

Constitutional Horticulture: Deliberation-Respecting Judicial Review

William N. Eskridge, Jr. & John Ferejohn

Engineering and architectural metaphors recur in discussions of constitutionalism by both political scientists and law professors. The dominant image is one of architects who design a constitution, which is then constructed or built according to the design.¹ These metaphors have largely supplanted the older Aristotelian metaphor of a constitution as “the life of the city,” a pragmatic description of social norms and practices that have become entrenched in a society.² The newer architectural metaphors have more bite for modern political problems, which assume that by creating a well-designed written constitution some important social project (such as liberal rights, markets, or democracy) can be realized or encouraged. We take that point but suggest that modern concepts of constitutional design have much to learn from Aristotle. There are two ways of looking at constitutional design. One is an engineering perspective, where the designer hardwires the system to proceed in a certain way and then turns it loose, like a well-made watch or machine. Another design perspective is horticultural, where the designer plants a garden, whose original plan changes as the plants grow and receive further attention from the gardener. Thus, the constitution plants institutions, gives them powers or duties, and announces rights, but all at a high level of generality. The general purposes, powers, and rights sprout and grow, taking form as they are cultivated by the implementing persons and institutions. The full-grown constitutional trees adapt to climatic changes (or not) and if

1. Indeed, the title of Walter F. Murphy’s article for this symposium, *Designing a Constitution: Of Architects and Builders*, 87 TEXAS L. REV. 1303 (2009), reflects this very trend. There are numerous other examples of the engineering-design metaphor in use. See, e.g., DONALD S. LUTZ, THE PRINCIPLES OF CONSTITUTIONAL DESIGN 183, 215–18 (2006) (considering the development of constitutional design principles as the outcome of centuries of discussion and debate; suggesting that designers should apply different design principles to achieve desired results; and cautioning against rote application of design principles since results often depend on underlying conditions); John Boye Ejibowah, *Integrationist and Accommodationist Measures in Nigeria’s Constitutional Engineering: Successes and Failures*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 233 *passim* (Sujit Choudhry ed., 2008) (referring to the design process in Nigeria as constitutional engineering); John McGarry et al., *Integration or Accommodation? The Enduring Debate in Conflict Regulation*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?, *supra*, at 41, 41, 56, 74 (comparing the constitutional issues of integration and accommodation to architecting houses, apartments, or condominiums and referring to the forced mixing and integration of ethnicities as engineered mixing).

2. See 2 ARISTOTLE, *Politics*, in THE COMPLETE WORKS OF ARISTOTLE IV.11.1295a35–1295b1, at 2045, 2056 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation) (arguing that citizens will seek a life without impediment and that these norms will become embodied in the constitution of their society).

successful flourish and reproduce. In contrast to the engineering perspective where the designer can be a stranger—a clockmaker who designs the mechanism and leaves it to function as planned, or a Lycurgus who exiled himself from Sparta after giving it a constitution—the horticultural perspective requires that the designer or her associates be stakeholders with an ongoing relationship to the design.³

The horticulture metaphor offers a number of advantages for constitutionalists. To begin with, most important institutions of public law cannot be hardwired into a constitution, and this is especially true for one that is as hard to change as the Constitution of 1789. For example, America experimented with numerous institutional approaches to currency and financial regulation before settling on the Federal Reserve System,⁴ a regime now being tested. It would have been disastrous for constitutional designers to hardwire one institutional regime into the foundational document. More importantly, the notion of constitutional horticulture is a more realistic and productive way to understand constitutionalism. Engineering metaphors invite subsequent interpreters to continue the original design by ferreting out the “original meaning” of a constitutional provision, an enterprise fraught with difficulties. Horticulture metaphors, in contrast, invite subsequent cultivators to carry out the shared project in a way that allows it to flourish and contribute to the larger public interest.⁵

The more mechanical engineering-based theory might have an offsetting advantage. Unelected federal judges are the primary interpreters of our Constitution of 1789, and there is justified anxiety when such judges trump the democratic process to enforce constitutional values. Because most versions of engineering-design theory require judges to follow the original meaning of the Constitution (or some other fixed-meaning approach), such a theory promises more determinate guidance for judges and claims to reduce the likelihood that a judge will just read his or her values into the Constitution. In contrast, horticultural design theory runs the risk of vesting judges with discretion to tend the constitutional garden as they see fit, without even the pretense of following the original plans.⁶ Fair enough.

3. The horticultural metaphor was suggested to us by Peter Ordeshook.

4. See, e.g., John J. Chung, *Money As Simulacrum: The Legal Nature and Reality of Money*, 5 HASTINGS BUS. L.J. 109, 128 (2009) (recounting the history of the Second Bank of the United States, a privately owned bank chartered by Congress that performed central bank functions such as issuing paper bank notes and served as the “fiscal agent of the government”).

5. We attended a conference on constitutionalism with Justice Scalia several years ago. A Canadian judge spoke proudly of that country’s understanding of its Charter as a “Living Tree.” Justice Scalia pondered that for a moment and quipped, “A bonsai?”

6. The original designers may not fully understand the futility of precisely engineering fundamental institutions of, for example, public finance. See Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 391 (arguing that judges in early legal tender cases uniformly believed that the framers of the Constitution of 1789 understood the Coinage Clause to bar Congress from issuing paper money not backed up by specie). Under a horticultural perspective,

Because the Constitution is old, short, and almost impossible to amend, however, there is no original meaning for a judge to “discover” as to most important issues, and so the engineering-oriented judge is left with no more guidance than the horticulturalist. This is a genuine constitutional dilemma for either design perspective.⁷

This Article points to a way to manage the dilemma: in constitutional adjudications, judges should behave like good horticulturalists, whose science is empirical in that it pays attention to how the plants are doing and evolving. In the world of politics, that means that constitutional horticulturalists need to listen to and respect other institutions—to be deliberation-respecting. The premise of such review is that most constitutional horticulture should proceed through deliberation among legislators, executive officials, and voters. Such “democratic deliberation” is the most legitimate way in which the large “C” as well as small “c” (Aristotelian) constitutions should evolve. “We the People” are and must be the gardeners, and not merely the observers or even plants, in our national garden. The role of judges must be to facilitate and, occasionally, to guide the work of the gardeners. If judges try to dominate the process or arrogate it to themselves, or if they abdicate this role and leave the garden to run wild, they risk developing a garden of weeds. For these reasons, judicial review should avoid closing off democratic deliberation, should respect the products of such deliberation, and should create constitutional floors only when supported by deliberation among a wide array of represented interests. Part I of this Article develops this basic thesis, Part II applies it to a recent problem, and Part III explores it by reference to several areas of doctrinal debate.

I. Deliberation-Respecting Judicial Review

What is deliberation? Deliberation, for us, is the process by which people engage in interactive discussions to decide what to do.⁸ Consider an example. The law faculty faces a decline in the value of its endowment and must decide what to do about a budget shortfall. The faculty discussions will focus on how to solve the problem. Professors will consider whether there are ways to replace at least some of the endowment portion of the budget with other sources of funding, whether the law school ought to borrow

later interpreters should understand the Constitution as open-ended on many such issues even if its framers did not.

7. To be utterly clear, the old, open-textured, and hard-to-amend Constitution creates a dilemma for original-design theorists because there is no useful “original meaning” for a judge to “discover,” and so the metaphor either collapses or becomes a shell game by which the judge smuggles in her own values under cover of original meaning. The main dilemma for horticulturalists is that their openly dynamic perspective needs a “legal” form of reasoning that is tied to constitutional text in a persuasive way.

8. For especially thoughtful discussions of deliberation, see AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3–13 (2004) and HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY* 85–93 (2002).

money, which programs ought to have their expenses reduced and through what mechanisms, and so forth. So one feature of deliberation is *problem solving*. Our model of deliberation is one where factual information as well as normative arguments are brought to bear on the problem, and the pre-existing views of the discussants evolve in the course of investigation and discussion.

A second feature of deliberation is *constitutional*, by which we mean consideration of the (larger) institution's objectives, identity, and norms, which may be implicated in decisions made to solve the practical problem. For example, if the faculty considers elimination or curtailment of clinical programs, the faculty ought to consider the implications of that step for the law school's ability to carry out its educational mission. Is there a governance rule limiting the faculty's options as regards clinical education? Is the institutional mission losing something important by eliminating these clinical programs? Are there other cost-cutting measures that would have less detrimental effects on that mission? Is the institutional mission more about the intellectual instruction of law students, or perhaps the production of cutting-edge conceptual scholarship, than teaching students "how to practice law"? Does clinical education contribute to the intellectual-instruction and conceptual-scholarship missions of the law school? And so on.

Finally, the deliberation ought to consider the views and interests of the school's "stakeholders"—persons with an ongoing relationship to the institution and whose interests will be affected by the decision. Among the stakeholders the faculty should consult are the law school's alumni, its current student body, and its nonfaculty. If alumni and students, for example, are strongly in favor of retaining Clinic A but not Clinic B, those views and the reasons adduced therefor should be seriously considered by the faculty. If both clinics were eliminated, what would the reaction of students and alumni be? (If those eliminations were part of a broader set of cuts, including to faculty resources, would the reception be different?) Would prospective law students, otherwise attracted to this particular school, be significantly less inclined to attend because of the loss of this program? These and other considerations are broadly *democratic* ones: What stakeholders does the faculty "represent"? Whose views matter and therefore should be accommodated if possible?

Successful deliberation (1) comes up with an intelligent and realistic approach to the problem that (2) is consistent with or represents an improvement of the institution's constitutional commitments and identity and (3) is considered reasonable by the bulk of the institution's constituents, a group that might change in response to the proposed course of action. These structural features help us understand more deeply what deliberation is. For example, institutional deliberation engages different forms of reasoning—the practical reasoning of problem solving and policy analysis, the rationalistic or philosophical reasoning of constitutionalism, and the political reasoning associated with democracy or customer service. Like a stool with three legs,

deliberation relies on each form of reasoning; to exclude any form of reasoning from deliberation would be disabling. Relatedly, and more deeply, these different modes of deliberation are not entirely separable; they are interlinked, and they should be. If there is a solution to the problem that gains consensus support among the faculty, based upon evidence and expert conjecture, the faculty will bend constitutional rules to accommodate the solution and will be more aggressive in selling the solution to students and alumni. The proposed solution, unfortunately, will often entail rejection of views and proposals important to some faculty members, university administrators, alumni, and students. Institutions as well as persons strive under conditions of scarcity. Not all goals can be realized, and there will always be trade-offs. For these reasons, deliberation involves hard choices and conflicting (sometimes sharply conflicting) points of view.

