failure of these conditions would suggest that virtually all such actions would be candidates for serious judicial scrutiny. Such a situation would grossly violate even the weakest requirements of institutional allocation under our Constitution.⁴⁷

Failure of deliberation also fails as a necessary condition. Deliberative, neutral decisionmaking is one of those attractive images that pervades constitutional scholarship. Government officials in careful thought may seem unbiased and trustworthy when envisioned in isolation. But societal decisionmaking never leaves these officials isolated. Deliberation and severe political malfunction are compatible.

44. We will discuss the Supreme Court's use of a test like that proposed by Ely after we have examined judicial limitations more closely. See Part III.B.2 *infra*.

45. Sunstein, *supra* note 2.

46. See Part II.D *infra*.

47. See Part I *supra*.

Well intentioned, high-minded government officials can easily be the instruments of severe political malfunction in a context which distorts what they see and understand or which distorts their decisions in aggregation with others. The complexity and size of society make each government official dependent on others in society for information, wisdom, and aid in shouldering the responsibility of decision-making. This interdependence operates in a wide variety of channels or processes. Some views are overrepresented in these processes and, therefore, in the perceptions of these officials. Honest administrators who hear only the views of organized special interests may believe they are deliberating the public interest. Other views are absent and, therefore, unavailable to correct misconceptions or otherwise discipline these officials. In such a context, legislators who believe that women should be protected from the evils of the marketplace or that blacks are better suited for trade schools or that citizens should be preferred over aliens for government jobs may be honestly deliberating the public interest. The recent Iran-Contra affair has shown that severe problems can exist even when government officials operate according to zealously maintained visions of the public interest. Malfunctions lie in the general political process, not the mindset of the governmental actors.⁴⁸

Deliberation and its relationship to a higher sense of citizenship form an important theme in recent scholarship.⁴⁹ The rejection of self-interested preference as the sole basis of societal decisionmaking has strong intuitive appeal. But as the foregoing analysis shows, the way these commentators employ this notion has severe analytical problems. Although constitutional commentators are impressively eloquent in their rejection of selfish preference, they are disturbingly mute about alternative conceptions.

Paradoxically, rather than articulate an alternative conception of societal good, these commentators attempt to sidestep the task with simplistic institutional arguments which equate a societal decisionmaker or a trait of decisionmaking with the existence of these otherwise undefined conceptions of societal good. Sunstein's reliance on deliberation is an example. It is certainly not the only or the most

48. It is Sunstein's position that Madison hoped that removal of national legislators from local majorities by distance and, to some degree, by indirect election would produce the opportunity for contemplation of a higher good. As the subsequent discussion of the framing of the original Constitution will show, there are reasons to doubt Sunstein's perception of Madison's position. As we shall see, even if Sunstein is correct about Madison, the resulting removal of national legislators from local majorities is likely to substitute one bias or distortion of influence for another.

49. See Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986), for a good presentation of the various positions on civic virtue.

fragile example.⁵⁰ But, as the analysis of Sunstein's position shows, simplistic institutional arguments, especially those which ignore sys-

50. A classic example of a futile attempt to associate philosophical position and institutional outcome is found in the approach of David A.J. Richards and Ronald Dworkin. See, Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979); R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 90-94, 188-92 (1977). Their logic operates as follows. The legislature is clearly the utilitarian determiner (the proposition is considered so obvious that no argument is offered). On this basis, rights which operate to invalidate legislation show the existence of strong anti-utilitarian principles in our Constitution. Further, since the legislature is utilitarian, it cannot check its own process against anti-utilitarian constructs. This must be done by the judiciary. Thus, the authors prove both the existence of anti-utilitarian principles and the role of the judiciary in protecting them.

The argument that utilitarianism is associated with the political process while anti-utilitarianism is associated with the judiciary is fatally simplistic. The majoritarian political process is hardly a perfect determiner of utilitarian outcomes; the analogous consideration of representation of citizen desires presented here shows that. A utilitarian Constitution would not necessarily allocate decisionmaking to the legislature, or indeed form that legislature in the most directly democratic manner. It is easy to conceive of trumps on the legislature in a utilitarian system. Therefore, the existence of such trumps does not indicate the existence of anti-utilitarian elements. In some instances courts removed from the political process may be superior determiners of the utilitarian good.

Nor is it by any means clear that the superior determiner of the anti-utilitarian ideal (or ideals) is the judiciary rather than the legislature or the executive, let alone whether we would prefer the federal or state judiciaries, legislatures, or executives or how these various institutions should be designed or structured. Even if we were to assume Dworkin's and Richards's first argument, that the legislature is always the superior determiner of utilitarianism, it does not mean that the legislature is not also the superior determiner of anti-utilitarianism. To be superior in one vein does not make the entity inferior in another.

To go further one would have to specify how nonutilitarian principles are designated and protected. Anti-utilitarians often assign the judiciary this role because the judiciary is considered the most deliberative or contemplative branch. Even assuming these traits, why should we assume that they are essential in the designation and protection of nonutilitarian principles? The relevance of deliberation is supported, if at all, by analogy to *personal* search for principles higher than self-interest. These arguments confuse *aggregate* (societal) and *personal* (individual) decisionmaking. The modes by which we attain the higher good in a large society may be quite different from the manner in which we search for that good on a personal level. There are good reasons to believe that on the societal level this search is usually (but not always) better accomplished by the less deliberative political process than by the more deliberative judiciary. See *Back to the Future*, *supra* note 8, at 210-16.

Nor are arguments about the inability of the legislature to police itself helpful. These are simply arguments for institutional allocation by default, which cannot hold up in a sophisticated institutional analysis. Allocation by default is a common institutional argument made by constitutional scholars. In one fashion or another, problems with the political process are revealed and the judiciary swept into place by the assertion that since they are the only entity outside this defective political process they must be the determiner. But such arguments are flawed.

The legislative process is not monolithic. It does not fit the image of the evil individual who would hardly be likely to police himself or herself. There are millions of individuals — and numerous interests, positions, and factions — operating within the process. These positions operate to balance and control each other. The degree and form of this internal control varies over time. As we have seen, this is the mechanism of control on which we rely in most instances. I would hardly argue that this is the ideal, or more importantly, even the optimal means of policing in all instances. But it cannot be dismissed a priori. Institutional allocation cannot be determined simply by a bromide like "one can't police oneself." In a complex institutional setting in which all institutions are highly constrained and imperfect, the defects in one process do not validate allocation to an alternative. These defects may be necessary conditions, but they are far from sufficient ones.

temic elements, are insufficient as institutional analyses let alone as definitions of the public good.

The proponents of the anti-preference position must do more than assert the need for more than preferences. They must articulate these principles and carefully consider their relationship to that complex allocation of decisionmaking which is constitutional law. There is no simple correspondence between a sophisticated definition of the public good and a specific allocation of societal decisionmaking. Basic institutional choices like the definition and role of the legislature, executive, or judiciary and indeed the very nature of government are not self-evident from a given definition of the public good or vice versa.

There is a subtle, iterative relationship between institutional choice and the choice of the public good. Clearly institutional choice or analysis is dependent on the definition of the public good which these choices are meant to serve. On the other hand, conceptions of the public good have little meaning without some sense of how they will be achieved. A conception of the public good which cannot come into being makes little sense.

What we mean by the public good is often conditioned by our assumptions or beliefs about how societal institutions function. Affection for liberty or freedom and the definition of particular liberties or freedoms seem linked to particular fears of government misbehavior. The civil or natural rights of a given age seem closely related to recent histories of government misbehavior concerning these subjects.⁵¹ The more sophisticated we are about institutional behavior and those factors which cause it, the more sophisticated we will be about our notions of the public good and, in particular, our sense of which values or freedoms we wish to emphasize in which contexts. In turn, a better-developed sense of what we want will aid us in institutional choice.

I have conceived of political malfunction in terms of significant and systemic failure to represent the interests of the populace partly because respect for citizen interests ought to be a central component of any measure of the public good. It troubles me that it is an incomplete measure and one which disturbs many, yet I am handicapped by the lack of adequately articulated alternative conceptions.

I believe, however, that the analysis of institutional behavior presented here, with its emphasis on simultaneous comparison of insti-

51. For example, the natural rights emphasized in late eighteenth and early nineteenth century American jurisprudence, such as the right to sell or control one's labor or property, *see, e.g.*, Justice Bushrod Washington's often-quoted list of "fundamental rights" in *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230), followed a period of royal manipulation and suppression of such activity in England and the colonies. *See* C. HILL, *THE CENTURY OF REVOLUTION, 1603-1714* (1961).

tutions and systemic considerations, provides insights which are applicable across any conception of the public good. Even the more particularized notions of majoritarian and minoritarian bias presented here are likely to have broad application. Indeed, given the rough approximations and tendencies which characterize this stage of my analysis, I would guess that the constructs and insights presented here would be relevant given any sensible alteration in the underlying conception of the public good.⁵²

This proposition will be tested to some degree by the applications in this article. It can be tested further if constitutional commentators will give institutional choice and institutional analysis the attention they deserve. It is the importance of institutional analysis, not the validity of any particular conception of the public good, which concerns me. We can begin to explore the validity of the conceptions of political malfunction set out here by examining how well they aid us in understanding the framing of the original Constitution.

D. *The Polar Models: A Look at the Framing of the Original Constitution*

Concerns about both majoritarian and minoritarian bias have played a central role throughout our constitutional history,⁵³ particu-

52. It must also be remembered that the representation of citizen interests (or its failure) is used to define political malfunction and, therefore, to define an important condition for judicial intervention. But it does not necessarily define how the judiciary should resolve those issues which, because of this malfunction, the judiciary ought to consider reviewing and remaking. I am not suggesting that judges resolve societal issues solely on the basis of citizen interests. In reality, the character of judicial decisionmaking makes it unlikely that the courts would ever be a very good instrument to poll the citizenry. In instances of severe political malfunction, they might be better than the political process, but that's not saying much.

Courts will ultimately resolve these issues in a manner which is difficult to specify. As we shall see, judges must continuously reconsider various institutional factors like resource limitations, subject-matter expertise, and comparative biases which do not disappear when the courts make the first rough determination that they might take over an area of societal decisionmaking. Ultimately, however, there comes a point in the remaking of these societal decisions when judges must turn to those musings that constitute individual human decisionmaking, whether they are called contemplation, deliberation, intuition, tradition, or just plain guessing. Presumably, these musings will respect citizen interests, desires, and preferences, but they are likely to reflect other concerns as well.

53. Fears of minoritarian bias can be seen in the Jacksonian era, which laid heavy emphasis on concerns about the role of special interests. See, e.g., M. MEYERS, *THE JACKSONIAN PERSUASION* (1960). This trend continued into the post-Civil War period, manifested directly in constitutional positions like that of Justice Field, who sought an expansive reading of the fourteenth amendment in response to his perception of the undue influence of small organized forces at the state and local level. See McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 976-77, 981 (1975).

On the other hand, one can see the emphasis on majoritarian bias in *Carolene Products* — both the footnote and the case. In the case, the Court rejected a significant role for the judiciary in reviewing economic regulatory legislation despite the potential of minoritarian bias; in the footnote, the Court asserted a strong concern about the protection of minorities. 308 U.S. 144,

larly in the framing and ratification of the original Constitution. This period shows clear concern about both these forms of bias. In fact, the two opposing constitutional positions of the time — the Federalists and Anti-Federalists — can be traced through the differences in their concerns about majoritarianism as opposed to minoritarian bias.

