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THE PRICE OF PUBLIC ACTION: JUDICIAL DOCTRINE, LEGISLATIVE ENACTMENT COSTS, AND THE "EFFICIENT BREACH" OF CONSTITUTIONAL RIGHTS

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INTRODUCTION

In the most famous sentence in all of American constitutional jurisprudence, Chief Justice Marshall declared, "[I]t is emphatically the province and duty of the Judicial Department to say what the law is."[1] Though susceptible of multiple readings, Justice Marshall's statement succinctly captures a particular view of how constitutional judicial review operates. On this view, pervasive in much legal scholarship and commentary, there is some set of government actions that are prohibited by "the law"; it is the duty of the courts to identify and to police the boundaries of that set; and anything that falls outside of the judicially-defined set of prohibited actions is permissible.[2] This Article contends the focus on direct judicial assessment and enforcement of constitutional limits obscures important ways in which courts implement constitutional guarantees indirectly. Specifically, I argue that courts often can, do, and should craft doctrines that raise the costs to government decision-makers of enacting constitutionally problematic policies, rather than attempting to designate certain government actions, or categories of government actions, as permissible or impermissible.[3]

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[1] Marbury v. Madison, 1 Cranch 137, 177 (1803).

[2] *See, e.g.,* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 368 (1973) (declaring that the purpose of constitutional rights is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by courts"); United States v. Butler, 297 U.S. 1, 62 (1936) (stating that the court's task when evaluating a constitutional challenge to a congressional stature is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former"). *See also* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1578-79 & n.8 (2001) (discussing prevalence of this all-or-nothing view of constitutional rights); Guido Calabresi, *Forward—Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 82, 110 (1991) (claiming that "much of the academic constitutional law establishment" believes in a decisive judicial role in enforcing constitutional rights in which judges are responsible for enforcing these rights against government action); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2781 (2003) (observing that traditional debates in U.S. constitutional law and theory are predicated on the believe that the United States has "strong form" judicial review, in which the Supreme Court issues authoritative statements of what the Constitution requires that are absolutely binding on the other branches).

[3] My argument is closely related to Professor Ernest Young's defense of the canon of constitutional avoidance as a "resistance norm" of constitutional law, which seeks to enforce constitutional values in a different manner than a more conventional "invalidation norm." *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000) (arguing that "not all constitutional principles have a 'line in the sand' quality, such that all government acts short of that line are valid and all government acts falling over that line are invalid. Rather, some constitutional principles take the form of 'resistance norms'—norms that may be more or less yielding to governmental action, depending on the strength of the government's interest [or other factors]."); *see also id.* at 1594. My position is also consonant with Professor

The advantage of this sort of indirect strategy, as compared a categorical approach that seeks to classify government actions as lawful or unlawful, is that it may implement a kind of implicit balancing of interests, in which the damage to constitutional values is weighed against the strength of the government's interest in the challenged policy, more effectively than a direct judicial balancing test. When the government has better information than the reviewing court about the effect of the challenged policy on constitutionally relevant interests, heightened enactment costs act as a kind of screening device: If the government would still enact a given policy in the face of substantial additional enactment costs, the probability that the policy serves significant government interests is likely to be higher. Therefore, the existence of judicially-created enactment costs means that the government

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Dan Coenen's conclusion that much of constitutional adjudication makes use of "semisubstantive" or "second-look" decision rules rather than all-or-nothing absolute rules, *see* Coenen, *supra* note 2; Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281 (2002), as well as Professor Henry Monaghan's classic explication and defense of "constitutional common law," *see* Henry P. Monaghan, *Forward—Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). The argument also builds on my earlier work, primarily focused on administrative law, on how procedural hurdles or explanatory requirements can provide costly signals to overseers about the underlying value that agents attach to their policy proposals. *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753 (2006) [herinafter Stephenson, *Costly Signaling*]; Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006) [hereinafter Stephenson, *Strategic Substitution*]. Professor Jonathan Masur has recently suggested how a similar sort of screening mechanism may account for seemingly ineffective and expensive procedural requirements in the patent context and elsewhere. *See* Jonathan Masur, *Patent Signals* (Unpublished draft, Aug. 2007).

My argument is also connected to recent developments in the political science literature on delegation. Much of the delegation literature traditionally analyzed delegation regimes in which a political principal defined some "discretionary window" in which an agent had absolute authority. *See* David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004); Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 Am. J. Pol. Sci. 531 (1990). More recent work has pointed out, however, that the principal would often do better by using a "menu law," in which the agent receives variable transfer payments (or avoids unpleasant sanctions or costs) that depend on the agent's choice. *See* Sean Gailmard, *Discretion Rather Than Rules: Choice of Instruments To Constrain Bureaucratic Policy-Making* (Unpublished manuscript, Aug. 2006); *see also* David P. Baron, *Legislative Organization with Informational Committees*, 44 AM. J. POL. SCI. 485 (2000); Emerson Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J. L. ECON. & ORG. 114 (1998); Stephenson, *Costly Signaling*, *supra*. This menu law strategy offers the principal more flexibility in fine-tuning the incentives of the agent, and so it is generally a preferable strategy. Indeed, the discretionary window strategy is just a special case of the menu law strategy. *See* Gailmard, *supra*.

will not bother pursuing certain policies that it would otherwise have enacted, because the government's interest is simply not strong enough.

In a sense, this is a kind of constitutional law analogue to the well-known concept of "efficient breach" in contract law.[4] It would be possible for courts to fashion contract law doctrines—presumptions, balancing tests, and the like—to help them determine which contractual provisions ought to be enforceable under what conditions, and to enforce these determinations through injunctions. While courts employ this approach in some specific domains, however, the norm in contract law is to compel the breaching party to pay damages.[5] The logic is that the contracting parties usually have better information about the relative economic values of breach and performance, so a liability rule is more likely to deter inefficient breaches while allowing efficient breaches. In a similar fashion, constitutional doctrines that raise the costs associated with problematic government enactments may help deter policies that are "inefficient"—in the broad sense of failing a hypothetical ideal constitutional balancing test—while allowing what might be thought of as "efficient breaches" of constitutional rights. However, while the efficient breach analogy may be a useful heuristic in understanding the incentive effects of constitutional doctrines that alter the legislative enactment costs, the two situations are different in several crucial respects, which I will discuss in greater detail below.[6]

This Article has two main objectives. Part I explains, as a theoretical matter, how, why, and under what conditions judicial doctrines that manipulate legislative enactment costs may be a more effective tool for courts to implement the Constitution than doctrines that require direct judicial assessment of the relative strength of the competing interests at stake in any given case.[7] Part II argues that the federal judiciary already has the capacity to fashion doctrines that function in this way, and current doctrine influences legislative enactment costs more than has generally been appreciated. Although manipulation of government enactment costs may not be the intended or primary effect of *any* doctrine in constitutional law, it is an important function of *many* such doctrines. Furthermore, some doctrines might

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[4] *See* Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970); John H. Barton, *The Economic Basis for Damages for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972); Charles A. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

[5] RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to §§ 357-369, Topic 3 at 162 (1981).

[6] *See infra* TAN ___.

[7] For a general discussion of how judicial doctrines can be understood as a mechanism for implementing the Constitution, see Richard H. Fallon, *Forward—Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

be rationalized and justified as means of manipulating legislative enactment costs, even if this was never their intended function.

Understanding both the theory of enactment cost manipulation and the ways in which existing doctrinal approaches may influence legislative enactment costs may be useful in evaluating the advantages and disadvantages of these doctrines, as well as suggesting different ways of thinking about doctrinal strategies for implementing the Constitution. By thinking more systematically about these issues, one may be able to craft doctrines that more effectively leverage the advantages associated with an enactment cost strategy while minimizing the inevitable shortcomings of such an approach.

I. THE THEORY OF ENACTMENT COST MANIPULATION

A. The Inevitability of Balancing and the Problem of Uncertainty

Constitutional review of government action pervasively, perhaps inevitably, requires some form of balancing.[8] In virtually all hard constitutional cases, some privileged right, interest, or entitlement comes into conflict with a normatively attractive competing government interest.[9] The need to balance constitutional values against competing interests is apparent in the text of some constitutional clauses, such as the Fourth Amendment's prohibition on "unreasonable" searches and seizures, and the Due Process Clauses of the Fifth and Fourteenth Amendments. Other clauses, such as the First Amendment's Speech and Religion Clauses and the Fourteenth Amendment's Equal Protection Clause, appear to embody more absolute prohibitions. But in practice, when defining the underlying right that is protected "absolutely" and in specifying the remedies available, courts have recognized the need to balance competing values and interests.[10]

This is not to assert that all constitutional doctrines involve some form of case-by case, totality-of-the-circumstances balancing, nor that they should. As an empirical matter, pure balancing tests are relatively rare (though certainly not absent) in constitutional doctrine.[11] As a normative

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[8] *See* Richard H. Fallon, *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993); Fallon, *supra* note 7; Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 78-80. *But see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

[9] *See* Fallon, *supra* note 8; Stephen E. Gottlieb, *Compelling Government Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988); Symposium, *Conference on Compelling Government Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 535 (1992).

[10] *See* Fallon, *supra* note 8, at 361-64; David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1547-63 (1992); Karst, *supra* note 8, at 78-80; Daryl Levinson, *Rights Essentialism and Remedial Equilibrium*, 99 COLUM. L. REV. 857 (1999).

[11] *See* Fallon, *supra* note 7, at 76.

matter, scholars of various ideological stripes have argued against the wisdom of doctrines that call for judges to engage in all-things-considered, case-specific balancing.[12] Yet in those areas where courts reject case-by-case "retail" balancing of constitutional values and competing interests, they typically engage in a kind of "wholesale" balancing when formulating or refining their doctrinal approach.[13] For example, a judicial decision that a category of government action is presumptively lawful or unlawful, or that certain controversies are non-justiciable, implicitly (and sometimes explicitly) rests a judgment about how to strike the appropriate balance between some constitutionally protected value and the government's interest in advancing legitimate public policy objectives.[14] Similarly, when courts decide that certain categories of government action will be subject to a relatively forgiving "rational basis" standard, while other categories will have to meet a more demanding level of scrutiny, these classification decisions typically involve probabilistic judgments about the likely costs and benefits of actions within the specified categories.[15] Thus, rejection of retail balancing in individual cases generally implies wholesale balancing in the creation of doctrinal tests to implement constitutional guarantees.

To assert that constitutional adjudication and doctrinal formulation usually involve balancing constitutional values against legitimate competing interests is to frame the problem faced by the courts, not to resolve it. How are courts to strike the appropriate balance? How are they to devise doctrinal frameworks that maximize the chances that an appropriate balance will be struck? This problem is especially acute given that courts face two well-known institutional limitations. First, the federal judiciary's lack of direct electoral accountability raises questions about the extent to which courts may make value-laden judgments about the validity and relative importance of alleged constitutional rights and competing government interests. Alexander Bickel famously dubbed this legitimacy problem the "countermajoritarian difficulty,"[16] and constitutional theorists have debated it ad nauseum for a half-century since.[17]

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[12] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); FREDERICK SCHAUER, PLAYING BY THE RULES 107-74 (1991); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 645- 674-79 (1991); Aleinikoff, *supra* note 8, at 972-995 (1987); Paul W. Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 47-60 (1987).

[13] *See* Fallon, *supra* note 7, at 77-78; Fallon, *supra* note 8, at 360-65.

[14] *See* Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Fallon, *supra* note 8, at 361-64; Faigman, *supra* note 10, at 1547-63.

[15] *See* Fallon, *supra* note 7.

[16] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).

[17] *See* Barry Friedman, *The Birth of an Academic Obsession: The Countermajoritarian Difficulty, Part Five*, 112 YALE L. J. 153 (2002); Barry Friedman, *The Counter-*

Even if one brackets or rejects the legitimacy objection to judicial review, courts still face a second institutional problem: their comparative disadvantage in gathering and evaluating information about the connection between policies and outcomes. It is not enough to assign normative weight to constitutionally protected values and competing government interests in the abstract. One must also assess the likely consequences of the challenged government action for those values and interests.[18] Yet judges may not be especially good at making these sorts of empirical or predictive judgments, and that creates problems independent of the normative legitimacy of "counter-majoritarian" judicial review.[19]

To illustrate the distinction between the legitimacy problem and the information problem, consider a stylized example involving a free speech issue. Imagine that a speaker in a public park is delivering a racist rant to a large crowd, and the police detain him pursuant to a statute that proscribes speech that is likely to incite racial violence. Now suppose (unrealistically) that the court reviewing the case could be certain that the probability that this sort of speech would actually cause a race riot is 15%. The example thus assumes away the court's information problem. The legitimacy problem remains, however. If the court were to hold that the statute is unconstitutional, one might reasonably ask why an unelected court is entitled to decide that a 15% chance of a race riot is not high enough to prohibit inflammatory speech when the democratically elected legislature reached a different conclusion. Responding to this challenge is especially difficult if we concede that there is some point at which the risk of violence is so great that prohibiting the speech would be justified. (Imagine, again unrealistically, that we knew with absolute certainty that this speech, if allowed, would trigger a city-wide race riot in which hundreds would die.) If we make that concession, then we have admitted the need for some sort of balancing. Yet how confident can we be that the court will strike the balance at the right point? Should a 15% risk of a riot be sufficient to restrain speech? 5%?

Majoritarian Problem and the Pathology of Constitutional Scholarship, 95 NW. U. L. REV. 933 (2001).

[18] *See* Karst, *supra* note 8, at 81, 84.

[19] *See* Fallon, *supra* note 8, at 376; Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 209 (1971); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178-82; *but see id.* at 1182-86 (suggesting that, even if Congress has a superior institutional capacity to make predictive empirical judgments, it may lack appropriate institutional incentives to gather and use factual information appropriately). This information problem may arise because the professional background and training of judges, coupled with the comparative institutional insulation of the judiciary, makes courts systematically worse than the legislature or executive at assimilating empirical data and making factual predictions. The lack of electoral accountability may also mean the courts are more likely to err in assessing the impact of various statutory proposals on the welfare of relevant constituencies.

30%? There are good reasons to worry whether courts will assign the correct normative weight to the competing interests, whether they do the balancing at the retail level or at the wholesale level.

Now, consider a variant on the same example in which the legitimacy problem is assumed away but the information problem is present. Suppose that the court both would and should find the hypothetical statute unconstitutional as applied if, but only if, the probability that the targeted speech would incite a riot is less than 20%. That is, the government interest in public safety outweighs the speaker's autonomy and self-expression interests only if the probability of inciting a riot is greater than 20%. Even if there is no normative legitimacy problem with allowing the court to enforce that principle, the court is likely to be quite uncertain as to the true probability that the speech in question might cause a riot. Furthermore, even though the government, the defendant, and other interested parties might have better information on this point, they have an incentive to exaggerate in whatever direction favors their interests: The defendant's attorney will insist that the probability of this sort of speech inciting violence is very low, while the government will insist that it is very high. The court will need to come up with some way to sift through the competing arguments and evidence and make the judgment that minimizes the aggregate error costs.

