

2014

The Lawlessness of Standing

John Paredes

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

John Paredes *The Lawlessness of Standing*, 26 Loy. Consumer L. Rev. 247 (2014).

Available at: <http://lawcommons.luc.edu/lclr/vol26/iss2/3>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

THE LAWLESSNESS OF STANDING

*John Paredes**

Abstract: In *Clapper v. Amnesty International*, the Supreme Court ruled that lawyers and journalists do not have standing to challenge government warrantless wiretapping of international correspondence under the 2008 amendments to FISA. The Court refused to recognize the increased costs of protecting confidential communications as injuries-in-fact unless surveillance is “certainly impending.” But more tellingly, the plaintiffs did not even allege the real injury at stake—the loss of a reasonable expectation of privacy for groups the government targets. The standing doctrine forces parties and courts to reason insincerely and blocks potentially meritorious lawsuits. Although there have been proposals to reform the standing doctrine, courts say that the Constitution requires it. The constitutional justifications advanced do not withstand scrutiny.

Scholars and courts justify constitutional standing doctrine in terms of separation of powers and the ability to waive one’s rights. Both justifications are rooted in the countermajoritarian difficulty, which posits that in a democracy, courts cannot legitimately interfere with majority rule except to protect minority rights. Both justifications fail because each confuses the preferences of the majority with democracy. To the contrary, democracy also requires the rule of law, which is predicated on principled adjudication independent of majority preferences. Thus, the bare invocation of majority rule is not sufficient to justify the constitutional standing doctrine.

* J.D., Yale Law School, 2013. I would like to thank Owen Fiss for his mentorship and patience in advising me on what began as a seminar paper for his *Metaprocedure* class. This Article borrows heavily from conversations with Bruce Ackerman and Scott Shapiro on the application of their legal and constitutional theories to the problem of standing. Barrett Anderson, Ally Bennett, Glenn Bridgman, Rob Cobbs, Doug Curtis, David McNamee, Andrew Tutt, and Chas Tyler provided generous and invaluable feedback on drafts of the Article. David McNamee deserves special mention for working out the Article’s central ideas with me over a series of delightful and edifying lunches and teas.

I. INTRODUCTION

Last term, the Supreme Court decided that lawyers who incurred extra costs in communicating with their clients for fear of wiretapping did not have standing to sue.¹ In *Clapper v. Amnesty International*, the plaintiff-appellees were attorneys and journalists who alleged that the 2008 amendments to FISA, which permit the government to wiretap international correspondence without individual warrants, are unconstitutional.² Plaintiffs alleged that they suffered particular economic injuries from increased costs associated with fulfilling their professional obligations to maintain client confidentiality.³ For example, instead of talking to a client on the phone, a conscientious attorney may have to meet him in person to preserve confidences.⁴ Obviously, such injuries are not why this suit was brought. At the heart of the matter is not the plaintiffs' financial loss for having to travel. The real injury in question is the violation of our reasonable expectation of privacy. Of course, the lawyers needed to concoct some economic injury because the standing doctrine does not recognize the loss of the expectation of privacy as an injury-in-fact.

No one is happy with the standing doctrine.⁵ It forces parties to plead insincerely and causes issues to be poorly framed and decisions poorly reasoned. Yet it persists, partly for lack of an alternative, and partly for a string of justifications that bear closer scrutiny. We lack alternatives because certain justifications rooted in separation of powers constitutionalize standing and preclude creative solutions. These justifications misconceive democracy as pure majority rule and fail to take law seriously. Democracy requires not only attention to the preferences of the majority; it also requires principled adjudication. Thus, the power to uphold the law when the majority would flout it bolsters rather than undermines democratic government. We should lay these false justifications to rest and create a standing doctrine that works.

¹ *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).

² *Id.* at 1142-45.

³ *Id.* at 1143.

⁴ *Id.* at 1151.

⁵ For a few classic critiques, see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

The justifications for the standing doctrine are well-rehearsed. The first and most influential is based on the separation of powers and the limits of Article III power: “the judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts.”⁶ Second, the courts refrain from giving advisory opinions to “assur[e] both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that ‘the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.’”⁷ Third, the standing doctrine protects court dockets from a deluge of purely ideological cases.⁸ And fourth, “[f]ederal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons not parties to the litigation.”⁹ To elaborate on the last justification, there are two reasons it might be fairer to have people enforce only their own rights: first, rightsholders will usually be the best proponents of their own rights; and second, certain rightsholders may not wish to assert their rights, and these wishes should be respected. This second reason implies that people have a right to waive certain rights.

Justifications of standing are either prudential or principled. Prudential justifications are rooted in the quest for correct and efficient adjudication. In other words, courts would run better with the standing doctrine than without it. The aversion to advisory opinions, the protection of dockets, and the preference for competent parties bringing suits are all prudential justifications. They are all concerned with the courts making high quality decisions at a reasonable timeframe and manageable cost. We dislike advisory opinions because we suspect that opinions are less carefully reasoned in “the rarefied atmosphere of a debating society” than in the world of hard facts and real consequences.¹⁰ We protect our dockets from frivolous lawsuits because too many of them could freeze up the courts for the meritorious suits. And we

⁶ *Hein v. Freedom From Religion Found, Inc.*, 551 U.S. 587, 598 (2007) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 454, 471 (1982)).

⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (quoting *Valley Forge Christian Coll.*, 454 U.S. at 472).

⁸ *United States v. Richardson*, 418 U.S. 166, 192 (1974).

⁹ *Singleton v. Wulff*, 428 U.S. 106, 113 (1976).

¹⁰ *Lujan*, 504 U.S. at 581 (quoting *Valley Forge Christian Coll.*, 454 U.S. at 472).

prefer that competent parties bring suits because they produce robust records, which make for better-informed decisions.

On the other hand, principled justifications are rooted in notions of political legitimacy and rights. Thus, if a federal court were to hear cases against the dictates of standing doctrine, it would either be acting outside the scope of its legitimate authority or violating someone's legally protected rights. The two principled justifications for standing are separation of powers and the right of waiver. The former is concerned with constitutional limits to the legitimate authority of the federal courts; the latter the rights of would-be plaintiffs to stay out of court.

The distinction between prudential and principled justifications makes clear how to effectively argue against the doctrine. In particular, if we can dispose of the principled justifications, the standing doctrine is vulnerable to prudential proposals for reform. The standing doctrine has generally been considered ineffective at promoting its instrumental aims.¹¹ The degree to which plaintiffs have to jump through hoops and concoct injuries-in-fact to create standing results in bad cases, in which the real issues are neither discussed openly nor given due consideration before the public. Bad cases, of course, make for bad opinions. Since the standing doctrine causes bad results, it should only be salvaged if (a) it produces better results than its alternatives, or (b) there is some principled reason that requires us to accept the bad results in service of some higher imperative. In other words, without principled justifications, standing doctrine is vulnerable to prudential proposals to reform.¹²

The principled justifications for standing do not hold up to scrutiny. Thus, we should seriously consider proposals to reform or overhaul the standing doctrine to make it more effective at facilitating its practical goal of correct and efficient adjudication. The bulk of this Article engages the separation of powers justifi-

¹¹ See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 465-501 (2008).