Recent work on the period between the Declaration of Independence and the Constitutional Convention suggests a gradual change in perceptions about the dangers of government. Political thinking at the time of the Revolution placed heavy emphasis on the excesses of the monarchy and the royal governors. There was an accompanying great faith in the legislature and the associated broader-based franchise.⁵⁴ These early American perceptions paralleled the English experience, where hostility to royal grants of special favors to a privileged few produced seventeenth century constitutional reforms increasing the role of Parliament.⁵⁵ By the time of the framing of the Constitution, however, the great faith in the legislature had waned in substantial part because of the perceived excesses of post-Revolutionary legislative majorities. The potential for excesses by both executive and legislative branches raised concerns about the excesses of both the few and the many — concerns about the undue influence of both minorities and majorities.⁵⁶ The degree of concern about one or the other of these influences, however, varied significantly between proponents and opponents of the proposed Constitution.

The Framers, or at least those who authored the Federalist papers, recognized the existence of both forms of bias, expressed concern about both, but seemed to worry most about majorities. James Madison in particular placed great emphasis on the dangers of the majority:

If a faction consists of less than a majority, relief is supplied by the

152 n.4 (1938). The Warren Court will be remembered best for its decisions protecting traditional minorities. At the same time, that Court radically de-emphasized judicial review of economic regulation even when there were clear indications of strong special interest influence. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding state statute prohibiting opticians from providing eyeglasses without a prescription from an optometrist or ophthalmologist); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding state statute restricting "business of debt adjusting" to lawyers).

In analyses of modern America, many social scientists place great emphasis on minoritarian bias, whether in the form of the economist's theories of regulation or the political scientist's concepts of special interest legislation or agency capture. See, e.g., Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971); M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); *THE POLITICS OF REGULATION* (J. Wilson ed. 1980); B. MITNICK, *THE POLITICAL ECONOMY OF REGULATION* (1980).

54. See, e.g., G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

55. See C. HILL, *supra* note 51.

56. See G. WOOD, *supra* note 54, at 135, 237-44; D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 131 (1984).

republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular Government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. . . .

. . . [T]he majority . . . must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. . . .

. . . [A] pure Democracy, by which I mean a Society consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction.⁵⁷

And also:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to . . .⁵⁸

These comments reveal two other elements of importance. They emphasize the systemic nature of political malfunction. Madison's analysis is not based on the mindset of public officials. Majorities are most to be feared because they are least likely to have their influence checked within the larger political system. Whether or not Madison's view that majorities were most to be feared is correct, his argument reflects a sophisticated perception of the systemic nature of political malfunction.

Madison's comments also reveal the major Federalist response to this perceived danger: the removal or insulation of federal government decisionmakers from local populations. They sought this insulation in several ways. First, these decisionmakers were physically distanced. The national capital was generally much further from most citizens than the seat of state or local governments; physical distance was no small factor at a time when travel was so difficult. Second, each of these decisionmakers was to represent a large number of constituents, thereby making organization of a majority more difficult. Third, they served for relatively long terms ranging from two to six years. As such, their constituents had far less frequent access through the ballot box and a more complex record to decipher and judge.

57. THE FEDERALIST NO. 10, at 59-60 (J. Madison) (H. Dawson ed. 1863).

58. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 206 (M. Meyers ed. 1973) (emphasis in original).

Fourth, the Senate and President were indirectly elected — the Senate by state legislatures and the President by the electoral college.⁵⁹

The Federalists were not opposed to popular government. They gave us a Constitution with elective offices and finite terms of service. No government officials held office by right of birth and all, except the judges, faced periodic reelection either by direct vote of the populace or by bodies whose members were themselves subject to periodic election.⁶⁰ But there can be no doubt that pure majoritarian government was not what the Federalists wanted. They were very concerned about protection against what they perceived as the excesses of the majority.

Their opponents, the more heterogeneous Anti-Federalists,⁶¹ appear far more concerned about minoritarian bias than the Federalists. The Anti-Federalists feared that indirectly elected Senators serving long terms would devolve into an aristocracy and combine with the indirectly elected President to allow an easy conduit for “the advantage of the few . . . over the many.”⁶² In response, they sought rotation in office, shorter terms, the possibility of recall, and easier impeachment.⁶³ They also feared that the House was insufficiently numerous to enable it to be “a representation of the people” and, therefore, would be subject to influence and corruption.⁶⁴ They feared “the superior opportunities for organized voting which they felt to be inherent in the more thickly populated areas.”⁶⁵ They feared that a Supreme Court not subject to popular control would favor the rich.⁶⁶ As we have seen, these are all signs of concern about minoritarian bias.

59. See D. EPSTEIN, *supra* note 56, at 59, 95-97, 99-100, 105.

60. Madison, in particular, opposed the election of the Senate by state legislatures and any attempt to seek a “mixed” government such as the English parliamentary monarchy. *Id.* at 122-23.

61. “[T]he Antifederalists were far from united in their political ideas.” J. MAIN, *THE ANTI-FEDERALISTS* 119 (1961); see Wood, *The Worthy Against the Licentious*, in *CONFEDERATION AND THE CONSTITUTION* 86 (G. Wood ed. 1973).

62. 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA*, IN 1787, at 493-94 (J. Elliot ed. 1836) [hereinafter *DEBATES*] (comments of George Mason). See also *id.* at 503-04 (comments of Patrick Henry); *id.* at 220 (comments of James Monroe).

63. See *id.* at 50 (comments of Patrick Henry). See also note 62 *supra* and materials cited therein.

64. *Essays of Brutus*, in 2 *THE COMPLETE ANTI-FEDERALIST* 380 (H. Storing ed. 1981) (essay of Nov. 15, 1787); see also *Letters of Centinel*, in *id.* at 142 (letter I); *Letters from the Federal Farmer*, in *id.* at 235 (letter of Oct. 10, 1787); 2 *DEBATES*, *supra* note 62, at 248-49 (comments of Melancton Smith); 3 *id.* at 281-82 (comments of William Grayson).

65. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 *WM. & MARY Q.* 3, 13 (1955).

66. See *Essays of Brutus*, *supra* note 64, at 438-39 (essay of Mar. 20, 1788); 1 *DEBATES*, *supra* note 62, at 495 (comments of George Mason).

This tension between the Federalist and Anti-Federalist positions centered on the controversy over the relative roles of larger versus smaller jurisdictions — in particular, the role of the state versus the national government. As we have seen, Madison feared the power of the majority more than that of the minority. He saw the answer in a stronger national government as well as the indirect election of government officials. The Anti-Federalists believed in small jurisdictions and feared that, as governments grew larger and more remote, the concentrated few would subvert the process.

From an institutional perspective, it is easy to understand the importance given jurisdictional size by those who debated the original Constitution. The factors we have already discussed coalesce here. Smaller jurisdictions tend to decrease the costs of organization, acquisition of information, and access to political influence. At the simplest level, local officials are physically more accessible. They live among their constituents and the official locus of decisionmaking is within the locale. Unlike members of Congress, local and even state representatives have their primary residences in the locale they represent; state capitals are, in most instances, far more accessible than is Washington, D.C. The legislatures of smaller jurisdictions tend to be smaller and to operate on fewer issues. State and local officials tend to serve shorter terms than their federal counterparts. Shorter terms and simpler agendas make it easier to understand and evaluate the actions of these officials. Easier understanding means less need for investment in information and less need for the organization which goes with it. Smaller populations mean fewer people to inform and fewer people to organize for effective political action. As a general matter, smaller jurisdictions tend to be more homogeneous. As such, it is easier to identify the views shared by the majority. Ease of identification and similarity in views simplifies organization and communication.

Both the Federalists and Anti-Federalists understood the connections between size of jurisdiction and political response; they had different views on the results. To the Federalists, politically active local majorities were the problem and a more complex, indirect national government was the answer. To the Anti-Federalists, the opposite was true. These two very different views of jurisdictional size envision very different trade-offs between majoritarian and minoritarian bias.⁶⁷

The Federalist and Anti-Federalist positions both possess inade-

67. Important technological changes may have altered the association between size of jurisdiction and form of bias which characterized the views of those who debated the original Constitution. Vastly improved transportation has made the national capital far more accessible. More important, the growth of a national news media makes the happenings in Washington far more

quacies and inconsistencies. Anti-Federalists can be seen as the heirs to the classical republican tradition. They envisioned a republic small in size with a small and homogeneous population.⁶⁸ The great problem for the Anti-Federalists was the extrapolation of republican ideals to a large, dispersed, and heterogeneous population. They did not have an alternative for a national government.⁶⁹

For the Federalists, whose affirmative program was more directly embodied in the Constitution, the problems are more subtle and yet more important. Madison and the Federalists stressed government on a larger scale with political decisionmakers (legislators and executives) removed from the mass of the populace both by distance and by mode of selection. The analysis of political malfunction employed here suggests that, to the extent that the Federalist structure achieved the insulation of officials from the general populace, it traded one bias for another.

Greater distance, more complex modes of selection, and larger and more diverse constituencies provide protection of public officials from the masses — but not complete isolation. Other paths of influence, and therefore sources of bias, remain and in fact flourish. The more complex setting enhances the power of organization and the accumulation of funds while it helps conceal underhanded dealings. Isolation provides respite from the masses but not from concentrated minorities. In other words, removal may purchase protection from majoritarian bias by increasing the potential for minoritarian bias.

This trade-off is an important reality which we will consider throughout the article. The Anti-Federalists seemed to understand the trade-off. In my view, Madison and the other Federalists also recognized this trade-off and chose what they considered the lesser evil. Cass Sunstein's view is different.

accessible to citizens throughout the nation. There may in fact be more information available through the media about the national government than about state or local governments.

These shifts are countered by other changes in two hundred years. The nation has grown in size and population. That population is far more heterogeneous, especially at the national level. The scope and complexity of societal issues, especially those decided at the national level, has grown. These changes will be considered as we work our way through modern constitutional law.

68. See Michelman, *supra* note 49, at 19; *Essays of Brutus*, *supra* note 64, at 109-13; Wood, *supra* note 61, at 97; 1 DEBATES, *supra* note 62, at 481 (letter from Yates and Lansing); *Letters from the Federal Farmer*, *supra* note 64, at 230; Kenyon, *supra* note 65, at 6-8. They apparently envisioned an exchange of ideas which allows the populace to recognize and support a public good greater than any narrower self-interest with which members of that populace might have begun. They feared that this exchange would not occur in larger, more heterogeneous populations. Wood, *supra* note 61, at 97; *Letters of Centinel*, *supra* note 64, at 141; *id.* at 56.

69. The same problem remains for those who today wish to resurrect these republican ideals. See Michelman, *supra* note 49, at 17-55. What institutional form will organize a society which today is far larger and more heterogeneous than it was in 1787?

Sunstein believes that Madison's attempt to remove federal legislators from the pressures of local majorities was motivated by a desire to secure greater opportunity for legislative deliberation in the service of a public good beyond preferences.⁷⁰ He points to Madison's desire for a legislature made up of "a chosen body of citizens . . . whose patriotism and love of justice" would lead them to serve as "enlightened statesmen."⁷¹ Whatever Madison's desires, however, he apparently did not hold out much hope that such a legislature would result from the structures established in the Constitution. David Epstein, whose extensive examination of the Federalist position Sunstein uses to support his own view of Madison, finds a significant gap between Madison's desires and his perception of reality.⁷² There is a conflict between Madison's vision of the outcome of a system which would check the power of any single faction by pitting one faction against another and the ascendancy to office of "enlightened statesmen" with a neutral view.⁷³ Madison may have *hoped* for the ascendancy of noble spirits but he apparently *expected and planned* for far more mortal ones.

Sunstein portrays Madison as believing that decisionmakers, cut loose from the pressures of the majority, would somehow be free from other influences and transcend private interests. It seems unlikely that Madison was unsophisticated enough to believe that deliberation about the public interest is the likely result of removing government officials from majoritarian political pressure. If that was his belief, it would be a particularly poor piece of Madison's analysis upon which to build a modern theory.