It is important for deliberation to work well. Broadly speaking, each important occasion for serious deliberation implicates the survival of the institution and the flourishing of its members. Institutions that make stupid choices or that unnecessarily alienate their past, present, and future constituents are organizations that will not flourish and may not survive.⁹ Assume that our hypothetical law faculty addresses its fiscal crisis by abolishing its most popular clinical programs because the governing board of the faculty wants to preserve its own salaries and programs, and believes that clinics are academically expendable. The first reason is a bad one because the faculty is self-dealing; the second reason involves a constitutional judgment that strikes us as simplistic (we believe clinical programs are academically central) and a practical and political judgment that is probably unresponsive to the views and preferences of alumni, students, and prospective students. If our intuitions are right, this exercise in deliberation is not a success, and the failed deliberation will undermine the institution.¹⁰

Generalize the lessons that might be drawn from the case of the law school fiscal crisis. Deliberation can go wrong in a lot of ways, but especially when the decision makers (1) make decisions without a thorough understanding of alternatives and consequences, (2) take a constitutionally impoverished view of the choices available to the institution, or (3) consider the needs and interests of only a fraction of the community and not the common good (this is especially bad when the decision makers are driven by their own self-interests). Bad deliberation undermines the legitimacy of the

9. Cf. ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET* 36–37 (1991) (arguing that pluralist democracies are threatened when the “stakes” of politics get too high, thereby alienating some groups).

10. On the other hand, abolishing a popular clinic might be a good thing because its many supporters will make the best case for considering clinics institutionally central to the school. This will provide the faculty with useful information and will make it harder for them to make a self-serving decision (e.g., eliminating the clinic to avoid cutting faculty salaries).

institution, which helps us see how multifaceted “legitimacy” itself is.¹¹ Illegitimacy, an institution’s perceived loss of support,¹² can come from (1) stupid *substantive* decisions that have bad consequences,¹³ (2) inconsistency between problem-solving decisions and the institution’s *constitutional* mission and commitments,¹⁴ or (3) intensely negative *political* reactions by the institution’s constituents.¹⁵

A final observation completes our account of what deliberation is. Ends and means interact in practical reasoning; a necessary part of deciding whether to pursue some goal is taking account of available means and their costs.¹⁶ Thoughtful deliberation about one thing (i.e., means) will affect the decision makers’ views about the other (i.e., ends). Deliberation, or practical reasoning, concerns not only what to do but also, in a certain way, what to want. Ends and means need to fit together in a kind of reflective equilibrium. Thus, in the case of the law school fiscal crisis, the dean might announce, to general agreement, that the goal of her austerity plan is to maintain the law school’s academic excellence while at the same time cutting “budgetary fat.” If the faculty chooses as a means to that end the elimination of clinical programs, the faculty has deliberated not only about a *means* but also about the *end* (i.e., the school’s “academic excellence”). There will probably be discussion about the value of some or all of the clinics to academic excellence, and a vote to eliminate clinics will be a constitutional vote as well.

11. See GUTMANN & THOMPSON, *supra* note 8, at 23 (explaining how this process works for governmental legitimacy by noting that, “[w]hen binding decisions are routinely made without deliberation, the government not only conveys disrespect for citizens, but also exposes its lack of adequate justification for imposing the decision on them”); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794 (2005) (acknowledging legal, sociological, and moral standards as possible sources of legitimacy).

12. See Fallon, *supra* note 11, at 1795 (“[L]egitimacy signifies an active belief by citizens . . . that particular claims to authority deserve respect or obedience . . .”).

13. See *id.* at 1828 (defining “content legitimacy” as the belief that a particular decision is “substantively correct”); Jeffrey J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675, 682, 680–83 (1994) (finding that people who agree with a Supreme Court decision and believe it will have good consequences (e.g., that a Court holding related to public schools is a “good . . . development for public education”) are more likely to believe that the Court had the authority to make the decision and that the decision was constitutional).

14. See Fallon, *supra* note 11, at 1814, 1835 (opining that the Supreme Court “acted morally legitimately in deciding [in] *Bolling v. Sharpe*” that “the Due Process Clause of the Fifth Amendment forbids racial discrimination by the federal government, . . . even if the Court’s constitutional holding was erroneous or possibly even illegitimate as a strictly legal matter, as some have argued” (referring to *Bolling v. Sharpe*, 347 U.S. 497 (1954))).

15. See Gregory C. Sisk, *Questioning Dialogue by Judicial Decree: A Different Theory of Constitutional Review and Moral Discourse*, 46 RUTGERS L. REV. 1691, 1739 n.176 (1994) (predicting that the Supreme Court would lose its legitimacy if it were to issue decisions that were unpopular and “candidly political or moral in nature”).

16. See HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 6, 14–15 (1994) (“We can deliberate rationally about ends. . . . Deliberation . . . is essentially the selection of means to some end. . . . [D]eliberation may include ascertaining the constituent components of some end as well as assessing alternative causal means to it.”).

The framers of the Constitution were familiar with how “differences of opinion . . . often promote deliberation and circumspection,”¹⁷ and they contemplated an institutionally richer practice of deliberation than that contained in our case of the law school fiscal crisis.¹⁸ As articulated in the *Federalist Papers*, the Constitution of 1789 set forth a framework for national lawmaking that was thoroughly deliberative and where different institutions and We the People served distinct and productive deliberative roles.¹⁹ The overall goals of the interinstitutional deliberation were, however, the same as those we have derived from the foregoing hypothetical—solving problems in ways that are faithful to constitutional commitments and responsive to the needs and demands of stakeholders.²⁰ In carrying out this balance, each institution has its own comparative advantages, its own characteristic form of reasoning, and its own distinctive deliberative role.²¹

The Constitution of 1789 starts, “We the People . . .,”²² thereby announcing, right off the bat, that sovereignty in the United States rests with the citizenry. Thus, the electorate or people stand as political principals in relation to the other institutions and their occupants. Underlying the Preamble’s announcement of popular sovereignty is the belief that acceptance—not just passive acquiescence by the people—is needed to preserve the legitimacy of our government *and* to encourage citizen

17. THE FEDERALIST NO. 70, at 426–27 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

18. See THE FEDERALIST NO. 63 (Alexander Hamilton), *supra* note 17, at 384 (opining that the Senate will be a “temperate and respectable body of citizens” that will “suspend the blow mediated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind”); THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 17, at 412 (describing the most desirable mechanism of electing the President as one in which the “election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice”); THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 17, at 443 (noting that the checks of the Executive on the Legislative Branch perform the vital function of “increas[ing] the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design” and that “[t]he oftener a measure is brought under examination, . . . the less must be the danger of those errors which flow from want of due deliberation”).

19. See THE FEDERALIST NO. 38 (James Madison), *supra* note 17, at 237–39 (describing the Constitution as deriving its power from the people, who appoint, directly or indirectly, all of the Legislature, Judiciary, and Executive); THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 321 (advocating for the “separate and distinct exercise of the different powers of government . . . essential to the preservation of liberty”).

20. See THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 321–22 (discussing the limits on the federal government’s power and stating that “the interest of the man must be connected with the constitutional rights of the place”).

21. See John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice*, in CONSTITUTIONAL JUSTICE, EAST AND WEST 21, 22–27 (Wojciech Sadurski ed., 2002) (summarizing the various deliberative expectations of the different institutions of democracy).

22. U.S. CONST. pmbl.

engagement.²³ A government that is unresponsive to mobilized citizen viewpoints is democratically illegitimate because it has alienated its citizens. In a democracy, therefore, citizen *political* preferences are presumptively important and need no justification. This fact is recognized in electoral practices, for seeking or demanding reasons from voters might be discouraged as a sign of respect for the sovereign nature of the voters' decisions. Where the popular initiative exists, important change ought to occur if We the People demand it. Although our representative democracy does not put many statutory policies to a direct vote of the people, it does need to be responsive to popular needs and demands where they are expressed in institutionally sanctioned ways (through elections and popular initiatives and referenda).²⁴

One step removed from the citizenry are the President and members of Congress, who are chosen by democratic elections and are accountable because they can be turned out in a future election.²⁵ Article I, Section Seven of the Constitution vests the power to make public policy within Congress, so long as both chambers agree upon the statutory text, with a contingent veto by the President.²⁶ Congress is the focal point for both the *problem solving* as well as *political* dimensions of deliberation. Rather than creating law and policy through a direct vote of the people, popular preferences would be "refine[d] and enlarge[d]" by passing them through elected representatives.²⁷ "Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."²⁸ Reasons are offered in the legislature in two directions—to the people and to other governmental officials and regulated entities. Directed toward the electorate, legislators' reasons tend to be purposive: here is a problem We the People have recognized, and our statute is the best way to deal with this problem as a matter of the public interest, while fitting into a larger understanding of our country's characteristic features and ideals. Directed to agencies and judges (and regulated persons), reasons are of a different kind: specific directives that must be followed because they were chosen deliberatively by the

23. See Donald S. Lutz, *Consent*, in A COMPANION TO THE AMERICAN REVOLUTION 650, 650–52 (Jack P. Greene & J.R. Pole eds., 2007) (discussing the necessity of direct consent for government legitimacy in the United States).

24. See THE FEDERALIST NO. 10 (James Madison), *supra* note 17, at 77–79 (stressing that government must be protected against the views of an "interested and overbearing majority" and must follow procedures that allow even factional citizens to "cooperate for their common good").

25. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 327 (2002) (exploring how the Executive and Legislative Branches of government are accountable to U.S. citizens, and wrestling with the important role that the ability of the people to vote the President or a member of Congress out of office plays as a check on the federal government's power).

26. U.S. CONST. art. I, § 7.

27. THE FEDERALIST NO. 10 (James Madison), *supra* note 17, at 79.

28. *Id.* at 82.

people's representatives and more abstract guidance as to how those directives ought to be construed.

Moreover, each part of the lawmaking process plays a different deliberative role: the House of Representatives, the body closest to the people because of the smaller districts and short terms, is most responsive to popular attitudes and demands;²⁹ the Senate, with long terms and statewide districts, is expected to be a "select and stable" body that would bring the nation's wisest and most experienced public statesmen together so that they could apply longer term considerations of "reason and justice" to measures urgently sought by the House;³⁰ and the President, as the only nationally elected official, understands the statutory purpose within a larger plan for the country, especially our needs for government "energy" to protect us against internal and external threats.³¹ Because he has separate constitutional duties, such as the Commander-in-Chief power,³² the President is not only a part of legislative deliberations but also plays a special role in executive deliberations. Presidential signing statements, controversial as they may be, are useful bridges between these two distinctive roles: the President conveys to Congress as well as the citizenry that he interprets the statute, or intends to enforce it, in certain ways that may depart from congressional understandings.³³

Another step away from the electorate are agencies, which are the key *problem solving* organs: they translate popular movements and public problems into legislative proposals and then administer the enacted statutes by filling in substantive details through rulemaking, policy guidance, opinion letters, manuals, and speeches.³⁴ (While agencies occupy a much larger place in government than the framers expected they would,³⁵ the Constitution

29. See THE FEDERALIST NOS. 51–58 (James Madison) (justifying the structure and role of the House of Representatives).

30. See THE FEDERALIST NO. 63 (James Madison), *supra* note 17, at 384 (justifying the structure and role of the Senate); THE FEDERALIST NO. 64 (John Jay), *supra* note 17, at 392 (noting the importance of stability in the Senate).

31. See THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 17, at 423–24 (noting the importance of the President to provide "energy" to governance); THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 17, at 427–30 (justifying the unitary presidency on the ground that one man would be accountable to the people for poor executive decision making).

32. U.S. CONST. art. II, § 2, cl. 1.

33. See, e.g., Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 599 (2008) (noting the President's use of signing statements as a potential check on Congress's role in affecting public behavior).

34. See HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY* 3–8 (2002) (explaining that unelected bureaucracies become problem-solving organs due to their sole focus and extensive expertise in the area of their particular policy issue); M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383 (2004) (laying out the many different vehicles agencies have for announcing or implementing directive rules for citizens to follow).

35. David H. Rosenbloom, *Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's Twentieth-Century Progress*, 60 PUB. ADMIN. REV. 39, 39 (2000); see also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 327–30, 342–43 (2002) (explaining that modern Supreme Court rulings have unanimously ruled against using the

assumes that the executive power would be administered through various executive departments.)³⁶ Agency officials are not elected, and their decisions tend to be well below the radar of the media and most voters, but they are accountable to the President, our nationally elected executive official.³⁷ Because there are many statutory gaps to fill, these below-the-radar decisions are important ones, and the framers expected execution of the law to be a role involving “energy,” the vigorous application of the law to carry out its public-regarding goals.³⁸ Thus, agencies are under a much greater obligation to explain their decisions *purposively*: this rule is needed to carry out the announced congressional purpose; here are the facts and arguments supporting this rule; and the arguments against our rule are not factually correct or have some other practical defect.³⁹

Yet another step removed from We the People are life-tenured federal judges. The Judicial Branch is the branch most insulated from politics and thereby usually the least accountable to popular opinion. The nature of classic adjudication and the political insulation of judges require judges to give reasons; indeed, reasoned justification in light of public-regarding purposes and the legal landscape is the comparative advantage that judges have traditionally been understood to bring to our nation’s Constitution.⁴⁰ Unlike the personal reasons voters harbor or the forward-looking purposive reasons that legislative and executive officials are supposed to offer, judge-given reasons are distinctively but not uniquely *constitutional*. Compared with the reasons given by legislators and executive officials, judicial reasons tend to be more backward looking, less openly consequentialist, and more philosophical.⁴¹ So even if this statute represents the political preferences of the voters today *and* is an effort to solve a public problem, it might still fall athwart our nation’s fundamental commitments. As Hamilton put it in *Federalist No. 78*,

nondelegation doctrine to limit legislative delegation of power to agencies, despite the fact that Madison, in the *Federalist Papers*, and Chief Justice Marshall, in *Wayman v. Southard*, 23 U.S. 1 (1825), acknowledged the existence of a nondelegation principle).

36. U.S. CONST. art. II, § 2, cl. 1.

37. *Id.*

38. See THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 17, at 423–24 (explaining that an “energetic executive” is necessary to the administration of laws and the good execution of government).

39. The model in text is closest to the notice-and-comment rulemaking procedure that scholars often advocate for agency action. *E.g.*, RICHARDSON, *supra* note 8, at 214–30; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559–62 (1992).

40. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372 (1978) (describing reasoned decision making as the principal benefit of judicial adjudication).

41. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 82 (Steve Sheppard ed., Oxford Univ. Press 2008) (1930) (describing how judges decide cases by looking backward at established precedent); O. Carter Snead, *Dynamic Complementarity: Terri’s Law and Separation of Powers Principles in the End-of-Life Context*, 57 FLA. L. REV. 53, 77 (2005) (contrasting the judiciary’s backward-looking method of decision making with the more consequentialist method employed by the legislature).

statutory interpretation by judges was expected to impose “moderation” on “unjust and partial laws,” and judicial review would prevent “fundamental law” from being supplanted by oppressive statutes.⁴² Overall, Hamilton’s argument was that the nation needed a deliberative institution (the Judiciary) as “an essential safeguard against the effects of occasional ill humours in the society.”⁴³ It does not appear to us that Hamilton was of the view that We the People, Congress, and the President should not carefully consider constitutional issues in their deliberations (the Constitution itself suggests the contrary).⁴⁴ Instead, Hamilton’s point was that the Judiciary was, as a matter of structure, best situated to stand up for fundamental values and limits on government than the problem-solving branches, which were committed to action more than contemplation.

A question that neither Hamilton nor the other framers directly answered is what deference judicial review ought to give to the national deliberative process accompanying a statute and its implementation. *Federalist No. 78* says that judges ought not “substitut[e] their pleasure to that of the legislative body,” suggesting that if an issue was not clearly addressed by the Constitution’s text, courts should be reluctant to override the deliberation of the other national branches and ought to leave the matter to the voters and the political process.⁴⁵ Indeed, the legendary Marshall Court (1801–1835) followed precisely this approach. In *McCulloch v. Maryland*,⁴⁶ arguably the greatest constitutional decision in our history, Chief Justice Marshall commenced his discussion of the constitutionality of the United States Bank with a presumption favoring the settlement reached by Congress, the President, and the voters; gave a broad reading to Congress’s powers “necessary and proper” to carry out its enumerated authority; and lectured Maryland against interfering with matters that had been resolved at the national level.⁴⁷

Since the Marshall Era, the Supreme Court has continued to defer to national (and, to a lesser extent, state) deliberation as to issues on which the constitutional text is ambiguous. Accordingly, the Court has developed elaborate doctrines of conditional deference to various constitutional players, namely, Congress, the President, agencies, trial courts, state legislatures and

42. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 17, at 470.

43. *Id.* at 469.

44. See U.S. CONST. pmbl. (announcing that it is “We the People” that “ordain and establish” this Constitution with its descriptions of power premised on the democratic deliberative ideal); U.S. CONST. art. I, § 8 (expounding congressional powers that are premised upon debate); U.S. CONST. art. II, § 1 (outlining the careful deliberative process by which the President is elected).

45. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 17, at 469.

46. 17 U.S. (4 Wheat.) 316 (1819).

47. *Id.* at 322–25, 329–30. Other Marshall Court decisions trumped state-level deliberations when they were inconsistent with settled national commitments. *E.g.*, *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

courts, and even its own constitutional precedents.⁴⁸ The biggest exception is *Dred Scott v. Sandford*,⁴⁹ where the Taney Court invalidated the Compromise of 1820 based upon a questionable reading of the Constitution and, thereby, pushed a hyperpolarized country into civil war. Other exceptions have included the Supreme Court's invalidation of parts of the Civil Rights Act of 1875,⁵⁰ the New Deal's regulatory program,⁵¹ and modern antidiscrimination laws as applied to the states⁵²—all interventions that were politically clumsy, weak in their legal reasoning, and morally questionable. In all these instances, the Court viewed the Constitution as having an engineered design that could be mechanically “discovered,” but each “discovery” coincided with the “pleasure” of the majority Justices.

Dred Scott dramatically illustrates the desirability of deliberation-respecting judicial review. An issue in the case was whether Congress went beyond its authority in barring slavery from new territories, pursuant to its plenary authority to govern the territories;⁵³ this is an issue as to which the Constitution could have been read as the dissenting Justices read it. Congress, the President, and an engaged electorate had thoroughly deliberated over this matter and agreed to the Compromise of 1820,⁵⁴ which *Dred Scott* nullified.⁵⁵ Two dissenting opinions deferred to Congress's judgment on this issue, based upon the settled deliberations of the political branches.⁵⁶ Apart from the moral issues, there are three governance reasons why the *Dred Scott* dissenters were right to approach the constitutional issue deferentially rather than dogmatically.

First, review deferring to national deliberation is more likely to reflect popular preferences. If the Constitution is ambiguous, a resolution supported by We the People is (all else being equal) better than one rejected by popular

48. For cases applying these various deference doctrines, see, for example, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (agencies); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (Congress and the President); and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (lower court findings of fact).

49. 60 U.S. (19 How.) 393 (1857).

50. See *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down part of the Civil Rights Act of 1875).

51. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down New Deal coal production law).

52. See *Morrison v. United States*, 529 U.S. 598 (2000) (striking down portions of the Violence Against Women Act).

53. *Dred Scott*, 60 U.S. at 432.

