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## The Collateral Consequences of Ex Post Judicial Review

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# THE COLLATERAL CONSEQUENCES OF EX POST JUDICIAL REVIEW

Brianne J. Gorod\*

*Abstract:* Judicial review produces disruptions to democratic preferences that are not constitutionally required. Judicial review produces these disruptions because the law the Court declares unconstitutional is not automatically replaced with the laws that policymakers would have enacted had they known their preferred policy was unconstitutional. The Court is institutionally ill-equipped to address these disruptions, and the coordinate branches are often unwilling or unable to do so—unwilling because their membership has changed since the law was enacted, or unable because of institutional features that make quick response difficult. Under either scenario, these disruptions are cause for concern. Yet they are virtually inevitable under our current system of ex post judicial review. The answer is not to abandon judicial review, which plays an important role in our constitutional structure, but to reconceptualize it. This Article offers preliminary thoughts on what a system of ex ante judicial review might look like and argues that such a system would also address the policy distortions and significant legal uncertainties caused by our current system. Recognizing that such radical reforms are unlikely to be imminent, the Article also offers a number of more modest proposals that could help address these greater-than-necessary democratic disruptions in the short term. Finally, the Article argues that the Supreme Court has not taken even these modest steps because it is unwilling to acknowledge the policy disruptions its decisions often produce. This lack of honesty about its role may impair the Court’s ability to fill that role effectively.

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## INTRODUCTION

The most obvious facts are sometimes the least appreciated. Each time a legislature or an agency enacts a new law or regulation, it does so against the backdrop of the existing statutory or regulatory regime, and its decisions about what laws are necessary or desirable are thus informed (at least to some degree) by its understanding of what laws already exist.<sup>1</sup> This fact may be obvious, but the consequences that follow from it often are not. This Article explores one such consequence: the significant, but not constitutionally required, disruptions to democratic preferences that constitutional judicial review commonly produces. These disruptions are what I call the “collateral consequences” of judicial review.

Constitutional judicial review—which I define broadly to include any

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1. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 94 (2000) (“Whenever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant.”); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”); cf. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (“Congress is understood to legislate against a background of common-law adjudicatory principles.”).

judicial action that displaces legislative or regulatory judgment on constitutional grounds—has been a feature of the American judicial system for nearly as long as the system has existed. Although the origins of judicial review are often associated with *Marbury v. Madison*<sup>2</sup> and Chief Justice Marshall’s famous declaration that it is the province of the judiciary to “say what the law is,”<sup>3</sup> Marshall was recognizing an existing practice, not creating a new one.<sup>4</sup> And it is a practice that, notwithstanding “one long dry spell,”<sup>5</sup> has remained a persistent feature of our constitutional democracy ever since.

Judicial review has been the subject of significant academic attention. Most notably, the academic community has long been obsessed with what Alexander Bickel called the “countermajoritarian difficulty”—that is, understanding whether (and in what circumstances) it is appropriate for unelected judges to overturn the judgments of democratic actors.<sup>6</sup> But the difficulty is not an insurmountable one. To many, judicial review plays an integral role in our constitutional structure, enabling courts to strike down statutes and regulations that are inconsistent with the nation’s highest law, the Constitution.<sup>7</sup>

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2. 5 U.S. (1 Cranch) 137 (1803).

3. *Id.* at 177.

4. As William Treanor has argued, “judicial review was dramatically better established in the years before *Marbury*” than most have recognized. See William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 457 (2005); cf. Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1176–77 (1987) (arguing that the Founders intended the courts to overrule legislative judgments based not only on the Constitution, but also on natural law).

5. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 390 (1998) [hereinafter Friedman, *The History*]; see also *id.* (noting that “the Supreme Court invalidated no national legislation [between *Marbury* and *Dred Scott*]”).

6. See *infra* notes 32–43 and accompanying text.

7. See, e.g., Bruce Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1046 (1984) (“When the Court invokes the Constitution, it appeals to legal enactments that were approved by a whole series of majorities—namely the majorities of those representative bodies that proposed and ratified the original Constitution and its subsequent amendments. Rather than a countermajoritarian difficulty, the familiar platitude identifies an intertemporal difficulty.”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 911 (1985) (“Far from exalting the judiciary over all, the doctrine of judicial review based on the courts’ construction of the Constitution simply safeguarded the authority of the people who had ‘ordained and established’ the Constitution in the first place.”); Martin H. Redish, *1990 Survey of Books Relating to the Law*, 88 MICH. L. REV. 1340, 1349 (1990) (reviewing ROBERT NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989)) (“Since in a constitutional democracy the only justification for judicial review by an unrepresentative governmental organ is to ensure that the majoritarian branches adhere to the countermajoritarian limitations imposed by the Constitution, judicial invalidation of the exercise of majoritarian will on any other grounds erodes fundamental democratic principles.”).

The problem, however, is when an act of judicial review produces disruptions to democratic preferences that are not constitutionally required. Such disruptions frequently arise for the reason I noted above. When policymakers enact laws, they do so in reliance on the existing state of the law. In other words, they enact some laws and not others based on which laws seem necessary to achieve desired policy goals in light of other laws already on the books. Thus, for example, policymakers will not enact law *Y* because they think law *Y* is unnecessary in light of existing law *Z*, which accomplishes the same goal. This is an eminently reasonable approach to legislating, except for one problem: when the Court strikes down law *Z* as unconstitutional, constitutional law *Y* is not in place even though policymakers would have enacted it had they known law *Z* was unconstitutional. Thus, the Court's decision to strike down law *Z* produces disruptions to democratic preferences beyond those the Constitution requires.

Consider a more concrete example: the Supreme Court's landmark decision in *Citizens United v. Federal Elections Commission*.<sup>8</sup> In that case, the Court held that *Citizens United*, a nonprofit corporation, could engage in political spending to distribute its anti-Hillary Clinton documentary on video-on-demand during the 2008 election cycle.<sup>9</sup> To reach that result, the Court held unconstitutional a federal law that prohibited "corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate."<sup>10</sup> Whether one agrees with the Court or not,<sup>11</sup> it held that this disruption to democratic preferences was required by the First Amendment.<sup>12</sup> But the Court's decision produced other disruptions to democratic preferences that were not constitutionally required under its holding in that case. For example, one consequence of the Court's decision in *Citizens United* was arguably to allow foreign involvement in U.S. elections in ways that were not previously

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8. 558 U.S. 310 (2010).

9. *Id.* at 315.

10. *Id.* at 315, 310.

11. In the three years since the decision issued, a voluminous literature has developed on the merits of the Court's holding, as well as its broader implications. See generally Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643 (2011); Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243 (2010); Gene Nichol, *Citizens United and the Roberts Court's War on Democracy*, 27 GA. ST. U.L. REV. 1007 (2011); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

12. *Citizens United*, 558 U.S. at 340–41.

possible,<sup>13</sup> even though the Court expressly left open the question whether restrictions on such involvement would be constitutional.<sup>14</sup> Likewise, the Court's decision enabled this spending to occur without adequate disclosure,<sup>15</sup> even though the Court suggested that disclosure requirements would be constitutionally permissible.<sup>16</sup> Again, the Court's decision produced these disruptions because the campaign finance regime assumed the existence of the prohibition on corporate and union spending; policymakers had not enacted laws they might have wanted had they known corporations and unions would be able to engage in this kind of political spending.

These sorts of democratic disruptions reflect the paradoxical nature of the Supreme Court's power.<sup>17</sup> Although the Court's influence on American society and politics is profound,<sup>18</sup> it has always been (and was created to be)<sup>19</sup> the least powerful of the three coordinate branches of government.<sup>20</sup> Its power is (in theory) limited to resolving the specific

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13. Although there is some debate about whether this result necessarily follows from the Court's decision in *Citizens United*, there are strong arguments that existing law does not sufficiently address the involvement of foreign-owned and controlled corporations in U.S. elections. See *infra* notes 117–119 and accompanying text.

14. *Citizens United*, 558 U.S. at 361.

15. See *infra* notes 120–121 and accompanying text.

16. *Citizens United*, 558 U.S. at 365–66.

17. Alexander Bickel began his celebrated *The Least Dangerous Branch* by noting this paradox: “The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962).

18. See, e.g., Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 787 (1999) (“Certainly the federal judges, and especially the Justices of the Supreme Court . . . exercise an extraordinary degree of authority over our society and culture.”).

19. See, e.g., THE FEDERALIST NO. 78, at 427 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“[I]t proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two [that] the general liberty of the people can never be endangered from that quarter . . .”).

20. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 516–17 (1987) (“Functional approaches to matters involving the judiciary acknowledge its position as ‘the least powerful branch’; their consistent tendency is to validate legislative choices, avoiding confrontation.”). But see Bobby R. Baldock et al., *A Discussion of Judicial Independence with Judges of the United States Court of Appeals for the Tenth Circuit*, 74 DENV. U. L. REV. 355, 358–59 (1997) (discussing the proposition that the judiciary is the least powerful branch, and not unanimously agreeing with it); Wood, *supra* note 18, at 787 (“Alexander Hamilton called the judiciary the ‘weakest branch’ of the three branches of government, but today we know better. To us not only does the unelected, life-tenured federal judiciary seem remarkably strong, but at times it actually seems bolder and more capable than the two elective branches in setting social policy.” (footnote omitted)).

case or controversy before it,<sup>21</sup> and it cannot enact rules to address gaps or other disruptions in the law that its rulings may create. Thus, when the Court strikes down a law, it does not put in place the additional policies or rules policymakers would have enacted had they known their preferred outcome was unconstitutional.

To be sure, policymakers can respond to these democratic disruptions. The problem is that they often do not, and they rarely do so quickly. In many cases, by the time the Court strikes down a law, the coalition that enacted that law will no longer exist, and the new coalition may be unwilling to respond to the Court's decision.<sup>22</sup> To some, this may seem unproblematic: if current policymakers are not bothered by the new status quo, then perhaps no one else should be. But normally, when policymakers enact a policy into law, that policy remains the law until subsequent policymakers take affirmative action to repeal it.<sup>23</sup> This requirement ensures that there is transparency to the political process and that positive changes in the law reflect conscious choice and deliberate action. Our current system of judicial review turns this process on its head, allowing democratic preferences to be disrupted without affirmative action by the coordinate branches. To the extent these disruptions are not constitutionally required, that should at least give us pause.

In other cases, policymakers may want to respond, but their response will be slow in coming for institutional reasons related to both the courts and the coordinate branches. It will surprise no one that the coordinate branches often fail to act quickly, and that is no less true when the courts have disrupted democratic preferences in a way that might warrant some legislative or regulatory response. Thus, again, the result of the Court's decision will be a change in the status quo that, critically, is not constitutionally required. To some, this too may seem unproblematic because under this scenario there will eventually be some policy response to address the democratic disruptions. But that policy response may be a long time in coming, and in the interim, the consequences of these democratic disruptions may be significant.

The proper response to this problem is not to abandon judicial review, which is an essential part of our constitutional structure, but instead to

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21. See U.S. CONST. art. III.

22. See generally William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 524 (1992).

23. The one exception to this general rule is when the statutory provision compels its own expiration through a sunset provision. See, e.g., Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1014–21 (2011) (discussing the history of “temporary legislation”).

reconceptualize it. After all, these problems are to some degree inherent in any system of ex post judicial review. When the Court strikes down a law *after* it has been enacted, it is often impossible to meaningfully rectify the democratic disruptions that its decision creates. It would be far better if the courts could provide guidance to policymakers *before* they act, or at least provide broader decisions when they review a statute, so policymakers may better understand the legal framework when they are trying to respond.

Indeed, a system of ex ante judicial review would help address other problems with our current system. Significantly, the prospect of ex post judicial review can create policy distortions, as policymakers sometimes do not enact their preferred policy (or any policy at all) because of uncertainty about its constitutionality.<sup>24</sup> Moreover, our system of ex post judicial review, combined with the iterative, case-by-case manner in which it is exercised, often produces significant uncertainty about the state of the law that creates difficulties for governmental actors and the public alike. To take a recent example, when the D.C. Circuit Court of Appeals held unconstitutional President Obama's recess appointment of several members of the National Labor Relations Board ("NLRB"),<sup>25</sup> the decision created significant uncertainty not only about the validity of actions the NLRB had taken with respect to parties not before the court, but also actions taken by other agencies, such as the Consumer Financial Protection Board, whose head had been similarly recess appointed.<sup>26</sup> One cannot help but wonder whether there might be a different—and better—way.

This Article does not attempt to fully describe the problems posed by ex post judicial review, or to comprehensively develop an alternative model. But it does provide some preliminary thoughts on what a system of ex ante judicial review might look like, while recognizing the constitutional and practical obstacles that such reform would face. It also offers proposals for more modest reforms that could be implemented under our current system of ex post judicial review. Those proposals will not completely eliminate these democratic disruptions, but may nonetheless help minimize the problem. For example, courts could stay their judgments for defined periods of time to give policymakers an opportunity to respond before the decision goes into effect, thus giving

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24. See *infra* notes 146–148 and accompanying text.

25. Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).

26. See generally Stephen Koff, *Appeals Court Strikes Down Obama's Recess Appointments*, CLEVELAND PLAIN DEALER (Jan. 25, 2013, 11:59 AM), [http://www.cleveland.com/open/index.ssf/2013/01/appeals\\_court\\_strikes\\_down\\_obam.html](http://www.cleveland.com/open/index.ssf/2013/01/appeals_court_strikes_down_obam.html).



policymakers an opportunity to stop these democratic disruptions before they even occur. In some cases, it might even be appropriate for the Court to put in place the rules that they think policymakers would have adopted had they known the law they enacted was unconstitutional.

Policymakers could help address this problem, as well. For example, Congress could enact more substantive fallback provisions. Such provisions would automatically go into effect when the law to which they are attached is held unconstitutional. Or they might adopt streamlined procedures to facilitate quicker responses in the immediate aftermath of judicial decisions, or engage in regular statutory or regulatory housekeeping to ensure that attention is paid to areas in which court action tends to produce these democratic disruptions. At minimum, thinking through these possible solutions will help us to understand this underappreciated consequence of judicial review, as well as what can be done about it.

Part I provides background on judicial review, both as it is viewed in the literature and in the courts. This background helps make clear that although judicial review has been the focus of much attention, the topic of this Article—the greater-than-necessary democratic disruptions it produces—has not been.

Part II explains why these disruptions exist—how the courts create them, and why they end up unaddressed by policymakers. It looks, in particular, at the two different scenarios in which they arise. In some cases, policymakers may not respond because they are not bothered by the change in status quo the Court's decision creates. In other cases, they may want to respond, but immediate response is impossible. As this Part explains, both scenarios present cause for concern.

Part III leaves the theoretical and turns to the practical. It provides a number of concrete examples of these democratic disruptions and demonstrates that they are not constitutionally required by illustrating the many different ways (short of amending the Constitution) that policymakers can respond to them.

Part IV offers preliminary thoughts on solutions. Most significantly, it begins to imagine what a system of *ex ante* judicial review might look like and explains the benefits of such a system. It also offers a number of other proposals that may be more realistic short-term responses to this problem. None of these proposals is perfect, but each may be appropriate in some circumstances. At minimum, the Court and the coordinate branches should systematically consider adopting these proposals. If nothing else, that systematic consideration will bring more attention to the larger complexities of our system of *ex post* judicial review.

Finally, Part V concludes by offering some thoughts about why the

Court has not more regularly adopted these modest proposals. The answer, I argue, lies in the way the Court sees its role—or at least purports to see it. The Court wants to present itself as divorced from the worlds of politics and policy, even though its decisions often have profound consequences for both worlds. A little more realism about its role could make it much easier for the Court to play that role effectively.