¹² See, e.g., Mark V. Tushnet, *The "Case or Controversy" Controversy, The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706-07 (1979). Mark Tushnet proposed a barebones approach to standing, under which the only standing requirements are real adversity between plaintiff and defendant and capability of plaintiff to generate a concrete and detailed record to facilitate decisionmaking; See also Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 334-40 (2002). Gene Nichol voiced his support for Tushnet's proposal and added that courts should presume standing unless there are strong reasons to deny it.

cation, which is the main intellectual force behind the standing doctrine. The Article will also briefly address the waiver of rights argument, which exerts comparatively less force on the legal profession's thinking about standing.

II. THE SEPARATION OF POWERS ARGUMENT FOR STANDING DOCTRINE

The main principled argument for the standing doctrine is that separation of powers confines the federal courts' role to the adjudication of private rights. The courts cannot legitimately rule on the constitutionality of legislative or executive action if it does not implicate private rights because such a ruling would impinge upon the political branches' purview as more legitimate interpreters of the constitutional rights of the majority. The political branches are supposedly more legitimate interpreters because they are more politically accountable and thus can claim to speak for the people better than the unelected judiciary. According to this argument, courts have the special role of protecting the rights of individuals because majority rule is particularly defective in doing so.

Justice Scalia, eloquently espoused this view—and set the current terms of the standing debate—in his famous 1983 article, *The Doctrine of Standing as an Essential Element of the Separation of Powers*:

[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.¹³

Traditionally, the standing doctrine had interpreted the case and controversy language of Article III to require litigants to have a stake in the conflict. Scalia himself pointed out that such a reading of Article III is “[s]urely not a linguistically inevitable conclusion . . .”¹⁴ The following year, the Supreme Court reasoned for the first time, in *Allen v. Wright*, that standing was required

¹³ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

¹⁴ *Id.* at 882.

by separation of powers.¹⁵ This has since become boilerplate.¹⁶ In fact, in *Clapper*, the Court went so far as to declare that “[t]he law of Article III standing . . . is built on separation-of-powers principles [and] serves to prevent the judicial process from being used to usurp the powers of the political branches.”¹⁷

Scalia’s argument draws force from Alexander Bickel’s notion of the countermajoritarian difficulty in judicial review—that there is something unseemly about a court of unelected elite judges making pronouncements on what the people’s representatives in a democracy can or cannot do.¹⁸ In Bickel’s view, the essence of democracy is that decisions affecting the majority be made by the majority.¹⁹ Both Bickel and Scalia fail to clarify whether this unseemliness is merely a political or prudential difficulty, or a more serious deficit in legitimacy.

The prudential argument is straightforward. If the Supreme Court regularly thwarts the people’s wishes as expressed by executive and legislative action, it risks being ignored and thus undermining its own authority. Thus, in order to maintain its authority, the Court must tread lightly when it crosses the political branches. But the prudential argument lacks the dispositive force of principled argument and is adequately covered by the prudential considerations of the Political Question Doctrine.²⁰ This doctrine acknowledges that there are times when the Court’s power to persuade is limited, and for its own good and for the good of the federal government, it should not meddle with certain sensi-

¹⁵ *Allen v. Wright*, 468 U.S. 737, 752 (1984).

¹⁶ *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009); *Hein v. Freedom From Religion Found.* 551 U.S. 587, 598 (2007); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992).

¹⁷ *Clapper*, 133 S. Ct. at 1146.

¹⁸ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (2d ed. 1986) (“[W]hen the Supreme Court declares unconstitutional legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. . . . [I]t is the reason the charge can be made that judicial review is undemocratic.”).

¹⁹ *See id.*

²⁰ *See Baker v. Carr*, 369 U.S. 186, 217 (1962). *Baker* lists three prudential reasons a federal court might refuse to hear a case under the Political Question Doctrine: “[T]he impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

tive political issues.

But there may be times the Court can confront the political branches and win, even when only the rights of the majority are concerned. The question then becomes whether, in these times, the Court should be permitted to do so. For Scalia's separation-of-powers justification to be responsive to this question, we must read it to make the *principled* argument that it is always *illegitimate* for the Court to strike down executive or congressional action as unconstitutional when only the rights of the majority are concerned. By implication, the majority are the authoritative interpreters of their own constitutional rights, and elections are their way of enforcing these rights.

This Article addresses the principled argument. In my view, Bickel's and Scalia's notion of democracy as majority rule does not take the notion of *law* seriously. Democracy cannot exist without law, and thus undermines itself if it fails to respect the rule of law. Intrinsic in the nature of law is a rule of adjudication that is necessarily countermajoritarian. Hence, there can be no working democracy without some form of countermajoritarian adjudication. And by implication, the assertion that an adjudicative body is countermajoritarian cannot, by itself, compel the conclusion that such a body is undemocratic. Further, our own legal system contains constitutional commitments that supersede the will of the majority; thus, the majority cannot be the arbiter of constitutional law. To honor our constitutional commitments, we must have a constitutional interpreter that is not beholden to the majority. Thus, federal judges are the appropriate interpreters of our constitutional commitments. There are two difficulties with interpreting a countermajoritarian constitution. The first is the problem of *constitutional silence*: if judges derive their countermajoritarian authority from the Constitution, do they usurp the people's authority when they issue constitutional rulings on issues on which the constitution is actually silent? And the second is the *temporal difficulty*: how can the commitments of people long dead legitimately constrain the will of the majority today?

III. LAW AS A SOURCE OF LEGITIMACY

A. Law is Necessary for Democracy

Majority rule cannot be the only source of legitimacy in a democracy, because majority rule is insufficient to constitute a democracy. We do not think of democracies springing forth fully

formed from the state of nature. None of the old civilizations began as democracies. Rather, democracies arise out of reforms to more authoritarian regimes with pre-existing legal systems. This is true not only as a matter of historical accident, but by necessity. Majority rule cannot exist on any significant scale without law, and law by its nature is at least partly rooted in reason and principle, things that are decidedly different from majority rule. One way to argue this is by *reductio ad absurdum*. Let us try our very best to construct a theoretical polity where the only legitimizing force is majority rule, and we will necessarily fail.

Imagine a polity where every aspect of community life is governed by majority rule. For example, when someone is alleged to have done something objectionable, the community convenes to pass judgment on the charge. They decide by deliberation and majority vote whether the alleged conduct happened, whether it is prohibited by the polity, and what punishment, if any, is warranted. To simplify matters, assume that the entire polity can convene in one place and cast its votes at the same time, and that this does not unduly burden day-to-day life. When the time comes to vote, one person speaks up and proposes that the vote be carried out by secret ballot, another by show of hands, and yet another electronically. How, then, does the community determine how to vote? The answer cannot simply be, majority rule.

For example, in a small crowd of one hundred people, it is conceivable that the group might spontaneously converge on a mechanism, like a show of hands or, if the margin is wide enough, a vocal "aye." Perhaps the person with the loudest voice or the least inhibition will shout out a suggestion, and the rest will follow out of convenience. However, imagine a community of, say, ten thousand. It would be impossible for any one person in the crowd to have an adequate visual or auditory sense of what constitutes a majority. Instead, it becomes necessary to systematize voting.

