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JUDICIAL RESTRAINT IN THE ADMINISTRATIVE STATE: BEYOND THE COUNTERMAJORITARIAN DIFFICULTY

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INTRODUCTION	760
I. FOUNDATIONS.....	771
A. <i>Judicial Restraint and the Target of Justice</i>	771
B. <i>The Countermajoritarian Difficulty</i>	785

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1. The Plebiscitary Feature.....	788
2. Democratic, Epistemic and Analytic Arguments	796
II. SIMPLE EXTENSIONS	806
A. <i>The Simple Extension of the Countermajoritarian Difficulty</i>	813
1. Values-statutes and the Strong Version of the Simple Extension	818
2. A Weak Simple Extension?	834
3. Reviving Nondelegation?	839
B. <i>Other Legislature-Centered Arguments</i>	844
C. <i>Arguments from Reversibility</i>	853
D. <i>Judicial Doctrine: The Possibility of Differential Restraint</i>	859
III. BEYOND THE COUNTERMAJORITARIAN DIFFICULTY.....	874

INTRODUCTION

"The root difficulty is that judicial review is a counter-majoritarian force in our system."¹ With the unforgettable epithet, "counter-majoritarian," Alexander Bickel set the terms for debate about judicial review—terms that have yet to be redefined. His 1962 masterpiece, *The Least Dangerous Branch*, is rightly counted as the most important work of constitutional scholarship written in the last half-century,² not only for its explicit argument in favor of judicial restraint, but above all for the underlying and largely implicit conception of judicial review upon which the argument rests. *The Least Dangerous Branch* argues that the democratic, majoritarian cast of legislation is a sufficient reason for judicial restraint. Its underlying conception is that judicial review is exemplified, if not comprised, by the practice of invalidating the statutes that legislatures enact. In Bickel's words: "Judicial review . . . is the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision."³ My aim is to demolish this conception.

¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

² See SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* 148 (1993) ("[T]here is no disagreement about [Bickel's] influence on the constitutional debate Many writers credit Bickel with inaugurating that debate as the specific quest for a way to reconcile a nondeferential judiciary to majoritarianism within a broadly relativist or conventionalist view of morality and consistently with the American Legal Realist critique of legal formalism.").

³ BICKEL, *supra* note 1, at 20.

Bickel's conception of judicial review has served as a deep point of consensus for the multiple debates about judicial restraint that *The Least Dangerous Branch* helped animate. These include, most saliently, the debate about interpretive method focused upon *Griswold v. Connecticut*⁴ and *Roe v. Wade*.⁵ This debate has gone under different names, first as the debate about "interpretivism,"⁶ more recently as the debate about "originalism,"⁷ as the disputed issue has been refined—but never to produce consensus, only further strife. The issue, roughly, is this: Do some aspects of justice, such as "privacy," furnish sufficient grounds for a reviewing court to invalidate a statute, when the court's decision is only weakly supported by the text of the Constitution?⁸ More concretely: Were *Griswold* and *Roe* legitimately or illegitimately decided?⁹ *The Least Dangerous Branch*, in an obvious way, has played an important role in this debate. Bickel's Countermajoritarian Difficulty has served as a leading argument against the "privacy" jurisprudence, advanced by its two most famous scholarly critics, John Hart Ely and Robert Bork.¹⁰ What I am about to suggest

⁴ 381 U.S. 479 (1965).

⁵ 410 U.S. 113 (1973); see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744-52 (1989) (describing "privacy" jurisprudence initiated by *Griswold* and carried forward in *Roe*).

⁶ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1-41 (1980) (distinguishing between interpretivism and non-interpretivism); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 9-36 (1982) (same); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703-10 (1975) (same).

⁷ See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085-86 (1989) (noting shift in terminology for describing contending sides in debate, from "interpretivism" vs. "non-interpretivism" to "originalism" vs. "non-originalism"); BARBER, *supra* note 2, at 157-58 (same).

⁸ See *infra* text accompanying notes 61-71 (describing this debate). It bears emphasis that this debate about interpretive method is only the most prominent of the multiple scholarly debates about judicial restraint. A cross-cutting debate is whether courts, whatever the proper interpretive method, should invalidate statutes that are not "clearly" unconstitutional. See *infra* Part II.B (discussing "minimalism").

⁹ "[M]ore than any other constitutional decision of recent times, the *Abortion Cases—Roe v. Wade* and *Doe v. Bolton*—rekindled the debate about the legitimacy of what I am now calling non-interpretive review." PERRY, *supra* note 6, at 144 (footnotes omitted). I should emphasize that *Roe* and *Griswold* figure centrally in this scholarly debate with respect to the interpretive method employed in those cases, not the results that the Court reached. See *id.* at 144-45 (drawing this distinction). One might be a non-interpretivist or non-originalist and still believe that, all things considered, abortion is morally wrong.

¹⁰ See ELY, *supra* note 6, at 4-9, 101-03 (containing Ely's central statement of the Countermajoritarian Difficulty); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 139-41, 153-55, 251-59 (1990) (containing Bork's central statement of the Countermajoritarian Difficulty); *infra* notes 84-85 (discussing Bork's and Ely's reliance on the Counter-

is something less obvious: that even the defenders of the broad interpretive method upon which *Griswold* and *Roe* are based—scholars such as Ronald Dworkin, Michael Perry, Thomas Grey and Laurence Tribe,¹¹ to name only a few—have implicitly accepted the conception of judicial review underlying the Countermajoritarian Difficulty and relied upon by Ely and Bork. These champions of a broader approach to constitutional interpretation have accepted, without needing to, Bickel's legislature-centered conception of judicial review. In this sense, *The Least Dangerous Branch* has not just fueled and figured in the subsequent scholarly debate about interpretive method. It has *defined* that debate—implicitly so, again, because its conception of judicial review is never really defended, and hardly even disclosed, by Bickel or by the subsequent proponents of the Countermajoritarian Difficulty.

Judicial review is not the practice of invalidating statutes. Nor is it a practice exemplified by the invalidation of statutes. Rather, judicial review is, at a minimum, the practice of invalidating (state and federal) statutes, rules, orders and official actions on direct constitutional grounds.¹² It includes all of the following: (a) excluding from a trial the fruits of a search by the street-level operative of a law-enforcement agency, on the grounds that the search violated the Fourth Amendment;¹³ (b) reversing the conviction of a protester for a "breach of the peace," on the grounds that her activities were protected by the First Amendment;¹⁴ (c) overturning an otherwise valid administrative order entered by a labor board, which directs a church

majoritarian Difficulty). For Bork's and Ely's attacks on the "privacy" jurisprudence, see BORK, *supra*, at 95-100, 110-26, 257-59; ELY, *supra* note 6, at 43-72; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); cf. ELY, *supra* note 6, at 221 n.4 (distinguishing *Griswold* from *Roe*, as defensible in terms of a less open-ended approach to constitutional interpretation).

¹¹ See sources cited *supra* note 6, *infra* notes 62, 65.

¹² See *infra* note 131 (elaborating on this definition).

¹³ See generally WILLIAM W. GREENHALGH, *THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS* 21-102 (1995). It is revealing to note (following Professor Greenhalgh's tabulation) that the overwhelming majority of these cases are described as challenges to an arrest, or a search, or some other particular action by a law enforcement officer, rather than to a general regulatory or statutory policy.

¹⁴ See *Cantwell v. Connecticut*, 310 U.S. 296, 307-11 (1940). Although the statute underlying a conviction might be invalidated too, see, e.g., *Houston v. Hill*, 482 U.S. 451, 467 (1987) (facially invalidating overbroad statute); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (facially invalidating vague statute), my point here is that reversing the conviction of someone who has engaged in protected speech properly counts as an instance of judicial review independent of the court's invalidation, or not, of a statute.

to engage in collective bargaining with its employees, because the Religion Clauses entitle the school to an exemption from the collective-bargaining statute;¹⁵ (d) striking down some agency's rules for adjudicating individual claims, as violating procedural due process;¹⁶ and (e) invalidating a statute that abridges the right to abortion.¹⁷ Judicial review includes, as an instance, the invalidation of statutes—where to “invalidate” a statute means to issue a legally authoritative determination that the statute lacks legal force¹⁸—but it *also* includes the invalidation of agency rules, agency orders and simple actions such as street-level searches or the treatment of prisoners. Now, by some miracle of statutory interpretation that works its magic because every rule, order or action ultimately derives from a statute that gives it legal life,¹⁹ it might be the case that the practice of invalidating statutes can be taken as a proper synecdoche for the whole practice of judicial review. But unless this is the case—and this Article will demonstrate that it is not—the debate about judicial restraint that scholars have conducted with such vigor since *The Least Dangerous Branch* has been radically incomplete.

I am hardly the first to point out the error in conflating judicial review (even confined to the federal system) with the review of statutes. Charles Black made this point, elegantly and cogently, almost three decades ago:

The political and legal problems of *Marbury v. Madison* exist in only one kind of confrontation—the confrontation of Congress and the Court. In many cases passing on the constitutionality of federal actions, what is actually involved is a confrontation between the Court and some official to whose judgment on constitutionality none of the piously repeated rules of deference and restraint have anything like the application they might be thought to have to Congress.²⁰

Others, since, have concurred.²¹ But Black's insight has not received

¹⁵ See *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979).

¹⁶ See *Brock v. Roadway Express Inc.*, 481 U.S. 252, 268 (1987); *Califano v. Yamasaki*, 442 U.S. 682, 692-97 (1979).

¹⁷ Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 887-98 (1992). Insofar as *Casey* simply invalidates a statutory provision, and not an entire act, it does not count as a true statutory invalidation. See *infra* note 104 (discussing the concept of statutory “invalidation” and associated individuation criteria).

¹⁸ See *infra* note 104 (specifying what judicial “invalidation” of statutes involves).

¹⁹ See ELY, *supra* note 6, at 4 n.* (implicitly suggesting this possibility).

²⁰ CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 77 (1969).

²¹ See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 634-

anything like the emphasis and scholarly response it deserves. It has not figured centrally in the debates about "interpretivism" and "originalism." The insight opens up the possibility that arguments for judicial restraint, effective with respect to the judicial practice of invalidating statutes, might have little or no force with respect to the practice of invalidating agency rules, orders and actions, and thus that the proper contours of judicial review in an administrative state might be quite different than a legislature-centered conception would lead us to believe.

Consider the most important extant argument for judicial restraint: the Countermajoritarian Difficulty. What does the argument say? What did Bickel mean by it, and what do Bork and Ely mean when they hurl it against *Roe*? Formally, it says this: (1) Some statutes should be taken to bear the "Plebiscitary Feature," defined as follows—a statute bears the "Plebiscitary Feature" if it would be chosen, over the status quo and some range of alternatives, in a hypothetical plebiscite, perhaps idealized; and (2) it is intrinsically unfair and, all things considered, wrong for a court to invalidate a statute that bears the Plebiscitary Feature, at least on grounds such as "privacy" that are only weakly supported by the text of the Constitution. This formalization of the Countermajoritarian Difficulty is defended below.²² If you dispute it, draw some other formalization and see whether it avoids the problem identified here. The problem is this: Even if the Countermajoritarian Difficulty, thus formalized, holds *true*, it furnishes no basis for restraint in any other aspect of the broad practice of judicial review, except for that part comprised or exemplified by the practice of invalidating statutes.²³

Compare these two cases. In the first case, Congress passes a statute proscribing abortions (say, in hospitals receiving federal funds) except when the woman's life is endangered. In the second case, a health agency, operating under a statute that authorizes the agency to

35 (1993) ("[T]he vast majority of judicial overruling of governmental activity is concerned not with statutes or actions of the legislature, or even the chief executive, but with the work of administrative officials, from the loftiest cabinet officer to the lowest administrative actor. The actions range from administrative policymaking to application of administrative rules. In these cases making the countermajoritarian difficulty stick is extremely difficult." (footnotes omitted)); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 246 n.7 (1995) (arguing that "[a] court's relative majoritarian deficit is surely larger" when overturning statutes rather than decisions by individual officeholders).

²² See *infra* Part I.B.1.

²³ By "exemplified," here, I mean via a Simple Extension. See *infra* Part II.

issue "reasonable rules to assure the health of patients" in these hospitals, enacts a rule proscribing abortions except when the woman's life is endangered.²⁴ (This latter statute is what I will call a "values-statute,"²⁵ because it authorizes the agency to pursue a basic, open-ended value, here "health.") Assume the Countermajoritarian Difficulty holds true. If so, the no-abortion statute in the first case bears the Plebiscitary Feature, and no court should invalidate it. But is it true that the no-abortion *rule*, in the second case, also bears the Plebiscitary Feature? Why would that be true? Because the rule maximizes health, and in that sense is a valid interpretation of the health statute, which itself bears the Plebiscitary Feature? But surely any interpretive link between the health statute and the agency's no-abortion rule is too weak to support the claim that the no-abortion rule would be chosen (over some range of alternatives) in a hypothetical plebiscite, simply because the health statute would. This seems intuitively correct; this Article will defend the intuition at some length.

Thus the Countermajoritarian Difficulty, without more, simply fails to answer the question whether a court can legitimately invalidate an agency decision such as the no-abortion rule on the grounds of "privacy"; it fails to explain why a broad practice of review grounded in *Roe* or *Griswold* would be wrong across most of the range of its application. Although there might still be good arguments for a general posture of restraint, based for example on the majoritarian cast of the *Presidency*²⁶ (which oversees the health agency) or on some other institutional feature of the administrative state, Bork, Ely and other proponents of the Countermajoritarian Difficulty have never made these kinds of arguments.

This might be a real defect for restraintist theory, even in a world different from the one in which we live. Even on a statutory model of governance, where legislatures enact nicely determinate statutes, and every rule, order or action ties back to one of these, judicial review might still not be exemplified by the practice of reviewing statutes. Let us bracket the question for now. For what, above all, makes the Countermajoritarian Difficulty and similar restraintist theories radically incomplete is the rise of *administrative*, as contrasted with statutory, governance. One of the great ironies of the legislature-centered debate about judicial review, fueled by *The Least Dangerous Branch*, is

²⁴ Cf. *Rust v. Sullivan*, 500 U.S. 173 (1991) (rejecting a challenge to agency regulations prohibiting grantees from engaging in abortion-related speech).

²⁵ See *infra* notes 140-42 and accompanying text.

²⁶ See *infra* text accompanying notes 327-34.

that this debate has occurred with such vigor, not before, but *after*, the historical and jurisprudential changes of the New Deal—Roosevelt's proliferation of administrative agencies, and the "switches in time" of 1937 through which the Court finally recognized the administrative state.²⁷ *The Least Dangerous Branch* adopted and made canonical a conception of judicial review that, by 1962, was already two decades too old. Administrative governance in the United States has meant many different things—a regulatory state, federal power, adversarial legalism, the Plebiscitary Presidency, state paternalism, iron triangles²⁸—but one of the many things it has meant is formal administrative discretion. The disappearance of the nondelegation doctrine, never enforced since the New Deal,²⁹ means that Congress, without constraint, may explicitly delegate formal lawmaking power to agencies, or may simply promulgate statutes that are indeterminate in one or more senses of that word.³⁰ Further, there appear to be good reasons in political economy why a legislature might sometimes, if not always, accord agencies formal discretion—for instance, to control outcomes but deflect blame, or to avoid a contested issue disputed by

²⁷ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34-80 (1991) (analyzing the New Deal as a "constitutional moment" involving radical constitutional changes); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994) (providing a detailed jurisprudential analysis of the Court's New Deal decisions culminating in the "switches in time"); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995) (history of these decisions). Gary Lawson starkly (and pessimistically) summarizes the constitutional features of the post-New Deal administrative state, wrought by the "switches in time," in *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

²⁸ The literature on all this, of course, is huge. Three good places to start are: Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (the still-classic overview from the perspective of an administrative lawyer); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989) (a tremendously useful summary of the empirical work on agencies in the case-study tradition); and DENNIS C. MUELLER, *PUBLIC CHOICE II* (1989) (an equally useful summary of much of the relevant rational-choice scholarship).

²⁹ For a general history and critique of the demise of the nondelegation doctrine, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993). By "never enforced," I mean as a grounds to invalidate statutes, or to construe statutes narrowly merely by virtue of statutory indeterminacy. The Court has invoked the nondelegation doctrine, under the rubric of statutory interpretation, as a way to invalidate certain kinds of agency decisions, e.g., decisions violating constitutional criteria. See *infra* note 214 (discussing how the Court invokes the nondelegation doctrine in interpreting statutes).

³⁰ For my purposes, it suffices that statutes are indeterminate in the weak sense of being contestable, rather than in the stronger sense of lacking objective or knowable meaning. See *infra* text accompanying notes 159-61.

two organized groups.³¹ And Congress, in fact, routinely does this.³²

Formal administrative discretion attenuates the interpretive link between a statute and the rules, orders or actions taken under it. This point is obvious—indeed entailed by the very concept of “discretion” as I mean it here—and has fueled recent calls (thus far unsuccessful) for a revival of the nondelegation doctrine.³³ My point is equally obvious, but less well known: administrative discretion eviscerates legislature-centered theories of judicial restraint. To be sure, the formal discretion of agencies and their operatives may be a sham; it may well be that agencies are captured by interest groups, or dominated by congressional committees, or ruled by the Presidency.³⁴ But a theory premised upon the special democratic properties of legislatures will not tell us *that*. Restraintist scholars have, above all, claimed that the formal output of legislatures—*statutes*—have special democratic legitimacy.³⁵ However tempted we might be to “reinterpret” this as some kind of claim about the democratizing structure of the administrative state, we should read these scholars for their intentions and recognize the statutory model of governance that they have presupposed. The formal discretion of administrative agencies creates a profound normative problem for restraintist constitutional theory, as the theory now stands, whatever political scientists theorizing in a positive mode (or others) might believe about the real power that formal discretion imports. Indeed, on certain positive theories (such as a theory that posits the dominance of agencies by legislative committees that, in turn, are beholden to organized groups rather than electoral majorities), the real import of formal discretion may turn out to have highly unattractive implications for a restraintist theory

³¹ See, e.g., Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 37-62 (1982) (providing a positive theory of delegation along these lines).

³² See *infra* note 140 (describing Congress's use of “values statutes” that epitomize delegation of power to administrative agencies).

³³ See *infra* note 213 (citing prominent works in the debate about reviving non-delegation doctrine).

³⁴ See, e.g., Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 431-45 (1989) (discussing mechanisms whereby the President, Congress and interest groups influence agencies, short of formal, substantive legislation); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 3-4 (describing agencies as enmeshed in struggles for influence between legislators and interest groups on the one side and the President on the other).

³⁵ See *infra* notes 86-87 and accompanying text (describing the legislature-centered focus of arguments for judicial restraint).

premised on the majoritarian cast of lawmaking.³⁶

We need to see. In short, we need a theory of judicial restraint for the administrative state. By "judicial restraint" I mean roughly this: a practice of limiting the occasions for judicial review, grounded in some deficit of the reviewing court, relative to an epistemically perfect court that neither caused nor constituted any wrong (democratic or otherwise) by the act of judicial review. For example, someone who argues that a reviewing court has full authority to invalidate a statute, rule, order or action violating moral rights, but that, despite the woman's moral right to "privacy," anti-abortion laws infringing upon that right are justified by the fetus's overriding right to life, is not an advocate of restraint. A restraintist argument, whether democratic or epistemic, is fundamentally different from an analytic argument about the meaning of constitutional criteria.³⁷ To be sure, the implication of this analytic argument, balancing the moral rights of woman and fetus, is to limit the occasions for judicial review (in striking down anti-abortion laws)—but the argument has nothing whatsoever to do with judicial capacities and limitations. It would hold equally true if courts were epistemically and democratically perfect. The Countermajoritarian Difficulty, by contrast, concerns precisely the alleged democratic deficit of reviewing courts. It is a restraintist, not an analytic argument. The question asked here is how this sort of argument—an argument about judicial review, as such—can possibly be extended into the administrative state.

Part I of this Article lays the conceptual foundations for a theory of judicial restraint in the administrative state. It attempts to explicate, in a rigorous way, certain concepts that would figure crucially in any such theory—in particular, the foundational concept of judicial restraint. It shows how arguments for restraint are directed against a particular *target*: against the broad view that (a court's best understanding of) "justice" provides a sufficient basis for judicial review. Part I also introduces the notion of a "legislature-centered restraintist argument": an argument that points, centrally, to features of *legislatures* as grounds for courts to refrain from invalidating *statutes*. And,

³⁶ See Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 136-48 (1988) (arguing that the legislative committee system is designed to maximize the reelection chances of legislators, who in turn are responsive to organized groups within their districts).

³⁷ See generally Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978) (drawing this sort of distinction).

finally, it gives a clear analysis of the Countermajoritarian Difficulty. This is the legislature-centered argument that has been by far the most famous and influential,³⁸ yet that, despite this fame and influence, has been too often misconstrued and misunderstood, both with respect to its "plebiscitary" conception of statutes, and with respect to the democratic rather than epistemic or analytic construal of what I call a statute's "Plebiscitary Feature."

Part II shows why legislature-centered arguments do not extend into the administrative state. More precisely, this Part shows why legislature-centered arguments lack what I will call a "Simple Extension." A Simple Extension of some legislature-centered argument purports to show that courts have grounds for restraint in reviewing rules, orders and actions merely by virtue of their interpretive pedigree—the fact that every rule, order or action, to be proper, must derive from and be a proper interpretation of some underlying statute. So, for example, we might conjecture that rules, orders and actions bear Plebiscitary Features if statutes do (as the Countermajoritarian Difficulty supposes); or, more weakly, that it is unfair to invalidate unjust rules, orders or actions, whether or not they bear Plebiscitary Features, because they are proper interpretations of statutes that do bear such features. Part II of the Article shows, in detail, why *any* extension argument of this kind must fail. It focuses first on the Countermajoritarian Difficulty, because of its importance in past and current debates about judicial restraint; but the broader claim defended here is that the Simple Extension of any legislature-centered argument, democratic or epistemic, will be unsuccessful. Further, although the failure of Simple Extensions is accentuated by broad delegations of power to administrative agencies, this failure is not solely attributable to the demise of the nondelegation doctrine. Part II demonstrates that no plausible nondelegation doctrine would make sufficiently tight the interpretive link between statutes and administrative rules, order or actions so as to require judicial restraint just by virtue of that link. Finally, this Part demonstrates that existing Supreme Court doctrine, in highly significant and hitherto unnoticed ways, *confirms* the claims here advanced. The possibility of *differential* restraint—that courts might have broader grounds to invalidate rules, orders and actions, as opposed to statutes—is not just this author's theoretical construct. That possibility turns out to be black letter law.

³⁸ See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 712 n.66 (1995) (citing sources that characterize the Countermajoritarian Difficulty as a central problem of modern constitutional theory).

So the question that this Article poses—"Do courts have grounds for judicial restraint in the administrative state?"—has a partly negative answer. Are there grounds for restraint that bear upon the judicial practice of reviewing rules, orders and actions, as distinct from the special practice of reviewing statutes? No: at least not just because of interpretive pedigree. But this negative claim, defended in Part II, does not amount to a *wholly* negative answer to our question. It might still be the case that the various features of the institutions that make up the administrative state—that odd amalgam of agencies, the Presidency, legislative committees, and interest groups, to name its key components—provide reviewing courts sufficient grounds for restraint, in particular contexts. We should consider the possibility of a "Plebiscitary Presidency," one whose effective oversight of agencies might confer the Plebiscitary Feature on (some) rules, orders or even actions, independent of their statutory pedigree. We should also consider the possibility that agencies might have an *epistemic* advantage over courts on certain constitutional issues by virtue of the epistemic constraints that the very process of adjudication brings. One of the unfortunate consequences of the scholarly preoccupation with legislatures has been a concomitant obsession with the democratic grounds for judicial restraint. But arguments for restraint, properly understood, might be epistemic rather than democratic. A democratic argument for restraint with respect to some constitutional criterion C (some aspect of justice) claims that judicial review violates some intrinsic democratic value D, which overrides C. By contrast, and more simply, an epistemic argument claims that courts are epistemically imperfect in determining what C requires.

Part III excavates a significant epistemic argument that has remained largely hidden in the scholarly literature, but that, I suggest, deserves at least as much attention as the Countermajoritarian Difficulty or any other democratic argument, with respect to whether courts should refrain from invalidating administrative rules, orders or actions. Call this the synoptic argument: To the extent that the constitutional legitimacy of a rule or general practice may depend upon the overall improvement in the important value (for example, health, safety, basic welfare or environmental preservation) that the rule or practice secures, as balanced against the overall infringement on constitutional rights that it works, the very orientation of courts to particular parties and cases will amount to a real epistemic handicap. Our scholarly debates must be doubly widened: we must enlarge our focus from legislatures to agencies and, simultaneously, from the

purported democratic deficits of courts to their possible epistemic limitations.

I. FOUNDATIONS

What do we mean by "judicial restraint"? What is the particular conception of "unrestrained judging" that arguments for restraint particularly seek to limit? How might the features of governmental institutions, such as the epistemic capacities of courts, the special democratic cast of legislatures, or the less democratic cast of administrative agencies, play a role in restraintist arguments? And how, in particular, do those features figure in the most famous and important argument of this sort, the Countermajoritarian Difficulty?

A decent theory of judicial restraint—for the administrative state, or for that matter any other governmental regime—ought to be clear about these essential matters. All too often, they are left obscure or confused, even by the scholarly literature on constitutional law.³⁹ The central claim of this Article—the substantive claim defended in Part II—is that legislature-centered restraintist arguments, paradigmatically the Countermajoritarian Difficulty, fail to advance good reasons for limiting the practice of judicial review in an administrative state. But first, what precisely are the form, content and purpose of a restraintist argument, especially this paradigmatic one? This Part attempts to clarify the problem of restraint and to explicate the Countermajoritarian Difficulty, thus laying a foundation for a theory of restraint in the administrative state.

A. *Judicial Restraint and the Target of Justice*

Arguments for judicial restraint seek to limit, in some way, the occasions for judicial review—the occasions on which courts invalidate statutes, rules, orders or actions.⁴⁰ But how? Some arguments for limiting these occasions are simply arguments about the content of those normative criteria that bear on judicial review. For example, to say

³⁹ See, e.g., *infra* text accompanying notes 118-21 (discussing the conflation of democratic arguments for restraint with subjectivism); *infra* text accompanying notes 53-59 (distinguishing between the modest concept of judicial restraint and the more robust claim that a statute might be "unconstitutional" without being subject to judicial invalidation).

⁴⁰ This crucial distinction between judicial invalidation of statutes and judicial invalidation of administrative rules, orders and actions is fleshed out below. See *infra* note 104.

that obscene speech is not protected by the First Amendment,⁴¹ that the Fourth Amendment permits warrantless searches of factories in "closely regulated" industries (where the owners' expectation of privacy is diminished),⁴² that reducing the value of property does not, without more, run afoul of the Takings Clause,⁴³ or that the Due Process Clause furnishes no procedural rights to those who are merely applying for government benefits,⁴⁴ is to say that the occasions for judicial review in these areas ought to be limited (relative to the possible worlds in which courts invalidate anti-obscenity laws, always require search warrants, hold value-reductions to be "takings," and require hearings even for would-be beneficiaries). Thus these restrictive interpretations (restrictive, relative to those possible worlds) of the First Amendment, Fourth Amendment, Takings Clause and Due Process Clause, are indeed arguments for "judicial restraint" in a broad sense. The normative criteria set out in the Bill of Rights provide some or all of the criteria against which courts engaged in constitutional review should measure statutes, rules, orders or actions. A reviewing court ought not strike down a statute, rule, order or action that it takes to satisfy these criteria; so an argument to show that some statute, rule, order or action satisfies the criteria is, in a broad sense, a restraintist argument. This broad conception of "judicial restraint" would, however, place the whole content of constitutional law under the rubric of that term. Why waste a useful term in this way? "Judicial restraint," usefully, seems to have something special to do with *courts*; it seems to pick out courts' flaws and deficits as a special set of reasons for restricting review. The broad conception of "judicial restraint" misses this point.

Lawrence Sager, in an important and well-known article, has confronted this problem. He writes:

In applying the provisions of the Constitution to the challenged behavior of state or federal officials, the federal courts have modeled analytical structures; I will call these models or structures of analysis *constructs*. These resemble conceptions of the various constitutional concepts from which they derive. But the important difference between a true constitutional conception and the judicially formulated construct is that the judicial construct may be truncated for reasons which are based not upon analysis of the constitutional concept but upon various concerns

⁴¹ See *Miller v. California*, 413 U.S. 15, 36 (1973).

⁴² See *New York v. Burger*, 482 U.S. 691, 702 (1987).

⁴³ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978).

⁴⁴ See *Lyng v. Payne*, 476 U.S. 926, 942 (1986).

of the Court about its institutional role.⁴⁵

Sager continues:

What I want to distinguish between here are reasons for limiting a judicial construct of a constitutional concept which are based upon questions of propriety or capacity and those which are based upon an understanding of the concept itself.⁴⁶

Sager valuably points out that the limited "institutional role" of courts defines a special set of reasons for courts to refrain from invalidating statutes, rules, orders or actions, distinct from reasons that are "based upon an understanding of the constitutional concept itself." Sager calls the first kind of reasons "institutional" and the second kind "analytic."⁴⁷

To get a sense of this distinction, consider again the federal law (a statute or a rule) hypothesized in the Introduction—a law that prohibits abortions except where the woman's life is endangered—and imagine that the law is challenged in court as violating the Due Process Clause. The following would then be an "analytic" argument for the court to uphold the law: "Although the anti-abortion law infringes upon the woman's moral right to privacy—a moral right that is protected by the Due Process Clause—this infringement is, on balance, justified by the fetus' overriding moral right to life." This is an "analytic," and not an "institutional," argument to limit judicial review because the argument simply elaborates what it takes to be the moral considerations bearing upon the constitutional question at hand. The claim is simply that the anti-abortion law is, on balance, morally, and therefore constitutionally, justified. No special limit on the "institutional role" of courts is claimed. To see this, imagine that courts of constitutional review have the broadest possible "institutional role": they are epistemically perfect in determining what morality requires; they work no democratic wrong in overriding the legislature's choices; the remedies they order are perfectly effective; and these courts are licensed to strike down, on constitutional grounds, any law that violates moral rights. The argument for upholding the anti-abortion law based upon the moral rights of woman and fetus is an "analytic" argument because it is not vitiated by these

⁴⁵ Sager, *supra* note 37, at 1214.

⁴⁶ *Id.* at 1217-18.

⁴⁷ See *id.* at 1218 (distinguishing between "institutional" and "analytical" reasons for "limiting a judicial construct of a constitutional concept") (internal quotations omitted). I have truncated Sager's "analytical" to "analytic."

imagined, institutional facts; it could still be addressed to these perfect, imagined courts.

By contrast, each of the following arguments for upholding the anti-abortion law counts as "institutional," not "analytic": (1) "Courts are epistemically weak in determining what open-ended, ethical criteria such as 'privacy' require; it is legislatures and agencies, not courts, that are theoretical authorities in this area, and so the lawmaking body's decision to issue the anti-abortion law provides the court sufficient reason to believe that a woman's moral right to privacy does not entitle her to an abortion"⁴⁸; (2) "Although courts are theoretical authorities with respect to 'privacy,' and although the moral right to privacy is indeed best understood to protect abortion, legislatures and agencies are more democratic than courts, and in this instance the intrinsic democratic wrong constituted by judicial review is sufficient to require that the court uphold the anti-abortion law"⁴⁹; and (3) "In the long run, given the remedial limitations of courts and the pedagogic effects of according primary responsibility for protecting moral rights to legislatures and agencies, limiting judicial review in this area will actually lead to fewer violations of the right to privacy."⁵⁰ Each of these three arguments counts as "institutional," by Sager's definition, because each identifies some deficit in the reviewing court—an epistemic, democratic or remedial deficit—as grounds to uphold the anti-abortion law. None of the three would hold true if courts were epistemically, democratically and remedially perfect in the way that I imagined above.

I suggest that "institutional" reasons, as Sager calls them, simply *are* reasons for judicial restraint. The concept of judicial restraint invites us to focus on the particular epistemic, democratic or remedial capacities of reviewing courts, as opposed to review-limiting considerations that have nothing particularly to do with courts. This is the dichotomy that Sager elaborates and makes more precise with his

⁴⁸ On the concept of a "theoretical authority," see generally Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1615-16, 1667-77 (1991). An argument to limit judicial review based upon the theoretical authority of legislatures or agencies would be an example of what I will call an "epistemic" argument for judicial restraint. See *infra* text accompanying notes 124-26.

⁴⁹ See *infra* text accompanying notes 107-17 (discussing "democratic" arguments for judicial restraint).

⁵⁰ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE* 336 (1991) (questioning the efficacy of judicial remedies); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 146, 375 n.42 (1993) (relying on Rosenberg to argue for judicial restraint).

"analytic"/"institutional" distinction.⁵¹

Unlike Sager, however, I will eschew the term "institutional," and refer to "institutional" reasons simply as reasons for judicial restraint.⁵² In addition, I will decouple the concept of judicial restraint

⁵¹ Indeed, Sager uses the term "judicial restraint" in just this way. See, e.g., Sager, *supra* note 37, at 1224 ("[T]he distinction between the scope of the norms of the Constitution and the scope of their judicial enforcement is inherent in the doctrine of judicial restraint and played a central role in the early formulation and defense of that doctrine [by James Bradley Thayer]."); *id.* at 1227 ("[T]he idea of the scope of constitutional norms extending beyond the scope of their judicial enforcement is intrinsic [to the judicial restraint thesis].").

⁵² The term "institutional" is confusing because the features of government institutions might be relevant, *analytically*, to what the Constitution requires of a statute, rule, order or action. This is obviously true when a statute, etc., is challenged as violating, for example, Articles I, II or III of the Constitution, which concern the very institutional structure of our government. But it is also true for that portion of the Constitution that has proved of primary interest to theorists of restraint, and that is of primary interest in this Article: the Bill of Rights. The ethical criteria that lie behind the Bill of Rights, and bear upon constitutionality, are not necessarily institution-invariant. We should not assume that what justice, or moral rights, requires of a statute, rule, order or action is independent of the features of government institutions. Consider the typical defense of the right to free speech, which relies not merely on the role of self-expression in individual well-being, but even more on the role of political speech in exposing and thereby correcting legislative bias or error. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 179, 253-54 (1986) (arguing that free speech rights are primarily grounded upon public benefits of speech); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 46 (1982) ("The special concern for freedom to discuss public issues and freedom to criticize governmental officials is a form of the argument from truth, because the necessity for rational thinking and the possibility of error in governmental policy are both large and serious."). See generally RAZ, *supra*, at 178-80, 247 (generally denying that the content of a moral right is exhausted by the interest of the rights-holder). Or consider the possibility that procedural rights might have differential force depending on the institutional context; although current doctrine does not say this, it might plausibly be argued that the Constitution requires agencies to engage in fuller, more deliberative, lawmaking procedures than legislatures, given the special democratic cast of legislatures. Cf. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (denying that "the arbitrary-and-capricious standard [of the Administrative Procedure Act] requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause").

Thus, we might have an advocate of limiting review who argues that a statute or rule restricting some kind of speech should be upheld and denies that legislators possess the deficit by reference to which the free speech advocate criticizes the statute or rule. Similarly, the advocate of limiting review might describe the democratic process by which some statute was enacted in order to show that its enactment satisfied procedural due process. Such arguments for limiting review, albeit relying on the features of legislatures, would be squarely "analytic," not "institutional."

Nor can one even say that the institutional features of courts will lack analytic significance. Assume that courts have the following epistemic defect in adjudicating certain controversial constitutional rights (say, rights to privacy): they are easily disrupted by popular turmoil. I suggest that this epistemic deficit could provide either a reason

from a further claim that I take Sager to advance. This further claim concerns the proper application of the predicate, "unconstitutional." The claim is this: a statute, rule, order or action might be properly described as "unconstitutional" *without* this description entailing that the statute, rule, order or action is properly invalidated by reviewing courts. To be clear, let us call this further claim the Revisionist Construal of "constitutionality"—revisionist, because it overturns the traditional view that the concept "unconstitutional" entails judicial invalidation.⁵³ For example, someone who adopts the Revisionist

for judicial restraint, or an analytic reason to limit review, depending on the case. *Case 1 (restraint)*: The legislature passes Law 1 limiting rights to privacy. By virtue of the courts' epistemic deficit, it is the legislature, not the courts, that is a theoretical authority with respect to privacy, and so the reviewing court should uphold the law. *Case 2 (analytic)*: The legislature passes Law 2 limiting disruptive speech in or near courtrooms where courts adjudicate privacy rights. By virtue of the courts' epistemic deficit, and the importance of securing an impartial forum to adjudicate privacy rights, this infringement on speech rights is justified, and so the reviewing court should uphold the law.

⁵³ The Revisionist Construal is, seemingly, adopted by those scholars who write about the "underenforcement" of the Constitution and, at the same time, claim that legislators have an obligation to enforce constitutional criteria upon themselves. See Sager, *supra* note 37, at 1213 ("My concern here is with those situations in which the Court, because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries. . . . [I] want to argue that we should treat these 'underenforced' constitutional norms as valid to their conceptual limits, and understand the contours of federal judicial doctrine regarding these norms to mark only the boundaries of the federal courts' role of enforcement."); see also *id.* at 1220-27 (further articulating and defending the "underenforcement" thesis); *id.* at 1228-63 (developing the implications of the thesis). Other prominent advocates of this view include SUNSTEIN, *supra* note 50, at 350 ("Most of these recommendations are aimed at legislative and executive officials, not at the judiciary. . . . [T]he identification of constitutional law with the decisions of the Supreme Court is a damaging and ahistorical mistake."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 15-17 (2d ed. 1988) ("The United States Constitution addresses its commands not only to federal judges but to all public authorities."); and Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-89 (1975) [hereinafter *The Conscientious Legislator's Guide*] (discussing the obligations of legislators to determine the constitutionality of proposed legislation). See generally PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* xxxi (3d ed. 1992) (casebook intended to challenge the assumption that "the Constitution is only what the Supreme Court has said it is").