54. See *Compromise of 1820*, 3 Stat. 545 (1820) (admitting Missouri into the Union as a state on the condition that slavery was to be prohibited in the state); *Dred Scott*, 60 U.S. at 587–88 (Curtis, J., dissenting) (describing the contentious legislative debates surrounding the passage of the *Compromise of 1820*).

55. See *Dred Scott*, 60 U.S. at 455 (Wayne, J., concurring) (noting that the majority's decision declared the *Compromise of 1820* unconstitutional).

56. *Id.* at 539–40 (McLean, J., dissenting) (objecting that consensus surrounding the Northwest Ordinance of 1785 had settled the issue); *id.* at 609–11 (Curtis, J., dissenting) (objecting that the Constitutional Convention of 1787 had repeatedly deliberated about and reaffirmed Congress's authority to regulate slavery in the territories).

majorities. The Justices have intuitively understood this point, as the Court's constitutional jurisprudence has consistently reflected popular attitudes.⁵⁷ *Dred Scott*, of course, was not just an unpopular opinion, but was an opinion that sought to *terminate* deliberation on a politically charged topic that intensely but evenly divided the country. Deliberation-ending judicial review is a danger to democracy itself; groups told they have no prospect of prevailing in political deliberation become radicalized and may drop out of normal politics.⁵⁸

Second, deliberation-respecting judicial review provides a basis in *legal materials* for resolving the Constitution's ambiguities. The judge seeking a legal rather than personal judgment would do well to attend to enacted statutes that are the product of deliberation among a diverse array of perspectives and interests that has yielded a rough consensus on the issue. In *Dred Scott*, it is legally and not just politically relevant that Congress under the Articles of Confederation excluded slavery from the territories in the Northwest Ordinance of 1787,⁵⁹ that the first Congress under the Constitution reenacted that prohibition,⁶⁰ and that Congress in the Compromise of 1820 and the Kansas–Nebraska Act reaffirmed this settled legal understanding.⁶¹

Finally, there are *pragmatic* reasons for deferring to national deliberations. “How do we read the Constitution? Is it not a practical instrument?”⁶² Recall the holistic nature of deliberation. The Compromise of 1820 (and that of 1850) (1) sought to solve or manage a national problem, without (2) alienating major factions within the country or (3) violating constitutional commitments.⁶³ This web of interconnected practical and political judgments was one that the Supreme Court unraveled in *Dred Scott*. Although the disastrous effects of that decision were exceptional, that has

57. See THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 192 (1989) (“[T]he modern Court has been an essentially majoritarian institution.”).

58. See PRZEWORSKI, *supra* note 9, at 70–74 (explaining that groups with no chance of success in the democratic process have incentives to forego the political process in favor of radical action).

59. July 13, 1787, in 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 334, 343 (Roscoe R. Hill ed., 1936) (1787).

60. Northwest Ordinance of 1789, 1 Stat. 50, 53 (1789).

61. See Compromise of 1820, 3 Stat. 545, 548 (1820) (“[I]n all that territory . . . north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state, contemplated by this act, slavery and involuntary servitude . . . shall be, and is hereby, forever prohibited.”); see also *Dred Scott*, 60 U.S. at 616–19 (Curtis, J., dissenting) (citing the Northwest Ordinance of 1789 and the Compromise of 1820 as examples of Congress’s power to prohibit slavery); cf. Kansas–Nebraska Act, 10 Stat. 277, 282–83 (1854) (repealing the Compromise of 1820 and leaving the regulation of slavery to the people of the territories, “subject only to the Constitution of the United States”).

62. *Dred Scott*, 60 U.S. at 544 (McLean, J., dissenting).

63. See Michael F. Holt, *Introduction* to HOLMAN HAMILTON, PROLOGUE TO CONFLICT: THE CRISIS & COMPROMISE OF 1850, at xi, xi–xii (2005) (discussing the many provisions of the Compromise of 1850 designed to placate both Northerners and Southerners); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1511 (2007) (noting the widespread acceptance of Congress’s two Compromises, which helped maintain the Union).

been in part because the Supreme Court has not engaged in such a bold constitutional challenge to national deliberations since 1857. The foregoing reasoning is perhaps the best explanation for the Court's political question doctrine.⁶⁴

II. An Application of Deliberation-Respecting Theory: The Second Amendment

Consider a hot-off-the-presses example of our theory's critical utility. Since 1976, District of Columbia gun-control laws have essentially barred the possession of loaded handguns in the home.⁶⁵ In *District of Columbia v. Heller*,⁶⁶ a police officer challenged this regulation as inconsistent with the Second Amendment,⁶⁷ which says: "A well regulated Militia, being necessary to the security of a free State, *the right of the people to keep and bear Arms, shall not be infringed.*"⁶⁸ The District of Columbia argued that the Second Amendment's protections extend no further than the militia context; that is, the operative clause (*italicized*) is limited by the purpose clause that precedes it.⁶⁹ The District also argued that the Second Amendment permitted gun regulation that served public safety.⁷⁰ Writing for a bare majority of the Court, Justice Antonin Scalia read the operative clause to recognize a judicially enforceable right for law-abiding citizens to possess firearms within the home for self-defense and struck down the District's law.⁷¹

The Court unanimously believed that the primary purpose of the Second Amendment was to protect state militias against congressional disarmament, and most of the debate among the Justices focused on whether the Second Amendment had a secondary purpose of protecting self-defense by

64. The Court identified pragmatic features requiring political question deference in *Baker v. Carr*, 369 U.S. 186, 211–17 (1962). We are thus suggesting that one such pragmatic reason for the Court to defer to the political process is that process's deliberative balance of incommensurable factors—namely, practical, constitutional, and political ones.

65. See D.C. CODE § 7-2502.01(a) (2001) (prohibiting the possession of unregistered firearms); *id.* § 7-2502.02(a)(4) (2001) (prohibiting registration of pistols, with exceptions for organizations that employ police officers); *id.* § 7-2507.02 (2001) (requiring that registered firearms be kept unloaded and disassembled or bound by a trigger lock, with exceptions for police officers). All of these regulations have been in effect since 1976.

66. 128 S. Ct. 2783 (2008).

67. *Id.* at 2788.

68. U.S. CONST. amend. II (emphasis added).

69. See *Heller*, 128 S. Ct. at 2799 ("Petitioners take a seemingly narrower view of the militia, stating that '[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses.'") (citation omitted).

70. See Brief for Petitioners at 42, *Heller*, 128 S. Ct. 2783 (No. 07-290) (arguing that the U.S. legal system has historically allowed reasonable regulation of firearms to protect public safety); see also Brief for Former DOJ Officials as Amici Curiae Supporting Petitioners at 1, *Heller*, 128 S. Ct. 2783 (No. 07-290) (submitting this brief "to express their view that federal, state, and local gun control legislation is a vitally important law enforcement tool used to combat violent crime and protect public safety").

71. *Heller*, 128 S. Ct. at 2822.

individuals against other individuals.⁷² Assuming that the Court majority was correct to find a right of self-defense protected by the Amendment, Justice Breyer's dissenting opinion argued that the District had a strong regulatory interest sufficient to justify infringing regulation.⁷³ Before 1791, America's three largest cities heavily regulated guns within their limits, and Boston's law swept much more broadly than the District's.⁷⁴ The framers would have been aware of these laws, yet the Second Amendment and its history provide no reason for believing that they were inconsistent with that Amendment or its state analogues. More importantly, Justice Breyer argued that government regulation of guns for safety reasons involves constitutional interests on both sides—whatever Second Amendment interest gun owners have is set against the wider population's constitutional interest in state protection against violence.⁷⁵ In such cases, the Court has deferred to legislative judgments for all the reasons we have set forth: the legislature's greater fact-finding capacities, its legitimacy in balancing interests of different citizen groups, and the incommensurability of the constitutional, practical, and political factors in the balance.⁷⁶ Unless a court is certain that the Constitution has been violated, it should be reluctant to strike down a state experiment and cut off deliberations. Insisting that judges "consider the facts as the legislature saw them," Justice Breyer reviewed the factual basis for the District's intrusive gun-control law and concluded that the legislature had compelling reasons to think that children's lives were at risk from guns in the home and that a gun ban would save lives.⁷⁷ If a gun-control law saves the lives of children, that is a compelling justification under the strictest scrutiny.⁷⁸

Justice Breyer and his colleagues in dissent approached constitutionalism from the horticultural perspective that we are stressing—but his was not the primary dissenting opinion, and most of the judicial debate in *Heller* seemed to be framed from the engineering perspective, with a focus on the "original meaning" hardwired in the constitutional design of 1787–1791.⁷⁹ As we shall now show, that apparent focus of debate explains very little about what the majority Justices were doing in *Heller*. Indeed, the most dramatic original meaning opinion in the history of the Court ultimately yielded a constitutional framework that was, in the end, deliberation-respecting.

72. *Id.* at 2823–24.

73. *Id.* at 2847–48 (Breyer, J., dissenting).

74. *Id.* at 2849.

75. *Id.* at 2852–53.

76. *Id.* at 2852.

77. *Id.* at 2854; *see also id.* at 2854, 2856–57 (reporting the number of children killed by guns each year); *id.* at 2857–61 (reviewing empirical studies debating the actual effects of strict gun-control laws in urban areas).

78. *Id.* at 2851–53.

79. *Id.* at 2789–97 (majority opinion); *id.* at 2824–31 (Stevens, J., dissenting).

Justice Scalia's majority opinion relied on the original meaning of "keep and bear arms."⁸⁰ According to professional linguists and historians, however, "bear arms" was almost always used in the eighteenth century to mean use of weapons in a military context; hence, the Second Amendment's original meaning was probably to allow citizens to "keep" military weapons insofar as needed to "bear" them in military service.⁸¹ This reading is consistent with the purpose clause's emphasis on a citizen militia and with the drafting history of the Second Amendment.⁸² Commentators of various political persuasions have criticized Justice Scalia's original meaning case for a right of self-defense, suggesting that the Court was simply imposing a particular policy (guns for self-defense in the home) upon the political process.⁸³ These cogent criticisms impel us to ask whether *Heller* really was an exercise in the mechanics of original meaning.