Systematic majority rule over a large populace demands, at minimum, an established method to determine the majority opinion. It needs rules that govern the voting process, such as: who may vote, what constitutes a valid vote, and so on. Also necessary are what H.L.A. Hart calls *secondary rules*, which are emblematic of the rule of law.²¹ First, the polity needs to know where to look to determine whether something is a valid voting rule; there needs to be some rule that governs this, which Hart

²¹ H.L.A. HART, THE CONCEPT OF LAW 80-81, 94 (Oxford Univ. Press eds., 1st ed. 1961).

calls the *rule of recognition*.²² Second, as disputes inevitably arise, the polity must have a *rule of adjudication* that determines how these disputes are to be settled.²³ Our rules for voting for the purely majoritarian polity are starting to look a lot like law. As it turns out, a large community cannot govern itself through majority rule without employing a particular technology of social control—the rule of law.

In our system, the secondary rules cannot themselves be majority rule.²⁴ These rules are necessary conditions for the establishment of majority rule in a large polity, and thus need to *precede* majority rule in time. In other words, at least a barebones legal system needs to exist before majority rule can be systematically implemented and democracy established. Put more intuitively, before people can govern themselves, they must first be able to decide on and follow rules—they must be law-abiders.

History confirms the need for a legal system prior to establishing a democracy.²⁵ By conventional accounts, democracy was first realized in ancient Greece, where it arose out of aristocratic forms of government. Aristotle recounts that in 7th century B.C. Athens, high political office was allocated by lineage and wealth; appointees held office for life at first, and then for a ten-year term.²⁶ Scholars credit the legal reforms of Solon, Cleisthenes, and Ephialtes for the foundation of ancient Athenian democracy.²⁷

B. Democracy as a Type of Legal System

Not only does the rule of law precede democracy in time, but rather, democracy is a *type* of legal system. Thus, to talk about trade-offs between law and democracy is to commit a category mistake, like saying that there are trade-offs between utilitarianism and ethics. What is not legal, by definition, cannot be democratic. Thus, to refer to illegal actions by a majority as democratic is to confuse democracy with mob rule.

Imagine two polities, each with ten thousand citizens, both democracies in name. Both polities have identical constitutions and laws; the procedures for election and impeachment for both

²² *Id.* at 94-95.

²³ *Id.* at 96-98.

²⁴ *See id.* at 80-81.

²⁵ *See generally* ARISTOTLE, *THE ATHENIAN CONSTITUTION* (H. Rackham ed., 1981).

²⁶ *Id.* at 15.

²⁷ *See generally* KURT A. RAAFLAUB, JOSIAH OBER & ROBERT WALLACE, *ORIGINS OF DEMOCRACY IN ANCIENT GREECE* (Univ. of Cal. Press 2007).

are the same. The only difference is in the way each community deals with popular dissatisfaction with its elected leaders. In Polis A, people discuss the issues with each other, write op-eds, campaign against the incumbents, and vote them out in the next elections. Polis B, having somewhat more fiery citizens than Polis A, does everything Polis A does, and more. Every so often, the people take to the streets and oust the incumbent against the dictates of the constitution. The High Court swears in the informal mass choice for replacement out of fear of popular unrest, and Polis B continues with its business. By stipulation, Polis B has more popular political participation than Polis A, but the surplus of its popular participation over A is illegal.

Can we say, then, that Polis B is more democratic than Polis A? We might rightly say that Polis B has a more active civil society, or even, contentiously, that it is freer. But we would also say that it has weaker institutions, and, all things considered, a weaker democracy. On the other hand, even though the citizens of Polis A might be less politically engaged, their respect for their own legal institutions strikes us as more democratic. Increased popular participation in politics and increased majoritarianism might be said to be more democratic, but *only within the framework of legality*. Popular acts that break the law of a democratic polity undermine rather than strengthen democracy. Legality is not only a precondition for the establishment of democracy; it is a necessary feature of any act of democratic government.

This is not to say that some laws and legal systems cannot be more or less democratic than others. Utilitarianism is a type of ethical system, and nothing that does not pertain to ethics can be utilitarian. That said, an ethical tenet or someone's personal ethics can be more or less utilitarian in the sense that they more or less resemble a certain ideal type of utilitarianism. Thus, certain laws or legal systems can be more democratic than others, perhaps based on how much they reflect the will of the majority. Nonetheless, the act of disobeying an undemocratic law within a basically democratic system is not a democratic act. For example, one might say that the Electoral College is an undemocratic institution because it stands in the way of simple majority rule in presidential elections. However, had the Supreme Court or Congress done away with the Electoral College without a constitutional amendment in the 2000 elections, such action would have been illegal and therefore not democratic.

I am not merely playing with semantics. Hopefully, the reader has begun to intuit from the examples above that there are

certain goods provided by the rule of law that are also inextricable goods of what we call democracy. As legal philosopher Lon Fuller noted, the rule of law entails the existence of rules that are generally applicable, publicly accessible, clear, consistent, prospective, satisfiable, and stable.²⁸ These features of a legal system allow people to organize themselves politically, cooperate to achieve collective goals, and resolve disputes efficiently. Illegal popular action undermines the goods provided by legality—goods proper to democracy. Such illegal popular action might be empowering and liberating—for instance, deposing a corrupt or abusive leader. Such action might even be necessary to establish democracy out of an authoritarian regime. But though extralegal popular uprisings may do good in the world, we should not confuse them with democracy.

Democracy is a type of legal system and legality is intrinsic to democracy. While certain laws and legal systems are more or less democratic than others, we cannot properly say that there are trade-offs between democracy and legality. Often, a democracy that follows its undemocratic laws is acting more democratically than one that ignores them. Thus, to assess whether it is undemocratic for unelected judges to reverse the political branches when the rights of minorities are not implicated, we must examine the nature of our legal obligations and figure out exactly what demands the Constitution makes on our federal judges.

IV. CONSTITUTIONAL LIMITS ON MAJORITY RULE

Law imposes legitimate constraints on freedom. I use the term “legitimate” here in a weak sense. Law is legitimate by virtue of the rule of recognition, which officialdom takes to be binding and the populace at least acquiesces to. The rule of recognition, of course, can be illegitimate in the stronger, moral sense, in which case the entirety of the law is illegitimate in this moral sense. In the United States, the federal rule of recognition is widely perceived to be more-or-less morally legitimate, and thus, the rule of law here is agreed upon to have moral value. After all, our Constitution and other federal laws are at least partly responsible for the kind of life we lead in this country today—a life of relative security and prosperity, free of formal caste and de jure segregation, and in which various freedoms largely prevail. If we appreciate the fruits of our legal system, then we must respect the legal system itself. And what does the rule of law entail, if not adher-

²⁸ LON FULLER, *THE MORALITY OF LAW* 33-39 (Yale Univ. Press 1964).

ence to particular laws even if they happen to be unpopular, *because they are law?*

Our federal government was of course not established as a pure democracy, but as a limited republic. In 1789, there was no reason to suspect that any countermajoritarian law or process was *per se* illegitimate. When the people adopted the Constitution, they committed to binding themselves by certain rules even if a time should come that these rules be momentarily unpopular. In particular, in adopting Article V, the people relinquished the power to renege on certain commitments without attaining substantial supermajorities.²⁹ While the passing of this higher law may have been democratically legitimate because it involved collective action by a theoretical or stylized majority, such higher law maintains its legitimacy *because it is law*. One important constitutional question we must address in assessing the standing doctrine is how, within the constitutional order, to override an unpopular constitutional law. This is of course a very difficult question on which much ink—and blood—has been spilt. The obvious, though perhaps insufficient, answer is the Article V process. Under Article V, Congress can propose amendments to the Constitution by a two-thirds vote in each house.³⁰ Alternatively, two thirds of the state legislatures can order Congress to assemble a constitutional convention to propose amendments.³¹ Amendments become law if three quarters of the states ratify them, either through their legislatures or through state conventions as Congress directs.³²