This simple pair of examples is meant to illustrate the conceptual distinction between concerns about courts' ability to correctly assign normative weight to constitutional values and competing government interests, and limitations on courts' capacity to evaluate the degree to which those values and interests are implicated by a given government action. In real life, the distinction is more elusive, and the degree to which a judicial decision or doctrine reflects a court's normative judgment about the relative importance of different interests, rather than an empirical predication about the probable effect of the challenged policy on the relevant values, may not always be clear.[20] Nonetheless, there is an important conceptual distinction between the objection that courts are unqualified to make *value* determinations (the legitimacy problem) and the objection that they are unqualified to assess relevant *facts* (the information problem).

That distinction is important for purposes of this Article because the focus here is primarily on doctrinal solutions to the judiciary's information problem. As in the second version of the hypothetical hate speech case, the Article assumes away concerns about whether the courts assign the appropriate level of normative significance to various rights, values, and interests. This is not because these concerns are unimportant, nor because the judici-

[20] *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 544 (1991) (claiming that the "Court fails to distinguish between normative principles and empirical propositions"); *id.* at 546 (noting the Court's traditional "casual interweaving of fact and law").

ary's ability to make contested normative value judgments is unproblematic. But this Article's central arguments principally concern the doctrinal strategies that courts can employ to ameliorate their informational limitations. In exploring that issue that issue, bracketing the legitimacy objection simplifies the analysis and exposition.

B. Enactment Costs and the Implementation of the Constitution

This Article's central claim is that judicial doctrines can raise the costs to legislators[21] of enacting a given policy, thereby increasing the probability that policies subsequently enacted would satisfy a hypothetical ideal balancing test of constitutional or statutory values against competing government interests. The argument is not simply that judicial doctrines can reduce the total quantity of constitutionally problematic legislation by imposing an implicit tax, though that is certainly one effect of doctrines that raise legislative enactment costs. I advance the stronger claim that judicial imposition of additional enactment costs on legislatures enables courts to reduce their comparative informational disadvantages. The better-informed government decision-makers will only be willing to act when their true interest in the policy is sufficiently strong; government exaggeration of its true interest is no longer a viable strategy. Thus, courts may be able to approximate indirectly the outcomes that would be achieved by an ideal constitutional balancing test that courts are not able to implement directly.

The idea can be illustrated with another stylized example. Imagine that Congress is considering a statute that would advance some legitimate government interest but that would also injure some constitutional value. For concreteness, imagine a statute that would impose new regulatory obligations on internet service providers. Proponents of the legislation justify it in terms of some legitimate public interest, such as eliminating on-line copyright infringement or protecting national security by blocking or monitoring the transmission of sensitive information. The statute, however, may also threaten values protected by the Constitution, such as speech rights or privacy rights.

Securing passage of the statute requires effort on the part of supportive legislators and interest groups. This is true even for legislative proposals that are relatively simple and uncontroversial, and it is especially true for more complex or divisive proposals. The costs to legislators and interest groups of drafting and enacting legislation, other than the disadvantages of the legislation itself, are primarily opportunity costs. Legislators have a limited amount of time, staff, and political capital to allocate to a variety of

[21] The same analysis applies to other government decision-makers, including the President, law enforcement officials, and administrative agencies. The textual focus on legislative decision-making is purely for expositional convenience.

activities, including not only legislation but also oversight, constituency service, campaigning, and public relations activities. A rational legislator will allocate her limited resources among these activities so as to maximize her ability to achieve her objectives, which will typically include re-election or career advancement, ideological or policy goals, prestige, and leisure.[22] Therefore, when a legislator considers whether to work toward the enactment of a given bill, such as the hypothetical internet regulation statute, she will consider not only how passage of that statute would benefit her, but also the opportunity costs of devoting resources to that bill rather than to other activities. Interest groups typically face a similar kind of trade-off: Effort devoted to securing the passage or any one legislative proposal is effort that cannot be devoted to some other valued activity. Legislation will be enacted only if a sufficient number of influential players in the legislative process believe that the net political and policy benefits associated with the legislation outweigh the opportunity costs of devoting sufficient effort to ensure passage.

Suppose that the benefits to legislators and interest groups of passing the hypothetical internet regulation statute exceed the opportunity costs, so that the statute is enacted into law. The statute might then be challenged on constitutional grounds; in a case like the hypothetical internet statute, such a challenge is likely. If an omniscient judge were able to apply an ideal constitutional balancing test, she would uphold the statute if but only if the legitimate government interests in enacting the statute (e.g., fostering innovation or defending against threats to national security) outweigh the injury to constitutionally significant values (e.g., speech and privacy).[23] Alternatively, if the court were confident that the legislature would always fully internalize the costs and benefits of its decisions, then judicial review would be superfluous, because the court, even if not omniscient, would always uphold the omniscient and benevolent legislature.

Problems arise, however, if the judiciary has incomplete information and the legislature has misaligned incentives.[24] The legislature may undervalue the constitutional interests at stake—or, equivalently, it may overvalue the competing benefits. In other words, the private benefit of enacting the statute may exceed the private enactment cost for a sufficiently large

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[22] *See, e.g.,* RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 137 (1978).

[23] The judge could do even better if she could credibly commit in advance to uphold only statutes where the public benefits exceed the sum of the constitutional cost and the social opportunity costs of enactment. Credible commitment would be necessary here because, at the moment the statute comes before the court, the enactment costs associated with the statute are sunk.

[24] Yet more problems arise if the judiciary has misaligned incentives and the legislature's information is no better than the court's. Put these problems, serious as they are, aside for the moment.

number of legislators and interest groups, even though the social benefit of the statute is less than its total social cost. If this is the case, the legislature would sometimes favor statutes that would fail the hypothetical ideal balancing test. If the reviewing court were omniscient, or at least had information as good as the legislature's about the statute's likely effects, the court could still constrain the legislature through the application of the ideal constitutional balancing test. But if the court's information about the issues at stake is not as good as the legislature's, the court's problem is much more difficult.

To illustrate, assume that the court can confidently assess the degree to which the hypothetical internet regulation statute impinges on constitutionally privileged speech and privacy rights, but the court's information about the statute's relationship to competing government interests—to intellectual property protection, national security, or what have you—is significantly worse than the legislature's. To make the information problem as stark as possible, albeit at the price of some descriptive realism, let us assume that the legislature (considered as a unitary actor[25]) knows the public benefit of the statute with certainty even though it may undervalue the constitutional interests at stake, while the reviewing court, despite having exactly the right values, can only make a rough estimate of the statute's impact on legitimate public interests.

If the reviewing court had to rely only on its own information, it would have to decide whether the expected public benefit of the statute—given the court's incomplete information—is greater or less than the cost to constitutional values.[26] The court could apply a kind of retail balancing test or, alternatively, some other doctrinal formula that the court believes will achieve an appropriate constitutional balance at the wholesale level. But these ap-

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[25] The theoretical difficulties with treating a multi-member body as a unitary decision-maker are well-known. *See* Richard McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). This Article, however, does not assume a single legislative intent or will, nor does it rely on the assumption that all members of the legislature have the same information. Rather, this Article assumes that the legislature employs some set of institutional arrangements that generate stable equilibrium policy choices, *see, e.g.,* Kenneth Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979), and that the equilibrium policy choice is affected by information that the legislature collectively receives and processes about the impact of various policies on some normatively relevant set of outcomes. Characterizing the legislature, or the enacting coalition, as a unitary actor that "knows" the effect of policies and outcomes and chooses the policy that would advance "its" interest is a shorthand way of describing this more complex collective choice problem.

[26] Again, if the court could commit to a decision rule ahead of time, it would uphold the statute only if the expected public benefit exceeded the sum of the constitutional costs and the social opportunity costs of enactment.

proaches entail substantial error costs. The court's uninformed application of the relevant test may well prevent or deter the enactment of socially desirable, constitutionally justifiable legislation. After all, the true social benefit of the statute may be much larger than the court's estimate of the expected benefit. On the other hand, the court may end up approving a statute that inflicts an unjustifiably large injury to constitutionally protected values if the expected benefit is much higher than the actual benefit.

This dilemma is a well-known problem with judicial attempts to balance constitutional and other public values, whether at the retail level or the wholesale level. The question therefore arises whether there are better that the court can implement constitutional values than a direct but uninformed inquiry into the effect of a challenged statute on constitutionally relevant values and interests. Is it possible for the court to establish doctrinal mechanisms that induce outcomes that more closely approximate those of the hypothetical ideal constitutional balancing test?

There are a number of ways that the courts might attempt to achieve such a result. One possible strategy targets the problem of misaligned legislative incentives, developing doctrines designed to induce greater legislative deliberation or to limit the influence of parochial interest groups.[27] Another approach is for the judiciary to establish doctrinal tests that elicit more accurate and credible information from the legislature about the public interests at stake, for example by demanding certain types of evidentiary showings or information disclosure.[28] An alternative or complementary tactic, and the one on which this Article focuses, is to formulate doctrines that establish indirect mechanisms that credibly transfer information from the legislature to the court. One such approach is to increase the costs to the legislature of enacting constitutionally problematic legislation.

To see how this strategy could work, consider a case in which the legislature, though better informed than the court, systematically undervalues constitutionally privileged interests relative to competing government objectives. Under this assumption, the private cost to legislators of enacting a given statute—the opportunity costs of enactment, plus the other perceived disadvantages of the law, including whatever interest the legislators have in the relevant constitutional costs—may be smaller than the social costs of the

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[27] *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

[28] *Cf.* Matthew C. Stephenson, *Evidentiary Standards and Information Acquisition in Public Law* (Unpublished manuscript, August 2007) (considering how judicial demands for certain types of evidentiary showings affect government decision-makers' incentives to acquire information); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001) (applying a model in which cost-benefit analysis entails disclosure of information about policy effects by a better-informed agent to a less-informed political principal).

legislation, including its impact on constitutional values. If, however, the opportunity cost of enacting the statute were to increase to the point where the statute's private cost to a decisive coalition of legislators were equal to the true social cost, then the legislature would never enact a statute with negative net social value. The legislature, however, would still pass the legislation if the private benefit to a decisive coalition were sufficiently high. Enactment costs thus function as a screening device, deterring legislative action with low private benefit to the legislature.

Because all legislative activity entails opportunity costs, some screening will take place even without judicial intervention. Furthermore, the process for enacting legislation laid down in Article I, Section 7 of the Constitution—which requires the assent of both chambers of Congress plus the President, or two-thirds of each chamber if the President is in opposition—might itself be considered a device for raising the enactment costs of legislation, thereby helping to ensure that any legislation that makes it through this process is perceived by a sufficiently large number of legislators and interest groups not just as having some positive value, but as having considerable positive value.[29]

If the existing screen is not powerful enough to filter out enough undesirable statutes, the courts can try to find ways to make the screen more demanding. One way for the courts to do this is by developing doctrines that raise enactment costs for those statutes where the legislature is likely to overvalue a statute's benefits relative to its costs. The court's manipulation of legislative enactment costs enables it to extract more information from the legislature about the true public benefit of the statute in question. Even if the court cannot verify the government's assertions regarding the legislation's benefits, the magnitude of the enactment cost forces the government to credibly reveal some of its private information indirectly through its behavior. Judicial doctrines that raise the government's enactment cost thus increase the credibility of the government's assertion that it has a sufficiently strong interest in the legislation to justify the injury to constitutionally privileged values.

C. The Theory's Domain

[29] This beneficial effect of the Constitution's cumbersome lawmaking procedure (as well as other "supermajority" rules) has been advanced and defended in a series of articles by John McGinnis and Michael Rappaport. *See* John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1128-37 (2007); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 732-43 (2002); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as Constitutional Solution*, 40 WM. & MARY L. REV. 365, 407-418 (1999).

In order for judicial doctrine to perform the hypothesized screening function described in the preceding section, four critical assumptions must hold. *First*, the relevant government policymakers' private interest in enacting a policy must be positively correlated (in expectation) with some normatively legitimate social interest, even though the government's interest in enacting the policy is systematically too strong. *Second*, the enacting legislative coalition must have better information about the expected impact of the policy than does the reviewing court, but the court must have reasonably good information about the enacting coalition's policy preferences. *Third*, the court must be able to fashion doctrines that increase the private opportunity cost of enactment for the decisive legislative coalition by more than these doctrines increase the social opportunity cost of enactment. *Fourth*, judicial doctrine must be capable of imposing enactment costs that are sufficiently meaningful and predictable to decrease the government's willingness to pursue the targeted class of policy decisions.

This Article does not claim that all of these assumptions always hold. Rather, the claim—more modest, but perhaps still controversial—is that they hold sufficiently often that a functionalist theory of judicial doctrine that focuses on manipulation of enactment costs is important to understanding and assessing the operation of real-world constitutional review. In order to better understand both the theory and the limits to its domain, I will elaborate on each of these four key assumptions.

1. Preferences—The first critical assumption is that the government's interest in a given policy is likely to be positively correlated with the true social interest in that policy, but also likely to be too strong. This assumption will hold when the government systematically *undervalues* constitutionally privileged interests, but not when the government is excessively *hostile* to those interests.

The critical distinction between undervaluation and hostility can be illustrated in the context of the Equal Protection Clause's restriction of race-based discrimination. Bracket for the moment debates about the legitimacy of distilling purposes or values from constitutional texts, as well as controversies about the scope and purpose of the Equal Protection Clause. Let us assume, for purposes of developing the distinction between undervaluation and hostility, that the central purposes of the Equal Protection Clause are to eliminate the economic, political, and social subjugation of non-white minorities, to eradicate race-based stereotyping and stigmatization, and to dampen and defuse race-based conflict.[30] If these are the values the Equal

[30] Many scholars have argued that this, or something like it, is the most plausible understanding of the purposes of the Clause. *See, e.g.,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1502-21 (2nd ed. 1988); RONALD DWORKIN, A MATTER OF PRINCIPLE 318 (1985). This, of course, is a controversial position, but given that the example in the text is

Protection Clause is meant to advance, it is reasonable to suppose that the Southern legislatures that enacted Jim Crow legislation were hostile to these values. The very purpose of Jim Crow, after all, was to perpetuate the subordination and stigmatization of African-Americans. The more effectively segregationist legislation advanced these goals—that is, the more effectively it subverted the values embodied by the Equal Protection Clause—the greater its appeal to a pro-Jim Crow legislature.