## I. COURTS AND COMMENTATORS HAVE PAID INSUFFICIENT ATTENTION TO AN IMPORTANT CONSEQUENCE OF JUDICIAL REVIEW

Constitutional judicial review is at once controversial and uncontested. Although no one doubts that it is a valid exercise of judicial authority, almost no one agrees on why and under what circumstances. As a result, judicial review has been an almost constant source of discussion and debate, both within the academic community and without. I do not attempt to retread this familiar territory here, but instead I provide a brief background on how judicial review has been viewed by commentators and the courts. As I explain, both communities have neglected an important part of the story: judicial review can produce significant disruptions to democratic preferences even when the act of judicial review is otherwise warranted. The remainder of this Article focuses on those disruptions—and what can be done about them.

### A. *In the Literature*

There is a vast literature that addresses judicial review: its history,<sup>27</sup> its theoretical underpinnings,<sup>28</sup> its effectiveness,<sup>29</sup> its costs,<sup>30</sup> and its

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27. See generally Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1795–859 (2008); Treanor, *supra* note 4, at 455; William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994); Wood, *supra* note 18.

28. See, e.g., David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 725 (2009) (proposing “a theory of judicial power that addresses [why] political actors, such as presidents and legislatures, comply with acts of judicial review that limit their power” and whether “the relationship between judicial review and popular rule [is] necessarily an antagonistic one”).

29. See generally GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Michael Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

30. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154, 165 (1999) (describing the popular benefits that might result in the absence of a system of judicial review). *But see* Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416 (2000) (responding to Tushnet’s critique of judicial review) [hereinafter Chemerinsky, *Losing*].

justifications.<sup>31</sup> The most significant cost, at least to many in the academic community, is the “countermajoritarian difficulty”<sup>32</sup>—the problem of reconciling judicial review with popular governance in a democratic society.<sup>33</sup> As Barry Friedman has observed, the countermajoritarian difficulty “has been the central obsession of modern constitutional scholarship.”<sup>34</sup> Although the nature of the obsession has shifted over time—alternating between a project of justification (when the academy likes the consequences of judicial review) and one of critique (when the academy is less enamored of the results judicial review produces)—the problem identified remains the same: the purported “inconsistency between judicial review and democracy.”<sup>35</sup>

Scholars have, of course, offered a wide variety of justifications for the practice of judicial review. Most famously, some scholars have offered judicial review as a means of “enforc[ing] the limits of the Constitution.”<sup>36</sup> Under this view, the courts can step in to enforce the Constitution to protect against defects in the political process.<sup>37</sup> This is the idea underlying the famous footnote 4 in *Carolene Products*,<sup>38</sup> which

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31. See *infra* notes 36–41 and accompanying text.

32. The term “countermajoritarian difficulty” was made popular by Alexander Bickel in 1962, Friedman, *The History*, *supra* note 5, at 334–35; see BICKEL, *supra* note 17, at 16, although concerns about the tension the term identifies predate the label, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 YALE L.J. 153, 157 (2002) [hereinafter Friedman, *The Birth*] (noting that “judicial review has been criticized on and off since at least 1800 on the ground that it interferes with popular will,” but distinguishing those criticisms from the “intellectual problem of justifying judicial review that has gripped the academy nonstop since the early 1940s”).

33. Friedman, *The History*, *supra* note 5, at 333.

34. *Id.* at 334–35; see also Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 495 (1994) (noting that the “last generation of constitutional scholars” is “[p]reoccupied with the ‘countermajoritarian difficulty’”); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1822 (1992) (noting that “[l]iberals brood over the ‘countermajoritarian difficulty’”).

35. Friedman, *The Birth*, *supra* note 32, at 156 (“Before, judicial review was good—so long as it was used properly. Now, judicial review is bad. The curious thing, of course, is that under either scenario, scholars see a countermajoritarian problem . . .”); cf. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CINN. L. REV. 1257, 1257 (2004) (noting “that commentary on the Court inevitably is motivated and molded as much by approval or disapproval of the Court’s immediate decisions as by an attempt to stand aloof from present events and ascertain what the institution does, and whether on balance it is worth it”).

36. Chemerinsky, *Losing*, *supra* note 30, at 1424.

37. See *id.* at 1425 (rejecting the argument that there are “incentives for the political branches to comply with the Constitution” because there are “instances in which the political process lacks the incentives he describes and in which the courts have acted to uphold the Constitution”).

38. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

recognized that heightened review might be appropriate in cases in which the operation of the political process was suspect.<sup>39</sup>

Some scholars have rejected the view that the judiciary is particularly well-situated to safeguard constitutional rights, but have justified the practice on other grounds. Under one view, even if the courts are not uniquely well-situated to protect constitutional rights, two checks (i.e., the courts and the policymaking branches) are better than just one (i.e., just the policymaking branches).<sup>40</sup> Under another, the courts' institutional weakness means they can less easily take advantage of constitutional usurpations than the other branches and will be more likely to disapprove them.<sup>41</sup> This discussion of the justifications for judicial review is only the tip of the iceberg, but provides some indication of the extent to which scholars have struggled to reify the practice.

To be sure, some scholars have questioned whether this obsession merits the attention it has received. Friedman and others have argued that there is reason to question whether judicial review is, in fact, countermajoritarian, or at least any more countermajoritarian than the political process itself.<sup>42</sup> To these scholars, whatever the theoretical problems with judicial review, the empirical realities tell a different story: the judicial branch often acts consistently with popular preferences, and there is good reason to think that the political branches (for a variety of reasons) do not.<sup>43</sup>

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39. *Id.* at 152 n.4.

40. See, e.g., Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1535 (2000) (arguing “that the courts can add an additional veto to rights-restricting government action, thereby increasing the cost of such action and decreasing the probability of its occurrence”); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1695 (2008) (“The best case [for judicial review] . . . rests instead on the subtly different ground that legislatures and courts should both be enlisted in protecting fundamental rights, and that both should have veto powers over legislation that might reasonably be thought to violate such rights.”).

41. Cross, *supra* note 40, at 1576–77 (arguing that because “the judiciary is a weaker branch, at least with respect to implementation of mandates, the judiciary is less likely to be able to advance other interests at the expense of constitutional freedoms” and “[c]onsequently, the judiciary will tend to evaluate the programs that the other branches initiate, and be more likely to disapprove of those programs under the Bill of Rights than would the other branches”).

42. See, e.g., Friedman, *The History*, *supra* note 5, at 337–38 (citing others who have taken this view).

43. Friedman, *The Birth*, *supra* note 32, at 166 (discussing scholarship that “strongly suggests that legislative enactments often do not enjoy majority support, that judicial decisions often do, that judges tend to reflect the views of the popularly elected President that appoints them, and that most of what courts invalidate is the work not of legislative bodies anyway, but of low-level, equally unaccountable administrative actors”).

My purpose in this Article is not to resolve (or even join) the controversy over this obsession, but rather to point to an aspect of judicial review that the academic community has barely noticed, let alone obsessed over: the extent to which judicial review produces disruptions to statutory and regulatory schemes beyond those that are constitutionally required under the Court's decisions. Michael Dorf has touched on this issue in his article on "'fallback' provisions"—provisions that go into effect when a law is declared unconstitutional in full or in part.<sup>44</sup> As Dorf explained, these provisions "fill[] the legal vacuum that would otherwise exist during the time between the invalidating decision and the enactment, if any, of new, valid legislation."<sup>45</sup> The "legal vacuum" to which Dorf refers is one manifestation of the democratic disruptions that are the focus of this Article, but he does not discuss these disruptions at any length because his focus is on fallback provisions and the complications they pose as a solution (even if a partial one) to the "legal vacuum" judicial review can cause.<sup>46</sup> And beyond this reference, the legal literature has largely ignored this important collateral consequence of judicial review.

Perhaps this oversight is not surprising because these disruptions are in some sense orthogonal to the debates about the countermajoritarian difficulty that have been the focus of the judicial review literature. Those who are concerned about the countermajoritarian difficulty have focused on reconciling the underlying tension of unelected judges overruling elected legislators, while those who are not have focused on why there is no underlying tension at all. Neither group has focused on the true breadth of the disruptions that judicial review can cause.

Yet both groups should. To those who are concerned about the countermajoritarian difficulty, these disruptions should be even more problematic because they cannot be justified by the need to adhere to constitutional requirements. They thus undermine traditional justifications for the project of judicial review. To those who are not concerned about the countermajoritarian difficulty, the traditional explanation of why they are not concerned has not sufficiently taken account of these consequences. Perhaps there is a case to be made that these additional disruptions also tend to reflect majoritarian preferences, but there is reason to suspect that might not be so. Among other things, these consequences tend not to be transparent and thus the courts may be

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44. Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 304 (2007).

45. *Id.*

46. *See id.* at 310.

less sensitive to popular preferences. At minimum, a case should be made.

And for members of both camps, there is an additional reason to be aware of these disruptions, if not concerned about them. Whatever members of the academy have to say about judicial review and its tensions with democratic governance, the courts view the tension as a real one, as I discuss in the next section. They recognize, of course, that they must sometimes engage in judicial review, but they are also (at least sometimes) reluctant to do so, perhaps in part because they recognize that the disruptions their decisions produce will not be limited to those that the Constitution requires. Some might champion this reluctance, viewing it as better not to have unelected judges upending the decisions of the elected branches. But to the extent we truly believe that the Constitution is the nation's highest law, we should want the courts to enforce its requirements. If the courts are reluctant to do so, constitutional rights may be under-recognized and under-enforced.

In the next section, I discuss a number of tools the courts have adopted in response to this perceived tension, and explore how these tools often lead the Court to avoid judicial review even when it might be appropriate. As I will argue below, the Court should not seek simply to avoid judicial review; rather, it should also work with the coordinate branches to try to address it.

### *B. In the Courts*

As I just noted, the academic community is not alone in its preoccupation with judicial review and its purported tensions with our democratic system of government. The Court, too, has repeatedly recognized that the proper role of the courts in a democratic society is “limited,”<sup>47</sup> and that courts should hesitate before striking down the judgments of the democratic branches.<sup>48</sup> This does not mean, of course, that the pages of the U.S. Reports are filled with judicial theorizing about the conceptual underpinnings of judicial review. But even if the Court's efforts to come to terms with the institution of judicial review are often implicit, its concerns with this central tension manifests in a number of different doctrines.

Most significant among these doctrines is the canon of “constitutional

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47. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009).

48. *Blodgett v. Holden*, 275 U.S. 142, 157–58 (1927) (Holmes, J., concurring) (declaring an act of Congress unconstitutional is “the gravest and most delicate duty that this Court is called on to perform”).

avoidance.” Although the Court not infrequently declares laws unconstitutional, it always first (at least in theory) considers whether it need do so. A significant tool of statutory construction that arguably dates back to the early nineteenth century,<sup>49</sup> this canon actually encompasses “several closely related but conceptually distinct principles of statutory construction.”<sup>50</sup> As perhaps most famously articulated in Justice Brandeis’ opinion in *Ashwander v. Tennessee Valley Authority*,<sup>51</sup> the canon (1) counsels that courts “not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of,”<sup>52</sup> and (2) requires courts to “first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided” before declaring an act of Congress unconstitutional.<sup>53</sup> The constitutional avoidance canon is “frequently praised as a form of judicial restraint,”<sup>54</sup> and the Court itself has explicitly recognized that

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49. The Supreme Court has on occasion suggested that the doctrine of constitutional avoidance originated with the 1804 case *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979) (“In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall’s admonition in [*Charming Betsy*] by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.”). In fact, *Charming Betsy* involved the interpretation of a statute so as to avoid conflict with international law, *Charming Betsy*, 6 U.S. (2 Cranch) at 118, but the general principle is arguably the same. See Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, 1585 (1998) (arguing that “[t]he canon of constitutional avoidance evolved from Chief Justice Marshall’s declaration in *Murray v. Schooner Charming Betsy*”).

50. See Ernest A. Young, *Federal Courts: Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1574 (2000).

51. 297 U.S. 288 (1936).

52. *Id.* at 347; see also, e.g., *Camreta v. Greene*, \_\_\_U.S. \_\_\_, 131 S. Ct. 2020, 2031 (2011) (“[A] longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988)).

53. *Ashwander*, 297 U.S. at 348; see also, e.g., *Clark v. Suarez-Martinez*, 543 U.S. 371, 381 (2005) (explaining that “one of the canon’s chief justifications is that it allows courts to avoid the decision of constitutional questions” and “[i]t is a tool for choosing between competing plausible interpretations of a statutory text”); *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (“[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.” (citation omitted)). There is some disagreement in the case law regarding whether the canon should be invoked whenever there are “serious doubts” about the constitutionality of the statute, or only when it is actually unconstitutional. See, e.g., *Clark*, 543 U.S. at 395 (Thomas, J., dissenting) (“The modern canon of avoidance is a doctrine under which courts construe ambiguous statutes to avoid constitutional doubts, but this doctrine has its origins in a very different form of the canon. Traditionally . . . it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.”).

54. Young, *supra* note 50, at 47; see also Michelle R. Slack, *Avoiding Avoidance: Why Use of the*

constitutional avoidance follows from the “principle of judicial restraint”<sup>55</sup> and “is followed out of respect for Congress.”<sup>56</sup>

Constitutional avoidance is not the only tool of self-restraint in the judiciary’s arsenal. To the contrary, the courts have over time developed many doctrines that enable them to decide not to decide. These “passive virtues,” as Alexander Bickel called them,<sup>57</sup> provide the courts with means of avoiding the political fray and the interbranch conflict that politically contentious decisions will often produce.<sup>58</sup> Political question doctrine, for example, cautions the courts to avoid addressing questions that are textually committed to the other branches for decision.<sup>59</sup> Although courts may resort to these tools for many reasons beyond their relationship with Congress, that relationship nonetheless remains an important reason that courts exercise restraint.

Even when it cannot avoid deciding a case on constitutional grounds, the Court will often try to decide it on the narrowest constitutional ground possible. For example, the Court has long recognized that facial challenges to laws are disfavored; in other words, the Court would prefer to strike down a particular application of a law than to invalidate it entirely.<sup>60</sup> Although there are “several reasons” for this practice, the Court has explained that one of them is that “[f]acial challenges . . . run contrary to the fundamental principle of judicial restraint that courts should neither ‘anticipate a question of constitutional law in advance of the necessity of deciding it’ nor ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be

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*Constitutional Avoidance Canon Undermines Judicial Independence—A Response to Lisa Kloppenberg*, 56 CASE W. RES. L. REV. 1057 (2006).

55. *E.g.*, *Camreta*, 131 S. Ct. at 2031.

56. *Rust*, 500 U.S. at 191; *see also* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988) (“A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”).

57. BICKEL, *supra* note 17, at 113.

58. Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 31 (1998) (“These passive virtues consist of a number of clever decision avoidance techniques that permit judges to refrain from deciding cases rife with the potential to generate serious interbranch conflict.”); Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 132 (2009) (“In Bickel’s view, the practice of unelected judges weighing the legality of legislative acts poses a profound challenge to the majoritarian characteristics of the American democracy. The passive virtues, he argued, work as a powerful counterpoint to this challenge.” (footnote omitted)).

59. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing various ways to identify cases involving political questions).

60. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008) (explaining why facial challenges are disfavored).



applied.”<sup>61</sup> Moreover, “facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.”<sup>62</sup>

Thus, the Court is clearly sensitive to the “countermajoritarian difficulty” that has so beguiled the academic community. But, like the academic community, it has not focused, at least explicitly, on the disruptions that are the focus of this Article. As a result, the Court has focused on avoiding judicial review, rather than addressing it once it occurs.<sup>63</sup> The remainder of this Article explores why that current focus is insufficient—and offers preliminary thoughts on what we might do about it.

## II. JUDICIAL REVIEW PRODUCES DEMOCRATIC DISRUPTIONS THAT ARE NOT CONSTITUTIONALLY REQUIRED

Despite all of the academic hand-wringing over judicial review, it is an institution that is plainly here to stay. And, as I noted earlier, there are good reasons for this: when a legislature or agency enacts a law that is inconsistent with the Constitution, judicial review is an important means of ensuring fealty to our nation’s highest law.<sup>64</sup> The problem is that

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61. *Id.* at 450 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring)).

62. *Id.* at 451; *see also id.* (“We must keep in mind that ‘[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.’” (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006))).

63. The exception to this general rule is the severability doctrine. *See generally* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010) (tracing the history of modern severability doctrine). Under that doctrine, a court may “excise any unconstitutional clauses or applications from a statute, leaving the remainder in force if the legislature would prefer that result to the statute’s total invalidation.” David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 639 (2008). Severability also refers to the idea that “courts presume that the constitutionally valid applications of statutes should be severed from any constitutionally invalid applications, leaving the valid applications in force, unless Congress would not have intended the valid applications to stand alone.” Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1950 (1997). Although severability can minimize the consequences of judicial review, it does not address judicial review’s collateral consequences. *See infra* Part II.A.

64. There is, of course, an ever-growing literature on the extent to which other institutions can—and should—also play a role in interpreting the Constitution. *See, e.g.*, Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996) (noting that “the structural, historical, and normative case for ‘departmentalist’ constitutional interpretation—for the federal legislative, executive, and judicial departments each having an obligation, in the exercise of its granted powers, to interpret and apply the Constitution—is now familiar” (footnote omitted)). But this literature does not undercut the view that the judiciary plays an important role in ensuring fealty to the Constitution.

judicial review does not just disrupt constitutionally invalid laws; it also produces disruptions to democratic preferences that are not constitutionally required. In this Part, I explore why that is and the two distinct scenarios in which these disruptions may arise.

A. *Explaining Collateral Consequences*

As I noted at the outset, legislators and regulators act, at least to some degree, with knowledge of the existing state of the law, and their decisions about which laws are necessary and which are not are informed by that knowledge.<sup>65</sup> As a result, policymakers will not enact some laws that might be desirable and constitutional because existing laws are already designed to achieve essentially the same result. That is, policymakers will not enact law *X* (a prohibition on felons transporting any firearms across state lines) because law *Y* (a prohibition on all people transporting firearms across state lines) already exists. This allocation of resources is sensible and efficient so long as law *Y* exists. But if law *Y* is struck down (on Second Amendment grounds, for example),<sup>66</sup> that decision creates a gap in the intended legal framework, arguably one that is not constitutionally required.

Consider a simple example. In *Lorillard Tobacco Co. v. Reilly*,<sup>67</sup> the U.S. Supreme Court struck down a regulation promulgated by the Massachusetts Attorney General which prohibited

[o]utdoor advertising [of cigarettes and smokeless tobacco products], including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.”<sup>68</sup>

The Court concluded that the regulation violated the First Amendment because the “broad sweep of the regulations indicates that the Attorney General did not ‘carefully calculate the costs and benefits associated with the burden on speech imposed.’”<sup>69</sup> But just because the

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65. *See supra* note 1.

66. Under the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2009), this is an entirely plausible result. *See id.* at 573, 626–27 (recognizing an individual right to bear arms under the Second Amendment, but noting that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons”).

67. 533 U.S. 525 (2001).

68. *Id.* at 535–36.

69. *Id.* at 561 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)).

1,000-foot ban was unconstitutional did not mean that a 500-foot ban would have been, or one that was more narrowly tailored or more carefully justified. Yet Massachusetts had not enacted any of those other regulations because none was necessary so long as the 1,000-foot ban was on the books.

The Supreme Court, of course, did not put in place any of these constitutional alternatives when it struck down the 1,000-foot ban. Although *Marbury* recognized the power of the courts to “say what the law is,”<sup>70</sup> the courts “say what the law is” in a very different way than legislatures do.<sup>71</sup> The courts do not, generally, craft positive law; that responsibility rests with members of the executive and legislative branches. The courts are supposed to limit themselves to resolving disputes about the law,<sup>72</sup> and any law they do make is supposed to be incidental to that function of dispute resolution.<sup>73</sup> As a result, when the Court decides a case, its role (under current Supreme Court doctrine) is generally limited to deciding the particular question that the parties bring to it. It is not appropriate for the Court to consider all of the various ancillary consequences that may result from its decision. For example, it is not generally for the Court to query whether its decision leaves gaps in the law or requires other changes to make its legal decision work in the real world, even if the Court’s decisions do in fact often require such changes.

Even if the Court could identify these consequences, it will often be difficult for the Court to determine how best to address them. After all, the Court can hardly be expected to predict with accuracy how Congress or other policymakers would want to respond to those consequences.<sup>74</sup> As Michael Dorf has noted, “[c]ourts would balk at constructing, out of

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

71. See, e.g., Krotoszynski *supra* note 58, at 2–3 (noting that “most academics and judges have viewed the legislative role as quite separate and distinct from the judicial role”).

72. See, e.g., Chris H. Miller, *The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation*, 72 ALB. L. REV. 117, 129 (2009) (describing the courts’ focus on dispute resolution). See generally Lon L. Fuller & Kenneth I. Winston, *The Forms & Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978).

73. See, e.g., Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 23 (2002); (describing how judges create new law); Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 221 (2000) (“Judges employing the common law method most obviously and legitimately make law and policy.”); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1920 (1986) (“It is a judge’s obligation to decide private disputes. If, as part of that process, interpretation of the constitutionality of statutes is required, so be it.”).

74. See Dorf, *supra* note 43, at 305 (noting that “each institution has at best a limited ability to predict or control how the other will respond to its work product”).

whole cloth, the nearest constitutional thing to a provision they have just invalidated, for that seems a quintessentially legislative task.”<sup>75</sup>

It is worth noting that severability, the doctrine the Court most commonly invokes after it has held a law unconstitutional, does not address this problem. When the Court invokes the severability doctrine, it excises one part of a law from the rest, invalidating the unconstitutional provision but allowing the remainder of the law to stand.<sup>76</sup> Although that act does limit the consequences that follow from the Court’s exercise of judicial review, it does not change the fact that some provision of the law was invalidated—and that policymakers might have enacted additional (or different) laws had they known that provision would not exist.

Of course, at first blush, it might seem unproblematic that policymakers would have enacted different laws had they known their preferred outcome was unconstitutional. After all, policymakers can always enact these new or different laws *after* the Court has acted. The problem is that the policymaking branches generally cannot respond quickly—and sometimes they will not respond at all. In the remainder of this Part, I discuss these two scenarios and explain why we should care about the democratic disruptions that are produced in each of them.

### B. *Scenario I: Legislative Lag*

To start, there is nothing inherently problematic about an act of judicial review producing disruptions to democratic preferences that are not constitutionally required. The Court may not be able to address those disruptions, but Congress or other policymakers can act where the Court cannot. The problem, however, is that policymakers rarely act quickly.<sup>77</sup> Be they regulators or legislators, federal or state, they are unlikely to respond in an expeditious manner to an act of judicial review.<sup>78</sup>

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75. *Id.* at 311. According to Dorf, “European constitutional courts sometimes avoid this difficulty by ordering the legislature to craft new, valid legislation.” *Id.* at 311 & n.28 (citing Gerald E. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 274–78 (1995)).

76. *See supra* note 63.

77. Dorf, *supra* note 44, at 304 (noting that there is often a “legal vacuum . . . during the time between [a judicial decision invalidating legislation] and the enactment, if any, of new, valid legislation”).

78. I focus here on responses by Congress, but there is no reason to think that responses by federal regulators or state policymakers will be any quicker. If anything, they may take longer to respond. The slowness of the regulatory process is often noted, *see, e.g.*, Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1020 (2000) (noting that “regulatory action has slowed or halted because of extensive procedural requirements”),

As an initial matter, policymakers cannot respond to acts of judicial review unless they are aware of them. Although one might expect there to be regular communications between the courts and the coordinate branches, the opposite is more nearly true.<sup>79</sup> To be sure, Congress will be aware of the most high profile of the Supreme Court's decisions: when the Court announced its decision in the health care reform cases the Term before last or the same-sex marriage cases last Term,<sup>80</sup> no one was unaware of what was happening at One First Street that day. But even at the Supreme Court, blockbuster, high-profile cases are the exception, not the rule. And even if Congress is generally aware of what the Supreme Court is up to, there is much less reason to have confidence that all state legislatures (many of which are not even full-time<sup>81</sup>) follow the goings-on at the U.S. Supreme Court quite so closely.

But even if we assume that policymakers are aware that the Court has acted in a way that might warrant some policy response, immediate response will still be rare. There are all sorts of reasons for this fact, not all of which need be discussed fully here. But a few key facts illustrate the point. To start, Congress will rarely be able to devote all of its energies to any one issue, even an important one. There will be other items on its lawmaking agenda and other obligations, such as oversight, that consume its energies. Thus, it may take time for the legislative process to even get underway. And once underway, the process itself will take time. Schoolhouse Rock may be able to describe how a bill becomes a law in just three minutes,<sup>82</sup> but it is in fact a lengthy process in which procedure and politics often work together to tie up bills in

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and action by state legislatures that are often part-time and have small staffs may also be slow in coming.

79. See ROBERT A. KATZMANN, *COURTS AND CONGRESS* 74 (1997); see also *id.* (“[J]ust as Congress is largely unaware of the courts’ decisions, anecdotal evidence suggests that the judiciary tends not to know of congressional activities that relate to its work.”); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 *GEO. L.J.* 653, 655 (1992) (“Anecdotal evidence—a view commonly held across the political and judicial spectrum and especially by those with experience in both branches—suggests that all too often the first and third branches do not fully appreciate one another’s concerns.”).

80. See *United States v. Windsor*, \_\_U.S.\_\_, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, \_\_U.S.\_\_, 133 S. Ct. 2652 (2013); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, \_\_U.S.\_\_, 132 S. Ct. 2566 (2012).

81. See, e.g., Michael D. Gilbert, *Disclosure, Credibility, and Speech*, 27 *J.L. & POL.* 627, 631 (2012) (noting that “[m]any state legislatures are part-time”).

82. *Schoolhouse Rock!: I’m Just a Bill* (ABC television broadcast 1975), available at <http://www.youtube.com/watch?v=tYeJ55o3EI0>. National Public Radio’s updated version may provide a somewhat more accurate—although equally brief—account of the legislative process. *How a Bill Becomes a Law... These Days*, ON THE MEDIA (Mar. 26, 2010), [www.onthemedial.org/2010/mar/26/how-a-bill-becomes-a-law-these-days/](http://www.onthemedial.org/2010/mar/26/how-a-bill-becomes-a-law-these-days/).

committees for weeks or months before they get a vote (if they ever get one).<sup>83</sup> Some scholars have likened the legislative process to “a procedural obstacle course that favors opponents of legislation and hinders proponents.”<sup>84</sup> And it has become an even more arduous obstacle course in recent years, as members of Congress use procedural devices to prevent the passage of legislation that enjoys majority support in both houses.<sup>85</sup> Finally, when Congress is closely divided, successful legislation will require careful—and time-consuming—negotiations.<sup>86</sup>

To some extent, this legislative inertia is not a bad thing. Indeed, we might not want policymakers to respond to a judicial decision without fully studying it and considering its implications, both to understand what policy responses are desirable and to consider whether those policy responses are constitutional under whatever new precedent the Supreme Court has just created. Careful study of the question may be particularly necessary where the Court strikes down a complicated or long-standing statutory scheme,<sup>87</sup> or where the new legislation Congress is considering

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83. See, e.g., James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 16–17 (1994) (“The initiation, negotiation, and enactment of a statute is a multidimensional process that requires committing considerable institutional resources, navigating politically sensitive internal procedures, and anticipating substantial societal consequences.”); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 98 (1994) (noting that “the committee system reinforces congressional inertia that bogs down most legislation”). See generally DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* 144 (1997).

84. ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 230 (5th ed. 1996); see also *id.* at 229–60.

85. The filibuster, for example, is an often used tool of obstruction on the Senate floor. See Aaron-Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401, 1418 (2010). See generally Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997). And the filibuster does not just make it more difficult to pass the legislation that is being filibustered; it also makes it more difficult for the Senate to accomplish anything else. See, e.g., Ezra Klein, *What Is a ‘Hold’?*, WASH. POST, (Feb. 5, 2010, 10:37 AM), [voices.washingtonpost.com/ezra-klein/2010/02/what\\_is\\_a\\_hold.html](http://voices.washingtonpost.com/ezra-klein/2010/02/what_is_a_hold.html) (“Even if you can crush every one of these filibusters without breaking a sweat, you’ve still just seen a whole week—or maybe much more—of the Senate’s time chewed up.”); Charles A. Stevenson, *Stevenson: In Senate, ‘Motion to Proceed’ Should Be Non-Debatable*, ROLL CALL (Apr. 19, 2010, 12:00 AM), [http://www.rollcall.com/issues/55\\_117/-45256-1.html](http://www.rollcall.com/issues/55_117/-45256-1.html).

86. See, e.g., Seidenfeld, *supra* note 83, at 114 (“Congressional adoption of a statute usually requires legislators to build a coalition of interest groups that may have different or even conflicting statutory goals.”); see also Abner J. Mikva, *A Reply to Judge Starr’s Observations*, 1987 DUKE L.J. 380, 380–81 (describing the compromises involved in passing a specific piece of legislation).

87. The confusion over *Citizen United*’s effect on the ability of foreign-owned and controlled corporations to participate in domestic elections is evidence of this fact. That confusion was most powerfully demonstrated at the 2010 State of the Union when President Obama criticized the Court for “revers[ing] a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections,” and Justice Alito

might raise its own constitutional issues.<sup>88</sup>

But whatever the causes, this period of legislative lag means that the Court's decision will go into effect without any legislative response.<sup>89</sup> It may well be that in some cases this period of legislative lag is inconsequential, but in other cases it may be quite significant, especially depending on the nature of the democratic disruptions and the length of the lag.