Article V clearly articulates sufficient conditions for amending the Constitution. Whether these conditions are necessary is controversial. For example, Laurence Tribe and Henry Paul Monaghan argue that Article V provides the only legitimate means for amending the Constitution.³³ On the other hand, Bruce Ackerman and Akhil Amar both believe that certain exceptional demonstrations of popular sovereignty outside of politics as usual can result in valid constitutional change.³⁴ It is undisputed that

²⁹ U.S. CONST. art. V.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

³⁴ See AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 292–99 (2005). Amar writes that if a majority of the American voting population were

ordinary executive or congressional action cannot be sufficient to alter the Constitution. If it were, the substantial supermajorities required by Article V both in Congress and among the states would serve no purpose. In keeping with the spirit of Article V, if the framers' Constitution is to be respected, some rare and significant display of popular sovereignty on the order of Article V must be a necessary condition for amendment. Under this theory, both judicial and legislative or executive revision are illegitimate, for these would conceive of *imperfect popular acquiescence* (through elections), which might be rooted in as little as popular indifference, as a popular mandate to amend the Constitution. If we take the legitimacy of law seriously and consider the weighty supermajorities (or exceptional cases of popular mobilization and deliberation) required for constitutional change, the counter-majoritarian difficulty disappears.

V. WHY JUDGES?

Granting that the people passed certain laws that were not repealable through the ordinary political process, and they meant to have these laws enforced against the majority, why is it that *judges*, and not politicians, are the appropriate authority to interpret the Constitution where the rights of the majority are concerned? There are two ways of arguing this. The first is to argue this is what the framers intended, and the second is to argue from political morality and expediency.

A. *The Formalist Argument*

The Constitution itself contains some evidence that the framers intended for courts to review the actions of the political branches.³⁵ The Supremacy Clause of Article VI provides that

to publicly organize and vote directly for a constitutional amendment, that such amendment could be valid. On Amar's view, such a show of popular sovereignty would match the democratic legitimacy of the adoption of the 1789 Constitution and thus would be sufficient to amend it. *See* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266-94 (Harvard Univ. Press 1991). Ackerman, on the other hand, argues that on rare occasions, the country enters the realm of constitutional politics or "higher lawmaking." During such "constitutional moments," an exceptionally involved deliberating public expresses its will to revise constitutional understandings by ratifying self-consciously and publicly constitutional government action in a series of high-salience elections.

³⁵ Bruce Ackerman, Sterling Professor of Law & Political Sci., Yale Law Sch., Lecture at Yale Law Sch.: The Constitution: Philosophy, History and Law (Jan. 24, 2012).

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby³⁶

“[A]ll Treaties made, or which shall be made, under the Authority of the United States,” are “the supreme Law of the Land.”³⁷ But federal laws are supreme law only if they are “in pursuance” of the Constitution. One reason for this is that the United States had signed on to treaties before the adoption of the 1789 Constitution. Most notably, the Treaty of Paris, which ended the Revolutionary War, was signed in 1783. The framers wanted to make clear to the world that the United States would continue to honor its pre-existing treaty obligations under the new Constitution. But more importantly, the word “authority” suggests a principal-agent relationship and the idea of apparent authority. In other words, if someone has the authority to sign a treaty for the United States and does so, and such treaty is later ratified by the Senate, such a treaty is the supreme law of the land regardless of whether the agents have abused the authority granted them by the principal (the people of the United States). “Under the Authority,” then, requires merely that those in power execute the formal steps required to sign and ratify a treaty to create supreme law. And while all laws duly passed by Congress are similarly enacted “under the Authority” of the United States, some of them might not be “pursuant to” the Constitution. Treaties, unlike laws of the United States, need not be “pursuant to” the Constitution to be supreme law. This was particularly important in 1789 when the United States was at the fringe of the world stage and needed to persuade the powers of the day of its legitimacy. “In pursuance,” on the other hand, is much stronger than “under the Authority.” It implies that certain laws passed under the authority of the United States, through the valid lawmaking channels, might not be in pursuance of the Constitution and are therefore not the supreme law of the land.

Who, then, decides which laws are in pursuance of the Constitution and which ones aren't? The text of Article VI suggests that “the Judges in every State” are not to be bound by federal laws that are not in pursuance of the Constitution. Bickel

³⁶ U.S. CONST. art. VI.

³⁷ *Id.*

claimed that this language is only directed to state judges, that it does not address the paradigmatic case of judicial review.³⁸ However, read in conjunction with Article III, it is clear that Article VI binds federal judges to review the “pursuance” of laws to the Constitution. Article III, Section 2 provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”³⁹ When federal judges decide “Cases,” they need to apply *some* law, including “the supreme Law of the Land.” Of course, this does not include some laws—those not in pursuance of the Constitution. If, in applying supreme law, a federal judge finds that a federal law lacks pursuance, she must so decide. Contrary to Bickel’s claim, state judges needed special mention in the Supremacy Clause not because federal judges were not to be bound by federal law, but because state judges were constituted by the states and needed special instruction for their additional commission under the Constitution.

The question remains of what constitutes a “case” under Article III. Justice Scalia repeats the conventional judicial position that “[t]here is no case or controversy . . . when there are no adverse parties with personal interest in the matter.”⁴⁰ As mentioned earlier, though, even he acknowledges that such an interpretation is “[s]urely not a linguistically inevitable conclusion.”⁴¹ Given what I have argued, it makes no sense to provide judicial review for cases involving minority rights and withhold it for other cases.

Consider the following premises: first, the Constitution is legitimate and binding not because of majority rule, but because it is law; second, the Constitution cannot be altered by a simple majority through the ordinary political process; third, the Constitution’s strictures are meant to be enforced against the majority even when they are momentarily unpopular; and fourth, the federal courts are tasked with reviewing legislation for constitutionality, at least when minority rights are concerned. Given these premises, there is no principled reason why judicial review would be legitimate for minority, but not majority rights, because any justification for the former that is consistent with these premises necessarily includes the latter.

³⁸ BICKEL, *supra* note 18, at 8-9.

³⁹ U.S. CONST. art. III, § 2.

⁴⁰ Scalia, *supra* note 13, at 882.

⁴¹ *Id.*

According to Justice Scalia, judicial review for minority claims is part of the courts' "traditional undemocratic role of protecting individuals and minorities against impositions of the majority."⁴² The fleshed-out argument is that minorities have certain legal entitlements that are protected from the impositions of the majority that they would not be able to vindicate through the political process, precisely because the majority does not value them.⁴³ Hence, judicial review is legitimate because it protects these rights.⁴⁴ If my first premise is correct (that the Constitution is binding because it is law), we should protect these rights not out of any special solicitude for minorities, but *because they are law*. Judicial review is justified because it protects *the supreme law* from the encroachments of the political branches. In the case of minority rights, these encroachments are driven by the lack of regard for minorities or the fleeting popular passions that afflict the majority from time to time. Judicial review is justified because we care about the Constitution, and we know that where minorities are concerned the political branches are particularly *bad interpreters* of the Constitution.