But not all government action that offends the Equal Protection Clause does so because the enacting officials were hostile to the Clause's values. Consider the California prison officials who decided to segregate prisoners on the basis of race for the first 60 days in the state penal system.[31] These officials asserted that their purpose was to reduce the risk of race-based violence,[32] and there is little reason to doubt their honesty. Indeed, it seems implausible that these officials hoped by their actions to perpetuate the subordination of non-white minorities or negative stereotypes about race.[33] It is much more likely that they either gave no thought to how a presumption in favor of racial segregation would affect the dignity of non-white prisoners or to the public perception that race is a useful predictor of behavior, or else that these officials believed such negative consequences would be outweighed by the benefits of reducing prison violence.

That does not make the prison segregation policy desirable or constitutional. It is quite possible that the prison officials, confronted as they were with the immediate and serious risks of violence, undervalued the constitutional interests safeguarded by the Equal Protection Clause. Insensitivity to these interests may well have led the state to enact an unjustifiable policy. But the problem in this case is undervaluation of the constitutional interest, not hostility to it. A hypothetical showing that the prison segregation policy would degrade the dignity of African-American prisoners more than had been previously supposed would almost certainly have made this prison segregation policy less appealing, not more appealing, to the responsible officials.

This distinction between undervaluation and hostility is important, not least because it highlights the fact that not all, or even most, government threats to constitutional rights spring from hostility to constitutional values. The injury to those values is not necessarily less severe when the cause is undervaluation rather than hostility, though there is an ongoing debate about the normative significance of "government purpose," on which this Article

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merely illustrative, it is not necessary for this Article to take a position on whether this position is correct.

[31] *See* Johnson v. California, 543 U.S. 499 (2005).

[32] *See Johnson*, 543 U.S. at 502-03.

[33] *But see Johnson*, 543 U.S. at 519 (Stevens, J., dissenting) (finding a "very real risk that prejudice (whether conscious or not) party underlies the [state officials'] policy").

takes no position.[34] The distinction is relevant to this Article because a judicial strategy that relies on increasing government enactment costs will be much more effective when the government undervalues constitutional interests than when it is hostile to them. In the former case, forcing the government to show that it is deeply committed to a policy is more likely to result in the enactment only of those decisions where the constitutional values at stake really are outweighed by legitimate competing interests. In the latter case, intense government commitment to a particular policy may actually indicate that the injury to constitutionally privileged interests is especially severe.[35]

A closely related point is that in order for the enactment cost strategy to make sense, there must be a sufficiently close and positive relationship between the interests to which the government actually responds and the interests that can be legitimately balanced against constitutionally protected values. If, for example, the legislature is more likely to ban a particular kind of expressive conduct if that conduct is likely to trigger violence, then raising the costs of enacting a statutory ban on such speech is more likely to create an effective screen that limits constitutionally problematic decisions to those cases where they are truly justified. If, on the other hand, the legislature's interest in passing the speech-restrictive statute is responsive only to normatively irrelevant or disreputable considerations rather than legitimate government interests, then an enactment cost strategy will be less effective. It may succeed in deterring some unjustifiable violations of constitutional rights, but it will not be a useful filtering or sorting mechanism.

This, one's assessment of the utility of the enactment cost strategy depends considerably on one's view of the performance of American political institutions. If one believes that these institutions, for all their faults, exhibit a reasonable degree of positive responsiveness to normatively defensible policy interests, then the enactment cost strategy is more sensible. The correspondence need not be perfect, nor need it arise because of any intrinsic benevolence on the part of policymakers. But, in order for the government's willingness to incur private enactment costs to signal something useful about the true public values at stake, the government's propensity to impinge on constitutional interests must be stronger, on average, when the legitimate government interests on the other side are more compelling. If one takes the more pessimistic view that the outputs of American legislative and executive institutions are generally unrelated to any normatively defensible concept of the public interest, then an enactment cost strategy's viability is limited.

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[34] *See* Richard Fallon, *Strict Judicial Scrutiny* 54 UCLA L.REV. 1267 (2007); JOHN HART ELY, DEMOCRACY AND DISTRUST 105-79 (1980).

[35] *Cf.* Stephenson, *Costly Signaling*, *supra* note 3..

2. Information—The second critical assumption of the theory that judicial manipulation of enactment costs can function as beneficial policy filters concerns information: the legislature must have better information about the actual impact of the policy in question on relevant interest than does the reviewing court, but the court must have reasonably good information about legislative preferences. If the government does not have superior information about policy effects, then there is no asymmetric information problem to be solved. If the court does not have at least a rough sense of how government preferences and social preferences are misaligned, the court cannot compensate for this misalignment by adjusting legislative enactment costs.

Like the assumption that legislative interests are positively responsive to public interests, the assumption that legislatures or other government decision-makers have better access to policy-relevant information implicates one's views about the overall performance of American political institutions. The more optimistic view is that, although the assumption of perfect information made in the stylized example presented above is an obvious exaggeration, legislatures do typically make decisions on the basis of information that is not available to a lay person or a reviewing court. Legislators need not acquire this information directly, or even consciously process it. Responsiveness to information may instead take the form of input from staff, constituents, or interest groups. Nonetheless, on the optimistic view, legislative action is likely to reflect, at least on average, an informed judgment about the connection between policy choices and actual outcomes.

The more cynical view is that government policymakers either do not know or do not care about the connection between policy and outcomes.[36] The assertion that they do not care is a claim about incentives, related to the earlier discussion concerning legislative responsiveness to public interests. The claim that they do not know reflects a belief that the issues are sufficiently complex, and the institutional means for information-processing sufficiently poor, that policy decisions reflect sheer guesswork.

The accuracy of these contrasting visions depends in part on the nature of the policy issue, in part on the specific decision-maker in question, and in part on additional issues beyond the scope of this Article. The important point is that a judicial strategy that focuses on manipulating government enactment costs is most likely to be effective when the government plausibly has better information about the connection between policy and outcomes than does the court. If the government's information is not likely to be much better than the court's, then the court may be better off simply doing the constitutional balancing directly (either retail or wholesale).

Of course, even if the government initially has better information than the court, the court may not need to use something like the enactment cost strategy if it can learn what the legislature knows through more direct

[36] *See* Devins, *supra* note 19, at 1182-86.

means, perhaps by demanding disclosure of relevant evidence.[37] The problem with this strategy is that the courts may lack the necessary time or expertise to assess the evidence proffered by the government. Furthermore, if the legislature's decision is "informed" in the sense that it is responsive to the information of a diverse array of constituents and interest groups, there may nothing tangible to disclose. Courts may also rely on signals from third parties, or their own research, to ameliorate their informational disadvantages. This is likely to reduce the problem to some degree, but again the institutional limitations of courts may preclude complete elimination of the informational asymmetry. The court's ability to reduce its informational disadvantages is likely to vary across different situations. The greater the court's ability to acquire relevant information directly, the less necessary or desirable the manipulation of legislative enactment costs will be as a means of extracting credible information. Such a strategy is most useful in cases where the judiciary finds it impossible or excessively costly to acquire credible information from the legislature through more direct means.

Despite the judiciary's disadvantages with respect to information about the connection between policies and outcomes, the court must have reasonably good information about legislative preferences in order for manipulation of enactment costs to be a viable strategy.[38] The court's information need not be perfect, but the more uncertain the court is about legislative preferences, the greater the error costs doctrinal manipulation of enactment costs will entail. To make this abstract point more concrete, consider again the hypothetical internet regulation statute. In order for an enactment cost strategy to be viable, the court's judgment as to whether legislature typically overvalues national security or copyright protection relative to constitutional liberty must be better than the court's judgment of the statute's actual impact on the national security or intellectual property interests at stake.

This assumption will clearly not hold in all cases, but there are some reasons to suppose it will often be plausible. First, because political or ideological considerations are likely to affect a large number of decisions, the court may have a larger number of data points from which to infer legislative preferences. Second, courts may be able to draw inferences about legislative preferences by observing structural features of the political system. For example, it may be reasonable to assume that legislative preferences will typically be biased in favor of politically powerful groups such as

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[37] *See* Stephenson, *supra* note 28.

[38] For similar reasons, the court also must have some sense of how different doctrinal requirements will affect legislative and social opportunity costs. Without such information, the court will not be able to determine what additional enactment cost, if any, would improve screening in a desirable way.

those with highly concentrated interests,[39] or in the direction of addressing highly visible or salient public concerns.[40] Electoral pressures may also distort legislative efforts in the direction of short-term results or easily observable benefits.[41]

3. *The Social Costs of Enactment Costs*—The third critical assumption is that the court must be able to fashion doctrines that increase the *private* opportunity costs to policymakers more than the attendant *social* opportunity costs. As the earlier discussion noted, if legislators devote more time and energy to passing one piece of legislation, they have less time to devote to other tasks, such as work on other legislation, oversight activities, campaigning, constituency service, and leisure.[42] Diversion of resources away from these activities is personally costly to legislators; that is why enactment costs can function as a screening device. But such diversion of resources may also be socially costly if the other activities that compete for legislative time and attention also serve the public interest. Thus, the valuable screening that enactment costs may perform for courts and society is not free. Although raising the legislature's enactment cost improves screening—making it less likely that the legislature will enact a statute that would fail an ideal balancing test—it also means that any statutes that *are* enacted will entail a higher social cost than they would have otherwise.[43]

Raising the legislature's enactment costs is only a desirable strategy if the private opportunity cost to the legislature of bearing the additional enactment costs is sufficiently high relative to the social opportunity cost. Otherwise, the expected benefits of improved screening will be offset by the expected social opportunity costs of making legislative action more difficult. Furthermore, as long as at least some of the legislature's private enactment cost represents a social opportunity cost, the court will not want to increase enactment costs to the point where the legislature would never pass a statute with negative social value. Instead, the court will tolerate some degree of incentive misalignment in order to avoid excessive expenditure of scarce legislative resources on any one statute.

All this indicates that an enactment cost strategy is less desirable when the other activities competing for the legislators' attention are more socially

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[39] *See, e.g.,* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS (1982); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1972).

[40] *See* Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002); Hugo Hopenhayn & Suzanne Lohmann, *Fire Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 J. L. ECON. & ORG. 196 (1996).

[41] *See* Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 902 AM. POL. SCI. REV. 809 (1998); Ethan Bueno de Mesquita, *Politics and the Suboptimal Provision of Counterterror*, 61 INT'L ORG. 9 (2007).

[42] *See supra* TAN ___.

[43] Of course, the social cost may be offset if the costly activities the court demands have additional public benefits that are not internalized by the legislature.

valuable. If one believes that more work on securing passage of the hypothetical internet regulation bill would come primarily at the expense of retail constituency service work or leisure time for legislative staff, then raising the enactment cost of the internet bill may entail relatively low social opportunity costs. On the other hand, if devoting more effort to passing the internet bill would divert resources overseeing the implementation of existing statutes or securing passage of other valuable legislation, then raising enactment costs may impose significant social costs.[44] A judicial strategy that involves some increase in enactment costs may still result in better expected outcomes than the court would achieve if it attempted to balance constitutional values against government interests directly, but the difference in relative desirability would be smaller.

There may appear to be some tension between the assumption that the legislature is positively responsive to legitimate public interests and the assumption that the social opportunity costs of legislative enactment efforts are relatively small. The former assumption seems to rest on an optimistic view of the legislative process, while the latter assumption appears to rest on a more pessimistic view that legislators devote much of their energies to activities will low social utility. The tension dissolves, however, if one makes the plausible assumption that although the legislative interest in any specific project is positively correlated (in expectation) with the social value of that project, the legislator's prioritization of various activities does not correspond to a normatively optimal prioritization. This is analogous to stating that a firm manager's incentive to pursue a firm project is positively correlated with the profitability of that project, but also that the manager's allocation of effort across projects diverges from the allocation that would maximize the firm's profitability.

4. *Implementability*—The fourth critical assumption of the enactment cost theory is that courts are able to devise and implement doctrines that raise legislative enactment costs in meaningful and predictable ways. In general, courts cannot mandate additional enactment costs directly—they cannot, for example, impose a direct tax on legislators for allocating resources to particular bills. Instead, the main weapon available to the court is its power to strike down an unconstitutional law or policy. The court can condition its approval of a challenged law on whether or not the legislature has engaged in some set of costly activities, thereby raising legislative enactment costs. For this approach to work, however, two conditions must hold.

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[44] *Cf.* Ethan Bueno de Mesquita & Matthew C. Stephenson, *Regulatory Quality Under Imperfect Oversight*, 101 AM. POL. SCI. REV. 605 (2007) (differentiating situations in which greater effort devoted to a given policy is socially costly from situations where it is not).

First, legislators must care about whether or not the statute is upheld by the court. There may well be cases in which this condition fails. Legislators sometimes vote for statutes without knowing or caring whether those statutes will survive constitutional scrutiny. The symbolic political benefit of taking a position on some salient public issue might be all that matters.[45] Furthermore, legislators may sometimes vote for a statute knowing, or even hoping, that the court will reject or limit it. That way, the legislators can take credit for a popular but ill-advised statute without having to deal with the undesirable consequences of actually passing that statute into law.[46]

These caveats notwithstanding, it seems implausible to suppose that legislators are systematically indifferent to the fate of the statutes they pass. After all, excessive indifference to legal viability can be a risky political strategy. Sophisticated interest groups may well be aware of the doctrinal prerequisites for constitutional validity. They will not be satisfied by empty symbolism, and they will lobby for enactment of policies that will actually go into effect. Furthermore, the unsophisticated mass public may only care whether, at the end of the day, the problem the statute was meant to address was solved. They may be difficult to appease through symbolic position-taking precisely because they are unsophisticated and uninformed.[47] Additionally, having a statute struck down as unconstitutional may reflect badly on the legislature, and it may embolden those legislators or constituencies that opposed the legislation in the first place. Finally, to the extent that legislators care at least somewhat about advancing a policy agenda, then they will have an interest in enacting statutes that actually become law. Thus it is reasonable to suppose that there is a sizeable set of cases where the conditioning of judicial approval on government enactment costs is likely to have an effect on actual government behavior.

The second condition is that the court must be able to establish, within the constraints of existing institutional arrangements, doctrines that actually raise the government's enactment costs. That is, the reviewing court must

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[45] *See* DAVID R. MAHEW, CONGRESS: THE ELECTORAL CONNECTION 61-73 (1974).

[46] *See* Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions* 25 L. & SOC. INQUIRY 91 (2000); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349 (1993). A related argument is that legislators often prefer that the courts resolve the issue one way or the other so that the legislators do not have to address it themselves. *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993); Keith Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

[47] *See* Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J. L. ECON. & ORG. 379, 393-94 (2004); Matthew C. Stephenson, *When the Devil Turns…: The Political Foundations of Independent Judicial Review*, 32 J. LEGAL. STUD. 59, 62-63 (2003).

be able to impose on the legislature conditions that the legislature must meet in order for a statute in a given class to be upheld, and these conditions must be credible, meaningful, foreseeable, and consistent with other features of American judicial and legislative institutions. This last condition is important here because the point of this Article is not to consider what sort of institutional arrangements might be possible if one were building a political-judicial system from scratch, but whether the existing federal judiciary has available to it doctrinal tools and resources that are, or can be, used to better achieve an appropriate constitutional balance by raising legislative enactment costs. This issue is sufficiently important that I treat it separately in Part II.