Madison and the Federalists were not necessarily wrong to emphasize the need to address majoritarian over minoritarian bias. The correct choice depends on a number of factors, such as size of the jurisdiction or complexity of the issues, which may make one or the other bias more likely. As the analysis develops, we will find concerns about both forms of political malfunction throughout constitutional law. The polar models are powerful precisely because neither is always appropriate.

Analysis of these malfunctions plays a role in a larger analytical framework. Whether one or the other form of political malfunction is somehow more pernicious or prevalent cannot be considered in the

70. See notes 45-46 *supra* and accompanying text.

71. See Sunstein, *supra* note 2, at 41, 43 (quoting THE FEDERALIST NO. 10, at 58, 60 (J. Madison) (P. Ford ed. 1898)).

72. D. EPSTEIN, *supra* note 56, at 87-88, 97-100, 138-41, 150-53.

73. *Id.* at 108-09.

abstract. The efficacy of judicial review depends on the characteristics of the reviewer as well as those of the reviewed. In this scheme, the proper judicial role is a *match* between the potential political malfunction and the potential for judicial response. The rest of this article explores this match by examining judicial response and its variation in form and effectiveness across the two forms of political malfunction.

III. THE JUDICIAL RESPONSE

Having provided an overview of societal decisionmaking dominated by the political process, and divided the malfunctions of the political process into two polar forms, we now seek to identify when and how the judiciary responds to these malfunctions. The first section of this Part suggests some working hypotheses about judicial limitations and capacities. The second section categorizes and examines the judicial response to the political malfunctions we have thus far discussed.

A. *Judicial Constraints and Capacities*

1. *Limited Resources and the Cost of Judicial Response*

Identification of political malfunction — a severe systemic underrepresentation of a given interest — is only a first step in defining the dimensions of judicial review. The identification of a political malfunction does not automatically mean that the resulting government action is invalid. It means only that the governmental determination is biased and it identifies the direction of the bias. The presence of such a bias does not necessarily mean that the same decision would not have been made by an unbiased process.

Thus, for example, the congressional restriction on the interstate sale of filled milk, at issue in *Carolene Products*, may well have been the product of a Congress subject to severe minoritarian bias. The interests of the dairy industry may have been overrepresented relative to that of the dispersed majority of consumers. But, an unbiased Congress in which consumer interests were adequately represented might also have passed the restriction, based perhaps on the offsetting benefits to consumer safety.

Severe bias provides grounds to distrust the determination of the political process. The more severe the bias, the greater the distrust. But courts cannot act on this distrust without remaking the underlying societal decision. Despite continuing claims by judges that they do not make legislative decisions or social policy, that is precisely what judicial review (no matter how it is defined) requires them to do. As

such, the judiciary's ability to resolve the underlying societal decision becomes relevant.

We have emphasized the severely limited resources of the judiciary, especially relative to the ever-growing number of government actions potentially subject to review.⁷⁴ The resource costs of judicial review, which can vary substantially from one subject matter to another, affect not only the amount but also the form of judicial review.

These costs depend on the ease with which courts can distinguish valid from invalid governmental activity, and their ability to formulate and articulate a corresponding clear test. Clear tests mean fewer cases brought, litigated, and appealed, and therefore a smaller burden on the judiciary. Such clarity, however, involves a degree of arbitrariness or, more gently, generalization, which risks invalidating good legislation or accepting bad. The chances as well as the costs of such an error vary with the subject matter of the legislation under review. Some subject matter — like foreign affairs — may be so complex and sensitive that sweeping rules could be established only at unacceptable costs.⁷⁵ In general, the more rigid the rule the greater the pressure to allow qualifications which make the rule dependent on a wider variety of circumstances, eventually evolving into a more flexible standard. The price for this flexibility is a larger continuing role for the judiciary.

This interaction between resource costs, risks of error, and the potential for sweeping solutions determines the price tag for judicial review of a given area of government activity. This price tag cannot help but influence the selection of areas for judicial review as well as the form of that review.⁷⁶ From this perspective, for example, the price tag of judicial review in the era of economic due process, high at the outset, grew much higher as limiting strategies failed and the govern-

74. See Part I *supra*.

75. In a creative analysis of the political question doctrine, Fritz Scharpf argued that subjects like foreign affairs were so difficult for the courts that the sweeping solution of abstention was the paramount response. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517 (1966). Even after twenty years, Scharpf's thoughtful analysis provides useful insights into the meaning and scope of judicial ability. Scharpf's general theory is examined extensively in *Taking Institutions Seriously*, *supra* note 8, at 381-84.

76. It will no doubt disturb some proponents of judicial review that I am treating a hallowed subject in terms of limits and resources. No doubt any discussion of constraints on the capacity of the judiciary is speculative and intellectually treacherous. But such constraints do exist and they are sufficiently important to demand attention. Proponents of judicial review would be unwise to ignore these constraints in their analyses and arguments. Failure to consider these factors leaves this central issue to their opponents. More important, without an appreciation of the role of such factors, these analysts will not understand the judicial responses they observe and they will not be able to influence the judiciary to be more ambitious and productive with their resources.

ment activity increased. The courts had real difficulty developing a simple and efficient strategy which would discern valid from invalid government action. In *Lochner v. New York*,⁷⁷ an early instance of judicial invalidation of legislation under economic due process, the Court qualified the newly established freedom of contract allowing government to regulate when there were serious health and safety impacts on third parties, or where there was serious need to protect one of the contracting parties who did not have the mental capacity to contract, or where the contract was the product of a monopoly situation. Anyone familiar with modern welfare economics can understand that these standard grounds for government intervention are both amorphous and pervasive.

The courts could not simply invalidate all government regulation of commerce. Such a simple and sweeping solution ran too great a risk of invalidating valid legislation. But the vague standards of *Lochner* presented the courts with a sizable potential for review and, therefore, an open-ended invitation to remake important and difficult societal decisions. The courts evolved a series of constructs meant to separate valid and invalid regulations. These constructs created a hodgepodge of judicial decisions filled with inconsistent twists and turns, undefined concepts, and enough uncertainty to allow legislation seemingly declared invalid to remain in effect.⁷⁸ As the output and

77. 198 U.S. 45 (1905).

78. In *Lochner* itself, 198 U.S. at 45, the Court invalidated maximum-hour legislation in the baking industry although it had shortly before approved such legislation with respect to the mining industry. *Holden v. Hardy*, 169 U.S. 366, 396-97 (1898). Within a few years, it made an exception to the invalidity of maximum-hour legislation for instances where it applied particularly to women. *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908). Not much later, the Court allowed maximum-hour legislation virtually across the board without even noting that it was overruling *Lochner*. *Bunting v. Oregon*, 243 U.S. 426, 437-39 (1917).

Over the same period the Court's decisions on the related subject of the validity of minimum-wage legislation showed the opposite progression. The Court had upheld federal minimum-wage legislation in 1917, *Wilson v. New*, 243 U.S. 332, 359 (1917); upheld state minimum-wage legislation in 1917, *Stettler v. O'Hara*, 243 U.S. 629 (1917) (per curiam), *affg. by an equally divided court* 69 Or. 519, 139 P. 743 and 70 Or. 261, 141 P. 158; invalidated federal minimum-wage legislation in 1923, *Adkins v. Children's Hosp.*, 261 U.S. 525, 560-62 (1923), and appeared to do the same for state legislation under the authority of *Adkins* in 1925 and 1927. *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927) (per curiam); *Murphy v. Sardell*, 269 U.S. 530 (1925) (per curiam).

The trend for the Court's treatment of minimum-wage legislation was not only inconsistent with the pattern of maximum-hour cases, it was also confusing. When, in 1937, the Court finally upheld minimum-wage laws (after apparently invalidating a similar law the previous year in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936)), the Washington statute it upheld had been in existence for twenty-three years. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390 (1937).

During the entire era, the Court limited regulation of prices and rates to businesses "affected with a public interest." From its inception in the pre-*Lochner* case of *Munn v. Illinois*, 94 U.S. 113, 125-26, 133-35 (1877), to its death nearly sixty years later in *Nebbia v. New York*, 291 U.S. 502, 536-39 (1934), this central concept remained a mystery. The Court flirted with the idea of monopoly as a defining element, but it did not consistently adhere to this criterion. *See Nebbia*,

complexity of governmental regulation increased in the 1930s, the costs of court involvement also increased. Although many factors may have contributed to the retreat from economic due process which occurred, the sizable and increasing price tag for judicial involvement and the failure of judicial strategies to control these rising costs pushed relentlessly in that direction.

These costs and the courts' ability to find tractable solutions which lessen them only reveal one aspect of the question of judicial review. The analysis is comparative and the choice of whether to review is or should be a balance of these costs with the benefits of judicial review. As we have seen, these benefits are related to the severity of political malfunction. More severe political malfunctions justify greater outlays of judicial resources and greater temerity by judges. But even if they are not the sole determiners of judicial review, costs and tractability cannot be ignored. The courts' resources are limited and the demands on these resources grow more severe.⁷⁹ The understandable struggle to use these resources wisely creates pressure to resolve issues with the least cost possible.

We see indications of this desire for dispatch and resolution in the Supreme Court's remedy in the controversial abortion decision, *Roe v. Wade*.⁸⁰ There, the Court was faced with a wide variety of abortion regulations and prohibitions. Although concluding that the sweeping solution of wholesale invalidation of all regulations and prohibitions was untenable, the Court nevertheless did not confine itself to invalidating the particular state anti-abortion law or simply to acknowledging that there might be instances in which the state's interests could justify regulation. Instead it set out, in detail, the circumstances in which the state might regulate or prohibit abortions; it divided the period of pregnancy neatly into thirds and defined the specific state responses allowed in each successive twelve-week period.

Arbitrary elements abound. When one considers the large variety of potential regulations; the wide variation in health conditions with

291 U.S. at 538. The test was adopted in *Munn*, virtually abandoned in *Brass v. North Dakota ex rel. Stoesser*, 153 U.S. 391, 402-04 (1894), questioned in *Williams v. Standard Oil Co.*, 278 U.S. 235, 239-40 (1929), and briefly resurrected in *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 438-39 (1930). For a time, the Court also spoke of a business's impact on the general public, see *Munn*, 94 U.S. at 126, but it eventually abandoned this unwieldy concept, see *Tyson & Brother v. Banton*, 273 U.S. 418, 430 (1927). The Court found itself regularly admitting that the "public interest" test was difficult to explain and apply, see, e.g., *Tyson*, 273 U.S. at 430; *Ribnik v. McBride*, 277 U.S. 350, 355 (1928), but it kept trying to employ it. Finally, in *Nebbia*, the Court conceded that there could be no "closed class" of businesses "affected with a public interest"; all businesses of any importance affect the public. 291 U.S. at 536.

79. See note 13 *supra*.

80. 410 U.S. 113 (1973).

person, place, and time; and the ill-defined nature of the state's interest in the fetus, the compartmentalization of interests into discrete twelve-week periods seems a very arbitrary way to balance the relevant interests.⁸¹ In recent cases dissenters on the Court have chided the majority for not allowing a more flexible, if less specific, formulation.⁸²

The *Roe* formulation and the Court's unwillingness to increase its flexibility seems consistent with a desire to reduce litigation even at the expense of arbitrariness. Calls for a more reasonable and flexible review of abortion regulation come from dissenting judges who strongly oppose court involvement in the abortion issue in general. Whatever their views on the merits, the strategy they propose would increase the costs of judicial activity in the area, and therefore increase the chances that the Court would abandon the abortion question altogether. I believe that both the majority and the dissenters understand these implications. Given the demands on judicial resources inherent in the uncharted right of privacy⁸³ and the controversial issue of abortion, it is hardly strange that the Court should choose to impose an arbitrary system which roughly balances the needs of flexibility and the needs of specificity.