Consider the case presented by the stylized facts of *Clapper*.⁴⁵ Congress has passed a law that allows the government to spy on our foreign communications without a warrant, possibly in violation of the First and Fourth Amendments.⁴⁶ We can infer that the law is popular or at least that the majority tolerates it from the lack of large-scale popular protest. To simplify matters, let us assume that the political branches are enacting the wishes of the majority. If the plaintiffs are correct, then the political branches are violating the Constitution in enacting and enforcing this law.⁴⁷ The political process is failing to honor the Constitution because the majority at the moment is overly concerned about security and thus does not adequately value the particular constitutional strictures in question. This is exactly the same reason why judicial review is justified in the case of minority entitlements—popular passions and myopias cloud the judgment of popularly elected leaders and the political branches are thus *bad*

⁴² *Id.* at 894.

⁴³ *See, e.g.,* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

⁴⁴ *See id.*; *See generally* John HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard Paperbacks 1981).

⁴⁵ *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).

⁴⁶ *Id.* at 1142-45.

⁴⁷ *See id.*

interpreters of the Constitution. If we think that judicial review is justified for the sake of upholding the law and not out of special solicitude for minorities, then we must apply this justification even when minority rights are not implicated. Judicial review must be justified to protect the Constitution *whenever* the majority and the political branches threaten to interpret it badly, even for unconstitutional laws that apply equally to all. After all, legal legitimacy is based on *what the law is*, not on whose interests are protected.

B. A Majoritarian Counter

Jeremy Waldron makes a strong argument that legislatures may be more legitimate interpreters of the Constitution than judges. In his view, though most people in the polity may take constitutional rights seriously, people disagree over the extent to which certain rights apply and how to adjudicate competing claims of right.⁴⁸ Often, Waldron argues, the Constitution itself is silent on such issues.⁴⁹ Assuming that you have a properly functioning democracy in which people care about rights, the most legitimate way to adjudicate such questions that are not controlled by the Constitution, is to give all those affected by the decision as equitable a say as possible. Of course, the way to achieve this is majority decision.⁵⁰

One possible argument against Waldron is that law is law, and his political theory objections are irrelevant if the Constitution commands otherwise. Implicit in the Bill of Rights, the Reconstruction Amendments, and Article V is a distrust of the people's respect for rights. If the framers had high regard for the people's respect for the rights enshrined in the Constitution, they would have felt no need to entrench them subject to revision only by a weighty supermajority. Rather, they sought to entrench the Constitution, including its rights provisions, out of fear that the people, in the throes of violent passions often stirred up by electoral politics, would make rash decisions that they would later regret. One problem with legal interpretation is that the power to authoritatively interpret law is the power to defang it. If a majority of the people was not to be trusted to amend the Bill of Rights, it is unclear how the political branches, whose actions are sup-

⁴⁸ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1369-70 (2006).

⁴⁹ *Id.* at 1368.

⁵⁰ *Id.* at 1388.

posed to at best imperfectly represent the will of a majority of the people, should be able to.

But perhaps Waldron's critique merits more than a purely legalistic response. Perhaps the constitutional argument is not 100% convincing. When debating the meaning of interlocking parts of a two-hundred-year-old text, it is possible to come up with conflicting interpretations, none of which might be 100% convincing. Perhaps, with enough ingenuity and industry, one might come up with a number of cute conclusions from the interactions between different parts of the text that could not have been intended by the framers. The question of whether such conclusions would then have the force of law is difficult. It is problematic to dispose of such weighty questions, with such power to affect our social and political lives, solely on technicalities.⁵¹

If there are no 100% convincing interpretive arguments, having practical considerations in support of a fairly strong interpretation could tip the scales in its favor. Furthermore, if a certain interpretation makes sense as a matter of political theory and practicality, it becomes more plausible that the framers intended such interpretation and that we are not inventing fancy technicalities.

C. Pragmatic Arguments

As a practical matter, what makes judges better interpreters of the Constitution than legislators? Interpretation is both conceptually problematic and difficult in practice. By "conceptually problematic," I mean that postmodernism has lain waste to the idea that texts have a stable and determinate meaning. How, then, can one say that one is bound by a text, if in interpreting the text, especially in hard cases, one necessarily creates meaning? Several scholars have opined on this.⁵² Suffice it to say that if we would like to believe that we are bound by law at all, we have to believe that there are such things as legitimate and illegitimate interpretation, and that the legal profession has practices that differentiate between the two.

By "difficult in practice," I mean two things. First, interpretation can sometimes be intellectually demanding, and people may make mistakes as in any hard intellectual endeavor. Second,

⁵¹ Bruce Ackerman lecture, *supra* note 35.

⁵² See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 23-30 (1991); OWEN FISS, THE LAW AS IT COULD BE 149-171 (N.Y. Univ. Press 2003).

due to the high moral and political stakes involved in many legal questions, interpretation can be morally demanding. One might be tempted to substitute policy preference for interpretation, particularly when issues are complex enough that one can create a plausible though self-consciously wrong interpretation.

The profound difficulties involved in legal interpretation rightly make us uneasy that *anyone* should be given the power to do it. Perhaps, in an ideal world, we would entrust only genius-saint-lawyers to do such work. Unfortunately, there may be more seats in our Supreme Court or in Congress than there are genius-saint-lawyers in the United States. That said, we operate in what Scott Shapiro calls an *economy of trust*, in which there are certain tasks that must be done and we must entrust *someone* to do them no matter what.⁵³ Though we may trust neither judges nor legislators 100% or even 50%, if we are to live under constitutional rule, we must entrust *someone* to interpret the Constitution.⁵⁴ Thus, what matters is not the *absolute* amount of trust we place in particular actors, but rather how much we trust them *relative* to the other options.⁵⁵ If we trust judges only 30%, but Congress a mere 20%, it would be rational for us to choose judges over Congress. In other words, if our choice is between judges and the political branches, I need not show you that we should trust judges in an absolute sense, but merely that we should trust judges a little more than the political branches.

Why, then, should we trust judges more than the political branches? First, a judge's training and socialization make her a better interpreter of law than a layperson. Second, the institution of the judiciary is itself better designed to handle hard cases and issues of principle than the executive or the legislature.

i. Training and Socialization

Faith in judges requires faith in the law and its ability to set real constraints on those trained in it. Legal training teaches one to parse dense texts, to think according to precedent, and generally to interpret authority. It teaches one to read an authoritative text sympathetically and extrapolate from it certain principles and implications whether or not one personally agrees with them. It trains one to take the long view, to understand that even though one might not agree with a particular outcome, tolerating

⁵³ SCOTT SHAPIRO, LEGALITY 334-42 (2011).

⁵⁴ *Id.* at 342-43.