But note that the term "underenforcement" is *itself* ambiguous. It might mean simply that the moral criteria lying behind the Bill of Rights are not fully enforced (leaving open whether a statute nonjusticiably violating those criteria is properly described as "unconstitutional"). Or, more robustly, it might mean the Revisionist Construal. Sager and others scholars in the "underenforcement" tradition apparently intend "underenforcement" to have this more robust meaning. See, e.g., Sager, *supra* note 37, at 1227 n.48 ("If the Supreme Court were to decide . . . [that] it would not declare certain legislative enactments unconstitutional, such a decision should not

Construal can, without contradiction, assert that statutes which have a serious disparate impact on racial minorities are, in fact, unconstitutional under the Equal Protection Clause, but that reviewing courts should nonetheless decline to enforce the "disparate impact" component of equal protection, given the epistemic and remedial difficulties that a court-enforced "disparate impact" doctrine would bring.⁵⁴ Or, she can assert that each person has a constitutional right to governmental provision of those minimum resources required to secure her basic welfare, but that given courts' remedial and epistemic deficits, this constitutional right should not be judicially enforceable.⁵⁵ By contrast, on the Traditional Construal, to describe a statute, rule, order or action as "unconstitutional" means that the statute, etc., is properly invalidated by reviewing courts; and to invoke a "constitutional right" means that the rights-holder is entitled to judicial relief.⁵⁶

The Revisionist Construal may ultimately be correct, but its failure to draw a clean break between unconstitutionality and moral wrong is problematic,⁵⁷ and for purposes of this Article, it is quite unnecessary.

end legislative discourse about the constitutionality of the enactment."); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 428 (1993) [hereinafter Sager, *Justice in Plain Clothes*] (referring to a legislative option that violates an unenforced norm but that the judiciary would nevertheless uphold, as an "unconstitutional option"); see also Brest, *The Conscientious Legislator's Guide*, *supra*, at 589 ("Decisions not striking down laws do not always mean that laws are constitutional . . . for a court's failure to invalidate may only reflect its institutional limitations."); SUNSTEIN, *supra* note 50, at 152 ("The reasoning of *Katzenbach* can be understood as a recognition that for institutional reasons, the Court will sometimes uphold certain practices even if those practices could justifiably be found unconstitutional by an institution not facing the limits that the judiciary does.").

⁵⁴ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the "disparate impact" of some law or legal practice on a minority group is insufficient to warrant its invalidation by reviewing courts under the equal protection component of the Fifth Amendment); SUNSTEIN, *supra* note 50, at 151-52, 155-57 (arguing that a "disparate impact" constraint is an underenforced component of the Equal Protection Clause).

⁵⁵ See *infra* notes 380-85 and accompanying text (literature on constitutional welfare rights).

⁵⁶ See RAZ, *supra* note 52, at 255-62 (1986) (defending the view that constitutional rights are moral rights given special institutional treatment). As Raz explains, "[t]he most visible fact about constitutional rights is that they are subjected to special institutional treatment. Matters which affect them are taken away from the exclusive control of ordinary legislative and administrative processes and subjected to the jurisdiction of the courts (or of special constitutional courts)." *Id.* at 257.

⁵⁷ If it is true that a legislator is generally required to legislate in accordance with her best understanding of morality, see, e.g., SUNSTEIN, *supra* note 50, at 17, identifying some aspect of morality as constitutional but unenforceable does not seem to say anything of significance for either legislators or courts. Sager himself clearly recognizes

The concept of judicial restraint (or, to use Sager's language, the concept of "institutional" reasons to limit review) does *not* presuppose the Revisionist Construal. All it presupposes is the weaker claim that there are objective, normative criteria lying behind the practice of judicial review—call these "criteria bearing on constitutionality"—by virtue of which courts justifiably invalidate statutes, etc., absent judicial deficits, but that are not necessarily fully enforced by courts, given the deficits courts actually have. This is a weaker claim because it is one to which *both* the proponent of the Traditional Construal and the proponent of the Revisionist Construal can assent. The traditionalist will say that a statute, etc., which violates the criteria but is not properly invalidated by reviewing courts is not, all things considered, "unconstitutional," while the revisionist will say that it is.⁵⁸ For example, the traditionalist will say that a statute with a disparate racial impact is not, all things considered, unconstitutional under the Equal Protection Clause, given the epistemic, remedial or democratic limitations of courts. The revisionist, by contrast, will say that a statute with a disparate racial impact *is* unconstitutional, but unenforceably so, given the epistemic, remedial or democratic limitations of courts. The crucial point for our purposes is that *both sides* in the debate will be able to distinguish between "analytic" considerations that concern

this problem:

Suppose a legislator must choose between two legislative options, anticipates that the judiciary would uphold each option as constitutionally valid, but believes that the appropriate reading of the Constitution (as opposed to the judiciary's likely reading) condemns one option. Surely, she will see herself as bound to avoid the unconstitutional option. But what if the legislator believes, in contrast, that while both options are constitutional, one option is unjust? Without more, we can assume that she again will see herself as bound, this time to avoid the unjust course of action.

Sager, *Justice in Plain Clothes*, *supra* note 53, at 428. Consider, again, statutes that have a disparate impact on minority groups or fail to provide for the needs of the poor. What is the practical significance, for the practices of courts, legislators, other institutions and citizens, of the statement that such statutes are not only unjust but (unenforceably) *unconstitutional*? Sager may well have a good response to the problem, *see id.* at 428 (explaining "why underenforcement matters"), but in any event the Revisionist Construal is unnecessarily controversial for a project, such as this one, that simply needs the less controversial concept of judicial restraint.

⁵⁸ More specifically, the Traditional Construal asserts it to be a *necessary* condition for describing a statute, rule, order or action as unconstitutional that it be properly invalidated by reviewing courts. This may not be a sufficient condition, at least for rules, orders or actions, by virtue of the complex ways in which constitutional criteria figure in the interpretation of statutes. For example, a reviewing court might invalidate a rule, order or action violating constitutional criteria by saying that the rule, etc., is not authorized under the governing statute, given the "serious constitutional doubts" that the rule, etc., raises. *See infra* Parts II.A.2., II.D.

the best understanding of the criteria bearing on constitutionality, and the separate, special category that Sager calls "institutional" reasons and that I call "reasons for judicial restraint."⁵⁹

The definition of judicial restraint that I will employ, and that remains neutral in the debate over the Revisionist Construal, runs as follows:

Judicial Restraint

An argument for "judicial restraint" identifies some deficit of the reviewing court (relative to an epistemically perfect court that neither caused nor constituted any wrong by the act of judicial review), just insofar as this deficit provides a reason for limiting review *without* changing the rightness or wrongness, goodness or badness, of the statutes, rules, orders or actions under review (as compared to the status quo or to alternative statutes, rules, orders or actions) as evaluated by the criteria bearing on constitutionality.⁶⁰

By "criteria bearing on constitutionality," I mean criteria by virtue of which reviewing courts properly invalidate statutes, etc., as unconstitutional, absent epistemic, democratic or other deficits; or equiva-

⁵⁹ I am indebted to Michael Moore for valuable discussions on this point.

⁶⁰ The caveat, "as compared to the status quo or to alternative statutes . . .," is absolutely crucial. As we shall see, the Countermajoritarian Difficulty is a restraintist argument that points to a feature of courts—their undemocratic cast—as grounds for concluding that the very act of judicial review is itself unjust. But the crucial point is that this undemocratic feature bears upon the injustice of *the court's decision to invalidate the statute*, not the injustice of the statute itself, relative to the status quo or relevant alternative statutes. What the Countermajoritarian Difficulty says is this: a statute violates some aspect C of justice, relative to the status quo or relevant alternatives, but judicial invalidation of the statute violates a democratic value D that outweighs C. The undemocratic cast of courts that gives rise to the violation of D does *not* change how the statute fares in terms of C, relative to the status quo or relevant alternative statutes. See *infra* Part I.B.2.

In speaking of how the statute, etc., fares under constitutional criteria (justice, etc.) as compared to the status quo or to relevant alternative statutes, I mean to include both the possibility that (a) these criteria concern the *state of affairs* that consists in the statute's being in force, compared to the alternative state of affairs comprised by the status quo or alternative statutes; and (b) these criteria concern the legislature's *action* in enacting the statute, compared to inaction or relevant alternative legislative actions. I take no position here on whether political justice, or the other criteria bearing on constitutionality, concern political states of affairs, governmental actions, or both. Cf. Dennis McKerlie, *Equality*, 106 *ETHICS* 274, 275 (1996) (distinguishing between "teleological" and "deontological" views of equality; teleological views see inequality as a property of outcomes, while deontological views see inequality as a property of actions—the property of unfair treatment). "Without changing" means that the judicial deficit does not change whether the statute, etc., violates the criteria, all things considered. See *infra* note 340.

lently, criteria that an epistemically, democratically, and otherwise perfect reviewing court *would* enforce.

In particular, this Article focuses on two kinds of restraintist arguments. One is an *epistemic* argument, which says that courts (given their epistemic deficits) should take the lawmaking body's enactment of the statute, etc., as sufficient reason to believe that some criteria bearing on constitutionality are satisfied. The other is a *democratic* argument, which says that courts (even if epistemically perfect) produce a democratic wrong by the very act of invalidating the statute, etc.

* * *

Arguments for judicial restraint, thus defined, take as their target one or another conception of the criteria bearing upon constitutionality. Suppose someone proposes a set of criteria; the advocate of restraint would then try to show why, assuming the proposal is true, judicial deficits nonetheless exist such that a reviewing court ought not invalidate every statute, rule, order or action that it takes to violate the proposed criteria. In theory, the proposal might be arbitrarily broad. It might include all normative criteria—not just originalist criteria or certain high-priority moral criteria, say, but also moral criteria of any kind, or even nonmoral (e.g., aesthetic) criteria. But, in fact, no American constitutional scholar seems to want to propose *that*. Rather, throughout this Article, I assume a singular target of arguments for judicial restraint—call it the “target of justice.” An argument for judicial restraint, directed against this singular target, seeks to show why a reviewing court ought not invalidate a statute, rule, order or action merely because it takes the statute, rule, order or action to be *unjust*.

My use of the term “justice” may be a bit unsettling. Constitutional theorists typically argue about “basic rights” and “fundamental values,” and about “interpretivism” and “originalism,” not about “justice.”⁶¹ However, whatever the special language that constitutional scholars have employed in the past and continue to use, it is at least roughly accurate to say that the status of justice as a proper basis for judicial review has been the leading problem in constitutional theory since Bickel. The high-profile debate about the proper interpretive method for judicial review, between scholars (such as Ronald

⁶¹ But see Sager, *Justice in Plain Clothes*, *supra* note 53, at 435 (arguing that the criteria of “justice” are partly unenforced constitutional criteria).

Dworkin,⁶² Michael Perry,⁶³ Thomas Grey⁶⁴ and Laurence Tribe,⁶⁵ to name only a few) who advocate broader methods and scholars (such as Raoul Berger,⁶⁶ Robert Bork⁶⁷ and John Hart Ely⁶⁸) who oppose these broader methods and instead advocate restrictive versions of "originalism" or the method known as "representation-reinforcement," is at least roughly a debate about whether the requirements of justice furnish sufficient grounds for courts to invalidate statutes.⁶⁹ The scholars in the first group contend that a judge is warranted in invalidating a statute that she takes to be unjust, or at least a statute that she takes to violate certain aspects of justice, such as "privacy," even though the text of the Bill of Rights supports this

⁶² See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

⁶³ See PERRY, *supra* note 6.

⁶⁴ See Grey, *supra* note 6.

⁶⁵ See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

⁶⁶ See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

⁶⁷ See BORK, *supra* note 10.

⁶⁸ See ELY, *supra* note 6.

⁶⁹ The debate about which method for interpreting the Constitution reviewing courts should employ has generated a voluminous scholarly literature. For a useful summary, with bibliography, see MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 1-193 (1993); see also *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); Symposium, *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981). Well-known scholarly contributions that might be classed, along with Dworkin's, Perry's, Grey's and Tribe's, as defenses of relatively broad judicial methods of constitutional interpretation include: BICKEL, *supra* note 1; PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (1989); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); and Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); see also *infra* note 85 (discussing Bickel's special position, as an advocate of the Countermajoritarian Difficulty who also believed courts should employ a broad method of constitutional interpretation, at least as a default matter). Prominent defenders of a narrower judicial approach, along with Bork, Berger and Ely, include: Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988)); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

decision relatively weakly, if at all.⁷⁰ The scholars in the second group make a point of denying this contention.⁷¹

What do I mean by "justice?" John Rawls, our leading theorist of justice, proposes that (political) justice involves two lexically ordered principles, the Basic Liberties Principle and the Difference Principle, which he asserts would be chosen by rational social contractors behind a "veil of ignorance."⁷² But Rawls also explains that this particular proposal represents only one version of the general *concept* of justice:

I view these principles as exemplifying the content of a liberal political conception of justice. The content of such a conception is given by three main features: first, a specification of certain basic rights, liberties and opportunities (of a kind familiar from constitutional democratic regimes); second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to claims of the general good and of perfectionist values; and third, measures assuring to all citizens adequate all-purpose means to make effective use of their liberties and opportunities.⁷³

Political "justice," as a general concept, simply means a set of moral criteria that mark out (what are taken to be) particularly significant aspects of individual well-being,⁷⁴ and that are, therefore, given par-

⁷⁰ I say "relatively weakly" to cover the view that the constitutionalized aspects of justice do not figure in constitutional adjudication wholly independent of the text of the Constitution, see Grey, *supra* note 6 (arguing for unwritten constitutional principles), but rather find textual support in the open-ended language of the Bill of Rights or the Ninth Amendment, or in the overall structure of the Bill of Rights. See Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (locating the right to privacy in penumbra of specific guarantees of Bill of Rights); DWORKIN, *supra* note 62, at 132-37 (arguing that broad clauses in the Bill of Rights, such as due process or equal protection, express moral *concepts* such that the Supreme Court should develop its own best understanding of these concepts, rather than relying upon the particular conceptions held by the Framers); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 54-82 (1994).

⁷¹ See *infra* note 85 (discussing Bork's and Ely's views).

⁷² See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *JUSTICE*]; JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS, *LIBERALISM*]. For Rawls's more recent formulation of the two principles of justice, see RAWLS, *LIBERALISM*, *supra*, at 291.

⁷³ RAWLS, *LIBERALISM*, *supra* note 72, at 6; see also RAWLS, *JUSTICE*, *supra* note 72, at 3-4 ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. . . . [I]n a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.").

⁷⁴ This leaves open the possibility that these aspects of individual well-being are, to some extent, instrumentally rather than intrinsically important. See RAZ, *supra* note 52,

ticular *priority*, relative to other criteria ("the general good"), in ranking governmental actions or political states of affairs. Constitutional scholars who advocate broad methods of judicial review need not agree with Rawls that his two principles best specify the high-priority criteria included under the rubric of "justice." Nor need they agree with Rawls's particular test for significance, the veil of ignorance. However, these scholars do characteristically agree that statutes which violate certain high-priority moral criteria are properly invalidated by courts, just because these criteria take high priority.⁷⁵ That is the standard defense of the Court's decisions in the "privacy" cases such as *Griswold v. Connecticut* or *Roe v. Wade*, which in large part inflamed the scholarly debate about interpretive method described here.⁷⁶ The standard explanation for why a statute that unjustifiably infringes upon "privacy" is not only wrong, but also unconstitutional, is that privacy is (in some way) a particularly important interest.⁷⁷

To be sure, it is certainly possible to support the Court's decisions in *Roe* and *Griswold* while denying that all aspects of justice are included within the set of criteria bearing on constitutionality. "Justice has both negative and positive aspects," one might claim. "The right announced in *Roe* and *Griswold* is a negative right—a right against governmental actions that violate a person's privacy—and it is merely

at 245-63 (arguing that individual rights are often partly grounded in collective interests and not solely in the interests of the rights-holder).

⁷⁵ See, e.g., DWORKIN, *supra* note 62, at 132-37, 147-49; *id.* at 133 ("The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest."); PERRY, *supra* note 6, at 91-145; RICHARDS, *supra* note 69, at 228-47; Brest, *supra* note 69, at 227 ("[C]onstitutional adjudication should enforce those, but only those, values which are fundamental to our society."); FISS, *supra* note 69, at 5-17; *id.* at 11 (arguing that constitutional courts should give meaning to the "public values" that "are central to our constitutional order"); Grey, *supra* note 6, at 706-10 (arguing that constitutional adjudication is properly based on society's basic values, rather than merely the text of the Constitution); Moore, *supra* note 69, at 393-96 (suggesting that constitutional courts properly invalidate statutes that violate real, higher values set forth by the Bill of Rights). *But cf.* Wellington, *supra* note 69, at 279-80 (denying moral priority of constitutional criteria). By "just because," I do not mean that these scholars necessarily take a statute's violating high-priority moral criteria to be sufficient grounds for a court to invalidate the statute, wholly apart from the text of the Bill of Rights. See *supra* note 70 (discussing the possibility that justice figures in constitutional adjudication with weak textual warrant). Rather, the claim might be that the open-ended language of the Fourteenth Amendment or the Ninth Amendment warrants these criteria figuring in constitutional adjudication, just because of their moral priority.

⁷⁶ See *supra* note 9 (discussing the importance of *Roe* and *Griswold* to this debate).

⁷⁷ See Rubinfeld, *supra* note 5, at 752-82 (analyzing and criticizing this standard explanation).

this kind of right, rather than positive rights to governmental assistance, that reviewing courts (however perfect) ought to protect." Yet there also exists a significant and well-known cadre of constitutional scholars who claim, quite clearly, that the positive, moral right to governmental provision of the minimum resources or services needed to secure one's basic welfare—albeit not necessarily enforced by reviewing courts—takes constitutional status. As Erwin Chemerinsky puts it: "Included among the affirmative duties that should be found in the Constitution is the right to basic subsistence: food, shelter, and medical care."⁷⁸ Others who have advanced similar claims include Frank Michelman, Cass Sunstein and Lawrence Sager himself.⁷⁹

Given these claims, it would be, I think, entirely within the range of competent constitutional theorizing for a constitutional theorist to assert the following:

The Target of Justice

A statute, rule, order, or action that is unjust, in any way, violates the criteria bearing on constitutionality. If reviewing courts were epistemically, democratically, remedially and otherwise perfect, they would invalidate unjust statutes, rules, orders or actions as unconstitutional. And to the extent actual courts properly decline to invalidate statutes, etc., they take to be unjust, that is only because of their deficits.⁸⁰

By contrast, I know of no American constitutional scholar who thinks that a merely inefficient statute, or one that tends to produce ugliness in the world, is constitutionally problematic (even unenforceably so).⁸¹ Thus, the target of justice is the broadest plausible target for re-

⁷⁸ Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 527 (1993). Indeed, Chemerinsky goes further and tentatively suggests: "It is the judicial role to declare and enforce such rights." *Id.*

⁷⁹ See *infra* notes 380-85 and accompanying text (literature on constitutional welfare rights).

⁸⁰ See Sager, *Justice in Plain Clothes*, *supra* note 53, at 428-35 (arguing that requirements of justice are constitutional requirements, but are unenforced).

⁸¹ Why not? Why not count efficiency among the criteria bearing on constitutionality on the theory that if courts were epistemically, democratically, remedially and otherwise perfect, they would indeed properly invalidate merely inefficient laws? This line of thinking suggests that, to count among the criteria bearing on constitutionality, some part of morality must not simply be *counterfactually* enforced by reviewing courts, but must additionally ground some actual legal practice (e.g., its judicial enforcement against rules, orders or actions, but not statutes) beyond the background role in law-making that morality always has. See *id.* (proposing a further role of this sort for underenforced criteria of justice). If this point is wrong, and counterfactual enforcement suffices, then we might have yet broader plausible targets against which to test restraintist arguments.

straintist arguments. It is likewise the most generous of the plausible targets. Imagine that a given argument for judicial restraint, whether democratic, epistemic or other, fails to succeed against the target of justice. The argument fails to show why a reviewing court should refrain from enforcing *any* aspect of justice. Then *a fortiori*, the argument will fail to succeed against a narrower view of the criteria bearing on constitutionality—say, the view that includes only some aspects of justice among these criteria.

The general question posed in this Article—“What are the grounds for judicial restraint in the administrative state?”—will thus be given a singular and crisper form: “What are the restraintist grounds for courts to refrain from invalidating rules, orders and actions that they take to be *unjust*?” The focus, here, on restraintist arguments is justified because—as I have tried to show—such arguments comprise a distinct and well-defined subset of the much larger set of arguments to limit judicial review. Identifying the grounds for *judicial restraint* with respect to administrative rules, orders and actions is one discrete step toward the larger goal of specifying the proper contours of judicial review in the administrative state. A complete answer to the larger question—“What kinds of *agency* decisions should be invalidated under the First Amendment, the Takings Clause, procedural due process, the Equal Protection Clause, and the rest of the Constitution?”—presupposes both an analytic theory specifying the content of the true criteria bearing on constitutionality, and a theory of judicial restraint. I start here with a theory of restraint, not an analytic theory, because of the vastness of the analytic task. And, in turn, a crisp way to show that particular arguments for judicial restraint are failures is to show that they fail even against the generous target of justice. This is the strategy that this Article takes.

B. *The Counter-majoritarian Difficulty*

One particular argument for judicial restraint has been, far and away, the most famous and influential in modern scholarship about judicial review. This argument is the Counter-majoritarian Difficulty.⁸²

The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual

⁸² See generally Croley, *supra* note 38, at 712 n.66 (citing sources that characterize the Counter-majoritarian Difficulty as a central problem of modern constitutional theory).

people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. . . . [I]t is the reason the charge can be made that judicial review is undemocratic.⁸³

Alexander Bickel, John Hart Ely and Robert Bork—likely the three most important restraintist scholars in the last half-century—all rely on this kind of claim about the majoritarian cast of legislative bodies⁸⁴ in arguing for the (otherwise quite different) narrowed approaches to judicial review that they defend.⁸⁵

⁸³ BICKEL, *supra* note 1, at 16-17. See generally *id.* at 16-23 (discussing the majoritarian cast of legislatures).

⁸⁴ See *id.* at 16-17 (Bickel's central statement of the Countermajoritarian Difficulty); BORK, *supra* note 10, at 139-41, 153-55, 251-59 (Bork's central statement of the Countermajoritarian Difficulty); ELY, *supra* note 6, at 4-9, 101-03 (Ely's central statement of the Countermajoritarian Difficulty).

⁸⁵ In Bork's case, the narrowed approach he defends—narrowed, relative to the limiting-point view that courts ought to invalidate unjust statutes—is restrictive originalism. I say "restrictive" because there might be more capacious versions of originalism that would make a statute's injustice a sufficient condition for its invalidity—via the claim that the original meaning of the Ninth or Fourteenth Amendments was to proscribe injustice. See PERRY, *supra* note 70, at 54-82 (describing capacious originalism). Bork says something like this: A court legitimately invalidates a statute only if (1) there is some textual provision in the Constitution such that (2) the statute violates the "original meaning" of the provision, *i.e.*, the provision's meaning as given by the semantic rules extant at the time of its framing; and finally, (3) this original meaning must be sufficiently determinate. See BORK, *supra* note 10, at 143-85 (defending originalism); *id.* at 165-66 (rejecting capacious originalism).

John Hart Ely, by contrast, is not a restrictive originalist, because Ely, in *Democracy and Distrust*, identifies one very special aspect of justice—the value of democratic process—that furnishes a court sufficient grounds to invalidate a statute despite the absence of strong originalist grounds for doing so. The general function of constitutional courts, Ely thinks, is just to elaborate this very special value, not only with respect to matters such as voting rights or free speech, but also by invalidating discriminatory statutes that reflect the wrongful exclusion of outsiders from politics—thus the approach to judicial review that Ely calls a "representation-reinforcing" approach. See ELY, *supra* note 6, at 73-104 (defending a "representation reinforcing" approach); *id.* at 11-41 (rejecting "clause-bound" interpretivism). Nonetheless, Ely still counts as a leading critic of broad interpretive methods because a central aim of *Democracy and Distrust* is to show why this very special aspect of justice, democratic process, is the *only* aspect that courts should enforce without a restrictive originalist warrant. See *id.* at 43-72 (criticizing broader theories of judicial interpretation).

Bickel adopts a restraintist posture different from Bork's, and different again from Ely's. Indeed, Bickel's posture is highly idiosyncratic. Unlike Bork and Ely, Bickel insists quite emphatically that justice—what he calls "enduring values" or "principle"—amounts to a proper standard by which reviewing courts properly test statutes, quite apart from the text or original meaning of the Constitution. See BICKEL, *supra* note 1, at 23-28, 65-72, 235-43 (defending his view of the Court as an institution whose core function is to articulate and apply fundamental principles). Yet Bickel also claims that a court should not simply strike down an unjust statute. The famous and idiosyncratic

The Countermajoritarian Difficulty is a legislature-centered argument for restraint—as all general arguments for judicial restraint have been.⁸⁶ It points, centrally, to the special case in which *statutes* are reviewed by constitutional courts, and purports to show why, given certain features of legislatures, this judicial practice should be limited.⁸⁷ In Part II, I will take the Countermajoritarian Difficulty as the exemplar for the entire class of legislature-centered arguments, and show how the argument—successful or not in the special case of statutes—fails to extend into the administrative state. But in order to do so, it is important to clarify exactly what the Countermajoritarian Difficulty says. Despite (or perhaps because of) the fame and influence

suggestion of *The Least Dangerous Branch* is that, instead, a court should (intermittently) employ the procedural devices grouped by Bickel under the heading of the “Passive Virtues” so as to delay a definitive invalidation of an unjust statute and, instead, prompt the democratic branches to comprehend and reconsider the injustice they had wrought. See *id.* at 111-98 (generally describing and defending the Court’s use of Passive Virtues); *id.* at 244-73 (describing and defending the Court’s use of Passive Virtues in *Brown v. Board of Education*); see also Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (demonstrating the centrality of “prudence” in Bickel’s political philosophy).

⁸⁶ Important arguments for judicial restraint that are agency-centered, or at least give significant attention to agencies rather than making legislatures the modal case, have arisen in the various substantive literatures covering one or another part of the Bill of Rights. See, e.g., 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 4 (2d ed. 1978) (raising the possibility of judicial restraint with respect to the Fourth Amendment); JERRY MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 199-205 (1985) (arguing for judicial restraint with respect to procedural due process); see generally *infra* text accompanying notes 336-89 (describing the epistemic cast of these and related arguments). But these agency-centered arguments have been substantive rather than transsubstantive. They have not, yet, been synthesized into a general agency-centered theory of restraint, covering a range of substantive constitutional doctrines, and these arguments have not appeared in the scholarly literature focusing on judicial review and restraint that Bickel animated.

⁸⁷ Again, by describing an argument for restraint, such as the Countermajoritarian Difficulty, as “legislature-centered,” I do *not* mean that its advocates wholly ignore the invalidation of agency rules, orders or actions, as opposed to statutes. See BICKEL, *supra* note 1, at 16-17 (discussing the effects “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive”); BORK, *supra* note 10, at 160 (referring to the “power of courts to invalidate statutes and executive actions in the name of the Constitution”); ELY, *supra* note 6, at 4 (referring to “a court invalidat[ing] an act of the political branches on constitutional grounds”). Rather, I mean that the invalidation of statutes is taken as the modal case, and that no serious attention is given to the problem of reviewing administrative rules, orders or actions rather than statutes. As Ely puts the point in discussing his own work: “[T]his book is written against the paradigm of judicial review of a decision ultimately traceable to legislative action.” *Id.* at 4 n.*. Ely and Bickel both recognize the problem of extending their claims beyond the modal case of statutes, but only briefly discuss it. See BICKEL, *supra* note 1, at 19-20; ELY, *supra* note 6, at 4 n.*, 45 n.9.

of the Countermajoritarian Difficulty, the exact substance of the argument remains unclear.

I construe it this way:

The Countermajoritarian Difficulty

Statutes should be taken to bear the Plebiscitary Feature; and, by virtue of this Plebiscitary Feature, it is wrong (unfair) for courts to invalidate statutes on the mere grounds of justice. To say that a statute bears the Plebiscitary Feature means that the statute would be chosen, by a majority of the citizenry, in a hypothetical plebiscite.

Further, the Countermajoritarian Difficulty is most readily understood as a democratic argument for judicial restraint. It points to the majoritarian, or what I call "plebiscitary," cast of the legislative process as embodying an intrinsic procedural value that is infringed when a court invalidates a statute (because courts are not democratic bodies), and that is sufficiently strong to override the constitutional aspect of justice (e.g., "privacy") at stake. In short, the Countermajoritarian Difficulty identifies the Plebiscitary Feature that statutes should be taken to bear as a democratic, restraintist reason *sufficiently forceful* for courts to refrain from invalidating statutes on certain grounds, even though they are (or may be) at least *prima facie* unconstitutional.

1. The Plebiscitary Feature

In general, a legislature-centered restraintist argument need not rely upon the fact that legislators are elected while (federal) judges are not. It might identify some other difference between legislatures and courts, besides their electoral status, that justifies limiting judicial review.⁸⁸ And, in theory, a legislature-centered argument that does rely upon the legislators' electoral status need not further claim that restraint flows from the particular responsiveness of legislators to the judgments, preferences, beliefs or other attitudes of a majority of the citizenry. Instead, the claim might be that legislators, qua elected, are simply epistemically or remedially well-placed to decide certain moral issues.⁸⁹ The Countermajoritarian Difficulty is simply one *kind* of legislature-centered argument for restraint—albeit a particularly important and distinctive one. What distinguishes it, I suggest, is: (1) a fo-

⁸⁸ See *infra* text accompanying notes 336-39.

⁸⁹ See *infra* note 335 (discussing the epistemic views of Robin West, John Agresto and Carlos Nino).

cus on the *election* of legislators;⁹⁰ (2) a claim that legislators are properly responsive, at least intermittently, to the judgments, preferences, beliefs or other attitudes of the citizenry;⁹¹ and (3) a claim that proper responsiveness of this kind entails responsiveness to the judgments, preferences, beliefs or other attitudes of a *majority* of the citizenry, where citizen judgments, etc., differ.⁹² An economical way to express all this is through the conceit of the "Plebiscitary Feature": the proponent of the Countermajoritarian Difficulty claims, distinctly, that statutes should be taken to bear the Plebiscitary Feature; that is, they would be chosen by a majority of the citizens in some kind of hypothetical plebiscite.⁹³

⁹⁰ See, e.g., BICKEL, *supra* note 1, at 19 ("[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."); ELY, *supra* note 6, at 4 (quoting, with approval, this passage from Bickel); BORK, *supra* note 10, at 4-5 ("The Constitution preserves our liberties by providing that all of those given the authority to make policy are directly accountable to the people through regular elections.").

⁹¹ See, e.g., BICKEL, *supra* note 1, at 18 (referring to the "process of reflecting the will of a popular majority in the legislature"); *id.* at 19 (referring to the electoral process as a means of "making institutions of government responsive to the needs and wishes of the governed"); ELY, *supra* note 6, at 102-103 (referring to the "unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives" and asserting that "[i]n a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office."); BORK, *supra* note 10, at 259 ("There is no way to decide . . . [policy] questions other than by reference to some system of moral or ethical principles about which people can and do disagree. Because we disagree, we put such issues to a vote and, where the Constitution does not speak, the majority morality prevails."); *id.* at 252 (referring to non-originalist judicial review as judges' "impos[ing] their moral philosophy upon a citizenry that disagrees").

⁹² See ELY, *supra* note 6, at 7 ("Our constitutional development over the past century has . . . substantially strengthened the original commitment to control by a majority of the governed. Neither has there existed among theorists or among Americans generally any serious challenge to the general notion of majoritarian control. . . . [M]ajoritarian democracy is . . . the core of our entire system . . ."); *id.* ("[W]hatever the explanation, and granting the qualifications, rule in accord with the consent of a majority of those governed is the core of the American governmental system."); BICKEL, *supra* note 1, at 19 ("[Despite the role of organized groups in the political process], it remains true nevertheless that only those minorities rule which can command the votes of a majority of individuals in the legislature who can command the votes of a majority of individuals in the electorate."); BORK, *supra* note 10, at 139 ("The first principle [of our political system] is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.").

⁹³ The concept of a *hypothetical* plebiscite is not meant to appeal to notions of hypothetical consent, contract, etc., common in political theorizing. Rather, it is meant

This claim is not equivalent to a preference for direct democracy over indirect democracy. I do not mean to suggest that the proponent of the Countermajoritarian Difficulty wishes to replace Congress with some kind of standing national plebiscite. Bickel, Bork and Ely do not articulate such a wish,⁹⁴ nor need they. It is entirely possible, indeed plausible, to believe that (a) it is wrong for courts to invalidate (as unjust) a statute that warrants a claim about the right kind of hypothetical plebiscite, but *not* that (b) it is wrong for courts to invalidate (as unjust) an actual plebiscite—for one might be of the view that plebiscites are fair procedures for resolving disputes about justice only if they meet certain conditions, yet deny that actual plebiscites meet those conditions. In particular, the advocate of the Countermajoritarian Difficulty might idealize citizen judgments, in some way, and express these ideals as restrictions on the hypothetical plebiscite. She might stipulate that voters in her hypothetical plebiscite be reasonable, not just rational; or that they be adequately informed about the requirements of justice. Rawls's veil of ignorance is only the most famous example of this kind of idealization.⁹⁵ Imagine a system of representative democracy in which legislators decline to respond to the downright irrational or stupid judgments of their constituents, or

simply to capture the supposed responsiveness of statutes to voter preferences: although an actual plebiscite has not occurred, an appropriately responsive statute is, equivalently, one that *would* be approved in a plebiscite of the right kind. See *infra* text accompanying notes 105-06.

⁹⁴ See BICKEL, *supra* note 1, at 17 ("Representative democracies—that is to say, all working democracies—function by electing certain men for certain periods of time, then passing judgment periodically on their conduct of public office. . . . What we mean by democracy, therefore, is much more sophisticated and complex than the making of decisions in town meeting by a show of hands."); ELY, *supra* note 6, at 4 ("It is true that the United States is not run town meeting style. . . . But most of the important policy decisions are made by our elected representatives (or by people accountable to them)."); BORK, *supra* note 10, at 253 (referring to "representative democracy" as "the basic institution of our Republic").

⁹⁵ See, e.g., RAWLS, *LIBERALISM*, *supra* note 72, at 47-88, 133-72 (arguing that the content of liberal political conception of justice reflects only "reasonable" disagreements between citizens holding different comprehensive moral views); ACKERMAN, *supra* note 27, at 266-94 (asserting that special moments of "higher lawmaking" have democratic legitimacy only because citizens are sufficiently deliberate and impartial in their judgments); JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* 12 (1991) (arguing for a "deliberative" form of plebiscitary democracy); Paul Weithman, *Contractualist Liberalism and Deliberative Democracy*, 24 PHIL. & PUB. AFF. 314, 317-18 (1995) (noting that theorists of "deliberative democracy" aspire to the refinement of citizens' judgments: "[Citizens] should come to believe that the interests with the greatest claim to satisfaction by political means are interests in the common good and in the free and equal status of all."). It should be emphasized that neither Rawls nor deliberative democrats adopt a plebiscitary theory. See *infra* note 109.

even sometimes to reasonable and informed judgments (say, if the underlying issues are technical, or do not involve fundamental values, or are not deeply contested), but in some instances *do* respond to the reasonable and informed judgments of a majority of the citizenry. A proponent of the Countermajoritarian Difficulty might assert that courts should exercise restraint in the process of reviewing statutes just because legislators are selectively responsive in this appropriate way.

In short, some versions of the Countermajoritarian Difficulty build restrictions into the hypothetical plebiscite that they posit, such that only statutes warranting claims about *that* kind of hypothetical plebiscite are seen to bear the proper Plebiscitary Feature. These restrictive versions of the Countermajoritarian Difficulty readily coexist with a preference for indirect over direct democracy. The claim would be that actual plebiscites do not meet the restriction, and that the very office of legislator is both to respond to and yet to foster the idealization⁹⁶ of citizen judgments, preferences, beliefs or other attitudes in the way that the restriction requires. But even these versions of the Countermajoritarian Difficulty distill the central claim advanced by Bickel, Ely and Bork—that statutes have a majoritarian cast, at least sometimes—into a claim about *some* kind of hypothetical plebiscite. To assert that a statute *S* reflects the actual or somehow idealized judgments, preferences, beliefs or other attitudes held by a majority of the citizenry is precisely to say that *S* would be chosen in a plebiscite where citizens were constrained to vote based upon those kinds of judgments, etc. Further, even in the more restrictive versions of the Countermajoritarian Difficulty, where statutes sometimes warrant claims about hypothetical plebiscites that actual plebiscites do not always warrant, it is still the capacity of indirect-democratic institutions to mimic hypothetical plebiscites that essentially distinguishes

⁹⁶ "Foster the idealization" is meant to be deliberately ambiguous. Perhaps legislators respond to citizen judgments, etc., if and only if legislators take these to be sufficiently reasonable and informed; or perhaps legislators respond to citizen judgments, etc., if and only if these are held with sufficient intensity and consistency (regardless of whether legislators take them to be reasonable and informed), on the grounds that such judgments, etc., are more likely to be reasonable and informed, and that in any event legislators do not have the epistemic capacity to "screen" citizen judgments, etc., beyond screening them for intensity. So my point is *not* that, if one believes in a restricted hypothetical plebiscite, one must further attribute a "screening" role to legislators. My point is simply the following: All one needs to reconcile (1) a plebiscitary theory with (2) a preference for indirect over direct democracy is some kind of further claim that (3) legislators should not always reach their decisions by reference to what they take to be citizens' actual views.

them from courts. The fact that legislatures, but not courts, are responsive to the judgments, preferences, beliefs or other attitudes (albeit idealized) of a majority of the citizenry is still crucial in justifying judicial restraint; otherwise, we are dealing with a different kind of legislature-centered argument altogether.⁹⁷ For these reasons, I think it is fair to characterize even the more restrictive versions of the Countermajoritarian Difficulty as claiming that statutes should, at least sometimes, be taken to bear the Plebiscitary Feature of some kind.