### C. *Scenario II: Political Change*

In the preceding section, I assumed that policymakers wanted to respond to the Court's decision, but that institutional features of legislative action made a quick response difficult. But this assumption will not always be a good one. In many cases, policymakers may not want to respond because the policymakers currently in office are not the ones whose legislative or regulatory scheme was disrupted by judicial action. After all, when the Court engages in judicial review, it will almost always be years after the particular law was enacted. Indeed, this delay is inherent in our system in which laws are often not challenged until after they have gone into effect, and in which cases slowly work their way through the court system. During this intervening period, there

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demonstrably indicated his disagreement by appearing to mouth "not true." See, e.g., *Justice Openly Disagrees with Obama in Speech*, NBCNEWS.COM (Jan. 28, 2010, 1:19 PM), [http://www.nbcnews.com/id/35117174/ns/politics-white\\_house/t/justice-openly-disagrees-obama-speech/#.UgQQA5L2Z5d](http://www.nbcnews.com/id/35117174/ns/politics-white_house/t/justice-openly-disagrees-obama-speech/#.UgQQA5L2Z5d). Compare Zachary Roth, *Reformers: Court Decision Creates 'Huge Opening' for Foreign Companies to Sway Elections*, TPMMUCKRAKER (Jan. 25, 2010, 1:03 PM), [http://tpmmuckraker.talkingpointsmemo.com/2010/01/reformers\\_court\\_decision\\_creates\\_huge\\_opening\\_for.php](http://tpmmuckraker.talkingpointsmemo.com/2010/01/reformers_court_decision_creates_huge_opening_for.php), with Bradley A. Smith, *Citizens United We Stand*, AM. SPECTATOR, May 20, 2010, available at <http://spectator.org/archives/2010/05/07/citizens-united-we-stand>. Although it was not entirely clear which part of the President's statement Justice Alito was responding to, many commentators understood Alito to be responding to the President's assertion about the decision's impact on foreign spending. See, e.g., Lyle Denniston, *Commentary: Alito vs. Obama—Who's Right?*, SCOTUSBLOG (Jan. 28, 2010, 7:12 PM), <http://www.scotusblog.com/2010/01/commentary-alito-vs-obama-whos-right/> (assuming "without hard proof" that "Justice Alito was reacting to the President's discussion of the potential role of foreign corporations in American politics").

88. Cf. *Dorf*, *supra* note 44, at 308–09 (“[W]hen Congress or a state legislature scripts its response to a prospective decision overruling its output in advance of that ruling, it cannot possibly take account of whatever points the courts will make in the future discussion.”).

89. See, e.g., Donna D. Adler, *A Conversational Approach to Statutory Analysis: Say What You Mean & Mean What You Say*, 66 MISS. L.J. 37, 76 (1996) (“Congress’s institutional responses are slow and difficult. The concept that if the courts make incorrect decisions, Congress regularly can correct those mistakes in a timely manner is unrealistic.”); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 46 (1991) (noting that there are “obstacles to overriding the courts” and “even when the legislature does override a court’s statutory construction, such legislative action takes time, and, in the meantime, the judicial construction is binding law”).

will often have been one or more elections, and the political composition of the executive and legislative branches will have changed. Even if the coalition that enacted the now-invalidated provision might have wanted to respond to the act of judicial review, the new powers-that-be may like the disruptions to democratic preferences that the Court has wrought. Indeed, they may view it as a gift; the work of their forebears has been destroyed without the expense of any political capital to repeal the law.<sup>90</sup>

Some people who are bothered by the outcome in Scenario I may view this scenario as relatively unproblematic. If the elected branches are unconcerned about these democratic disruptions, then there really is no democratic disruption at all. Or so the theory goes. But this response ignores a simple fact: in our legal system, the preferences of the coalition that enacted a law are supposed to persist until new policymakers revisit the issue.<sup>91</sup> Thus, if a law is on the books, and current policymakers do not like it, they cannot just wish it away; they need to repeal it through the processes of bicameralism and presentment.<sup>92</sup> That process ensures transparency and provides a basis for public discussion about the issue. It also encourages accountability because the public knows who is responsible for the enactment of the law, and for its repeal. These values are compromised, if not lost entirely, when judicial review produces democratic disruptions that are not constitutionally required, and there is no response at all by the democratic branches.

Thus, we should not be sanguine about the possibility that democratic disruptions are blessed by democratic inaction. Rather, democratic disruptions in the Scenario II category may present different issues than democratic disruptions in the Scenario I category, but they too warrant greater attention than they have previously received.

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90. Of course, it will often be difficult to know for sure whether legislative inaction is deliberate, or simply the result of the various factors that produce Scenario I legislative lag.

91. See, e.g., Susannah Landes Foster, Note, *When Clarity Means Ambiguity: An Examination of Statutory Interpretation at the Environmental Protection Agency*, 96 GEO. L.J. 1347, 1363 (2008) (noting that “often a future Congress will not want to defend the duly enacted laws of a previous Congress. Those laws remain valid, however, until they are repealed through a statute that undergoes bicameralism and presentment”); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990) (“At least rhetorically, the Court views its role as implementing the original intent or purpose of the enacting Congress.”).

92. Indeed, it is black-letter law that implied repeals are disfavored. *United States v. Fausto*, 484 U.S. 439, 461 n.9 (1988) (Stevens, J., dissenting) (“The presumption disfavoring implied repeals has been a part of this Court’s jurisprudence at least since 1842.”).



### III. COLLATERAL CONSEQUENCES IN PRACTICE

In the prior Part, I argued that judicial review often produces disruptions to democratic preferences that are not constitutionally required. These disruptions are not just a theoretical problem; they are a practical reality. In this Part, I illustrate the many different kinds of disruptions that are not constitutionally required (and thus may be remedied without resort to a constitutional amendment) by providing a typology of the ways in which policymakers can respond to instances of judicial review short of attempting to amend the Constitution. My purpose here is not to assess whether any particular response is appropriate in any given case, but simply to show that none of these consequences of judicial review can be justified on the ground that it is constitutionally required. This Part, although it does not even approach a comprehensive treatment of the instances in which these greater-than-necessary democratic disruptions have arisen, should nonetheless provide some sense of the frequency with which such disruptions can occur when the Court engages in judicial review.

#### A. *Trying Again (Through Constitutional Means)*

Although it is common to think that a judicial declaration of unconstitutionality leaves policymakers with no recourse but constitutional amendment,<sup>93</sup> policymakers can often respond in much more substantive (and effective)<sup>94</sup> ways. After all, even where the Court has held that a specific law or practice is unconstitutional, there will often be ways in which legislators or regulators might have been able to effectuate the same policy goals (or at least much of those goals) had they known that their top preference was unconstitutional.<sup>95</sup> As Michael

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93. JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 194 (2012) (“A Supreme Court decision interpreting the Constitution can be overturned only by a new decision or by a constitutional amendment.”).

94. Amending the Constitution is no easy task. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 427 (1983) (noting that “a brief review of the history of the amendment process lends support to the argument that amending the Constitution is not so easy that courts should infer additional, nontextual requirements from article V”).

95. See, e.g., Keith E. Whittington, *James Madison Has Left the Building*, 72 U. CHI. L. REV. 1137, 1137 (2005) (reviewing J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004)) (noting that “[j]udicial review is often thought to be an absolute veto, killing legislation with no hope of resurrection,” but that “[c]reative and persistent legislators will try to reanimate these statutory corpses, and it is an open question whether judicial disapproval really lays the issue to rest”). Although these policy responses are in a sense an attempt to overrule the Court’s decision, they

Dorf has explained, when a court invalidates a law, even if it severs other provisions, it still “sacrifices *everything* that [the constitutionally invalid provision] accomplished.”<sup>96</sup> Thus, “[i]f there were some constitutionally valid way to achieve much of what [the invalid provision] achieved,” that “would be preferable from a policy standpoint to” leaving the severed provisions standing alone.”<sup>97</sup>

In some cases, legislators can simply reenact the same legislation, either in full or partial form. After all, there are a number of constitutional doctrines that turn on the purpose underlying the legislation, the evidence that policymakers amass to support the need for it, or how tailored the government’s remedy is to the identified problem.<sup>98</sup> For example, any time the Court considers whether a law can survive challenge under some form of heightened scrutiny, the Court will consider both the government’s interest in enacting the law and whether the evidence that supports the need for the legislation (and its ability to effectively serve that need) can satisfy the appropriate standard of review.<sup>99</sup> Thus, Congress may sometimes be able to make previously unconstitutional legislation constitutional by providing additional justifications or changing it in only minor ways. For example, in the case of the Massachusetts prohibition on outdoor advertising of tobacco products,<sup>100</sup> the state might have been able to re-enact this law by offering a more robust explanation for the breadth of the ban and why it

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nonetheless recognize the new legal constraint that exists on their authority. They are thus categorically different than when Congress simply “disregard[s] by act or omission any unwelcomed interpretation.” Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 GA. L. REV. 211, 236 (2010).

96. Dorf, *supra* note 44, at 313 (emphasis in original).

97. *Id.*

98. See, e.g., Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 34 (2008) (“Numerous constitutional doctrines, most notably in the areas of free speech, due process, and equal protection, demand that statutes be ‘narrowly tailored.’”); *id.* at 44 (“When a reviewing court evaluates the legality of a government decision challenged on constitutional or other grounds, the court may consider whether the responsible government decisionmaker has developed an adequate explanation of the basis for its decision, often in the form of a record or report containing detailed evidence and analysis.”); *id.* at 50 (“Judicial attention to disfavored explanations for government policy choices is particularly notable in the context of the First Amendment’s religion clauses.”).

99. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, \_\_\_U.S.\_\_\_, 131 S. Ct. 2729, 2738 (2011) (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution.”).

100. See *supra* notes 67–69 and accompanying text.

was necessary, or it might have been able to provide additional evidence of the problem and why alternatives to a broad ban would have been insufficient to address the problem.

Relatedly, sometimes Congress can address a constitutional deficiency merely by showing that it is sensitive to the constitutional limits on its power. For example, in *United States v. Lopez*,<sup>101</sup> the Supreme Court struck down the Gun Free School Zones Act, which made it unlawful to “knowingly . . . possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”<sup>102</sup> According to the Court, the statute was not a valid exercise of Congress’s Commerce power because, in part, it “contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”<sup>103</sup> The next year, Congress re-enacted the law, adding the jurisdictional element, which required that the firearm “ha[ve] moved in or . . . otherwise affect[ed] interstate or foreign commerce.”<sup>104</sup> Because virtually all guns have “moved in or . . . otherwise affect[ed] interstate or foreign commerce,” the amendment did not meaningfully change the statute, yet the addition of this language has proven sufficient for it to survive challenge, at least in the courts of appeals.<sup>105</sup>

And even if policymakers cannot justify the exact same law, they may be able to justify a more tailored one. For example, in the case of the ban on outdoor advertising of tobacco products, Massachusetts might have adopted a ban of 250 feet or 500 feet to replace the 1,000-foot ban that was struck down. After all, there can be little doubt that, if forced to choose, the Attorney General would have preferred a more limited ban to none at all. In fact, even though this decision was directed at a Massachusetts regulation, Congress effectively responded to it many years later when it gave the FDA the authority to regulate tobacco products. In the Family Smoking Prevention and Tobacco Control Act,<sup>106</sup> Congress authorized the FDA to re-promulgate its outdoor

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101. 514 U.S. 549 (1995).

102. 18 U.S.C. § 922(q)(2)(A) (1994) (current version at 18 U.S.C. § 922(q)(2)(A) (2006)).

103. *Lopez*, 514 U.S. at 561.

104. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, sec. 657, § 922(q)(2)(A), 110 Stat. 3009-369, 3009-372 (1996) (codified as amended at 18 U.S.C. § 922(q)(2)(A) (2000) (current version at 18 U.S.C. § 922(q)(2)(A) (2006))).

105. *United States v. Dorsey*, 418 F.3d 1038, 1045-46 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037, 1038 (8th Cir. 1999) (per curiam) (quoting 18 U.S.C. § 922(q)(2)(A) (2000) (current version at 18 U.S.C. § 922(q)(2)(A) (2006))).

106. Pub. L. No. 111-31, 123 Stat. 1776 (2009).

advertising regulations with whatever modifications were necessary in light of intervening First Amendment jurisprudence, including *Lorillard*.<sup>107</sup>

Regardless of whether policymakers try to reenact the same law or a similar one, the fact that the Court has struck down one means of achieving a policy goal may spur policymakers to think more creatively about other ways to achieve it. After all, often policymakers will choose a particular legislative path not because it is the only way to achieve the desired policy, but because it is the cheapest one or perhaps the most politically feasible.<sup>108</sup> In the absence of the easiest or cheapest alternative, they may well decide to invest additional resources in alternative means of achieving the policy goal. To return to the tobacco regulation, for example, the inability to limit tobacco company's advertisements may have prompted Massachusetts to think about other steps it could take to discourage youth smoking, such as spending more on its own public education campaign and imposing harsher penalties for selling tobacco products to minors.

To consider another example, as the constitutional validity of affirmative action programs appeared to be in danger, policymakers started to think more creatively about ways they could accomplish the same aims as race-based affirmative action without relying specifically on race. For example, in the context of higher education, class-based programs and top 10% programs were adopted as ways to avoid the strictures on programs that take account of race.<sup>109</sup> When the Supreme

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107. *Id.* § 102(a)(2)(E), 123 Stat. at 1831 (authorizing the Secretary of Health and Human Services to publish a final rule which shall be identical to the one promulgated in 1996 except that it may “include such modifications to section 897.30(b), if any, that the Secretary determines are appropriate in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in [*Lorillard*]”).

108. For example, if the Court had not upheld the individual mandate in the Affordable Care Act, Congress could have achieved the same broad policy goals by establishing a single-payer system, as Justice Kennedy suggested at oral argument. *See* Transcript of Oral Argument at 25, Dep't of Health & Human Servs. v. Florida, \_\_U.S.\_\_, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf) (“Let’s assume that it could use the tax power to raise revenue and to just have a national health service, single payer.”).

109. *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 290 (2001) (discussing the adoption of top percent programs in Texas, California, and Florida after each “lost the ability, or thought it soon would lose the ability, to consider race when making university admissions decisions”); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1060 (1996) (“If *Adarand* invalidates many current race-based programs, and if the major alternatives in the political debate over affirmative action are unsatisfactory, then there are strong moral, political, and legal reasons for those concerned about remedying the legacy of past discrimination to back a new plan for class-based affirmative action.”).

Court decided in *Grutter v. Bollinger*<sup>110</sup> that some forms of race-based affirmative action are permissible,<sup>111</sup> there was presumably less need to focus on those sorts of programs. If the Court were to one day overrule its decision in *Grutter*,<sup>112</sup> many policymakers would presumably respond to that decision by launching new and different types of non-race-based affirmative action.

Finally, sometimes Congress will both try to re-enact the law and also search for alternative means to achieve the same policy results. For example, following the Court's decision striking down Congress's attempt to limit minors' access to "indecent" materials on the Internet, Congress both enacted a new law aimed (albeit unsuccessfully) at curing the constitutional infirmity of the original,<sup>113</sup> and also passed a law that tried to address the problem in a slightly different way, using Congress's spending clause power to limit minors' ability to access such materials at public libraries.<sup>114</sup>

Thus, the Court's determination that a law is unconstitutional does not mean that policymakers cannot still achieve its ultimate goal. The problem, as I discussed earlier, is that it may be difficult, if not impossible, to pass that alternative legislation after the Court acts. As I discuss in the next Part, it would be preferable if policymakers could know in advance that their preferred means of achieving the policy goal was unconstitutional, so they could simply enact an alternative (constitutional) law in the first place.<sup>115</sup>

### B. Addressing Other Policy Vacuums

Even where the Court's decision makes it difficult to achieve the exact policy goal of the invalidated provision, policymakers can still

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110. 539 U.S. 306 (2003).

111. *Id.* at 343.

112. Last Term, the Court declined to overrule *Grutter*, *Fisher v. Univ. of Texas*, \_\_U.S.\_\_, No. 11-345 (June 24, 2013), but it arguably made it more difficult for universities to implement race-based affirmative action, *see, e.g.*, Olatunde Johnson, *Fisher's big news: No big news*, SCOTUSBLOG (June 24, 2013 11:12 PM), <http://www.scotusblog.com/?p=165811> (noting that *Fisher* "preserved *Grutter*'s core holding," but that "Justice Ginsburg in her dissent argued that the Court's application of strict scrutiny was in fact too strict").

113. Omnibus Consolidated and Emergency Supplemental Appropriations, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998); *see also* *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert denied*, 555 U.S. 1137 (2009).