II. THE PRACTICE OF ENACTMENT COST MANIPULATION

Part I argued that when four key assumptions hold, courts can improve the constitutional performance of government policymaking institutions by conditioning judicial approval of certain constitutionally problematic policies on the government's willingness to undertake activities that raise the costs of enacting those policies. Doing so screens out government actions with benefits that are low relative to their constitutional and other social costs, while allowing the government to take action with relatively high social benefits.

The argument is similar to the claim that, in contract law, a damages remedy is superior to a specific performance remedy because a damages remedy facilitates "efficient breaches" of contractual obligations. One can think about judicial doctrines that raise the costs of enacting constitutionally problematic policies, rather than deem those policies absolutely prohibited or permitted, as facilitating a kind of "efficient breach" of constitutional rights. The comparison might seem inapt, in that we typically say that if a government action satisfies the prevailing judicial doctrine, there is no constitutional violation. But we could just as easily say that if one contractual party fails to perform but pays adequate compensation to the other party, there is no breach of the contract. In both cases, the less-informed court uses a party's willingness to pay as a credible signal of that party's private information about the true benefits of its action.

There are, however, important differences between the notion of efficient breach in contract law and the constitutional law analogue developed in this Article. Many of these salient differences are encompassed in Part I's discussion of the key assumptions of the theory. For example, in the contractual setting the costs imposed on the breaching party are redistributed to the other party, which implies that the social costs of imposing the damages remedy are usually small. Typically, judicial imposition of legislative enactment costs does not involve a redistribution of wealth from the

legislature to some other party, so the social costs of the enactment cost strategy in constitutional law may generally be higher.

Another important difference is that the efficient breach argument in contract law, and analogous arguments in tort and other areas of private law, is the explicit and primary rationale for much of the relevant judicial doctrine in these areas. Although there are numerous competing theories in the mix, there is plenty of direct, explicit support for the claim that judges fashion private law doctrine in order to maximize some conception of social efficiency, and that they do this by devising substantive and remedial rules that leverage the private information of the legally regulated parties.[48] This is much less true in constitutional law. One of the challenges and intended contributions of this Article is to show that something like the enactment cost strategy is in fact much more widespread in constitutional law than is generally acknowledged.

It turns out that the prevailing doctrinal approaches in many areas of constitutional law condition judicial approval on the willingness of legislators, or other government decision-makers, to incur some substantial cost, over and above the "ordinary" cost of enacting a given policy. In some cases, it may be that these doctrines emerge, persist, and evolve largely because of their effect on enactment costs, even if they are not typically explained or defended in those terms. Furthermore, even if the effect of these doctrines on legislative enactment costs is entirely unintentional, the enactment cost theory might provide a normative justification for at least some of these doctrinal strategies, independent of their conventionally recognized effects. Focusing on the enactment cost justification for various doctrines may, in turn, suggest ways in which these doctrines ought to be refined or reformed.

This Part discusses four mechanisms through which constitutional doctrine might raise government enactment costs. First, constitutional doctrine might demand a direct government expenditure of material government resources in order to eliminate a constitutional deficiency. Second, constitutional doctrine might impose particular requirements on statutory drafting, such as narrow tailoring or clear statement rules. Third, constitutional doctrine might reward or penalize various forms of legislative history, making judicial approval easier when the desirable forms of legislative history are present and the undesirable forms are absent. Fourth, courts may devise constitutional doctrines that may be unpredictable in their application, which from an ex ante perspective may have the same effect as an increase in enactment costs.

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[48] *See, e.g.,* U.S. v. Blankenship, 382 F.3d 1110, 1133-34 (11th Cir. 2004); Northern Indiana Public Service Co v. Carbon Country Coal Co., 799 F.2d 265, 279-80 (7th Cir. 1986); Marcus, Stonewell & Beye Government Securities, Inc. v. Jefferson Inv. Corp., 797 F.2d 227, 231-32 (1986); Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d. Cir. 1985).

A. Expenditure of Material Resources

The natural place to begin is with those doctrines that expressly demand that the government expend material resources to eliminate or remedy a constitutional defect. Most obviously, some constitutional rules require the government to pay injured parties some amount of money. The most prominent of these constitutional liability rules is the "just compensation" requirement of the Fifth Amendment's Takings Clause. Similarly, judicial doctrines that impose additional procedural requirements – either directly under the Due Process Clause or indirectly through doctrines that reward procedural formality with greater judicial deference – may require greater outlays from the public treasury. These effects will raise government enactment costs to the extent that the decisive coalition internalizes some of the costs associated with greater expenditures of public funds.

1. Constitutional Liability Rules—The most familiar constitutional rules that raise the material resource cost of constitutionally problematic activities are those doctrines that require the government to pay compensation to injured parties. The most well-known such rule is the requirement that the government pay "just compensation" when it takes property for public use pursuant to the eminent domain power. There are arguably other constitutional liability rules as well, and some scholars have argued for broader use of liability rules, as opposed to "constitutional property rules," in other domains of constitutional law.[49] Constitutional liability rules, like other liability rules, are often defended as serving both an interest in compensation and an interest in deterrence.[50] In addition, constitutional liability rules, particularly the Just Compensation Clause, are sometimes defended on fairness grounds that go beyond the traditional interest in compensation for victims. According to this argument, fairness requires that benefits to the general public be paid for by the general public rather than by a small number of disproportionately affected property owners.[51]

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[49] *See* Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135 (2005); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004) [hereinafter Kontorovich, *Liability Rules*]; Thomas W. Merrill, *The Constitution and The Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143 (1999).

[50] On the deterrence rationale, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 84-85 (1993); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 58 (4th ed. 1992); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Laws*, 17 J. LEGAL STUD. 269, 269-70 (1988). On the compensation rationale, see Kontorovich, *Liability Rules*, *supra* note 49.

[51] *See, e.g.,* Armstrong v. United States, 364 U.S. 40, 49 (1960) (stating that the purpose of the Takings Clause is to prevent the government "from forcing some people alone to

The compensation and fairness rationales for constitutional liability rules have no direct relationship to the enactment cost theory elaborated in Part I, but the deterrence rationale is a straightforward application of that theory. The familiar argument runs as follows: If the government's does not have to pay compensation when it seizes private property, it will take property even when the benefit of the public use, as perceived by the government, is less than the benefit to the existing owners of retaining their property (as reflected in market prices). If, however, the government has to pay just compensation, the government will take the property if but only if the monetized benefit of the taking to the government is greater than the market price. Thus, the compensation requirement allows socially efficient takings, where the monetized public benefit exceeds the market price, but deters socially inefficient takings where the monetized public benefit is below the market price.[52]

An important feature of the deterrence argument – and an important way in which it differs from the compensation and fairness rationales – is that the court could achieve the optimal behavioral result through injunctive relief if the court had accurate information about the social benefit of the proposed public use. If the court had such information, it could simply prohibit takings with negative net benefits and allow takings with positive net benefits, without requiring that any compensation be paid in the latter case. Likewise, the deterrence argument implicitly assumes that the government does not internalize the full social costs of the taking to the property owner (or, equivalently, that the government overvalues the benefits of the taking). If this were not so, then the government would take the property if and only if the true social benefit were greater than the true social cost, without any need for judicial intervention.

The deterrence rationale for a just compensation rule is therefore sensible only if we assume that the government is better-informed than the court as to the consequences of the taking but gives insufficient relative weight to the interests of the property owners. Under these circumstances, a govern-

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bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). *See also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

[52] An obvious but important objection is the Coasian argument that an absolute property rule – either that the government may take without compensation, or that the government may not take without the permission of the property owner – would achieve the same result when transaction costs are zero, because open-market bargaining will always cause the property to be assigned to the party that places a higher value on it. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* 85 HARV. L. REV. 1089 (1972). The literature on this argument is too vast to summarize here. I assume, for purposes of developing the argument, that there are enough situations where transaction costs or market failures preclude efficient Coasian bargaining, such that the power of eminent domain may be justified in at least some circumstances.

ment left to its own devices would take property too often, while a court attempting to police takings through absolute injunctions would make frequent errors that allow too many, or too few, takings to occur. A compensation requirement, though imperfect, may induce better overall results because the increase in enactment cost may offset the government's excessive zeal for takings.

The fact that the enactment cost in this context takes the form of a transfer from the government to the injured parties makes the strategy more attractive. Conceivably, we could achieve the same deterrence result simply by making the government destroy an amount of public money equal to the market value of the seized property, but that approach would involve a pure deadweight social loss.[53] The transfer payment to the property owner does not eliminate the social cost of the taking because the compensation payment will require additional tax revenue, borrowing, or the diversion of resources from other government programs, but the deadweight loss component of the enactment cost will be proportionally smaller.[54]

A general problem with viewing this sort of monetary liability rule as an effective enactment cost strategy is that it assumes the government internalizes the costs associated with expenditures from the public treasury. Several scholars have observed, however, that governments do not act like profit maximizing firms.[55] Neither elected politicians nor bureaucrats are directly rewarded for how effectively they manage public revenues, especially since the government's capacity to run large budget deficits means that the legislature operates under a relatively soft budget constraint.[56] Furthermore, the amounts of money involved in compensating property owners are small relative to the government's overall budget, and the burdens of supplying the needed funds can be concentrated on politically weak groups either by raising their tax burden or by diverting funds from programs that would otherwise benefit those groups.[57]

These objections, while important, should not be overstated. While the federal government, as well as the governments of some states and large cities, may not be all that concerned about the amounts of public money that contemplated takings would require, many local governments are more fi-

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[53] This is a characteristic feature, and a recognized weakness, of this form of "money burning" signaling argument. *See* Stephenson, *Costly Signaling*, *supra* note 3, at 785-87.

[54] Of course, it might be even more socially efficient if the government were compelled to pay the market value of the property not to the former owners, but rather to starving children (or some other socially worthy cause).

[55] *See* Daryl J. Levinson, *Making Government Pay*, 67 U. CHI. L. REV. 345, 345-48, 354-57 (2000); Edward Rubin, *Rational States?*, 83 VA. L. REV. 1433, 1438-41 (1991); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

[56] *See* Levinson, *supra* note 55, at 347-348.

[57] *See* Levinson, *supra* note 55.

nancially constrained.[58] Moreover, unlike the federal government, many states and localities are subject to balanced budget requirements that give sitting legislatures and executives less freedom to shift costs to future years (though state and local governments have found ways to circumvent some of these limits).[59] And while government officials are not profit-maximizers, they may well want to maximize some combination of political support and the achievement of specific policy objectives—and government money can be used to buy both of those things.[60] A rational politician faced with the need to use some government money to compensate for a taking of property would try to raise this money in whatever manner causes the least disruption to her political and policy goals, but the fact that she will rationally try to minimize the opportunity costs associated with a taking of property does not mean that those opportunity costs are zero.

Thus, the claim that monetary liability cannot function as an effective deterrent to inefficient takings – or, in the language I employ here, that monetary liability is not a meaningful enactment cost – seems overstated. That said, the amount of money that a legislature would need to pay to achieve "just compensation" often may not result in significant increases in legislative enactment costs because the legislature does not internalize the full social cost of the compensation payment, just as the legislature does not internalize the full social cost of the taking itself. Perhaps larger monetary liability would achieve the desired deterrent result, which raises that intriguing (though perhaps unrealistic) possibility that the government should be required to pay the former owner compensation well in excess of the property's market value. (The downside of this, however, is that the social cost of a larger transfer is likely to be greater.) The fact that compensatory monetary liability may not achieve optimal deterrence further suggests looking at other ways that courts might raise the enactment costs of constitutionally problematic policy decisions, particularly those that involve costs that are more fully internalized by the enacting coalition.

2. Procedural Safeguards—Requiring a direct payment to injured parties is not the only way that courts can raise the material cost of constitu-

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[58] *See* Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 NYU L. REV. 1624 (2006).

[59] *See* D. Roderick Kiewiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 J. L. ECON. & ORG. 62 (1996).

[60] *See* Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994); Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 48 Q. J. ECON. 371 (1983); Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 89 (1986); JOHN A. FEREJOHN, PORK BARREL POLITICS (1974); BRUCE BUENO DE MESQUITA ET AL., THE LOGIC OF POLITICAL SURVIVAL (2003). *See also* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001).

tionally problematic government enactments. Other doctrinal rules and principles may also raise the resource costs of certain policy decisions. For Courts might invoke the Due Process Clause of the Fifth or Fourteenth Amendment to require the government to provide certain (costly) procedural safeguards before the government may take certain constitutionally significant interests. Supreme Court case law on procedural Due Process has elaborated the sorts of procedural protections that are required for different forms of deprivation of liberty or property.[61] Other constitutional provisions provide for more specific procedural protections for particular types of government action, such as the Fourth Amendment's warrant requirement and the Fifth Amendment's grand jury indictment requirement.

In addition to those constitutional rules that directly require some type of procedural formality, other constitutional doctrines indirectly encourage – or, in some cases, practically require– the government to use more elaborate procedures in order to secure judicial approval for an otherwise constitutionally doubtful decision. In the takings context, for instance, the Fifth Amendment requires the government to establish that the taking is for a "public use." This requirement is particularly salient when the government transfers property between private parties.[62] Whether the government used elaborate formal procedures in making the decision to take the property would not seem to bear any necessary relationship to the question whether the taking serves a public use, yet Public Use Clause opinions sometimes emphasize this consideration.[63] Similarly, in a non-constitutional administrative law context, whether an agency used formal decision-making procedures in promulgating an interpretation of a statute is a central factor courts consider in deciding whether the agency's interpretation is entitled to deference.[64]

The conventional justification for constitutionally or judicially imposed procedural requirements is that they increase accuracy by correcting mistakes *ex post* and by encouraging government decision-makers to be more thoughtful and careful *ex ante*. I do not dispute this benefit of procedural formality, though there is room for disagreement about how effective the

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[61] *See* Zinermon v. Birch, 494 U.S. 113 (1990); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Carey v. Piphus, 435 U.S. 247 (1978); Mathews v. Eldridge, 424 U.S. 319 (1976); Fuentes v. Shevin, 407 U.S. 67 (1972).

[62] *See* Kelo v. City of New London, 545 U.S. 469 (2005); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)..

[63] *See, e.g.,* Kelo v. City of New London, 545 U.S. 469, 484 (2005) (emphasizing the "comprehensiveness of the [city's] development plan" and the "thorough deliberation that preceded its adoption"); *id.* at 493 (Kennedy, J., concurring) (noting that the city's compliance "with elaborate procedural requirements" as a reason not to apply a stricter standard of review to the city's taking and transfer of private property).