It certainly is open to the proponent of the Countermajoritarian Difficulty to claim that only some statutes bear Plebiscitary Features. The claim might be that the legislative process only intermittently reflects the kind of citizen judgments, etc., that our plebiscitary theory demands—for example, when the public is sufficiently engaged to overcome its normal apathy,⁹⁸ or when legislation is sufficiently salient to prompt legislative attention to what legislators take to be citizen judgments, etc.⁹⁹ I do not mean to deny the possibility of a restraintist who posits an intermittently majoritarian legislature.¹⁰⁰ And this restraintist might deal with her intermittent Plebiscitary Feature in two ways: (a) she might argue that courts should identify, and exercise restraint with respect to, only those statutes that truly bear Plebiscitary

⁹⁷ See Friedman, *supra* note 21, at 630 ("Those enamored of the countermajoritarian difficulty might [argue] that what is important is that courts overturn the will of representative branches. . . . But once one disclaims reliance on the argument that legislatures *actually* represent majority will, or that courts *actually* override it, the countermajoritarian difficulty loses its force. . . . [C]ountermajoritarian theory rests explicitly on the notion that the other branches of government 'represent' majority will in a way the judiciary does not, which in turn rests on the assumption that there is a majority will."); see also Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L.J. 2185, 2204 (1996) (defending the majority-vote procedure for enacting legislation: "Although our topic is legislation, it will be easier to explain the points I want to make about respect in terms of majority decision in a direct democracy, rather than majority decision in a representative legislature. I assume that in the latter context a representative's claim to respect is in large measure a function of his constituents' claims to respect; ignoring him, or slighting or discounting his views, is a way of ignoring, slighting, or discounting *them*. So let us deal direct.").

⁹⁸ See ACKERMAN, *supra* note 27, at 266-94.

⁹⁹ See, e.g., Gary J. Miller, *Formal Theory and the Presidency*, in RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES 289, 289-90 (George C. Edwards III et al. eds., 1993) (discussing a theory of episodic legislative responsiveness to voter preferences, grounded in issue salience and presidential entrepreneurship).

¹⁰⁰ See BICKEL, *supra* note 1, at 17 (noting that representative democracy "operates under public scrutiny and criticism—but not at all times or in all parts. . . . [and that] [d]ecisions that have been submitted to the electoral process in some fashion are not continually resubmitted, and they are certainly not continually unmade").

Features,¹⁰¹ or (b) she might argue that courts lack the epistemic capacity to do *that*, and thus that every statute should be taken (by courts) to bear the Plebiscitary Feature. The latter formulation of the Countermajoritarian Difficulty clearly is more robust, and thus is my focus here. Because courts will have no reason for restraint in reviewing rules, orders or actions by virtue of their statutory pedigree, even if every statute should be taken to bear the Plebiscitary Feature, then *a fortiori* courts will have no reason for restraint in reviewing rules, orders or actions by virtue of their statutory pedigree, where courts are epistemically well-placed to pick and choose among statutes.

Note that a fully fleshed-out version of the Countermajoritarian Difficulty would have to explain what alternatives are placed against the statute in the hypothetical plebiscite. Voters do not choose the winning outcome *simpliciter*; at least under a simple majority-vote procedure; the winning outcome has rather been paired with one or more rejected alternatives, typically including the status quo ante.¹⁰² On a super-strong version of the Countermajoritarian Difficulty, which stipulates that an enacted statute would be chosen over some very large range of possible alternatives in a hypothetical plebiscite, the problem identified in the Introduction and fleshed out below in Part II, may well disappear. Take the health statute and no-abortion rule discussed in the Introduction. The statute authorizes the agency to "issue reasonable rules to assure the health of patients." A moderate version of the Countermajoritarian Difficulty says that voters in a hypothetical plebiscite would choose the health statute over the status quo, and perhaps some range of circulating alternatives (say, all proposed amendments to the health statute that were presented to Congress for a vote, and rejected). A super-strong version might insist that voters in a hypothetical plebiscite would choose the health statute, not only over the status quo and the circulating alternatives, but also over this alternative as well: "The agency is empowered to issue

¹⁰¹ See *id.* at 111-98 (detailing Passive Virtues, whereby courts can refrain from invalidating statutes that have majoritarian support); cf. ACKERMAN, *supra* note 27, at 288-90 (arguing that, on rare occasions, transformative statutes function as informal constitutional amendments, such that in light of the sustained popular support for the principles that these statutes embody, the Supreme Court performs a doctrinal "switch in time," and upholds the statutes rather than invalidating them).

¹⁰² See generally MUELLER, *supra* note 28, at 58-95 (summarizing public-choice literature that shows the susceptibility of majority-vote procedures to "cycling," and, relatedly, the importance of agenda-setting power, by virtue of the diversity of voter preferences in ranking any given alternative against others); WILLIAM RIKER, *LIBERALISM AGAINST POPULISM* (1982) (same).

reasonable rules to assure the health of patients, *except* a no-abortion rule." Thus the no-abortion rule, under this super-strong version, directly bears the Plebiscitary Feature, quite independent of the statutory pedigree of the no-abortion rule or the institutional structure of the administrative state.

The super-strong version, however, seems quite ad hoc. Unless the alternative of excepting the no-abortion rule was on the legislature's or the nation's agenda at the time the health statute was enacted, why are we warranted in concluding that the health statute would be chosen over that alternative in a hypothetical plebiscite?¹⁰³ I assume that, at best, a moderate version of the Countermajoritarian Difficulty holds true. Further, let us make the status quo ante (rather than the status quo ante plus some range of circulating alternatives) the only alternative covered by the Plebiscitary Feature; this simplifies exposition but does not change the argument at all. A statute bears the Plebiscitary Feature, on this simplified construal, if it would be chosen over the status quo in a hypothetical plebiscite. Relatedly, then, the Countermajoritarian Difficulty says that judges ought not "invalidate" the statute in the sense of depriving it of legal force, i.e., restoring the status quo. (If circulating alternatives were included, then the Countermajoritarian Difficulty would preclude judges from restoring the status quo *or* replacing the statute with one of the circulating alternatives.)¹⁰⁴

¹⁰³ One response might be that we are warranted in reaching that conclusion if the legislature ought to have considered the alternative under applicable norms of conscientious legislation. This possibility is considered below. See *infra* text accompanying notes 188-97. But, at this stage, we should not assume a particular (strong) account of what the norms of conscientious legislation require by stipulating that statutes bear Plebiscitary Features against all alternatives.

¹⁰⁴ In short, I am adopting a "facial" rather than an "as-applied" version of what it means to "invalidate a statute" within the Countermajoritarian Difficulty. Further, the individuation principle I am adopting is that a single statute equals a text separately enacted by Congress, i.e., a single entry in the *Statutes at Large*. A court "facially" invalidates a (single) statute when it holds that the statute is entirely unconstitutional—not properly applicable in *any* instance. A court invalidates a statute "as applied" when it holds that *some* instance of the statute is constitutionally improper. See generally Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (discussing the "facial"/"as-applied" distinction). Note that the facial, but not the as-applied version, requires a theory of individuating statutes. Under the as-applied version, all one has to say is that some instance of the entire corpus of unrepealed texts has been held to be constitutionally improper; while on the "facial" version, one needs to decide whether a single statute equals a single prescriptive sentence, a single provision, a single entry in the *Statutes at Large*, or the entire corpus of unrepealed texts. See generally JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 70-92, 140-47 (2d ed. 1980) (discussing the problem of individuating laws); Joseph Raz, *Legal Principles and the Lim-*

What objections might be advanced against my construal of the Countermajoritarian Difficulty? It might, of course, be objected that statutes do not really bear Plebiscitary Features—that legislators are really responsive to organized minorities, or that Arrow's Theorem renders the whole notion of majority rule misconceived, and so on.¹⁰⁵ But I am not endorsing the Countermajoritarian Difficulty in this Article. I am simply making the generous assumption that it works in the case of statutes, and then formalizing the argument so as to see whether, *even on this assumption*, it can be extended to administrative rules, orders or actions.

Another objection might be that there are good grounds, quite independent of the majoritarian cast of legislatures, for courts to refrain from invalidating statutes. Again, this is correct: I focus on the

its of Law, 81 YALE L.J. 823, 825-29 (1972) (same). I am individuating statutes textually, not semantically, so as to leave open the possibility that a legislature might enact seriatim two semantically identical but separate "statutes," only one of which is invalidated by the courts. Cf. FREDERICK SCHAUER, *PLAYING BY THE RULES* 62-64 (1991) (noting the view that rules should be individuated by their semantic content, not by the sentences that express this content).

So my conception of "invalidating a statute" is, in these ways, a relatively narrow one. But that conception fits the notion of legislative *choice* underlying the Countermajoritarian Difficulty and other legislature-centered theories. The notion is that, when the legislature chooses option 1 (enacting some text T) over option 0 (for simplicity, the status quo), option 1 has some special property—the Plebiscitary Feature—relative to option 0. We are warranted in predicting that a hypothetical plebiscite of appropriately idealized citizens would choose option 1 over 0. If this is true, and if the warranted prediction does indeed give courts some reason for restraint, then *that* is reason for courts not to pick option 0 over 1—which is what a "facial" invalidation of T involves. By contrast, "as-applied" invalidation means partially repealing T (to exclude the instances held invalid by the court). In short, it means that the court chooses some option 2 (partially repealed T) over 1. Similarly, if T includes multiple provisions or sentences, "facially" invalidating some part of T means, again, choosing some option 2 over 1. But perhaps our hypothetical plebiscite would reach the same result! See generally sources cited *supra* note 102 (describing the importance of the "cycling" problem to majority-vote procedures: the fact that a majority votes for 1 over 0 does *not* imply that it would vote for 1 over 2, 3, 4 and so forth). The legislature's enactment of 1 over 0 does not warrant our predicting that the hypothetical plebiscite would choose 1 over 2, and thus provides the court no reason for restraint in requiring 2 over 1—or at least not in the same way that it provides the court reason for restraint in requiring 0 over 1.

Now, it might be objected that we can extrapolate from the legislature's choice, and, for example, derive the Plebiscitary Feature for the choice of 1 over 2. Indeed, this is precisely the question we will consider in Part II. But it is important to leave the question open for a substantive debate; the question ought not be settled by fiat, at the definitional stage, by defining "invalidating a statute" to include "as-applied" invalidation or "facial" invalidation of parts of a single enacted text.

¹⁰⁵ See Friedman, *supra* note 21, at 628-53 (presenting criticisms of the Countermajoritarian Difficulty).

Countermajoritarian Difficulty as an exemplar, not as the only possible kind of legislature-centered argument. This particular argument describes statutes as responsive, or sometimes responsive, to the judgments, etc., of a majority of the citizenry. Such a description, I claim, is equivalent to describing statutes as bearing, or sometimes bearing, the Plebiscitary Feature.¹⁰⁶

2. Democratic, Epistemic and Analytic Arguments

The Countermajoritarian Difficulty is not an analytic argument about the content of constitutional criteria. Nor is it an epistemic, restraintist argument. Rather, the best interpretation of the Countermajoritarian Difficulty is that it is a *democratic* argument for judicial restraint.¹⁰⁷

The argument, thus construed, starts from the premise that it is intrinsically proper for the lawmaking process to amalgamate in a fair way the (perhaps idealized) judgments, preferences, beliefs or other attitudes of the citizenry, quite apart from the goodness or rightness of the outcomes of that process (statutes) in some other respect.¹⁰⁸

¹⁰⁶ It is, of course, open to the majoritarian theorist to make a yet more modest claim: not that *statutes* bear Plebiscitary Features, but that *legislators* do. "The elected legislator, as compared to his opponent, has been elected by a majority of the voters—and that is *all* I mean by describing the legislature as majoritarian," the theorist might say. But this kind of majoritarian theory is not, yet, a theory of judicial restraint. Courts review statutes, not legislators, and the theorist must tell us why courts should limit their practice of doing that.

Imagine that the theorist draws some kind of link (democratic, epistemic or other), between the plebiscitary cast of *legislators*, and the statutes they enact, short of actually conferring the Plebiscitary Feature on statutes. We then, indeed, have a different kind of legislature-centered argument for restraint than the Countermajoritarian Difficulty, as I construe it. But my arguments against the Simple Extension of the Countermajoritarian Difficulty are meant to apply generally to all legislature-centered arguments. See *infra* Part II.B. Nor is it the case that the theorist can *a priori* extend her argument to administrative agencies by treating the entire administrative state as a single institution headed by an elected official, the President. For who knows *a priori* whether the democratic or epistemic link from Plebiscitary Presidents to agency rules, etc., is the same as the link from plebiscitary legislators to statutes? See *infra* text accompanying notes 327-34.

¹⁰⁷ For a seminal discussion of the different possible interpretations of arguments to limit judicial review, particularly those that appeal to the democratic cast of legislatures, see DWORKIN, *supra* note 62, at 131-49.

¹⁰⁸ This premise (which I mean not to defend, but simply to excavate) might in turn be supported in various ways. One way might be this: a citizen's participation in politics, including lawmaking, is an aspect of her autonomy (her self-governance), which in turn partially constitutes or indeed lays the foundation for her good life. Such a notion is regularly advanced in the literature on procedural due process, to explain why individual participation in adjudication might be valued even if its positive

This argument offers the further premise that, where judgments, preferences, beliefs or other attitudes differ, a majority-vote procedure is the fairest way to resolve such differences. Just how these premises are specified, and justified, might vary. For example, one might offer a quasi-Rawlsian story,¹⁰⁹ which goes like this:

Justice is objective but highly contestable. Reasonable citizens disagree about what the values of justice require. At least where there is a sufficient degree of reasonable disagreement about sufficiently important values, including the values of justice, it is wrong to impose a particular understanding of those values, even if that understanding is objectively correct, absent a fair procedure. A fair procedure for resolving reasonable disagreements, including reasonable disagreements about justice, is to decide the issue by the right kind of majority vote among those concerned. Majority vote is a fair procedure because of May's theorem.¹¹⁰ "Right kind" means, *inter*

effect on the outcome of adjudication is nil. See, e.g., Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII 126, 127 (J. Roland Pennock & John W. Chapman eds., 1977) ("[Participatory procedures] seem responsive to demands for *revelation* and *participation*. They attach value to the individual's *being told why* the agent is treating him unfavorably and to his *having a part in the decision*."); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981) ("The unifying thread in this literature [on procedural due process] is the perception that the effects of process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decisionmaking."); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 4 (1974) ("My principal thesis in this Essay is that a legal process can be good, *as a process*, in two possible ways, not just one: It can be good not only as a means to good results, but also as a means of implementing or serving process values such as participatory governance, procedural rationality, and humaneness.").

Another way to support the premise might be to advert to notions of consent and the role of consent in establishing legitimacy. See Hurd, *supra* note 48, at 1657-63 (describing and criticizing consent-based theories). Yet a third way might be to claim that giving a citizen's judgment weight in a governmental decision is a way of respecting her. See Waldron, *supra* note 97, at 2204-06.

¹⁰⁹ Jeremy Waldron, in an important recent article, presents a defense of majoritarianism along these lines—one that contemplates citizen disagreement even about justice itself, and that sees majority vote as a fair procedure for resolving these disagreements. See Waldron, *supra* note 97, at 2197-214. This defense is quasi-Rawlsian because it draws upon Rawls's idea of respecting disagreement; but only quasi-Rawlsian because Rawls, himself, does not defend disagreement about justice. Rather, Rawls posits a *single* conception of justice that results from disagreement about morality more broadly. See *id.* at 2201-02 (describing and criticizing Rawls's views). Similarly, Waldron suggests, proponents of "deliberative democracy" downplay voting because they fail to take adequate account of citizen disagreement. See *id.* at 2188-89.

¹¹⁰ See MUELLER, *supra* note 28, at 96-100 (presenting and offering a proof of May's

alia, that the participants must in fact hold reasonable conceptions of justice and be motivated to vote by these conceptions.¹¹¹

This is only one account of why it is intrinsically proper for citizens's judgments, preferences, beliefs or other attitudes (here, judgments about justice) to have a role in politics, and what sort of majority-vote procedure (here, an idealized one) is intrinsically fair for reconciling these attitudes. Other accounts, quite different in their details, might well be offered. The general idea behind such accounts, however, is that a fair majority-vote procedure employed to reconcile citizen judgments, etc., in this way realizes some intrinsic value (call it "plebiscitary fairness"), which is attached to a statute bearing the Plebiscitary Feature. Thus, the Feature is not merely instrumental to a statute's efficiency, utility or justice, or to its goodness or rightness in some other respect.

References to the intrinsic fairness of majority-vote rules, and conversely to the unfairness worked by judicial review, are replete in the literature on the Countermajoritarian Difficulty.¹¹² "[C]oherent, stable—and *morally* supportable—government is possible only on the basis of consent, and . . . the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account."¹¹³ Judicial restraint is therefore warranted, according to the democratic construal, because the very act of judicial review violates the intrinsic value of plebiscitary fairness. This is true

theorem); see also Waldron, *supra* note 97, at 2211-12 (suggesting that majority vote is the only procedure that accords equal respect to persons in "circumstances of politics").

¹¹¹ Cf. RAWLS, *LIBERALISM*, *supra* note 72, at 47-88 (asserting that the content of political justice is specified with reference to different, but "reasonable," comprehensive moral views).

¹¹² See, e.g., BICKEL, *supra* note 1, at 17 (arguing that judicial review "thwarts the will of representatives of the actual people of the here and now"); *id.* at 18 (describing legislative action as the process of "reflecting the will of a popular majority"); ELY, *supra* note 6, at 7 ("[R]ule in accord with the consent of a majority of those governed is the core of the American governmental system."); *id.* (describing majoritarian democracy as either, for the moral absolutist, a "tenet of natural law" or, for the moral relativist, "the most natural institutional reaction to the realization that there is no moral certainty"); BORK, *supra* note 10, at 139 ("The first principle [of our governmental system] is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities."); *id.* at 153 ("The orthodoxy of our civil religion, which the Constitution has aptly been called, holds that we govern ourselves democratically, except on those occasions . . . when the Constitution places a topic beyond the reach of majorities.").

¹¹³ BICKEL, *supra* note 1, at 20.

even if courts are epistemically perfect, and even if the statute violates the constitutional criterion (aspect of justice) at stake.

Let us abstract the democratic construal of the Countermajoritarian Difficulty as follows:

The Countermajoritarian Difficulty (Democratic Construal)

A statute may violate a criterion C bearing on constitutionality—some aspect of justice, such as “privacy”—relative to some alternative (the status quo) that does not. The statute is at least *prima facie* unconstitutional, insofar as it violates C.¹¹⁴ It is also the case, however, that judicial review (invalidating the statute and returning society to the status quo, by virtue of C) violates the intrinsic democratic value D of plebiscitary fairness. Plebiscitary fairness is weightier than C, and so judicial restraint is required even if courts are epistemically perfect with respect to what C (and D) require.¹¹⁵

Alexander Bickel, the author and first defender of the Countermajoritarian Difficulty, intended, quite clearly, to advance a democratic argument of this kind—not an epistemic argument, and not an analytic one.¹¹⁶ And although later proponents, such as Robert Bork and

¹¹⁴ On the Revisionist Construal of “unconstitutional,” the statute is unconstitutional. On the Traditional Construal, the statute is *prima facie* unconstitutional, by virtue of violating some criterion bearing on constitutionality, but not all-things-considered unconstitutional because of democratic value D’s overriding weight. See *supra* text accompanying notes 53-59 (discussing Revisionist and Traditional Construals).

¹¹⁵ It may be possible to defend a mixed democratic view, such that courts which are not epistemically perfect, but are epistemically better placed than legislatures to determine what C requires, ought to uphold statutes bearing Plebiscitary Features. (Perhaps democracy becomes important because no institutions are epistemically perfect, and citizens know that no institutions are perfect.) Even on this mixed view, however, the *contribution* that the Plebiscitary Feature makes is democratic, not epistemic. The fact that the statute bears the Feature does not provide the court sufficient reason to believe that it satisfies C; rather, invalidating the statute is still wrong because it infringes upon D. (As I argue below, it is implausible to think that the Plebiscitary Feature makes an epistemic contribution. See *infra* text accompanying notes 124-26.) The central point, both in the mixed case and in the pure case of deference by epistemically perfect courts, is that an institution better placed to determine what justice requires nonetheless upholds what it takes to be an unjust statute by virtue of some overriding democratic value.

¹¹⁶ As noted, Bickel thought that justice (what he called “principle” or “enduring values”) furnished a proper standard for constitutional adjudication, quite apart from the Constitution’s text or the Framers’s original meaning or intentions. See BICKEL, *supra* note 1, at 23-29, 65-72, 235-43. He urged courts to refrain from invalidating “unprincipled” statutes that had sufficient majoritarian support—relying upon the various procedural devices, lying halfway between invalidation and affirmance on the merits, that Bickel termed the Passive Virtues—even though courts were, in his view,

epistemically well-placed to determine what "principle" required, and *even though* such statutes remained unprincipled, indeed perhaps unconstitutional. *See id.* at 111-98 (generally describing the Passive Virtues). Why? Because invalidation would be undemocratic, despite the statute's injustice, indeed unconstitutionality. Thus Bickel's summary of the Passive Virtues:

[J]udicial review brings principle to bear on the operations of government. By "principle" is meant general propositions, as Holmes called them . . . ; organizing ideas of universal validity in the given universe of a culture and a place, ideas that are often grounded in ethical and moral presuppositions. . . .

Exercising a function of this description, however imprecise, in a society dedicated both to the morality of government by consent and to moral self-government, the Supreme Court touches and should touch many aspects of American public life. But it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government The means [to resolve this problem are] "the passive virtues."

Id. at 199-200. *See generally id.* at 111-98 (describing the Passive Virtues more fully).

Quite clearly, Bickel rejected an epistemic account of the Countermajoritarian Difficulty. Again and again, *The Least Dangerous Branch* asserts that "the Court is the institution best fitted to give us a rule of principle," *id.* at 261, and that "the elected institutions are ill fitted, or not so well fitted as the courts, to perform [this] task." *Id.* at 27; *see also id.* at 26, 65-72, 82, 95, 156, 199-200 (discussing the advantages of courts, relative to elected bodies, in reaching "principled" decisions). Majority rule is not an epistemic tool. Indeed it is precisely the responsiveness of legislatures to the preferences of a majority of the electorate that, for Bickel, undermines their epistemic capacity. As Bickel explained:

Men in all walks of public life are able occasionally to perceive this [principled] aspect of public questions. Sometimes they are also able to base their decisions on it; that is one of the things we like to call acting on principle. Often they do not do so, however, particularly when they sit in legislative assemblies. There, when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view. . . . [T]he creative establishment and renewal of a coherent body of principled rules—that is what our legislatures have proven themselves ill equipped to give us.

Id. at 24-25.

As for the analytic claim that a statute with sufficient majoritarian support is thereby rendered "principled" and constitutional: again, this clearly is not what *The Least Dangerous Branch* intends. An analytic construal of the Passive Virtues would be weird: "An otherwise unprincipled statute that has majority support is not unprincipled, solely because it has majority support; and so the Court should exercise the Passive Virtues with respect to that statute." If the statute is not unprincipled, why not simply uphold it? The Passive Virtues, for Bickel, were rather just a means by which courts could avoid the unfortunate alternative of upholding and thereby legitimating unprincipled statutes, while also avoiding the undemocratic alternative of invalidating them. *See id.* at 69 ("The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or, in Charles L. Black's better word, 'legitimate' legislation as consistent with principle. Or it may do neither. It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency."); *see also id.* at 200 (same).

Consider Bickel's most famous and controversial example of the Passive Vir-

John Ely, do not articulate any such intention, and almost surely would not avow one,¹¹⁷ I suggest that the democratic construal is by far the most charitable and plausible interpretation of what these authors mean when they invoke the majoritarian cast of statutes.

What else might they be saying? Imagine that a reviewing court prepares to invalidate a statute as violative of some aspect C of justice, say "privacy"; the proponent of the Countermajoritarian Difficulty points to the statute's Plebiscitary Feature as sufficient reason for the court to refrain from invalidation. What kind of significance, if not democratic significance, might the Plebiscitary Feature have? Consider the following three alternatives: (1) the reference to the Plebiscitary Feature might be mere verbiage; (2) the Plebiscitary Feature might have analytic significance; or (3) the Plebiscitary Feature might have epistemic significance.

As for the first alternative, the Countermajoritarian Difficulty is, indeed, sometimes mixed together with arguments for limiting judicial review that are wholly independent of the majoritarian cast of legislation (in my terms, wholly independent of a statute's "Plebiscitary Feature"). For example, both Ely and Bork advance a metaethical, analytic argument against decisions such as *Roe* and *Griswold*, to the effect that supposed aspects of justice, such as "privacy," are purely subjective. In effect, they say this: "C is not a constitutional criterion and furnishes no basis for judicial review, because it has no objective content. Statements of the form 'this is unjust' no more than an-

tues: the sequence of decisions by the Court in *Brown v. Board of Education* I (holding school segregation unconstitutional) and II (denying an immediate remedy). Bickel thought that *both* decisions were correct; he thought that (1) school segregation was "unprincipled" and therefore unconstitutional; *but also* that (2) because segregation had the support of a majority of Southerners, an immediate remedy would have been undemocratic. See *id.* at 250-51; see also *id.* at 244-72 (full discussion of this example). This is restraintist, not analytic praise for the *Brown* decisions. If Bickel had held the odious analytic view that the support of a majority of Southerners rendered segregation just and constitutional, he would have had to believe that *Brown I* was wrongly decided.

¹¹⁷ Consider, for example, what the democratic argument says in the context of the Court's "privacy" jurisprudence: "Privacy is indeed an objective value of justice, that is part of the criteria bearing on constitutionality; and a statute that violates privacy is indeed unconstitutional, or at least *prima facie* unconstitutional; but the statute nonetheless ought not be invalidated if it bears the Plebiscitary Feature." Certainly Bork and Ely do not *admit* that privacy is an objective value of justice that takes constitutional status. See BORK, *supra* note 10, at 95-100, 110-26, 257-59 (criticizing the Court's privacy jurisprudence); Ely, *supra* note 10, at 920 (same); cf. ELY, *supra* note 6, at 221 n.4 (distinguishing *Griswold* from *Roe*, as defensible in terms of a less open-ended approach to constitutional interpretation).

nounce the subjective preferences of the speaker, and of course, statutes, rules, orders or actions are not unconstitutional simply because they violate someone's subjective preferences."¹¹⁸ If such claims about the subjectivity of justice are true, however, then further claims about the Plebiscitary Feature of statutes are superfluous. Imagine that C is indeed subjective and, further, that some governmental decision challenged as violating C—for example, an administrative rule or order issued by an unelected bureaucrat—turns out not to bear the Plebiscitary Feature. Nonetheless, the reviewing court is surely not licensed to invalidate the administrative rule or order as violating C.¹¹⁹ The subjectivity of C is sufficient reason for C *not* to figure in judicial review, whether or not the decisions under review are majoritarian.

The Countermajoritarian Difficulty does not build upon the metaethical argument about the subjectivity of justice, or other argu-

¹¹⁸ Consider this excerpt from *The Tempting of America*:

Every clash between a minority claiming freedom from regulation and a majority asserting its freedom to regulate requires a choice between the gratifications (or moral positions) of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the competing claims. . . .

....

We may put aside the objection, which seems to me itself dispositive, that the judge has no authority to impose upon society even a correct moral hierarchy of gratifications. I wish to make the additional point that, in today's situation, for the reasons given by [Alasdair] MacIntyre, *there is no objectively "correct" hierarchy to which the judge can appeal.*

BORK, *supra* note 10, at 257-58 (emphasis added). Or consider this one from Ely's *Democracy and Distrust*:

The view that the judge, in enforcing the Constitution, should use his or her *own values* to measure the judgment of the political branches is a methodology that is seldom endorsed in so many words. As we proceed through the various methodologies that are, however, I think we shall sense in many cases that although the judge or commentator in question may be talking in terms of some "objective," nonpersonal method of identification, what he is really likely to be "discovering," whether or not he is fully aware of it, are his own values.

ELY, *supra* note 6, at 44 (footnote omitted); *see also* Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653, 657-68 (1991) (noting subjectivist strain in Ely); BARBER, *supra* note 2, at 2-10, 78-80, 124-29 (discussing Bork's moral skepticism).

¹¹⁹ By referring to the objectivity of these criteria, I mean simply that claims about their content are truth-stating and that the truth of such claims is fixed by more than the speaker's own beliefs; this leaves open the possibility that conventions, rather than nature, play the truth-fixing role. *See* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 607-08 (1993) (distinguishing between subjectivism, where "[t]o say that something is right . . . is to say that it seems right to me, no more, no less," and "minimal objectivity," where "what seems right to the majority of the community determines what is right").

ments for limiting review that are independent of the Plebiscitary Feature.¹²⁰ Just the opposite: the proponent of the Countermajoritarian Difficulty must *presume* that his target, C, is an objective, normative criterion included among the criteria bearing on constitutionality.¹²¹ For if C is subjective, or for some other reason not included among the set of constitutional criteria, then C cannot be judicially enforced against statutes, rules, orders and actions, whether or not these have Plebiscitary Features attached. If "privacy," for example, is really subjective, then invoking the Countermajoritarian Difficulty against decisions such as *Roe* and *Griswold* is mere verbiage.

A second possibility is that the Plebiscitary Feature is not superfluous, but rather has analytic significance. Imagine a conventionalist view of justice that concedes C's objectivity and constitutional status, but sees the Plebiscitary Feature as constitutive of what C requires. Conventionalism, generally, is the view that objective morality, including justice, is a kind of convention, constituted (in some way) by our common practices, understandings or beliefs.¹²² So one might try to

¹²⁰ Another view that is wholly independent of the Plebiscitary Feature, and that turns references to the majoritarian cast of statutes into mere verbiage, is analytic originalism: the view that, quite independent of the epistemic capacities of courts and the democratic wrongs they might work, the only criteria by virtue of which courts properly invalidate statutes, rules, orders or actions are the criteria set out with sufficient specificity in the text of the Constitution. See generally Farber, *supra* note 7 (analyzing the originalism debate). By contrast, *restraintist* originalism could be something like the following: Reviewing courts may rely upon non-originalist criteria in reviewing governmental decisions only insofar as these do not bear Plebiscitary Features.

¹²¹ A final possibility, one I do not discuss at any length here, is that a statute bearing the Plebiscitary Feature functions as an informal constitutional amendment: it "repeals" C, so that C is no longer a criterion bearing on constitutionality. See generally ACKERMAN, *supra* note 27, at 266-94 (presenting a theory of "transformative statutes" functioning as informal constitutional amendments). In this way, the statute's Plebiscitary Feature might have analytic, not restraintist significance—analytic not to the best understanding of C, but to its constitutional status. I take this to be an even more startling and demanding reading of the Countermajoritarian Difficulty than my democratic reading; statutes would need to bear very strong Plebiscitary Features indeed to amend the Constitution, and Ackerman takes great pains to specify the hurdles that a statute must overcome to be "transformative." See *id.* ("When put to the test, most movements will fail to generate the deep and decisive support required before they can constitutionally speak in the special accents of We the People of the United States.").

¹²² Conventionalists disagree with moral realists, who assert that an action or state of affairs can be unjust or wrong, independent of any of our conventions. See Moore, *supra* note 69, at 286 (arguing that there is a "moral reality," or "a right answer to moral questions," which should inform the interpretation of legal texts); DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 14-36 (1989) (discussing realism and conventionalism in ethics). See generally BARBER, *supra* note 2, at 147-201

offer a conventionalist, analytic account of the Plebiscitary Feature: "C is not independent of the Plebiscitary Feature; rather, what fixes C's content simply is the right kind of plebiscite." But is this at all plausible? Conventionalism comes in different flavors. A "deep conventionalist," such as Dworkin, gives relatively more weight to general moral concepts like privacy, speech or equality, and relatively less weight to the specific moral conceptions that, for the deep conventionalist, such general concepts can override. A "shallow conventionalist," who might appeal to an "evolving consensus" or to "tradition," gives more weight to specific conceptions and less to general concepts. A shallow and even a deep conventionalist might acknowledge that a proper plebiscite or a statute bearing the Plebiscitary Feature is one element in that set of practices, understandings and beliefs which collectively constitute "justice." At the margin, then, a single proper plebiscite affirming some outcome might constitute that outcome as just, even though the outcome would be unjust by virtue of the remainder of the constitutive set. But that is quite different from saying that a single proper plebiscite necessarily constitutes its outcome as just (until the next plebiscite), independent of the rest of our understandings, practices and beliefs. That would be a super-shallow, and highly implausible, variant of conventionalism.¹²³ Although the idealized, or possibly idealized, nature of the Plebiscitary Feature might give comfort to someone who accords the Feature analytic significance, it must be remembered that idealization cannot be so strong as to preclude citizen disagreement. A law promulgated by a plebiscite of reasonable, informed citizens who nonetheless disagree with one another might still violate the Difference Principle, or privacy, or free speech.

Finally, the Plebiscitary Feature might have epistemic, rather than democratic significance. On this construal, the Countermajoritarian Difficulty says: "Plebiscitary legislatures are epistemically well-placed

(discussing and criticizing conventionalism in Ronald Dworkin's thought, and in liberal constitutional thought generally).

¹²³ See Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2260 n.114 (1992) (denying that the outcome of a plebiscite fixes moral facts, even for a conventionalist). To be sure, there might be *some* aspects of justice that go to the very process of lawmaking, and that are exhausted by the plebiscitary cast of legislatures. Procedural due process in lawmaking might be like this. One might take the view that justice-in-procedure demands notice, some kind of hearing, and some kind of evidentiary process for lawmaking by unelected agencies, but not for lawmaking by majoritarian legislatures. See *supra* note 52. But this is simply another way of saying that the plebiscitary cast of legislatures makes them especially democratic—not that it makes their outcomes especially just for all the aspects of justice.

to determine what C requires, while courts are not; thus, the legislature's enactment of this statute provides a court sufficient reason to believe that the statute does not violate C."¹²⁴ Note that this construal forces us to read the standard, celebratory claims about the intrinsic fairness of majority vote—standard among advocates of judicial restraint—as misconceived. A majority-vote rule, under the epistemic construal, is simply a mechanism for producing statutes that are good or right by other standards. Indeed, the epistemic construal makes the very emphasis on the majority-vote rule, as opposed to alternate voting rules, a puzzle. Why are *plebiscites* especially accurate mechanisms for determining what justice requires, rather than procedures that employ, say, a 67% rule, or a 41% rule?¹²⁵ Nor is it clear what would lend the plebiscite this supposed accuracy about justice. Our Median Voter might simply be wrong in her judgment about what our justice-constituting conventions, deep or even shallow, require.¹²⁶ Of course, if super-shallow conventionalism holds true, the Median Voter will necessarily be right about justice. In that case, however, we are back to an analytic, not an epistemic, construal of the Countermajoritarian Difficulty.

One might try to avoid this problem by building restrictions into the plebiscite—by requiring the voters to be, for example, impartial, deliberate and well informed—but these restrictions would either be

¹²⁴ See *infra* text accompanying note 244 (an epistemic interpretation of Thayer's view); *infra* text accompanying notes 336-89 (an epistemic argument for restraint, independent of elected cast of legislators); *infra* note 335 (citing sources that adopt an epistemic argument that depends, in part, on the elected cast of legislators). Even if one were to take the view that the legislator, qua elected, is epistemically better placed on matters of constitutional law, it seems implausible that being elected by a 51% rule, as opposed to a 48% rule, or a 75% rule, is required to give the legislator her epistemic advantage. But see Carlos Santiago Nino, *A Philosophical Reconstruction of Judicial Review*, 14 CARDOZO L. REV. 799, 822-31 (1993) (an epistemic argument for judicial restraint, grounded in part in the majoritarian cast of legislation).

¹²⁵ See MUELLER, *supra* note 28, at 96-100 (stating and proving May's Theorem: majority vote is the only voting rule that satisfies four conditions of decisiveness, anonymity, neutrality, and positive responsiveness); see also *id.* at 52 (if the appropriateness of a voting rule depends merely on its total costs—external costs plus decisional costs—then the priority of the majority-vote rule over other voting rules is contingent on the shape of these cost curves).

¹²⁶ See PERRY, *supra* note 70, at 96-101, 106-10 (arguing that legislatures are epistemically weaker than courts on matters of constitutional law, by virtue of the legislator's elected status: constitutional knowledge requires deliberation, while the legislator has an electoral incentive to respond to her constituents' views instead of deliberating); DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION* 331-62 (1966) (Congress's constitutional competence has diminished over the course of the twentieth century as it has become increasingly responsive to the electorate).

too strong or too weak. If the idealized voter's judgment about justice must be *right*, then we have eliminated the element of majority-vote (not unanimity) characteristic of plebiscitarian theories. A properly unanimous plebiscite is an oxymoron. Even the idealized voter must be capable of erring about our justice-constituting conventions in a plebiscitarian theory and, if so, it is hard to see why the proper plebiscite would be particularly well-placed epistemically to determine what C requires. Further, even if it *were* true that the Plebiscitary Feature has an epistemic function nearly ensuring that statutes bearing it do not violate C, we would need an additional explanation for why courts are epistemically weaker than legislatures with respect to C—an explanation that advocates of the Countermajoritarian Difficulty do not standardly provide. Although Bork and Ely do conflate the claim that (a) "It is undemocratic for courts to invalidate statutes as unjust" with the claim that (b) "Justice is subjective," they do *not* further claim that (c) "Courts are epistemically weaker than legislatures with respect to objective justice."