Indeed, Justice Scalia's opinion abandoned any pretense of mechanically discovering original meaning when it stated that the Second Amendment presumptively *allows* the federal government to impose registration requirements on gun owners, to regulate interstate shipment and public displays or concealment of guns, to bar convicted felons from owning guns, and to prohibit the use of particularly dangerous firearms.⁸⁴ Ironically, Justice Scalia rewrote the Second Amendment *both* to render the purpose clause surplusage *and* to weaken the operative clause, for the federal government is authorized to "infringe" on the right to "keep" or "bear" arms in lots of ways. Here is how the Second Amendment would have to read in order to fit the *Heller* opinion: "The right of law-abiding people to keep small Arms in their homes, for self-defense purposes, shall not be subjected to unreasonable regulation." Notice how different the *virtual* Second Amendment is from the *actual* Second Amendment. Notice also how the

80. See *id.* at 2788–2802 (majority opinion) (examining the evidence pertaining to the original meaning of the Second Amendment's text); *id.* at 2797–99 (examining tradition-based evidence confirming linguistic evidence).

81. Brief for Professors of Linguistics and English Dennis E. Baron et al. in Support of Petitioners at 18–28, *Heller*, 128 S. Ct. 2783 (No. 07-290); see also Brief of Amici Curiae Jack N. Rakove et al. in Support of Petitioners at 2–3, *Heller*, 128 S. Ct. 2783 (No. 07-290) (arguing that historical evidence shows that the Anglo-American tradition never treated gun ownership as an individual right); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 618 (2000) (stating that to "bear arms" in the writings of James Madison and in contemporary usage referred only to the possession of arms for military use). For a post hoc assessment critiquing the two brands of originalism employed by the majority and the dissent, see Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008).

82. See *Heller*, 128 S. Ct. at 2831–36 (Stevens, J., dissenting) (examining the Second Amendment's drafting history in the context of the Constitution's own drafting process).

83. See Adam Liptak, *Justices' Ruling on Guns Elicits Rebuke, from the Right*, N.Y. TIMES, Oct. 21, 2008, at A15 (reporting that noted conservative jurists Richard Posner and J. Harvie Wilkinson have denounced the Court's opinion in *Heller* as the worst sort of judicial activism).

84. See *Heller*, 128 S. Ct. at 2816–17.

Second Amendment has morphed into a privacy right remarkably similar to the one the Supreme Court recognized in *Griswold v. Connecticut*.⁸⁵

In the end, therefore, *Heller* is a highly *dynamic* reading of the Second Amendment, a feature that has drawn criticism and even ridicule upon the Court.⁸⁶ Our theory, ironically, provides an explanation and partial legal defense for the Court's dynamic reading. In figuring out how to translate the eighteenth century's protection of the people's right to "keep and bear arms" to our modern urban world, congressional deliberation over the last century is surprisingly illuminating.⁸⁷ In 1892, after municipal police forces had replaced state militias, Congress made it a crime in the District of Columbia (over which Congress has plenary jurisdiction) to carry a concealed pistol, except in one's business and "dwelling house."⁸⁸ Permits for carrying concealed weapons in public were available for "necessary self-defense."⁸⁹ A brief legislative discussion suggested that Senators were sensitive to a citizen's "natural right to carry the arms which are necessary to secure their persons and their lives."⁹⁰ In 1932, Congress enacted a comprehensive firearms law for the District that barred anyone convicted of a crime of violence from possessing a pistol⁹¹ and prohibited anyone from carrying a concealed pistol without a license, "except in his dwelling house or place of business or other land possessed by him."⁹² Section 14 prohibited anyone in

85. 381 U.S. 479 (1965). The *Griswold* Court "found" a marital privacy right within the "penumbras" of the First, Third, Fourth, and Fifth Amendments. *Id.* at 484. *Heller* creates a home privacy right that links the Second Amendment with the Third Amendment, barring the quartering of troops in people's homes; the Fourth Amendment, protecting against unreasonable searches and seizures within the home; the Fifth Amendment, regulating state "taking" of one's home; and perhaps the First Amendment, protecting rights of intimate association and family within the home.

86. See, e.g., Liptak, *supra* note 83 (reporting conservative criticism of the Court's opinion in *Heller*); Frank Askin, *The Washington Post Supreme Court Year in Review 2009: The Major Cases and Decisions of 2008*, N.J. LAW., Feb. 2009, at 59 (stating that the Court's opinion in *Heller* was ridiculous).

87. See generally Brief for Amici Curiae 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent at 2, *Heller*, 128 S. Ct. 2783 (No. 07-290) [hereinafter Brief for Congress and the Vice President] (explaining "the historical meaning of the Second Amendment as understood by the Congress"); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995) (analyzing federal regulation of gun ownership in the light of the worldwide growth of police states during the twentieth century).

88. Act of July 13, 1892, ch. 159, 27 Stat. 116 (amended 1901).

89. Act of Mar. 3, 1901, ch. 854, § 855, 31 Stat. 1189, 1328.

90. 23 CONG. REC. S5788 (1892) (statement of Sen. Mills) (objecting to the proposed bill); see also *id.* at S5789 (statement of Sen. Wolcott) (defending the bill as consistent with "the constitutional right of any citizen who desires to obey the law").

91. Act of July 8, 1932, Pub. L. No. 72-275, § 3, 47 Stat. 650, 651.

92. *Id.* § 4. A license could be granted to anyone showing good reason to fear injury to his person or property. *Id.* § 6. The committee reports briefly noted that "[t]he right of an individual to possess a pistol in his home, or on land belonging to him, . . . [would] not [be] disturbed by the bill." S. REP. NO. 72-575, at 3 (1932); accord H.R. REP. NO. 72-767, at 2 (1932) (containing similar language).

the District from possessing a "machine gun, sawed-off shotgun," and other dangerous weapons; there was no dwelling-house exception for that rule.⁹³

Legislators also crafted national firearms legislation in response to a growing problem of dangerous use by criminals and malefactors. Congress in 1927 prohibited mail delivery of "pistols, revolvers, and other firearms capable of being concealed on the person,"⁹⁴ and in 1934 prohibited the possession of sawed-off shotguns and machine guns that had been transferred in violation of certain tax and registration requirements.⁹⁵ The Second Amendment was barely mentioned in these debates,⁹⁶ but neither did Congress regulate possession of handguns for self-defense in the home.⁹⁷ The balance between public safety and private sanctuary was explicit in the Property Requisition Act of 1941,⁹⁸ enacted on the eve of our entry into World War II.⁹⁹ The Act authorized the President to requisition private property for national defense purposes, but Congress stipulated that the Act not be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport" or "to impair or infringe in any manner the right of any individual to keep and bear arms."¹⁰⁰ In the extensive debate over requisitioning or registration of firearms, members of Congress insisted upon these caveats for Second Amendment reasons.¹⁰¹ Although hunting was repeatedly mentioned, the primary justification was that a hallmark of totalitarian (Nazi and

93. § 14, 47 Stat. at 654.

94. Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059.

95. Act of June 26, 1934, ch. 757, § 6, 48 Stat. 1236, 1238; *see also* *United States v. Miller*, 307 U.S. 174, 177, 183 (1939) (upholding the 1934 Act against Second Amendment attack).

96. In hearings on the 1934 Act before the House Committee on Ways and Means, the issue of the Second Amendment was briefly mentioned three times during the five days of hearings. *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 19, 53, 148–49 (1934). *But see* Halbrook, *supra* note 87, at 606 ("In perhaps the most significant discussion of the hearings, Congressman David J. Lewis asked how the bill could be reconciled with the Second Amendment right to keep and bear arms . . ."). In the hearings for the 1927 Act, there was no mention of the Second Amendment. *Carrying of Pistols, Revolvers, and Other Firearms Capable of Being Concealed on the Person in the Mails: Hearings on H.R. 4502 Before the H. Subcomm. of the Comm. on the Post Office and Post Roads*, 69th Cong. (1926).

97. *See* Halbrook, *supra* note 87, at 605 ("Once enacted, the NFA required registration of machine guns, short-barreled shotguns, rifles, and other selected firearms. Pistols and revolvers were included in the original bills, but were removed as a compromise measure.").

98. Act of Oct. 16, 1941, ch. 445, 55 Stat. 742.

99. *See id.* (showing that the Property Requisition Act of 1941 was passed on October 16, 1941—less than two months before the attack on Pearl Harbor).

100. *Id.* § 1.

101. *See* H.R. REP. NO. 77-1120, at 2 (1941) (concluding that under the final bill, there would be "no occasion for the requisition of firearms owned and maintained by the people for sport and recreation, nor is there any desire or intention on the part of the Congress or the President to impair or infringe the right of the people under [the Second Amendment]"); Halbrook, *supra* note 87, at 618–31 (collecting quotations from various legislators).

Communist) regimes was disarming citizens.¹⁰² Accordingly, to distinguish our liberty-protecting constitutionalism from theirs, Congress reaffirmed the individual's right to "the private ownership of firearms and the right to use weapons in the protection of his home, and thereby his country."¹⁰³

The Gun Control Act of 1968 created Congress's primary national regime for firearm regulation.¹⁰⁴ This is a broad and "infringing" regime, but Congress rejected proposals for nationwide registration of handguns.¹⁰⁵ The 1968 Act is notable for *not* regulating gun ownership by law-abiding citizens for self-defense or home use. Section 101 of the statute says that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity."¹⁰⁶ Although this is the sort of cheap talk Congress often engages in for political purposes, it does help explain the regulatory choices made in the statute Congress enacted. Indeed, in the Firearms Owners' Protection Act of 1986,¹⁰⁷ Congress amended the 1968 Act in minor ways to further protect "the rights of citizens to keep and bear arms under the second amendment."¹⁰⁸

Although none of these legislative materials was cited in his *Heller* opinion, the precise contours of the constitutional right Justice Scalia says he "discovered" in the original meaning of the Second Amendment came instead from twentieth-century congressional deliberations.¹⁰⁹ The twentieth-

102. See Halbrook, *supra* note 87, at 600, 619–28 (showing how many members of Congress were concerned by the efforts to limit firearm possession undertaken by totalitarian police states such as Nazi Germany and Stalinist Russia).