[64] *See* United States v. Mead Corp., 533 U.S. 218, 229-31 (2001). *See also* Stephenson, *Strategic Substitution*, *supra* note 3, at 534 n.14.

sorts of procedures mandated by courts actually are in improving substantive accuracy. I want to suggest that in addition to whatever direct accuracy-improving or error-correction effects formal procedures may have, additional procedures also raise the material costs of certain government actions, whether that action is conducting a search, taking private property, terminating welfare benefits, or what have you. If the relevant government decision-maker internalizes a significant portion of these resource costs, then judicial imposition of formal procedural requirements will increase government enactment costs, with the potential screening results described in Part I.[65]

This separate effect is easier to see if we assume – counterfactually – that procedural formality has no direct effect on accuracy. If we make that assumption, then the only function that these procedures have (other than whatever psychological or legitimacy benefits they may confer) is to increase the material cost to the government of taking the action that requires the use of procedures. This procedural cost may function as an enactment cost, deterring the government from taking action when the net benefit to the government of the action is low, but enabling the government to take action when the perceived benefit of the action to the government is high.

Again, my argument is not that this is the only effect of procedural formality. If it were, then some other costly activity, including burning money or buying food for starving children, would be just as effective at protecting constitutional values as requiring formal procedures (except insofar as procedural formality has some intrinsic constitutional value). The argument is that in addition to whatever benefits formal procedures have with respect to improving accuracy, they may also have the screening benefits associated with increasing government enactment costs. The strength of this latter benefit is proportional to the degree to which the relevant government decision-maker internalizes the costs associated with the additional procedures.

This perspective on procedural requirements has a couple of potentially interesting implications. First, it implies that the marginal benefit of any given procedural safeguard may be higher than it would appear if only error-correction benefits were considered. To put the same point in a slightly different way, the enactment cost perspective suggests that the marginal cost of additional procedures may be less than it might otherwise appear: While some of the additional procedural cost is indeed a social cost, some of that cost has a partially offsetting social benefit insofar as it more closely aligns government preferences with social preferences. Second, because of the screening effect, the set of cases that are actually subjected to the required formal procedures are likely to be those where the government interest in taking the action is relatively strong. These observations together

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[65] *See* Stephenson, *Strategic Substitution*, *supra* note 3; Masur, *supra* note 3; *cf.* Tiller, *supra* note 3.

suggest that one might underestimate the net benefits of judicially-imposed procedures if one neglects the enactment cost effect and looks only at cases in which the government decided to take the action that triggers the additional procedural safeguards.

That said, the concerns about the efficacy of direct monetary compensation apply to the use of costly procedures as well. If the responsible government decision-makers do not internalize a substantial portion of the procedural costs, or if the procedural costs themselves are trivial relative to the other costs and benefits at stake, then the effect of judicially-imposed procedural formality on enactment costs may be practically trivial. This suggests that the marginal benefits of such procedural requirements are likely to be higher when they require the primary government decision-maker to internalize significant costs than when they do not. It also suggests the importance of looking beyond material resource expenditures to other types of judicially-imposed requirements that more directly raise enactment costs by imposing burdens directly on the government actors involved in promulgating constitutionally problematic policy decisions.

B. Statutory Drafting

Another way that courts can raise the enactment costs of constitutionally questionable policies is to impose drafting requirements that make promulgation of such policies more time-consuming and difficult. I will focus on two closely related drafting requirements that may have this effect. The first is the requirement that a statute be "narrowly tailored" to achieve some legitimate purpose. The second is the requirement that, in order to achieve certain constitutionally problematic results, the legislature must provide a "clear statement" of its intent to do so. Narrow tailoring requirements and clear statement rules have many effects, but one effect common to both is an increase in the costs associated with drafting a statute to achieve a disfavored result.

1. *Narrow Tailoring*—Numerous constitutional doctrines, most notably in the areas of free speech, due process, and equal protection, demand that statutes be "narrowly tailored."[66] The obvious and intuitive purpose of a narrow tailoring requirement is to reduce the problem of over-inclusiveness,

[66] *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); New York Times v. Ferber, 458 U.S. 747, 769 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989); Erznomznik v. City of Jacksonville, 422 U.S. 205 (1975); Reno v. ACLU, 521 U.S. 844, 846 (1997); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002); Coenen, *supra* note 2, at 1823-28; Fallon, *supra* note 34; Ian Ayers, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1996);

along with the attendant risk that an overbroad statute will be applied in an undesirable discriminatory fashion.[67] Put another way, a narrow tailoring requirement may be a way to ensure that statutory restrictions are only applied to those cases where the social benefits of these restrictions are high relative to the constitutional costs. Even if the aggregate benefits of a broadly-worded statute would outweigh the aggregate costs, a court might still want to improve the cost-benefit ratio by eliminating, to the extent possible, those individual applications where the costs exceed the benefits.

This does not completely explain why a court would strike down an entire statute on the grounds that it failed the narrow tailoring requirement. Even if the courts dispensed with the narrow tailoring requirement, they could accept case-by-case challenges to particular applications of the statute. This alternative approach has several drawbacks, however. Reliance on as-applied challenges may create substantial uncertainty for both regulators and potentially regulated parties, and it may also entail significant litigation costs for litigants and courts. It may therefore be more sensible for the court to insist that the legislature do the narrowing of the statute ex ante, rather than relying on the judiciary to address the over-inclusiveness problem ex post. Doing so may lessen the aggregate social costs of reducing statutory over-inclusiveness, and it will also shift those costs from courts and litigants to the enacting legislature.[68] This last point about shifting the costs of tailoring the statute to the legislature suggests that narrow tailoring requirements may also be a way for courts to raise legislative enactment costs, independent of the effect of the narrow tailoring requirement on how broadly the statute will actually apply.

We can see this by considering a hypothetical case in which the narrow tailoring requirement has no effect on the scope of a statute's application in practice. Suppose that the legislature is considering a statute that prohibits publication of "information which would tend to undermine national security." On its face, the statute appears to sweep very broadly. Suppose, however, that we make the (unrealistic) assumption that in practice law enforcement officials would only apply the statute to some subset of the conduct (call it subset *X*) that might conceivably violate the broad terms of the statute. Alternatively, we might define subset *X* as the set of applications that the court, applying the relevant doctrinal tests for as-applied constitutional challenges, would permit. Although the broadly-worded statute appears to prohibit a large set of activities, its actual effect is to prohibit only conduct in subset *X*.

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[67] *See* Forsyth County v. Nationalist Monument, 505 U.S. 123, 133; Coenen, *supra* note 2, at 1728; Ayers, *supra* note 66, at 1786; Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

[68] *Cf.* Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992).

Now imagine that the Supreme Court imposes a narrow tailoring requirement that says the statute is unconstitutional unless the statutory language itself restricts application to subset *X*. By assumption, compliance with this narrow tailoring requirement would not narrow the actual application of the statute, because the conduct that is prohibited in practice is only subset *X*, with or without narrow tailoring of the statute itself. But the enactment cost to the legislature is much higher under the narrow tailoring requirement, because the legislature has to try to determine the subset *X* ahead of time, draft sufficiently detailed statutory language to define that set, and bear whatever opportunity and political costs are associated with engaging in that additional drafting activity.

The analysis in Part I suggests a reason why the court might want to impose a narrow tailoring requirement in such a case, even though the scope of the statute's practical application would not be affected. The court might worry that, although prohibiting conduct in subset *X* might be justified by a sufficiently compelling interest, the legislature undervalues the constitutional values at stake relative to the competing government interests. But, the court is aware that the legislature has better information about the actual effect of prohibiting the conduct in subset *X*. Even though the narrow tailoring requirement does not alter the scope of the statute's potential application, it means the legislature will not bother enacting a narrowly-tailored statute unless the benefits are sufficiently large relative to the additional enactment costs. If the assumptions developed in Part I hold, then this can be a sensible strategy for the reviewing court.[69]

To be clear, my claim is not that narrow tailoring requirements do not alter the breadth of a statute's application if it is enacted. The preceding example made that assumption in order to clarify a separate and independent effect that a narrow tailoring requirement may have on legislative enactment costs. Seeing narrow tailoring doctrines in this light reveals their importance not only to narrowing the scope of constitutionally problematic statutes, but also to ensuring that such statutes are justified by sufficiently weighty interests on the other side. This suggests an additional reason why a court might prefer to impose a narrow tailoring requirement, rather than limiting statutory over-inclusiveness through ex post judicial limitations on the scope of the statute's permissible applications.

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[69] This argument is similar to, but distinct from, the claim that narrow tailoring requirements ensure "some measure of care and deliberation in the lawmaking process itself." Coenen, *supra* note 2; *see also* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). The argument developed in this Article is not that narrow tailoring rules produce more careful and appropriate policy choices by forcing legislative reflection and deliberation, though that may well be one effect. Instead, the argument advanced here is that by raising the costs to legislators, narrow tailoring rules may implement a screening mechanism independent of any other effects on legislative reflection or consideration.

2. *Interpretive Presumptions and Clear Statement Rules*—In addition to narrow tailoring mandates, courts can impose other requirements on the statutory drafting process that raise the enactment costs of constitutionally problematic policies. One common doctrinal technique with this effect is the so-called "clear statement rule."[70] When a court invokes a clear statement rule, it announces that it will not ascribe to statutory language a certain disfavored meaning unless the legislature has made that meaning unmistakably clear in the text of the statute.[71] There are quite a few clear statement rules, many of which are explicitly designed to enforce constitutional values. Most obviously, under the modern version of the canon of constitutional avoidance, courts will construe statutes so that they do not raise "difficult" constitutional problems. That is, if Congress wishes to come close to the constitutional line, it must make its intention to do so clear.[72] There are also a variety of more specific clear statement rules that seem designed to protect constitutional values through statutory interpretation. These include: the presumptions against federal derogation of traditional state functions[73] or abridgement of state sovereign immunity,[74] and the narrow construction given to conditions on federal grants,[75] which are all designed to protect federalism values; the requirement that Congress must legislate unambiguously if it wishes to abrogate dormant commerce

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[70] For general discussions of clear statement rules and related canons of statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451-60 (1989); EINER ELHAUGE, STATUTORY DEFAULT RULES (2007); Coenen, *supra* note 2, at 1603-40.

[71] It is important to emphasize that, when a court refuses to adopt a particular reading of a statute because Congress has not endorsed that reading with sufficient clarity, the court is rejecting the reading that its other tools of interpretation would otherwise indicate is best understanding of the text. Otherwise, the clear statement rule has no effect on the outcome.

[72] *See, e.g.,* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988); Zadvydas v. Davis, 533 U.S. 578 (2001); Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001); Kent v. Dulles, 357 U.S. 116 (1958). *See also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Lisa Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

[73] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005); Gonzales v. Oregon, 546 U.S. 243 (2006); Gregory v. Ashcroft, 501 U.S. 452 (1991).

[74] *See* Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, Missouri, 411 U.S. 279 (1973); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Raygor v. Regents of the University of Minnesota, 534 U.S. 533 (2002); Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 204 (1991)..

[75] *See* Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981); Gonzaga University v. Doe, 536 U.S. 273 (2002).

clause limitations on discriminatory state legislation;[76] the rule of lenity[77] and the presumption in favor of judicial review,[78] which protect due process values; the tendency to construe statutes in ways that favor groups that are especially vulnerable to government discrimination, which advances the purposes of the Equal Protection Clause;[79] the presumptions against extra-territorial legislation[80] and against congressional derogation of the President's foreign affairs power,[81] which safeguard presidential primacy in international relations; the presumption against retroactive deprivations of vested rights, which protects the property and liberty interests guaranteed by the Fifth Amendment as well as the interests safeguarded by the Contracts Clause;[82] and the judicial reluctance, at least in some instances, to read congressional delegations to executive branch agencies broadly, which may be a way of indirectly limiting congressional abdication of its Article I law-making responsibilities.[83]

Courts and sympathetic commentators typically justify the use of substantive, quasi-constitutional clear statement rules with one or more of four arguments. The first is the empirical claim that legislators are reluctant to intrude on the sensitive topics protected by the various clear statement rules. Thus, if the statute suggests but does not clearly require a meaning that would implicate the clear statement rule, it is probably the case that the members of the enacting legislative coalition did not intend or understand the statute to have that result. This is especially true if the provision at issue attracted little attention, debate, or opposition.[84]

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[76] *See* Maine v. Taylor, 477 U.S. 131, 139 (1986); New York v. United States, 505 U.S. 144, 171 (1992); Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992).

[77] *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952); Chiarella v. United States, 445 U.S. 222 (1980).

[78] *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986); *Felker v. Turpin*, 518 U.S. 651 (1996). *See also* Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743 (1992).

[79] *See* Bob Jones University v. United States, 461 U.S. 574 (1983); INS v. Cardozo-Fonseco, 480 U.S. 421, 449 (1987); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Eskridge & Frickey, *supra* note 70, at 602, 610-14; Sunstein, *supra* note 70, at 473, 484.

[80] *See* EEOC v. Arabian American Oil Company, 499 U.S. 244 (1991).

[81] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Zemel v. Rusk, 381 U.S. 1 (1965); Daimes & Moore v. Regan, 453 U.S. 654 (1981); Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986).

[82] *See* Winfree v. Northern Pac. Ry. Co., 227 U.S. 296, 301 (1913); Martin v. Hadix, 527 U.S. 343, 358 (1999); Landgraf v. USI Film Products, 511 U.S. 244 (1994).

[83] *See* Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). *See also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223.

[84] *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 466 (1989); Lowe v. SEC, 472 U.S. 181, 206 n.50 (1985) (Stevens, J., concurring in part and dissenting in

A second argument in favor of clear statement rules is that they foster deliberation and careful consideration on constitutionally sensitive topics. Sophisticated legislators or interest groups will not be able to sneak something by a majority of the enacting coalition, nor will the legislature itself be able to sneak something by the voters. The demand for a clear statement, on this view, compels a greater level of transparency, deliberation, and accountability than would attend the ordinary legislative process.[85]

The third argument in favor of constitutionally-derived clear statement rules appeals to a kind of judicial minimalism.[86] Because clear statement rules, particularly the canon of constitutional avoidance, obviate the need to resolve a hard constitutional question by deciding the case on statutory grounds, these rules are thought to foster judicial modesty and moderation, as well as preserving the courts' institutional legitimacy and authority and limiting conflict with the other branches of government.[87]

The fourth standard argument in favor of quasi-constitutional clear statement rules is more explicitly substantive, and perhaps for that reason it is less common in judicial decisions. The argument goes something like this: The judiciary is charged with implementing duly enacted statutory law, but it is also charged with enforcing constitutional values. Courts have some authority to enforce constitutional values indirectly, by construing ambiguous statutes in ways that advance those values. This is not inconsistent with the judicial responsibility to enforce statutory law, because by definition an ambiguous statute is susceptible to multiple interpretations.[88] So, the argument goes, if the legislature has failed to provide sufficiently clear commands, the courts may and should interpret those ambiguous commands so as to advance other substantive values that are derived from the Constitution.[89]

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part); Spector v. Norwegian Cruise Lines, Ltd., 545 U.S. 119, 139 (2005) (plurality opinion); Rust v. Sullivan, 500 U.S. 173, 191 (1991); Ex Parte Endo, 323 U.S. 283, 300 (1944); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 79 (1994); Eskridge, *supra* note 72, at 1020-2.