⁵⁵ *Id.* at 363-64.

occasional bad outcomes is necessary to maintaining the rule of law, and the order and justice that such a regime promotes. Judges in the American legal system are generally lawyers who have achieved considerable success in the profession, who hopefully have internalized this legal training and can make careful, reasoned judgments paying full respect to a law that may not be entirely clear, or with which they may not entirely agree.⁵⁶

Politicians, on the other hand, are not elected for their legal training or acumen. Though many of them happen to be lawyers, *qua politicians*, they are not primarily engaged in making and evaluating legal arguments. Rather, politicians are elected by and large for their policy positions and are engaged in making law that suits their political convictions. If democracy functions correctly, one would hope that elected officials tend to have stronger political convictions than most people. Thus, they are likely to have more at stake on one side of any given legal question that has significant political repercussions. And since they spend most of their time fighting for particular policy positions, it might be expecting too much from them to take off their policy hat when the battle is fiercest and put on their dispassionate interpreter hat. It might be a tall order to give them the last word on the constitutionality of the policies they are most fiercely advocating for or against. Thus, it makes sense to have someone somewhat removed from the political process and somewhat more impartial to apply a brake on government action when it runs afoul of the Constitution. And though judges are often less than paragons of impartiality, on the whole they seem more trustworthy than politicians.

ii. The Institution of the Judiciary

On the second point, the judiciary as an institution is better designed to issue principled decisions that respect the rule of law than the political branches.⁵⁷ As Owen Fiss notes, certain procedures limit the exercise of the judicial power to make judges more objective.⁵⁸ In resolving disputes and thus interpreting the law, judges must: (1) stand independent of the litigants' and the body politics' interests; (2) listen to and be informed by grievanc-

⁵⁶ Granted, judges are human too and are not immune to common impulses to override unclear law with one's own judgment. The issue here is who is better positioned to make a decision that is properly deferential to the law.

⁵⁷ OWEN FISS, *THE LAW AS IT COULD BE* 163-64 (2003).

⁵⁸ *Id.*

es whether they want to or not; (3) listen to everyone affected in a given conflict; (4) take public personal responsibility for their decisions; and (5) provide justifications for their decisions that can be universalized, subject to scrutiny by the legal community and the public at large.⁵⁹

Perhaps the most controversial among these procedural safeguards is judges' individual responsibility for their decisions. Skeptics question the legitimacy of the judiciary precisely because they believe that individuals should never be solely responsible for certain decisions that affect many people—both for reasons tied to representative democracy, and for the obvious reason that individuals are fallible.⁶⁰ On the contrary, judges are more trustworthy than the political branches in making principled decisions on law *because* they bear individual responsibility for their decisions. Legislators make decisions in groups, and while they need to make a public vote, they are not generally subject to the full burden of explaining why they voted one way or another. The president is personally responsible *ex officio* for decisions made by the executive branch. We know, though, that the president delegates most executive decisions and relies heavily on advisors more informed than she for the decisions she does make. Judges, then, are uniquely situated among the branches of government in that they alone make decisions as individuals that they are both fully intellectually responsible for and fully accountable for.⁶¹

This autonomy is crucial to principled decision-making. Social psychology has thoroughly documented the effects of groupthink—people are led astray in strikingly simple cognitive tasks when they have access to other people's erroneous judgments on the issue at hand.⁶² In their bestselling book, *Nudge*, Richard Thaler and Cass Sunstein summarize findings on group-

⁵⁹ *Id.*

⁶⁰ See, e.g., Bickel, *supra* note 18, at 16; Scalia, *supra* note 13, at 884; Waldron, *supra* note 48, at 1369-70.

⁶¹ Appellate judges decide cases in panels and may persuade each other to see the law one way or another. This somewhat weakens my assertion that judges decide as individuals. That said, judges generally reach their own conclusions before they confer, and each judge must sign his name to a reasoned out opinion.

Also, judges may solicit the advice of their clerks, but clearly hold the intellectual authority in the relationship. Clerks are generally very young lawyers, often fresh out of law school. It is highly unlikely that a case would arise in which the clerk's expertise so far surpasses the judge's that the judge feels the need to defer to the clerk intellectually.

⁶² RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 56-59 (rev. ed. 2009).

think.⁶³ For example, Solomon Asch conducted an experiment in which people were asked to select out of three lines the line that matched a fourth line in length. When deciding on their own, subjects almost always got it right.⁶⁴ However, when deciding with a group of five others, all of whom answered wrong, subjects answered incorrectly a third of the time.⁶⁵ Such results have been replicated and extended in over 130 experiments in seventeen countries.⁶⁶ Brain imaging studies suggest that when people err by conforming in such studies, they actually perceive the situation as the others do.⁶⁷ More disturbingly, in one such experiment, people were asked whether they agreed with the statement: "Free speech being a privilege rather than a right, it is proper for a society to suspend free speech when it feels threatened."⁶⁸ When asked individually, only 19 percent of people agreed, but when exposed to four people who agreed, a full 58 percent agreed.⁶⁹ Findings about groupthink even in matters of deep principle render comprehensible Hannah Arendt's chilling observation about morality in Nazi Germany:

It was as though morality, at the very moment of its collapse within an old, highly civilized nation, stood revealed in its original meaning, as a set of mores, of customs and manners, which could be exchanged for another set with no more trouble than it would take to change the table manners of a whole people.⁷⁰

Like it or not, people are swayed by groupthink, even in the most important moral matters. People feel justified in holding prejudices when others around them do. And given that the executive and legislative branches are supposed to be representative of the people, there is no reason to think that these branches should be insulated from the prejudices that afflict the people. Neither are judges. But, in forcing judges to confront information from all parties to a dispute and to take individual responsibility for intellectually independent decisions, our system of govern-

⁶³ *Id.*

⁶⁴ *Id.* at 56.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 57.

⁶⁸ *Id.* at 59.

⁶⁹ *Id.*

⁷⁰ HANNAH ARENDT, RESPONSIBILITY AND JUDGMENT 43 (Jerome Kohn ed., 2003).

ment gives judges an edge over the other branches in overcoming groupthink and deciding matters objectively.

Furthermore, even if groupthink were not a problem, certain group dynamics work against true principled decision-making. For instance, the logistics of discussion in a large group makes it difficult for points of view to be aired in their full and nuanced way, and for all concerns to be heard. Additionally, while each individual member of a large group might be able to vote yea or nay according to principle, it is incredibly difficult for such a group to articulate a coherent principled justification for such a decision. Because some people are unlikely to change their mind when issues of deep principle are concerned, and such people are nearly always present in large groups, large group decision-making tends more toward compromise than agreement on principle. Sometimes, it is not the case that a compromise can be a principled decision. Sometimes, the only principled option is on an extreme end of public opinion, and not near the center. The larger the group, the less feasible to honor a principle that happens to be unpopular with the majority. Judges, given the freedom to justify their decisions individually, can write opinions that honor the principles they individually believe apply.⁷¹

VI. OBJECTIONS

A. *Constitutional Silence*

Sometimes in questions of constitutional rights the law is simply silent.⁷² If the law is truly silent on an issue, what legitimacy do judges have to determine the rights of the majority? Judges are trained to interpret the law. It is unclear that this training makes them better at determining what the law should be if no law exists. At any rate, an argument asserting the superior policy wisdom of judges would be too antidemocratic to countenance and would not draw any support from my rule-of-law argument.

The Constitution contains certain particular commitments and is not *carte blanche* for judges to impose morality on the political branches. The Constitution is not silent in all conflicts over rights. Often, what happens is that the political branches pass a

⁷¹ In practice, judges often compromise on principle to achieve stronger majorities or unanimity, but such compromise is a lesser evil in a group of nine than in one of 538.