114. Children's Internet Protection Act, Pub. L. No. 106-554, sec. 1701-1703, 114 Stat. 2763 (2000) (providing that public libraries could lose federal funding if they did not place filters on publicly-accessible computers).

115. *See infra* Part IV.

often achieve many of the provision's aims. A couple of examples illustrate the point.

As I noted at the outset, in *Citizens United*, the Court held unconstitutional a ban on corporations and unions making independent expenditures from their general treasury funds.<sup>116</sup> That the Court's decision would allow corporations and unions to engage in spending that the campaign finance regime did not previously allow was obvious—and necessary given the Court's view of the First Amendment. But the Court's decision produced other significant disruptions that were not constitutionally required because the entire campaign finance scheme had depended on (or at least assumed) the existence of this broad prohibition on corporate and union spending. In other words, that prohibition had obviated the need for other, more specific prohibitions on election spending—prohibitions that remained completely lawful after *Citizens United*. For example, policymakers might have wanted to limit foreign corporate spending in domestic elections. Indeed, there is reason to think that they did,<sup>117</sup> and that such a limitation would have been constitutional.<sup>118</sup> Yet *Citizens United* disrupted that preference because the prohibition on *corporate* spending was the provision that had previously prohibited spending by *foreign-owned and controlled corporations*. As a Congressional Research Service report explained, “U.S. corporations with some degree of foreign ownership or control were prohibited from directly making campaign expenditures under 2

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116. See *supra* notes 8–9 and accompanying text.

117. Federal law currently prohibits “foreign national[s]” from “directly or indirectly . . . mak[ing] . . . an expenditure, independent expenditure, or disbursement for an electioneering communication.” 2 U.S.C. § 441e(a) (2006); see also *Bluman v. FEC*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011) (“[2 U.S.C. § 441e(a)] readily passes constitutional muster”), *aff'd*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1087 (2012).

118. The majority noted that it “need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process,” explaining that the provision in issue would be “overbroad” even if the Court assumed that the Government had such a compelling interest. *Citizens United v. FEC*, 558 U.S. 310, 362 (2010). Rick Hasen has argued that he has “little doubt that the Court would uphold [foreign spending] limitations” even though, in his view, “it is difficult to see how any of the arguments supporting a foreign spending limit could be squared with the reasoning of the majority in *Citizens United*.” Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 609, 606 (2011); see also *Testimony Submitted to the United States Senate Committee on Rules and Administration*, 111th Cong. (2010) (statement of Heather K. Gerken), available at [http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/gerkentestimony020210.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/gerkentestimony020210.pdf) (“While it is possible that the Court will hold that companies controlled by foreign nationals—like domestic firms—enjoy a robust First Amendment right to engage in independent expenditures, it is more likely that the Court will find that protecting U.S. elections from the influence of foreign nationals is a legitimate state interest, sufficient to justify appropriately tailored regulations.”).

U.S.C. § 441b prior to *Citizens United* because of their status as corporations, not because of their foreign ties.”<sup>119</sup> In its absence, foreign-owned corporations can arguably act without restraint.

Policymakers might also have wanted to ensure that any new corporate and union spending was fully disclosed. Again, the Court did not suggest that such disclosure requirements would be constitutionally problematic. To the contrary, the Court suggested otherwise.<sup>120</sup> Yet adequate disclosure and disclaimer requirements were not on the books—arguably, the need for them had not been so great prior to the Court’s decision in *Citizens United*—and so corporate and union spending could proceed apace without those requirements.<sup>121</sup>

On the other end of the political spectrum, consider *Roe v. Wade*.<sup>122</sup> In *Roe*, the Supreme Court recognized that the “right of personal privacy” implicit in the Constitution is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” and thus held unconstitutional state laws that criminalized all abortions, except to

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119. L. PAIGE WHITAKER ET AL., CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V. FEC*: CONSTITUTIONAL AND LEGAL ISSUES 9 (2010); see also Matthew Mosk, *Democrats Writing Bill to Bar Foreign Money from U.S. Political Campaigns*, ABCNEWS.COM (Jan. 25, 2010), <http://abcnews.go.com/Blotter/democrats-bar-foreign-money-us-politics/story?id=9658403> (one Democratic congressman noting that there is “a big danger that the decision opens the door to foreign owned corporations indirectly spending millions of dollars to influence the outcome of U.S. elections through their American subsidiaries”). The prohibition on spending by “foreign principal[s]” is insufficient to address this problem because the term “foreign principal” is defined to include “a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.” 22 U.S.C. § 611(b)(3) (2000). Thus, it does not, by its terms, include corporations organized under the laws of the United States that are owned or controlled by foreigners. There are, of course, arguments one could make to try to bring such expenditures within the scope of this provision. For example, one could argue that a foreign national who owns or controls an American corporation that makes an independent expenditure is indirectly making the expenditure. Or, alternatively, one could argue that federal regulations proscribe such participation. See 11 C.F.R. § 110.20 (2004) (“A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person’s Federal or non-Federal election-related activities . . .”). But there is no reason to feel confident that either of these arguments would prove successful.

120. *Citizens United*, 558 U.S. at 366.

121. See, e.g., Dan Froomkin, *Don’t Blame the Supreme Court for Citizens United—Blame Congress, the FEC and the IRS*, HUFFINGTONPOST.COM (Mar. 24, 2012, 9:14 AM), [http://www.huffingtonpost.com/2012/03/24/citizens-united-supreme-court-montana-challenge\\_n\\_1313579.html](http://www.huffingtonpost.com/2012/03/24/citizens-united-supreme-court-montana-challenge_n_1313579.html) (“The Citizens United decision strongly affirmed the need for full disclosure of political donations. But by taking advantage of a gaping loophole left open by legislative and administrative inaction, political operatives from both parties are actively soliciting and receiving unlimited amounts of money in absolute secrecy, simply by claiming to be nonprofit groups devoted to social welfare.”).

122. 410 U.S. 113 (1973).

preserve the life of the mother.<sup>123</sup> But, again, this decision created other disruptions to democratic preferences. For example, policymakers might have wanted to impose consent requirements or waiting periods—restrictions on the availability of abortion that the Court strongly signaled might be constitutional in its decision.<sup>124</sup> After all, for many states that had statutes broadly criminalizing abortions prior to *Roe*, there had been no need for laws that placed more specific constraints on when and how abortions could be obtained after the first trimester and after viability. Thus, just like the absence of prohibitions on foreign spending in U.S. elections after *Citizens United*, after *Roe* there was an absence of prohibitions that may well have been favored by many legislators and that were perfectly lawful under the Court’s holding.

That many legislatures would have preferred some restrictions on abortion to none at all not only makes sense, but is also borne out by history. For example, the year after the Court’s decision in *Roe*, Massachusetts passed “[a]n act to protect unborn children and maternal health within present constitutional limits.”<sup>125</sup> That act “required an unmarried minor . . . to obtain the consent of both of her parents in order to terminate a pregnancy by abortion.”<sup>126</sup> Although the Supreme Court ultimately struck down the statute, the Court did outline for the Massachusetts legislature how it could draft a similar law that would survive constitutional scrutiny.<sup>127</sup> Moreover, in the years since *Roe*, many states have enacted other abortion regulations, such as spousal

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123. *Id.* at 152–53, 166.

124. *Id.* at 154 (explaining that “this right is not unqualified and must be considered against important state interests in regulation”); *id.* at 155 (noting that a state statute limiting the right to abortion might survive if it could be justified by a “compelling state interest”). To provide some guidance to lower courts in reviewing such restrictions, the Court established the famous trimester framework, *id.* at 164–65, which was subsequently altered by the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

125. Meryl A. Joseph, Note, *The Massachusetts Parental/Judicial Consent Law for Minors’ Abortions: Perspectives on the Past, Present, and Future*, 26 NEW ENG. L. REV. 1051, 1053 (1992) (quoting 1974 Mass. Acts 706 § 1 (codified at MASS. GEN. LAWS ch. 112, § 12S (1990))). Prior to *Roe*, Massachusetts law provided that

“[w]hoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or, with the like intent, unlawfully uses any instrument or other means whatever, or, with like intent, aids or assists therein, shall . . .” be punished.

*Kudish v. Bd. of Registration in Med.*, 248 N.E.2d 264, 265 n.1 (Mass. 1969) (quoting MASS GEN. LAWS ch. 272 § 19).

126. Joseph, *supra* note 125. If both parents would not consent, the law did allow a minor to go to the courts, but a judge could allow the abortion only for “good cause shown.” *Id.* (quoting *Baird v. Bellotti*, 393 F. Supp. 847, 849 (D. Mass. 1975)).

127. *See id.* at 1065; *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).



consent requirements and waiting periods.<sup>128</sup>

*Citizens United* and *Roe* are hardly anomalous. Given the costs of legislative and regulatory action, legislators and regulators will rarely enact laws and regulations that are superfluous in light of other laws already on the books. And thus it will often be the case that when the Court strikes down one statute, there will be disruptions to democratic preferences that could have been addressed by other statutes had policymakers known they were necessary.

### C. *Facilitating Changes*

Even in those cases where policymakers are not bothered by the Court's decision, they may still want to respond to ensure that it can be implemented successfully and without causing new problems. In other words, the Court's decision may have produced a need for new laws that did not previously exist.

Again, *Citizens United* provides an example. There, the Court rejected the Government's argument that "corporate independent expenditures can be limited because of [the government's] interest in protecting dissenting shareholders from being compelled to fund corporate political speech."<sup>129</sup> In other words, individuals might invest in a company hoping to see economic returns and instead find that their money was being used to support political causes with which they did not agree. The Court acknowledged the abstract legitimacy of the concern, but rejected it as a practical matter, noting that "[t]here is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"<sup>130</sup> Yet the Court did not assess whether the existing procedures of corporate democracy were actually sufficient to prevent such abuses; and, given that there used to be a broad prohibition on corporate political spending, there is reason to think that existing state laws may not have been sufficiently robust to address this problem. Thus, policymakers may have wanted to enact new shareholder protections to ensure that the Court's decision did not create abuses of the corporate form.

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128. Michael Grimm, Comment, *American Academy of Pediatrics v. Lungren: California's Parental Consent to Abortion Statute and the Right to Privacy*, 25 GOLDEN GATE U. L. REV. 463, 469 (1995) ("Several states reacted to *Roe's* broad holding by passing legislation concerning peripheral abortion issues, such as waiting periods, spousal notification, and parental consent." (footnotes omitted)).

129. *Citizens United v. FEC*, 558 U.S. 310, 361 (2010).

130. *Id.* at 361–62.

The Supreme Court's decision in *Melendez-Diaz v. Massachusetts*<sup>131</sup> provides another example. In that case, the Court announced a new protection for criminal defendants, but in so doing, may have produced disruptions to the workings of criminal administration in many states. In *Melendez-Diaz*, the defendant was convicted of cocaine trafficking and distribution based, in part, on three "certificates of analysis" showing the results of forensic analysis performed on the substances.<sup>132</sup> This evidence was admitted without the testimony of the lab analyst who performed the analysis, and the defendant argued that its admission violated the Confrontation Clause, which provides criminal defendants with the right "to be confronted with the witnesses against [them]."<sup>133</sup>

The Court ultimately agreed, concluding that the evidence and "the documents at issue in this case fall within the 'core class of testimonial statements,'"<sup>134</sup> and thus the Confrontation Clause required the live testimony of an analyst familiar with the forensic work.<sup>135</sup> The dissenting justices condemned the Court's decision, inveighing against what they viewed as the deleterious consequences it would produce on criminal proceedings. According to the dissent, "the Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court's new constitutional designation as the analyst, simply does not or cannot appear."<sup>136</sup>

Although the Court questioned whether these practical consequences were a valid factor to consider in assessing the constitutionality of a practice,<sup>137</sup> they also thought the dissent's practical concerns were overblown because states could adopt measures to address them. For example, they noted that many states have so-called "notice-and-demand" statutes that "require the prosecution to provide notice to the

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131. 557 U.S. 305 (2009).

132. *Id.* at 308.

133. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

134. *Melendez-Diaz*, 557 U.S. at 310.

135. *Id.* at 311 ("Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." (emphasis in original)).

136. *Id.* at 340–41 (Kennedy, J., dissenting).

137. *Id.* at 325 (majority opinion) ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.").

defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial."<sup>138</sup> But the Court did not identify all of the states that have such statutes or limit its holding to those states. There is reason to think that many states may not have had them, given that before *Melendez-Diaz*, there would have been no need unless that state's constitution required live testimony in this context. Thus, policymakers might have wanted to enact such laws to prevent the disruptions that the Court's new rule could otherwise produce.

#### IV. REFORMING JUDICIAL REVIEW

Having recognized that judicial review often produces greater-than-necessary democratic disruptions, the critical question remains—what, if anything, can be done about them. As should be clear from the discussion thus far, these disruptions are in some sense inherent in our current system of ex post judicial review: the courts are institutionally ill-equipped to address these disruptions, and policymakers are institutionally ill-equipped to respond quickly, if they choose to respond at all. But the answer, I argue, is not to abandon judicial review. It is to reconceptualize it. Ex ante judicial review would preserve for the judiciary its integral role in our constitutional structure without producing these greater-than-necessary democratic disruptions. Of course, the path to ex ante judicial review is not an easy one, as I discuss below. Thus, I also propose interim reforms that are more feasible in the short term. None of these interim reforms offers a complete solution to the problems of ex post judicial review, but at minimum, they would help focus attention on the issue and the need for solutions.

##### *A. Toward Ex Ante Judicial Review*

As I noted at the outset, judicial review has been a feature of the American legal system for nearly as long as there has been an American legal system.<sup>139</sup> And as long as there has been judicial review, it has been ex post, relying on courts to step in after the law has been enacted and (often) gone into effect. There are certainly advantages to this approach, not least among them that it means the courts will not expend time adjudicating questions until the coordinate branches have actually

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138. *Id.* at 326.

139. *See supra* note 4.

expended the resources necessary to enact the policy into law. But it does mean that by the time the court has declared a law unconstitutional, it will often be difficult, if not impossible, to recapture the democratic preferences that would have existed had policymakers known that their preferred outcome was unconstitutional.

The answer to these problems is not to abandon judicial review altogether. After all, judicial review is an integral part of our constitutional structure, offering one of the few mechanisms to ensure that everyday enactments of the nation's policymaking bodies are consistent with the dictates of the nation's highest law. Nor is the answer to rely on constitutional avoidance tools to reduce the incidence of judicial review because, as previously discussed, those tools avoid judicial review even where it is arguably necessary.

Instead, the answer is to make judicial review less necessary by preventing the enactment of unconstitutional laws and regulations in the first place, and I propose here two reforms that could help make that happen. First, a more liberal approach to justiciability requirements might enable policymakers to ask the Court for its views as to a proposed law or action's legality *before* policymakers act.<sup>140</sup> Although it may arguably be difficult for the Court to address such abstract questions and there may be inefficiencies if policymakers ultimately decide not to adopt the policy for other reasons, the availability of this advice would help prevent the enactment of unconstitutional laws, and policymakers could thus put in place their next best outcome in the first instance. Second, even if the Court did not want to consider questions about laws that have not yet been enacted, the Court could still provide a more holistic assessment of a statute and its constitutionality when one part of the law comes before it through the normal channels. Even if this reform would provide less advance guidance to policymakers than advisory opinions, it would nonetheless provide a much richer understanding of the existing legal framework when they need to respond to judicial decisions.