[85] *See* United States v. Bass, 404 U.S. 336, 349 (1971); Spector v. Norwegian Cruise Lines, Ltd., 545 U.S. 119, 139 (2005) (plurality opinion); Greene v. McElroy, 360 U.S. 474, 507 (1959); Eskridge & Frickey, *supra* note 70, at 631; Young, *supra* note 3, at 1608; Sunstein, *supra* note 70, at 471; Calabresi, *supra* note 2, at 104).

[86] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM AND THE SUPREME COURT (1999).

[87] *See* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); Almendarez-Torres v. United States, 523 U.S. 224, 238 (1993).

[88] *See* Young, *supra* note 3, at 1588-93.

[89] *See* Young, *supra* note 3; Sunstein, *supra* note 70, at 459; Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2112 (1990); Jane S. Schachter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 652 n.308 (1995); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 34-

Critics of substantive clear statement rules have attacked all of these justifications on a variety of grounds.[90] This Article does not aspire to address or resolve these debates. Instead, I want to suggest that judicial demands for a clear congressional statement, in addition to whatever other effects they may have, can serve to increase legislative enactment costs for constitutionally problematic policies. This argument is similar to the last of the four justifications for constitutional clear statement rules sketched above. It differs, however, by emphasizing that the clear statement rule is a method for gauging indirectly the strength of the constitutional value relative to the other public interests at stake.[91] This argument thus avoids the potential criticism of more standard "constitutional values" position that such an approach would lead to overprotection of certain constitutional values at the expense of other legitimate public interests. The point of the avoidance canon and related clear statement rules, on this account, is not simply to enforce a constitutional value, but to assess the relative strength of competing government interests.

The argument parallels the earlier argument as to how narrow tailoring requirements can increase legislative enactment costs. Indeed, the parallel derives from the fact that both a narrow tailoring requirement and a clear statement rule are, at bottom, judicial demands for greater precision in statutory drafting. Judicially-devised clear statement rules and judicially-imposed narrow tailoring requirements both require the enacting legislators and supportive interest groups to make a statute clearer if they want to achieve constitutionally problematic results. Producing this additional clarity raises the enactment costs for the coalition that supports the statute.[92]

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35 (1957). This justification for using something like the constitutional avoidance canon to enforce constitutional values is more prominent in countries that lack a written constitution. *See* T.R.S. Allen, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 *Cambridge L. J.* 111 (1985); Aharon Barak, *Forward—A Judge on Judging: The Rule of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

[90] *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

[91] *Cf.* EEOC v. Arabian American Oil Co., 499 U.S. 244, 262 (1991) (Marshall, J., dissenting) ("Clear statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them."); Young, *supra* note 3, at 1552.

[92] *See* Rodriguez, *supra* note 78, at 747 (arguing that "the presumption of reviewability ensures that legislators must expend greater than normal costs to rebut this presumption"); Brudney, *supra* note 84, at 30 (stating that "adding these details to text [to satisfy a judicial clear statement rule] increases the possibility for delay and obstruction even though the details themselves would command overwhelming support … because every provision, clause, or word of a statute can become the focus of additional amendments or procedurally based attacks from a small but sufficiently determined minority"); Young, *supra* note 3, at 1597 (claiming that the "effect of the presumption [in favor of judicial review] is that supporters of administrative nonreviewability must expend the time, effort, and political capi-

As before, it is easier to see this effect if we assume, perhaps counterfactually, that a clear statement rule neither reflects an accurate empirical judgment about legislators' preferences nor improves the quality of the legislative process. To illustrate, let us again suppose that the legislature is considering the hypothetical internet regulation statute. The enacting coalition and its interest group supporters understand that the version of the statute originally proposed would authorize government monitoring of internet activity in ways that would raise constitutional questions related to speech and privacy. However, the statute is sufficiently ambiguous that a court could plausibly read the statute not to allow this sort of intrusive electronic snooping, even though that is not the best reading of the statutory text.

Let us now consider three doctrinal regimes that the court might apply: one in which the court treats the electronic monitoring in question as constitutionally permissible, one in which the court treats it as prohibited, and one in which the court would hold that this sort of monitoring is permissible if the court were forced to address the question, but the court would avoid the constitutional question through statutory interpretation if possible. Let us also assume that the legislature can figure out ahead of time which approach the court will adopt.

Under the first regime, the legislature will pass the statute in its original version and the court will uphold the electronic searches as constitutional. Under the second regime, the legislature will either amend the statute to remove the offending provision or let the court to invalidate it. Under the third regime, in which the court applies a clear statement rule, the legislature's choice is more complicated. The legislature could simply pass the statute as originally drafted, even though it knows that the court will adopt a strained reading of the statute that does not allow the problematic electronic searches to go forward. Alternatively, the legislature could amend the statute to make explicit its authorization of electronic snooping. This latter approach would allow the intrusive electronic searches to go forward, but it would entail additional costs for the enacting coalition.

There are a few reasons why compliance with a clear statement rule might entail significant additional enactment cost. First, even if legislators and interest groups are generally aware that reviewing courts will apply the constitutional avoidance canon or some other clear statement rule, these interested parties will need to figure out exactly how they need to draft the statutory language to secure judicial approval. This takes work, and this work has opportunity costs: The legislative aide or interest group staffer who is working on crafting language that will satisfy the courts' clear statement rule is not doing other things. Second, the need to get additional language into the bill provides one more opportunity for members of the

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tal necessary squarely to confront the jurisdictional issue and formulate the needed clear statement of congressional intent"); *id.* at 1608-09.

enacting coalition to extract a price for their support, and one more opportunity for opponents to obstruct or delay passage. Third, supporters of the constitutionally problematic provisions of the statute have only so much time and political capital. If they have to invest these resources in fashioning a sufficiently clear statement to satisfy the courts, they may have less ability to advance other aspects of their agenda. This is especially so if the clarity of the statement itself raises the profile, and hence the political salience, of the constitutionally problematic provisions.

If clearer statutory drafting is more expensive to members of the enacting legislative coalition and their supporters, then clear statement rules may raise enactment costs. Legislators and interest groups would be willing to bear these additional costs only if the benefits of the statute internalized by the members of the enacting coalition are sufficiently high. If the four assumptions described in Part I hold, then the constitutional avoidance canon and other clear statement rules may help reviewing courts implement indirectly a regime that more closely approximates an ideal constitutional balancing test. Even if the interpretive canons applied by the court do not reflect an accurate empirical evaluation of legislative preferences, do not facilitate more deliberation, and do not appreciably reduce judicial activism, these canons may implement a screening device that helps to ensure that the legislature will not pursue constitutionally problematic policies unless the enacting coalition views those policies as sufficiently important.

C. Legislative History

Few issues in the theory and practice of statutory interpretation are as contentious as the debate over the proper role of legislative history. Any attempt to summarize this debate will oversimplify the more nuanced and sophisticated arguments for and against judicial reliance on legislative history to resolve statutory ambiguities. With that caveat, most of the contemporary discussion revolves around three questions. The first question is the degree to which different types of legislative history are reliable evidence of some normatively legitimate conception of statutory meaning.[93] The sec-

[93] *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in the judgment); McNollGast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994 at 3, 24; James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 888 (1930). There is, in turn, an even more longstanding and complex debate over theories of statutory meaning. The three leading theories (really, categories of theories) are (1) intentionalism, which views the search for statutory meaning as a search for the intent of the enacting legislators; (2) purposivism, which seeks to identify a statutory purpose or set or purposes that may be different from or independent of the intention of any individual legislator; and (3) textualism, which posits that questions of statutory meaning turn on what the words of the statute would have been understood to mean by an objective reader of the statute familiar with the context in which it was enacted. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY

ond question concerns the broader institutional effects that judicial use of legislative history may have on both the legislative process and the judicial process.[94] The third question is whether judicial use of legislative history may be illegitimate for reasons independent of its probative value or practical consequences.[95]

Again, these debates are sufficiently complex that this Article cannot and does not aspire to engage them directly, nor does it take a final position on when, if ever, courts should employ various forms of legislative history in statutory interpretation. I make the more modest claim that viewing constitutional doctrine through the lens of enactment cost manipulation suggests ways that courts might use legislative history in constitutional cases in order to implement indirectly an appropriate constitutional balancing test. If judicial willingness to look to legislative materials beyond the text of the challenged government enactment can raise the costs to the government of adopting constitutionally problematic policies, this can filter out government decisions that have low benefits relative to their constitutional costs. This argument differs from most of the conventional arguments for the use of legislative history in statutory interpretation, and it may therefore avoid some, though certainly not all, of the traditional criticisms.

Judicial attention to legislative history can influence government enactment costs in at least two ways. First, certain types of legislative history may be costly to produce. Examples might include extended hearings, elaborate studies, reports, and the like. If reviewing courts evince greater skepticism of enactments that are not accompanied by elaborate supplementary materials of this kind, the courts may effectively raise legislative enactment costs. Second, while potential members of an enacting legislative coalition may view some kinds of legislative history as costly, they may view other forms of legislative history as politically beneficial. For instance, politicians might trumpet the harm that a given enactment might inflict on an unpopular minority group in order to appeal to the prejudices of a

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INTERPRETATION (1994). Although criticism of the probative value of legislative history is often associated with textualism, while sympathy to the use of legislative history is usually associated with intentionalist or purposivist approaches, there is no necessary theoretical connection between these positions. It would be possible, for example, for a textualist to view legislative history as highly probative of how a reasonable person would have understood statutory language at the time it was enacted, while an intentionalist or purposivist might view certain forms of legislative history as highly unreliable guides to normatively relevant forms of intention or purpose.

[94] *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 859 (1992); Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685 (1999); W. David Slawson, *Legislative History and the Need To Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 407-10 (1992).

[95] *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

majority. If reviewing courts demonstrate a greater willingness to invalidate legislative enactments accompanied by "bad" legislative history, they may effectively raise the costs of such enactments because supporters will not be able to advertise, and may even have to disclaim, objectives that would be politically popular.

1. Rewarding "Good" Legislative History: Analysis and Explanation Requirements—When a reviewing court evaluates the legality of a government decision challenged on constitutional or other grounds, the court may consider whether the responsible government decision-maker has developed an adequate explanation of the basis for its decision, often in the form of a record or report containing sufficient detail, evidence, and analysis. The reviewing court may be more inclined to uphold a challenged action accompanied by such material, and in extreme cases the courts might treat development of a sufficiently detailed record as a prerequisite to the legal validity of the policy itself.

These sorts of explanation requirements are the norm in judicial review of administrative agency decisions.[96] Although this approach is rarer and more controversial in judicial review of legislative decision-making, there are numerous examples in which the Supreme Court appears to have conditioned its approval of a constitutionally problematic legislative enactment on the quality of the legislative record.[97] A particularly good illustration is the Court's approach to assessing the constitutionality of prophylactic legislation enacted pursuant to Section Five of the Fourteenth Amendment. Section Five grants to Congress "the power to enforce, by appropriate legislation" the substantive provisions of the Amendment, including prohibitions

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[96] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 383 (1986); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L. J. 387, 411-13, 419-25; Stephenson, *Costly Signaling*, *supra* note 3, at 758-61.

[97] For scholarly discussions of this phenomenon, see Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 226-32 (1976); A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L. J. 1707 (2002); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731 (1996); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Stephenson, *Costly Signaling*, *supra* note 3, at 794-800; Devins, *supra* note 19; Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996); Coenen, *supra* note 2, at 1655-89.

on state deprivations of equal protection or due process. The question when Congress can invoke its Section Five power to abrogate state sovereign immunity from civil lawsuits has proved difficult. The Supreme Court has held that the validity of a congressional invocation of Section Five depends on the "congruence and proportionality" between the risk of constitutional violations and the legislative means adopted to prevent such violations.[98] Although the Court has repeatedly denied that the quality of the legislative record is a significant consideration in evaluating whether federal legislation satisfies the congruence and proportionality test,[99] in practice the court often points to the quantity and quality (or lack thereof) of evidence in the legislative record in making these determinations.[100]

Something like this approach also appears in some First Amendment speech cases, in which the Court has required Congress to present an adequate record showing the legitimacy of the purported government interest in imposing a speech restriction. In these cases, the question is typically whether the government's interest in the challenged speech restriction is sufficiently weighty in light of the applicable level of scrutiny. In deciding that question, the Court often looks to the evidence in the legislative record compiled by Congress in support of the legislation.[101] As in the Section Five cases, the Court disclaims any intent to treat Congress like an administrative agency, subjecting its record of decision to some kind of "hard look" review.[102] But, as in the Section Five cases, the Court often seems to do precisely that.

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[98] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[99] *See* City of Boerne v. Flores, 521 U.S. 507, 531 (1997) (stating that "lack of support in the legislative record" is not dispositive and that judicial deference to congressional judgments is not "based on the state of the legislative record Congress compiles"); Florida Prepaid Postsecondary Expense Board v. College Savings Bank, 527 U.S. 627, 646 (1999) (stating that "lack of support in the legislative record is not determinative" of whether Congress has exceeded its Section Five powers). *See also* Perez v. United States, 402 U.S. 146, 156 (1971).

[100] *See* Florida Prepaid Postsecondary Expense Board v. College Savings Bank, 527 U.S. 627, 640, 644, 646 (1999); Kimel v. Florida Board of Regents, 528 U.S. 62, 88-89, 91 (2000); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 368-69, 371 (2001); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 730-32 (2003); Tennessee v. Lane, 541 U.S. 509, 528-29 (2004).

[101] *See* Turner Broadcasting System, Inc. v. FCC (Turner I), 512 U.S. 622, 664-68 (1994); *id*. at 669 (Blackmun, J., concurring); Turner Broadcasting System, Inc. v. FCC (Turner II), 520 U.S. 180, 196-213 (1997); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 806-07, 822 (2000); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 391-92 (2000); Bartnicki v. Vopper, 532 U.S. 514, 530-31 & n.17 (2000); Reno v. ACLU, 521 U.S. 844, 875 n.41, 879 (1997); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 128-30 (1989). *See also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 60-62 (Brennan, J., dissenting).