In some areas of potential judicial involvement, sweeping solutions are so inappropriate that the courts must choose between more expensive case-by-case review and abandonment of the area of review. The high costs of particularized review may cause abandonment of judicial involvement, as they arguably did with economic due process, or a refusal to get involved, as they arguably did in the context of school

81. The concept of viability used by the Court to define the crucial third trimester in which the states might prohibit abortions epitomizes the arbitrariness of this trimester system. The Court did not derive this concept from any of the cultures or religions whose considerations of the abortion issue the Court so laboriously rehearsed in its opinion. Viability is a technical concept borrowed from medicine where it served purposes usually unrelated to questions of abortion.

The rationale for the division between the first and second trimester is less important but no less arbitrary. It is basically a non sequitur. The Court ruled that the states had no special interest in the health of the mother before the second trimester because for the first twelve weeks the risk to the mother from terminating pregnancy was less than that from continuing it. But prohibition of termination (abortion) was not in issue in the difference between the first and second trimester. The issue was regulation of the abortion procedures, not prohibition of abortion. There was no a priori reason to believe that there were not more or less healthy ways of aborting in the first twelve weeks which, under the holding, the state might prescribe.

The trimester system and the strange choice of viability have been criticized by many commentators. *E.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Lynn, *Technology and Reproductive Rights: How Advances in Technology Can Be Used To Limit Women's Reproductive Rights*, 7 WOMEN'S RTS. L. REP. 223 (1983).

82. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (O'Connor, J., dissenting); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (O'Connor, J., dissenting).

83. We will discuss the right of privacy more fully at the text following note 138 *infra*.

finance.⁸⁴ On the other hand, the importance of judicial involvement may cause the courts to bear these costs as they have in the school desegregation cases. In such instances, there are continuous pressures to find broader-based strategies which increase tractability and decrease costs.⁸⁵

2. *Judicial Bias and Capacity*

In addition to the costs of judicial decisionmaking, there are also considerations of bias and judicial ability. As with the legislative or administrative processes, we must consider the judicial process as a whole and raise similar questions about representation and systemic bias.⁸⁶ The dominant structural characteristic of the judiciary is its removal and insulation from direct political pressures: federal judges are appointed for life. Earlier, I argued that the insulation of federal legislators which Madison and the Federalists used to combat majoritarian bias traded majoritarian for minoritarian bias. Is the same true for the even greater insulation accorded the federal judiciary?

Minoritarian bias operates in a number of ways in the political process, including graft, prospects of future employment, or campaign contributions. Although the life tenure and ethos of federal judges may make it unlikely that they could be influenced by such prospects,

84. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

85. The school desegregation area, in fact, has seen many innovative attempts to deal with these pressures. See M. REBELL & A. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* (1982).

86. As with analyses of political malfunction which focus on the characteristics of legislators, analyses of judicial malfunction which focus on the characteristics of judges are problematic. For example, Paul Brest argues that judges are elitist and unrepresentative based on their demographic characteristics. Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765 (1982). But that judges are more elitist and less representative than elected officials does not follow from the demographics of the most observable decisionmakers. Brest points out that there are few minorities or females and no nonlawyers on the federal bench. *Id.* at 771. Judges are also not poor; all have incomes substantially above average. *Id.* But in this simple sense, Congress is even less representative than the courts. Blacks make up 5% of the federal bench, but less than 4% of the Congress (4.6% of the House; 0% of the Senate). Women make up over 8% of the federal bench, but less than 5% of Congress (5% of the House and 2% of the Senate). The Supreme Court has one black and one woman and, therefore, in terms of simple demographics, each group has more than 10% membership. Most members of Congress are lawyers or business people and their salaries are clearly above average.

It may be valid to argue that the judiciary is elitist or unrepresentative relative to the legislature. But those characteristics are the product of the character of the given institution not demographics of judges and legislators. Whatever the characteristics of the legislators, they are dependent on reelection to retain office. In this sense, they can be considered dependent upon and, therefore, representative of populations which have different demographic characteristics from theirs. These differences, however, need not always cut in the direction of less elitism or broader representation. To the extent that the mechanism of minoritarian bias characterizes the given political decision, the politically dominant part of the population may be less representative of the general population than even the legislators themselves.

influence can also occur through more subtle means, primarily through the working of the adjudication process. The adjudication process is an important source of information for judges. Their view of the issues can be molded by what they are told and shown in the cases brought to them.⁸⁷ Judges usually accumulate less specific information than administrators who have narrower jurisdictions or legislators who have independent staffs for investigation. The more complex the issues and the less familiar the judges are with the given area, the more likely that they can be influenced by the information provided by the litigants.

From this perspective, the primary source of bias affecting the judiciary stems from the simple fact that it takes resources to litigate. The amount spent on litigation, like that spent on lobbying, reflects the ability to pool funds and, in turn, the size and distribution of the stakes involved. As with lobbying, dispersed groups with lower per capita impact face greater organizational needs and greater organizational costs than more concentrated interests.

Many cases will not be brought and others will be underfunded where the interest is widely dispersed. One need only think of a dispute with \$1,000,000 at stake and ask whether the likelihood of litigation and the quality of that litigation would vary as one saw that stake concentrated on one individual, or dispersed among ten individuals, or 100 individuals and so on. Certainly, if it were divided evenly among one million people, the chances of litigation would be very small.⁸⁸

Thus, although the form and perhaps the degree of minoritarian bias may differ from that characterizing legislatures or administrative agencies, the judiciary does tend toward minoritarian bias.⁸⁹ Certain groups and interests will not be represented because they are dispersed.⁹⁰ Whether and to what extent the judicial process is less repre-

87. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 38-39 (1977).

88. Devices like class actions may aid in reducing this bias. But, especially given the restrictions on such actions, the potential for correction is slight. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

89. Consider the following comments about the role of special interests in the evolution of the common law in this country:

Special interest prevailed over general interest, or prevailed at unfair cost to other special interest, largely because legal processes did not provide that all relevant interests had adequate representation. . . . In policy making by litigation — in the making of common law — there was the chronic danger that public policy of general import, or bearing heavily on other particular interests, would be made in response to too narrow a record and too limited a range of argument provided by the particular litigants to whom the precedent-making lawsuit was open.

J. HURST, *supra* note 34, at 71.

90. The disadvantages of dispersed groups can also lead to problems with follow-up and periodic review. Even if a coalition is organized to bring the initial litigation, it may be difficult to hold it together to produce the additional litigation necessary to ensure enforcement and im-

sentative than the political process depends on the context for comparison. In some contexts, the biases of the judicial process may be an advantage because of its match with the bias of the political process. As I shall argue subsequently, this bias tends to make courts a better match for majoritarian than minoritarian bias in the reviewed entity.

Beyond issues of bias, the ability of judges to learn about and understand a given substantive area affects the tractability and costs of judicial review of that area. This ability can vary widely among substantive areas. In the extreme, there are the traditional doubts about judicial ability to understand and decide issues of foreign affairs and national security. Here, questions about expertise, government control of information, secrecy, and significant (but often unassessable) risks of judicial error induce judicial timidity. The political question doctrine is the most extreme expression of this diffidence.⁹¹

On a more general level, courts do not have the investigative resources available to most governmental processes. Judges do not generally have the luxury of specializing in a given area of social policy as do many legislators. Judges are assigned cases of all sorts often on a random basis. It would seem that the more complicated the social policy question the more unattractive the judicial alternative.

In fact, viewed from one vantage point, courts are not good at anything — or at least at anything complex and important. In an often-cited study,⁹² Donald Horowitz has presented a very critical picture of judicial policymaking. As Horowitz sees them, courts receive information in a skewed and halting fashion,⁹³ misunderstand the social contexts of the cases before them,⁹⁴ choose atypical cases as the vehicles for addressing social issues,⁹⁵ and generally lack the facilities, abilities, and propensities for enforcing, administering, and following up on the cases they decide.

All this should give pause to those romantics who see in the courts

plementation. See generally D. HOROWITZ, *supra* note 87, at 51-56 (arguing that courts are not equipped to monitor the effects of a decision after the litigation is concluded). The existence of these problems are yet another reason why "sweeping solutions" and "creative arbitrariness" are important. The more certain (if arbitrary) the principle and the remedy, the easier (and more likely) its subsequent enforcement and implementation.

91. See Scharpf, *supra* note 75. The courts can, to a limited degree, postpone or delay decision until they can gather more information and increase their understanding. The most subtle treatment of this creative use of delay is Alexander Bickel's notion of passive virtue. A. BICKEL, *supra* note 17, at 111-98.

92. D. HOROWITZ, *supra* note 87.

93. *Id.* at 38-41.

94. *Id.* at 45-51, 260.

95. *Id.* at 266-68.

a removed, platonic ideal capable of generally guiding society in its moral evolution and search for neutral principles. Courts are highly limited and potentially awkward decisionmakers. Advocates of judicial activism must address this reality in order to legitimate a significant judicial role.

But Horowitz's study can do no more than force us to accept the reality of judicial imperfection. By its own terms it is not comparative, and that is far more damning than Horowitz supposes. All societal decisionmakers are highly imperfect. Were Horowitz to turn his critical eye to administrative agencies or legislatures he would no doubt find problems with expertise, access to information, characterization of issues, and follow-up. Careful studies would undoubtedly reveal important instances of awkwardness, error, and deleterious effect.

The relevance of technical expertise and investigative resources can be understood only in terms of the incentives and pressures present in the given process. The image of careful investigation and broad inquiry seems often ill-fitted to the actual goings-on in legislatures. Legislators are not technicians or scholarly investigators acquiring and collecting social data and issuing learned and neutral reports. They often ignore or manipulate technical information in line with the political pressures in the system.

Legislators are centrally concerned about the desires of their constituents (or at least those constituents who have clout). These needs and desires are conveyed in threats of ouster, impassioned rallies, shifting vote patterns, lobbying, and the other signals of political support or opposition to which a legislator with a finite term of office listens so intently. What legislators hear through these processes affects how they react to the technical policy information they receive. Under these circumstances, the greater technical fact-gathering ability of the legislature may be relatively unimportant.

As a general matter, the ability to respond systematically to the popular will is a major advantage of the political processes over the judiciary. Where, however, political pressures provide a distorted picture of the public will with severe underrepresentation of parts of that public, a process so strongly attached to those pressures may be at a disadvantage relative to a more removed and insulated judicial process.

Under the view presented in this article, the rare moments of judicial dominance only occur in instances of severe political malfunction. This necessary condition severely limits the relevance of noncomparative considerations of judicial ability like that of Horowitz. Severe limitations on judicial capability may sometimes mean that even se-

vere political malfunctions will sometimes go unremedied because the remedy is worse than the problem. But, in some instances, even an awkward, myopic, error-prone judicial response may be superior to a political process in the throes of serious malfunction.

What judges are good at may be relevant, but it is not decisive. They must look first to where they are needed and seek out the most severe examples of political malfunction. They will find many such instances. They then must be conscious of what they can do in light of these competing claims on their resources. Judges may well be called upon to make societal decisions which, in the abstract, they are not well-equipped to make. The comforts of procedural issues may have to give way to the discomfort of less familiar subject matter — even foreign affairs and national security.

B. *The Form of Response: The Match Between Political Malfunction and Judicial Capability*

We can now consider the balance between the severity of political malfunction and the limits on the judiciary and, in turn, the judicial responses to this balance. These responses are divided here into several categories, which are then associated with the two forms of political malfunction: minoritarian and majoritarian bias.