* * *

In short, *The Least Dangerous Branch* is not only the origin of the Countermajoritarian Difficulty, but also its standard version. The best reading of what its more recent proponents, such as Bork and Ely, might mean by the "Countermajoritarian Difficulty" is precisely what its framer, Bickel, plainly meant: a democratic, restraintist argument for courts to refrain from invalidating statutes, albeit statutes that are unjust and at least *prima facie* unconstitutional, where judicial review would be unfair and undemocratic. It is, quite properly, an argument for "judicial restraint," yet one that must be understood as making strong, restraintist claims about the intrinsic fairness of the legislative process. Let us now see whether these strong claims can be extended into the administrative state.¹²⁷

II. SIMPLE EXTENSIONS

Should constitutional reviewing courts exercise restraint in the

¹²⁷ The argument below in Part II, against Simple Extensions, does not presuppose that the Countermajoritarian Difficulty is democratic rather than epistemic; my assertion will be that legislature-centered arguments *generally* fail. However, because such arguments do indeed fail, we will need to look to institutional structure, not mere interpretive pedigree; and, for that enterprise, the democratic rather than epistemic cast of the Countermajoritarian Difficulty is absolutely crucial. See *infra* Part III.

administrative state? What, if any, reasons for restraint bear upon the judicial practice of invalidating administrative rules, orders and actions—as opposed to the practice of invalidating statutes? An argument for “judicial restraint,” again, is an argument for limiting judicial review based upon some deficit (such as an epistemic deficit or a democratic deficit) of the reviewing court, just insofar as this deficit does not change how the statute, rule, order or action under review fares (relative to the status quo or relevant alternatives) under the criteria bearing on constitutionality. Such arguments are directed against the broader conceptions of judicial review that, at the limiting point, take “justice” as an appropriate criterion for reviewing courts to enforce. Imagine, then, the limiting-point conception of judicial review in the administrative state: on this conception, a reviewing court properly invalidates a *rule, order or action*, merely because it takes the rule, order or action to be unjust. Can we identify good, restraintist reasons to reject this conception?

Maybe not. There may well be no grounds for judicial restraint in the administrative state. More strongly yet, there may well be no grounds for judicial restraint in the administrative state *even if* legislature-centered theories of restraint, such as the Countermajoritarian Difficulty, hold true. Such theories point to the supposed advantages of legislatures, relative to courts (such as democratic or epistemic advantages), in order to show why courts ought not invalidate *statutes* merely because they take these to be unjust. For example, as we have seen, the Countermajoritarian Difficulty is a legislature-centered restraintist argument that rests upon the intrinsic democratic value of “plebiscitary fairness.” It says that (1) statutes should be taken to bear the Plebiscitary Feature, such that (2) it is unfair and, all things considered, wrong for a court to invalidate statutes on the mere grounds of justice. Both of these propositions have been vigorously criticized by constitutional scholars; but let us imagine that these criticisms fall short.¹²⁸ Assume that both propositions are true. One might *still* ask whether it would be unfair and, all things considered, wrong—a violation of the intrinsic value of plebiscitary fairness—for courts to invalidate unjust rules, order or actions. That is, one might still ask

¹²⁸ See generally Croley, *supra* note 38, at 748-78 (discussing a range of possible responses to the Countermajoritarian Difficulty); Friedman, *supra* note 21, at 628-53 (same). These criticisms of (1) and (2) may well be correct; nothing said in this Article is meant to suggest otherwise. The criticisms will not be repeated or elaborated upon here, because they already have been made so well as part of the well-worn debate about judicial invalidation of statutes.

whether the restraintist reasons identified by the Countermajoritarian Difficulty or any other legislature-centered restraintist theory also provide grounds for restraint in the administrative state. No one has seriously analyzed this question. I claim that the answer may well be "No."¹²⁹

This question urgently requires an answer. The practice of invalidating statutes is only one special part of the general practice of judicial review. This is true at the Supreme Court level, and even more at the level of the lower federal courts. Courts commonly, indeed, normally, exercise the power of judicial review—which means, at a minimum, the power to invalidate (state and federal)¹³⁰ statutes, rules, orders and actions on direct constitutional grounds¹³¹—without

¹²⁹ Again, I must emphasize that I am not the first to raise this point. See sources cited *supra* notes 20-21 (recognizing the error in conflating judicial review with the review of statutes). I do think it fair to say, however, that the problem of extending legislature-centered arguments into the administrative state—or indeed developing general, agency-centered arguments that have no analogues for legislatures—has not been given the full-blown scholarly scrutiny that this Article attempts to provide.

¹³⁰ The focus of this Article is federal. The arguments against Simple Extensions, developed in this Part, apply equally against Simple Extensions from state statutes to state rules, orders and actions. Clearly, however, a full inquiry into the actual democratic, epistemic, or further features of agencies relevant to judicial review of agency decisions—the inquiry sketched out in Part III—should separately consider state as well as federal agencies.

¹³¹ "Order," here, includes a judicial order. See *infra* note 132 (discussing an empirical study by Seth Kreimer that finds that challenges to judicial orders comprise a significant portion of the constitutional claims raised in the lower federal courts). By "direct constitutional grounds," I mean to exclude the universal, and derivative, constitutional challenge lurking behind every statutory challenge: that agency action which is illegal under the governing statute, at least where a governing statute is constitutionally required, see *infra* note 133, is itself unconstitutional. See *Dalton v. Specter*, 114 S. Ct. 1719, 1726-28 (1994) (holding, for purposes of the principle that presidential decisions are reviewable for constitutionality, that a claim that the President has acted in excess of statutory authority is not a constitutional claim). "Invalidation" includes the partial or "as-applied" invalidation of rules and statutes, as well as "facial" invalidation, but the focus of the Countermajoritarian Difficulty, as I have construed it, is on "facial" invalidation. See *supra* note 104.

Further—and this is crucial—invalidating administrative rules, orders or actions on direct constitutional grounds encompasses more than a judicial holding that, "This rule, etc., is unconstitutional." It also encompasses judicial invalidation of rules, orders and actions as poor interpretations of their governing statutes, just insofar as the Court invokes constitutional criteria in interpreting the statutes. See *infra* Part II.A.2 (discussing the pervasive role of the Avoidance Canon in the judicial interpretation of statutes). In particular, I count judicial invalidation of a rule, order or action under the rubric of the "serious constitutional doubts" doctrine, as an instance of judicial review. See *infra* Part II.D. To insist that judicial review in the administrative state does not encompass application of the Avoidance Canon, in particular its "serious constitutional doubts" component, is to make a serious semantic and conceptual mistake—

invalidating statutes.¹³² If the Countermajoritarian Difficulty or other

one that risks excluding, by definitional fiat, the very possibility of differential restraint. See *infra* text accompanying notes 323-25 (developing this point).

I say that judicial review includes, "at a minimum," the power to invalidate statutes, rules, orders and actions on direct constitutional grounds, because judicial review might also be taken to include the power to *uphold* (and therefore legitimate) statutes, rules, orders and actions. See, e.g., BICKEL, *supra* note 1, at 69 (noting that judicial articulation of principle encompasses both "striking down legislation as inconsistent with principle" and "validating or, in Charles L. Black's better word, 'legitimizing' legislation as consistent with principle"). It is beyond the scope of this Article to consider what reasons for restraint, if any, bear upon judicial review in this broader sense. I thank Seth Kreimer for pressing me to recognize this point, and apologize for not yet being able to answer it.

¹³² My colleague Seth Kreimer recently completed an extremely valuable empirical study of constitutional claims raised in the Supreme Court and the federal trial courts. Professor Kreimer found:

At the Supreme Court level, the challenged decision maker is most often the legislature, and least often an individual executive official. Legislative actions are at issue in two out of five cases decided by the Supreme Court; decisions by individual bureaucrats appear only half as often. The frequency of cases roughly mirrors the breadth of effect and dramatic import of the challenged decision: the legislative decision is the most deserving of the Supreme Court's limited resources, and the least likely to be controlled by sub-constitutional decision rules.

In the trial court's caseload the order is reversed. Challenges to legislative action are by far the least prevalent type of constitutional review, while challenges to actions by street level bureaucrats generate almost half of the constitutional claims. In the district court sample, only [7.6% of the claims] challenge legislative action. In contrast, decisions by individual officials and police officers, which accounted for barely a fifth of Supreme Court cases (18%) spawn 45% of the cases before the trial courts. Individual civilian officials account for [28% of the cases], police officers for [17.5%]. This reversal is not solely an application of the proposition that law application is a far more frequent activity than legislation. Although both judges and administrative agencies apply law, decisions by both judges and administrative agencies account for the same proportion of cases in the Supreme Court and District Court dockets. Judges made the challenged decisions in a third of the cases and challenges to administrative agency action comprise about one case in six.

Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, WM. & MARY BILL OF RIGHTS J. (forthcoming Summer 1997) (manuscript at 40-41, on file with the *University of Pennsylvania Law Review* and author).

Nicholas Zeppos has performed an important empirical study of the Supreme Court's constitutional caseload, which demonstrates, dramatically, the extent to which the Supreme Court relies upon constitutional criteria in interpreting statutes rather than invalidating statutes. See Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 309-12, 335-45 (1993). Zeppos studied 55 years of Supreme Court cases, up through the 1991-92 Term, and, strikingly, found that: "In this time period, the Court invalidated 69 acts of Congress. Significantly, however, on 86 occasions the Court invoked a constitutional value to interpret a statute narrowly." *Id.* at 309 (footnotes omitted). In particular, as we shall see, importing constitutional criteria into the interpretation of statutes provides an

legislature-centered theories do not reach beyond the practice of reviewing statutes, then the importance of such theories, even if true, will be quite limited. Bork, Ely, Bickel and other advocates of restraint will at best have identified restraintist reasons (plebiscitary fairness, or whatever) that properly constrain reviewing courts only in the special case of statutory review.

There are two possible strategies for demonstrating that courts should exercise restraint in the administrative state. The first possible strategy—the simple one—is to show that legislature-centered reasons for restraint also bear upon the judicial practice of reviewing rules, orders and actions merely by virtue of the statutory pedigree of these rules, orders and actions. Each and every rule, order or action that an administrative agency issues or takes is issued or taken pursuant to an underlying statute. Each and every one, to be legally proper, must be a proper interpretation of that underlying statute.¹³³ So the following sort of argument, which I will call the “Simple Extension,” might be offered:

The Simple Extension of the Countermajoritarian Difficulty

Assume the Countermajoritarian Difficulty is true. Then the following is also true: If an administrative rule, order or action is a good interpretation of a statute that is properly taken to bear the Plebiscitary Feature, then it is unfair and, all things considered, wrong for a court to invalidate the rule, order or action on the mere grounds of justice.

Such an argument tries to show why courts have reason to exercise restraint in reviewing rules, orders and actions, *quite independent of* the particular, institutional structure of the administrative state—

important mechanism for judicial invalidation of agency rules, orders and actions. See *infra* Parts II.A.2, II.D. (discussing the Avoidance Canon and the “serious constitutional doubts” doctrine).

My definition of judicial “invalidation” of a statute is narrow: it includes facial but not as-applied invalidation. See *supra* note 104. What Kreimer and Zeppos show is that statutory invalidation (of any kind) comprises only a minority of judicial review cases, even at the Supreme Court level. In turn, I would conjecture, “facial” invalidation is only a relatively small fraction of total statutory invalidation. See Dorf, *supra* note 104, at 236-39 (showing that facial invalidation is highly disfavored under the Court’s announced doctrine, and arguing that it is only appropriate if there exists a constitutional or statutory restriction on severability).

¹³³ It could be argued that this claim needs to be qualified for special cases. Cf. *Dames & Moore v. Regan*, 453 U.S. 654, 669-89 (1981) (upholding presidential suspension of American claims against Iran pending in American courts, absent direct statutory authority). Because, I claim, the statutory pedigree of rules, etc., does *not* require restraint, the argument need not be addressed here.

independent of the epistemic or democratic capacities of particular agencies;¹³⁴ the intensity of presidential oversight;¹³⁵ the intervention of legislative committees;¹³⁶ and so forth. I have called it a "Simple Extension" because it claims that the restraintist reason identified in some legislature-centered theory can be extended to the entire, broad range of judicial review simply because of the interpretive link between every rule, order and action and the underlying statute.¹³⁷

This Part demonstrates that the simple strategy is a failure. Section A analyzes, at length, the Simple Extension of the Countermajoritarian Difficulty and rejects it. Again, I focus on the Countermajoritarian Difficulty because of its importance and fame in the literature on judicial review, and because of the clarity that an analytic focus brings. My claim, however, is that the Countermajoritarian Difficulty (in lacking a Simple Extension) exemplifies the broader class of legislature-centered theories. Thus Section B shows why the analysis offered in Section A is equally applicable to other legislature-centered theories, such as epistemic theories or democratic theories that rely upon democratic values other than plebiscitary fairness. Section B shows that these theories, too, lack a Simple Extension.

Section C examines a set of arguments that are closely related to the Simple Extension—arguments to the effect that the *reversibility* of agency decisions by Congress generates a reason for judicial restraint—and shows how such arguments rest upon a basic misconception about the nature of judicial review in the administrative state. Finally, Section D turns to existing legal doctrine concerning the proper scope of judicial review of rules, orders and actions and explains how this doctrine, in interesting and hitherto-unnoticed ways, *confirms* the analyses offered in Sections A, B and C.

I should emphasize that this Part takes us only halfway home—not all the way. As I have argued, there are two possible strategies for

¹³⁴ See generally WILSON, *supra* note 28, at 72-110 (describing the influence of interest groups and of internal agency "culture" on agency decisionmaking).

¹³⁵ See sources cited *infra* notes 327-34.

¹³⁶ See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990) (an empirical study of congressional oversight over agencies); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 122-23 (1996) (summarizing rational-choice literature on congressional control and citing sources).

¹³⁷ See ELY, *supra* note 6, at 4 n.* (implicitly proposing a Simple Extension of the Countermajoritarian Difficulty and claiming that it would hold true if the nondelegation doctrine were revived).

showing why courts should exercise restraint in the administrative state. The first is to develop a Simple Extension of some legislature-centered argument for restraint: to show why restraint follows from the statutory pedigree of rules, orders and actions, quite independent of the democratic, epistemic or other features of the various institutions that make up the administrative state. The second strategy is to attend to those institutional features and show how, at least in some cases, such features do indeed furnish good, restraintist grounds for limiting review. For example, it might be claimed that some administrative rules, orders or actions do in fact bear Plebiscitary Features—not by virtue of the Simple Extension of the Countermajoritarian Difficulty, but rather by virtue of (a) the plebiscitary cast of the Presidency, plus (b) the President's capacity to oversee the decisions of (at least some) agencies.¹³⁸ Or, the claim might be that the expert staff, the decisional processes, the formal structure, the informal culture or some other feature or features of certain agencies lends them an epistemic advantage—relative to courts—with respect to certain constitutional questions, and thus that courts have epistemic grounds for restraint on these questions, in reviewing the rules, orders or actions of these agencies.¹³⁹

This Part rules out the first, simple strategy, not the second, harder one. I do not give a conclusively negative answer to the question, "Do courts have grounds for restraint in the administrative state?" Rather, I show what shape a positive answer to that question will need to take. A theory of judicial restraint for the administrative state must take on the difficult task of analyzing its institutional structure. Such a theory will need to tell us *what agencies are like*, democratically or epistemically, and how this bears on the judicial practice of reviewing administrative rules, orders or actions. *That* is the scholarly task that, until now, our (legislature-centered) debates about judicial review have ignored. Hard as it is, it is a task that cannot be avoided if we are to know whether courts should exercise restraint beyond the special case of invalidating statutes. The failure of the Simple Extension does not foreclose, but rather compels, this task—a task that, in Part III, I begin to undertake. The statutory pedigree of every rule, order or action is indeed an institutional truth (of sorts) about the administrative state; but it is much too thin a truth to justify, without much more, a practice of judicial restraint.

¹³⁸ See *infra* text accompanying notes 327-34.

¹³⁹ See *infra* text accompanying notes 336-89.

A. *The Simple Extension of the Countermajoritarian Difficulty*

The Simple Extension of the Countermajoritarian Difficulty is false. We cannot move, via the interpretive process, from the assumed truth of the Countermajoritarian Difficulty to the truth of the further claim that it is unfair and, all things considered, wrong for courts to invalidate rules, orders and actions that are good interpretations of statutes bearing the Plebiscitary Feature. In particular, as this Section will show, the Simple Extension is false in a regime of "values-statutes," even on a generous version of the Countermajoritarian Difficulty in which all statutes warrant claims about the outcomes of highly idealized plebiscites. A "values-statute," as I shall use that term, is a statute that sets forth some value such as "health," "safety," "competition," "communication," "education," "just compensation" or "equality"—some basic aspect of individual well-being or of a just, democratic republic—pursuant to which the agency is authorized to issue rules, promulgate orders, or take actions. Values-statutes epitomize the formal delegation that is characteristic of the administrative state.¹⁴⁰ By the term "administrative state," again, I mean to signal not

¹⁴⁰ See, e.g., Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 475 (1985) [hereinafter Pierce, *Constitutional and Political Theory*] (describing Congress's broad delegations of power to administrative agencies, including statutes that authorize agencies to take action pursuant to stated "decisional goals," and noting that "[m]any recently enacted statutes contain only lists of decisional factors or goals to guide agency actions"); 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 2.6, at 68 (1994) (same); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1253 (1985) (distinguishing between "rules statutes" which "state rules demarcating permissible from impermissible conduct," and "goals statutes" which "state goals, which usually conflict, and delegate the job of reconciling any such conflicts to others who are entrusted with promulgating the rules of conduct necessary to achieve those goals"); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 401 (1987) [hereinafter Pierce, *Political Accountability and Delegated Power*] (estimating that "goals statutes" as defined by Schoenbrod, or equally indeterminate rules statutes, comprise 99% of all present congressional delegations to agencies); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 411-18 (1989) (describing and defending "goal-oriented legislation"); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 327 (1987) (agreeing with Professor Pierce that the "Schoenbrod test would invalidate most of the federal regulatory statutes now on the books"). William Eskridge nicely describes the importance, and distinctive nature, of what I am calling "values-statutes" when he says: "[S]tatutes are frequently written as directives not to the citizenry but to the bureaucracy. . . . The content of the statute then consists of creating or identifying the agency, structuring its decision making, and suggesting the overall goals or guidelines for the agency's ongoing implementation of the statutory scheme." WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 2 (1994). David Schoenbrod has become a prominent defender of the nondelegation doctrine, which

just the existence of administrative agencies, but, more particularly, the absence of any significant nondelegation constraints¹⁴¹ on Congress's conferral of authority upon them; where, in turn, a nondelegation constraint is a constraint upon the "indeterminacy" of statutes (defined in the modest sense elaborated below). Let us hold in abeyance the objection that values-statutes are themselves unconstitutional because they would violate a properly revived nondelegation doctrine. The focus here on values-statutes is doubly justified: first, because the nondelegation doctrine has not yet been revived, and second, because this focus on the extreme case will show most crisply the weaknesses in the Simple Extension, which reach much more broadly to rules-statutes that no plausible nondelegation doctrine would preclude.¹⁴²

The Simple Extension claims that it is "unfair" for courts to invalidate rules, orders or actions that are good interpretations of statutes bearing the Plebiscitary Feature. Note two different possible versions of this claim, one stronger and one weaker. The stronger version is that such rules, orders or actions bear the Plebiscitary Feature themselves—they warrant claims about the outcomes of hypothetical plebiscites—and so the intrinsic unfairness in their invalidation is just the unfairness intrinsic to judicial invalidation of statutes. The weaker version is that, although rules, orders or actions that are good interpretations of statutes bearing the Plebiscitary Feature do not, necessarily, bear the Feature themselves, it is still intrinsically unfair, in some way, for courts to invalidate them, say, because the interpretive process is the fairest process for elaborating a statute that has been enacted through the fairest possible process for making law.¹⁴³

(he proposes) ought to be built around precisely the distinction between permissible rules-statutes and impermissible values-statutes. See SCHOENBROD, *supra* note 29, at 180-91; Schoenbrod, *supra*, at 1249-74; David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 826-28 (1983); David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 358-66 (1987). I use the term "values-statute" rather than "goals-statute" so as to avoid the utilitarian flavor of "goal."

¹⁴¹ See *infra* note 214 and accompanying text (discussing the demise of the non-delegation doctrine).

¹⁴² By a "rules-statute," I mean a statute that directly changes the legal position of some citizens and that merely authorizes the agency to interpret, enforce and adjudicate these statutory rules rather than further stating some background value as a separate basis for agency rules, orders or actions.

¹⁴³ See ESKRIDGE, *supra* note 140, at 13-14 ("Theories of statutory interpretation in the United States have in this century emphasized the original meaning of statutes, and debates have focused on identifying the best evidence of that original meaning. . . . This 'archaeological' . . . focus of traditional approaches to statutory interpre-

This weaker version of the Simple Extension might initially seem more attractive precisely because it is weaker; one need not make the strong showing that proper rules, orders or actions would be the outcome of a hypothetical plebiscite.

Yet the attraction is chimerical. Imagine that invalidating proper rules, orders or actions is unfair, but in some different sense than invalidating the underlying statute would be. The advocate of restraint would then argue that this alternate unfairness amounts to a reason for limiting the enforceable criteria for judicial review of rules, orders or actions just as the primary unfairness involved in the Counter-majoritarian Difficulty amounts to a reason for limiting the enforceable criteria for judicial review of statutes. But why should these two reasons, alternate and primary, be equally potent and thus equally limiting? The restrictive originalist, for example, points to the Plebiscitary Feature of statutes as a reason for constricting the enforceable criteria for judicial review of statutes from Justice plus the Positive Constitution to only the Positive Constitution.¹⁴⁴ The primary sense of fairness outweighs Justice, but is outweighed by positive, higher law. The alternate sense might not be precisely this weighty. It might not be strong enough to exclude Justice (or some aspects of Justice) as legitimate grounds upon which courts may invalidate rules, orders or actions. So we would *still* end up with a disjunction between the practice of reviewing rules, orders and actions, and the practice of reviewing statutes—perhaps, in the former case, with no judicial restraint at all.

First, then, we should determine whether the stronger version of the Simple Extension is true—whether rules, orders or actions that arise as proper interpretations of statutes bearing the Plebiscitary Feature *also* bear the Feature, i.e., whether they warrant the claim that they would be chosen over the status quo in hypothetical plebiscites. This Section will show why the strong version of the Simple Extension is false and, in so doing, will show why any weaker version must also be false.

The hypothetical plebiscites about which statutes, and perhaps rules, orders or actions as well, warrant claims, according to the Counter-majoritarian Difficulty, might be more or less restricted. How

tation is inspired in large part by anxiety that non-elected officials feel when they make policy decisions in a democracy. . . . [These] theories promise that statutory interpretation in concrete cases can be analytically connected with decisions that have been made by a majority-based coalition in the legislature").

¹⁴⁴ See *supra* note 85 (discussing Bork's restrictive originalism).

the participants' judgments, preferences, beliefs or other attitudes should be idealized, if at all, depends on the underlying democratic theory that accords intrinsic value to a proper plebiscite. For example, Rawls asserts as a basic axiom and requirement of citizenship that citizens be "ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so."¹⁴⁵ This "reasonable" point of view, Rawls explains, lies between mere rationality (where the citizen is moved only by her own good) and pure impartiality (where the general good suffices to move her).¹⁴⁶ The quasi-Rawlsian democratic theory sketched out above¹⁴⁷ sees majority vote as a fair procedure for resolving the disagreements about these "fair terms of cooperation" that might arise even between "reasonable" citizens. On this theory, a statute bears the Plebiscitary Feature only if it warrants a claim about a hypothetical plebiscite in which citizens take the special, intermediate point of view that Rawls calls "reasonable."¹⁴⁸ Or consider Ackerman's denial that a statute has any special legitimacy if merely supported by the hasty, distracted judgments of citizens who are ordinarily intent on leading their own private lives outside the sphere of politics. Ackerman insists that citizens must transcend rational apathy and reach deliberate, "considered" judgments, before Congress can claim to speak for "We the People":

[M]ost private citizens have no trouble recognizing that most of their voting decisions do not measure up to *their own standards of deliberateness*; and that, if they took the trouble to think about the issues more carefully, their judgments might well be different from the relatively superfi-

¹⁴⁵ RAWLS, *LIBERALISM*, *supra* note 72, at 49.

¹⁴⁶ *See id.* at 50; *see also id.* at 17 n.18 (stating that justice as fairness is perched on the idea of reciprocity, between the idea of impartiality and the idea of mutual advantage).

¹⁴⁷ *See supra* text accompanying notes 108-17.

¹⁴⁸ "Deliberative democrats" typically propose an even less self-interested perspective. *See* Paul J. Weithman, *Contractualist Liberalism and Deliberative Democracy*, 24 PHIL. & PUB. AFF. 314, 317 (1995) (noting that deliberative democracy requires that: "Deliberation and debate about legislation and policy should be debate about what policy best promotes the common or the public good. Democratic politics should not take the form of competition among groups each of which advocates legislation on the basis of its particular economic, social or sectional interests."). For a recent contribution to this literature, *see* AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY & DISAGREEMENT* (1996). Again, I am relying on the Rawlsians and deliberative democrats as exemplars of how citizen judgments are idealized. These theorists, however, are *not* majoritarians; rather, they emphasize consensus among idealized citizens, at least within the domain of the theory (for Rawlsians, the domain of justice). *See supra* note 109.

cial views they now hold.¹⁴⁹

Under a quasi-Ackermanian theory, it would be unfair for a court to invalidate the outcome of a proper majority vote among citizens, but only if the voters had adequately deliberated before forming their respective judgments. While the quasi-Rawlsian theory idealizes citizens's judgments along one dimension (point of view), the quasi-Ackermanian theory does so along another (degree of deliberation). A third dimension concerns information¹⁵⁰—a proper plebiscite might require well-informed citizens—and there might be yet further dimensions of restriction.

It seems apparent that, as our democratic theory places increasing restrictions on the hypothetical plebiscites that figure in the Counter-majoritarian Difficulty, by idealizing citizen judgments along one or more of these dimensions—and thereby limiting the range of citizen disagreement—the Simple Extension becomes *increasingly* plausible. Consider the following case. A flag-burning statute states that "No person shall burn a flag of the United States." A war protester burns a flag to protest the war, and an administrative order is entered directing her to pay a civil fine.¹⁵¹ Given a suitably restricted hypothetical plebiscite, it seems, the order bears the Plebiscitary Feature if the statute does. Where the participants in our hypothetical plebiscite need simply be rational, not reasonable (in Rawls's sense of the distinction, with rationality keyed to the participant's own plans, projects and interests, and reasonableness to some conception of what is fair), the Median Voter in the plebiscite would be free to vote for the statute but against the order—say, because the war protester is a friend of hers, or because she plans to engage in war protest herself. But assuming that the Median Voter's judgments are sufficiently idealized, then the Simple Extension *does* seem to hold true in this application. This result follows because, first, the statutory prescription is determinate in this application—no one reasonably disagrees that the war protester's particular action is an instance of flag burning—and

¹⁴⁹ ACKERMAN, *supra* note 27, at 241-42 (footnote omitted).

¹⁵⁰ Cf. Connie S. Rosati, *Persons, Perspectives, and Full Information Accounts of the Good*, 105 ETHICS 296, 296-99 (1995) (discussing informed-preference accounts of individual well-being); David Sobel, *Full Information Accounts of Well-Being*, 104 ETHICS 784, 790-93 (1994) (same).

¹⁵¹ Cf. *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (overturning a state prosecution for flag burning under a statute that prohibited desecration of the flag); *United States v. Eichman*, 496 U.S. 310, 312 (1990) (overturning a federal prosecution for flag burning under a statute that prohibited mutilation of the flag).

second, the aspect of justice at stake in this instance, free speech, seems to be an aspect of justice that the Median Voter reasonably should have determined to override. That is, she should not have voted for the statute unless she believed that the prescription was, all things considered, justified in this very type of application (one including all the morally relevant features of the war protester's particular act of flag burning): the type of application where the flag burner is speaking rather than, for example, merely disposing of flags.¹⁵²

Let us imagine, then, that a highly idealized Countermajoritarian Difficulty holds true. It is not so idealized as to preclude some range of disagreement among citizens (for otherwise a plebiscite would be unnecessary), but still stringent in demanding impartiality, deliberation, informedness and other positive, consensus-creating attributes that a democratic theory might value. Nonetheless, as we shall now see, the Simple Extension is generally false, particularly in a regime of values-statutes. Even if the highly idealized Median Voter would vote for a given values-statute, she might not vote for a rule, order or action that is properly issued or taken pursuant to that statute.

1. Values-statutes and the Strong Version of the Simple Extension

By virtue of what flaws does the Simple Extension fail to hold true in a regime of values-statutes? An exemplary case to illustrate the flaws is *Skinner v. Railway Labor Executives' Ass'n*.¹⁵³ In *Skinner*, the Supreme Court upheld, over Fourth Amendment challenge, a rule promulgated by the Federal Railroad Administration ("FRA"), requiring railroads to perform drug and alcohol testing of railway workers after railroad accidents.¹⁵⁴ The Federal Railroad Safety Act of 1970, pursuant to which the agency promulgated this rule (the "drug-testing rule") is an exemplary values-statute. The relevant provision of the Act authorizes the FRA to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety."¹⁵⁵ Assume that the drug-testing rule in fact violates the best

¹⁵² See *infra* text accompanying notes 188-97 (discussing theories of conscientious legislation).

¹⁵³ 489 U.S. 602 (1989).

¹⁵⁴ See *id.* at 633-34.

¹⁵⁵ *Id.* at 606 (citing 45 U.S.C. § 431(a) (1970)). The Act and this provision were repealed, as part of a general codification of the transportation laws without substantive change. See Revision of Title 49, Transportation, United States Code, Pub. L. No. 103-272, 1994 U.S.C.C.A.N. (108 Stat. 745) 818. The provision currently authorizing the promulgation of railroad safety rules is codified at 49 U.S.C. § 20103(a) (1994).

analytic understanding of the basic value ("security")¹⁵⁶ embodied in the Fourth Amendment,¹⁵⁷ but is otherwise a good interpretation of the Safety Act. That is, assume that the rule is justified in terms of "safety," the prime statutory value, because it effects a net reduction in the rate of human death or injury relative to the status quo; and that, in addition, the railroad's costs of complying with the rule are less than the rule's benefits, i.e., safety is not overridden by any other (nonconstitutional) values. Finally, assume that a generous version of the Counter-majoritarian Difficulty holds true; the Safety Act bears the Plebiscitary Feature, such that an idealized Median Voter would vote in favor of the Act. This is not a vacuous statement. It implies that the Median Voter would support federal rather than state authority, would judge the FRA to be a sufficiently expert institution, and would give a negative rather than a neutral or even positive valuation to safety risks in railroading (by contrast with, say, safety risks in hang gliding). But the statement, if not vacuous, is certainly thin. It certainly does *not* imply that the idealized Median Voter would support the drug-testing rule.¹⁵⁸

What defeats the Simple Extension in *Skinner*, to begin with, is the problem of indeterminacy—by which I mean not the absence of objectively correct interpretations of legal standards, or the unknowability of these correct interpretations, but, more modestly, the possibility of disagreement among interpreters about the proper interpretation of (even) objective and knowable standards. This is the modest sense of "indeterminacy" conceded, indeed assumed, by Dworkin when he

("The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety . . ."). Because my discussion of the Safety Act is meant to be exemplary, and because the Safety Act was at issue in *Skinner*, I use the present tense in my discussion of the Act.

¹⁵⁶ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

¹⁵⁷ That is, assume that the Court's decision in *Skinner* can only be justified, if at all, as an exercise in judicial restraint.

¹⁵⁸ Note that if the Simple Extension does hold true here, then the democratic theorist must count judicial invalidation of the following to be *equally* counter-majoritarian: (a) the rule, enacted by the FRA under a wide-open Safety Act; (b) the Safety Act itself; and (c) a drug-testing statute identical to the rule, but passed by Congress. So, for example, the restrictive originalist who relies upon the Counter-majoritarian Difficulty and Simple Extension must argue that, although a law that violates the best understanding of "security" is thereby unconstitutional or at least *prima facie* unconstitutional, a court should restrict itself to the (narrower) original meaning of the Fourth Amendment in reviewing *not only* the drug-testing statute, but also the drug-testing rule.

says that some legal problems comprise "hard cases."¹⁵⁹ If all interpreters were Hercules, then perhaps no cases would be "hard"; so perhaps one should provide a relativized definition of this modest indeterminacy. A legal standard is modestly indeterminate, relative to some interpreters (constrained to take a particular point of view, to be more or less deliberate, to have more or less information, and so forth) if the thus-constrained interpreters remain free under those constraints to disagree about the interpretation of the legal standard. For the remainder of this Section, I will use "indeterminacy" to mean modest indeterminacy in this relativized way and assume that statutes are, at most, only modestly indeterminate.¹⁶⁰ If the Simple Extension falls short on this premise, then *a fortiori* it falls short if statutes are more robustly indeterminate.¹⁶¹

Note again that plebiscitary theories cannot (it seems) foreclose modest indeterminacy because the very concept of a plebiscite presumes the permissibility of some citizen disagreement.¹⁶² In particular, a values-statute such as the Safety Act will be indeterminate with respect to its prime value—here, safety—in a significant fraction of its applications. This is particularly true where the application is a rule, such as the drug-testing rule, that at best achieves small reductions in the absolute number of deaths and injuries.¹⁶³ The source of the in-

¹⁵⁹ See DWORKIN, *supra* note 62, at 81-130; see also RAWLS, LIBERALISM, *supra* note 72, at 54-58 (asserting that "burdens of judgment" produce "reasonable disagreement" between citizens).

¹⁶⁰ See Waldron, *supra* note 97, at 2206 & n.63 (building a majoritarian theory from citizen disagreement, without claiming the absence of objective moral truth).

¹⁶¹ See BRIAN BIX, LAW, LANGUAGE & LEGAL DETERMINACY 1 (1993) (defining the problem of legal indeterminacy as "whether law always (or most of the time or never) provides unique correct answers to legal questions").

¹⁶² The fact that a statute would hypothetically be approved by a majority of the citizenry, and not (more robustly) that it would hypothetically be approved by unanimous vote, can give rise to some kind of reason for judicial restraint only on the premise that citizens in this hypothetical plebiscite properly disagree about something. Otherwise, why does the existence of a mere hypothetical majority create our restraintist reason? Now, the advocate of judicial restraint could, in theory, claim that statutes should be taken to bear Unanimity Features—and thus, without contradiction, deny the existence of even modest indeterminacy among his idealized citizens—but the advocates of the Counter-majoritarian Difficulty do not claim that. I take "majoritarian" to rule out this Unanimity Feature interpretation. A Unanimity Feature argument for restraint would, of course, run right into an institutional problem: Why do legislatures have any special claim to instantiate the Unanimity Feature?

¹⁶³ See, e.g., STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 42-50 (1993) (discussing sources of uncertainty in risk assessment); CARL F. CRANOR, REGULATING TOXIC SUBSTANCES: A PHILOSOPHY OF SCIENCE AND THE LAW 12-48 (1993) (discussing sources of uncertainty in the assessment of toxicity).

determinacy in this sort of case is empirical, not evaluative. Impartial, deliberate, well-informed citizens, who agree that deaths and injuries count as adverse "safety" events, might nonetheless dispute whether the drug-testing rule augments or reduces these events relative to the status quo.¹⁶⁴ Post-accident drug testing of railroad employees might cause employee suicides or heart attacks; it might be no less costly, and less effective, than various safety devices that could be installed on trains. Such are the issues that enmesh rulemakings in the area of risk regulation.

The advocate of the Simple Extension might try to develop an account that circumvents the problem of indeterminacy through the special kind of reasons for action that Joseph Raz calls "exclusionary reasons." An exclusionary reason is, roughly, a reason for some action that, further, excludes other (first-order) reasons otherwise bearing upon that action.¹⁶⁵ If an actor believes that an exclusionary reason obtains, then she has reason not to take account of the covered (first-order) reasons in her practical deliberations.¹⁶⁶ An exclusionary-reason account of the Simple Extension would run as follows: The idealized Median Voter would exclude the first-order reasons otherwise bearing upon her vote for or against a rule, order or action—(what she takes to be) the effects of the rule, order or action, how those effects should be valued, and so forth—because the rule, etc., is not a mere proposal, but instead has been promulgated by a lawmaking body that the Median Voter recognizes as an authority and to which she would therefore defer. So in *Skinner*, for example, the Median Voter who believes that the drug-testing rule will increase rather than reduce the rate of death and injury (relative to the status quo or

risks); LESTER B. LAVE, *THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY* 31-45 (1981) (discussing sources of uncertainty in risk assessment).

¹⁶⁴ See PETER ASCH, *CONSUMER SAFETY REGULATION: PUTTING A PRICE ON LIFE AND LIMB* 70-79 (1988) (discussing common errors and anomalies in risk assessment by ordinary persons); W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* 101-37 (1992) (same).

¹⁶⁵ See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 35-48 (1990) (discussing exclusionary reasons). Technically, the kind of account I give here is a "protected reason" account—a protected reason is an exclusionary reason plus a first-order reason to act in a certain way—but I will loosely use the term "exclusionary reason" because that emphasizes how, on this account, the agency's decision excludes the Voter's own deliberation. See Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 849-53 (1989) (summarizing Raz's account of exclusionary and protected reasons).

¹⁶⁶ See Hurd, *supra* note 48, at 1625-27 (fleshing out Raz's claim "that an exclusionary reason gives one a reason not to consider further the (first-order) reasons").

to some no-more-costly alternative) would nonetheless exclude these direct reasons from her deliberations and still vote in favor of drug testing, because the FRA's status as a "safety" authority gives her an exclusionary reason that she would recognize. How do we know that the Voter would recognize *that* exclusionary reason? Precisely because of her (assumed) vote in favor of the Safety Act, which delegates authority to the FRA to promulgate safety rules. If the Counter-majoritarian Difficulty holds true, and thus an agency's authorizing values-statute warrants the claim that a majority of voters would vote in favor of the statute in a hypothetical plebiscite, then even if the value's indeterminacy precludes the inference that the same majority would vote for a safety-enhancing rule based merely upon their first-order reasons, we can still infer that the majority would vote for a safety-enhancing rule based upon their exclusionary reasons. Or so the account would go.

The exclusionary-reason account is problematic, however, in a number of ways.¹⁶⁷ First, it presumes an exclusionary reason where none need exist. It conflates the weaker and assumed premise that the idealized Median Voter would vote to have an agency promulgate rules, with the stronger premise that the idealized Median Voter would recognize an exclusionary reason with respect to those rules. That is hardly clear. For example, Ackerman's "economy of virtue" account suggests that private citizens ordinarily abstain from serious involvement in politics, *not* because their political judgments would be ill-considered if they *were* involved, but because they have private lives to lead.¹⁶⁸ So it might be the case that the idealized Median Voter: (1) votes in favor of the Safety Act because she judges that, given her other commitments, she generally lacks the time to deliberate about safety; but (2) does not exclude her own judgment in favor of the FRA's on every safety issue.¹⁶⁹ The "economy of virtue" account

¹⁶⁷ For a general critique of the account of legal authority that Raz grounds in the concept of exclusionary reasons, see Hurd, *supra* note 48.