[102] *See, e.g.,* Turner I, 512 U.S., at 665-66.

The focus on the quality of the legislative record shows up in Equal Protection jurisprudence as well, particularly in the affirmative action cases.[103] Justice Powell, who wrote the controlling opinion in the seminal *Regents of the University of California v. Bakke* case,[104] appears to have viewed the adequacy of legislative findings as particularly important. In *Bakke* itself, Justice Powell emphasized that although race-conscious admissions programs at public universities might be constitutional in the presence of adequate findings that such a program was necessary to address a compelling state interest in remedying past racial discrimination, the California Board of Regents had not made such findings with respect to the admissions policy challenged in *Bakke*. Furthermore, in his concurring opinion in *Fullilove v. Klutznick*,[105] which upheld an affirmative action program for federal public works projects, Justice Powell emphasized the importance of formal congressional findings and legislative history that established the program was necessary to remedy past discrimination.[106] More recent affirmative action decisions suggest that other members of the Court also view legislative findings as significant, though the opinions are somewhat opaque on this point.[107]

There are also examples of cases where the Court might have adopted a doctrinal approach that emphasized the quality and comprehensiveness of the legislative record, but decided not to do so. The best illustrations are the Commerce Clause cases *United States v. Lopez*[108] and *United States v. Morrison*.[109] The Fifth Circuit's opinion in *United States v. Lopez* indicated that adequate congressional findings were necessary to deciding that a federal law criminalizing possession of firearms near a school was a valid exercise of Congress's power under the Commerce Clause.[110] The opinion sug-

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[103] *See* Coenen, *supra* note 2, at 1670-75.

[104] 438 U.S. 265 (1978)

[105] 448 U.S. 448 (1980).

[106] *Fullilove v. Klutznick*, 448 U.S. at 502-03 (Powell, J., concurring). *See also id.* at 549-50 (Stevens, J., dissenting) (arguing that congressional findings were inadequate to justify the program as serving a compelling government interest).

[107] *See* Mississippi University for Women v. Hogan, 458 U.S. 718, 730 & n. 16 (1982); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492, 500, 504, 510 (1989); *id*. at 520 (Kennedy, J., concurring); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 220-21 (1995). *See also* Coenen, *supra* note 2, at 1673-75.

[108] 514 U.S. 549 (1995).

[109] 529 U.S. 598 (2000).

[110] United States v. Lopez, 2 F.3d 1342, 1362-64 (1993). As support for this conclusion, the Fifth Circuit cited several Supreme Court cases in which, according to the Fifth Circuit, statutes had been "upheld against Commerce Clause attacks on the basis of formal Congressional findings … [or] legislative history…." *Id.* at 1362 (citing *EEOC v. Wyoming*, 460 U.S. 226, 231-232 & n.3 (1983); *FERC v. Mississippi*, 456 U.S. 742, 755-56 (1982); *Hodel v. Virginia Surface Mining*, 452 U.S. 264, 277-79 (1981); *Perez v. United States*,

gested the possibility that adequate congressional findings might be strongly conducive to finding no constitutional violation.[111] In affirming the Fifth Circuit's holding, the Supreme Court also emphasized the absence of congressional findings of a substantial effect on interstate commerce.[112] The Court, however, emphasized that its judgment of effects on commerce was independent, and that congressional findings were only useful insofar as they aided the Court in making that judgment.[113]

The Court drove this point home in *Morrison*. In that case Congress provided extensive hearing records and documentation for the assertion that the Violence Against Women Act's civil cause of action for gender-based violence would have a substantial effect on interstate commerce.[114] The Supreme Court, however, dismissed these findings as irrelevant to the Commerce Clause analysis and reemphasized that the Court was to make an independent judgment regarding a statute's effects on interstate commerce.[115] After the Supreme Court's decisions in *Lopez* and *Morrison*, it is not clear whether congressional findings have any significant effect on the probability that a purported congressional exercise of the Commerce Clause power will be upheld.[116] But it is plain that the Supreme Court could have, and may yet, adopt an approach more similar to the one that the Fifth Circuit adopted in *Lopez*, and that Justice Souter appeared to endorse in his *Morrison* dissent.

Judicially-imposed evidence and analysis requirements are typically explained and justified with reference to two interrelated purposes. First, the government's decision-making record may provide the reviewing court with more substantive information about the strength of the government's interest, which the court can use to make its own independent assessment of whether the policy ought to be upheld. In other words, explanation requirements may be a way of mandating information transmission from the

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402 U.S. 146, 147-48 n.1 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 298-300, 303-04 (1964)).

[111] United States v. Lopez, 2 F.3d 1342, 1363, 1368 (1993) (noting that when congressional findings of a substantial effect on interstate commerce are present, "[p]ractically speaking, such findings almost always end the matter," but declining to reach the question whether the legislation at issue might be sustained if accompanied by "adequate Congressional findings or legislative history").

[112] United States v. Lopez, 514 U.S. 549, 562 (1995). *See also* Coenen, *supra* note 2, at 1659-61; Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 652 (1996); Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1194 n.73.

[113] United States v. Lopez, 514 U.S. 549, 563 (1995).

[114] United States v. Morrison, 529 U.S. 598, 614 (2000); *id*. at 628-36 & nn. 2-9) (Souter, J., dissenting).

[115] United States v. Morrison, 529 U.S. 598, 614-15 (2000). *See also* Coenen, *supra* note 2, at 1661-62.

[116] *See* Gonzales v. Raich, 545 U.S. 1, 20-22 (2005); *id.* at 53-53 (O'Connor, J., dissenting); Coenen, *supra* note 2, at 1661-65 & n. 373.

government to the court.[117] Second, explanation requirements may assure the court that the government actually has made a decision on the basis of some degree of information and expertise. Even if the reviewing court cannot confidently assess the government's explanation on the merits, it may be able to use the quality of that explanation to distinguish informed decision-making from uninformed decision-making. A more cynical alternative to these two explanations is that reviewing courts actually care little about the quality of the legislative record, and judicial statements (positive or negative) about the quality of the legislative or administrative record are usually no more than makeweights.[118]

I do not deny any of these possibilities. What I want to suggest is that, in addition to whatever other functions may be served by judicial attention to the quality and quantity of the legislative record, this approach may also raise legislative enactment costs. Holding hearings, commissioning and presenting studies, providing evidence and explanation, instructing staffers to prepare elaborate analyses, and related activities all consume time and resources that could have been devoted to other activities.[119] The greater the quantity and quality of the supporting materials, the more time and resources will typically be required. Thus, the more significance a reviewing court attaches to the legislative record for a given decision, the greater the enactment costs of that decision are likely to be. This is true whether the requisite work is done by the legislators and their staffs or by outside interest groups, as both groups face significant opportunity costs for their time and resources.

If this is true, and if the other conditions for the enactment cost argument hold, then implicit or explicit judicial demands for a high-quality legislative record may help implement constitutional requirements independently of any other function these requirements might perform. To put the point as starkly as possible, even if courts learn no verifiable information

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[117] This appears to be how the Supreme Court majority opinions in *Lopez* and *Morrison* view the relevance of congressional findings. *See Lopez*, 514 U.S. 549, 562-63 (1995) (suggesting that congressional findings, though not required, may be useful in Commerce Clause cases when such findings "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye"); *Morrison*, 29 U.S. 598, 614 (2000) (stating that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation" and rejecting congressional findings that rely on an "unworkable" method of reasoning).

[118] *See* Coenen, *supra* note 2, at 1688-89, 1846-47; Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977); Richard Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271, 281 (1982); Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1871-76 (2001).

[119] *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 919 n.256 (1987).

from the content of a legislative record, the mere fact that the enacting legislative coalition provided that record can provide the court with useful information about the strength of the government's interest. Again, I am not claiming that legislative record requirements perform no function other than increasing enactment costs, nor do I claim that influencing enactment costs is the intended purpose of judicial emphasis on the quality of the legislative record. What I do want to argue is that when courts condition approval of constitutionally problematic legislation on the presence of costly legislative history, this has the effect of raising the government's enactment costs, and this in turn may have the screening function described in Part I. The positive and normative debate over these sorts of doctrinal approaches is therefore incomplete if the effect on enactment costs is neglected.

2. Penalizing "Bad" Legislative History: Impermissible Statements of Government Motive—The preceding examples involved cases where the reviewing court rewarded legislators for providing "good" (but costly) explanations for constitutionally problematic decisions. There are also cases in which the courts appear to punish legislators for advancing "bad" explanations—that is, providing "bad" legislative history—for their policy choices. In addition to whatever other effects that judicial punishment of such explanations might have, this approach increases the government's enactment costs insofar as the judicially-disfavored statements in the legislative history are politically beneficial to the relevant government decisionmakers.

Judicial attention to disfavored explanations for government policy choices is particularly notable in the context of the First Amendment's religion clauses. A persistent difficulty in enforcing both the Free Exercise Clause and the Establishment Clause, at least on their prevailing modern understandings, is the problem of distinguishing impermissible religious favoritism or hostility from permissible recognition of, or permissible interference with, religious beliefs or practices. How is a reviewing court to distinguish the former from the latter? When does recognition become favoritism? How do we know when the government has crossed the line separating legitimate policies that happen to burden certain religious practices and illegitimate policies designed to suppress or penalize particular religious beliefs?[120]

One approach that courts have used, when trying to draw these distinctions, is to look not only to the challenged government enactment itself, but also to what the supporters of this enactment have to say about it. In nu-

[120] *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002); JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988).

merous Establishment Clause cases, reviewing courts have looked beyond the challenged enactment itself to the rhetoric of the responsible government officials. Rhetoric in the legislative history (before or after enactment) suggesting hostility to minority religions, or a desire to privilege particular religions or religion generally, may render the enactment more vulnerable to constitutional invalidation on Establishment Clause grounds.[121] This approach also crops up in other constitutional contexts as well, most notably the First Amendment's Speech Clause and the Fourteenth Amendment's Equal Protection Clause, as well as other areas.[122]

Judicial attention to legislative history that evinces a purpose to support or suppress religious practice, or some other disfavored purpose, is controversial.[123] Several possible justifications for such attention are prominent in the literature and the case law. First, and most obviously, if one purpose of the First Amendment's religion clauses is smoking out bad government motives, legislative statements may be highly probative. A closely related argument turns on the claim that the primary harms the religion clauses are designed to prevent are symbolic or psychological: the feeling of exclusion or marginalization, along with the social divisiveness that may arise as a consequence of such feelings. (A similar claim might be made regarding at

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[121] *See* Larson v. Valente, 456 U.S. 228, 253-55 (1982); McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844 (2005); *id.* at 881 (O'Connor, J., concurring); Edwards v. Aguillard, 482 U.S. 578 (1987); *id*. at 597 (Powell, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 56-60 (1985); *id*. at 65 (Powell, J., concurring); *id*. at 74-79 (O'Connor, J., concurring in the judgment); McGowan v. Maryland, 366 U.S. 420, 449-53 (1961). Some Justices also appear to ascribe significance to the rhetoric of enacting legislators in determining whether the government has violated the Free Exercise Clause by targeting specific religious beliefs or practices for disfavored treatment. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534-35 (1993); *id*. at 540-42 (Opinion of Kennedy, J.).

[122] *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); Romer v. Evans, 517 U.S. 620 (1996); Hunter v. Underwood, 471 U.S. 222 (1985); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Hill v. Colorado, 530 U.S. 703, 719 (2000); *id.* at 768-69 (Kennedy, J., dissenting); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 589-94 (1975); Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1966); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205 (1970); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Coenen, *supra* note 2, at 1755-74; Richard L. Hasen, *Bad Legislative Intent*, 2006 WISC. L. REV. 843.

[123] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558-59 (1993) (Scalia, J., concurring in part and concurring in the judgment); Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting); McGowan v. Maryland, 366 U.S. 420, 466, 468-69 (1961) (Opinion of Frankfurter, J.); United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting); Palmer v. Thompson, 403 U.S. 217, 224 (1971); United States v. O'Brien, 391 U.S. 367, 383 (1968); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); BICKEL *supra* note 16, at 221.

least one of the purposes of the Equal Protection Clause.) If so, then government rhetoric is constitutionally relevant because such rhetoric directly affects the social meaning and understanding of legislative acts.[124] Even if legislative rhetoric does not independently influence the social meaning of government acts, it may be highly probative as to how such acts are understood in the relevant community.

The enactment cost perspective developed in Part I does not directly engage the validity of these claims. Instead, it suggests a possible alternative or additional function that judicial penalization of "bad legislative history" (as well as post-enactment behavior) may perform. One reason government decision-makers often advertise the religious motivations behind a particular legislative or administrative act is because it is politically advantageous to do so. In many communities, legislators have an incentive to demonstrate their piety not only through rhetoric, and not only through government action, but through the conjunction of the two. The value of religiously-inspired legislation is greatly reduced, however, if the enacting legislators are not allowed to invoke their support of that legislation as evidence of their religious convictions without jeopardizing the validity of the enactment itself. Forcing the legislators to abstain from pro- or anti-religious rhetoric when promulgating a constitutionally problematic decision may perform a screening function similar to that associated with doctrines that impose additional costly requirements. Here, instead of adding an enactment cost, the courts subtract an enactment benefit, which amounts to the same thing.

To illustrate, imagine that a state legislature is considering a bill that would prohibit businesses from opening on Sundays.[125] The law will produce some benefits, both religious and secular. A Sunday closing law may provide a sense of religious solidarity for the Christian community, and it may encourage prayer and reflection. Designating one day a week as a mandatory holiday might also have a variety of non-religious benefits, and picking the day that most residents would customarily want to take off anyway is a sensible thing to do. On the other hand, a Sunday closing law will also produce costs. Some of these costs implicate the values and interests that the Establishment Clause, at least on some plausible accounts, is designed to safeguard. By affirming the significance of the Christian Sabbath and facilitating Christian religious worship, the Sunday closing law may place disproportionate burdens (both material and psychological) on

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[124] *See* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005); Wallace v. Jaffree, 472 U.S. 38, 75-76 (O'Connor, J., concurring in the judgment)

[125] *See, e.g.,* McGowan v. Maryland, 366 U.S. 420 (1961).

non-Christians, which in turn could increase divisiveness along religious lines.[126]

A rational state legislator, acting in good faith, will try to balance these considerations. This legislator will also recognize that the political benefits from supporting the Sunday closing law are greater if she can claim, openly and adamantly, that she supported the law primarily out of a desire to honor and promote Christian religious beliefs. For purposes of developing the argument, let us take off the table for the moment the argument that by engaging in such rhetoric the legislator would alter the social meaning of the law such that it has a greater marginalizing and divisive effect. Let us further assume that there is nothing inherently objectionable about a desire to promote Christian solidarity and to encourage Sunday prayer, as long as other religious or secular groups do not suffer any significant harm. This assumption is obviously contestable, but I want to put to one side the argument that judicial attention to legislative rhetoric is appropriate because religious motivations are inherently illegitimate.