1. *Correcting the Process*

John Ely has argued that many areas of judicial activity improve the political process. He associates this aspect of judicial review with the second paragraph of the *Carolene Products* footnote.⁹⁶ From this vantage, voting rights and first amendment protection of speech, press, and assembly improve the elective process and, therefore, subsequent legislative and executive decisionmaking. These “process” notions have played a central part in the judicial activism of the last forty to fifty years. Even those generally most critical of this activism see the first amendment and its protection of political speech and press as valid grounds for judicial activity.⁹⁷

From an institutional perspective, correction of malfunction has obvious attraction. A judiciary severely constrained by its limited resources as well as doubts about its abilities must leave vast areas of decisionmaking unattended, and struggle with whatever it does handle. If political malfunction can be reduced, fewer resources need be

96. See J. ELY, *supra* note 4, at 75-77.

97. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

expended on review of the output of the corrected process. Similarly, if a malfunction can be corrected, an area of political activity can be ignored with less regret.

But to make each of these corrections, courts must resolve complex and difficult societal issues which have already been resolved by the political process. If courts are to assure public access to information about government activity, for example, they must often consider the implications of that access on such sensitive subjects as national security and foreign affairs.⁹⁸ Although the corrective potential provides a significant added benefit which would and should attract the courts, it is not a sufficient condition for judicial intervention. It is still necessary to balance the relative abilities of the political and judicial processes to resolve the basic substantive issues involved. The existence of the corrective potential may tip the balance where political malfunction does not otherwise seem severe or the limitations on the judiciary would otherwise appear daunting. But it is still the balance of all of these factors considered together which is determinative.

That protection of political speech and the press help to correct political malfunction explains why protection of speech and the press is important, but not why *judicial* protection, as opposed to political protection, is important. If the political process can adequately protect speech and press, judicial protection is not needed. Is there political malfunction associated with this protection? Ely suggests what he calls the "in/out" bias: those in power wishing to stay in power suppress criticism in order to do so.

Such a conception of malfunction, although sensible at first glance, misses the systemic nature of the political process by focusing only on the most immediate actors — a tendency of Ely's which we saw earlier.⁹⁹ Those in office might like to do many things ranging from embezzlement of public funds to the exclusive use of government facilities for themselves and their friends. Whether they can do so, however, depends on the behavior of the political system *as a whole*. The "ins" bias Ely suggests must be supplemented by some reason why the desire of those in office to suppress criticism will not be countered within the political process itself.

In some instances, suppression of political speech and press can carry serious political consequences. Pervasive censorship might incur the wrath of the powerful media — a source of information to the dormant majority — or anger large numbers of citizens. Suppression

98. *New York Times v. United States*, 403 U.S. 713 (1971) (Pentagon Papers case), is a prime example. See text following note 101 *infra*.

99. See discussion of Ely's "motivation" theory of political malfunction in Part II.B *supra*.

of the views of the Democratic Party by a Republican Administration seems a politically dangerous step which would be done infrequently even without judicial protection.

But there are two quite different instances in which the political process as a whole offers little threat to officeholders bent on suppressing expression. Not surprisingly they involve either majoritarian or minoritarian bias. Censorship often suppresses unpopular political messages rather than political messages immediately dangerous to the political officeholders. It has been the Communist Party or some other fringe group, not the Democratic or Republican Party, which has most often been censored. In such instances, the "ins" do not feel compelled to hide from the public their suppression of unwelcome expression. Here the political views of dissidents can be suppressed because the general public would not feel harmed — indeed they would feel benefited. To the extent that this censorship benefits a low-impact majority while intensely harming a small minority, we again have the conditions for majoritarian bias.¹⁰⁰

The presence of a low-impact majority also raises the distinct possibility of minoritarian bias. The public may be generally benefited by the free exchange of ideas. But as with government regulation of the market in goods and services — the classic examples of minoritarian bias — each regulation has only a very small impact on a given individual. Such an individual has little incentive to investigate and understand the regulation in question and may even be convinced that the regulation in question is beneficial. The detriment to citizens, although small from any one regulation, is substantial when summed over all regulations. Where a concentrated minority such as officeholders favors suppression of ideas, we have the conditions for severe minoritarian bias. This minoritarian bias and the majoritarian bias just discussed provide the systemic grounds for political malfunction missing in Ely's "in/out" analysis.

Analyzing the judicial response to the protection of expression also requires consideration of the costs of that protection. Constitutional review of these regulations of expression is an imposing task. Regulation of expression confronts the courts with subject matter of varying difficulty ranging from traffic control to national security and with restraints on expression of varying degrees ranging from complete suppression via prior restraints to limited controls on the manner of delivering the message.

100. Majoritarian bias and first amendment protection of nonpolitical speech are discussed in note 129 *infra*.

Some cases severely test the ability of the courts. In the Pentagon Papers case,¹⁰¹ for example, the government claimed dire consequences for international relations, national security, and the execution of an ongoing (if undeclared) war unless publication of the material in question was suppressed. Assessing such claims confronts the courts with strains on their ability, a fact not lost on government lawyers. The risks raised by the government's claims are both very great and very difficult for the courts to gauge.

The Pentagon Papers case dramatically reveals the tensions created when severe suspicion of the political process shows up in the same context as severe limitations on judicial ability. Although prior restraint of political speech is traditionally the most suspect form of constraint on expression, only three Justices declared governmental attempts at such suppression generally invalid. The remaining three majority Justices voted to invalidate the particular prior restraint involved because of the absence of either a congressional statute or a presidential regulation. As such, these three swing Justices were allowing the political processes to dictate those circumstances in which the dangers to national security would be great enough to justify prior restraint, in effect reallocating the decision back to a political process whose determinations about political expression are usually subject to substantial suspicion.

Thus, even though protection of expression possesses special potential to correct political malfunction, defining the judicial role in that protection requires analysis of both political malfunction and judicial capacity. We can expect variations in the degree to which the judiciary reviews and remakes governmental regulation of expression based on these factors.

Access to the vote and the reapportionment of legislative districts are clearly issues directly connected to the political process. Arguably this connection provides a potential for correction of political malfunction so great that it does not take much in the way of political malfunction or judicial capacity to make out a case for judicial intervention. In fact, there are ample reasons to suppose that the political process suffers from serious malfunction in the determination of voting questions and that these issues are tractable for the courts.

In the case of voting and redistricting, the "ins" bias has a valid claim as a sufficient condition for political malfunction. A state legislature, elected by a distorted voter base, is well positioned to preserve that base since those who can vote them out are precisely those voters

101. 403 U.S. 713 (1971).

who benefit from the distortion. (In this instance, the "ins" constitute not only those in office but also those who put them there and who have the votes to throw them out.)

The Supreme Court appears to have adopted this view in its reapportionment cases.¹⁰² Moreover, it has limited the resource costs of intervention by employing a sweeping solution: one person, one vote. This simple approach sidestepped the intractable process of balancing such concerns as population, land mass, and tradition. Like other sweeping solutions, the one person, one vote rule came at the cost of some arbitrariness since the criteria which were suppressed have relevance.¹⁰³ We will return to this subject shortly. But this sweeping solution had the ring of general principle and allowed the judiciary to take on issues which had significant potential to indirectly correct political malfunction.

Thus, the attraction of such political process correction as protection of political expression and access to the vote can be joined with a strong case for the need for judicial protection. There remain, however, important questions of just how this correction takes place and how it operates in response to majoritarian and minoritarian bias.

These process corrections all aim at making information, organization, or the vote more generally accessible. As such, they decrease the relative advantage of concentrated interests who trade upon their superiority in gathering information, organizing, and gaining access to power through nonvoting channels. But what perfects the process vis-à-vis minoritarian bias may do little for and, in fact, aggravate majoritarian bias. Government bureaucrats whose manipulations of programs reflect the will of a majority have little to fear from public exposure or an expanded franchise. Majoritarian bias is generated when simple democracy works too well. The majority knows its interest and votes it. Because that interest is unweighted, however, a minority suffers substantial losses for disproportionately small gains to the majority.

Thus, judicial responses like the basic rule of American voting rights — one person, one vote — are well suited to the dissipation of minoritarian bias. But this emphasis on pure majoritarianism can reinforce majoritarian bias. In the extreme, if it were possible to fully perfect the process by making every citizen totally aware of his or her own interest and able to translate immediately that interest into an effective vote, minoritarian bias would disappear, but majoritarian bias

102. See *Baker v. Carr*, 369 U.S. 186 (1962).

103. Consider the sorts of factors discussed by Justice Harlan, dissenting in *Reynolds v. Sims*, 377 U.S. 533 (1964).

would be worse.¹⁰⁴

Examined from this perspective, the various components of *Carolene Products* — the holding of the case and the principal concerns expressed in the footnote — are very much interrelated. The holding abandons serious judicial review of economic regulation, thereby leaving dispersed majorities like consumers unprotected from the minoritarian bias which often characterizes governmental decisions about economic regulation. However, paragraph two of the *Carolene Products* footnote promises indirect aid to these dispersed majorities by strengthening their access to and participation in the political process. There remains the question of protecting against majoritarian bias which is uncorrected and perhaps even aggravated by the protection of paragraph two. Paragraph three of the footnote responds by promising special judicial examination of those actions most likely infected by majoritarian bias.

In brief, it appears that the *Carolene Products* Court's concern for protection of discrete and insular minorities was correct and remains so. Minoritarian bias is lessened by judicial protection which opens the political process. But majoritarian bias is not. In general, the courts can address majoritarian bias only by the continued case-by-case substitution of judicial decisions for decisions made by the defective political process.

The structural characteristics of adjudication discussed earlier¹⁰⁵ also make the judiciary a better candidate for protection of concentrated minorities than for protection of dispersed majorities. The worst instances of minoritarian bias involve highly dispersed and dormant majorities such as consumers and taxpayers. Because of the costs of information and organization, these groups are unlikely to be able to organize and finance litigation. The victims of majoritarian bias, on the other hand, should find the organization of litigation easier. These are identifiable and often concentrated victims. A judicial

104. Compare the following observations on the use and abuse of the modern media:

Before the day of the big-circulation newspaper, the radio, and television there was usually little likelihood that information or sensation produced by legislative inquiry would reach beyond the capital city. . . . [P]owerful tendencies worked toward political apathy and despair; individuals felt cut off from understanding the social currents that tossed their lives, lost confidence that they could significantly affect what happened to them, had difficulty in perceiving where common interests lay. This setting created a constructive role for legislative inquiry directed at informing public opinion, and even at arousing public worry, anger, or urgent demand. But the availability of the new mass audience was tempting to ruthless political ambition. Armed with committee subpoena powers, a headline-hunting legislator now could find a new avenue to personal power . . . at whatever expense to individuals or groups pilloried by his shrewd manipulation of damaging testimony.

J. HURST, *supra* note 34, at 125.

105. See Part III.A.2 *supra*.

process structured for easier minority access is, therefore, more hospitable than a majoritarian political process.

The analysis of the effect of process correction on the two polar biases and the associated case for judicial focus on majoritarian bias is subject to some qualification. Even if these process corrections operate against minoritarian bias, they hardly remove it. Courts occasionally still react to this potential for minoritarian bias by direct scrutiny and invalidation of legislation thought infected by it.¹⁰⁶

It is also possible to imagine situations in which improved political interchange might decrease majoritarian bias. If this improved interchange made the majority feel more sympathetic to the minority's interest, there would be an alleviation of majoritarian bias. It was hoped, for example, that the racial integration of schools might improve relations between black and white children and decrease the effectiveness of old stereotypes (simple symbols). If increased interchange also was to increase interaction and interdependence between members of the majority and the minority, it would become increasingly difficult to tailor government action which safely targeted only the minority.

Even given these qualifications, however, judicial activity in direct reaction to majoritarian bias seems both more necessary and more feasible given the greater possibility that majoritarian bias will survive judicial correction of the political process and the greater chance that minority claims will be represented in the judicial process. Although these are admittedly only rough tendencies, such insights are important in an analysis as constrained and approximate as that which the judiciary must undertake.