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140. For recent decisions strictly applying justiciability requirements, see *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009) ("The doctrine of standing is one of several doctrines that reflect [the Article III "cases" and "controversies" requirement]. It requires federal courts to satisfy themselves that 'the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction.'" (emphasis in original) (citations omitted)); *National Park Hospitality Association v. Department of the Interior*, 538 U.S. 803, 807–08 (2003) ("Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" (citations omitted)).

My goal here is not to sketch out precisely what either of these reforms would look like. After all, any detailed proposal would benefit from a comprehensive study of the advisory opinion practices and justiciability requirements in the states and abroad,<sup>141</sup> a project that is beyond the scope of this Article. Suffice it to say for present purposes, that such a comparative study would provide a number of different models from which such a system could borrow to ensure that the structure of the system is one in which the Court is not overburdened and is able to adequately address the legal issues before it. It would also help highlight the costs of such a system, so we can meaningfully assess how those costs balance against the benefits, and try to design a system that maximizes benefits while minimizing costs.

There is, of course, nothing novel about suggesting that it would be good to avoid unconstitutional laws before they are enacted or to ensure that policymakers understand the legal framework against which they are legislating. After all, these are presumably always important goals. Policymakers—or at least legislators—have a constitutional obligation to safeguard the Constitution and are supposed to heed constitutional strictures whenever they act.<sup>142</sup> And offices like the Office of Legal Counsel at the Department of Justice provide guidance on whether proposed legislation and regulations suffer from some constitutional infirmity.<sup>143</sup> But these existing procedures are obviously insufficient to

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141. See, e.g., Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845 (2001) (explaining that "some state courts play an explicit and accepted advisory role in their relations with the other branches"); Krotoszynski, *supra* note 58, at 29 ("The practice of the states demonstrates that advisory opinions are not inherently inconsistent with maintaining a proper separation of powers."); Jonathan D. Persky, Note, "*Ghosts that Slay*": A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155 (2005).

142. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (recognizing that "Congress, like this Court, is bound by and swears an oath to uphold the Constitution"); see also Dorf, *supra* note 44, at 342 ("[I]n our constitutional system, elected officials as well as judges take an oath to uphold the Constitution."). Of course, policymakers may sometimes (for political or other reasons) vote for laws that they actually do not want to see go into effect, but there is reason to doubt that policymakers will generally act in so strategic a fashion. See Stephenson, *supra* note 98, at 24–25 (explaining that "caveats notwithstanding, it seems implausible to suppose that legislators are systematically indifferent to the fate of the statutes they pass" because, among other things, "to the extent that legislators care about advancing a policy agenda, they will have an interest in enacting statutes that actually become law").

143. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1244 (2006) (explaining OLC's "bill comment" practice in which "OLC reviews bills introduced in Congress for potential constitutional problems" and "[w]hen a potential constitutional problem arises, OLC produces a short bill comment identifying the problem," and "[a]nother executive branch office then puts the bill comment together with policy commentary from other offices and forwards the whole package on to Congress").

alert policymakers to what the *courts* will decide,<sup>144</sup> and they provide little help when policymakers know that there is some question about the constitutionality of the new law, but want to test constitutional limits, as they will sometimes legitimately want to do.

An *ex ante* approach to judicial review could also help address other costs imposed by *ex post* judicial review and justiciability constraints. Specifically, the courts' iterative manner of decisionmaking makes policy response more difficult because it creates significant uncertainty about the future development of the law—an uncertainty that may be largely unproblematic when all law is made by common law courts, but is considerably more problematic when other actors also participate in the development of the legal framework.

As an initial matter, this uncertainty means that policymakers cannot fully understand the legal framework within which they are operating,<sup>145</sup> and the results of the legislative (or regulatory) process may be altered as a result. Most significantly, policymakers may factor predictions about what the courts will do in the future into their decisions about what policies to adopt in the present. Scholars have written about the “policy

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144. To be sure, the policymaking branches are sometimes aided by judicial statements in cases that have already been decided. In *Heller*, for example, the Court observed that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

*Dist. of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). But those statements can sometimes mislead policymakers, as they are not binding on the Court itself or even lower courts. *See, e.g.*, Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1046 (2005) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)) (“The significance of *Boerne* was augmented by the Court’s cutting back on dicta in its famous 1966 decision in *Katzenbach v. Morgan* that had suggested Congress could go beyond the Court in protecting Fourteenth Amendment rights.” (footnotes omitted)). Moreover, there will not always be such statements relevant to the particular policies the coordinate branches are considering.

145. To be sure, legislators almost always act against the backdrop of some amount of legal uncertainty, but a recent Supreme Court decision in the field highlights that uncertainty and may also encourage additional litigation in the area. The Supreme Court decision itself may also, in fact, introduce new uncertainty by raising—but not addressing—new questions about how the law should operate, imposing vague standards, or otherwise failing to elucidate specifically how the law will work in the future. Justice Scalia recently noted just this feature of the Court’s development of the law, observing in the context of cases addressing the Sixth Amendment right to the effective assistance of counsel that “[t]oday’s opinions deal with only two aspects of counsel’s plea-bargaining inadequacy, and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process.” *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376, 1392 (2012) (Scalia, J., dissenting); *see also id.* (“Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from ‘the criminal justice system’?”).

distortion” that can result when legislators operate in the shadow of judicial review and try to anticipate whether and why the Court might strike down a pending bill.<sup>146</sup> As Mark Tushnet has explained, “[p]olicy distortion occurs when, due to judicial review, legislators choose policies that are less effective but more easily defensible than other constitutionally acceptable alternatives.”<sup>147</sup> More specifically, policy distortion will generally occur when “courts, exercising the power of judicial review, say something about what the Constitution requires, and legislators somehow improperly take what the courts have said into account as they shape policy.”<sup>148</sup> This policy distortion can take different forms. In some cases, policymakers might not enact their preferred policy because they think it is unconstitutional (or at least that the courts will declare it to be) and adopt some less preferred policy in its place. In other cases, policymakers may decide that their preferred policy is constitutionally infeasible and simply decide that the next best option is not worth the time and effort it will take to enact it.

This iterative lawmaking also creates a related, but distinct form of uncertainty that can discourage legislative or regulatory response—namely, the possibility of additional changes in the area of law that may alter what response is appropriate. In other words, even if lawmakers do not fear that any new law or regulation they enact will be struck down, they may nonetheless be concerned that future changes in the law will supersede their efforts to create a stable public policy. Rather than having to legislate in the same area in piecemeal fashion year after year, policymakers might prefer to wait until there is a stable legal framework against which they can make policy.

The recent litigation surrounding campaign finance regulation provides a perfect example of how one act of judicial review can prompt additional ones, sometimes ones that have an even greater impact on the area of law than the original decision. As I discussed earlier, the Supreme Court’s decision in *Citizens United* allowed corporations and unions to make unlimited independent expenditures from their general

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146. See generally Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

147. *Id.* at 250; see also Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 HARV. L. REV. 2064, 2065 (2011) (explaining that “because the legislature cannot know ahead of time whether plausibly unconstitutional statutes will be struck down or left standing, it must discount the expected value of such proposals by the probability of their not being invalidated in deciding how to expend its limited political capital,” and “[a]ll else equal, this makes legislation that the Court might strike down less attractive to Congress, and so less likely to be enacted, than constitutionally unproblematic legislation” (footnote omitted)).

148. Tushnet, *supra* note 146, at 259.

treasury funds. In *SpeechNow.org v. FEC*,<sup>149</sup> the D.C. Circuit relied heavily on the Supreme Court's decision in *Citizens United* and concluded that the government could not limit individual contributions to independent expenditure groups.<sup>150</sup> As the court explained,

[i]n light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption . . . . Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group.<sup>151</sup>

This decision led to the development of the so-called Super PAC, which spends money "independently" of candidates and thus can raise funds without legal limits.<sup>152</sup> As has been widely discussed, Super PACs played a significant role in the 2012 Republican primary and will presumably continue to play a major role in elections going forward.<sup>153</sup> If Congress or the Federal Election Commission had acted immediately following *Citizens United*, it would not have known to address this significant additional alteration in the legal framework of campaign finance regulation.<sup>154</sup> A system of *ex ante* review would address these issues.

Finally, our system of *ex post* judicial review creates significant legal uncertainties while cases are being litigated—uncertainties that can make it difficult for governmental actors and the public alike. There are not just the obvious uncertainties that exist while a case is slowly working its way through the court system. During that period, the government and the public will act in the shadow of the law, even

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149. 599 F.3d 686 (D.C. Cir. 2010).

150. *Id.* at 694–95.

151. *Id.*

152. See, e.g., Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 562 & n.40 (2012) (reviewing LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS POLITICS—AND A PLAN TO STOP IT* (2011); JACK ABRAMOFF, *CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST* (2011)).

153. See generally, Bob Biersack, *Outside Spending: The Big Picture (So Far)*, OPENSECRETSBLOG, (Jun. 11, 2012, 8:00 AM), <http://www.opensecrets.org/news/2012/06/outside-spending—the-big-picture.html>.

154. Indeed, such additional changes were not difficult to predict. See Kang, *supra* note 11, at 243 ("Although the immediate public reaction focused on the potential for increased corporate spending in elections, the much larger importance of the case is the signal from the Court about the direction of campaign finance law going forward.").



though there is a non-trivial possibility that the law will not ultimately be upheld.<sup>155</sup> There are also the uncertainties that exist when a court decides one case that applies only to the specific parties before it, but may have application to many other parties.<sup>156</sup> To be sure, parties will often have to act with some uncertainty about the law—what it means, how it applies in some new context, whether it might change<sup>157</sup>—but the question is whether an alternative model of judicial review could eliminate at least some of that uncertainty. Again, there seems reason to think that it might.<sup>158</sup>

Admittedly, adopting an *ex ante* form of judicial review—be it advisory opinions or broader review of statutes implicated by more traditional cases—would be no small change. Either reform would require a significant reconceptualization of the way we think about Article III’s requirements, as well as a practical restructuring of the ways in which the courts operate. To start, both of these suggestions would run afoul of Article III’s “case or controversy” requirement, at least as it has come to be interpreted.<sup>159</sup> But it is worth noting that Article III’s constraints are largely court-developed.<sup>160</sup> The Constitution itself, of

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155. See TOOBIN, *supra* note 93, at 270 (explaining that Principal Deputy Solicitor General Neal Katyal did not try to delay the appeal in the health care cases because federal agencies “were spending tens of millions of dollars a month preparing to implement the ACA. It was simply irresponsible to let the legal uncertainty around the law linger”).

156. See *supra* notes 25–26 and accompanying text.

157. Complete certainty is almost surely unattainable. The Court can always overrule itself, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (“[I]t is common wisdom that the rule of *stare decisis* is not an ‘inexorable command,’ and certainly it is not such in every constitutional case.” (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting))), and changes in the membership of the Court will often produce doctrinal changes, see generally TOOBIN, *supra* note 93. Nonetheless, a decision from the Court provides greater certainty than no decision at all.

158. Persky, *supra* note 138, at 1160 (explaining that advisory opinions are used because of “positive externalities that are ever-present, but largely unheralded,” and discussing an example in which one “provided much-needed finality in a politically charged, time-sensitive public dispute”).

159. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (“When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.”); *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (“The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party . . .”).

160. See, e.g., William R. Casto, *The Early Supreme Court Justices’ Most Significant Opinion*, 29 OHIO N.U. L. REV. 173, 203 (2002) (“Given the Anglo-American practice in the eighteenth century, the Constitution’s cases or controversies requirement might have been interpreted to encompass advisory opinions . . .”); Note, *supra* note 147, at 2067 (“This construction of the federal judicial power was not inevitable. In addition to the numerous advisory opinions given by the early Justices, English judges had a longstanding practice of issuing advisory opinions upon the monarch’s request.”).

course, speaks in broad and amorphous terms, providing no content to the requirement that there be a “case or controversy.” And there is no express prohibition on advisory opinions, or any other procedure that might facilitate broader judicial resolution of disputes. There is also reason to question whether these constraints actually achieve the practical benefits that are attributed to them<sup>161</sup>—namely, ensuring that the courts have all of the information necessary to resolve disputes.<sup>162</sup> It is thus at least worth considering whether we might be better off with a more cabined understanding of the “case or controversy” requirement and a renewed focus on other tools that might better ensure that courts do not exceed their proper role in a democratic society.

Of course, putting aside the constitutional restraints, these approaches would also require significant adjustments in the way the courts operate—or at least in the ways we tend to conceive of courts operating. After all, the courts depend (in theory) on the parties to provide them with all of the information they need to accurately and fairly resolve disputes. But as has been discussed elsewhere, this notion that the courts rely on the parties is more myth than reality, born of the courts’ unwillingness to acknowledge that they are often forced to make decisions of the type that lawmaking bodies make.<sup>163</sup> Because the adversarial system—at least as currently structured—is ill-suited to providing the courts with the facts that they need to resolve these kinds of disputes, they often look beyond the parties to find them, and as a result, rely on factual claims that have not been subject to adversarial testing (or any testing at all).<sup>164</sup> Thus, the courts are already looking beyond the parties, and they are already in need of adjustments in their structure to help them do so better. Indeed, the Court frequently appoints

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161. Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Fact-Finding*, 61 DUKE L.J. 1, 69–70 (2011).

162. Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1302 (1986) (identifying “two main purposes to the advisory opinion ban: ensuring an adversarial presentation of actual disputes in order to receive proper judicial process and promoting finality of judicial action essential to the maintenance of separation of powers within the national government” (footnotes omitted)); see also Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1002–03 (1923) (arguing against advisory opinions on the ground that “[t]he stuff of [current constitutional] contests are facts, and judgment upon facts. Every tendency to deal with them abstractedly . . . is bound to result in sterile conclusions unrelated to actualities.” (footnote omitted)).

163. Gorod, *supra* note 161, at 4, 10–11; see also Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 451 (2009) (“Neither courts nor legal commentators have acknowledged the many institutionalized judicial practices that seem to undermine the norm against issue creation.”).

164. Gorod, *supra* note 161, at 53–55.

counsel to represent positions that have been abandoned below;<sup>165</sup> it could similarly appoint individuals to represent the two sides in such controversies. Moreover, numerous state courts, unburdened by the supposed constraints of Article III's "case or controversy" requirement, allow for advisory opinions and have found ways to make an advisory opinion practice work.<sup>166</sup>

I do not attempt to resolve here the constitutional debates or to provide a comprehensive description of what an alternative model of ex ante judicial review might look like. Instead, my point is simply that it is time to consider what such a model might look like, if only because too little attention has been paid to how features of our system of ex post judicial review can hurt both the courts and the coordinate branches. At minimum, it seems worth considering why our constitutional structure pronounces courts the final arbiters of constitutional disputes and then disables them from broadly resolving disputes about the meaning of the Constitution in an efficient manner.

### B. *Changing the Court*

While I believe we should think broadly about how our current system of ex post judicial review works—and does not work—I have no illusions that the radical reforms I just discussed will happen quickly. Nor should they. It will take time to work through the practical and constitutional objections I touched on above. While we begin to work through these broader issues, it is important to think about what, if anything, can be done in the meantime to address these greater-than-necessary democratic disruptions. In fact, there are a number of steps the Court could currently take to help address these disruptions.

None of these solutions is perfect—indeed, each arguably entails some costs or dangers—but each may nonetheless be better than the status quo, at least in some cases. And the virtue all of these solutions share is that the Court has on occasion done each of these things, suggesting that they could be implemented under our current system of ex post judicial review. Whether it adopts any one of them (and which one it adopts) will vary depending on the specifics of the case, but the simple act of systematically considering these solutions will not only

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165. See generally Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae To Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907 (2011).