103. 87 CONG. REC. 6811 (1941) (statement of Rep. Hall).

104. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 (2006) and in scattered sections of 26 U.S.C. (2000)); see also William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 79 (1999) ("For three decades, the Gun Control Act of 1968 (GCA) has formed the legal core of national gun policy in the United States.").

105. See Vizzard, *supra* note 104, at 84–87 (describing several ultimately rejected handgun registration proposals, including Senate Bill 3634, introduced by Senator Joseph Tydings; Senate Bill 3691, advanced by the Johnson Administration; Senate Bill 3637, introduced by Senator Edward Brooke; and Senate Bill 3691, introduced by Senator Thomas Dodd).

106. § 101, 82 Stat. at 1213.

107. Pub. L. No. 99-308, 100 Stat. 449 (codified as amended in scattered sections of 18 U.S.C. and 26 U.S.C.).

108. *Id.* § 1(b)(1)(A). As far as we can tell the only provision of the Act that responds to this goal is Section 107, which preempts state laws barring interstate travel with lawful firearms. *Id.* § 107; see also 131 CONG. REC. S9114 (1985) (statement of Sen. Symms) (indicating that federal preemption of state law was intended to protect the right of lawful firearm transportation between states).

109. Indeed, one can be even more precise: the contours of the right—limited to law-abiding citizens, focused on self-defense in the home, and subject to boatloads of regulation—are those argued for in the separate amicus briefs submitted by the Solicitor General and by Congress and the Vice President. See generally Brief for the United States as Amicus Curiae at 2–4, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) (describing congressional regulation

century deliberative materials suggest that the precise definition of Second Amendment rights in *Heller* (self-defense in the home, with perhaps some license for hunting) is one that reflects the most intensely held preferences of gun-loving Americans while giving urban jurisdictions plenty of regulatory options for protecting public safety. (That the District and Chicago are the only jurisdictions to ban firearms in the home reinforces this conclusion.)¹¹⁰ This gave the *Heller* majority reason to believe that they could trump the political process without a backlash; they could placate Second Amendment enthusiasts without actually endangering public safety.

We are still inclined to dissent from the majority's activism, however, and the reason is that the nation is still experimenting with gun regulation. Much of the regulation is probably inefficacious and may even be counter-productive, but the fact is that we do not know exactly what works and what does not work. Local experiments are a good way to test hypotheses and gauge public reactions. In this respect, there is a significant *deliberation-ending* feature to *Heller* that justifies the dissenters' position. Moreover, there is a *deliberation-inducing* feature that the *Heller* majority also ignored. In 1906, Congress authorized the District itself to enact "all such usual and reasonable police regulations, . . . as [the District] may deem necessary for the regulation of firearms."¹¹¹ Given Congress's own actions respecting a homeowner's self-defense interest in home handguns, the District's 1976 statute barring operative handguns in the home might have been construed as not "usual and reasonable." By interpreting the 1906 statute to preempt the District's law, the Court would have provisionally ended the District's experiment, subject to Congress revisiting the issue in fresh authorizing legislation.

III. Deliberation-Respecting Judicial Review and Constitutional Doctrine

Deliberation-respecting judicial review not only provides insights into the messy Second Amendment debate in *Heller* but also provides a critical edge for other doctrinal mysteries. In this short Article, we cannot provide a comprehensive survey, but the methodology we have outlined for *Heller* is one the Court frequently follows: survey relevant statutes and their underlying deliberations, and learn from that survey how ambiguous constitutional provisions might be read. For example, this is precisely the methodology the

permitting lawful possession of firearms by citizens subject to reasonable restrictions); Brief for Congress and the Vice President, *supra* note 87, at 20–28 (noting that Congress extended the right of gun ownership in the home to citizens who did not fall into certain excluded classes).

110. *Heller*, 128 S. Ct. at 2865; see also *Under Fire: Does the District of Columbia's Gun Ban Help or Hurt the Fight Against Crime?: Hearing Before the H. Comm. on Government Reform*, 109th Cong. 72 (2005) (statement of Rep. John J. Duncan, Jr., Member, H. Comm. on Government Reform) ("Nor has there been any success in Chicago, the only major city to have roughly similar [gun-control laws to those in the District of Columbia].").

111. Act of June 30, 1906, Pub. L. No. 59-401, § 4, 34 Stat. 808, 809 (codified as amended at D.C. Code § 1-303.43).

Court follows to determine whether a form of punishment is “cruel and unusual” in violation of the Eighth Amendment.¹¹² Likewise, the Court’s equal protection and voting-rights jurisprudences have closely followed this model.¹¹³ Consider how this methodology informs—and ought to inform—other areas of constitutional law.

A. *The Right to Privacy*

Deliberation-respecting judicial review has provided an orderly way for the Supreme Court to legitimately develop its privacy jurisprudence, starting with *Griswold v. Connecticut*,¹¹⁴ which struck down nineteenth-century contraception law after all but two states had formally abandoned such regulations.¹¹⁵ Progressive groups argued that the *Griswold* right encompassed a woman’s choice to have an abortion and a gay person’s right to engage in consensual sodomy.¹¹⁶ Legislatures were just starting to grapple with these issues in the 1960s, and so our theory would *not* support an immediate judicial expansion of the privacy right in these ways. In *Roe v. Wade*,¹¹⁷ however, the Court announced a broad right to choose abortions.¹¹⁸ The Court did so before most state legislatures had an opportunity to seriously consider the various reform proposals propounded by family-planning

112. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311–18 (2002) (reviewing the actions of state legislatures in regards to capital punishment in cases of mental deficiency); *Penry v. Lynaugh*, 492 U.S. 302, 331–35 (1989) (reviewing state legislative deliberations on capital punishment and mental deficiency before evaluating petitioner’s arguments in light of that discussion); *Coker v. Georgia*, 433 U.S. 584, 597–98 (1977) (discussing the moral and legislative grounds for imposing particular punishments in cases of rape).

113. See, e.g., Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. (forthcoming 2009, on file at <http://ssrn.com/abstract/1154242>) (arguing that, while Justice Douglas wrote the opinion in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1965), based on the Fourteenth Amendment, the opinion would have been better supported by invoking congressional deliberations over the Twenty-Fourth Amendment and the Voting Rights Act as originally argued by Justice Douglas in convincing the Court to hear the case); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2084–88 (2002) (exploring the influence of the civil rights movement and congressional legislation as a motivation for the Court’s decisions to overturn all race-based discriminations); *id.* at 2124–38 (demonstrating that the Court’s sex-discrimination jurisprudence generally followed the norms accepted in the national and state deliberative processes during the 1960s and 1970s).

114. 381 U.S. 479 (1965).

115. *Id.* at 499; see also Appellant’s Brief app. at 30, *Tileston v. Ullman*, 318 U.S. 44 (1943) (No. 420) (presenting a map of “States Having Contraceptive Services Under Medical Supervision,” 1942); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 240–44 (1994) (describing the Justices’ deliberative processes during *Griswold*).

116. See GARROW, *supra* note 115, at 304 (outlining the debate between pro-life and pro-choice groups on whether *Griswold*’s marital right to privacy extended to abortion cases).

117. 410 U.S. 113 (1973).

118. *Id.* at 153.

groups and the objections of pro-life groups;¹¹⁹ before the nation was able to see the effects of the abortion deregulation that California and New York legislated shortly before *Roe*;¹²⁰ and without input from the Executive Branch, including the Department of Health, Education, and Welfare.¹²¹ In short, it was premature for the Court to announce in 1973 that the unborn fetus is not a person for constitutional purposes, that a woman has an absolute right to choose abortions in the first trimester, and that the state has an interest in “potential human life”¹²² that becomes “sufficiently compelling to sustain regulation of the factors that govern the abortion debate.”¹²³ These are deep normative issues that Americans were heatedly deliberating in 1973; the Justices had no special competence as regards these issues and had blind spots with respect to both the pro-life position *and* the view of many women that abortion laws violated the equality principle.¹²⁴

On the other hand, our theory supports the narrow holding of *Roe v. Wade* that the Texas abortion law violated the Due Process Clause.¹²⁵ Adopted in 1856, before women could vote, the Texas law criminalized abortions unless the life of the mother was in danger.¹²⁶ That exception gave doctors no guidance to figure out when they could act to help the mother.¹²⁷ Indeed, Justice Blackmun’s initial draft in *Roe* would have ruled that the Texas law was void for vagueness,¹²⁸ a good basis for invalidation because it

119. See GARROW, *supra* note 115, at 346–50 (presenting the ongoing abortion debate in a variety of states including Colorado, California, Florida, Hawaii, Maryland, New York, and North Carolina).

120. See *id.* at 363–69 (analyzing California and New York’s judicial and legislative efforts to reform abortion laws during the late 1960s).

121. There was a vigorous abortion debate before *Roe*. See generally *id.* at 335–88 (outlining the legislative, judicial, and social debates taking place in the late 1960s); ROSEMARY NOSSIF, *BEFORE ROE: ABORTION POLICY IN THE STATES* (2001) (reviewing abortion policy and state-based responses before *Roe* with a particular focus on New York and Pennsylvania).

122. *Roe*, 410 U.S. at 158.

123. *Id.* at 154.

124. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985) (reiterating the criticism that the issues in *Roe* that “deeply touched and concerned ‘women’s position in society in relation to men’” were not “developed in the High Court’s opinion”).

125. See *Roe*, 410 U.S. at 164 (holding that the statute “sweeps too broadly” and accordingly “cannot survive the constitutional attack made upon it,” but without absolutely limiting a state’s authority to restrict abortions under particular circumstances).

126. 1856 Tex. Crim. Stat., tit. 17, ch. 7, arts. 531–36, reprinted in TEXAS GENERAL STATUTE DIGEST 524 (Oldham & White eds., 1859).