¹⁶⁸ See ACKERMAN, *supra* note 27, at 230-322 (presenting "economy of virtue" account).

¹⁶⁹ It might be objected that Ackerman's idealized Median Voter would not vote in favor of a statute delegating authority to some other body; she only enters politics to formulate and vote based upon her own judgments. But this objection cuts the wrong way, for, if it is true, it shows why the Safety Act does not bear the Plebiscitary Feature—which is where the Simple Extension needs to start. Whatever the details of Ackerman's account, his basic idea that people reasonably conserve on their deliberative capital helps explain why voters, or idealized voters, might vote in favor of a delegation but not accept the agency's decision on every issue within the scope of that delegation.

neatly explains why a plebiscitary legislature might legitimately set up an agency but then overrule particular agency rules that prompt citizen outrage, without abolishing the agency itself.¹⁷⁰ By contrast, the exclusionary-reason account has real difficulty explaining this. Because that account infers the existence of an exclusionary reason covering *all* agency rules from the existence of reason to establish the agency, then conversely it must infer the absence of reason to establish the agency from the absence of an exclusionary reason covering even one rule (here, the repealed rule).

Second, even if we *can* infer that the idealized Median Voter would recognize an exclusionary reason to vote in favor of the good agency rule, such as the drug-testing rule in *Skinner*, it is not clear whether the rule would thereby bear the same kind of potent Plebiscitary Feature that the Countermajoritarian Difficulty supposes statutes bear. There might be a difference in democratic theory between voting direct reasons and voting exclusionary ones. The very point of a proper plebiscite might be for a citizen's *own* deliberate, well-informed, impartial judgment to bear upon lawmaking, not just her judgment to ignore her own judgment—just as the very point of adjudicatory due process rights is, in part, for the participant *herself* to play a role in the adjudicatory decision.¹⁷¹ A democratic theory that denied this and maintained that agency rules issued under values-statutes, via exclusionary reasons, have just the same kind of democratic legitimacy as statutes, would thus have to deny that there is any democratic difference between the scenario where the legislature overturns a rule previously issued by an agency and the scenario where an agency simply overturns its own rule. Relatedly, this kind of theory would have to deny that there is any kind of democratic problem with delegation. If rules issued by agencies under authority delegated by plebiscitary legislatures are democratically equivalent to statutes issued directly by plebiscitary legislatures, what could the problem be? This democratic theory would value plebiscites, and yet would see unelected bodies (such as agencies) whose decisions may

¹⁷⁰ See, e.g., JERRY L. MASHAW & DAVID L. HAREFT, *THE STRUGGLE FOR AUTO SAFETY* 131-40 (1990) (describing how public outrage over the National Highway Traffic Safety Administration's ignition interlock rule prompted Congress to override the rule); KATHRYN HARRISON & GEORGE HOBERG, *RISK, SCIENCE AND POLITICS: REGULATING TOXIC SUBSTANCES IN CANADA AND THE UNITED STATES* 77-98 (1994) (a case study of the saccharine episode, where an outraged public spurred Congress to overturn the Food and Drug Administration's decision banning saccharine).

¹⁷¹ See sources cited *supra* note 108.

not directly warrant plebiscitary features as, nonetheless, fully democratic themselves.

These are some of the difficulties that an exclusionary-reason account would need to overcome. However, even if the difficulties can be overcome, or some other account provided why the idealized Median Voter would be constrained to agree that the drug-testing rule is safety-enhancing despite the indeterminacy of "safety," the Simple Extension remains false. Assume away this problem of indeterminacy; assume that impartial, deliberate, well-informed citizens are not, given those constraints, free to dispute that a truly safety-enhancing rule such as the drug-testing rule in fact enhances safety. Even so, the idealized Median Voter might vote *for* the Safety Act but *against* the drug-testing rule, because she believes the rule to conflict with some other value. Consensus among idealized citizens about the safety effects of the drug-testing rule would suffice to establish the Simple Extension only if the Safety Act accorded lexical priority to safety, but it does not. The Act authorizes the FRA to "prescribe, as *necessary, appropriate* rules, regulations, orders, and standards for all areas of railroad safety." Typical for a values-statute, it qualifies its reference to the prime value of "safety" through words such as "necessary," "appropriate," "reasonable" or "practicable"¹⁷²— words that permit the FRA (and Median Voter) to consider (some) conflicting values. Indeterminacy comprises only part of the reason why the Simple Extension is false in a regime of values-statutes; conflicting values comprise the other part.¹⁷³

The problem of conflicting values covers both nonconstitutional and constitutional values; and these conflicting values might, in context,¹⁷⁴ be either incommensurable or overriding. Let us start with a discussion of nonconstitutional overriding values (leaving the discussion of incommensurable values and constitutional values for later),

¹⁷² See Pierce, *Constitutional and Political Theory*, *supra* note 140, at 473-81 (describing how statutes standardly authorize or require agencies to consider multiple values); see also Exec. Order No. 12,866 § 1(a), 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (1994) (generally enjoining agencies to consider the costs as well as the benefits of regulation).

¹⁷³ On value conflict in morality, see generally MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* (1990) (describing the fact of plural and conflicting values in morality). For a discussion with reference to law, see Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 852 (1994).

¹⁷⁴ I say "in context," because the question here is how the different values influence the Voter's and the agency's choices with respect to particular options before the agency (here, the drug-testing rule or the status quo), not with respect to all options on which those values might bear.

for the analysis here simply duplicates and extends the analysis offered above. We are imagining that the positive safety benefits of the rule are *not*, in fact, overridden by nonconstitutional values. That is, with respect to the FRA's choice between enacting the rule and the status quo ante, the FRA does not have an overriding nonconstitutional reason not to enact the rule. Such an overriding nonconstitutional reason might obtain, for example, if the drug-testing rule were very expensive to implement—if implementing the rule consumed considerable labor or material resources, the purchasing power of which would otherwise be spread among railroad travellers, railroad shareholders and railroad workers, and used by them to enhance their well-being in various ways. But we are imagining that this is not the case for the drug-testing rule. Leaving aside its Fourth Amendment difficulties, the rule's additional negative effects on the well-being of travellers, shareholders and workers are truly *not* significant enough to override its positive, safety benefits; in short, the rule is (nonconstitutionally) "appropriate." Even so, the idealized Median Voter might disagree with the FRA about *that*. She might disagree that monetized cost-benefit balancing¹⁷⁵ (a technique now standardly used by federal administrative agencies to commensurate the various values, other than constitutional values, bearing upon the rules they enact¹⁷⁶) is indeed the right technique for deciding whether the drug-

¹⁷⁵ See Richard Layard & Stephen Glaister, *Introduction to COST-BENEFIT ANALYSIS* 1-56 (Richard Layard & Stephen Glaister eds., 2d ed. 1994) [hereinafter COST-BENEFIT ANALYSIS] (offering a methodological overview of cost-benefit analysis); EDWARD M. GRAMLICH, *A GUIDE TO BENEFIT-COST ANALYSIS* 197-222 (1990) (engaging in a methodological discussion of cost-benefit analysis for social regulation); M.W. Jones-Lee, in COST-BENEFIT ANALYSIS, *supra*, at 290-319 (engaging in a methodological discussion of cost-benefit analysis with respect to safety regulation); VISCUSI, *supra* note 164, at 1-74 (discussing methodology for valuing life-savings).

¹⁷⁶ See Exec. Order No. 12,866 § 1(a), 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (1994); BREYER, *supra* note 163, at 10-29 (defending the use of cost-benefit analysis for risk regulation); THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991) (describing the use of cost-benefit balancing by regulatory agencies); SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 33-42 (1992) (advocating the general use of cost-benefit balancing by regulatory agencies); Christopher M. Heimann et al., Project, *The Impact of Cost-Benefit Analysis on Federal Administrative Law*, 42 ADMIN. L. REV. 545 (1990) (reviewing the history and the use of cost-benefit analysis in federal administrative law); W. Kip Viscusi, *The Dangers of Unbounded Commitments to Regulate Risk*, in RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION 135, 135-66 (Robert W. Hahn ed., 1996) [hereinafter RISKS, COSTS, AND LIVES SAVED] (defending the use of cost-benefit analysis for risk regulation).

testing rule is nonconstitutionally "appropriate."¹⁷⁷ Or, if she is a cost-benefit balancer herself, she might vote against the rule on technical grounds, because she (wrongly) believes that the rule's monetized social costs are greater than its monetized social benefits. An exclusionary-reason account is likely even weaker here than for the initial question of whether the rule enhances "safety," since the FRA is no particular authority on balancing safety against other nonconstitutional values.¹⁷⁸

Incommensurability involves a different analysis. Suppose two different values, P(rime) and C(onflicting), with P supporting one option and C another. Moral theorists say that P and C are "incommensurable" in this context if P neither overrides C nor does C override P, so that there is no reason to choose one option over the other, but neither are the two options of equal value.¹⁷⁹ If this seems a little murky, it should. Incommensurability is still an infant subject in moral theory and, even more, in legal scholarship about the administrative state.¹⁸⁰ But there is real plausibility to the claim that options

¹⁷⁷ For critiques of cost-benefit balancing, apart from the specific issue of incommensurability discussed below, see DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* 93-99 (1996); David Copp, *The Justice and Rationale of Cost-Benefit Analysis*, 23 *THEORY & DECISION* 65-87 (1987). For critiques with specific reference to the use of cost-benefit analysis in regulation, see Lester B. Lave, *Benefit-Cost Analysis: Do the Benefits Exceed the Costs?*, in *RISKS, COSTS, AND LIVES SAVED*, *supra* note 176, at 104-34; Steven Kelman, *Cost-Benefit Analysis—An Ethical Critique*, *REGULATION*, Jan./Feb. 1981, at 33. For a technical critique within welfare economics, see ROBIN BODWAY & NEIL BRUCE, *WELFARE ECONOMICS* 262-72 (1984). For a qualified defense, see Donald Hubin, *The Moral Justification of Benefit/Cost Analysis*, 10 *ECON. & PHIL.* 169 (1994). For a general defense of the efficiency (i.e., potential Pareto) standard of which cost-benefit analysis is an application, see Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *J. LEGAL STUD.* 103 (1979).

¹⁷⁸ The Office of Management and Budget is an authority on value-balancing, or at least monetized value-balancing, but because OMB does not intensively review all agency rules, let alone agency decisions, with respect to costs and benefits, OMB's authority cannot be generally imputed to the agencies. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (1994); MCGARITY, *supra* note 176, at 271-91 (describing OMB's role in reviewing the costs and benefits of agency rules).

¹⁷⁹ For discussions of incommensurability in moral theory, compare RAZ, *supra* note 52, at 321-66 (arguing for the existence of incommensurability in this sense), with Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 *S. CAL. L. REV.* 995, 1056-75 (1989) (denying the existence of Razian incommensurability); see also ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 44-64 (1993) (discussing incommensurability); JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 75-92 (1986) (same).

¹⁸⁰ See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. CHI. L. REV.* 1, 64-72 (1995) (discussing the significance of incommensurability for the use of cost-benefit balancing in social regulation); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *MICH. L. REV.* 779, 834-43 (1994) (same); see also MARGARET

for choice (the options for choice by a single person, charting her own life, or the options for choice by a governmental agency or legislature, charting society's course) need not be ordered as better, worse or exactly equal. Consider the drug-testing rule. If the rule enhances safety and is costless to implement, then (leaving aside the Fourth Amendment) there is sufficient reason to enact the rule. If the rule is very expensive, then there is sufficient reason not to enact the rule. It may further be the case that there is a unique intermediate level of expense such that, at this level, the option of enacting the rule is precisely as good as the option of maintaining the status quo. But the proponent of incommensurability says, instead, that there might be an intermediate *range* of expense-levels where the two options of enacting the rule or maintaining the status quo are neither better, nor worse, nor equally good. This is plausible, because it seems counter-intuitive that a unique intermediate level of pure equality exists. Take a level of expense that is \$1 or \$10 or \$100 higher than the supposed unique intermediate level of pure equality: how could that marginal \$1 or \$10 or \$100 make the difference between it being socially indifferent to enact the drug-testing rule, and it being socially wrong?¹⁸¹

If the proponent of incommensurability is correct, then there is a further and, in a sense, deeper explanation for deviation between the FRA's choice and the idealized Median Voter's, beyond factual or evaluative disagreement. This explanation is deeper because it does not just flow from the Voter's or agency's epistemic deficits. It flows from the true absence of reason for choice between options, an absence that even epistemically perfect Voters and administrators would recognize. Imagine that the drug-testing rule truly enhances safety; it is not sufficiently expensive that the status quo is a truly better option;

JANE RADIN, *CONTESTED COMMODITIES* 184-205 (1996) (discussing the significance of incommensurability for compensation practices in tort law).

¹⁸¹ See RAZ, *supra* note 52, at 328 ("[P]eople's judgments of value are not very fine, so that most options are surrounded by margins of incommensurability. . . . Imagine that I am indifferent as between a walk in the park and a book with a glass of Scotch at home. It is possible that though I will definitely prefer (a) the book with a glass of port to (b) the book with Scotch, I am indifferent as between either and (c) a walk in the park. This establishes that I regard (a) and (c) as incommensurate."). But see TIMOTHY WILLIAMSON, *VAGUENESS* 8-9 (1994) (describing sorites paradoxes); *id.* at 3-4 (proposing an epistemic view of vagueness, exemplified by sorites paradoxes, such that "[i]n cases of unclarity, statements remain true or false"). Sorites paradoxes are, seemingly, similar in structure to small-scale Razian incommensurability. See also Regan, *supra* note 179, at 1061 (criticizing Razian incommensurability, and noting that options "can be hard to compare in practice without being incomparable in principle").

and the rule is sufficiently expensive that the status quo is truly incommensurable. Assume, further, that the agency and the idealized Voter recognize all of these truths. Even so, given a plausible set of rules for how agencies and legislatures should resolve incommensurabilities, the agency and Voter might choose different outcomes. For example, consider the plausible rule that the legislature is authorized to choose at will between incommensurable options, while an agency is not authorized to do so, but instead should choose the option that is supported by its prime, statutory value (for the FRA, "safety"). This rule builds upon the standard notion that elected bodies, such as Congress and perhaps the Presidency, have a special role in making "value choices"¹⁸²—on my construal, in resolving incommensurabilities or true equalities—and that, conversely, it is illegitimate for agencies to make these choices. Given this rule, the FRA would be constrained to enact the drug-testing rule (apart from its Fourth Amendment difficulties), while the idealized Voter who recognizes its true benefits and costs would still remain free to vote against it.¹⁸³

The final, least explored, and yet perhaps most important aspect of the problem of value conflict for the Simple Extension concerns *constitutional* values. Imagine that all other gaps in the Simple Extension have been plugged. Idealized Median Voters agree that the drug-testing rule reduces human deaths and injuries; they further agree that it does so without breaching other overriding nonconstitutional values; and they do not vote against the rule merely because it is incommensurable with the status quo (if it indeed is). Even so, the rule is unjust. It violates an aspect of justice presumably covered by Rawls's first principle¹⁸⁴ and, moreover, embodied in the Fourth Amendment: the right to security from unreasonable government searches and seizures.¹⁸⁵ Why, if this is true, should the idealized Me-

¹⁸² See, e.g., BORK, *supra* note 10, at 251-59 (asserting that legislatures, not courts, properly have the role of choosing between values); ELY, *supra* note 6, at 48-54 (same); Pierce, *Constitutional and Political Theory*, *supra* note 140, at 503-23 (asserting that in an administrative state, the Presidency, not courts, properly has the role of choosing between values).

¹⁸³ How does the Voter decide which way to vote? Perhaps the Voter just picks. See Regan, *supra* note 179, at 1063 ("It seems to me that at this point [of true incommensurability] it is perfectly appropriate to flip a coin.").

¹⁸⁴ See RAWLS, *LIBERALISM*, *supra* note 72, at 291 ("[T]he equal basic liberties in the first principle of justice are specified by a list as follows: freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law.").

¹⁸⁵ U.S. CONST. amend. IV.

dian Voter vote in favor of the drug-testing rule? Why wouldn't she reject the rule as unjust?

Before moving further, we should clarify an ambiguity in the Simple Extension that might otherwise confuse this crucial problem of the unjust rule. The Simple Extension, in the strong version we are considering, states:

If an administrative rule, order or action is a good interpretation of a statute that bears the Plebiscitary Feature, the rule, order or action also bears the Plebiscitary Feature; and it is therefore unfair to invalidate this rule, order or action on the mere grounds of justice.

One is tempted to say that the unjust drug-testing rule does not undermine the Simple Extension because the unjust rule is *not* a good interpretation of the Safety Act. A good interpretation of a values-statute will take account of overriding values, particularly justice, and since the drug-testing rule does not do that, the Simple Extension is inapplicable. I think it is quite true that a good interpretation of a values-statute will take account of overriding values, particularly aspects of justice (a point that is elaborated below);¹⁸⁶ but if the Simple Extension means *this* by "good interpretation," it is a vacuous claim. The Simple Extension, after all, is designed as an argument for judicial restraint—at a minimum, to show that "justice" does not comprise sufficient grounds for judicial review. If unjust rules, orders or actions do not trigger the Simple Extension because they are "poor interpretations" of their governing statutes, the (minimum) practical conclusion to the Simple Extension—that courts should not invalidate "good interpretations" as unjust—never comes into play. Therefore, the Simple Extension must be clarified as follows:

If a statute bears the Plebiscitary Feature, and an administrative rule, order or action is an otherwise proper interpretation of the statute (apart from the values of justice),¹⁸⁷ then the

¹⁸⁶ See discussion *infra* Part II.A.2.

¹⁸⁷ By "apart from the values of justice," I mean apart from the values of justice qua criteria bearing on constitutionality. For example, "health" may be an aspect of well-being minimally protected by the Constitution, if one indeed believes that the Constitution protects welfare rights. See *infra* text accompanying notes 380-85. But if a statute authorized some regulatory agency to promulgate rules to insure the "health" of workers, for example, I would not count a court's decision invalidating that agency's rules because the rules were insufficiently connected to the statutory "health" goal, as an act of constitutional review. In that sort of case, "health" provides a basis for the judicial decision quite apart from its constitutional status. Cf. Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 3-4 (1993) (discussing statutes that

rule, order or action also bears the Plebiscitary Feature; and it would be unfair for a court to invalidate the rule, order or action on the mere grounds of justice.

This is the nonvacuous formulation of the Simple Extension, and it is false.

The Simple Extension, thus formulated, is false because the idealized Median Voter's decision to vote in favor of the Safety Act, over the status quo, does not involve a further judgment with respect to the conflict between safety and that aspect of justice (security) violated by the unjust drug-testing rule. The Median Voter might reasonably and *consistently* vote in favor of the Act but against the safety-enhancing, cost-effective rule (otherwise a proper interpretation of the Act) just because the rule is unjust. What makes the safety case different from the war-protest case¹⁸⁸ is the internal inconsistency of these two hypothetical votes in the war-protest case. The war-protest case, again, is this: an agency enters an order fining a war protester who has burnt a flag, pursuant to a statute that prohibits "burn[ing] a flag of the United States." Here, the Voter's decision to enact the flag-burning statute *does* seem to involve a judgment covering precisely that aspect of justice—free speech—implicated by the war-protest order. It is hard to see how the properly idealized legislator or Median Voter could conscientiously vote in favor of the flag-burning statute without considering whether (and deciding in the affirmative that) the national-unity aim behind the statute justifies a prohibition on precisely that type of action encompassing all the relevant aspects of justice that arise in the particular case of the war protester, viz., flag-burning-as-political speech.

I am advancing a dual suggestion here. First, the proponent of the Simple Extension might try to defend her claim through a theory of "conscientious legislation," which will explain why *certain* rules, orders or actions bear Plebiscitary Features. Second, however, no plausible theory of conscientious legislation will explain why the drug-testing rule bears the Plebiscitary Feature. The idea of conscientious legislation, advanced by scholars such as Paul Brest and Lawrence Sager, is that legislators have an obligation to consider the constitutional issues raised by statutes they enact.¹⁸⁹ As Brest puts

"utilize the language of the Constitution itself, or, what is more typical of recent examples, the language of judicial gloss on the Constitution" (footnote omitted)).

¹⁸⁸ See *supra* text accompanying notes 151-52.

¹⁸⁹ See Brest, *The Conscientious Legislator's Guide*, *supra* note 53, at 585-89 (1975) (arguing that legislators are obliged to consider constitutional norms); Sager, *supra*

it: "[L]egislators are obligated to determine, as best they can, the constitutionality of proposed legislation."¹⁹⁰ A theory of conscientious legislation would flesh out the contours of this (supposed) obligation. It would specify *which* types of constitutional problems (for our purposes, conflicts with justice) the conscientious legislator or Median Voter ought to have considered before enacting the statute—thus precluding the Median Voter's hypothetical disapproval of those particular statutory instances characterized by a type of constitutional problem (injustice) that the Median Voter ought to have considered. Thereby, the theory of conscientious legislation would explain why certain applications of statutes, such as the war-protest order, bear Plebiscitary Features. The Median Voter *cannot* disapprove the order, *qua* unjust, because she ought to have considered (and decided against) giving decisive weight to the relevant aspect of justice (speech) before voting in favor of the flag-burning statute. Perhaps we might say that the legislator or Median Voter must resolve those constitutional issues that arise in the "ordinary application" of the statute.¹⁹¹ A prohibition on flag-burning "ordinarily" implicates free speech (or so we intuit); it does not ordinarily implicate religious freedom. So enacting the flag-burning statute involves a judgment with respect to conflicts between national unity and free speech, which subsumes all the morally relevant features of the order against the war protester; but not a judgment, say, with respect to the conflict between national unity and religious freedom that would arise if the flag-burning statute were applied to an iconoclast religious sect, which burns flags so as to affirm God's supremacy and condemn the "icons," including symbolic flags, that epitomize human vanity.¹⁹²

Obviously, this is rough and intuitive. I neither need nor wish to develop a specific theory of conscientious legislation that explicates our intuitive verdict that the war-protest order bears the Plebiscitary

note 37, at 1220-28 (same).

¹⁹⁰ Brest, *The Conscientious Legislator's Guide*, *supra* note 53, at 587.

¹⁹¹ See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 36 n.144 (1996) (discussing the importance of "prototypical cases" for human reasoning).

¹⁹² Cf. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (construing National Labor Relations Act to avoid constitutional question raised, under Religion Clauses, by assertion of Labor Board jurisdiction over parochial schools); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (construing Federal Unemployment Tax Act to avoid constitutional question raised, under Religion Clauses, by requiring parochial schools to pay unemployment compensation taxes); *infra* text accompanying notes 211-12 (discussing connection between applicability of Avoidance Canon and scope of duty of conscientious legislation).

Feature.¹⁹³ Rather, the ultimate point here is that even under seemingly plausible theories of conscientious legislation, such as the "ordinary application" theory, the idealized legislator or Median Voter could enact the FRA's Safety Act *without* considering the conflict between safety and that aspect of justice (security) implicated by the drug-testing rule. The legislator or Median Voter could conscientiously direct the FRA to enhance safety *without* considering whether, let alone affirmatively determining that, safety overrides the right to security protected by the Fourth Amendment.¹⁹⁴ To explain why the drug-testing rule must bear the Plebiscitary Feature, we would need a considerably more rigorous theory of conscientious legislation. At the extreme, a maximally rigorous theory of conscientious legislation would say that the idealized legislator or Median Voter cannot conscientiously vote for a statute unless she believes that *no* otherwise proper application of the statute is unjust. This extreme theory would mean, for example, that enacting a values-statute generally directing the agency to enhance some value, such as "safety," involves the judgment that every value-enhancing rule¹⁹⁵ also satisfies the First Amendment, the Fourth Amendment, the Fifth Amendment, and all other constitutional aspects of justice. This is deeply implausible—not the least because there exists a special institution devoted to such constitutional questions, *the federal courts*, which can perform the very function of invalidating otherwise proper applications of properly enacted statutes.¹⁹⁶

These issues have been almost completely ignored by the literature on judicial restraint. They are issues that emerge only once the traditional approach, which conflates judicial review with the review of statutes, is rejected and judicial review instead is properly understood to extend more broadly to include the review of administrative rules, orders and actions. The whole apparatus of the Countermajority-

¹⁹³ If that intuitive verdict about the war-protest order is wrong, all the worse for the Simple Extension.

¹⁹⁴ I suggest that the right to security is not implicated by "ordinary" applications of the Safety Act, even assuming we can develop a theory of conscientious legislation that makes rigorous the notion of "ordinary." "Ordinary" railroad safety rules (rules requiring railroads to have certain safety devices, or to take various safety precautions) do not implicate the Fourth Amendment.

¹⁹⁵ More specifically, every value-enhancing rule that is also appropriate in light of relevant nonconstitutional values.

¹⁹⁶ See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1176 (1996) (discussing government regulation "that does not, on its face, regulate protected conduct, but that has the incidental effect of burdening a right to engage in such conduct under some circumstances").

tarian Difficulty, which theorists of judicial restraint have labored to construct, shows only this: *if* the legislature's vote to enact a statute involves some judgment J about the Constitution (for example, that national unity overrides free speech), then it is unfair for a court to reach and give effect to a contradictory judgment. Judgment J would be the outcome of a hypothetical plebiscite and it is unfair to invalidate proper plebiscites because majority rule has intrinsic value, or so the proponent of the Countermajoritarian Difficulty argues. However, we also need a complementary theory, what I have called a theory of conscientious legislation, to explain *which* judgments about the Constitution a statute's enactment should be taken to involve—for it is only with respect to *those judgments* that the Countermajoritarian Difficulty, even if true, is relevant. If constitutional judgment K is not involved in the statute's enactment—if a conscientious Median Voter need not agree with K by virtue of her decision to vote in the statute's favor—then a judicial decision that overrides K is not countermajoritarian.

This neglected possibility is illustrated, most saliently, by a values-statute such as the Safety Act. The judgment K that a particular safety-enhancing rule such as the drug-testing rule comports with justice and the Constitution, despite its infringement upon the right to security protected by the Fourth Amendment, is *not* a judgment that the Median Voter must necessarily have reached, under the proper norms of conscientious legislation, before enacting the Safety Act. But precisely the same limitation on the Countermajoritarian Difficulty also arises under rules-statutes, indeed *determinate* rules-statutes, as is demonstrated by the case of the iconoclast flag-burning church or, less fancifully, by the following example.

Ritual Drug Use Hypothetical

An anti-drug law is passed by Congress, prohibiting the use of listed drugs, at Time T_1 . Marijuana is on the list. The use of marijuana is a central ritual for a small, genuine church. The Drug Enforcement Administration directs the church at Time T_2 to cease using marijuana, and applies to a federal court for enforcement of this order. The church claims in its defense that the order violates its free exercise rights.¹⁹⁷

Let us assume the idealized and conscientious Median Voter

¹⁹⁷ Cf. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 890 (1990) (rejecting Free Exercise Clause claim against application of general state drug law to sacramental use of peyote).

reaches the following judgment at Time T_1 , the time the statute is enacted: "There are good grounds for prohibiting some act-type A (marijuana use or flag burning); because these grounds are conclusive in most instances of that act-type, the norms of conscientious legislation permit me to vote in favor of a rules-statute prohibiting A." Yet, without inconsistency, she might still reach the following judgment at Time T_2 , the time the agency's order is entered: "It is clear that act-type A includes as an instance the particular action P (an action of sacramental marijuana use, or iconoclast flag burning) targeted by this order; yet P implicates a value of justice (religious freedom) that overrides the grounds behind my vote in favor of the rules-statute prohibiting act-type A; and so an order against P ought *not* be issued." The Median Voter might vote in favor of the general statute prohibiting act-type A, but *against* an order prohibiting P. Even if the determinate rules-statute prohibiting A bears the Plebiscitary Feature, the unjust order prohibiting P need not.

2. A Weak Simple Extension?

This last flaw in the strong Simple Extension of the Countermajoritarian Difficulty—that the Median Voter might herself vote against the drug-testing rule because it violates the very aspect of justice (security) that the strong Simple Extension seeks to render unenforceable—also dooms any weaker version of the argument. A weaker version would say something like this: "Although an administrative rule, order or action that properly interprets a statute (apart from the values of justice) does not bear the Plebiscitary Feature, it is nonetheless unfair for a court to invalidate the rule, etc., because interpretation is the fairest process for elaborating statutes." But if the drug-testing rule is indeed unjust and, further, if the rule does not bear the Plebiscitary Feature because the underlying statute's enactment should not be taken to involve a judgment with respect to the aspect of justice (security) that the rule violates, why say that the rule is a good interpretation of the Safety Act? Why not say, instead, that the rule is *otherwise* proper but ultimately illegal under the Act because it violates an overriding constitutional value that properly figures in the interpretation of the Act? A weaker version of the Simple Extension, in the case of a values-statute such as the Safety Act, would have to show either that (a) the statute must be interpreted to give lexical priority to its prime value, over all others; or (b) nonconstitutional

overriding values but not constitutional overriding values properly figure in the interpretation of the statute. The first is implausible,¹⁹⁸ the second even more so. Thus, it is hard to see how invalidating a rule such as the drug-testing rule could be unfair even under the weak Simple Extension.

More generally, one would want to say that the criteria bearing on constitutionality figure in the best interpretation of statutes. A rule, order or action that is otherwise proper under a statute which (let us assume) bears the Plebiscitary Feature, may well be a poor *interpretation* of the statute, all things considered, just because it violates the best understanding of the criteria bearing on constitutionality. This is not a novel idea; it is reflected in the eminent canon of statutory interpretation, that statutes should be construed to avoid constitutional difficulties. Let us call this the Avoidance Canon. The Avoidance Canon is one of the oldest, and arguably the most important, of the interpretive canons that the Supreme Court employs.¹⁹⁹ As the Court explained in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, the leading case on the Avoidance Canon:

[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, and has for so long been applied by this Court that it is beyond debate.²⁰⁰

Where the Avoidance Canon applies—where a court invalidates a rule, order or action violating some constitutional criterion C as a poor interpretation of the underlying statute, just in virtue of violating C—the weak version of the Simple Extension falls apart. For, in such a case, the best interpretation of the statute (bearing the Plebi-

¹⁹⁸ See *supra* note 172 (an agency elaborating a values-statute is typically authorized to consider competing values).

¹⁹⁹ See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992) (describing the Avoidance Canon as "[p]robably the most important of the constitutionally based canons [of statutory construction]").

²⁰⁰ 485 U.S. 568, 575 (1988) (citations omitted). For more recent reaffirmations of the Avoidance Canon, see, e.g., *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995) ("[W]e have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions."); *United States v. X-Citement Video*, 115 S. Ct. 464, 472 (1994) ("It is . . . incumbent upon us to read the statute to eliminate [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress."). For a further discussion of the Avoidance Canon, and particularly its "serious constitutional doubts" component, see *infra* Part II.D.

scitary Feature) is not the rule, order or action; rather, it is the court's decision to invalidate the rule, order or action. The interpretive pedigree of the rule, order or action does not generate a reason for restraint, even weakly (as the weak Simple Extension would claim), since the rule, order or action (all things considered) loses its interpretive pedigree by violating C.

As a stark example of the Avoidance Canon at work, consider the Court's decision in *NLRB v. Catholic Bishop*.²⁰¹ *Catholic Bishop* involved the National Labor Relations Act, which generally grants the Labor Board jurisdiction over "employers."²⁰² The Board had asserted jurisdiction over a group of parochial schools that employed lay teachers and had issued orders against the schools requiring them to engage in collective bargaining with the teachers' unions.²⁰³ The Supreme Court held that these orders were invalid, but not because the Labor Act was unconstitutional "as applied" in conferring jurisdiction over religious "employers" (such as parochial schools). Rather, the Court held them invalid because the term "employer" was best interpreted, in accordance with the Avoidance Canon, as exempting parochial schools:

[I]n the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.²⁰⁴

Catholic Bishop lies at the very boundaries of the Avoidance Canon. The opinion was controversial at the time it was decided²⁰⁵ and remains controversial today²⁰⁶ because the otherwise proper interpretation of the Labor Act that the Avoidance Canon defeated was not open to reasonable disagreement, as a matter of ordinary English: a parochial school is still an employer, in ordinary English. This controversy, however, concerns the scope of the Avoidance Canon, and

²⁰¹ 440 U.S. 490 (1979).

²⁰² 29 U.S.C. §§ 158(a), 152(2) (1994).

²⁰³ See *Catholic Bishop*, 440 U.S. at 493-94.

²⁰⁴ *Id.* at 507.

²⁰⁵ See *id.* at 518 (Brennan, J., dissenting) ("A statute is not 'a nose of wax to be changed from that which the plain language imports . . .'" (citing *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926))).

²⁰⁶ See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1066 (1989) (criticizing *Catholic Bishop* as a case where "public values" were wrongly invoked "to trump a clear text and supportive legislative history," and thus as "inconsistent with legislative supremacy").

not its soundness. As the otherwise proper interpretation becomes indeterminate,²⁰⁷ the controversy evaporates. *DeBartolo's* black letter formulation seems to make indeterminacy both necessary and sufficient for the Canon's applicability: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems *unless such construction is plainly contrary to the intent of Congress.*"²⁰⁸ The Supreme Court routinely employs the Canon to strike down otherwise proper ("otherwise acceptable") rules, orders or actions, where the underlying statutes are taken to be less determinate than in *Catholic Bishop*; these cases comprise the hard core of the Avoidance Canon.²⁰⁹ Values-statutes lie at the very center of this hard core. If the Avoidance Canon has any scope at all, it means that judicial invalidation of a value-maximizing rule, order or action should count as an interpretation, not as an "as-applied" invalidation, of the underlying values-statute.²¹⁰

The Avoidance Canon thus supports my claim that the criteria bearing on constitutionality figure in the best interpretation of statutes, at least where statutes are otherwise taken to be indeterminate. More precisely, I would suggest the following: the criteria bearing on constitutionality figure in the best interpretation of statutes where (a) courts have no independent restraintist reason to refrain from enforcing these criteria; (b) the right theory of conscientious legislation does not preclude their figuring thus; and (c) the right background

²⁰⁷ By "indeterminate" here, I intend the modest, relativized sense of "indeterminacy" used throughout this Article, meaning the permissible disagreement among interpreters left open by deliberative constraints that do not require omniscience, not the actual absence of truth. See *supra* text accompanying notes 159-61.

²⁰⁸ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (emphasis added).

²⁰⁹ See generally Zeppos, *supra* note 132, at 309-12, 335-45 (documenting the Court's frequent use of the Avoidance Canon).

²¹⁰ In light of the Avoidance Canon, and particularly its "serious constitutional doubts" component, the following comment by John Ely is astounding:

In interpreting a statute . . . a court obviously will limit itself to a determination of the purposes and prohibitions expressed by or implicit in its language. Were a judge to announce in such a situation that he was not content with those references and intended additionally to enforce, in the name of the statute in question, those fundamental values he believed America had always stood for, we would conclude that he was not doing his job, and might even consider a call to the lunacy commission.

ELY, *supra* note 6, at 3. For dramatic counterexamples to Ely's claim, see *Catholic Bishop*, 440 U.S. at 507; *Greene v. McElroy*, 360 U.S. 474 (1959); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958), discussed below at text accompanying notes 287-94.

theory of statutory interpretation does not preclude their figuring thus.²¹¹ We have already discussed the problem of conscientious legislation. As for the last problem, concerning theories of statutory interpretation, let me merely note that different theories might give constitutional criteria a more or less significant role in the interpretive process. For example, a textualist theory might permit constitutional criteria to figure in interpretation only where the ordinary English meaning of the statute's text is indeterminate (thus ruling out a case like *Catholic Bishop*). By contrast, a "legal process" or "natural law" theory might permit courts to invalidate rules, orders or actions as poor interpretations regardless of textual determinacy.²¹² At the extreme, what draws the boundary between interpretation and statutory invalidation is the notion of conscientious legislation; whatever your theory of statutory interpretation, you should not count a judicial decision entirely nullifying a statute's legal force as an interpretation rather than a facial invalidation.

It is well beyond the scope of this Article to defend either a particular theory of conscientious legislation, or a particular theory of statutory interpretation. What I *do* propose is that the proper theories, whatever they are, will at least permit constitutional criteria to figure in statutory interpretation in a case such as *Skinner*. Where an agency issues a rule, order or action under a pervasively indeterminate values-statute such as the Safety Act—pervasively indeterminate under any plausible set of deliberative constraints—and this rule, order or action violates the best understanding of the criteria bearing

²¹¹ It should be noted, further, that the Avoidance Canon is crucial to the ability of agencies to consider constitutional issues themselves. There is a presumptive rule that "adjudication of the constitutionality of congressional enactments [is] beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974)); see also *Communications Workers v. Beck*, 487 U.S. 735, 744 n.1 (1988) (stating this rule); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975) (same); Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1684-93 (1977) (analyzing this rule). If constitutional criteria simply overrode statutory outcomes, rather than figuring in the best interpretation of statutes, an agency would be violating this rule whenever it considered a constitutional issue, outside the special case of explicit statutory incorporation. See *Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987) ("[An] agency may be influenced by constitutional considerations in the way it interprets . . . statutes [but] it does not have jurisdiction to declare statutes unconstitutional."); NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 33-38 (1996) (discussing the pervasiveness of executive-branch interpretation of the Constitution).

²¹² See ESKRIDGE, *supra* note 140, at 107-206 (describing possible theories of statutory interpretation).

on constitutionality (such that courts have no independent reason to refrain from enforcing these criteria), a court's invalidation of the rule, order or action should count as an interpretation of the values-statute. That is what the Avoidance Canon doctrine suggests. At least in a regime of values-statutes, the weak version of the Simple Extension will not work.