2. *Direct Review, Majoritarian Bias, and Well-Defined Minorities*

As we have seen, majoritarian bias in particular survives well (perhaps flourishes) in an open, majoritarian system. In some instances of severe majoritarian bias and for some social issues, the courts have assumed the obligations of review and redecision. This has especially been the case where severe majoritarian bias is associated with identifiable, traditional minorities. We earlier connected the characteristics of those minorities traditionally protected in constitutional law and the characteristics of majoritarian bias set out here.¹⁰⁷ Identifying im-

106. See note 129 *infra*.

107. See Part II.B.3 *supra*. There we linked the discreteness, insularity, and immutability of these minorities with the attributes of majoritarian bias — a highly burdened minority and a low-impact yet politically active majority. Such minorities are safe targets for these burdens because they can be easily identified and localized (discrete and insular), and are otherwise unlikely to enter the majority or be entered by members of the majority (immutable). Activating an other-

portant sources of political malfunction, however, is only part of the case for judicial protection of minorities. Determining judicial protection also requires consideration of the difficulties or costs of that protection and a careful match between political malfunction and judicial response.¹⁰⁸

Judicial protection of these traditional groups takes a wide variety of forms and degrees of strength, reflecting variations in the severity of political malfunction and the costs of judicial response. As foreshadowed by the language of the *Carolene Products* footnote, the prime examples of judicial protection of minorities appear in cases dealing with race. The courts have doggedly pursued racial desegregation of public facilities, and in particular the public schools. Modern equal protection jurisprudence — suspect classification and two-tiered scrutiny — was forged in race cases.

From an institutional perspective, it is easy to understand why race is the classic suspect classification. Racial minorities are safe targets. They are usually physically distinct and often geographically localized. It is virtually impossible to leave or enter a racial category. The dismal political history of nonwhites has seen them excluded from voting by law and later by local practice.

Yet even the judicial treatment of race has not been straightforward or uniform. There are variations in the degree to which racial classifications are reviewed by the courts. These variations within the race cases can also be seen as the product of underlying variations in the basic institutional factors of political malfunction and judicial capacity.

On one level, racial classifications have been relatively easy for the courts to handle. Where express racial classifications are involved and operate to the detriment of racial minorities, the courts are often in a position to employ sweeping solutions which simply forbid the political process any use of racial classifications. Government officials have usually justified such racial classifications as means of preventing ra-

wise dormant low-impact majority is easier when the societal issue can be cast in simple and traditional terms — like race, alienage, and gender — with which members of that majority can easily identify.

108. As a general matter, the existence of well-defined, traditional groups probably increases the prospects of protection by reducing the difficulty of formulating and implementing judicial response. Courts constrained in their ability to recognize majoritarian bias and to administer the associated system of protection predictably focus on easily definable, traditional groups with a recognized history of abuse by political processes. As a matter of description, one can expect that less easily defined or traditional minorities will face a more difficult time winning protection. Such minorities would face the significant task of educating the courts on their plight. This suggestion comes from my colleague Bill Clune, who argues that the most powerless minorities might simply go unnoticed by the courts.

cial violence, unrest, and tension. These justifications have been rejected by the courts long before the modern era of equal protection¹⁰⁹ and continue to meet similar sweeping rejection.¹¹⁰ This sweeping rejection of racial classifications, at least where they operate to the detriment of minorities, seems to be the product of the small range of valid use and the significant chance of misuse by the government combined with the difficulty of the courts in discerning between valid and invalid use.

It would, for example, be simple minded to suggest that racial tension is not a reality and a danger which a perfect societal decisionmaker could consider. The white child in *Palmore v. Sidoti*,¹¹¹ raised by her white mother and her black stepfather, could be the target of significant prejudice and derision. Why should a state family law court assigned the task of protecting the interests of this child be precluded from considering these effects in its custody decision? Much of the answer lies in the high probability of misuse of such criteria by the highly imperfect political process. The government's justification itself highlights the existence of the conditions for majoritarian bias. It shows that race is a conscious criterion for members of the majority and that, therefore, the majority is unlikely to be dormant here. Where the existence of racial tension can be used as a factor in taking a child from a white mother who marries a black man, there is a significant chance that this factor will be outweighed by the political process with little weight given to the needs or interests of members of a racial minority or those who marry them. The Court simply cannot trust that the classification would be aptly applied nor is it able to make the necessary distinctions itself. The costs of a sweeping solution here seem justifiably low, although not zero.¹¹²

But such relatively easy solutions hardly characterize all of the racial issues which have faced or will face the courts. In some instances, greater difficulty has produced greater judicial involvement. Thus, for

109. *E.g.*, *Buchanan v. Warley*, 245 U.S. 60 (1917).

110. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

111. 466 U.S. 429 (1984).

112. The *Palmore* Court claimed that any consideration of racial tension in the custody decision was impermissible because it gave official recognition to this wrongful social phenomenon. Such an argument implies that racial tension could not be considered even where the result was favorable to the minority. That argument would neglect the much lower chance of political malfunction where a pro-minority determination is involved.

Notwithstanding the Court's assertion, it seems likely that the result in *Palmore* would have been different if the family court judge had considered the same racial tension as reason for increasing the child support owed by the white father in order to allow the child to attend private school or receive special counseling. This result is consistent with the analysis of reverse discrimination presented subsequently. *See* text at notes 120-24 *infra*.

example, the treatment of racial bias in public education has seen aggressive judicial intervention in the face of difficult societal policy decisions. Education is both important and complex. Vast amounts of public funds are expended on public education and huge administrative networks churn out a wide variety of educational decisions. Formulation and execution of educational policy is often controversial and difficult. The courts cannot easily treat school desegregation with simple formulae and sweeping solutions. Racial desegregation cannot be easily separated from issues like staffing, organization, funding, and educational philosophy. In addition, strong opposition to desegregation by the white majority creates a political advantage for governmental officials in resisting court action which, in turn, means more court action in order to oversee and administer previous judicial orders.

Despite substantial and continuing outlays of judicial resources and significant criticism, the federal courts have generally resisted the pressures toward timidity in school desegregation. The involvement of the courts has been substantial and far reaching, spawning innovative administrative techniques to allow district courts to cope with a responsibility which forces them to supervise ongoing educational decisions for long periods of time.¹¹³

But, even in connection with race, the courts have not always or even usually been so tenacious when faced with significant strains on their resources and capability. A major example of timidity is the court's general response to implicit racial classification. Invalidating only express racial classifications often provides very little protection for minorities. A political process pushed by active majorities can trample the interests of politically weak minorities without recourse to explicit racial classifications. Severe harm can be hidden in the folds of complex but important government activity such as educational administration and land use planning.

The courts have severely controlled their role in most complex social programs by limiting their pursuit of implicit racial classifications through the use of a motive or purpose test. In *Washington v. Davis*¹¹⁴ the Court announced that it would not accept disproportionate racial impact as a sufficient test for the presence of racial classification and, therefore, for serious judicial intervention. Instead, it required a showing that the relevant governmental officials had been motivated by illicit racial concerns.

113. See M. REBELL & A. BLOCK, *supra* note 85.

114. 426 U.S. 229 (1976).

Earlier I argued that it was a mistake to base the definition of political malfunction on the intent, motive, or purpose of government officials. Evil mental states are neither necessary nor sufficient to the conceptions of political malfunction employed in this article. To the extent that this motive test reflects the Court's perception of political malfunction, my earlier criticism of Ely's similar position applies to the Court: motive or purpose are poor indicators of political malfunction.¹¹⁵

There are several indications, however, that the Court's emphasis on motivation actually reflects concerns about its own limitations as a decisionmaker. First, the Court's relevant opinions emphasize judicial limitations. In *Washington v. Davis*, Justice White's majority opinion emphasized the dire implications of employing an impact standard. He pointed to the correlation between income and race and the significant chance that even legislation intended to aid the poor might harm them.¹¹⁶ According to this view, the courts would have been forced to apply strict scrutiny to a vast, ill-defined, and complex set of social legislation.

Second, the Court's use of the motive test vacillates, following a pattern which seems always to limit the judicial role. Before *Davis*, the federal courts had supposed that disproportionate impact was the test. In at least two prominent cases before *Davis*, the Court had appeared to reject motive tests. In *Palmer v. Thompson*¹¹⁷ the Court refused to find unconstitutional the closing of a public swimming pool even though the closing was clearly carried out for racial motivations. The Court there pointed to the absence of disproportionate impact. In *United States v. O'Brien*¹¹⁸ the Court refused to consider evidence of the mental states of the legislators to show that federal legislation forbidding the destruction of selective service cards was intended to stop demonstrations against the war in Vietnam.

One common element in these conflicting pronouncements is that the scope of constitutional rights and of judicial action is consistently controlled. Motivation is required in *Davis* and the judicial role is limited. Impact is required in *Palmer* and the judicial role is limited. Motivation is declared not relevant in *O'Brien* and the judicial role is limited. One need not be cynical to see the Court's concern about the limits of the judiciary.

There is no doubt that the Court had to find a way to confine those

115. See Part II.C *supra*.

116. 426 U.S. at 248.

117. 403 U.S. 217 (1971).

118. 391 U.S. 367, 383-84 (1968).

issues which would be regarded as racial and which would, therefore, receive serious judicial attention. Virtually any governmental decision has differential impacts, and often these impacts fall differently on different income groups. Many programs have a regressive distributive effect. Moreover, the correlation between race and income is substantial. Thus, there are grounds for Justice White's fears, expressed in *Washington v. Davis*, that a racial impact test could place far too great a demand on the courts.

A motive or purpose test looks like a neat tool to limit this demand. It has the appearance of a principle related to basic conceptions of political malfunction. It may even be a rough indicator of political malfunction. Where race is discussed by decisionmakers or otherwise appears to be a conscious consideration, it may be more likely that majoritarian bias rather than minoritarian bias is present. It is second nature to speak of legislation in terms of purpose.

Viewed more carefully, however, the test is neither easy to apply nor a good representation of political malfunction. In most contexts, the numbers of official governmental decisionmakers alone swamps realistic attempts to define collective intent. The Court has shown itself ambivalent about using the test for decisionmaking institutions of more than a few members. Identifying the intentions of large legislatures, let alone statewide referenda, poses serious conceptual problems.¹¹⁹ More importantly, reliance on intent as the sole criterion for distrust of the political process focuses on the wrong aspects of political decisionmaking. It ignores the structure of decisionmaking, the configuration of voting strength, and the undue influence of organized minorities or nondormant majorities. The absence of these central features diminishes the relevance of inquiries about the mindset of legislators and administrators.

It would seem better for the courts to resurrect an impact test and limit the judicial role by such criteria as the severity and directness of that impact. Directness could be determined by asking whether it was reasonable to assume that the severe impact would be generally recognized or expected at the time the legislation was passed. Such a test removes the need to scrutinize the actual debates or conversations and

119. *O'Brien* reflects the limits of *Davis* when it is applied to a large body of decisionmakers. In *Davis and Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (further articulating the *Davis* standard), the governmental decisionmaking bodies were small — city councils or administrative agencies. What is the rule when the entity is as large as a state legislature or Congress? The enduring problem of defining collective intent or purpose already inherent in *Davis* and *Arlington Heights* is significant here. See *Back to the Future*, *supra* note 8, at 203-10. Most representatives are unlikely to express motivation or purpose and there are likely to be a multiplicity of purposes.

to define collective intent. It also broadens the focus of inquiry beyond immediate government officials thereby recognizing the systemic nature of political malfunction. At the same time, however, the test would allow the courts to limit the degree to which they must track racial impact through the tangle of ever more indirect interactions with other social factors.