127. *Id.* art. 536 (“Nothing contained in this Chapter shall be deemed to apply to the case of an abortion procured or attempted to be procured by medical advice for the purpose of saving the life of the mother.”).

128. First Draft Opinion No. 70-18, Memorandum from Justice Harry A. Blackmun, in BLACKMUN PAPERS (Library of Congress, Box 151, Folder 6) (draft of Blackmun’s initial *Roe* opinion); see also GARROW, *supra* note 115, at 547 (quoting the cover note on Justice Blackmun’s initial draft: “My notes indicate, however, that we were generally in agreement to affirm on the merits. That is where I come out on the theory that the Texas statute, despite its narrowness, is unconstitutionally vague.”).

would have left the Texas legislature free to deliberate under modern circumstances, where women were a majority of the electorate. Such an opinion would have been deliberation-inducing, inviting the legislature to respond after deliberation in which women would have been heard. Unfortunately, other Justices refused to join Blackmun's narrow opinion, and the Court ultimately settled on the broader but premature privacy approach.

For similar reasons, our theory would not have supported invalidation of all consensual sodomy laws in *Bowers v. Hardwick*.¹²⁹ Although half the states in the country repealed their consensual sodomy laws between 1961 and 1986,¹³⁰ almost all the repeals were carried off by sneaking sodomy reform below the public radar as part of the Model Penal Code's modernization of criminal law.¹³¹ Only in California did the legislature openly debate the pro-gay implications and still opt for sodomy reform, but other states reinstated their consensual sodomy laws when the media alerted them to the gay-rights implications.¹³² The District of Columbia repealed its consensual sodomy law in 1981, a move that was immediately vetoed by the Democrat-controlled House of Representatives, 281 to 119.¹³³ AIDS-phobia after 1981 made sodomy reform virtually radioactive. Between 1969 and 1990, nine states revoked criminal sanctions for consensual heterosexual sodomy but left homosexual sodomy a crime—precisely the line that Justice White drew in *Bowers*.¹³⁴ To have announced a constitutional right to engage in private homosexual sodomy at the height of the AIDS epidemic would have created legitimacy problems for the Court and might have cast the privacy right into further doubt.

Although our theory is critical of the majority as well as dissenting opinions in both *Roe* and *Bowers*, the Court learned from the normative politics that followed these constitutional faux pas. In *Planned Parenthood v. Casey*,¹³⁵ the Court followed twenty years of post-*Roe* state legislative

129. 478 U.S. 186 (1986). Nor should the Court have adopted the clumsy anti-homosexual opinion written by Justice White. *Id.* at 187. Because Michael Hardwick had not been prosecuted and the District Attorney had abjured any intent to prosecute anyone for conduct in the home between consenting adults, the Court should have dismissed the appeal on ripeness or standing grounds.

130. *Id.* at 193–94.

131. See WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA, 1861–2003, at 120–27 (2008) (noting that during Illinois's sodomy repeal, homosexuals remained almost completely in the closet during the debate); *id.* at 144–65 (observing that sodomy reform in the 1960s failed when legislators detected the pro-homosexual effect); *id.* at 176–84 (reporting on the progress in repealing consensual sodomy laws because the repeal was enveloped in the adoption of the Model Penal Code).

132. See *id.* at 197–201 (discussing the California repeal); see also *id.* at 182–84 (discussing Idaho's reenactment of consensual sodomy laws after “mistaken” repeals were exposed).

133. *Id.* at 216.

134. See *id.* at 387–407 (providing an appendix of state sodomy laws, including references for the nine states: Arkansas, Kansas, Maryland, Missouri, Montana, Nevada, Oklahoma, Tennessee, and Texas).

135. 505 U.S. 833 (1992).

deliberation to reaffirm a woman's liberty to choose an abortion, but the decision balanced that liberty against legitimate state interests in the woman's health, parental rights to counsel pregnant minors, and the (potential) life of the fetus.¹³⁶ Hence, the Court deferred to state legislative processes imposing a mandatory waiting period, required disclosures, and parental consent for minors seeking abortions.¹³⁷ And the Court in *Lawrence v. Texas*¹³⁸ overruled *Bowers*,¹³⁹ but only after thirty-seven states and the District of Columbia (with nary a peep out of Congress) had repealed their consensual sodomy laws for gay as well as straight couples *and* after traditionalist groups had shifted their focus to same-sex marriage.¹⁴⁰ Justice Scalia's dissenting opinions in both *Casey* and *Lawrence* accused the majority of engaging in what we could call deliberation-ending judicial review,¹⁴¹ but he was wrong about that. By the time the Court decided *Lawrence*, deliberation had already ended on the sodomy issue, and the Court had discretion to announce a broad constitutional rule.¹⁴² Indeed, since *Casey* and *Lawrence*, the country has been deliberating about related issues, namely aid-in-dying, partial-birth abortion, and gay marriage—issues as to which the Court has been deliberation-respecting.¹⁴³

B. Separation of Powers

Deliberation-respecting judicial review also provides a distinctive angle for thinking about separation of powers. Most dramatically, this theory provides a justification for the Court's controversial opinion in *INS v. Chadha*.¹⁴⁴ *Chadha* invalidated legislative veto provisions in hundreds of federal statutes and was potentially far-reaching judicial activism, unsettling the careful balance between the federal Legislative and Executive

136. *Id.* at 846.

137. *See id.* at 886 (stating the holding on mandatory waiting period); *id.* at 898 (discussing the required disclosures); *id.* at 899 (reaffirming its view on parental consent).

138. 539 U.S. 558 (2003).

139. *Id.* at 578.

140. *Compare* *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986) (stating that all fifty states and the District of Columbia had statutes outlawing sodomy until 1961), *with Lawrence*, 539 U.S. at 559 (noting that only thirteen criminal sodomy statutes remained in effect).

141. *See Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting) (discussing the majority's revision of stare decisis standards); *Casey*, 505 U.S. at 982–84 (Scalia, J., dissenting) (commenting on the majority's use of stare decisis).

142. *See* ESKRIDGE, *supra* note 131, at 329 (commenting that *Lawrence* “was conforming to a new sociopolitical reality” that gays and lesbians were productive American citizens).

143. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 162–67 (2007) (upholding the federal Partial-Birth Abortion Ban Act, a law that reflected a deliberative choice by Congress and the President and echoed a state statutory convergence); *Washington v. Glucksberg*, 521 U.S. 702, 705–06, 710–19 (1997) (upholding state assisted-suicide law and expressing reluctance to terminate state legislative deliberation on this issue).

144. 462 U.S. 919 (1983).

Branches.¹⁴⁵ The *Chadha* Court, however, understood its insistence on constitutional limits as *deliberation-protecting* judicial review, where the Court protects the deliberative process against lazy or self-interested relaxation or regulation. Thus, the Court rejected legislative vetoes not only because they were inconsistent with the bicameralism and presentment requirements for legislation in Article I, Section Seven but also because they undercut the deliberative process the framers expected would minimize Congress's inclination to adopt "oppressive, improvident, or ill-considered measures."¹⁴⁶ Protecting deliberation is a rationale that justifies many of the Court's First Amendment decisions as well.¹⁴⁷

The Supreme Court also polices the exercise of presidential power along deliberation-respecting lines. The classic statement of such review is Justice Jackson's opinion in *Steel Seizure*.¹⁴⁸ Jackson's premise was horticultural: the Constitution's goal is to sow the seeds of a structure where the "art of governing" will flourish and where "practice will integrate the dispersed powers into a workable government."¹⁴⁹ Hence, the enumerated powers of the President should be given whatever "scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism," but those powers must yield to the legislative authority when Congress has adopted statutory resolutions.¹⁵⁰ (This was the third prong of Jackson's famous continuum of judicial scrutiny of presidential exercises of power, with great leniency when authorized by Congress and invalidity when in violation of Congress's valid statutory commands.)¹⁵¹ Justice Jackson closed his opinion fittingly: "With all its

145. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 563 (1992) (stating that the Court was systematically reversing the assumptions upon which Congress had passed multiple statutory provisions).

146. *Chadha*, 462 U.S. at 947–48; see also Eskridge & Ferejohn, *supra* note 145, at 525–28, 526 (arguing that the *Chadha* decision rested on an "unsatisfactory analysis" of bicameralism and presentment, two features designed to reflect legislative deliberation); *id.* at 558–59 (arguing that *Chadha* attempted, but failed, to ground its decision in a proper understanding of Article I, § 7).

147. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001) (finding the First Amendment inconsistent with a federal law barring dissemination of truthful information of concern to the public); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (stating that the First Amendment protection of the public's free access to multiple, antagonistic media sources is necessary for the maintenance of public deliberation); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (pointing out that "public discussion is a political duty[,] . . . a fundamental principle of the American government"). These are also examples of the "representation-reinforcing" review defended in JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88–104 (1980).

148. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

149. *Id.* at 635.

150. *Id.* at 640.

151. *Id.* at 635–38. Jackson's tripartite framework is the authoritative framework for evaluating the validity of presidential actions. See, e.g., *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action . . .").

defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”¹⁵² This admonition has been the Court’s guiding light in evaluating the President’s exercise of power during the War on Terror.¹⁵³

C. *The Dormant Commerce Clause*

Federal antitrust laws and other statutes enacted under Congress’s power to regulate interstate commerce assure the operation of a national competitive market, free of private bottlenecks; the Court has interpreted the Commerce Clause to have a “dormant” or “negative” feature, namely, to monitor state and local bottlenecks impeding the operation of our national market.¹⁵⁴ The dormant feature of the Commerce Clause is inferred from the structure of the Constitution and therefore has a common law quality that is subject to legitimacy problems. Our theory is that the Court ought, primarily, to be guided by federal statutory policy in determining what areas to apply sharper-eyed scrutiny to and, secondarily, to consider state statutory convergences when evaluating asserted state interests. Under this deliberation-respecting theory, if Congress has enacted legislation recognizing state regulatory interests, the Court ought to be more cautious in applying its dormant Commerce Clause jurisprudence. Conversely, where legislation reflects a congressional judgment that local interests must be more tightly monitored, the Court should be more scrutinizing. Finally, when evaluating the legitimacy and weight of the state’s regulatory interest, the Court should consider congressional preferences reflected in statutes, as well as widely held state policies. (These same considerations apply to the preemption cases; our theory would be leery of an aggressive jurisprudence of implied preemption.)¹⁵⁵

Take state highway regulation, for example. In the mid-twentieth century, many states adopted weight and other limits on trucks using their

152. *Steel Seizure*, 343 U.S. at 655 (Jackson, J., concurring).

153. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (“Whether or not the President has independent power, absent congressional authorization . . . he may not disregard limitations that Congress has . . . placed on his powers.” (citing *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring))); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (“[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” (citing *Steel Seizure*, 343 U.S. at 587)).

154. See Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (exploring the Court’s concern with state protectionism); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 130–40 (elucidating the antidiscrimination principle in the Court’s Commerce Clause jurisprudence).

155. See William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1442–43 (2008) (arguing that *Chevron* should be applied conservatively in preemption cases).

highways.¹⁵⁶ Such limits had obvious and direct effects of raising the costs of shipping goods in interstate commerce.¹⁵⁷ How deferential should the Court be when evaluating these state laws? Federal statutes authorized the Department of Agriculture to develop weight and other rules that reflected a good balance between safety and efficiency concerns.¹⁵⁸ But because Congress gave no indication that it expected these rules to be binding on the states, the traditional situses of safety regulations that were experimenting with various efforts to protect public safety, the Supreme Court proceeded cautiously by allowing most state regulations.¹⁵⁹

The Court in the 1940s signaled a more skeptical attitude toward idiosyncratic state rules that created unnecessarily high transportation costs.¹⁶⁰ The balance shifted as states liberalized their restrictions in the face of trucking industry lobbying and studies showing that the previous rules were not contributing to traffic safety.¹⁶¹ More importantly, Congress had created and funded the National Highway System, the purpose of which was greater uniformity so as to encourage economical interstate trucking of food-stuffs and other goods.¹⁶² The Court's jurisprudence became much more scrutinizing, especially against state laws that were idiosyncratic, as in *Kassel v. Consolidated Freightways Corporation*.¹⁶³ The plurality opinion in *Kassel* emphasized Iowa's inconsistency both with the limits set by *all* surrounding states and with the efficiency goals of the National Highway System.¹⁶⁴ Although the Court's jurisprudence demands deference to state

156. See, e.g., *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 195 (1938) (upholding South Carolina weight limitations).

157. See, e.g., Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1621 (2002) (noting that states could deploy weight limits to prevent interstate trucking firms from realizing a profit).

158. See Brief on Behalf of the United States as Amicus Curiae at 12–14, *Barnwell Bros., Inc.*, 303 U.S. 177 (No. 161) (discussing the Federal Highway Act of 1921).

159. See, e.g., *Barnwell Bros., Inc.*, 303 U.S. at 187 (noting the lack of standards adopted by Congress for highway regulations and such regulations' inherently local character).

160. See, e.g., *S. Pac. Co. v. Arizona*, 325 U.S. 761, 773–75, 793 (1945) (explaining the significant impediment that individual states' regulations could pose to interstate commerce and holding that such regulations must be uniform across states).

161. See *Noerr Motor Freight, Inc. v. E. R.R. Presidents Conference*, 155 F. Supp. 768, 777 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127, 131 (1961) (dictum) (commenting on the success of trucking associations in lobbying for increased weight limits for long-haul trucks).

162. Cf. *Interstate Commerce Comm'n v. Inland Waterways Corp.*, 319 U.S. 671, 678 n.4 (1943) ("It is hereby declared to be the national transportation policy of the Congress . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail" (quoting the Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898)).

163. 450 U.S. 662 (1981).

164. See *id.* at 665–67, 671 (plurality opinion) (recounting Iowa's particular regulations and noting that "Iowa's law is now out of step with the laws of all other Midwestern and Western States" and thus "its regulations impair significantly the federal interest in efficient and safe interstate transportation").

legislative deliberation in most cases, a Court majority in *Kassel* found deference inappropriate because the “local regulation bears disproportionately on out-of-state residents and businesses,” which were not represented in the state deliberative process.¹⁶⁵ The Court’s disposition had the virtue of being deliberation-inducing. Responding to *Kassel*, Congress enacted the Tandem Truck Safety Act of 1984,¹⁶⁶ authorizing governors to petition the Secretary of Transportation for an allowance to exclude double-trailer trucks and other oversize vehicles from portions of the interstate highway system.¹⁶⁷ The petition must show that such trucks present safety problems.¹⁶⁸

A similar process has occurred in cases involving waste treatment. In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,¹⁶⁹ the Court upheld a local waste-management ordinance that required waste haulers to bring trash to facilities owned and operated by a public benefit corporation created by the state.¹⁷⁰ Speaking for a plurality, Chief Justice Roberts construed an earlier precedent narrowly and upheld the policy,¹⁷¹ an approach that respected *both* the widespread adoption and success of such programs *and* Congress’s endorsement of them. The Resource Conservation and Recovery Act of 1976¹⁷² says that “collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.”¹⁷³ The purpose of that provision was to make sure that RCRA would “*not* . . . be construed to affect state planning which may require all discarded materials to be transported to a particular location.”¹⁷⁴ We would also read this congressional policy as a legal reason

165. *Id.* at 676, 675–76; *see also id.* at 687 (Brennan, J., concurring in the judgment) (“[T]he decision of Iowa’s lawmakers to promote Iowa’s safety and other interests at the direct expense of the safety and other interests of neighboring States merits no such deference.”).

166. Pub. L. No. 98-554, 98 Stat. 2829 (codified as amended in scattered sections of 49 U.S.C. (2000)).

167. 49 U.S.C. § 31111(f)(1).

168. *Id.* § 31111(f)(3).

169. 550 U.S. 330 (2007).

170. *Id.* at 334.

171. *See id.* at 346–47 (plurality opinion) (reading narrowly *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), to hold that while revenue generation cannot justify discrimination against interstate commerce, it can be considered to be a “local benefit” for purposes of evaluating a nondiscriminatory statute); *see also id.* at 348 (Scalia, J., concurring) (limiting his application of a “‘negative’ self-executing Commerce Clause” to only two types of state statutes: those that “facially discriminate[] against interstate commerce” and those that are “indistinguishable from a type of law previously held unconstitutional by this Court”); *id.* at 349 (Thomas, J., concurring in the judgment) (opining that *Carbone* was incorrectly decided because “[t]he negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice” because its application “turns solely on policy considerations”).

172. Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C. (2000)).

173. 42 U.S.C. § 6901(a)(4).

174. H.R. REP. NO. 94-1491, at 34 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272 (emphasis added).

for the Court to be cautious in applying its dormant Commerce Clause analysis to this area. More than half of the states, including New York, have adopted explicit statutory authorizations for local governments to adopt such ordinances.¹⁷⁵ There was no dispute in *United Haulers* that these laws were usually motivated by legitimate environmental concerns, and that localities faced crises if they did not effectively concentrate waste treatment and recycling.

Conclusion: The Horticultural Role of Deliberation-Rewarding Canons

Although our horticultural approach is skeptical of the Supreme Court's efforts to close off active democratic deliberation through activist judicial review—in decisions such as *Dred Scott*, *Roe*, and perhaps *Heller*—it is more open to deliberation-inducing review, such as *Kassel*, *Casey*, and the void-for-vagueness reasoning found in the first draft in *Roe*. Our greatest enthusiasm, however, is reserved for a positive judicial role, where the Court announces (or, as it does now, episodically applies) *deliberation-rewarding* canons of statutory construction. The Court has repeatedly held that federal judges must defer to agency interpretations of statutes that they are charged with enforcing.¹⁷⁶ Deliberation-respecting theory suggests that deference should not be meted out uncritically; for example, judges should not defer to agency decisions reflecting political pressure to abandon or sacrifice their statutory missions. Judicial deference is most appropriate when the agency has engaged in a deliberative process where the public has participated and the agency has responded with an explanation of its rule or interpretation and why it is a good effort to carry out the statutory purpose.¹⁷⁷ The Supreme Court has sometimes explicitly followed such an approach, rewarding agencies for resolving difficult legal questions through an open and deliberative process,¹⁷⁸ and punishing agencies for pursuing narrower

175. See Brief for New York et al. as Amici Curiae in Support of Respondents at 2–3, *United Haulers*, 550 U.S. 330 (No. 05-1345) (discussing state and local government need for flow ordinance authority).

176. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 *passim* (2008) for a chronicle of Court decisions espousing deference for agencies' statutory interpretation.

177. See, e.g., RICHARDSON, *supra* note 8, at 219–22 (describing how negotiated rulemaking can supplement notice-and-comment rulemaking in order to make administrative rulemaking more democratic); Lisa Shultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 553 (2003) (advocating for the introduction of a preference for notice-and-comment rulemaking over adjudicatory rulemaking in order to avoid agency arbitrariness); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83, 87, 134 (1994) (proposing a modification of the *Chevron* doctrine to require courts to more carefully review the reasonableness of an agency's statutory interpretation, thereby obligating the agency to "justify its interpretation in terms of the goals underlying the statute").

178. See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (upholding the EPA's interpretation of a statute as representing a "reasonable

ideological agendas reached after a secret, nonpublic process.¹⁷⁹ Just as we endorse deliberation-respecting judicial review, we also endorse deliberation-rewarding statutory interpretation, where the Court's role can be both modest and potentially productive.¹⁸⁰

accommodation of manifestly competing interests," which is "entitled to deference" because "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies") (footnotes omitted).

179. *See, e.g.,* *Gonzales v. Oregon*, 546 U.S. 243, 274–75 (2006) (rejecting the Attorney General's interpretation of a criminal drug statute that would have effectively preempted Oregon's death-with-dignity statute).

180. We recognize the possibility of "stealth constitutionalism," where the Court impedes agency and legislative agendas by throwing up canon-based hurdles and forcing Congress to return to issues that had been settled.