3. Reviving Nondelegation?

Would reviving the nondelegation doctrine repair the flaws in the Simple Extension (strong or weak) identified here?²¹³ To that query, we might respond, first, that we live in a constitutional world where the nondelegation doctrine remains dead,²¹⁴ and it is for *this* world that we need a theory of judicial restraint.²¹⁵ If this response does not

²¹³ Prominent works in the ongoing scholarly debate about reviving the nondelegation doctrine, besides Ely's, include: KENNETH DAVIS, *DISCRETIONARY JUSTICE* (1969); THEODORE J. LOWI, *THE END OF LIBERALISM* (1969); SCHOENBROD, *supra* note 29; Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); and Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 1 (1987).

²¹⁴ The Court has not struck down a statute on nondelegation grounds since the New Deal. See 1 DAVIS & PIERCE, *supra* note 140, § 2.6, at 66. Instead, the Court has upheld a variety of open-ended statutes over nondelegation challenges. See *Mistretta v. United States*, 488 U.S. 361, 373 (1989) ("[Since 1935] we have upheld . . . without deviation, Congress' ability to delegate power under broad standards." (citing cases)). The Court has occasionally relied on the nondelegation doctrine in interpreting statutes—as per the Avoidance Canon—to invalidate certain *kinds* of agency decisions. See, e.g., *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (construing statute, in light of nondelegation doctrine, to protect Fifth Amendment right-of-travel); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) (plurality opinion) (construing statute, in light of nondelegation doctrine, to preclude OSHA from issuing a standard for benzene without finding a "significant risk" of toxicity, given the enormous costs that eliminating all toxicity risk would involve); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-42 (1974) (construing statute, in light of nondelegation doctrine and congressional power to tax, not to authorize agency imposition of tax). But the Court has not invoked the doctrine in this way to limit indeterminacy as such; and indeed the applications in *Kent* and *Industrial Union* are quite helpful to my thesis, for these cases exemplify how conflicting values (in *Kent*, constitutional values) are brought to bear on agency decisions under the rubric of statutory interpretation. See *supra* Part II.A.2 (relying on the Avoidance Canon to argue against Simple Extensions); *infra* Part II.D (same).

²¹⁵ Similarly, the New Deal Court might have been wrong to depart from the old Commerce Clause cases, and permit the growth of a large federal government, see Lawson, *supra* note 27, at 1233-34; in the pre-New Deal world, Congress passed many fewer statutes, and the acute version of the Counter-majoritarian Difficulty, posed by judicial review of national statutes, was less important; still, constitutional scholars since Bickel have theorized, quite rightly, about the acute version.

persuade, however, a second, more trenchant answer can be given: no plausible nondelegation doctrine would salvage the Simple Extension. The flaws identified above are *epitomized* by a case like *Skinner*, but are not restricted to that sort of case.

On this score, there is a significant and hitherto ignored footnote in *Democracy and Distrust*, in which Ely briefly adverts to the problem of extending his restraintist claims into the administrative state:

In general this book is written against the paradigm of judicial review of a decision ultimately traceable to legislative action. To the extent that a case involves the decision of a government employee who is not effectively subject to the direction or control of elected officials, the mantle of "democratic decision" is correspondingly less appropriate, and at least some of this book's arguments are correspondingly attenuated. . . . I shall be suggesting in Chapter 5, however, that such failures of accountability are properly regarded as constitutional defects in their own right and thus number among the things courts should be actively engaged in correcting.²¹⁶

Ely's "suggestion" in Chapter Five is that the nondelegation doctrine be revived:

[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic. . . .

. . . Courts thus should ensure not only that administrators follow those legislative policy directions that do exist—on that proposition there is little disagreement—but also that such directions are given.²¹⁷

This suggestion, together with the quoted footnote, implies both a concession by Ely that the Simple Extension does not hold true under a regime of broadly delegated power, and a claim that it *would* hold true if statutes were less open-ended. What delegation "attenuates," Ely implicitly asserts, is the Simple Extension. Why read him as asserting that delegation attenuates the Simple Extension, rather than arguments for judicial restraint independent of statutory pedigree? Because the problem of delegation concerns the very tightness of the interpretive connection between statutes, on the one hand, and the rules and orders issued or actions taken under those statutes. (By contrast, one can readily imagine institutional structures, such as a Plebiscitary Presidency with broad and effective oversight powers, whose features would generate restraintist grounds for

²¹⁶ ELY, *supra* note 6, at 4 n.* (citation omitted).

²¹⁷ *Id.* at 132-33.

limiting judicial review regardless of, indeed because of, broad statutory delegations.²¹⁸ The epistemic or democratic features of agencies that argue for restraint could be uncorrelated, or even negatively correlated, with the strength of the nondelegation doctrine.) A revived nondelegation doctrine, Ely implicitly claims, would tighten the interpretive connection and thereby ensure that rules, orders or actions bear the Plebiscitary Feature (or something like that) just because statutes do. I will argue that Ely is wrong.

Let us take up Ely's suggestion and try to construct a nondelegation doctrine sufficiently strong to repair the Simple Extension. First, of course, our revived doctrine would need to prohibit the values-statutes that are, now, typical features of the administrative state: statutes that authorize agencies to define the substantive obligations and entitlements of citizens pursuant to open-ended values such as "health," "safety," "competition" or even (in the case of the FCC) the "public convenience, interest or necessity."²¹⁹ Instead, every substantive obligation or entitlement of a citizen would need to be traceable to some rule enacted by Congress in a statute. But this would hardly be enough. Statutory rules, after all, can be indeterminate, too, relative to whatever plausible deliberative constraints we impose—in particular, relative to the constraints that we impose on voters in our hypothetical idealized plebiscite. This is the modest implication of H.L.A. Hart's famous "no vehicle may be taken into the park" example.²²⁰ Our revived doctrine, then, would need to preclude indeterminate rules-statutes as well as values-statutes, for otherwise idealized Median Voters might still disagree about the best understanding of the statutory rules. But this now-robust doctrine would still be fatally incomplete. The substantive obligations or entitlements of citizens ("don't burn flags," "don't develop your wetlands," "widows but not widowers receive social security benefits") are hardly the only source of constitutional claims. The Fourth Amendment, the Due Process Clause, and (lest we forget) the "public employee speech" component of the First Amendment (to give only the leading examples) are also implicated by the "internal" or

²¹⁸ See *infra* text accompanying notes 327-34 (discussing Plebiscitary Presidency).

²¹⁹ See 47 U.S.C. § 303 (1994) (empowering the FCC to regulate radio stations "as public convenience, interest or necessity requires").

²²⁰ See H.L.A. HART, *THE CONCEPT OF LAW* 124-36 (2d ed. 1994) (describing "the open texture of law"); see also ESKRIDGE, *supra* note 140, at 13-47 (1994) (discussing indeterminacy of textualist as well as legislative-intention and -purpose approaches to statutory interpretation).

"procedural" choices that agencies make. Even if our rule-statute says, with apparent determinacy, that "No person shall burn a flag of the United States," the statute does not tell us, for example, how the agency should go about policing violations of the statute;²²¹ or how it should structure its proceedings for imposing civil penalties;²²² or how it should maintain internal discipline among agency employees, some of whom may wish to speak out in favor of the cause that the flag-burners support.²²³ Presumably, the agency makes these "procedural" or "internal" choices by deciding (within constitutional constraints and the constraints of nonconstitutional overriding values) what choices will minimize violations of the statutory rule; but what *those* choices should be is no more determinate than it is for the choices left open to agencies by values-statutes.²²⁴

Our revived nondelegation doctrine would thus need to require that a statute provide determinate guidance for every (constitutionally significant) rule, order or action that an agency issues or takes. We would, then, have statutes that specified, in detail, the inspection, search and arrest protocols that agencies should employ; or the procedural rules governing all of the agency's legal interactions with individual persons that fall under the broad rubric of current procedural due process doctrine; or the criteria for taking adverse

²²¹ See Kreimer, *supra* note 132, at 68 (empirical study of constitutional litigation in the Supreme Court and federal district courts, finding that "[a]t the trial level, claims of constitutional violation in published opinions involve police as actors more than twice as often as the Supreme Court, in 75 cases, representing 17.5% of the sample").

²²² See *id.* at 44-45 (finding that "claims of administrative due process violations, which appeared in only 3% of the nonlegislative cases in the Supreme Court, constituted the largest category of claims at the trial court level").

²²³ See *id.* at 46 (finding that "[t]he trial court's First Amendment caseload outside of the legislative arena is not characterized by the great confrontations between government and media. Almost half of [these First Amendment] cases involve claims by public employees alleging retaliatory job actions for criticism of their employers.").

²²⁴ See Mashaw, *supra* note 213, at 96-97. Mashaw writes:

While most discussions of the nondelegation doctrine focus on the question of substantive criteria for decision, establishing criteria is but one aspect of policy discretion. In the formation of regulatory policy, for example, at least the following general types of questions have to be answered: What subjects are to be on the regulatory agenda? What are their priorities? . . . What are the priorities for the utilization of enforcement machinery with respect to adopted policies? What are the rules and procedures by which the relevant facts about the application of legal rules will be found? . . . If violations are found, what corrective action or remedies will be prescribed?

Id.; see also Pierce, *Political Accountability and Delegated Power*, *supra* note 140, at 398-403 (describing drastic changes that a nondelegation doctrine requiring determinacy would bring).

employment actions against agency staffers. This would be silly; no advocate of a revived nondelegation doctrine goes nearly this far.²²⁵ Ely's proposal is typical. He writes:

[T]he nondelegation doctrine, even at its high point, never insisted either on more detail than was feasible or that matters be settled with more permanence than the subject matter would allow. Policy direction is all that was ever required, and policy direction is what is lacking in much contemporary legislation.²²⁶

Ely concludes that "[t]he problem [lies] in a propensity [of legislators] not to make politically controversial decisions—to leave them instead to others, most often others who are not elected or effectively controlled by those who are."²²⁷ Ely seems to be proposing that (1) statutes may not invite or require agencies to choose between incommensurables, or otherwise fail to provide agencies with an objective and knowable standard for their decisions; and perhaps that (2) statutes may not contain some indeterminacy merely because of Congress's cowardice. The first part of this proposal is all that traditional nondelegation doctrine required. As the Court stated in the leading pre-New Deal case: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [make an administrative decision] is directed to conform, such legislative action is not a forbidden delegation of legislative power."²²⁸ Both parts of Ely's proposal, together, do not even seem to eliminate values-statutes, let alone require a determinate scheme for specifying all the various constitutionally significant rules, orders or actions that agencies issue or take.

A super-strong nondelegation doctrine that required this sort of global precision, or even a doctrine that required determinate rules-statutes, would be silly for three reasons. First, there is no good originalist warrant for such requirements. Neither the Constitution's grant of "[a]ll legislative Powers" to Congress in Article I, Section 1, nor any other possible textual basis for a nondelegation doctrine, can plausibly be understood to mean (in modern or Framers' English), or

²²⁵ David Schoenbrod, the most vigorous scholarly proponent of a nondelegation doctrine, would permit rules-statutes as long as the rules were "meaningful," granting that "meaningful" rules would still need "interpretation." SCHOENBROD, *supra* note 29, at 182.

²²⁶ ELY, *supra* note 6, at 133.

²²⁷ *Id.* at 134.

²²⁸ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added).

to have been intended by its Framers to mean, that Congress may enact only such statutes that have sufficient specificity to preclude any disagreement among reasonable interpreters.²²⁹

Second, it is far from clear that a strong or even a weak nondelegation doctrine would be a good thing.²³⁰ Abolishing or eviscerating *federal governance* overall might be a good thing. Given federal power to govern some aspect of our common life, however, the relative superiority of congressional as opposed to administrative governance (say, with presidential supervision) is hardly obvious and is hotly contested.

Third, and finally, determinacy is not enough. I have identified a whole host of separate problems with the strong or weak Simple Extension of the Countermajoritarian Difficulty. These include incommensurability, the limits of conscientious legislation, and the role of constitutional criteria in shaping the best interpretation of statutes. To repair these flaws in the Simple Extension, we would need, not just an implausibly vigorous nondelegation doctrine, but accompanying theories of conscientious legislation, statutory interpretation, and a response to the problem of incommensurability, so as to ensure that unjust rules, orders or actions nonetheless bear Plebiscitary Features, or at least count as proper interpretations, despite their injustice and despite the possible existence of incommensurable alternatives. This is a tall order indeed, and one that I do not think Ely could possibly fill. Ely is doubly wrong: both in thinking that we could solve the problem of indeterminacy through a plausible nondelegation doctrine, and in thinking that indeterminacy is the only problem in extending the Countermajoritarian Difficulty to the administrative state.

B. *Other Legislature-Centered Arguments*

The flaws identified here are not peculiar to the Countermajoritarian Difficulty. In general, even if a particular legislature-centered argument truly identifies some restraintist reason sufficient to limit

²²⁹ See 1 DAVIS & PIERCE, *supra* note 140, at 66 (noting that "[t]he Court probably was mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power. The first Congress . . . delegated legislative power to the President by authorizing the grant of licenses to trade with the Indian tribes 'under such rules and regulations as the President shall prescribe.'").

²³⁰ See, e.g., WILSON, *supra* note 28, at 113-36 (1989) (defending delegation); Mashaw, *supra* note 213 (same); Rubin, *supra* note 140, at 408-26 (same); Stewart, *supra* note 140, at 323.

(some aspect of) the practice of judicial invalidation of statutes, constitutional reviewing courts will not have reason to refrain from invalidating rules, orders and actions, merely by virtue of the statutory pedigree of these rules, orders or actions. In short, legislature-centered restraintist arguments *generally* lack Simple Extensions. This is, necessarily, a suggestion rather than an absolute pronouncement. The feature of legislatures identified by a legislature-centered argument might, in theory, be the elected status of legislators,²³¹ or some non-electoral feature,²³² or some combination of features; and this feature, or combination, might require restraint for an epistemic, democratic, or some other kind of reason. Short of considering each of these possible permutations, we cannot be sure that each and every Simple Extension will fail. But there is good reason to believe that, in general, they will.

Let us consider an example: the legislature-centered argument put forward by James B. Thayer in his 1893 article, *The Origin and Scope of the American Doctrine of Constitutional Law*.²³³ This famous article is generally taken to be the origin of the modern debate about judicial review; it is from *Origin and Scope* that *The Least Dangerous Branch* and the literature that Bickel's work in turn generated, ultimately stem.²³⁴ Thayer described and defended a practice of restraint for courts of constitutional review in a way that no scholar before him had done. His claim was that, customarily, and justifiably so, courts reviewing statutes conformed to the following "rule of administration":²³⁵

[A court] can only disregard [i.e., invalidate] the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legisla-

²³¹ See *infra* note 335.

²³² See *infra* text accompanying notes 336-89.

²³³ 7 HARV. L. REV. 129 (1893).

²³⁴ See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983) (describing Thayer's article as "the most influential essay ever written on American constitutional law"); Sager, *supra* note 37, at 1222 (describing the work as "an important intellectual fount of the judicial restraint thesis"); see also BICKEL, *supra* note 1, at 35 (Thayer's article is "a singularly important piece of American legal scholarship"); GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 51-52 (1994) (describing Thayer's influence on Hand); Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978).

²³⁵ Thayer, *supra* note 233, at 144.

tive Acts²³⁶

Note the legislature-centered focus here: Thayer quite clearly describes a practice that involves, at least in the first instance, the review of statutes.²³⁷ This practice has come to be known as "minimalism." Minimalism requires that an act of Congress not be invalidated unless "clearly" unconstitutional.²³⁸ The merits of minimalism continue to provoke scholarly interest, and restraintist scholars continue to defend it.²³⁹ Thayer's work is not only of historical interest, as the backdrop for *The Least Dangerous Branch* and modern controversies about the Countermajoritarian Difficulty. It also remains of importance in its own right, as a canonical text for the healthy scholarly literature addressed specifically to minimalism.²⁴⁰

Why minimalism? Why, for Thayer, were courts obliged to employ a "clear error" standard in reviewing statutes? Part of the richness of Thayer's article is its ambiguity; his defense of minimalism might be interpreted in (at least) four different ways. First, Thayer might have meant to defend minimalism on analytic grounds. On the analytic construal of minimalism, the proper criteria bearing on constitutionality are essentially procedural, not substantive; a given statute fully satisfies these criteria as long as the legislators who promulgated the statute were sufficiently impartial, reasonable, and so forth, even if the statute turns out to violate one or another aspect of justice. In other words, on this construal, even an epistemically perfect, perfectly democratic court would not invalidate as unconstitutional a statute that was merely substantively unjust in some way.

At one point, *Origin and Scope* seems to take up the analytic view of

²³⁶ *Id.*

²³⁷ This is clear throughout Thayer's article. See *id.* at 143-57. Thayer begins the article with the following question: "How did our American doctrine, which allows to the judiciary the power to *declare legislative Acts unconstitutional*, and to treat them as null, come about, and what is the true scope of it?" *Id.* at 129 (emphasis added).

²³⁸ It is a practice that the Court still, sometimes, purports to follow. See *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (noting "[t]he customary deference accorded the judgments of Congress"). But see *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . .").

²³⁹ For a recent and important discussion of minimalism in a different sense, see Sunstein, *supra* note 191.

²⁴⁰ Some important entries in this debate include: PERRY, *supra* note 70; ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994); and *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

minimalism.²⁴¹ Yet this would be a very odd and idiosyncratic view of constitutional law, for it would seem to make the Bill of Rights (beyond the Due Process Clause) superfluous or at best hortatory. The more charitable and conventional reading of *Origin and Scope* is restraintist, not analytic.²⁴² Statutes that fail to conform with the best understanding of the criteria set out in the text of the Constitution, but contestably so ("unclearly"), ought not be invalidated by courts because of courts' limited institutional role. This idea is the thrust of Thayer's famous comment that:

[O]ne who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.²⁴³

The judge upholds the statute even though she takes it (unclearly) to violate the criteria bearing on constitutionality. But why should she exercise restraint in this way? Here, again, Thayer is ambiguous. *Origin and Scope*, read as presenting a restraintist rather than analytic defense of minimalism, is open to (at least) three quite different interpretations. The first is *epistemic*: reasonable legislators are epistemically better placed than courts to decide what the criteria bearing on constitutionality require, so that the legislature's decision to enact a statute (at least one not so clearly unjust as to vitiate the epistemic premise) provides the court sufficient reason to believe that the statute satisfies those criteria. The epistemic praise that Thayer seemingly heaps on legislators, at one juncture in his article, supports the epistemic reading: "It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always

²⁴¹ See Thayer, *supra* note 233, at 144 ("This rule [of minimalism] recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.").

²⁴² See, e.g., Sager, *supra* note 37, at 1222-24 (describing Thayer as a main source for ideas of judicial restraint and "underenforcement": Thayer's "rule of clear mistake . . . is not founded on the idea that only manifestly abusive legislative enactments are unconstitutional, but rather on the idea that only such manifest error entitles a court to displace the prior constitutional ruling of the enacting legislature").

²⁴³ Thayer, *supra* note 233, at 144.

to be attributed to that body."²⁴⁴ Yet Thayer elsewhere seems to say that, even if legislators lack "virtue," "sense" and "competent knowledge," courts still have good, non-epistemic grounds for minimalism:

No doubt our doctrine of constitutional law [that is—judicial review] has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality . . . And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.²⁴⁵

The claim is something like this: "popular responsibility" for matters of right and justice is undermined by nonminimalist (even epistemically perfect) judicial review and, conversely, is fostered by minimalism.

"Popular responsibility," in turn, might have either instrumental (remedial) or intrinsic (pedagogic) significance, so we thus have the second and third restraintist readings of Thayer. The second is *remedial*: nonminimalist review has the causal effect of diminishing "popular responsibility" (that is, of diminishing the strength and prevalence of various attitudes and dispositions among citizens, such as a sense of justice, a concern for constitutional values, etc.). In turn, this attitudinal change, over the long run, will cause the legislature to promulgate *more* unconstitutional statutes—an unwelcome development, given the remedial limitations of courts.²⁴⁶ The third and final reading of Thayer is *pedagogic*: nonminimalist review has the causal effect of diminishing "popular responsibility," which amounts to an intrinsic, collective harm, because the attitudes thus diminished are intrinsically good for citizens.

I am inclined to agree with Paul Kahn in rejecting the epistemic reading of Thayer.²⁴⁷ Thayer, after all, says that courts should *attribute* "virtue," "sense" and "competent knowledge" to Congress; he does

²⁴⁴ *Id.* at 149.

²⁴⁵ *Id.* at 155-56 (emphasis added) (footnote omitted).

²⁴⁶ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (questioning efficacy of judicial remedies).

²⁴⁷ See PAUL W. KAHN, *LEGITIMACY AND HISTORY* 85 (1992) (Thayer's "justification for judicial deference toward Congress [is not] grounded in institutional competence.").

not claim that legislators, in fact, have these favorable features.²⁴⁸ This is a constitutional fiction, which courts properly adopt on non-epistemic grounds (either pedagogic or remedial). It is not true that legislators have a general epistemic advantage over courts on matters of constitutional law;²⁴⁹ and it is not charitable to interpret Thayer as saying *that*, since he also describes legislators as “indocile, thoughtless, reckless [and] incompetent.”²⁵⁰ Kahn further suggests that a pedagogic account of *Origin and Scope* best accords with Thayer’s other writings: “Thayer [aims] at the moral development of the larger community. The people must struggle with the practical requirements of government from the perspective of morality, not law. . . . Too much court-made law will undermine popular moral growth.”²⁵¹

We can, however, bracket these interpretive issues. Whatever restraintist argument Thayer meant to advance in defense of “minimalist” judicial review—whether epistemic, remedial or pedagogic—his argument lacks a Simple Extension. Whatever grounds courts might properly have to abide by minimalism and refrain from invalidating all but “clearly” unconstitutional statutes, it does not follow that courts should refrain from invalidating all but “clearly” unconstitutional *rules, orders and actions*. As I have argued, Thayer’s text is rich in its ambiguity. It is rich, for our purposes, in plausibly grounding three different legislature-centered arguments, each of which is quite different from the Countermajoritarian Difficulty, but each of which falls prey to the same weaknesses once we try to extend the argument beyond the special practice of reviewing statutes.

Consider, first, the strong version of the Simple Extension, which says that courts have the same sort of restraintist reason to refrain from invalidating rules, orders and actions as they have to refrain from invalidating statutes. For the epistemic, remedial and pedagogic

²⁴⁸ Thayer, *supra* note 233, at 149.

²⁴⁹ See sources cited *supra* note 126 (arguing that courts are better placed to engage in the deliberation that constitutional knowledge requires). I say that legislators have no *general* epistemic advantage over courts on matters of constitutional law because minimalism would require a general practice of restraint. Legislators might well have an epistemic advantage on specific issues, say, synoptic ones. See *infra* text accompanying notes 336-89.

²⁵⁰ “And so in a court’s revision of legislative acts . . . it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent . . .” Thayer, *supra* note 233, at 149.

²⁵¹ KAHN, *supra* note 247, at 85.

construals of Thayer's argument, the strong version of their respective Simple Extensions would run as follows:

Epistemic Minimalism (Strong Simple Extension)

If a statute bears the "Epistemic Feature" (that is, the statute's enactment should be taken by courts as sufficient reason²⁵² to believe that the statute satisfies applicable criteria bearing on constitutionality, relative to the status quo), then an otherwise proper rule, etc., also bears the Epistemic Feature (courts have sufficient reason to believe that the rule, etc., satisfies the applicable criteria, relative to the status quo).

Remedial and Pedagogic Minimalism (Strong Simple Extensions)

If a statute bears the "Attitudinal Feature" (invalidating the statute would cause popular responsibility to diminish), then an otherwise proper rule, etc., also bears the Attitudinal Feature (invalidating the rule, etc., would cause popular responsibility to diminish).

We can consider the remedial and pedagogic accounts together because, on both accounts, judicial invalidation of statutes is supposed to have a certain causal effect, and their strong Simple Extensions would hold true only if judicial invalidation of rules, orders and actions has the same sort of causal effect.

The Simple Extension of Epistemic Minimalism, while not true, is at least plausible. The (epistemically capable) legislator has not, of course, actually approved a given rule, order or action; she has simply approved the statute. But the following premise is true, or at least plausible: if the legislator hypothetically would approve the rule, order or action, by virtue of her decision to enact the statute, then the rule, order or action bears the Epistemic Feature.²⁵³ Thus, in the case of our flag-burning statute, where the statute provides that "No person shall burn a flag of the United States," and an administrative agency issues an order against a war protester, pursuant to the statute, our reviewing court (now assumed to be epistemically imperfect) could reason as follows: (a) the statute bears the Epistemic Feature;

²⁵² This is a particularly robust kind of epistemic argument. There are weaker ones. See *infra* text accompanying note 340.

²⁵³ Imagine that the legislator hypothetically would approve the rule, order or action, by virtue of her decision to enact the statute. That is, the rule is rationally required by the considerations that prompted the legislator, exercising her epistemic capacities, to enact the statute. So the legislator hypothetically would approve the rule, etc., exercising her epistemic capacities. If *that* is true, then the rule, order or action bears the Epistemic Feature.

(b) the legislator hypothetically would approve the agency's order, because the order is a determinate application of the statute, and the aspects of justice infringed by the war-protest order would have been considered by the conscientious legislator, under applicable norms of conscientious legislation; (c) thus the order bears the Epistemic Feature.

This chain of reasoning, however, would not work in a case like *Skinner*, because it is not true that the legislator hypothetically would approve the drug-testing rule by virtue of her decision to enact the Safety Act. First, it may not be true that the legislator hypothetically would agree that the drug-testing rule is an otherwise proper interpretation of the Safety Act—that the rule appropriately maximizes safety.²⁵⁴ We can reasonably disagree about what “safety” requires and what safety measures are appropriate. One might object that these sorts of considerations, which undermined the Simple Extension of the Countermajoritarian Difficulty, should not be as effective here. After all, if, at the extreme, our (epistemically imperfect) reviewing court has reason to believe that legislators are epistemically perfect, and if the reviewing court has reason to believe that the drug-testing rule maximizes safety appropriately, then the court has reason to believe that the (epistemically perfect) legislators who enacted the Safety Act *would* agree that the rule maximizes safety appropriately. Perhaps so, but only if the court has reason to believe that the legislators are epistemically perfect on all matters, not just matters of constitutional law. And even if this is right, the further objections based on incommensurability and injustice remain potent.

Objections based upon injustice are particularly important in the case of Epistemic Minimalism. Our (epistemically imperfect) reviewing court has reason to believe that the drug-testing rule is unjust. This judicial reason would be cancelled if our epistemically perfect legislators had actually approved the drug-testing rule—but the legislators have not done so. Nor does the court have reason to infer the legislators' hypothetical approval of the drug-testing rule from their actual approval of the Safety Act, *because the court has reason to believe that the rule is unjust*. Epistemically perfect legislators would not vote for the drug-testing rule by virtue of their vote for the Safety Act since the reasons in favor of “safety” are overridden, in the case of the drug-testing rule, by reasons of justice—or so the reviewing court should

²⁵⁴ By “appropriately,” I mean within the constraints of overriding nonconstitutional values.

believe. The only way around this is to assume that the legislators are not just epistemically perfect or capable, but are subject to rigorous norms of conscientious legislation so that, if the drug-testing rule were indeed unjust, the legislators would have explicitly provided in advance, in the Safety Act, that no such rule should be issued. What this analysis suggests is that the Simple Extension could only follow from variants of Epistemic Minimalism that included very strong, and noncredible, claims about the epistemic capacities and conscientiousness of legislators.

The Simple Extensions of Remedial and Pedagogic Minimalism are also false; and, unlike the parallel argument from Epistemic Minimalism, these extensions may not even be plausible. This is because the initial premise that was true or plausible of Epistemic Minimalism, and true of the Countermajoritarian Difficulty, may be lacking here. This initial premise was that we could draw a connection *of the kind that statutory pedigree might constitute* between the relevant feature of the statute and the desired feature of the rule, order or action. In the case of Epistemic Minimalism, we were able to say that if the epistemically capable legislator votes for the statute (it bears the Epistemic Feature), and if she hypothetically would approve the rule, order or action, then the rule, order or action also bears the Epistemic Feature. Similarly, in the case of the Countermajoritarian Difficulty, we were able to say that if the Median Voter would approve the statute (it bears the Plebiscitary Feature) and if she hypothetically would approve the rule, order or action, then the rule, order or action bears the Plebiscitary Feature. In each case, the fact that the rule, order or action would hypothetically be approved by the legislator or Median Voter both “transmits” the relevant feature (Epistemic or Plebiscitary) from the statute to the rule, order or action *and* is the kind of connection that statutory pedigree might constitute. A rule, order or action is hypothetically approved, or not, by virtue of the reasons that support it. A rule, order or action is *also* a proper interpretation, or not, by virtue of the reasons that support it.

Can we identify a similar connection, of the kind that statutory pedigree might constitute, for Remedial Minimalism or Pedagogic Minimalism? The claim would need to be something like this: if invalidating a statute causes popular responsibility to diminish, then invalidating a rule, order or action that the legislature or populace hypothetically would approve also causes popular responsibility to diminish. Is this claim, or something like it, even plausible? To answer this question, we would need to flesh out the causal mechanism

behind Remedial or Pedagogic Minimalism, and determine whether that mechanism *also* supports a causal relation between judicial override of a decision that the legislature or populace hypothetically would approve, and a decrease in "popular responsibility." It is far from obvious why it should; for example, a court's facial invalidation of a statute might be a particularly salient event,²⁵⁵ which demoralizes the public in a way that the invalidation of a particular rule, order or action does not, regardless of the legislators' or citizens' hypothetical approval of the rule, order or action. Why should statutory pedigree preserve the causal regularities upon which the legislature-centered theories of Pedagogic or Remedial Minimalism—assuming these restraintist theories hold true—rely? Thus it is *not* clear that *any* rule, order or action, however "ordinary" and however determinate its interpretive pedigree, bears the Attitudinal Feature by virtue of being a proper interpretation of a statute that bears the Attitudinal Feature—let alone a rule, order or action where the now-familiar problems of indeterminacy, incommensurability, and the limits of conscientious legislation come into play.

Finally, we cannot salvage the Simple Extensions of Epistemic, Remedial or Pedagogic Minimalism by moving from a strong to a weak version. The weak version, again, claims that, although a rule, order or action that properly interprets a statute bearing the Epistemic or Attitudinal Feature need not, itself, bear the Feature, it is still wrong (for example, unfair) for courts to invalidate the rule, order or action on the grounds of justice, because interpretation is the best (fairest) process for elaborating statutes. The crucial point, however, is that the criteria bearing on constitutionality properly figure, to some extent, in the interpretation of statutes. The unjust drug-testing rule is a poor interpretation of the Safety Act, because it is unjust. This point, if right, defeats the weak Simple Extensions of Epistemic, Remedial and Pedagogic Minimalism as well as all other legislature-centered arguments for restraint.

C. *Arguments from Reversibility*

The Simple-Extension strategy is appealing for the advocate of judicial restraint because it purports to generate restraintist reasons with respect to the practice of invalidating administrative rules, orders or actions from a basic, general and legal truth about these rules, or-

²⁵⁵ See Miller, *supra* note 99, at 290 (noting the importance of issue salience to public involvement in politics).

ders or actions—their statutory pedigree—quite apart from the further features that agencies, or some agencies, may possess. The basic, general and legal truth is the following: federal administrative agencies lack constitutional authority to issue rules and orders or take actions, except pursuant to statutes that authorize them to do so, and against which the legality of these rules, orders and actions can always be tested.²⁵⁶

As we have seen, Simple-Extension arguments fail. The basic fact of interpretive pedigree does not suffice to extend legislature-centered restraintist arguments—such as the Countermajoritarian Difficulty, or the Epistemic, Remedial or Pedagogic versions of Thayer's argument (to name the exemplars)—into the administrative state. But there is a related, and equally basic, general and legal truth that the advocate of restraint might try to employ. Call this the fact of "reversibility."²⁵⁷ Not only must rules, orders and actions be proper interpretations of existing statutes; they also are subject to reversal by the future statutes that Congress might choose to enact. Given a restraintist feature that, one claims, statutes should be taken to bear—the Plebiscitary Feature, the Epistemic Feature, the Attitudinal Feature, or whatever—the further claim might be advanced that reviewing courts have just this kind of reason to refrain from invalidating rules, orders and actions because of their reversibility.

Alexander Bickel makes such a claim. In *The Least Dangerous Branch*, he briefly alludes to the question of extending the Countermajoritarian Difficulty into the administrative state, and tries to resolve the question this way:

It . . . does not follow from the complex nature of a democratic system that, because admirals and generals and the members, say, of the Federal Reserve Board or of this or that administrative agency are not electorally responsible, judges who exercise the power of judicial review need not be responsible either, and in neither case is there a serious conflict with democratic theory. For admirals and generals and the like are most often responsible to officials who are themselves elected and through whom the line runs directly to a majority. *What is more significant, the policies they make are or should be interstitial or technical only and are reversible by legislative majorities.* . . . Nor will it do to liken judicial review to the general lawmaking function of judges. In the latter aspect, judges are indeed something like administrative officials, for their decisions are also reversible by any legislative majority—and not infrequently they are reversed. Judicial review, however, is the power to apply and construe the

²⁵⁶ Cf. *supra* note 133 (noting the possible need to qualify this statement). Again, because I am arguing *against* the Simple Extension, I can assume the statement to be unqualifiedly true.

²⁵⁷ I am indebted to Larry Alexander, Frank Goodman and Seth Kreimer for valuable discussions on this point.

Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision.²⁵⁸

On one construal, Bickel is asserting that, because administrative rules, orders and actions are potentially reversible by truly majoritarian statutes, such rules, orders and actions are *also* majoritarian.

Reversibility I (The Countermajoritarian Difficulty)

Compare rules issued by two different kinds of administrative agencies, a Reversible Agency and an Irreversible Agency. The first is subject to reversal by Congress. But the second has special, independent constitutional authority, such that its rules are *not* subject to reversal by Congress. Because statutes, or some statutes, should be taken to bear the Plebiscitary Feature, the rules, orders and actions of the Reversible Agency, but not the rules, orders and actions of the Irreversible Agency, should also be taken to bear the Plebiscitary Feature, or at least a weak version of it.

This "Irreversible Agency" is imaginary. I do not suggest that such agencies could properly exist within our legal system,²⁵⁹ but rather I am imagining that one could exist so as to test and sharpen how much Bickel means to infer from the basic fact of reversibility.

Is there truly a thoroughgoing, democratic difference between the Reversible and the (imaginary) Irreversible Agency? Imagine that both agencies have street-level officers, who take various low-visibility actions, or low-level adjudicators, who issue various administrative orders against individuals who may lack the resources, information or clout to lodge an effective complaint with the Reversible Agency's legislative overseers.²⁶⁰ Do we really want to say that the street-level actions or low-level orders of the Reversible Agency are more plebiscitary than the counterpart actions or orders of the Irreversible Agency, just by virtue of the fact that the former are potentially reversible by statutes that (let us assume) would bear Plebiscitary Features? The

²⁵⁸ BICKEL, *supra* note 1, at 19-20 (emphasis added) (footnote omitted).

²⁵⁹ Whether they could—whether the fact of reversibility holds true unqualifiedly or not—raises the kind of issues discussed in the *Youngstown* case. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."). Because I am arguing against Bickel's reversibility strategy, I may assume *arguendo* that the fact of reversibility holds true unqualifiedly.

²⁶⁰ See Kreimer, *supra* note 132, at 5-6 (noting that the largest category of constitutional challenges raised in federal district court concern actions by street-level bureaucrats).

plausible claim that *some* decisions of the Reversible Agency (e.g., the published rules) are, indeed, more majoritarian than the counterpart decisions by the Irreversible Agency is no help because what makes that claim plausible is no longer merely the basic fact of reversibility. Rather, it is the further premises that (a) some of the decisionmakers within the Reversible Agency are motivated to avoid decisions that they expect to be reversed by statute;²⁶¹ and (b) there are some decisions that these decisionmakers can expect to be thus reversed, where these decisions are, *inter alia*, sufficiently salient, or sufficiently likely to trigger a "fire alarm,"²⁶² such that they are expected to come to the attention of legislative overseers. In contrast with the basic facts of reversibility or interpretive pedigree, premises such as (a) and (b) are *not* general, legal truths about administrative agencies. It seems wildly implausible that *every* agency decisionmaker within a reversible agency satisfies the motivational claim set out by the first premise, and that her every decision satisfies the salience claim set out by the second premise. In any event, these are premises whose truth and generality will only emerge after positive theorizing and empirical testing; nothing in the basic fact of reversibility entails them. The fact of reversibility, without (much) more, does not show why agency rules, orders or actions are plebiscitary even assuming that statutes are plebiscitary.

Bickel has a response to this line of criticism. A different interpretation of his brief passage in *The Least Dangerous Branch* is the following:

Reversibility II (The Countermajoritarian Difficulty)

Statutes, or some statutes, should be taken to bear the Plebiscitary Feature. Courts have reason not to directly invalidate a statute that bears the Plebiscitary Feature. Courts have the same kind of reason not to invalidate a rule, order or action—whether issued by a Reversible Agency or an Irreversible Agency. By invalidating the rule, order or action, the court thereby prevents Congress from enacting a statute with the

²⁶¹ Cf. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 249-53 (1987) (arguing that bureaucrats who anticipate legislative sanctions may comply, *ex ante*, with legislative preferences); Hammond & Knott, *supra* note 136, at 140-42 (modelling agency autonomy, by deriving a set of policies that an agency can adopt without being reversed by the President or Congress, and assuming that the agency adopts some policy within that set).

²⁶² See McCubbins et al., *supra* note 261, at 250 (suggesting that direct congressional oversight is less important than "'fire alarm' monitoring [which] consists of disappointed constituents pulling a member's fire alarm whenever an agency harms them").

same or similar content. These judicial decisions, therefore, indirectly preclude the enactment of future statutes bearing the Plebiscitary Feature and (in that sense) infringe upon the Plebiscitary Feature.