The treatment of implicit racial classifications is not the only example of major variation in the degree of judicial intervention on race issues. Explicit racial classifications aiding racial minorities have also been treated differently from those harming racial minorities. The Court has upheld affirmative action programs despite the presence of explicit racial classifications and claims by members of the Court that the same standard of strict scrutiny is applicable to any explicit classification.¹²⁰

Whatever the claims of these Justices, the scrutiny actually applied to these reverse discrimination cases operates much differently in practice. For over forty years the presence of explicit racial classifications signaled the application of a strict scrutiny standard which has always been fatal. In many instances, the legislation struck down had been justified as a reaction to racial prejudice and tension.¹²¹ The Court has allowed the existence of this racial prejudice and tension to justify the use of racial criteria only in the context of programs in which the benefited are members of racial minorities and the burdened are members of racial majorities.

The analysis proposed in this article endorses a diminished judicial role in these reverse discrimination cases. Although majoritarian bias makes government action which harms racial minorities severely suspect, government action which harms racial majorities is not subject to the same bias. On a simple level, such action is an example of counterbias — an instance in which a decision runs against the systemic bias. As indicated earlier, the existence of a malfunction or bias does not mean that all results will be contrary to the underrepresented group; they will just occur less often. These counterbias results occur

120. Four major racial affirmative action cases have been decided by the Supreme Court on constitutional grounds. In two, *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court declared the program in question valid. In two, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), the Court declared the program in question invalid. There also have been two instances in which the Court has approved affirmative action plans against claims that they violated civil rights legislation prohibiting racial discrimination. *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Santa Clara Transp. Agency*, 107 S. Ct. 1442 (1987). It disapproved such a plan in *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984).

121. *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429 (1984), discussed in note 112 *supra* and accompanying text.

despite a malfunction not because of one. Thus, at least at a simple level of analysis, there is no need for the review and remaking of such governmental decisions by the judiciary. A very low standard of scrutiny is needed.

This simple analysis, however, requires qualification. Reasons exist to distrust the political process in the context of reverse discrimination. Despite claims of reverse discrimination, a program can be employed to harm the minority in question. The racial minority may be harmed and the majority aided and that effect hidden in the folds of a complex program. Similarly, one racial or ethnic minority may be aided to the direct detriment of another.¹²² The presence of majoritarian bias should make the courts wary of such outcomes. Counterbias operates to reduce distrust only when the politically more powerful group carries the burden.

But a more sweeping claim of bias can be connected to reverse discrimination. No government program generates effects which fall uniformly on all members of large aggregates like racial minorities or majorities. The detriments of reverse discrimination programs do not fall on all whites. Instead they fall on that small group of whites who are denied access to the benefits of the program — admission to medical school, access to government contracts, and access to government jobs. These are groups with small numbers. On what grounds do we suppose that the interests of this small group is adequately represented (let alone, overrepresented) in the political process?¹²³

The answer to this question lies in the realities of judicial review. Only the most severe and lasting political malfunctions can be claimed as the basis of judicial intervention. Most government programs — at least viewed in isolation — have a detrimental impact on only a small group. The small minority of whites are almost certainly not perfectly represented in the political processes which produced the affirmative action programs in question. But that small group lacks the characteristics we have associated with severe majoritarian bias.

Those characteristics were a low-impact but still politically active majority, and a severely harmed minority. In turn, that meant that the minority in question must be a safe target because members of the majority would not want to run a serious risk of slipping into the severely harmed category. There is little reason to believe that the majority of whites, although immediately unharmed by affirmative action programs, could feel comfortable that they faced little or no risk of

122. These cautions about reverse discrimination were articulated by Justice Brennan in his concurring opinion in *Carey*, 430 U.S. at 172-76.

123. Justice Scalia uses this sort of argument in his dissent in *Johnson*, 107 S. Ct. at 1472-76.

falling into the harmed category. As the number of affirmative action plans has grown, so has the chance that present or future programs will impact a large number of whites.¹²⁴

The political processes which fashion affirmative action programs are not even close to perfect. But that is the situation for virtually all governmental decisions. Much stronger indications of intractable bias are necessary before judicial intervention can be justified, especially in so difficult and complex a field. By the analysis employed here, unless such a case is made the decision should remain with the political process.

Various other identifiable groups besides racial, religious, and ethnic minorities have received some degree of judicial protection. Here we will consider two of these groups — women and the poor — both because they have received significant attention from constitutional analysts and because the institutional analysis of judicial protection differs significantly between the two groups as well as between them and racial minorities.

Gender is a classification never officially termed suspect by the Court but which nonetheless has received heightened scrutiny (even before it was called heightened scrutiny). Many factors in our analysis favor the vision that women are likely targets of political malfunction. Gender classifications are immutable in both senses of that term. Gender is the oldest and most traditional distinction — the simplest of symbols, as likely to produce immediate reactions as race and religion. Women were excluded from the vote for most of our history. Gender is a discrete, bifurcated classification with easier identification even than race. There are many racial minorities and restrictions on one race may become restrictions on another. There are only two genders; in that sense, gender is more discrete than race.

There are, however, two elements which may decrease the force of the case for judicial protection of women from majoritarian bias. The most obvious is that women are not a minority. Women have the potential for significant voting strength. Women are also not insular. Women regularly interact with men in the household, in the school,

124. It is also possible to argue that minoritarian bias prevails. Racial minorities can be effective special interests. They are often instrumental in the passage of affirmative action plans — although in many instances their influence is felt through their threat to use the courts rather than direct influence in the political process. But again the question is whether affirmative action plans are a context for minoritarian bias extreme enough to call for judicial replacement of the political process. Minoritarian bias is most severe when the low-impact majority would likely ignore the issue involved because that issue is unfamiliar and inaccessible. Affirmative action issues do not readily fall into that category. Such plans receive substantial attention in the media because they interest people. Although concentrated racial minorities have been politically effective, affirmative action is not likely to be a fruitful context for long-term minoritarian bias.

and in the general community. As such, there is a significant chance that the negative impact of laws on women will have negative spillover effects on men. To that extent, women may not be safe targets.

This lack of insularity, however, can also be seen as a disadvantage for women. As Ackerman has argued, the dispersion of women may make organization more difficult.¹²⁵ On an even more subtle level, the interactions between men and women may not always or perhaps even usually produce empathetic relations with men. They may form contexts in which the interests of women are suppressed in favor of men. This is the world which feminists, in particular, have presented.¹²⁶ If the lack of insularity does not work to increase the positive interdependence of men and women, women remain the safe target that their physical immutability dictates, although their large numbers give them a political potential not shared by other safe targets.

This more complex picture of the treatment of women in the political process stands as a general reminder that the analytical constructs employed here, like all such intellectual devices, cannot capture the full texture of reality. Their application in any given area remains subject to review and debate. Yet they are valuable as a first cut at questions of institutional analysis and provide a framework which can help us understand the judicial treatment of even so difficult an area as gender discrimination.

From this vantage, the judicial approach to gender discrimination seems to be built not on fear of an overpowering majoritarian bias but rather the presence of a workable combination of minoritarian bias and ease of administration. Women can easily be seen as a dormant majority. Many laws employing gender classification exclude women from occupations or business. Such exclusions are typical of economic regulations by which concentrated groups seek to limit competition in general. These exclusions are aided in the gender setting by common stereotypes about women.

On the other hand, women would seem to have a less potent claim of minoritarian bias than other dormant majorities, such as consumers and taxpayers. That women are a discrete group tends to reduce the likelihood of dormancy. Discreteness, a disadvantage for a minority against majoritarian bias, is an advantage for a majority against minoritarian bias.

Discreteness here, however, can serve as an advantage for judicial

125. See Ackerman, *supra* note 33, at 729, 742.

126. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED* (1987); C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Fineman, *Dominant Discourse, Professional Language, and Legal Change*, 101 HARV. L. REV. (1988) (forthcoming).

intervention because it makes intervention easier — so long as the courts do not search much beyond explicit classifications. At least as to express gender categories, sweeping solutions seem quite usable. These classifications can be struck down with little loss. Gender is usually justified as a rough approximation of some other characteristic such as strength. More direct tests are usually available thereby decreasing the need for gender as an approximation.

The Court has taken a “low cost” approach to gender discrimination by scrutinizing gender classifications only so long as they are explicit and do not force the Court to confront difficult substantive areas. When, however, the legislation raises the prospect of greater expense, either by going beyond explicit gender classifications or by raising questions of gender equality in difficult substantive contexts, the Court seems to make an abrupt halt. The Court has taken a largely mechanical approach, striking down virtually all express gender classifications and ignoring implicit classifications even where the implications were very strong.¹²⁷ Even an attenuated threat of facing traditionally difficult subject matter seems to have caused the Court to back off from serious scrutiny of the congressional exclusion of women from the requirement to register for the military draft.¹²⁸ Such timidity again reveals a limited judicial commitment to scrutiny of gender classifications. Judicial reaction to gender discrimination, like the reaction to commercial speech and some laws reviewed under the dormant commerce clause, may only be a small scale incursion against minoritarian bias made tractable by the limits of constitutional doctrines designed for other purposes.¹²⁹

The case for judicial protection of the poor, another of Ackerman’s

127. An extreme example is *Geduldig v. Aiello*, 417 U.S. 484 (1974), where the Court refused to see a gender classification in the exclusion of pregnancy from California’s employee disability insurance coverage.

128. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

129. A deep distrust for minoritarian bias continuously prompts limited judicial reactions against it. On isolated occasions, both the Warren and Burger Courts have been tempted back to direct scrutiny of minoritarian bias. In *Morey v. Doud*, 354 U.S. 457 (1957), the Warren Court struck down an Illinois statute which placed requirements on all financial institutions except one, American Express.

Although the Burger Court subsequently overruled *Morey* in *New Orleans v. Dukes*, 427 U.S. 297 (1976), it built its own havens for direct review of minoritarian bias. The most obvious of these is commercial speech. Until recently, commercial speech had been excluded from the rigorous protection accorded speech in general. Precedent certainly did not compel the Burger Court to extend protection here. The first amendment, however, provides a convenient haven for direct judicial reaction to minoritarian bias.

Suppression of competition in the guise of consumer protection is the classic form of minoritarian bias. One standard way to control competition is restriction of advertising. Although restriction of advertising is neither the most frequent nor the most flagrant form of control on competition perpetuated by special interests, the special nature of speech established by the first amendment (on other grounds) provides a convenient (if arbitrary) limit which allows the courts

examples,¹³⁰ is quite different from the case for protection of women. Here, although there may be stronger reasons for protection, there are far more problems in providing it. Unlike women, the poor by most definitions are far from a majority of the nation, of any state, or even of most locales. Poverty is often associated with low education and transience. The rate of participation in the political process is significantly lower for the poor than the nonpoor.

The poor are dispersed and diffuse in quite a different sense than women and with quite different effects. Although the poor may be dispersed geographically in the sense that poverty exists throughout the nation, they are in many instances geographically isolated. The urban poor are likely to be concentrated in certain neighborhoods in the center city, seldom in the suburbs. They can be easily targeted geographically, and since they have very little interaction with the more affluent there will be little spillover, which adds to the ease of targeting. Zoning laws can increase income segregation; often that is their purpose. Income segregation aids easy targeting.

The only factor arguing against considering the poor a discrete minority is that poverty is not immutable — at least in theory. The poor become nonpoor and vice versa. It is unlikely, however, that many nonpoor will become poor and, therefore, the poor are relatively safe targets.¹³¹

to cut off the indistinguishable mass of regulation which would swamp the courts' abilities and resources.