The legislator will support the Sunday closing law if the benefits, political and otherwise, exceed the costs. Suppose, however, that the legislator undervalues the costs associated with the marginalization of non-Christian citizens and the religious divisiveness that a Sunday closing law may foster. Again, I am assuming a legislator who is not hostile to these interests—she just does not care about them enough to strike the constitutional balance appropriately if left to her own devices. Finally, suppose that the reviewing court is not terribly good at evaluating the actual impact of the Sunday closing law. On this predictive question, the legislature is likely to have better information the court.

This is simply another manifestation of the scenario developed in Part I. As the discussion in that Part demonstrated, the reviewing court might improve outcomes by raising the cost to the legislator of enacting the new law relative to retaining the status quo. One way for the court to do this is to make clear that it will uphold the Sunday closing law if, but only if, the enacting legislators abstain from making statements to the effect that they support the legislation because it recognizes and promotes Christian religious practices. The court might go further, requiring members of the enacting coalition expressly to disclaim any religious purpose for the law. Such a doctrinal approach would reduce the benefits legislators could expect to realize from passing the legislation. Those benefits, including the benefits associated with promoting observance of the Christian Sabbath, would not disappear, but the political benefits to enacting legislators would

[126] As was the case with the Equal Protection Clause example, *see supra* TAN __ & n.__, this Article in the text ascribes a set of purposes to the Establishment Clause for purposes of developing the example, but the Article does not take a position on whether this is in fact the best understanding of the Clause.

decrease because these legislators would not be able to point to their support of this legislation as evidence of their piety. By reducing legislators' ability to claim credit for certain popular aspects of the Sunday closing legislation, the legislation's political benefits will fall relative to its costs. This effect can bring the legislators' preferences more closely into line with the reviewing court's view of the appropriate constitutional balance.

One appealing feature of this form of enactment cost strategy is that it may entail fewer deadweight costs than other approaches. Compelling a legislature to devote scarce resources to preparing elaborate records may divert resources from other socially valuable legislative activities. Telling legislators that they must abstain from certain kinds of rhetoric may have considerably fewer social costs. I do not want to push this point too far, however. If we stick with our assumption that there is nothing inherently wrong with facilitating Christian worship, then there may be a social cost associated with preventing legislators from taking full credit for the certain aspects of their policy decisions. More generally, encouraging politicians to be disingenuous may be socially costly, both by encouraging cynicism and by giving political leaders an incentive to expend resources in order to make sure their true motives and interests are communicated to relevant constituency groups in some other way.

The enactment cost argument for penalizing bad legislative history is not mutually exclusive with other justifications for this approach, such as the belief that statements by government officials shape the social meaning of government policy. But the enactment cost argument is independent of these other arguments. One might believe that the only constitutionally relevant consideration is the effect of the law, not the intent of the legislators, yet still reach the conclusion that penalizing bad legislative history is an appropriate instrumental strategy for ensuring that those laws that are enacted are more likely to satisfy an ideal constitutional balancing test.

D. Doctrinal Uncertainty

Few judges or commentators have many kind words for unpredictability in constitutional doctrine.[127] Indeed, the social costs of unpredictability are well known. When it is difficult to anticipate how a constitutional test will

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[127] *See* Eric Posner & Adrian Vermeule, *Constitutional Showdowns* (Unpublished manuscript, Aug. 2007); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993). *But see* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1042 (2004); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002); Mike Schaps, *Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right*, 94 CAL. L. REV. 1243 (2006).

apply in different circumstances, the result may be under-deterrence (if parties have an incentive to push constitutional limits and courts are reluctant to sanction government conduct ex post)[128] or over-deterrence (the "chilling effect" which may arise if parties are concerned about incurring serious penalties if their behavior turns out to be considered unconstitutional).[129] Unpredictability may also increase litigation costs, and some fear that doctrine that is insufficiently clear and determinate will allow—indeed, encourage—judges to make constitutional rulings according to their subjective preferences regarding outcomes in individual cases.[130] While there are many defenders of "unpredictable" legal standards, these defenders typically do not defend unpredictability as such. Rather, they extol the virtues of flexible, context-sensitive doctrinal tests, and insist that the benefits of clear, predictable constitutional doctrines come at too steep a price.[131]

Recognizing the potential advantages of the enactment cost strategy suggests one potential benefit to unpredictability *qua* unpredictability in constitutional doctrine. The argument goes something like this: The enactment of any legislation entails opportunity costs for the members of the enacting coalition, who bear these costs regardless of whether the legislation ultimately goes into effect. Enacting legislators may also accrue benefits that are independent of whether a statute is ultimately upheld, but in most cases a sizeable fraction of the political and ideological benefits of passing legislation will be realized only if the legislative proposal becomes and remains valid law. When any individual legislator decides whether she will invest effort in passing a statute, she will compare the cost of enactment (net any political benefits that do not depend on whether the statute becomes law) to the benefits she will realize if the statute becomes law. The legislator will discount the present value of these benefits, however, if she cannot be sure whether the courts will uphold the statute. The less likely the courts are to sustain the statute, the lower the net benefits to the legislator of passing the statute. Therefore, as the probability of judicial acceptance drops, the higher the anticipated benefits of the statute would have to be to justify enacting the statute.

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[128] *See* Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales after September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185, 188 (2002).

[129] *See* Auvil v. CBS 60 Minutes, 67 F.3d 816, 822 (1995); *Case Comment*—Kelo v. City of New London, 119 HARV. L. REV. 287, 293 (2005); Julian Cyril Zebot, *Note—Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1066 (2002); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J. L. & PUB. POL'Y 395, 398-99 (1998).

[130] *See* Scalia, *supra* note 12.

[131] *See* Kathleen M. Sullivan, *Forward—The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

Because of this, doctrinal unpredictability is another way that courts can raise the legislature's enactment costs. In the enactment cost manipulation strategies discussed in previous sections, judicial doctrine increased enactment costs by conditioning approval of a constitutionally problematic policy on whether the government engaged in some costly activity – spending money, devoting time or political capital to more careful drafting or providing the right kind of legislative history, and so forth. In contrast, doctrinal uncertainty makes judicial approval probabilistic rather than conditional. But probabilistic approval, like conditional approval, can lower the expected net benefits of constitutionally problematic actions without precluding the possibility of such actions altogether.

To illustrate with a stylized example, let us return to the hypothetical internet regulation statute. Imagine that the enactment cost to a representative legislator in the potential enacting coalition is 3 units of utility. Let us suppose further that there is a 50% ex ante probability that this statute will have a very large positive effect on legitimate government interests (such as enforcing copyright protections or protecting national security); in this case, the statute is worth 10 units of utility to the legislator. There is also a 50% probability that the benefits will turn out to be more modest, worth only 4 units of utility to the legislator. Let us also assume that the legislator knows whether the statute has high or moderate benefits before enacting it. Because the value of the statute (4 or 10) exceeds the enactment cost (3) even if in the case where the statute has lower benefits, the legislator would always prefer enactment, absent other considerations.

Now, consider the problem from the reviewing court's perspective. Assume that the court shares the legislature's interests in national security and copyright protection, but the court also believes that the legislature systematically undervalues the constitutionally privileged interests in free speech and privacy that this proposed statute would implicate. Stipulate that the injury to these constitutional interests imposes a cost equal to 5 units of utility to the court, but that these interests are not considered by the legislature. Thus, if it turns out that the statute has high benefits the court would receive 5 units of utility (10 minus 5) if the statute is upheld, while if the benefits of the statute are more modest, the court's payoff from upholding the statute would be -1 (4 minus 5), which represents a net loss for the court relative to the status quo.

If the court knew the true benefits of the statute, it could condition its ruling on that information. But for the reasons discussed earlier, the court may not be able to make that assessment. If the uninformed court had to choose between upholding the statute and striking it down, it would uphold it. The reason is that the expected value of the statute to the court is 2 units of utility: There is a 50% chance that the statute is worth 5, and a 50% chance that it is worth -1. The 2 units of expected utility the court gets if it upholds the statute are better than the zero expected utility the court gets if

it strikes the statute down. The legislature, of course, will pass the statute regardless of whether the benefits are high or low, given that it can anticipate a net utility payoff of 1 (4 minus 3) if the statute's benefits are low and 7 (10 minus 3) if those benefits are high.

Now suppose that the court can commit in advance to an "unpredictable" legal doctrine. The effect of this doctrine is that the statute at issue has only a 50% chance of being upheld. In this case, the legislator's expected utility from passing a statute with high benefits is 2 units of utility: The legislator bears a cost of 3 up front, and has a 50% chance of realizing a gain of 10. So, if the statute is high value, the legislator still views it as worth passing, even though there is a 50% chance that the court will strike it down. If the statute has more modest benefits, however, the legislator would not be willing to pass the statute because the net utility payoff of doing so is -1: Passing the statute requires paying an enactment cost of 3 in exchange for a 50% chance of realizing a gain of 4.

Because the only statutes that reach the court under these conditions are those that have high benefits, the court would prefer ex post to uphold the statute in all cases. By assumption, however, the court cannot do so because it has committed itself to applying a doctrine that will invalidate the statute half the time.[132] The court's commitment to this unpredictable legal doctrine gives it an expected utility payoff of 2.5: The net utility payoff to the court of upholding a high value statute is 5, and the court realizes this benefit in the 50% of the cases where it upholds the statute. Thus, the expected utility to the court when it commits to an unpredictable doctrine (2.5) is greater than its expected utility payoff when it simply makes its best (predictable) choice ex post (2).

The reason for this result is that the uncertainty of judicial doctrine has a more powerful deterrent effect on the legislature for low value statutes than for high value statutes. Running the risk of judicial reversal is more worthwhile to the legislature when the statute has a higher value. In the stylized example discussed above, the court's best choice would be to commit to striking down legislative enactments with a 25% probability. A 75% chance that a statute is upheld is just small enough that the legislature would not enact a statute unless it has high rather than low benefits. So, the court's expected utility would be 3.75 (0.75 times 5)—almost double the 2 units of expected utility the court would realize if it followed the ex post optimal strategy of upholding the statute 100% of the time.

The foregoing argument implies judicial behavior that appears perverse, at least at first blush. The only cases the court hears are those in which the statute's constitutional costs are outweighed by legitimate government in-

[132] If this were not true, the screening at the legislative stage would not occur. This underscores how central the court's ex ante commitment to an unpredictable legal doctrine is to the structure of this argument.

terests, yet the court strikes down a large number of them. Furthermore, the court's decisions as to which statutes it will uphold and which it will strike down seem totally haphazard—which, in fact, they are, at least in the stylized version of the argument. An ex post evaluation might well conclude that the court's behavior was inexplicable and unjustifiable. Such a conclusion, however, might be too quick. If the court behaved differently—if, for example, it were willing to uphold all statutes in the relevant class—the mix of statutes that the legislature would enact might change considerably. As the above example illustrates, that such a change could lead to results that are systematically worse for the court when considered in the aggregate. Thus, doctrinal unpredictability, whatever its other costs, may have a direct benefit as a way to raise legislative enactment costs relative to anticipated statutory benefits.

The above argument is subject to a number of important qualifications and limitations. Foremost among these is the fact that the argument can work only if the court can credibly commit itself to a doctrinal framework that is unpredictable in application. Put another way, the court must be able to commit itself to striking down some number of legislative enactments, despite the fact that, ex post, the court would prefer that these enactments be upheld. The credible commitment problem applies to most versions of the enactment cost strategy, but the problem may be particularly acute in the context of a commitment to strike down some proportion of legislative enactments at random.

A second important qualification is that introducing uncertainty as to whether the court will uphold a legislative enactment does not always improve the court's expected utility, even when the four assumptions described in Part I hold. For one thing, the court must correctly calibrate the degree of doctrinal uncertainty. For another, even though doctrinal uncertainty improved the court's welfare in the stylized example developed above, it would be easy to construct an example in which the court does just as well, or better, by always upholding or always rejecting a given type of legislation. The desirability of the strategy of doctrinal unpredictability depends on the probability distribution for the possible statutory benefits. Speaking informally, some degree of doctrinal unpredictability is likely to be desirable when there is a high probability that the statute is bad for the court, but there is some probability that the statute has a very high value, such that the ex ante net expected value of a statute to the court is positive. In this set of cases, the court can do better by rejecting statutes at random with some positive probability, as this will deter the legislature from passing the statute unless it is high-value. Finally, the costs of unpredictable constitutional doctrine are real, and they may often outweigh any screening benefits that unpredictability may create.[133] Just as the deadweight social

[133] *See, e.g.,* Posner & Vermeule, *supra* note 127.

costs of judicial doctrines that increase enactment costs directly may outweigh the benefits of such doctrines, this may also be the case for doctrinal approaches that commit the court to some degree of unpredictability.

Nonetheless, understanding the potential benefits of unpredictability as a screening device may provide a partial explanation for why certain areas of judicial doctrine are more resistant to clarification and consistency than would otherwise seem optimal. The courts may recognize the virtues of predictability and clarity, but they may also see virtues in keeping the legislature a bit uncertain about which policies will pass constitutional muster, especially when the best clear rule the court could come up with would allow the legislature to promulgate large numbers of policies that the court, if fully informed, would view as unconstitutional.

CONCLUSION

This Article has advanced two central claims. First, Part I argued that under certain conditions, reviewing courts may implement constitutional guarantees more effectively by crafting doctrines that raise the enactment costs to government decision-makers of promulgating constitutionally problematic policies. When the conditions described in Part I are satisfied, this enactment cost strategy may have distinct advantages over both case-by-case balancing approaches and absolute, categorical rules that designate certain types of government action as prohibited or permitted. Second, Part II attempted to show that, while few if any judicial doctrines are explicitly and consciously designed with the primary purpose of raising government enactment costs, many doctrines may in fact have that effect. Thus, the enactment cost approach to judicial regulation of constitutionally problematic government activity may be more widespread than it would at first appear, and certain doctrinal approaches may be justified on enactment cost grounds even if these doctrines were not developed explicitly with that purpose in mind. At the very least, federal courts already have the doctrinal resources to implement such a strategy, if they choose to do so.

The fact that an enactment cost strategy may be effective under some circumstances does not mean, however, that existing doctrines are well-suited to this function. Indeed, given that few if any existing doctrines were designed with the express purpose of manipulating legislative enactment costs, it would be quite surprising if it turned out that all these doctrines served this function well. Part of the point of exploring this Article is to suggest how consideration of the screening functions served by judicial enactment cost manipulation may lead to productive suggestions for doctrinal reform. Such considerations are obscured, however, by adherence to the view that constitutional doctrine is about marking out the boundaries of permissible government action rather than creating incentives that protect constitutional values indirectly.