⁷² See WALDRON, *supra* note 48, at 1368.

measure that happens to be popular during a time of political upheaval, but against which certain established principles enshrined in the law militate.⁷³ The judge's role is then like that of general counsel at a corporation. She applies a brake on the agenda of the executives when it happens to run into conflict with higher law. Waldron assumes these cases away by positing that the legislature is a thoughtful body that deliberates deeply and respects the rights of all the citizenry.⁷⁴ I think he would admit that often these assumptions do not apply and that legislatures are often moved by the momentary passions of the people. Perhaps they could benefit from a body whose job it is to be principled and cautious and to apply a brake when the legislature gets carried away.

Silence in the law, particularly Constitutional Silence, is problematic within a common-law interpretive tradition. The rights provisions of the Constitution are written in intentionally broad language that openly invites interpretation. The fact that federal judges are charged by the Constitution with adjudicating cases that arise under it must mean that it bestows upon them the authority to interpret such provisions. Disposing of a case under, say, the Equal Protection Clause, is simply impossible without significant interpretation. Sometimes, this interpretation calls for line drawing based on an evolving awareness of social realities or on pragmatic considerations. For the Constitution to be enforceable as law applicable to specific cases, its authority as higher law must extend not just to the text of the document, but to authorized interpretations as well. The framers were steeped in the common law tradition when they drafted the document. When they tasked the Supreme Court with deciding cases that arise under it, it seems reasonable to infer that they knew they were setting up a common law system of constitutional jurisprudence and knew this would be the "supreme law."

Now on to the more difficult case. It seems perfectly reasonable that sometimes, the Constitution is actually silent and that the only judgment call to be made is a legislative one. The question then is who ought to decide *when* this is the case. The Court, as the most trustworthy (or the least untrustworthy) legal interpreter,⁷⁵ is the most competent and the most legitimate to de-

⁷³ The Plaintiffs in *Clapper* might argue that this is what happened when Congress amended FISA to allow warrantless wiretapping in the face of fears about international terrorism. *Clapper*, 133 S. Ct. at 1142-45.

⁷⁴ *Id.* at 1361.

⁷⁵ *See infra* at 127.

cide that the law is silent. And if it decides so, for reasons of democratic legitimacy, as well as the reasons Waldron advances, it would be more legitimate for the Court to defer to the political branches. Though the Court hasn't always done so, it does this by building deference to the political branches into its doctrines—for example, by applying rational basis for most instances of review of congressional action.

Still, perhaps sometimes the Court might be tempted to impose its policy vision and thus fail to acknowledge constitutional silence and legislate *sub silentio*. The Court would then be acting illegitimately, and there would be no legal check on its power to do so, save the extreme measure of impeachment. Though there might not be a formal check on the Court's power to make this determination, the Court has every reason to be cautious about overstepping its authority. After all, the only source of the Court's political power to discipline the other branches is its perceived legitimacy.⁷⁶

B. *The Temporal Difficulty*

A much more serious problem than the countermajoritarian difficulty is the *temporal difficulty*. In general, the law has an aversion to perpetual dead-hand control, as it should. Law has a legitimizing force that is independent of the current wishes of those in power, but it is not invincible.⁷⁷ As a matter of political morality, why should we feel bound today by the decisions of people long dead? There are two possible reasons to be bound by the framers' decisions. For people who revere the wisdom of the framers, the question is settled. For those who don't, the question is whether we approve of the impact of our age-old constitutional commitments on the life we live today. If so, then for prudential reasons we might consider respecting those commitments.

Scott Shapiro offers useful conceptual machinery for tack-

⁷⁶ See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) ("Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")

⁷⁷ See, e.g., Fiss, *supra* note 57, at 164.

ling the temporal difficulty. He describes two different types of legal systems based on where they derive continuing legitimacy from—*authority* and *opportunistic* systems.⁷⁸ While actual legal systems are probably some messy, historically contingent blend of the two types, understanding them in their pure form helps clarify the factors that legitimate a legal system whose founders are long gone.

In an authority system, the founders are revered as being superior decision-makers to the present-day people.⁷⁹ This superiority could be moral or prudential,⁸⁰ and could be based on a number of different things. Perhaps the founder was a prophet who received a special, one-time revelation from a deity. Alternatively, the founders could be distinguished by special moral ascendancy or political genius arising from a special set of historical circumstances such as a war for independence or a struggle for emancipation. Perhaps, the founders, having lived in more turbulent times than ours, in which questions of political morality acquire an immediacy and clarity that everyday life and politics obscures, have a wisdom as a product of their unique lived experiences that we in comparatively humdrum and morally muddy times are loath to reject too lightly.

On the other hand, an opportunistic system derives its legitimacy from an agreement by the legal establishment that the current system is in fact a good way to govern the polity.⁸¹ The legal insiders agree that on balance, given the strengths and weaknesses of the current system and the costs and uncertainties associated with changing it, it is best to stick with the status quo.⁸² In this view, though the legal regime is not perfect, it works well enough, and making do with what we have is better on the whole than overhauling the system.

The key difference between the two systems is that the former is predicated on deference and the latter on a direct exercise of political judgment.⁸³ We have here two orders of judgment, the first targeted toward the question “who decides what legal system we should adopt?” (call this the “who decides” question) and the second toward the question “what legal system should we adopt?” (call this the “what system” question). Authori-

⁷⁸ See SHAPIRO, *supra* note 53, at 350.

⁷⁹ *Id.*

⁸⁰ *Id.* at 350-51.

⁸¹ *Id.* at 351.

⁸² *Id.*

⁸³ *Id.* at 350-351.

ty systems conclude on the “who decides” question that the current legal actors collectively are not the best equipped to make this decision, and thus never reach the “what system” question. On the other hand, legal actors in opportunistic systems feel competent to decide the “what system” question and go ahead and do so.

This difference has significant repercussions on how a legal system handles the temporal difficulty—and what freedom legal actors have to disobey the dead hand of the framers. In a pure authority system, the current legal actors are subservient to the judgment of the framers and thus have no authority to change the legal regime outside of the avenues of change prescribed by the framers themselves.⁸⁴ On the other hand, in a pure opportunistic system, because it is the political judgment of the current legal actors that legitimates the system, if they judge that the system should change, then changing it is legitimate.⁸⁵ Of course, this must be a nuanced judgment that takes into account all the hidden costs of changing the system, such as resistance by those loyal to the old regime and uncertainty as to what the proper sources of legal authority are. The question then of why we should continue to let the dead hand control us is much more difficult to answer if we are making opportunistic judgments rather than simply following authority.

In the standing debate, those who most advocate the separation of powers argument for precluding courts from adjudicating majority rights are also the biggest proponents of originalism—those who, at least in name, are the most deferential to the framers.⁸⁶ It seems clear that the framers wished to entrench certain rights notwithstanding the fact that the majority at some point in the future might not wish to exercise them. It seems that those who are most respectful of the framers’ intent ought to respect this wish, countermajoritarian as it is. To the pure originalist, it should not matter how countermajoritarian or undemocratic something is if that is what the framers intended.

It would be much harder to fend off a critique from a pure opportunist who didn’t care what the framers thought, and who asked why, from first principles, judges ought to adjudicate the rights of the majority today. Then we would have to argue from history and political morality why our legal system has served us

⁸⁴ *Id.* at 351.