As Bickel puts it, "Judicial review . . . is the power to apply and construe the Constitution [such that] a legislative majority [is] powerless to affect the judicial decision."²⁶³

This claim is simply not true. Reversibility II rests upon a simple misconception about the nature of judicial review. The misconception is that, when a reviewing court strikes down some administrative rule, order or action as unconstitutional, and announces a piece of constitutional doctrine describing what makes the rule, order or action unconstitutional, subsequent Congresses are obliged to refrain from enacting *statutes* that fall within the announced description—statutes whose content is the same or similar to that of the invalidated rule, order or action—and subsequent reviewing courts are obliged to invalidate such statutes. But why assume this to be true? Might not a court legitimately invalidate a rule, order or action as violating some constitutional criterion C (some aspect of justice), and yet subsequently uphold a statute with the same or similar content, just by virtue of the institutional differences between legislatures and agencies? The misconception behind Reversibility II is that differential judicial enforcement of constitutional criteria, as between rules, orders or actions on the one hand and statutes on the other, is impossible or illegitimate.

We will examine, in the next Section, exactly how this misconception is belied by existing constitutional doctrines governing judicial review. The point here is to see how Bickel's Reversibility II is premised upon this misconception. If a court's decision striking down a rule, etc., by virtue of constitutional criterion C, leaves open the possibility that the court might recognize democratic, plebiscitary grounds to uphold a statute (even one with precisely the same content) challenged as violating C, then Reversibility II falls apart. For then the judicial decision striking down the rule, etc., ought *not* be taken by subsequent, plebiscitary legislators as binding them to refrain from enacting a statute (even one with precisely the same content as the voided rule, etc.) that falls within the description of C's

²⁶³ BICKEL, *supra* note 1, at 20; see also ELY, *supra* note 6, at 4 (noting that "in non-constitutional contexts [but not constitutional contexts] the court[s'] decisions are subject to overrule or alteration by ordinary statute").

contours announced by the reviewing court. Therefore that judicial decision is *not*, indirectly, countermajoritarian, in the sense of indirectly precluding the enactment of statutes that would bear Plebiscitary Features.

Indeed, the same misconception about the nature of judicial review also lies behind Reversibility I. The claim there is that the basic fact of reversibility, without more, confers (some kind of) the Plebiscitary Feature upon reversible rules, orders or actions. But, in this basic sense, judicial decisions that leave open the possibility of a subsequent legislative override are *also* reversible. Assume it to be the case that, when the FRA issues the drug-testing rule, the rule is weakly plebiscitary just because Congress, if it wanted, could subsequently abrogate the rule by amendment to the Railroad Safety Act. The FRA enacts this weakly plebiscitary rule, and the court strikes it down. If it is true that Congress could, in turn, override the judicial decision by enacting a drug-testing statute that reviewing courts would uphold on restraintist grounds, then the *judicial decision striking down the FRA's rule is weakly plebiscitary in just the same way as the initial rule*. The bare truth of reversibility, which is equally and symmetrically true of both the agency's rule and the judicial decision invalidating it, constitutes no kind of direct distinction between the two.²⁶⁴ If there is a distinction (and there may well be), it arises from *further* features of administrative agencies. Perhaps administrators, as compared with judges, are differentially motivated to avoid decisions that they expect to be reversed by statute;²⁶⁵ or perhaps administrative decisions, as compared with judicial decisions, are differentially salient to the legislature. Nothing said here is meant to preclude the possibility of a democratic, epistemic or other kind of difference, bearing on judicial review, between unelected administrators and unelected judges. But that difference, whatever it may be, is not entailed by, or in any way a direct consequence of, bare reversibility. For if it is true that administrative rules, orders and actions are potentially reversible by statute, it also turns out to be equally and symmetrically true that the decisions of constitutional reviewing courts *invalidating* administrative rules,

²⁶⁴ I say "direct distinction" to leave open the possibility that, because there *are* some legally irreversible decisions the judge has the power to make (invalidating a statute), this power affects his general motivational structure, which in turn makes him more insouciant about the prospect of reversal in the area of agency review.

²⁶⁵ See *supra* note 264. But see Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 96-98 (1994) (defending claim that judges seek to avoid reversal by Congress and the President).

orders or actions are potentially reversible by statute. Let us now see how.

D. *Judicial Doctrine: The Possibility of Differential Restraint*

The central claim defended in this Part is that the statutory pedigree of administrative rules, orders or actions does not, without more, require constitutional courts to exercise restraint in reviewing rules, orders or actions, whatever restraintist reason courts might have in reviewing statutes. In short, the statutory pedigree of rules, orders and actions does not, without more, rule out a practice of *differential restraint*. By differential restraint, I mean a practice whereby reviewing courts refrain from invalidating *statutes* that violate (the courts' best understanding of) some criteria bearing on constitutionality (some aspects of justice) but do *not* refrain from invalidating rules, orders or actions that violate the same criteria. In theory, at least, differential restraint should be a possible practice for us, one whose scope would depend upon the democratic, epistemic or other features, bearing upon judicial review, of agencies and legislatures.

I now want to show how this theoretical claim is supported by legal doctrine. *The legal doctrines governing judicial review license and anticipate differential restraint.* The idea that courts might have broader constitutional grounds to invalidate rules, orders and actions, as opposed to statutes, is not just this Article's theoretical construct. Rather, it is a construct that turns out to be black letter law.

The doctrinal touchstone for differential restraint is the eminent and longstanding canon of statutory construction that I have termed the Avoidance Canon: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."²⁶⁶ Notably, the Avoidance Canon does not merely stipulate that a rule, order or action should be counted as a poor interpretation of the underlying statute if the rule, order or action would be unconstitutional. It goes further than that: "*Serious doubt*"²⁶⁷ as to constitutionality suffices to invalidate an otherwise proper rule, order or action, where the Avoidance Canon applies. Again, the *Catholic Bishop* case mentioned above

²⁶⁶ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

²⁶⁷ *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961).

is illustrative.²⁶⁸ In *Catholic Bishop*, the Court held that the NLRB lacked jurisdiction over parochial schools, *not* because such jurisdiction would in fact violate the Religion Clauses, but merely because it would *risk* a violation.

The Board argues that it can avoid excessive entanglement [with the parochial schools]. . . . But at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed.²⁶⁹

This aspect of *Catholic Bishop* is conventional doctrine, announced by the Court in *DeBartolo* and many other cases.²⁷⁰ *Rust v. Sullivan* states the doctrine nicely (although, as we shall see, fails to follow it): "[A] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."²⁷¹

Think of the "serious constitutional doubts" doctrine as identifying one point on a spectrum of deference. That spectrum ranges from the extreme of minimalism, to a midpoint of no-deference, to an extreme of "maximalism." "Minimalism" is the standard name for the posture of deference advocated by Thayer in his famous 1893 article, as discussed above.²⁷² Under minimalism, let us say, a judge invalidates X (a statute, rule, order or action) if and only if *every reasonable person* should believe that X is unconstitutional. Under no-deference, a judge invalidates X if and only if *she* believes that X is unconstitutional. Under maximalism, a judge invalidates X if and only if *some reasonable person* could believe that X is unconstitutional. Official doctrine, governing review of statutes, ranges somewhere between minimalism and no-deference. Sometimes, the Court accords statutes a "presumption of constitutionality," which points towards minimalism; sometimes, the Court does not apply the presumption (no-deference).²⁷³ This point is well known. Indeed, there is a significant scholarly literature on minimalism, as we have seen.²⁷⁴ I am

²⁶⁸ See *supra* text accompanying notes 201-10.

²⁶⁹ NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979).

²⁷⁰ See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995) ("We have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions"); cases cited *infra* note 282 (employing "serious constitutional doubts" doctrine with respect to agency action).

²⁷¹ 500 U.S. 173, 191 (1991) (internal quotation omitted).

²⁷² See Thayer, *supra* note 233 and accompanying text.

²⁷³ See *supra* note 238 (discussing presumption of constitutionality).

²⁷⁴ See *supra* note 240.

suggesting, however, that official doctrine governing the review of rules, orders and actions (the "Avoidance Canon") points to a *different* portion of the deference spectrum entirely: the portion between *no-deference* and *maximalism*. The Avoidance Canon, by requiring courts to invalidate rules, orders or actions raising "serious constitutional doubts," establishes a posture of deference (or rather, vigilance) that is not minimalism, or even no-deference, but rather approaches maximalism.²⁷⁵ This is a remarkable and highly significant feature of constitutional doctrine, largely overlooked by constitutional scholars—with a few important exceptions, notably William Eskridge and Cass Sunstein.²⁷⁶

Maximalism, as such, is nonsense.²⁷⁷ Why should a judge (if she is

²⁷⁵ Notably, the Court does *not* standardly invoke the "presumption of constitutionality" doctrine with respect to agency decisions. *But see* United States Dep't of Labor v. Triplett, 494 U.S. 715, 721-22 (1990) (noting the "heavy presumption of constitutionality" regarding a fee-limitation regime established by statute and agency rules).

²⁷⁶ See ESKRIDGE, *supra* note 140, at 285-97 (discussing constitutionally grounded canons of statutory construction, including "serious constitutional doubts" doctrine); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 163-68 (1990) (same); Eskridge & Frickey, *supra* note 199, at 593 (same); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) [hereinafter Eskridge, *Public Values*] (same); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 468-69 (1989) (same). For earlier, critical treatments of the "serious constitutional doubts" doctrine, see HENRY J. FRIENDLY, BENCHMARKS 211-12 (1967); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 284-85 (1985); Harry H. Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49; *see also* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1 (1996) (discussing "serious constitutional doubts" doctrine, specifically with reference to free speech cases); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1011-27 (1994) (summarizing various doctrines by which the Court purports to avoid constitutional questions, including "serious constitutional doubts" doctrine); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 91 (1995) (discussing the Avoidance Canon in separation of powers context).

²⁷⁷ Perhaps this is too strong. Maximalism vis-à-vis agencies might in theory be defended on the grounds that it forces political institutions to deliberate about constitutional issues, and thus that constitutional courts properly invalidate, under the rubric of the "serious constitutional doubts" doctrine, even those agency decisions that the courts take to satisfy the criteria bearing on constitutionality. *Cf.* Sunstein, *supra* note 191, at 48 (suggesting that *Kent v. Dulles* as well as *Hampton v. Mow Sun Wong* can be understood as "founded on the idea that publicly accountable bodies should make the contested decision that was challenged in the case"). But would such an idea, standing alone, truly justify judicial invalidation of an otherwise proper agency decision that the court *also* believes to be constitutionally proper? Note that Professor Sunstein, in other writings, has adverted to the role of the "serious constitutional doubts" doctrine as a placeholder for underenforced constitutional criteria. *See infra* text accompanying

authoritative on matters of constitutional law, or even if she is not) invalidate a rule, order or action that she takes to be constitutional, merely because someone else who is reasonable but wrong could think otherwise? Rather, as Eskridge and Sunstein rightly suggest, the “serious constitutional doubts” doctrine is best reconstructed as a placeholder for *differentially enforced* constitutional criteria: criteria that courts properly enforce against rules, orders and actions, but not against statutes. To quote Sunstein:

[The principle] that courts should construe statutes so as to avoid constitutional doubts . . . allow[s] judicial ‘bending’ of [statutes]. Judge Richard Posner has criticized that principle on the ground that it creates a kind of ‘penumbral Constitution,’ one that allows courts to press statutes in particular directions even though—and this is his central point—they would ultimately be found not to offend the Constitution.

But Judge Posner’s objection becomes less forceful in light of the fact that constitutional norms are quite generally underenforced. The aggressive construction of questionable statutes, removing them from the terrain of constitutional doubt, can be understood as a less intrusive way of vindicating norms that do in fact have constitutional status; and this point applies even if courts would not invalidate those statutes if they were forced to decide the question.²⁷⁸

Eskridge says very much the same. He suggests that an underenforcement theory provides the “best account” of the “serious constitutional doubts” doctrine:

While a Court that seeks to avoid constitutional activism will be reluctant to invalidate federal statutes in close cases, it might seek other ways to protect constitutional norms. One way is through canons of statutory construction. A traditional example is the rule that ambiguous statutes should be interpreted to avoid constitutional difficulties Protecting underenforced constitutional norms through such clear statement rules is normatively attractive under republican theory (and under the critical pragmatism that I follow). It is not seriously undemocratic, since Congress can override the norm through a statutory clear statement.²⁷⁹

In short, the “serious constitutional doubts” doctrine is just a doctrine of differential judicial restraint.²⁸⁰

note 278.

²⁷⁸ SUNSTEIN, *supra* note 276, at 165 (footnotes omitted).

²⁷⁹ ESKRIDGE, *supra* note 140, at 286.

²⁸⁰ I should stress that my use of the term “underenforcement” here does not commit me to the Revisionist Construal of “constitutionality.” On the Traditional Construal of “constitutionality,” where criteria bearing on constitutionality are under-

The "serious constitutional doubts" doctrine has played, and continues to play, a significant role in the Court's jurisprudence.²⁸¹ Specifically, from the jurisprudential inception of the modern, federal administrative state in the New Deal, the doctrine has served as a mechanism by which the Court invalidates agency rules, orders or actions on constitutional grounds, while leaving open the possibility that statutes with the same or similar content might be upheld.²⁸² An

enforced so that some statutes, rules, orders or actions are *not* invalidated by reviewing courts in virtue of those criteria, then such statutes, etc., are simply not, all things considered, "unconstitutional." See *supra* note 53 (explaining that a less robust sense of "underenforcement" is consistent with Traditional Construal); *supra* note 58 (explaining that, on Traditional Construal, it is a necessary if not sufficient condition for a rule, order or action to be "unconstitutional" that it be properly invalidated by reviewing courts).

²⁸¹ See Eskridge, *Public Values*, *supra* note 276, at 1020-23 (describing the Court's use of the Avoidance Canon and citing cases); see also Zeppos, *supra* note 132 (discussing and documenting wide use of the Avoidance Canon by the Court).

²⁸² Cases in which the Court has explicitly invoked some version of the "serious constitutional doubts" formulation, in limiting federal agency action of some kind, where the constitutional provision at stake involved some part of the Bill of Rights, include: *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Lowe v. SEC*, 472 U.S. 181, 205 n.50 (1985); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780, 788 (1981); *United States v. Clark*, 445 U.S. 23, 33-34 (1980); *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Schneider v. Smith*, 390 U.S. 17, 26-27 (1968); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 63 (1964); *Greene v. McElroy*, 360 U.S. 474, 507 (1959); *Lee v. Madigan*, 358 U.S. 228, 234-35 (1959); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *United States v. Witkovich*, 353 U.S. 194, 201-02 (1957); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598-600 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-56 (1946); and *Ex parte Endo*, 323 U.S. 283, 299 (1944). See also *infra* text accompanying notes 295-98 (discussing *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976)).

The Court has also invoked the doctrine to cabin the authority of administrative agencies in other ways. See, e.g., *Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (finding the availability of judicial review for constitutional challenges to agency action); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341-42 (1974) (finding no agency power to tax); *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989) (finding no agency authority to adjudicate creditors' claims against savings and loan associations under agency receivership); *Commissioner v. Shapiro*, 424 U.S. 614, 632 (1976) (delineating the availability of exception to Internal Revenue Code's Anti-Injunction provision).

It might be argued that the practice of constitutional review under the rubric of statutory interpretation is even more extensive than this. For example, various of the "clear statement" rules that the Court invokes, see, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) (setting out a clear statement rule against retroactive agency regulations), are surely mechanisms for enforcing criteria bearing on constitutionality. See Eskridge & Frickey, *supra* note 199, at 631 ("One way to articulate and protect underenforced constitutional norms is through interpretive presump-

early and dramatic illustration is *Ex parte Endo*,²⁸³ in which the Court held that a writ of habeas corpus should be granted to a concededly loyal Japanese citizen, releasing her from the relocation camps administered by the War Relocation Authority.²⁸⁴ Hesitant to issue a holding that Congress would lack the constitutional power to require the claimant's detention, the Court instead interpreted the relevant authorizing statutes and Executive Orders not to authorize such detention, explaining, "[w]e have . . . favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality."²⁸⁵ Soon thereafter, as the Second World War gave way to the Cold War against communism in the 1950s, the Warren Court repeatedly employed the "serious constitutional doubts" doctrine to curtail constitutional abuses of the new war.²⁸⁶ In *Kent v. Dulles*,²⁸⁷ a leading case of this type and one that Charles Black specifically discussed in his seminal critique of legislature-centered theories of judicial restraint,²⁸⁸ the Court invalidated on statutory grounds a State

tions, clear statement rules, and super-strong clear statement rules—canons of statutory construction."); see generally *id.* at 598-629 (listing and describing various clear statement rules); ESKRIDGE, *supra* note 140, at 326-27 (comprehensively listing the Rehnquist Court's clear statement rules grounded in individual rights). Whether the application of a constitutionally grounded clear statement rule counts as an instance of judicial review depends upon whether judicial utterance of the term "constitutional," in some way (e.g., through the utterance of "serious constitutional doubts") is conceptually or semantically a necessary part of judicial review. I leave the question open.

²⁸³ 323 U.S. 283 (1944).

²⁸⁴ See *id.* at 297 (concluding that the War Relocation Authority "has no authority to subject citizens who are concededly loyal to its leave procedure").

²⁸⁵ *Id.* at 299. Cf. BLACK, *supra* note 20, at 79-82 (criticizing Court's failure to follow this approach in *Korematsu v. United States*, 323 U.S. 214 (1944)).

²⁸⁶ See Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1053-60 (1984) (discussing this and related techniques).

²⁸⁷ 357 U.S. 116 (1958).

²⁸⁸ Black wrote:

[T]here is [also] the case where Congress, by very broad and vague delegation, puts it within the power of some official to behave in a manner of questionable constitutionality

. . . The Court's typical—and seemingly harmless—solution has been to read the delegation itself as not including the power to tamper with important constitutional rights, so that—on this purportedly statutory ground—the official is held without power to do what he has done. This was the holding in . . . *Kent v. Dulles* I have called this method of solution harmless, and it is that, as long as the Court keeps firmly in mind that in such a case it is not confronting Congress at all, and remains institutionally free, and indeed bound, to make its own judgment unembarrassed by presumptions.

BLACK, *supra* note 20, at 78-79 (emphasis added) (footnote omitted).

Department regulation denying passports to citizens who were Communists, despite the Department's broad statutory authority to "grant and issue passports" at its discretion.²⁸⁹ The Court stated:

[T]he right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. . . . Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.²⁹⁰

The Court was careful to leave open the question whether Congress could constitutionally enact the same no-passport policy by statute.²⁹¹

Similarly, in *Greene v. McElroy*,²⁹² the Court held that the Department of Defense lacked statutory authority to deny security clearances to defense contractor employees without affording the employees an opportunity for confrontation and cross-examination, given the due process values at stake.²⁹³ The Court, however, distinctly refrained from deciding whether such a procedural scheme, if expressly authorized by Congress or the President, would be equally subject to judicial invalidation:

In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded

²⁸⁹ See *Kent*, 357 U.S. at 129-30 (holding that the Secretary of State had no statutory authority to "withhold passports to citizens because of their beliefs or associations").

²⁹⁰ *Id.* at 129 (citations omitted); see also *id.* at 125-27 (elaborating upon constitutional criteria at stake).

²⁹¹ See *id.* at 130.

²⁹² 360 U.S. 474 (1959).

²⁹³ See *id.* at 506-08 (emphasizing that "traditional forms of fair procedure [should] not be restricted . . . without the most explicit action by the Nation's lawmakers"); see also *id.* at 496-99 (elaborating upon constitutional criteria at stake).

the safeguards of confrontation and cross-examination.²⁹⁴

This distinction in *Greene* between agencies and elected bodies (the President and Congress) is particularly significant for a theory of restraint in the administrative state, both because it properly views the administrative state as potentially directed by, but not equivalent to, the Presidency, and, reciprocally, because it raises the possibility that presidential, like congressional, direction might give reviewing courts proper grounds for restraint.

During the tenure of Chief Justice Burger, the Supreme Court continued to rely on the "serious constitutional doubts" doctrine as a technique for invalidating administrative rules, orders and actions without prejudging the validity of statutes.²⁹⁵ In its striking decision in *Hampton v. Mow Sun Wong*,²⁹⁶ the Court went even further. *Hampton* invalidated a Civil Service Commission rule barring aliens from employment in the federal civil service as unconstitutional under the Due Process Clause of the Fifth Amendment, while carefully eschewing any suggestion that a statute, or a no-alien rule explicitly authorized by the President, would likewise be properly invalidated by constitutional reviewing courts. The Court explained:

When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. . . . Alternatively, if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.²⁹⁷

²⁹⁴ *Id.* at 508.

²⁹⁵ Besides *Catholic Bishop* itself, other significant Burger Court cases of this genre include: *Lowe v. SEC*, 472 U.S. 181, 205 n.50 (1985) (the SEC and free speech); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780, 788 (1981) (the Department of Labor and the Religion Clauses); *United States v. Clark*, 445 U.S. 23, 33-34 (1980) (the Civil Service Commission and equal protection); and *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) (the Social Security Administration and procedural due process); see also *supra* note 282 (citing these cases); Eskridge & Frickey, *supra* note 199, at 598-611 (discussing the Burger Court's use of the "serious constitutional doubts" test and related clear statement rules).

²⁹⁶ 426 U.S. 88 (1976).

²⁹⁷ *Id.* at 103 (emphasis added). The Court further explained:

We may assume with the petitioners that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the na-

Hampton is an unusual case because the Court did not employ the standard technique of bringing constitutional criteria to bear under the rubric of statutory interpretation and the "serious constitutional doubts" doctrine. Instead, the Court squarely stated that although the agency rule was unconstitutional, a statute or an executive order might not be.²⁹⁸

It must be stressed that, alongside cases such as *Greene, Kent, Catholic Bishop* and *Hampton*, the Supreme Court has repeatedly upheld agency rules, orders or actions in the face of plausible claims that these rules, orders or actions raised "serious constitutional doubts." As Professor Eskridge crisply comments: "For every case like *Catholic Bishop*, which interprets statutes to avoid constitutional doubts, there are other cases where a statute is construed boldly, to face substantial constitutional troubles."²⁹⁹ It is important, however, to remember that the doctrine must not be taken at face value: best justified, it is simply a placeholder for constitutional criteria that should, or might plausibly be, differentially enforced. The Court's uneven application of the doctrine can be understood, or at least rationalized, as reflecting the Justices' varying estimates of the varying considerations that weigh in favor of, or against, differential restraint. Given some criterion C bearing on constitutionality, differential restraint is only warranted where courts have reason to refrain from enforcing C against statutes, but not against rules, orders or actions. Differential restraint is unwarranted where courts lack a reason even to refrain from enforcing C against statutes. Reciprocally, differential restraint is unwarranted where courts have a reason to refrain from enforcing C against rules, orders or actions *as well as* statutes—say, by virtue of a President's in-

tional interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes . . .

....

We think the petitioners accurately stated the question presented in their certiorari petition. The question is whether the regulation of the United States Civil Service Commission is valid. We proceed to a consideration of that question, assuming, without deciding, that the Congress and the President have the constitutional power to impose the requirement that the Commission has adopted.

Id. at 105, 114.

²⁹⁸ Indeed, the President responded to *Hampton* by promulgating an Executive Order that barred aliens from the civil service, which a federal appellate court upheld. See *Vergara v. Hampton*, 581 F.2d 1281, 1287 (7th Cir. 1978). This interesting fact is pointed out by Sunstein, *supra* note 191, at 48 n.220.

²⁹⁹ Eskridge, *Public Values*, *supra* note 276, at 1073 n.302 (citing cases contemporaneous with *Catholic Bishop*).

tervention.

This last possibility, raised by *Greene* and *Hampton*,³⁰⁰ came to full prominence during the 1980s, with the presidency of that strong President, Ronald Reagan. The problems and promise of presidentialism became a central theme for ordinary administrative law, as exemplified by two of the foremost cases in the administrative law canon: *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*³⁰¹ and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*³⁰² *State Farm* involved the National Highway Traffic Safety Administration ("NHTSA"), while *Chevron* involved the Environmental Protection Agency ("EPA"). In each case, the agency, following Reagan's election, had changed its regulatory course and substituted a less stringent regulatory regime for an earlier, more stringent one. NHTSA in 1981 rescinded a rule (promulgated under Carter in 1977) requiring cars to have air bags or other passive restraints; EPA in 1981 broadened the applicability of the so-called "bubble" concept (reversing a rule promulgated at the end of the Carter administration, in August 1980) so that an entire plant, rather than a single smokestack, could be counted as a "stationary source" under the Clean Air Act.

State Farm held that NHTSA's change of course was illegal. Although the underlying statute was a wide-open values-statute, which simply instructed NHTSA to pursue the value of "motor vehicle safety," the Court held that the change of course was insufficiently justified in terms of this statutory value and therefore "arbitrary and capricious" under the Administrative Procedure Act.³⁰³ *State Farm* made clear that "arbitrary and capricious" review was deferential, but only moderately so; it lay somewhere between de novo review and automatic affirmance.³⁰⁴ The Court rejected NHTSA's proposal "that the arbitrary and capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause."³⁰⁵ It also ignored the suggestion of Jus-

³⁰⁰ But see *Schneider v. Smith*, 390 U.S. 17, 26-27 (1968) (invoking "serious constitutional doubts" doctrine to strike down national security regulation promulgated by President).

³⁰¹ 463 U.S. 29 (1983).

³⁰² 467 U.S. 837 (1984).

³⁰³ See *State Farm*, 463 U.S. at 46.

³⁰⁴ See *id.* at 43 (clarifying the appropriate standard of review).

³⁰⁵ *Id.* at 43 n.9. The Court continued (significantly, for our purposes): "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its

tice Rehnquist, in dissent, that Reagan's election amounted to a sufficient justification for the change of course. Said Justice Rehnquist:

The agency's changed view of the [passive restraint] standard seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.³⁰⁶

By contrast, only a year later in *Chevron*, the Court upheld the EPA's change of course. *Chevron* announced the seminal doctrine that courts would defer to "reasonable" agency interpretations of statutes, except where the statutes were "clear."³⁰⁷ This doctrine, standing alone, might be perfectly consistent with *State Farm*. Specifically, it might mean that, where statutes are unclear, courts should defer to agencies, but employ the moderately deferential approach set forward in *State Farm*. On this reading of *Chevron*, the EPA won the case simply because it had good reasons for its change of course, while NHTSA in *State Farm* did not.

On the other hand, *Chevron* might mean something else. The language of presidentialism is rampant in that decision, both to justify the general doctrine of deference and to explain why the EPA's new rule was reasonable. The Court stated:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is³⁰⁸

On another reading, then, *Chevron* overrules *State Farm* and embraces the position that Justice Rehnquist set forward in his *State Farm* dissent. That position seems to be the following: the President's policy functions as a fresh reason to warrant courts in upholding agency rules, orders or actions. An otherwise illegal agency decision will be rescued, if it is connected (in the right way) to the policy of the President.³⁰⁹ Whether *Chevron* really means this remains unclear. The

statutory mandate." *Id.*

³⁰⁶ *Id.* at 59 (Rehnquist, J., dissenting).

³⁰⁷ See *Chevron*, 467 U.S. at 842-43.

³⁰⁸ *Id.* at 865.

³⁰⁹ Contrast this with the view that, although the President rightly oversees the

proper reading of *Chevron*, and more generally the proper role of the President in overseeing agencies, have been intense subjects of debate by legal scholars, the lower courts, and the Court itself for the last decade.³¹⁰

Chevron and *State Farm*, again, concern ordinary administrative law: how strongly an agency's rules, orders or actions, where these do not implicate constitutional rights, must be justified to a reviewing court. But the prospect of presidentialism that excites these decisions also bears, quite directly, upon constitutional review. Indeed, *Chevron* prompted, and continues to prompt, scholarly discussion about the vitality of cases such as *Kent v. Dulles* or *Catholic Bishop*. Might not *Chevron*'s broad rule of deference displace the "serious constitutional doubts" test, and require courts to *defer* to an agency's judgment that an otherwise valid rule, order or action also satisfies the Constitution?³¹¹ The Court in *DeBartolo* tried hard to lay these doubts to rest. It noted that the agency's order under review in that case "would normally be entitled to deference"³¹² under *Chevron*, but then stated explicitly that the Avoidance Canon worked as an exception to *Chevron* deference, and held the order to be improper. Yet, soon after *DeBartolo*, the "serious constitutional doubts" test was called into question by one of the most visible and contested decisions of the Rehnquist Court, *Rust v. Sullivan*.³¹³

Rust, like *Chevron* and *State Farm*, involved an administrative

administrative state, so as to ensure that agency decisions are justified on the balance of relevant reasons, his intervention does not give courts an additional reason to uphold these decisions.

³¹⁰ Leading scholarly works in the debate about the *Chevron* case, and the broader questions it raises, include: ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* (1992); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Sidney A. Shapiro & Robert L. Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990).

³¹¹ See Sunstein, *supra* note 310, at 2110-14 (discussing whether *Chevron* trumps constitutionally inspired interpretive norms and concluding in the negative).

³¹² *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988).

³¹³ 500 U.S. 173 (1991).

change of course that was linked, in turn, to a change in the policy of the Presidency. Title X of the Public Health Service Act, enacted in 1970, authorized the Department of Health and Human Services ("HHS") to grant funds for family planning services, but stipulated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."³¹⁴ In 1988, after nearly two decades of a different interpretation, HHS issued regulations (the so-called "gag rule") that prohibited grantees (in their Title X projects) from counselling pregnant mothers about abortion, or even advocating abortion. This *volte-face* by HHS was linked to the strong anti-abortion platform that the Reagan and then Bush administrations had adopted.³¹⁵ And indeed, in upholding the gag rule, the Court in *Rust* seemed to acknowledge this link. Justice Rehnquist, writing for the Court, first determined that the rule was an otherwise valid interpretation of Title X. In his analysis, he seemed to suggest that the change in presidential policy helped to justify HHS's change in course:

We find that the Secretary amply justified his change of interpretation with a 'reasoned analysis.' [(citing *State Farm*)] . . . He [among other things] also determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the 'elimination of unborn children by abortion.'³¹⁶

Citing *DeBartolo* and conceding that the gag rule ought to be invalidated under the Avoidance Canon doctrine if it raised sufficiently serious constitutional doubts,³¹⁷ the Court then determined that no such doubts were raised. Finally, the Court considered and dismissed the First and Fifth Amendment challenges to the gag rule, on their merits. Four justices dissented, with all four arguing that the gag rule was invalid under the Avoidance Canon even if it did not, in fact, violate the Constitution. As Justice O'Connor put the point: "It is enough in this litigation to conclude that neither the language nor the history of [Title X] compels the Secretary's interpretation, and that the interpretation raises serious First Amendment concerns."³¹⁸ Indeed, Justice O'Connor's dissent in *Rust* is one of the most elo-

³¹⁴ 42 U.S.C. § 300a-6 (1994).

³¹⁵ See DEVINS, *supra* note 211, at 114-16 (discussing the gag rule in context of Reagan and Bush administration activism on abortion).

³¹⁶ *Rust*, 500 U.S. at 187 (emphasis added).

³¹⁷ See *id.* at 190-91.

³¹⁸ *Id.* at 224-25 (O'Connor, J., dissenting).

quent defenses of the "serious constitutional doubts" test extant in the case law.

If by his approving reference in *Rust* to a "shift in attitude against the 'elimination of unborn children by abortion,'" ³¹⁹ Justice Rehnquist intended to invoke and incorporate the position that he took in his *State Farm* dissent or the presidentialist language of the *Chevron* majority opinion that he joined, then *Rust* starkly raises the possibility that presidential direction might justify judicial restraint with respect to rules, orders or actions that violate the best analytic understanding of the criteria bearing on constitutionality. Consider the following to be the best defense of the dissenters' position in *Rust*:

"The gag rule in fact violates constitutional criteria.³²⁰ But because there plausibly exist good restraintist grounds to uphold a *statutory* gag rule, we should say merely that the agency's gag rule raises serious constitutional doubts."

The following would be the majority's response, per Justice Rehnquist:

"Good restraintist grounds to refrain from invalidating the agency's gag rule *also* exist. In particular, the gag rule rests upon the anti-abortion policy that this Presidency has very publicly espoused, which, we must assume, has the support of the majority of the citizenry. So, whatever the applicability of the 'serious constitutional doubts' test in some other case, it is inapplicable here. The agency's gag rule should only be invalidated if it violates some criterion sufficient for this Court to strike down a statutory gag rule."

On this reading, the debate between majority and dissent in *Rust* replicates, in the domain of constitutional law, the debate about the role of the Presidency that has been conducted, with great vigor, within ordinary administrative law.³²¹

Neither of these debates has yet been resolved by the Court. Until these debates *are* resolved, the scope of the "serious constitutional doubts" doctrine will remain unclear. Rather than resolve the uncer-

³¹⁹ *Id.* at 186.

³²⁰ See Sager, *supra* note 37, at 1227 n.48 (pointing to *Maher v. Roe*, 432 U.S. 464 (1977), which denied a constitutional claim for Medicaid funding of abortions, as a possible "underenforcement" decision).

³²¹ See *supra* note 310 (citing sources discussing *Chevron* and the proper role of the President in overseeing agencies); *infra* note 327 (listing political science sources discussing the emergence of a "Plebiscitary Presidency").

tainty, *Rust* only deepens it. What, precisely, are the conditions under which a reviewing court should invalidate an agency rule, order or action by virtue of some constitutional criteria, but should refrain, or plausibly might refrain, from enforcing the very same criteria against statutes? What, in short, are the conditions under which differential restraint is, or might plausibly be, warranted? This is the question of scope that divided majority and dissent in *Rust*, and to which existing case law provides no clear, or even half-clear answer.³²²

This doctrinal uncertainty, however, is quite illuminating for our purposes. What could the source of uncertainty be, if Simple Extension arguments hold true? Why would we need a doctrine that enabled differential enforcement of constitutional criteria, if—whenever courts had an epistemic, democratic or some other kind of reason to refrain from enforcing C against statutes—courts also had an equally powerful reason to refrain from enforcing C against proper rules, orders or actions by virtue of their statutory pedigree? The statutory pedigree of proper rules, orders and actions is a basic, general and legal feature of theirs. If this feature were, indeed, sufficient to extend legislature-centered arguments into the administrative state, then the “serious constitutional doubts” doctrine would properly have zero scope. The very point of Simple Extension arguments is to show why a doctrine of this kind, and the practice of differential restraint that it enables, are misplaced.

As for the arguments from reversibility,³²³ the case law simply eviscerates them. Reversibility arguments presume that it is impossible or illegal for a court to reverse an agency decision on constitutional grounds, and in turn be reversed by Congress.³²⁴ The very point of the cases I have summarized, from *Kent* and *Greene* to *Catholic Bishop* and *DeBartolo*, is to make that sequence both possible and legal. Nor does it do to claim that a decision like this is not really an instance of judicial review—that judicial review really means invalidating statutes, rules, orders or actions as “unconstitutional,” period. Let us imagine that the optimal technique for invalidating rules, orders and actions that violate the criteria bearing on constitutionality, yet also leaving

³²² The same uncertainty is true of the Court's clear statement jurisprudence. See Eskridge & Frickey, *supra* note 199, at 598 (“[T]he Court was . . . more than ready to acknowledge exceptions and caveats to those clear statement rules . . . , or to ignore them altogether in cases where they were arguably relevant.”).

³²³ See discussion *supra* Part II.C.

³²⁴ “Impossible” in the sense of being precluded by the very concept of a judicial reversal on constitutional grounds.

Congress appropriately free to enact statutes with the same or similar content (the mechanism that appropriately constrains Congress, and best facilitates the reasoned development of substantive doctrines for the review of rules, orders and actions) is simply (a) enforcing some constitutional criteria under the rubric of statutory interpretation and (b) applying the predicate "constitutional doubts" rather than "unconstitutional" to some rules, orders and actions that are invalidated. To insist, nonetheless, that this practice is not "judicial review" because it does not fall within the existing semantics of that term would be to rule out, by definitional fiat, an optimally structured practice of judicial restraint. Perhaps the "serious constitutional doubts" practice is not optimally structured; nothing I say here is meant to suggest that it is.³²⁵ But the semantics of the term "judicial review" should be broad enough to include this kind of doctrine. The problem of judicial restraint in the administrative state is not one that should be settled on semantic grounds.

III. BEYOND THE COUNTERMAJORITARIAN DIFFICULTY

Constitutional scholars will need to become students once more—students of the administrative state. In a legal world where reviewing courts are concerned with the constitutional validity of administrative rules, orders and actions in addition to statutes, the proper contours of judicial restraint cannot be specified independently of the particular democratic, epistemic or other features of administrative agencies, bearing on restraint, that arise from an agency's structure, its culture, its members' preferences, its decisional processes, and its political and institutional environment.³²⁶ Part II sought to demonstrate this proposition. The Countermajoritarian Difficulty, and more generally legislature-centered restraintist arguments of any sort, lack what I have called "Simple Extensions." Statutory pedigree fails to transmit the (supposed) Plebiscitary Feature of statutes, and

³²⁵ If, for example, the "departmentalists" were to be heeded, and the doctrine of judicial supremacy announced in *Cooper v. Aaron*, 358 U.S. 1 (1958), were to be rejected by the Court, the predicate "unconstitutional" could be freely applied to a rule, order or action, without constraining Congress. See *infra* note 330 and accompanying text (discussing "departmentalism").

³²⁶ See sources cited *supra* note 28. Other useful surveys include Hammond & Knott, *supra* note 136; Rodriguez, *supra* note 265, at 43-110; Jonathan Bendor, *Review Article: Formal Models of Bureaucracy*, 18 BRIT. J. POL. SCI. 353 (1988); and Roger G. Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, in REGULATORY POLICY AND THE SOCIAL SCIENCES 9 (Roger Noll ed., 1985).

more generally whatever Restraintist Feature a legislature-centered argument might posit, from statutes to the rules, orders or actions that statutes authorize. The failure follows, in important part, from the fact that administrative agencies exercise broadly delegated power; but that is not the entire story. Really, this failure is overdetermined, for, as we have seen, no plausible nondelegation doctrine could salvage the Simple Extensions. It is a failure built into the very structure of constitutional doctrine, in the deep notion of construing statutes to avoid constitutional questions.