The federal courts also actively review legislation subject to minoritarian bias under the rubric of the dormant commerce clause. It is common to see political malfunction here in the absence of representation of outside interests in the state. On this theory, interstate commerce needs judicial protection because the harms of regulation fall on those outside the state. In some instances, it is accurate to find the losers from such restrictions out of state and the winners in state. See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

Many dormant commerce clause cases, however, involve restrictions on out-of-state competition with in-state sellers. See, e.g., *Hunt v. Washington Apple Advertising Commn.*, 432 U.S. 333 (1977). Like any restrictions on competition, the losers include the consumers of the restricted product and, in these cases, those are *in-state* consumers. If such state laws suffer from political malfunction, it is minoritarian bias. The problem is not the absence of an in-state interest which might bear loss. The problem is the absence of activity by such a group. The major losers from restrictions on competition — whether in-state or out-of-state competition — are in-state consumers. As such, the dormant commerce clause, with its ostensible interest in bias against out-of-state interests, hosts a subset of the more pervasive minoritarian bias. Like commercial speech, the conventional rubric allows for a convenient cutoff from the mass of government actions subject to minoritarian bias.

130. See Ackerman, *supra* note 33, at 729, 739.

131. Such an assertion, of course, depends on the definition of "poor." Poverty and indigence are defined in a number of ways. Yet even given a generous definition of poverty, the probability that most nonpoor would become poor seems low.

The only relevant study of which I am aware indicates that, based on data from the 1970s, there is less than an 8% chance that someone in the upper 60% of the income distribution would fall into the lowest 20% of that distribution over a seven-year period. G. DUNCAN, *YEARS OF POVERTY, YEARS OF PLENTY*, 12-14 (1984). The upper limit of this lowest twenty percent is

There is, then, a strong case that the poor suffer significant majoritarian bias. The major problem with protecting the poor lies in the difficulties of providing that protection. Review of legislation affecting the poor poses issues of income redistribution. This topic lies at the core of social decisionmaking and arises in virtually every substantive setting. Where legislation (or legislative inaction) directly confronts income redistribution, the courts are competing with the political process for one of the most pervasive and controversial social issues. Virtually all laws redistribute income to some degree; tax laws and welfare laws are only the most obvious examples. It is very difficult to imagine that serious review could take the form of sweeping solutions. Without a confining strategy, the judicial role could easily exceed its physical capacity and substantive competence.

The Supreme Court has made overtures of protection for the poor. But it has narrowed that protection severely by confining itself to the impact on the indigent of only a small range of substantive issues and government actions. These government actions have usually involved access of the poor to the courts and the political process (voting). Courts have confined their role through the curious doctrine of fundamental rights.¹³² Even here the courts have refused to review seriously large-scale, controversial funding bills which can pervasively affect fundamental rights,¹³³ while invalidating more idiosyncratic and narrow government actions.¹³⁴

Because of serious vulnerability to majoritarian bias, the poor need judicial protection. But the challenge for proponents of that protection is to define a strategy which will allow the courts to review some important government actions without facing the full range of distributive questions.

The existing constitutional decisions examined thus far have generally followed a pattern at least roughly consistent with the institutional framework suggested in this article. Whether one agrees or disagrees with the outcomes or the reasoning of these cases, one can recognize the pattern; any differences seem to fall within a disputable range of institutional assumptions. Normative assertions made thus far have called for improved institutional results.

approximately thirty-five percent above the official poverty level, providing a broad definition of "poor." Presumably, if one used the official poverty level to define "poor," the probability of members of the majority of nonpoor becoming poor would be significantly lower.

132. We will discuss this doctrine at notes 136-38 *infra* and the accompanying text.

133. See *Harris v. McRae*, 448 U.S. 297 (1980) (abortion funding).

134. See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating a state law which effectively prohibited an indigent from marrying until he had satisfied prior child support payments).

But this sanguine mood does not always prevail and seems certainly broken by the Supreme Court's recent decision in *Bowers v. Hardwick*.¹³⁵ In that case, the Court carried fundamental-rights reasoning to an institutionally perverse conclusion. According to that reasoning, the singling out of an insular, discrete minority for derogatory treatment was a virtue which increased the constitutional validity of the government action.

The Court in *Bowers* was asked to pass on the validity of Georgia's sodomy law. The law had been attacked as a violation of the right of privacy which had been declared a fundamental right almost twenty-five years earlier in *Griswold v. Connecticut*,¹³⁶ where the Court struck down a law prohibiting the use of contraceptives. As indicated earlier, the term "fundamental rights," as used in constitutional jurisprudence, is more opaque than most.¹³⁷ The list of fundamental rights is, in fact, small. Many entries are familiar and can easily be linked to traditional forms of political malfunction.¹³⁸ The right of privacy, however, is not so easily cabined. It remains the most controversial, most potentially expansive, and least understood fundamental right.

Griswold is one of those cases that snotty law professors love to dissect, with its three concurring (and two dissenting) opinions locating the illusive right of privacy in various constitutional provisions ranging from the penumbras of the first, fourth, and fifth amendments to the ninth amendment to the basic tenets underlying the due process clause of the fourteenth amendment. Whatever the problems with these doctrinal rationales, however, it is the inability of the Court to define privacy, and the reasoning the various Justices used in attempting to do so, which gave rise to the strange logic of *Bowers*. In *Griswold*, various Justices went on at length about the dangers to home and marriage from state interference with these traditional concepts.

135. 106 S. Ct. 2841 (1986).

136. 381 U.S. 479 (1965).

137. See Part I *supra*.

138. Voting, appellate procedure, and political association are concerns closely connected to the correction of political malfunction (especially minoritarian bias) discussed earlier. As we have seen, indigence is often present when a violation of fundamental rights triggers strict scrutiny.

The ill-defined fundamental right to travel can also be broken down into familiar components. The right to travel from one state to another seems consistent with a classic form of political malfunction — state action operating on citizens of other states who have no vote in the restricting state. Similar concerns about political malfunction underlie the commerce clause and privileges and immunities clause. See J. ELY, *supra* note 4, at 89-91. In other guises, this right to travel picks up the first amendment concerns about the protection of unpopular political positions, see *Kent v. Dulles*, 357 U.S. 116 (1958), or judicial reaction to racial or wealth discrimination. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

From these vague ramblings in *Griswold*, it was easy to gather the notion that it was the prohibition of sexual and procreative activities of the most traditional sorts which should trigger judicial intervention. Here fundamental rights are truly linked to fundamentalness. The logic is simple — the more people who are seriously interfered with the more serious the interference.

But that logic is not relevant to the central institutional issue — the need for judicial protection. As the facts of *Griswold* show, such circumstances are precisely where judicial protection is not needed. No one was enforcing the law in *Griswold*. Those attacking the law had a devil of a time producing sufficient controversy to get standing and had failed on several occasions. This difficulty is perfectly consistent with the most straightforward institutional analysis: A state's attempt to interfere with activities which a vast majority consider important is likely to be dealt with quite well by the political process.

That the Court should have expended so much effort on unneeded protection in *Griswold* was at worst silly in that context. When the Court in *Bowers* used the *Griswold* reasoning to justify a selectively enforced sodomy prohibition in *Bowers*, however, the result is much worse. Although the Georgia sodomy law does not explicitly single out homosexuals, it is homosexuals who justifiably fear the law. This select subgroup apparently was the only group at risk from enforcement of the Georgia law. In both the courts and the media, *Bowers* was discussed primarily in terms of prohibition of a homosexual activity. More importantly, this narrow targeting of homosexuals made the Georgia law more acceptable to the Court in *Bowers*, with both the Court and the state of Georgia treating broader application of the statute as constitutionally suspect.

A sodomy law which in practice interfered with intimate relations among married couples would interfere with the actions of more people. But that sort of broad application would also make judicial protection less necessary: The more widespread and important the prohibited practice, the more likely that the prohibition will be reformed within the political process. The constitutional problem with the sodomy laws is that the real threat of enforcement is focused on a small group. Homosexuals can be singled out for enforcement without serious fear of political reaction. That makes judicial protection more important — not less.

There are good grounds, in fact, to consider homosexuals a group in need of general judicial protection, like that accorded under strict scrutiny equal protection. Homosexuals have a great many of the characteristics of protected minorities. They are a discrete, easily de-

finer group. Although immutability has been in issue, it is generally thought that sexual proclivity is a disposition established early in life (perhaps at birth) and unlikely to change. Homosexuals are often geographically insular. Sexual proclivity is another traditional subject which can easily generate a visceral response among the heterosexual majority. Certain religious groups have traditionally considered homosexuality a sin. These religious groups provide an organized subgroup capable of informing and organizing the heterosexual majority. Although gays are vocal minorities in a few communities, they are certainly a small minority in most locales, in all states, and in the nation.

The reluctance of the Supreme Court even to recognize the need to protect homosexuals seems difficult either to explain or to justify from an institutional standpoint. Whether one is sympathetic to homosexuality or not, homosexuals are still a group which faces serious potential for majoritarian bias. In *Bowers*, the Court could have confined its protection of homosexuals to the issue of sexual conduct and even hidden it under the guise of the right of privacy. Instead, it rejected protection of sexual privacy in exactly the situation in which it was most needed.

There are important societal issues where a prohibition severely impacts unconventional lifestyles and raises the possibility of majoritarian bias. It is possible to understand some of the Court's privacy decisions, as well as its protection of literary use of sexual images, as a reaction to such majoritarian bias (even though they may be rationalized under the rubric of fourteenth amendment fundamental rights or first amendment protection of expression). Minorities who suffer from this bias are often defined only by the particular unconventional lifestyle choice rather than by some more general and traditional minority classification. If because these minorities are not as easily defined as traditional minorities the courts choose to rationalize their protection in terms of subject matter, then resulting semantic fictions, like fundamental rights, are arguably understandable and tolerable. But when courts and commentators distort the conceptions so that decisions about judicial protection no longer relate to the need for such protection, the fictions come at too high a cost. Lyrical discussions of fundamentalness couched in terms of the search for self-fulfillment or the tradition of the American home promote the sort of twisted reasoning found in *Bowers*. If the courts are going to use the notion of privacy to protect the conventional activities by those already able to protect themselves politically, they should drop the concept now. At the least, it wastes precious resources; at the worst, it

adds to the problems of those unable to represent themselves in the political process.

CONCLUSION

Referring to the Allied victory in North Africa and its meaning to the prosecution of World War II, Winston Churchill allowed as how it was not the end, nor even the beginning of the end, but was perhaps the end of the beginning. In three articles, I have explored the need for comparative institutional analysis which realistically and sophisticatedly portrays the complexities of societal decisionmaking in general and of constitutional judicial review in particular. I have criticized those constitutional commentators who have failed to seriously consider institutional features and those whose considerations were not comparative or sufficiently developed. In this article, I have presented an institutional analysis which I have found useful in understanding constitutional law, history, and commentary, and I have applied it to a wide range of these issues.

I do not, however, believe that this is the last word on institutional analysis, let alone an encyclopedic review of all constitutional issues. Most of the task of constructing and improving the necessary analytical tools and employing them to understand constitutional law remains to be done (if, in fact, such work can ever be completed). Characterizing and studying the various parts of what I have called the political process, exploring the troubling interaction between societal goals and institutional choice, and examining empirically all the assertions about forms of bias and resource constraints just begin the work list. This article is certainly not the end or even the beginning of the end of this work.

Yet there is a beginning here which can be considered, criticized, and built upon. Institutional tools have been defined and a framework constructed. The analysis has been applied to constitutional decisions, historical moments, and commentary. These constructs and applications are admittedly subject to debate and change, but even in their present form they give judges and scholars something real to work with. They are better than the attractive but fictitious imagery of original intent and the judicial search for overriding moral principles. Constitutional law cannot be divorced from institutional reality and, therefore, constitutional analysis ought not be divorced from institutional analysis. That such analysis is difficult and even troubling cannot be denied. But it also cannot be avoided.