166. See, e.g., Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845 (2001) ("[S]ome state courts play an explicit and accepted advisory role in their relations with the other branches.").

provide partial solutions in some cases, but will also help further the larger conversation about these disruptions and our current system of judicial review.

*1. Transparency, Advice, and Communication*

It is impossible to address the democratic disruptions produced by judicial review without first acknowledging them. Yet the Court rarely does. Even though the very purpose of judicial opinions is to make the Court's work more transparent,<sup>167</sup> it often remains quite opaque—not just in terms of how the Court reaches its decisions, but also in terms of what those decisions actually mean. Indeed, rather than attempting to shed light on instances in which judicial review may warrant legislative or regulatory response, the Court more often does just the opposite, glossing over or ignoring altogether the significant disruptions that its decisions produce. But it need not be this way. The Court could use the judicial opinion as a means of alerting policymakers to the consequences of its actions and even identifying various ways in which policymakers might want to respond.

The Court is, after all, often equipped to provide policymakers with this type of information. When the Court decides an issue and writes its opinion in the case, it will have just studied the legal issue in great depth. Although this study will not always lead to an appreciation of the broader legal context surrounding the issue, it often will. Indeed, the broader context—and the practical consequences of various outcomes—will often be identified by amici,<sup>168</sup> and relevant to the Court's ultimate decision in the case.<sup>169</sup>

Indeed, the Court as an institution, and individual members of the Court in dissenting opinions, will sometimes engage in just this sort of judicial action—discussing the consequences of decisions or calling on policymakers to respond to decisions that they believe are misguided. Neal Katyal has described this judicial practice of “recommend[ing],

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167. See, e.g., Carl A. Auerbach, *A Revival of Some Ancient Learning: A Critique of Eisenberg's The Nature of the Common Law*, 75 MINN. L. REV. 539, 557 (1991) (noting that “[j]udicial decisions and opinions may educate the legislature and public”).

168. See, e.g., Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 987 (2009) (“There has been no shortage of praise in the legal literature for the ability of amicus briefs to inform the court of implications of a decision or to point out unintended consequences for people or groups not party to the suit.” (citation omitted)).

169. See, e.g., Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1373 (1990) (“It is difficult to argue to Americans that in evaluating a political theory they should ignore its practical consequences.”).

but . . . not mandat[ing], a particular course of action based on a rule or principle in a judicial case or controversy” as “advicegiving.”<sup>170</sup> The Court—or more commonly dissenting members of the Court—will sometimes go even further, encouraging Congress to act in response to judicial decisions that they believe have misinterpreted the law. In *Ledbetter v. Good-Year Tire & Rubber Co.*,<sup>171</sup> for example, Justice Ginsburg wrote a lengthy dissent, criticizing the majority’s interpretation of Title VII and calling on Congress to correct its error.<sup>172</sup> Noting that the Court had previously “ordered a cramped interpretation of Title VII,” and that Congress had addressed the problem with new legislation, she remarked that “[o]nce again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”<sup>173</sup> To be sure, *Ledbetter* was a statutory construction case—not a constitutional one—but if the Court and its members will call on Congress to act when the Court is doing nothing more than giving its best understanding of Congress’s intent, it makes that much more sense for the Court to do so when the Court is indisputably disrupting that intent. To be sure, the Court cannot force Congress or regulators to do anything—policymakers can decide whether (and how) they want to respond—but that does not seem reason for the Court to stay silent when it knows some action might be appropriate.

The Court has on occasion done this. In *District of Columbia v. Heller*,<sup>174</sup> for example, the Court invalidated the District of Columbia’s ban on handguns, concluding that it violated the Second Amendment.<sup>175</sup> In reaching that conclusion, the Court acknowledged “the problem of handgun violence in [the] country” and claimed to “take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution.”<sup>176</sup> The Court responded to this

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170. Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1710 (1998). Often the Court will engage in this sort of advicegiving as an alternative to engaging in judicial review, declining to strike down a law, but identifying what the Court views as the potential problems with it. As Katyal has explained, “advicegiving is a natural adaptation in a world in which judges fear *deciding* issues due to the countermajoritarian difficulty.” *Id.* at 1711 (emphasis in original); see also *id.* (“[T]hose jurists who want to avoid interference with legislative power announce narrow holdings, but superimpose broad advice (a form of dicta) by fully explicating the rationale and assumptions behind the decision.”).

171. 550 U.S. 618 (2007).

172. See *id.* at 643–61 (Ginsburg J., dissenting).

173. *Id.* at 661.

174. 554 U.S. 570 (2008).

175. *Id.* at 635.

176. *Id.* at 636.

concern by noting that its decision “[left] the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns.”<sup>177</sup> It then pointed to an earlier portion of the opinion in which it identified laws that the opinion had described as “presumptively lawful regulatory measures.”<sup>178</sup> Likewise, in the Court’s decision striking down Congress’ second attempt to limit minors’ access to harmful materials on the Internet, the Court noted that filters provide an available alternative and observed that “Congress can give strong incentives to schools and libraries to use them” and “could also take steps to promote their development by industry, and their use by parents.”<sup>179</sup>

Finally, in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>180</sup> the Court held that schools could not classify students by race for the purpose of making school assignments.<sup>181</sup> In concurrence, Justice Kennedy took issue with the plurality’s suggestion that “state and local school authorities must accept the status quo of racial isolation in schools,”<sup>182</sup> suggesting that

[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through [means other than the one invalidated], including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.<sup>183</sup>

The Court should more systematically provide just this sort of guidance and should make its existence clearer to the policymakers who are the intended recipients.<sup>184</sup>

The Court could also facilitate policymakers’ ability to address

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177. *Id.* at 636; *see also id.* at 626–27 & n.26.

178. *Id.* at 627 n.26.

179. *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004).

180. 551 U.S. 701 (2007).

181. *Id.* at 710–11.

182. *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment).

183. *Id.* at 789.

184. To be sure, problems can arise when courts try to use dicta to make law. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1260 (2006). But as even Judge Leval acknowledges, “dicta often serve extremely valuable purposes . . . . They can assist future courts to reach sensible, well-reasoned results. They can help lawyers and society to predict the future course of the court’s rulings.” *Id.* at 1253. What he identifies as “problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum.” *Id.*

judicial review by sending the relevant policymakers their opinions when they decide to engage in this advicegiving (or even when they do not, but still believe that some policy response might be appropriate). To be sure, there will be many cases in which the mere announcement of the Court's decision will be sufficient to alert Congress and other policymakers to the fact that their attention might be warranted. But in other cases policymakers (particularly state legislatures or agencies with smaller staffs) might be largely unaware that the Court has acted in a way requiring their attention. By affirmatively sending its opinion to these policymakers, the Court would make clear both that it has taken action that might require those policymakers' attention and that they should read the Court's opinion in case it has guidance about the types of action that might be warranted.

## 2. *Staying Judgments*

As I discussed earlier, greater-than-necessary democratic disruptions are a function of both judicial action and legislative inaction—or at least delayed action. Although greater transparency and communication between the branches may facilitate somewhat quicker responses from policymakers, immediate action will nonetheless remain difficult in many cases and impossible in others (for example, where the appropriate response is regulatory and the procedural strictures of the Administrative Procedure Act require notice-and-comment).<sup>185</sup> But if it is not possible for policymakers to act more quickly, it may be possible for the Court to act more slowly—specifically, the Court could facilitate policymakers' ability to respond to these democratic disruptions by staying its judgments for a defined period of time, thus enabling policymakers to act before these democratic disruptions are realized.

As an exercise of the Court's equitable powers,<sup>186</sup> such action would not be that different than lower courts' decisions to stay their judgments to give higher courts time to consider an issue.<sup>187</sup> It would also not be

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185. *See* 5 U.S.C. § 553 (2000).

186. *See, e.g.,* *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (“[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”).

187. The Federal Rules of Appellate Procedure, for example, provide the courts of appeals with the authority to “shorten or extend the time [to issue its mandate],” FED. R. APP. P. 41(b), and the courts of appeals will not infrequently extend the time to issue the mandate to prevent “disruption” to the actors that will be affected by the court's decision. *See, e.g.,* *Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006).

that different than courts leaving an invalid regulation in place while the agency considers what action to take in response to the court's decision.<sup>188</sup> Staying the judgment in a case could also be viewed as a form of case management—the inherent power courts, including the Supreme Court,<sup>189</sup> enjoy to manage their dockets, determine how to calendar their cases, and decide how long to wait before issuing a decision. Indeed, the Supreme Court has occasionally adjusted its schedule to permit Congress time to address an issue with legislation.<sup>190</sup>

On a few occasions in the past, the Court has done exactly what I propose—announcing its decision, but at the same time staying its judgment to allow for a response from policymakers. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>191</sup> for example, the Court considered whether “the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 . . . by § 241(a) of the Bankruptcy Act of 1978 violates Art[icle] III of the Constitution.”<sup>192</sup> The Court held that bankruptcy judges were not “Art[icle] III judges” because they did not “enjoy the protections constitutionally afforded to Art[icle] III judges,”<sup>193</sup> and that bankruptcy jurisdiction could not be placed with non-Article III judges.<sup>194</sup>

The Court recognized that it was not its place to attempt to restructure the bankruptcy system—“[w]e think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art[icle] III in the way that will best

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188. In deciding whether to vacate “an inadequately explained agency action,” the Court of Appeals for the D.C. Circuit considers “whether (1) the agency’s decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive or costly.” *N. Air Cargo v. USPS*, 674 F.3d 852, 860–61 (D.C. Cir. 2012).

189. Notwithstanding the traditional practice of resolving all of the cases heard in a term before the term’s end, the Court will sometimes depart from that practice when it decides the benefits of greater deliberation or additional argument outweigh the benefits of a more expeditious decision. *See, e.g.*, Herbert Brownell, Essay, *Civil Rights in the 1950s*, 69 TUL. L. REV. 781, 783 (1995) (“Several months later, near the end of the Supreme Court term in June 1953, instead of handing down a decision, the Court issued an order setting the Brown case for reargument in October of that year.”); *see also* *Kiobel v. Royal Dutch Petrol. Co.*, \_\_\_U.S.\_\_\_, 132 S. Ct. 1738 (2012) (setting case for reargument); *Citizens United v. FEC*, 557 U.S. 932 (2009) (setting case for reargument).

190. *See* *United States Nuclear Regulatory Comm’n v. Sholly*, 463 U.S. 1224 (1983) (Blackmun, J., dissenting) (noting that the Court granted certiorari and then twice postponed oral argument “while Congress considered proposed legislation”).

191. 458 U.S. 50 (1982).

192. *Id.* at 52.

193. *Id.* at 60.

194. *Id.* at 76 (“The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art[icle] III does not apply.”).



effectuate the legislative purpose”<sup>195</sup>—but it also understood that the wholesale invalidation of the nation’s bankruptcy courts could cause significant disruption. Thus, with no discussion at all, the Court decided to “stay [its] judgment until October 4, 1982 [ninety days],” explaining that “[t]his limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.”<sup>196</sup>

The Court adopted the same approach to remedy in *Buckley v. Valeo*.<sup>197</sup> There, the Court held unconstitutional “limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds.”<sup>198</sup> The Court also held that “most of the powers conferred by the Act upon the Federal Election Commission can be exercised only by ‘Officers of the United States,’ appointed in conformity with Art. II, § 2, cl. 2, of the Constitution, and therefore cannot be exercised by the Commission as presently constituted.”<sup>199</sup> The Court provided that its “mandate shall issue forthwith, except that our judgment is stayed, for a period not to exceed 30 days, insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act.”<sup>200</sup> As the Court explained, “[t]his limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act.”<sup>201</sup>

It might seem odd for the Court to permit the continued enforcement of laws even after it has declared them unconstitutional. After all, as the Supreme Court has explained, when plaintiffs come into court asserting that their rights are being violated, those rights are “present rights; they

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195. *Id.* at 87 n.40.

196. *Id.* at 88.

197. 424 U.S. 1 (1976).

198. *Id.* at 143.

199. *Id.*

200. *Id.* at 144.

201. *Id.* at 143 (emphasis in original); see also Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363, 381 (1987) (“The stay explicitly allowed ‘the present Commission’ to complete unfinished business pending at the time of *Buckley* and to ‘afford Congress an opportunity’ to remedy the constitutional defects contained in the Commission’s manner of appointment.”).

are not merely hopes to some future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.”<sup>202</sup> In fact, the Court recently expressed hesitation about the appropriateness of “stay[ing] a lower court judgment in light of unenacted legislation,” explaining that its “task is to rule on what the law is, not what it might eventually be.”<sup>203</sup> But in that case the Court was being asked to stay a case because future legislation might change the result in that case, not to allow policymakers an opportunity to respond to the Court’s decision. And, notably, the Court in that case did not foreclose the possibility that there might be some situations in which a stay would be permissible in light of proposed legislation.<sup>204</sup> While there may be instances in which the continued enforcement of an unconstitutional law seems too problematic to permit this solution, it should still be something the Court considers. In some circumstances, the benefits of a stay may outweigh its costs.

### 3. *Second-Best Preferences*

As the preceding sections suggest, it should generally fall to policymakers to replace invalidated laws with new policies that represent their second-best preferences: that is, their next preferred policy option after the one that has been held unconstitutional. Courts, after all, are institutionally ill-equipped to make policy,<sup>205</sup> and while the Court need not be passive in this enterprise, its role should be limited to facilitating policymakers’ ability to respond, rather than responding itself.

There may, however, be occasions in which it is appropriate for the Court not simply to displace legislative judgments, but instead to replace them, putting in place the policies that it believes the legislators who enacted the invalidated provision would have enacted had they known their preferred policy outcome was unconstitutional. Such an action, if

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202. *Watson v. Memphis*, 373 U.S. 526, 533 (1963); cf. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 631 n.245 (1984) (describing “the Court’s assertion that it could continue in effect for an interim period an allocation of judicial authority that it had found Congress could not constitutionally enact” as “[n]ot the least surprising aspect of the decision” in *Northern Construction*).

203. *Garcia v. Texas*, \_\_\_U.S.\_\_\_, 131 S. Ct. 2866, 2867 (2011) (per curiam).

204. *See id.* (“Even if there were circumstances under which a stay could issue in light of proposed legislation, this case would not present them.”).

205. *See supra* Part II.A.

successful, would immediately ameliorate the democratic disruptions of the act of judicial review. Moreover, it would address the temporal difficulties posed by the fact that the specific Congress whose legislative judgment is being displaced may no longer exist and may thus be unable to respond by putting in place its second-best preference.<sup>206</sup>

This solution may seem like an unconventional one for a court, but in fact, it is not that different from what the Court already occasionally does under the guise of severability analysis. When the Court engages in severability analysis, it sometimes does more than what this name suggests—simply severing one part of a law from the rest.<sup>207</sup> Rather, the Court produces a law that is significantly different from the one that existed before the Court acted—advisory guidelines where they were once mandatory,<sup>208</sup> or agency officials who can be removed at will where once they could only be removed for cause.<sup>209</sup> These decisions in effect represent the Court's effort to put in place policymakers' second-best preferences, or at least something that will approximate those preferences until policymakers are able to respond to the Court's decision.

To be sure, there is always a danger in the Court guessing what legislators or regulators would have done had they known that their preferred outcome was unconstitutional; the Court could misjudge what Congress would have wanted. But the Court could also be wrong about what Congress would have wanted if it strikes down a law and puts nothing in its place. The greater danger may be less that the Court will guess wrong than that the Court will damage its institutional reputation when it engages in such action. And perhaps for that reason alone this means of addressing judicial review should be pursued rarely and only when there is real reason to have confidence about what policymakers' second-best preferences would be. But, again, there may be cases in which it is appropriate, and the Court will not know that unless it systematically considers this option when it engages in judicial review.