Can a general defense of judicial restraint be developed, notwithstanding the failure of Simple Extensions? Do the epistemic, democratic or other features of the administrative state, rather than the too-weak interpretive link of rules, orders and actions to statutes, furnish courts with some kind of grounds for restraint? That remains to be seen. Clearly, scholars must now consider whether rules, orders or actions bear Plebiscitary Features by virtue of agencies' connection to a Plebiscitary *President*, who possesses the authority and capacity to oversee the administrative state. Nothing I have said thus far about the Countermajoritarian Difficulty precludes this possibility; indeed, my critique of the Simple Extensions is intended, in part, to initiate scholarly debate about the significance that the President's plebiscitary cast has, or might have, for judicial restraint in reviewing rules, orders and actions.

In recent years, the Plebiscitary President—by which I mean a President who is, in some way, responsive to the judgments, preferences, beliefs or other attitudes of a majority of the citizenry—has loomed increasingly large in both the political science literature on American government, and the legal literature on the separation of powers and administrative law. There is now a substantial body of writing in descriptive political science that points specifically to the emergence of a “Plebiscitary Presidency” (also called the “rhetorical Presidency” or the “modern Presidency”), characterized by various practices whereby the President seeks and claims the support of the national electorate.³²⁷ In turn, political scientists working in the rational-choice tradition have begun to theorize about why the President should indeed have a special link to the Median National

³²⁷ The descriptive political science literature on the rise of the “Plebiscitary Presidency” includes: SAMUEL KERNELL, *GOING PUBLIC* (2d ed. 1993); THEODORE LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* (1985); CRAIG RIMMERMAN, *PRESIDENCY BY PLEBISCITE: THE REAGAN-BUSH ERA IN INSTITUTIONAL PERSPECTIVE* (1993); and JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987).

Voter;³²⁸ and a fair number of legal scholars, building upon the work of the political scientists, have argued that the President's majoritarian properties provide a good justifying reason (among others) for augmenting his control over administrative agencies, through measures such as intensified regulatory review.³²⁹ The Plebiscitary President has also figured increasingly in scholarship about a constitutional problem closely related to that of judicial restraint: the so-called problem of "departmentalism," which concerns whether the constitutional doctrine announced by the Supreme Court is binding on other institutions and actors.³³⁰ Departmentalists have traditionally

³²⁸ See Miller, *supra* note 99. Miller's claim, in brief, is that:

The president has a special ability to overcome rational ignorance in the general public, creating the potential for mass mobilization on an issue that sparks the great changes in American politics. The president also has the ability to solve coordination problems, serving as a focal point and controlling the pace and timing of social movements. In addition, the president is the primary hope of representation for the large, latent interests that are not organized by means of selective incentives.

Id. at 322.

³²⁹ These scholars argue for a more or less "unitary Presidency"—a Presidency that exercises serious, unifying control over the administrative state. See generally Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 833-34 (1996) (analyzing and summarizing unitary President literature). Prominent scholarly works that advocate a "unitary Presidency," in one way or another, include: Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; and Pierce, *Constitutional and Political Theory*, *supra* note 140, at 469. Claims about the majoritarian cast of the Presidency are standard in this literature.

³³⁰ The literature on "departmentalism" is very large. It has been nourished by a controversial and well-publicized speech, by then-Attorney General Edwin Meese, criticizing the doctrine of judicial supremacy. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987). Leading scholarly defenders of Congress's authority to disagree with the Court about the Constitution include: JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984); ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); PAUL R. DIMOND, *THE SUPREME COURT AND JUDICIAL CHOICE: THE ROLE OF PROVISIONAL REVIEW IN A DEMOCRACY* (1989); and LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988). An important overview of the "departmentalism" problem is Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986). A recent empirical study is DEVINS, *supra* note 211. Useful symposia include Symposium, *Elected Branch Influences in Constitutional Decisionmaking*, 56 LAW & CONTEMP. PROBS. 1 (1993) and Symposium, *The Crisis in Legal Theory and the Revival of Classical Jurisprudence*, 73 CORNELL L. REV. 283, 371 (1988) (including panel on "The

pointed to Congress, above all, as the institution that may legitimately disagree with the Court about the Constitution. There is, however, a growing presidentialist school within departmentalism, which stresses the President's *own* power to depart from Supreme Court doctrine, quite independent of Congress's decision to do so—for example, when the President grants pardons or vetoes proposed statutes, and perhaps even when he issues directives to administrative agencies.³³¹

Yet another place that the Plebiscitary President has emerged is in Bruce Ackerman's seminal work of normative political theory and constitutional theory, *We the People*. In *We the People*, the "Plebiscitarian Presidency" (Ackerman's own words) plays a crucial role in the process of enacting the "transformative statutes" that function as informal constitutional amendments.³³² Finally, the Plebiscitary President may already have entered official (nonconstitutional) doctrine through the *Chevron* case, which clearly invokes the President's majoritarian cast in justifying its doctrine of judicial deference to agencies on matters of statutory interpretation. *Chevron's* idea, in turn, may have resonances within the constitutional case law on differential restraint, most recently in *Rust v. Sullivan*. As we have seen, one way to understand decisions such as *Greene v. McElroy*, *Hampton v. Mow Sun Wong*, or *Rust* is as saying that courts should uphold otherwise invalid administrative rules, orders or actions if they are sufficiently connected, in the right sort of way, to a presidential judgment

Role of the Legislative and Executive Branches in Interpreting the Constitution").

³³¹ See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-1990) (arguing for presidential autonomy in interpreting the Constitution); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993) (same); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (same); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993) (same); see also David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993) (questioning presidential autonomy in interpreting the Constitution). Here, as in the "unitary Presidency" literature, references to a majoritarian Presidency are standard.

³³² See ACKERMAN, *supra* note 27, at 268 ("The modern system [of higher lawmaking] has historical roots stretching back to Thomas Jefferson's 'Revolution of 1800,' but it came into its own in the modern regime inaugurated by the Democratic Party of Franklin Delano Roosevelt. Here the decisive constitutional signal is issued by a President claiming a mandate from the People. If Congress supports this claim by enacting transformative statutes that challenge the fundamentals of the preexisting regime, these statutes are treated as the functional equivalent of a proposal for constitutional amendment."). In describing the rise of this so-called "modern" system of higher lawmaking, Ackerman explicitly and repeatedly describes the modern President as "plebiscitarian." See, e.g., *id.* at 67, 83, 106.

or policy.³³³

Given the longstanding importance of the Countermajoritarian Difficulty for constitutional scholarship since Bickel, and the increasing salience of the Plebiscitary President in the various literatures and doctrines I have just described, we cannot ignore the possibility that presidential oversight suffices to render "countermajoritarian" and thus, in some instances, improper, the judicial practice of invalidating rules, orders and actions. But there are many hurdles that a Countermajoritarian Difficulty for the administrative state constructed along these lines would need to overcome. This Article has tried to show just how demanding the Countermajoritarian Difficulty is—a point often ignored or obscured in the existing literature. It demands a Plebiscitary Feature sufficiently strong to justify courts in upholding a statute, rule, order or action that *violates* the criteria bearing on constitutionality. The Plebiscitary Feature, again, does not furnish courts analytic grounds to limit review (statutes, etc. are not constituted as just, by virtue of bearing Plebiscitary Features), nor are the grounds that it furnishes epistemic (for these Features do not, in fact, evidence what constitutional criteria require). Rather, as I have tried to demonstrate, the Countermajoritarian Difficulty is a *democratic* argument to limit review—truly an argument for judicial restraint, but one that points to a special and democratic wrong supposedly constituted by the act of judicial review, a wrong sufficiently grave to override constitutional values. This democratic construal has real consequences for the argument's likely importance in the administrative state. The theorist of restraint who predicates a democratic argument upon the Plebiscitary Presidency would need to show us: (1) that the President should be taken to be a plebiscitary actor of the right kind (one whose decisions warrant claims about the outcomes of the proper hypothetical plebiscites); (2) that some or all rules, orders or actions should be taken to bear a sufficient presidential pedigree (one sufficient to confer upon them the right kind of Plebiscitary Feature); and (3) that, therefore, even epistemically reliable courts should uphold these rules, orders or actions, although they violate constitutional criteria that these courts would otherwise have sufficient grounds to enforce.³³⁴ And if the theorist wishes to short-circuit

³³³ See *supra* Part II.D.

³³⁴ The work of Terry Moe, one of the leading students of the Presidency and, in many ways, quite a "presidentialist," is revealing as to the likely truth (or the lack thereof) of the first two propositions. See Moe & Wilson, *supra* note 34.

As to the first proposition, Moe notes that Presidents, unlike legislators, have a

the presidential connection, and rely instead upon the agency's own processes, culture and incentives, its link to legislative committees, or whatever, she must demonstrate that *these* features are sufficiently powerful to give rise to the strong, overriding value (whether plebiscitary fairness, or some other democratic value) that a democratic argument for restraint demands.

This is a tall order indeed. I do not claim that the order cannot be filled. This Article has not done the institutional or ethical work to show that it cannot; such work remains to be done. It will be crucial, however, for constitutional scholars to understand just what the Countermajoritarian Difficulty, or other democratic arguments for restraint, demand, and just what would need to be true of agencies for such arguments to hold true.

Relatedly, I suggest, it will be crucial for scholars to see that democratic arguments such as the Countermajoritarian Difficulty do not exhaust the universe of arguments for judicial restraint. For much too long, the central focus of scholarship on judicial restraint

"heterogeneous national constituency," but also claims that "[r]election . . . does not loom as large in their calculations (and in the second term, of course, it is not a factor at all)." *Id.* at 11. Rather, Moe stresses the President's "autonomy," *id.* at 12, and drive for "leadership": "If there is a single driving force that motivates all presidents, it is not popularity with the constituency nor even governance per se. It is leadership." *Id.* at 11; see also STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993) (emphasizing the President's leadership project). The proponent of the Countermajoritarian Difficulty might respond that the President, qua leader, just embodies what a properly *idealized* plebiscite would choose. This response might work, but, in any event, there is real tension between the notion of the President as leader and the President as agent for the majority, which recapitulates the more general tension in democratic theory between "trustee" and "delegate" notions of representation, and which would need to be overcome.

As to the truth (or the lack thereof) of the second proposition, see Moe & Wilson, *supra* note 34, at 3-15 (describing chronic struggle for control of bureaucracy, between Presidents on the one side, and legislators, interest groups and agencies on the other). Moe also describes the various advantages that Presidents have in this struggle, see *id.* at 15-28, but concludes:

[I]n the ongoing politics of structural choice, the growth of presidential control represents an increasing threat to parochial interests and gives them stronger incentives to invest in political opposition. The most reasonable expectation is for some sort of equilibrium to be reached in future years, an equilibrium more presidential than we have now, but still a far cry from what presidents might like.

Id. at 28. See generally B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* 27-127 (1994) (describing statistical studies showing bureaucratic responsiveness to multiple "principals," including but not limited to the President); Hammond & Knott, *supra* note 136 (presenting a formal analysis of agency autonomy, as dependent on preferences and powers of multiple principals).

has been democratic, and not epistemic. "Is judicial review of statutes 'countermajoritarian' or otherwise undemocratic?" has been seen as *the* question for restraintist theorists, and their critics, to debate. This is not surprising, given the scholarly preoccupation with legislatures; for indeed it seems quite unlikely that legislators, qua elected, have any epistemic advantage, relative to courts, on matters of constitutional law. If the legislature's electoral feature constitutes grounds, of any sort, for judicial restraint, then such grounds will indeed be democratic, not epistemic. As Michael Perry states the point:

[I]ncumbency is undeniably a fundamental value for most members of the Congress. Members of the Congress are therefore more likely to cater to the interests and views of their constituents—and of their contributors—than they otherwise would. . . . [But a] regime in which incumbency is (inevitably?) a fundamental value seems often ill suited, in a politically heterogeneous society like the United States, to a truly deliberative, truly dialogic specification of indeterminate constitutional norms.³³⁵

But this truth—and it is a truth, I think—is an incomplete one.³³⁶ The truth is incomplete because the legislature's electoral feature is not the *only* feature it has. Legislators are not *merely* elected; they are, additionally, lawmakers rather than adjudicators;³³⁷ they are supposed to enact laws in virtue of the public values that laws are supposed to serve;³³⁸ they have (or may have) an epistemic capacity in determining

³³⁵ PERRY, *supra* note 70, at 107. See generally *id.* at 96-101, 106-10 (arguing that courts have epistemic advantage over legislators, on matters of constitutional law, by virtue of legislators' elected status). But see JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 27, 31-32, 104-05 & n.* (1984) (mounting an epistemic argument for departmentalism grounded in the elected cast of the legislature); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 296-300 (1994) (mounting an epistemic argument for Thayer's rule grounded in part in the elected cast of the legislature); Nino, *supra* note 124, at 822-31 (mounting an epistemic argument for judicial restraint grounded in the majoritarian cast of the legislature).

³³⁶ Note that Perry's claim is perfectly consistent with the admission that the epistemic reliability of non-elected reviewing courts is secured, in part, by their impeachability. Minimal removability by an elected institution is not the same feature, and need not have the same epistemic significance, as being elected; after all, it is not thought to have the same democratic significance.

³³⁷ See WEST, *supra* note 335, at 282 ("The idea of 'adjudicative law' may be antithetical to the progressive understanding of the Constitution" because of the authoritarian, corrective, conventionalist, and elitist cast of adjudication.).

³³⁸ See SUNSTEIN, *supra* note 50, at 17 ("[G]overnment must always have a reason for what it does. If it is distributing something to one group rather than to another, or depriving someone of some good or benefit, it must explain itself. The required reason must count as a public-regarding one. Government cannot appeal to private in-

the link between laws and these justifying values, which courts may lack;³³⁹ legislators are relatively unconstrained, in their lawmaking, by a system of precedent; and so forth. These features are conceptually distinct from the electoral feature, as the case of agencies exemplifies. Agencies are *unelected* lawmaking bodies that possess, or could possess, these other features. So the epistemic irrelevance of elections does not show that courts lack epistemic grounds for restraint in reviewing statutes. What remains a possibility, and one that students of judicial review must consider much more intensively than they have done thus far, is that courts may have epistemic grounds for restraint with respect to *agencies, or legislatures, or both*, by virtue of the non-electoral, epistemically significant features that agencies, or legislatures, or both, may possess.

Such an epistemic argument says something like this:

Epistemic Arguments for Restraint

A statute, rule, order or action is challenged as violating some criterion C bearing on constitutionality. Because the reviewing court is not epistemically perfect in determining what C requires, it should give more weight to the legislature's or agency's decisions or utterances than an epistemically perfect reviewing court would. Most strongly: the court should take the enactment of the statute, etc., as sufficient reason to believe that it satisfies C. More modestly: the court should take the enactment of the statute, etc., as sufficient reason to believe that it satisfies C, if the statute, etc., does not "clearly" violate C. More modestly yet: in deciding whether the statute, etc., violates C, the court should take as true some of the legislature's or agency's utterances, or some of its "reasonable" utterances, bearing on that question.³⁴⁰

In particular, I want to suggest that a recurrent epistemic concern has characterized constitutional scholarship since the New Deal. This concern has been articulated, not in the literature about judicial review and the Countermajoritarian Difficulty that Bickel spawned, but

terest alone.").

³³⁹ See *infra* text accompanying notes 341-89.

³⁴⁰ I use "satisfies" here to mean "does not violate, all things considered" rather than "does not infringe." A statute, rule, order or action that infringes upon moral rights embodied in the Bill of Rights, or other constitutional criteria, may "satisfy" constitutional criteria by virtue of some overriding value that the statute, rule, order or action secures, even if that value is not itself a constitutional value. See *infra* text accompanying notes 386-89.

rather—piece by piece—in the various *substantive* literatures covering the various components of the Bill of Rights. Scholars, writing independently about one or another aspect of justice embodied in one or another amendment to the Constitution, have independently voiced the same worry: that courts might have an epistemic weakness in resolving constitutional questions that are, in some way, “global” or “synoptic.”³⁴¹ Let us call this the problem of *synoptic review*. This problem has been a persistent theme in post-New Deal constitutional scholarship, albeit a quieter theme than the loud strains of the Counter-majoritarian Difficulty, and one that is of major importance for judicial review in the administrative state. In the remainder of this Part, I will briefly describe this epistemic problem.

* * *

The problem of synoptic review has a long scholarly history. Its discussion dates back, at least, to the series of law review articles written in the 1920s and 1930s, in reaction to the Court’s *Lochner* jurisprudence, that criticized the Court for failing to give adequate deference to legislative findings that public health, safety or some other proper public goal justified a statutory scheme limiting liberty of contract.³⁴² This literature was synthesized, and made more general, by Kenneth Culp Davis in one of his earliest and most influential articles: *An Approach to Problems of Evidence in the Administrative Process*.³⁴³ In this article, Professor Davis drew his famous distinction between “adjudicative” and “legislative” facts and identified the role that “legislative facts” played in constitutional review:

When an agency finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. When an agency wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which inform its legislative judgment may conveniently be denominated legislative facts. . . .

³⁴¹ See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396-99 (1981) (describing the “synoptic model” of agency decisionmaking, i.e., one that aspires to “comprehensive rationality”).

³⁴² See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 403 n.78 (1942) (citing earlier law review articles from the 1920s and 1930s about “constitutional facts”).

³⁴³ *Id.*

... The distinction between legislative and adjudicative facts apparently has been clearly recognized only in constitutional cases, in which a category of 'constitutional facts' has emerged. Often referred to as 'social and economic data,' constitutional facts are those which assist a court in forming a judgment on a question of constitutional law.³⁴⁴

Legislative facts are facts about the overall improvement in the world, with respect to some public value, that a statute or agency rule achieves. Davis was advancing both an analytic and an institutional claim about legislative facts: the analytic claim was that legislative facts could be relevant to whether a statute, rule, etc., satisfied the criteria bearing on constitutionality, while the institutional claim was that constitutional courts were poorly placed, epistemically, to determine the truth about relevant legislative facts. These claims were prescient, for Davis wrote his article in 1942, at the very dawn of the modern age of constitutional law, when it might have seemed that the Court's abandonment of *Lochner* would dissolve the problem Davis raised. But the problem did not dissolve: instead, Davis's theme was taken up and developed, for a post-New Deal world, in subsequent, and seminal, works of constitutional scholarship.

It was first taken up in Sanford H. Kadish's 1957 article, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*.³⁴⁵ This article laid the foundation for modern procedural due process doctrine and scholarship. Kadish set out and defended the kind of balancing test that the Court ultimately adopted in *Mathews v. Eldridge*.³⁴⁶ Under such a test, a procedural scheme satisfies due process if and only if it properly balances the intrinsic and instrumental benefits of according fuller process to affected persons, against the costs.³⁴⁷ Kadish's contribution on this score is well known. Less well known, perhaps, is that *Methodology and Criteria* also constituted a significant contribution to the literature on judicial restraint. Kadish believed that his balancing test was objective, in some measure—some proce-

³⁴⁴ *Id.* at 402-03 (footnote omitted).

³⁴⁵ 66 YALE L.J. 319 (1957).

³⁴⁶ 424 U.S. 319, 335 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

³⁴⁷ See Kadish, *supra* note 345, at 334-49 (defending the Court's "flexible due process" approach).

dural schemes would truly fail the test, and would be properly invalidated by epistemically perfect reviewing courts³⁴⁸—but he further recognized that the test did not automatically translate into enforceable doctrine. That would be true only if courts were, indeed, epistemically perfect.

In the first part of this section, the attempt was made to examine the extent to which the methods of rationality could be effectively utilized in the task of giving meaning to a flexible due process. In a sense, the issue there discussed was a false one, since the analysis proceeded in disregard of the realities of judicial review in operation. The discussion was premised upon the existence of a decision-making institution unrestricted in its access to and use of relevant data. The central question was: how could an ideal decision-maker confronted with the problem of signifying meanings for a flexible due process maximize the uses of reason and intelligence? But the Supreme Court exercising the function of judicial review is plainly not that ideal decision-making institution.³⁴⁹

In the concluding portion of his article, Kadish considered the possibility that courts might have epistemic grounds for restraint, insofar as the balancing test entailed predicting just what the overall costs and benefits of a given procedural scheme would be.³⁵⁰ Kadish's grounds for concern, here, were clearly epistemic rather than democratic: he explicitly rejected "the alleged nondemocratic character of judicial review"³⁵¹ and focused instead upon whether "the Supreme Court is institutionally equipped to ascertain and evaluate the complex factual data necessary for rational decision-making."³⁵² He surveyed, with some skepticism, the Supreme Court's intermittent reliance upon "legislative facts" in its decisions (including, most recently, the finding in *Brown v. Board of Education* that segregation caused psychological and pedagogical harm to black children),³⁵³ and speculated about the possibility of new institutions, such as "a research body which would make determination of constitutional facts."³⁵⁴ Kadish's article concluded on a note of uncertainty: "[the] impasse

³⁴⁸ See *id.* at 345 (questioning a view of due process adjudication premised upon "the complete subjectivity of all moral judgments"); *id.* at 348-49 (affirming the significant role of "reason and knowledge" in due process balancing).

³⁴⁹ *Id.* at 358 (footnote omitted).

³⁵⁰ See *id.* at 353 ("Ultimately the judgment, which will be phrased in terms of whether given procedures are consistent with due process, entails a prediction of consequences.").

³⁵¹ *Id.* at 359.

³⁵² *Id.*

³⁵³ 347 U.S. 483, 494 & n.11 (1954).

³⁵⁴ Kadish, *supra* note 345, at 363 n.198.

between what is theoretically desirable and practically possible makes the future progress of constitutional law in this area reasonably debatable.³⁵⁵ In recognizing this epistemic "impasse," Kadish anticipated the restraintist posture that was adopted in *Mathews* itself (where the Court announced its balancing formula, only to defer to the "good faith judgment"³⁵⁶ of the Social Security Administration), and would later be advocated by Jerry Mashaw (the scholar who has written most extensively and influentially about *Mathews*) in Mashaw's aptly-named *Due Process in the Administrative State*.³⁵⁷

Ten years after *Methodology and Criteria*, another hitherto-unknown scholar wrote his own foundational article about an aspect of the Constitution that, like procedural due process, would be significant for post-New Deal jurisprudence but until then had been left neglected and confused. This was Frank Michelman with his tour-de-force on the Takings Clause, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*.³⁵⁸ Like Kadish's, Michelman's article had two portions—analytic and epistemic. Every well-socialized constitutional lawyer knows Michelman's analytic treatment of the Takings Clause as requiring a "fair" practice of compensation, with fairness construed either in utilitarian terms³⁵⁹ or in the Rawlsian terms³⁶⁰ that Michelman preferred. But this celebrated analysis was paired with, indeed nested within, a less well-known discussion of the epistemic weaknesses of courts. Michelman began *Property, Utility, and Fairness* by saying this: "It is debatable whether what follows is an essay in constitutional law. . . . [F]or what is counselled here is, more than anything else, a deemphasis of reliance on judicial action as a method of dealing with the problem of compensation."³⁶¹ And he returned to this point in the last section of the article, entitled "Institutional Arrangements for Securing Just Compensation."³⁶² In that section,

³⁵⁵ *Id.* at 362.

³⁵⁶ *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

³⁵⁷ JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

³⁵⁸ 80 HARV. L. REV. 1165 (1967).

³⁵⁹ *See id.* at 1215 ("[I]f, for any measure, both demoralization costs and settlement costs . . . would exceed efficiency gains, the measure is to be rejected; but . . . otherwise, since either demoralization costs or settlement costs must be paid, it is the lower of these two costs which should be paid.").

³⁶⁰ *See id.* at 1223 ("[A] decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.").

³⁶¹ *Id.* at 1166-67 (emphasis added).

³⁶² *Id.* at 1245.

Michelman (more decisively than Kadish) urged judicial restraint: "One can nonetheless challenge the attribution of preeminent responsibility to the judiciary, identify institutional impediments to adequate control of fairness by courts, and explore the possible advantages of *self-discipline* by legislatures and public administrators."³⁶³ Those "institutional impediments" arose, in large part, because of what Michelman called the "overarching generality, the *global quality*,"³⁶⁴ of utilitarian or Rawlsian fairness.

In particular, restriction to the occasional foothold which litigation furnishes may disable courts from making competent judgments about fairness, or from prescribing adequate cures for its absence, since fairness is a quality of courses or networks of decisions rather than of any particular decision which may generate a case or controversy.³⁶⁵

Michelman, anticipating the "underenforcement" literature by a decade, proposed that the criteria of just compensation embodied in the takings clause be underenforced³⁶⁶ (courts should "atten[d] only to 'hard core' or 'automatic' cases")³⁶⁷ and that conscientious legislators and administrators should enforce upon themselves their duty to compensate, or avoid, nonjusticiably unfair takings.³⁶⁸ Like Kadish, Michelman made clear that he was not arguing for limiting review on analytic grounds. Nor were the grounds democratic; there is no hint of the Countermajoritarian Difficulty in *Property, Utility and Fairness*.³⁶⁹ Rather, the restraintist claim Michelman was advancing in his famous article was that both legislatures and administrative agencies³⁷⁰ might have an epistemic advantage over courts because of the "global quality" of a properly analyzed Takings Clause.

A third example of a scholar who coupled analytic claims about the "global quality" of one of the prohibitions of the Bill of Rights

³⁶³ *Id.*

³⁶⁴ *Id.* at 1247 (emphasis added).

³⁶⁵ *Id.*

³⁶⁶ See *id.* ("It is of course true of other constitutional limitations [including particularly the Takings Clause] . . . that courts cannot by themselves enforce to the limits of social desirability the values or principles embodied in the limitations.").

³⁶⁷ *Id.* at 1250.

³⁶⁸ See *id.* at 1245-58.

³⁶⁹ Michelman considered, but rejected, the possibility that a political mechanism might constitute fairness. See *id.* at 1246 ("The truth is that fairness continues to enter into political action in the form of a discipline; and it continues to be important to ask who should administer that discipline or, more particularly, whether we are right in relying as heavily as we do on the courts.").

³⁷⁰ See *id.* at 1245, 1247-48, 1251, 1257 (discussing administrators as well as legislators).

with epistemic doubts about the capacity of courts is the already-mentioned Kenneth Davis. In his appraisal of the Fourth Amendment in his *Administrative Law Treatise*,³⁷¹ Davis summarized the striking changes in Fourth Amendment doctrine that had taken place since the New Deal: the complete dismantling of Fourth Amendment constraints upon the power of agencies to compel persons to produce information, as well as the partial dismantling of Fourth Amendment constraints upon agency inspections.³⁷² Davis offered a general theory of these changes that connected the rise of the administrative state with a balancing methodology for constitutional law that, in turn, rendered Fourth Amendment (and other enumerated) constitutional rights defeasible by the values that the administrative state legitimately pursued:

The main item that has changed during the past century is the governmental need for information. A government that does little has less need for information than a government that does much, and the government today has taken on vast tasks that were unimagined in 1886, or even in 1924. As the government's need for information increases, the balancing of that need against the reasons for privacy and nondisclosure, which remain essentially constant, necessarily shifts in the direction of restricting the scope of the privilege.³⁷³

He argued that the Court should acknowledge this appropriate methodology: it should "bring its balancing out into the open."³⁷⁴ Davis wrote that "the basic system of impressionistic balancing, unexplained and unsupported by the kind of factual studies that can usefully be brought to bear on policy problems, is deeply unsound";³⁷⁵ noted that "agency rulemaking procedures of the 1970s are . . . far more scientific than the procedures of the Supreme Court for major policymaking";³⁷⁶ and invited the reader to consider a later section of the *Treatise*, on rulemaking, which elaborated upon the idea that this mechanism was superior to traditional adjudication for resolving

³⁷¹ See 1 DAVIS, *supra* note 86, at 224-306.

³⁷² See *id.* at 228-32, 241-59.

³⁷³ *Id.* at 299; see also KENNETH CULP DAVIS, HANDBOOK ON ADMINISTRATIVE LAW 136 (1951) (same theory).

³⁷⁴ 1 DAVIS, *supra* note 86, at 306. Indeed, in more recent years, the Court has done just that, and has made balancing the touchstone of Fourth Amendment jurisprudence. See Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 233-47 (1993) (describing pervasiveness of balancing in Fourth Amendment doctrine since 1980).

³⁷⁵ 1 DAVIS, *supra* note 86, at 301.

³⁷⁶ *Id.*

questions of legislative fact.³⁷⁷ All this seemed to point to an epistemic argument for judicial restraint in reviewing agency decisions, or at least agency rules—such as the drug-testing rule in *Skinner*³⁷⁸—that implicated the Fourth Amendment. But Davis did not go so far; indeed he offered no clear institutional solution at all, whether because of doubts about the Court's willingness to abandon Fourth Amendment factfinding to the agencies, or about the epistemic capacity of agencies on questions of constitutional law.³⁷⁹

Most recently, the theme articulated by Davis, Kadish and Michelman, each working on a different amendment to the Constitution, has been voiced yet again by constitutional scholars in yet another area of constitutional law: welfare rights. A significant group of scholars, beginning with Michelman himself in a 1969 *Harvard Law Review* foreword entitled *On Protecting the Poor Through the Fourteenth Amendment*,³⁸⁰ have claimed that the Constitution entitles persons, in some way, to resources or services sufficient to ensure their minimum welfare.³⁸¹ Sunstein advances the claim vigorously in *The Partial Constitution*, where he argues for a principle of "freedom from desperate conditions" ("No one should be deprived of adequate police protection, food, shelter, or medical care."), and links this principle to Roosevelt's second Bill of Rights—which, Sunstein suggests, epitomizes the historical and jurisprudential changes of the New Deal.³⁸² But even those scholars who advocate welfare rights most strongly seem to doubt whether such rights should be fully justiciable. As Sunstein states, "the second Bill of Rights was designed for legislative rather than judicial enforcement. Here the role of the judiciary is necessar-

³⁷⁷ See *id.* at 306 (referring to *id.* at 617-26).

³⁷⁸ See *supra* text accompanying notes 153-58.

³⁷⁹ See 1 DAVIS, *supra* note 86, at 306 (concluding simply that the Court should acknowledge balancing and "encourage counsel to present factual materials that will be needed to guide the balancing").

³⁸⁰ Frank Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

³⁸¹ See Chemerinsky, *supra* note 78, at 526-27 (arguing for constitutional status of welfare rights); Frank Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659-66 (same); Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966-67 (1973) (same); Michelman, *supra* note 380, at 9-13 (same); Sager, *Justice in Plain Clothes*, *supra* note 53, at 429-33 (same); SUNSTEIN, *supra* note 50, at 133-41 (same). See generally William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1771 n.1 (1994) (citing literature on constitutional welfare rights).

³⁸² SUNSTEIN, *supra* note 50, at 138-39.

ily limited, for courts lack the electoral legitimacy and the basic tools to introduce and manage a social welfare state on their own."³⁸³

Sunstein's apparent endorsement, here, of a democratic argument for judicial restraint with respect to welfare rights is puzzling, given his support for a constitutional right to abortion:³⁸⁴ why would there be any democratic difference between judicial enforcement of rights to welfare versus abortion? The best account of the difference concerns the epistemic or remedial deficits of courts, and not their democratic deficits. Sunstein goes on to articulate the epistemic argument quite strongly:

Adjudication is an exceptionally poor system for achieving large-scale social reform. Courts are rarely experts in the area at hand. Moreover, the focus on the litigated case makes it hard for judges to understand the complex, often unpredictable effects of legal intervention. Knowledge of these effects is crucial but sometimes inaccessible. A decision to require expenditures on school busing might, for example, divert resources from an area with an equal or greater claim to public resources—including medical and welfare programs for the poor. . . .

Ideas of this sort provide some support for the Court's aversion to the recognition of so-called positive rights. Judicial enforcement of such rights would have harmful effects on other programs, many of them quite important. Such effects can be taken into account by legislators and administrators, but rarely by judges.³⁸⁵

Here, again, in updated form, is the notion of a synoptic, constitutional inquiry dependent on "legislative facts," that as we have seen goes back (at least) to the scholarly criticism of *Lochner* from the 1920s and 1930s.

To summarize: Kadish's seminal article on procedural due process, Michelman's renowned article on takings, Davis's less-famous but parallel work on the Fourth Amendment, and the more recent literature on welfare rights, all articulate the same kind of argument for re-

³⁸³ *Id.* at 139.

³⁸⁴ *Id.* at 270-85 (arguing for a right to abortion, albeit on equal protection grounds).

³⁸⁵ *Id.* at 147-48. Sunstein continues:

[T]he creation of a legal right to subsistence would create a range of problems. . . . Courts do not have the tools to choose among the various possible ways of satisfying a subsistence right. They are in a poor position to assess the relationship between that right and other desirable social goals, including the provision of training and employment programs, not to mention incentives for productive work.

Id. at 148-49.

straint.³⁸⁶ This argument is epistemic, not democratic. It points to the problem of *synoptic* review—the problem of determining the overall improvement, with respect to a justifying value, that a statute, rule or administrative practice infringing upon constitutional criteria secures, and of weighing that overall improvement against the overall infringement.³⁸⁷ The problem of synoptic review will, at a minimum, arise on a thin-consequentialist view of ethics, as on Michelman's utilitarian construal of the Takings Clause—where the ultimate ethical question is whether invalidating a statute, rule, etc., increases overall utility, efficiency or some other general, background standard of good consequences. But, more importantly, the problem of synoptic review can arise even where the litigant is understood to have a moral right in Dworkin's sense (an aspect of her well-being that trumps the general, background standards)³⁸⁸ if that right can nonetheless be overridden by a sufficiently large improvement in a sufficiently important value. For example, a person has a moral right to participate in a governmental decision affecting her, but (as Kadish tells us) this right can be overridden if the overall resources needed to permit her and similarly situated persons to participate are too great. After all, these resources could be used instead to increase the level of payments to government beneficiaries. A person has a moral right against a warrantless administrative search, but (as Davis tells us) this right can (sometimes) be overridden if a practice of warrantless searches sufficiently increases public safety, health or environmental protection. A person may have a moral right to resources adequate for some basic need of hers, but (as Sunstein tells us) a welfare scheme may legitimately compromise the satisfaction of her kind of need, in order to satisfy equal or higher-priority needs of some other

³⁸⁶ Lon L. Fuller famously developed a similar theme, outside of constitutional scholarship, in his article *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (arguing that "polycentric" tasks were inherently unsuited to adjudication).

³⁸⁷ There is an issue of incommensurability lurking here. If constitutional values and the values that justify statutes, rules, etc., can be incommensurable, in context, see *supra* notes 179-83 and accompanying text, then there are two possible views about what the unconstitutionality of a statute, rule, etc., consists of: (a) the statute, etc., is unconstitutional if, in context (relative to the status quo) it infringes upon some constitutional value and is not supported by any overriding value; or (b) the statute, etc., is unconstitutional if, in context it infringes upon some *overriding* constitutional value. Whether your view is (a) or (b), it remains an objective question whether (a) or (b) obtains; further, the overall improvement in the justifying value that the statute secures will figure in either question.

³⁸⁸ See DWORKIN, *supra* note 62, at 81-130 (rights as "trumps").

kind. We might say the same about the doctrines permitting "time, place or manner" restrictions on speech: a person has a moral right to speak, but that right can be overridden if a content-neutral restriction on speech of that kind serves some "substantial governmental interest."³⁸⁹

These are compelling ethical claims. It is ethically compelling that the aspects of well-being protected by the Bill of Rights do not take lexical priority over the justifying values that statutes, rules, orders or actions infringing upon these rights might secure.³⁹⁰ Above all, the claims are compelling in the post-New Deal world, given the range of justifying values that lawmakers are now constitutionally authorized to pursue.³⁹¹ Less compelling is a conclusion, drawn from these ethical premises, that reviewing courts should exercise restraint in enforcing moral rights to speech, due process, security, property and basic welfare. Nothing I have said here is meant to endorse that conclusion. For, whatever the epistemic deficits of courts in determining the overall world-improvement worked by a challenged statute, rule, etc., with respect to some important justifying value, it is equally plausible that administrative agencies might be epistemically ill-placed to balance that improvement against moral rights.³⁹² Yet

³⁸⁹ See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding Park Service regulation limiting expression as satisfying the time, place or manner doctrine).

³⁹⁰ Cf. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (describing, but criticizing, development of balancing tests in post-New Deal constitutional doctrine).

³⁹¹ I have already observed one irony about the post-New Deal timing of our debates about the Countermajoritarian Difficulty: that these debates have been conducted with such heat and vigor in just that period of U.S. history when the rise and then the jurisprudential recognition of the administrative state have rendered obsolete the legislature-centered model of governance upon which the debate has been premised. Note, now, a second irony: that this debate has overshadowed, and continues to overshadow, scholarly writings roughly contemporaneous with Bickel's, such as Kadish's (1957), Michelman's (1967), or Davis's (1978), that ought to have, but did not, combine into an equally self-conscious and visible restraintist literature. Ought to have, because the problem of synoptic review that Kadish, Michelman and Davis identified was truly *au courant* with the constitutional revolution of the New Deal. What the New Deal revolution involved, among other things, was a decisive acceptance by the Court of the state's role in securing minimum incomes, safe workplaces, economic security, basic medical care and education, decent health, and other high-priority aspects of well-being, see SUNSTEIN, *supra* note 50, at 139, that can hardly be lexically subordinate to the aspects of well-being set out in the Bill of Rights.

³⁹² See Diver, *supra* note 341, at 428-34 (arguing for selective, not general use of the synoptic model by agencies); Fiss, *supra* note 69, at 34-35 (doubting constitutional competence of administrative agencies).

one can, I think, say at least this about epistemic claims for restraint grounded upon the synoptic cast of judicial review: such claims deserve at least as much attention and inquiry as their more famous, democratic cousins. Understand again that a democratic argument such as the Countermajoritarian Difficulty involves *both* the ethical claim that some democratic value overrides constitutional criteria *and* the institutional claim that the democratic cast of the relevant institution is sufficiently powerful to embody that value. Neither of *these* claims is, in the least, intuitively compelling, particularly when one turns from legislatures to administrative agencies. Epistemic arguments for restraint, modest or robust,³⁹³ are easily as plausible as this one.

Ultimately, there may prove to be no grounds whatsoever—neither democratic grounds nor epistemic grounds—that require courts to exercise restraint in reviewing administrative rules, orders and actions. But if there is a way clear to a different conclusion, the epistemic path would seem less difficult, and certainly no more so, than the arduous path mapped by the Countermajoritarian Difficulty. It is the epistemic path, I suggest, that we now ought to try.

³⁹³ See *supra* text accompanying note 340.