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206. Cf. Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U.L. REV. 1201, 1229–30 (2012) (discussing these intertemporal complications).

207. See *supra* note 63; see also Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 885 (2005) (“Intuitively, application severability may seem a judicial endeavor of more dubious legitimacy than text severability, as a court must draw lines not found in the statute’s language. In fact, however, severing unconstitutional applications is functionally equivalent to the well-established judicial practice of narrowly construing statutory provisions to avoid constitutional problems.”).

208. See *United States v. Booker*, 543 U.S. 220 (2005).

209. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, \_\_\_U.S.\_\_\_, 130 S. Ct. 3138 (2010).

### C. *Changing Congress (and Other Policymakers)*

It takes two to tango, and all of the responsibility for addressing the greater-than-necessary democratic disruptions caused by judicial review should not fall on the courts. To the contrary, there are steps the policymaking branches can—and should—also take to help reduce these disruptions. In some cases, these reforms may be particularly effective if adopted in conjunction with one of the judicial reforms discussed above.<sup>210</sup> Again, none of these solutions is perfect—each has costs—but we should at least consider whether the adoption of these tools in the right circumstances will help address the greater-than-necessary democratic disruptions that judicial review produces.

#### 1. *Fallback Law*

Congress occasionally provides guidance in its legislation about what should happen should the law be declared unconstitutional, in full or in part. Most commonly, this guidance takes the form of severability provisions, which instruct courts about what to do when just one provision of a larger law is held unconstitutional—that is, strike down the law in its totality, or leave the rest of the law in place.<sup>211</sup> But sometimes Congress goes even farther and enacts “substantive fallback provisions.”<sup>212</sup> These substantive fallback provisions—i.e., new provisions of substantive law—automatically go into effect when the law to which they are attached is held unconstitutional.<sup>213</sup> For example, to take one of the very simple examples discussed above, the law barring tobacco advertising within 1000 feet of schools could have included a substantive fallback provision of a 250-foot ban. Or it might have provided for some other policy designed to address under-age smoking. Thus, substantive fallback provisions essentially enable policymakers’ second-best preferences to automatically go into effect, without delay and without the courts having to guess what those second-best preferences would have been. That is a real benefit, and Congress should more often consider whether to include substantive fallback provisions when it has reason to suspect the law it is enacting might be held

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210. For example, as I discuss below, Congress could adopt rules that allow for expedited proceedings in the aftermath of a judicial decision. That reform—in conjunction with a judicial stay for a defined period of time—could allow for expeditious policy response without the disruption ever going into effect.

211. *See supra* note 63.

212. Dorf, *supra* note 44, at 305.

213. *Id.*

unconstitutional.

As I noted earlier, Michael Dorf has discussed the existence of such provisions at length, including the potential problems posed by the use of substantive fallback provisions. Among other things, Dorf discusses the extent to which a fallback provision's relationship with the invalidated provision may (or may not) affect the analysis of the fallback's constitutionality.<sup>214</sup> For my purposes, there are two problems in particular that make substantive fallback provisions an incomplete solution to the problems of ex post judicial review. First, in a world of limited time and in which enacting legislation is exceedingly difficult, it is simply unrealistic to expect that policymakers will enact substantive fallback provisions for every piece of legislation they enact, or even every piece of legislation which seems particularly likely to be subject to constitutional challenge. In many cases, the enactment of the fallback provision will be a waste of time and effort if the underlying provision is never held unconstitutional. Second, when policymakers write a substantive fallback provision, they cannot know the nuances of the Court decision that will trigger it. In other words, they are legislating their response without the benefit of knowing why the Court held the underlying provision unconstitutional, which may affect what they put in place in response.<sup>215</sup>

Thus, substantive fallback law does not offer a complete solution to the problem of judicial review's greater-than-necessary democratic disruptions. But that does not mean that it cannot be valuable in certain circumstances. For example, where it is especially likely that the underlying provision may be held unconstitutional (and especially where Congress can anticipate the possible grounds of a Court ruling), Congress should seriously consider enacting fallback provisions.

## 2. *Expedited Proceedings*

As discussed above, Congress is not an institution that is known for its ability to respond nimbly to rapidly developing events.<sup>216</sup> For good or for bad, legislative response generally takes time. But whatever one

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214. *Id.* at 313–25.

215. *Id.* at 347–48 (“Those who believe that the Court and the political branches should be engaged in dialogue about constitutional meaning have their own reasons to be skeptical of fallback law . . . . How can the legislature take the views of the courts into account in formulating its own response if it formulates that response before learning those views?”). *See generally* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 655–79 (1993) (discussing the dialogic function of judicial review).

216. *See supra* notes 77–89 and accompanying text.

thinks of that fact as a general matter—whether one views it as destructive gridlock or measured deliberation—it is arguably more problematic where judicial intervention has produced disruptions to democratic preferences that are not constitutionally required.

Significantly, though, much of the reason that legislative and regulatory action is generally slow in coming is a function not of constitutional imperative, but of Congress's own making (i.e., the internal rules that govern its own proceedings and the statutory rules that govern administrative proceedings).<sup>217</sup> Thus, Congress could change those rules to allow for more expeditious response, at least in the aftermath of a judicial decision. For example, to address legislative delays, Congress could eliminate the filibuster and other procedural hurdles, or lessen the amount of debate required before a vote can happen.<sup>218</sup> To address administrative delays, Congress might lessen the strictures of the Administrative Procedure Act, such as full notice-and-comment.<sup>219</sup>

To be sure, this reform will not help in those circumstances where current policymakers are not inclined to respond. Moreover, to those who believe that the system's design is essential to thorough deliberation and measured response, this cure may seem worse than the disease. But, again, the benefits of such an approach may still outweigh the costs, at least in some cases. And allowing for more expeditious action will not mean that action always occurs or without any deliberation. After all, at least on the legislative side, any response will still require enactment by both houses of Congress and presentment to the President.

### 3. *Housekeeping*

One of the most pernicious aspects of the democratic disruptions that are at the focus of this Article is the lack of transparency. Even when the Court's decision is the focus of substantial attention, the nature and scope of the greater-than-necessary democratic disruptions that it produces may not always be obvious. To return to the example of

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217. See, e.g., Jacob E. Gerson & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 553 (2007) (discussing internal rules that both speed, and delay, legislative action).

218. See, e.g., Bruhl, *supra* note 85, at 1418 (discussing the filibuster); Charles A. Stevenson, *In Senate, 'Motion to Proceed' Should Be Non-Debatable*, ROLL CALL (Apr. 19, 2010, Midnight), [http://www.rollcall.com/issues/55\\_117/-45256-1.html](http://www.rollcall.com/issues/55_117/-45256-1.html) (discussing possible reforms to the "motion to proceed").

219. See generally Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008).

*Citizens United*, the decision was hardly a secret—to the contrary, it was one of the most high-profile cases in recent memory—but it was still not immediately clear to even close observers of the Court what exactly the consequences of the decision would be, beyond the obvious influx of greater corporate and union spending.<sup>220</sup>

One way to ensure that these democratic disruptions do not go unnoticed would be for policymakers to decide in advance to engage in regular housekeeping of certain statutory schemes—either ones that are particularly complicated, or ones in which judicial intervention seems particularly likely. In these periods of regular statutory housekeeping, policymakers can study whether judicial decisions (or even other external developments) make changes to the underlying scheme necessary and then can take whatever action is appropriate.

Of course, housekeeping will (again) only address those disruptions that policymakers want to address. And housekeeping will only address them after the fact—the disruptions will still go into effect, which can itself make legislative response more difficult.<sup>221</sup> Finally, some might object that policymakers should not expend time and effort reviewing statutory schemes that may ultimately require no revisions or changes at all. But, again, there may be some schemes in which a regular review (which can be relatively quick if there have been no relevant changes in the period since the last review) would be of real benefit.

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These proposed reforms do not provide a complete solution to the problem identified in this Article. That that is so speaks to the need for a larger conversation about our system of ex post judicial review and whether it compromises the ability of the courts and policymakers to effectively work together. But these reforms may, at least in certain cases, help ameliorate the problem of these greater-than-necessary democratic disruptions. If nothing else, their systematic consideration—and even occasional adoption—would help focus attention on this larger problem. In some ways, it is surprising that the branches (and, in particular, the Court) have not more systematically adopted these

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220. See *supra* note 87.

221. Donald R. Livingston & Samuel A. Marcossou, *The Court at the Crossroads: Runyon, Section 1981 and the Meaning of Precedent*, 37 EMORY L.J. 949, 970 n.87 (1988) (“[I]f the status quo is created by an incorrect Supreme Court interpretation, the ‘retentionist bias’ and ‘legislative inertia’ may keep it in place.”); cf. Gans, *supra* note 63, at 643–44 (“[O]nce a court has rewritten the invalid statute via severance, it is much less likely that the legislature will act. Once a court has put in place a revised statute, legislative inertia takes over.”).

responses to judicial review. In the next Part, I suggest why that might be.

## V. TIME FOR A NEW REALISM

Although the collateral consequences of judicial review are significant in and of themselves and for what they reveal about the larger consequences of a system of ex post judicial review, they also may be able to teach us something about the Court and its relationship with the world around it. Indeed, the fact that the Court recognizes the importance of deference to the coordinate branches, yet fails to systematically adopt some of the more modest proposals I discussed above may suggest something important about the way the Court sees itself (or wants others to see it).

The Court presents itself as an apolitical institution, divorced from the worlds of politics and policy. As Judge Posner recently wrote, “Judges tend to deny the creative—the legislative—dimension of judging, important as it is in our system, because they do not want to give the impression that they are competing with legislators, or engaged in anything but the politically unthreatening activity of objective, literal-minded interpretation, using arcane tools of legal analysis.”<sup>222</sup>

The Supreme Court is no exception, and its failure to adopt the more modest proposals I suggested above may reflect this tendency. For example, as I noted, communication between the Court and Congress is surprisingly rare,<sup>223</sup> communications between the Court and other policymakers is largely non-existent. As then-Professor Katzmann noted in his seminal work on the relationship between the courts and Congress, the reason for the absence of communication may be at least partially philosophical, reflecting “an awkward unease about communications regarding substantive matters of policy and process [that] characterizes relations between the first and third branches.”<sup>224</sup> That that benign wariness persists may well result in significant part from the Court’s lack of realism about its own role. Regular interactions with Congress might suggest that the Court—like Congress—is an actor in the worlds of politics and policy.

Likewise, the Court’s failure to stay its judgments may reflect, at least

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222. Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 24, 2012), <http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism#>).

223. See *supra* Part II.A.

224. KATZMANN, *supra* note 79, at 82.



in part, its unwillingness to acknowledge that when it acts it often does more than apply the law; it actually changes the law, and substantial policy consequences often follow. Staying its judgment, after all, would implicitly recognize that the Court is disrupting the intent of democratically elected legislators in a way that might warrant some sort of response from policymakers. This, in turn, could suggest that the Court's decisions are motivated by the justices' political views, rather than the law,<sup>225</sup> and the Court might worry that its legitimacy (and thus its ability to function) will be harmed if it were to make its connection to the worlds of politics and policy so apparent.<sup>226</sup>

More sustained study is necessary, of course, to determine whether this hypothesis is right, but if it is, it is time to take stock of what we might be losing as a result of the Court's unwillingness to acknowledge the true nature of its role. After all, the Court's lack of realism can detrimentally affect the way it conducts its business. Here, its unwillingness to acknowledge that its decisions can produce collateral consequences actually magnifies those consequences by depriving the Court of tools it could use to minimize them. As has been discussed elsewhere, the Court's lack of realism affects the way it engages in factfinding, producing ad hoc factfinding that meaningfully impairs the quality of the Court's decisionmaking.<sup>227</sup>

A more honest accounting of the role of the Court and the nature of its decisions could potentially improve the way the Court operates. This is not to say that there might not be costs. Surely, the Court maintains its image (or struggles to do so) for a reason. Perhaps there might be some effect on how people perceive the Court and its legitimacy. That said, it is worth querying whether anyone today truly believes that the Court is

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225. This notion would hardly be new, *see generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993), but "the vast bulk of legal scholarship still explicitly or implicitly assumes that court decisions are based centrally upon reasoned arguments of the type taught in law school," Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U.L. REV. 251, 252 (1997). And the perception that the justices are influenced by their political views can affect the public's approval of the Supreme Court's work. *See, e.g.*, Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 7, 2012 (noting that "the court's standing with the public has slipped significantly in the past quarter-century" and that this "decline in the court's standing . . . could reflect a sense that the court is more political").

226. *See* Edward McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837, 845 (1955) ("The end product of the [Court's involvement in politics] must be to embroil the Court in undignified partisan controversy, and there may be a risk too, as happened with the Old Court majority before 1937, of the Court itself going down with a lost political cause.").

227. Gorod, *supra* note 161.

completely apolitical.<sup>228</sup> A popular description of the Court that does not mention the Court's "liberal" wing, its "conservative" wing, and the "moderate" in the middle is rare. If the general public recognizes that the Court is at least sometimes political, it may be time for the Court to do so as well, especially if doing so will improve its ability to do its job. Although I do not purport to offer here a catalogue of ways in which the Court's willingness to be more realistic about its role might improve its operations, I do think that this is a more general problem that requires sustained attention.

## CONCLUSION

The most obvious facts are sometimes the least appreciated. Significantly, it is completely unsurprising that legislators and regulators would make policy against the backdrop of existing laws and regulations. Yet there has been virtually no attention paid to what that fact means when the courts step in and disrupt that existing legal regime. One consequence of this fact is that judicial review produces disruptions to democratic preferences that are greater than the Constitution requires. Although these disruptions may take different forms and raise different concerns depending on the issue and the surrounding political context, there is every reason to think that these disruptions occur frequently.

This Article is first and foremost a call for recognition of these disruptions and a conversation about what they tell us about our system of ex post judicial review. We can begin to solve the problem only if we recognize it. But the Article also offers some preliminary thoughts on what solutions might look like. Most significantly, the Article argues that we should think about whether it would be possible to move toward a system of ex ante judicial review in which we try to prevent the enactment of unconstitutional laws and regulations, rather than simply invalidating them after the fact. While moving toward a system of ex ante judicial review would require working through difficult constitutional and practical questions, I do not think these problems are insurmountable, and I hope to work through them and comprehensively sketch out what such a system might look like in a future project.

In the meantime, I argue that there are more interim reforms that both the Court and the coordinate branches could adopt to help address these issues. None of these reforms is perfect, but in some cases, the benefits they offer may outweigh the costs. At minimum, the systematic

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228. See, e.g., Liptak, *supra* note 225 (reporting that three-quarters of Americans "say the justices' decisions are sometimes influenced by their personal or political views").

consideration of these solutions would help shine light on the larger problem and thus make possible a more complete solution. The Court's reluctance to adopt even these modest solutions may reflect its unwillingness to acknowledge the very real role that it plays in the worlds of policy and politics. But the only way that the Court can effectively do its job—in this and other respects—is if it acknowledges all aspects of what that job is.

It is time not only to acknowledge the greater-than-necessary democratic disruptions that judicial review produces, but also how the Court's role in governance produces those disruptions. Sometimes the most obvious facts are the least appreciated. There is much about the Court and its role that is obvious, and yet little appreciated. Recognizing the reality of the Court's role is a critical prerequisite to ensuring that the Court fills that role effectively.