⁸⁵ *Id.*

⁸⁶ See generally, e.g., *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013); Scalia, *supra* note 13.

well and ought to be as it is. Briefly consider how the First Amendment protected dissent in the McCarthy era, and how the Fourteenth Amendment provided constitutional backing for the Civil Rights Revolution and the Women's Rights Movement, and is now beginning to do so for the rights of Lesbian, Gay, Bisexual, and Transgender people to equal citizenship. Our Constitution has served as a rallying point to remind the people of their deeper values at times of cultural crisis, in which popular opinion hung in the balance. This is but one good brought to us by our sometimes-countermajoritarian Constitution.

VII. LITIGATING THE RIGHTS OF OTHERS

One prudential and principled argument in favor of the standing doctrine is that it prevents people from litigating the rights of others.⁸⁷ The prudential component asserts that parties who are personally wronged are the best to put forward their claims; they are likely to litigate with the most zeal and create the most fleshed-out and compelling record.⁸⁸ My focus is on the principled component, which asserts that to legitimately bring a lawsuit, one must be within the sphere of protection of a given legal right—for otherwise one would violate the implicit entitlement of the actual rightholder to waive their rights.⁸⁹

Eugene Kontorovich espouses the view that rights consist of individual legal entitlements, the waiver of which is as much a part of the entitlement as its exercise.⁹⁰ This view is to an extent intuitive. Begin with the premise that I have the right to be free from battery. If Andrew asks for my consent to be stricken, I give it, and then he proceeds to strike me (lightly), I will likely not prevail in court because my waiver of my entitlement against being stricken is as valid at law as my affirmative exercise thereof.

This same argument can be raised in a context involving the constitutional rights of the majority. Consider the facts of *Clapper*. The executive begins a national warrantless wiretapping scheme of suspected terrorists and their associates.⁹¹ Though it begins as an executive initiative, it later receives congressional

⁸⁷ *Singleton v. Wulff*, 428 U.S. 106, 113 (1976).

⁸⁸ *See, e.g.*, Tushnet, *supra* note 12.

⁸⁹ Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1695-99 (2007).

⁹⁰ *Id.*

⁹¹ *Clapper*, 133 S. Ct. at 1143-44.

support through legislation.⁹² Suppose this scheme is fairly popular or at least neutral with the people, and that the legislators who voted for it have no trouble getting reelected at least on wiretapping grounds. Kontorovich would say that the majority is virtually waiving any First and Fourth Amendment rights it might have in return for feeling safer. Thus, if someone were to raise a suit as a mere “concerned citizen,” and thus lack a concrete and particularized injury, she would be negating the majority’s right to waive their rights, and thus violating their rights.⁹³ For in choosing to waive the *affirmative* exercise of their rights, the majority are actually *exercising* their constitutional rights under the First and Fourth Amendments.⁹⁴ If, as Kontorovich assumes, the waiver of a right is as constitutionally protected as its exercise, then it would make sense that one should poll the populace on questions of the joint rights of the majority, because no process other than majority decision would give fair weight to everyone’s legal entitlement.⁹⁵ Since the United States Government can only have one secret wiretapping policy and cannot tailor it individually to each citizen’s preferences, either all must exercise their right affirmatively, or all must waive. Thus, elections might be a much more just, if still imperfect, way to vindicate the rights of the majority.

Such a reading of the Constitution runs into textual difficulties. The rights provisions of the Constitution are generally phrased as absolute injunctions on government action, rather than individual entitlements that people can turn on and off. For example, the First Amendment begins with “Congress shall make no law,”⁹⁶ and the Fourth declares that “no Warrants shall issue.”⁹⁷ Similarly the Fifth declares that “no person shall be,”⁹⁸ and the Due Process and Equal Protection Clauses of the Fourteenth Amendment that “No State shall make or enforce any law”⁹⁹ These injunctions are absolute and pay no attention to consent or lack thereof. If the framers had intended for the people to validly waive the exercise of these rights under the Constitution, they might have worded these clauses differently. It would not have been difficult for them to write a free expression clause that stat-

⁹² *See id.*

⁹³ Kontorovich, *supra* note 89, at 1724-25.

⁹⁴ *Id.*

⁹⁵ *See* Waldron, *supra* note 48, at 1388.

⁹⁶ U.S. CONST. amend. I.

⁹⁷ U.S. CONST. amend. IV.

⁹⁸ U.S. CONST. amend. V.

⁹⁹ U.S. CONST. amend. XIV, § 1.

ed: “The freedom of expression shall not be abridged without the consent of the people.” After all, the Bill of Rights does use such wording when it views consent or some other prevailing circumstance as authorization. For example, the Third Amendment states that “[n]o Soldier shall, in time of peace be quartered in any house, *without the consent of the Owner*, nor in time of war, *but in a manner to be prescribed by law*.”¹⁰⁰ Similarly, the Fourth Amendment provides that “no Warrants shall issue, *but upon probable cause . . .*”¹⁰¹ The Fifth Amendment is a model text for issuing a general injunction and then providing detailed exceptions: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”¹⁰² The succeeding text consists of absolute injunctions with no exceptions—on double jeopardy, compelled self-incrimination, and due process violations—before ending on takings, with a just compensation exception.¹⁰³ The framers knew how to craft exceptions to their injunctions on government action and didn’t.

Now, I can countenance an argument that we must not take the text of broad rights provisions too literally. After all, our contemporary doctrine on the First and Fourth Amendments is anything but textual. That said, as a matter of political morality, I fail to see why the waiver of a right should always be as protected as its affirmative exercise. Take for example the right to be free from slavery. I have the right to control my movements, to make decisions about how I want to live my life, and to the fruits of my labor. I also have the right to bind myself in the future by contract. But I do not have the right to contract myself into slavery. If I did, I would be building up the institution of slavery, which would run counter to society’s commitment to be free of it. Likewise, out of solidarity with the government I might choose not to speak ill of it during a sensitive time. However, I may not waive my right to speak freely when I choose to do so in the future. In the same way, even if ninety-nine out of a hundred people choose not to complain about wiretapping, I see no reason they should be able to override one person’s right to be free from it.

¹⁰⁰ U.S. CONST. amend III.

¹⁰¹ U.S. CONST. amend IV.

¹⁰² U.S. CONST. amend. V.

¹⁰³ *Id.*

An alternative view is that rights are not merely pieces of property, but social norms—actions that the government is forbidden to do for both moral and legal reasons.¹⁰⁴ Society forbids certain conduct not only because individuals are entitled to be free from it, but because society abhors the conduct itself.¹⁰⁵ In this view, the norm against battery might be understood as a prohibition of *nonconsensual* harmful or offensive contact. Certain norms prohibit behavior only when it affects a third party who has not consented, but others prohibit certain behavior altogether—such as the slavery example. And, as argued earlier, if the Constitution prohibits such behavior absolutely, then such prohibition is legitimate *because it is law*. The relevant question, then, is, what does the law prohibit?

The legal foundation for a theory of constitutional rights as non-derogable social norms in the American case might be found in seeing the Constitution as *constitutive* of the federal government.¹⁰⁶ The Constitution created a government of limited powers, all of which come from the Constitution itself. Thus, when the government exceeds those limits, it lacks the authority to act because the Constitution does not grant it. In *Reid v. Covert*, Justice Black's plurality opinion endorses this view.¹⁰⁷ There, the Court ruled that civilian wives of armed servicemen accused of murdering their husbands on overseas bases could not be tried by court-martial; rather, they retained their Constitutional right to jury trial.¹⁰⁸ The opinion states: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."¹⁰⁹ In this view, if it is alleged that the government has overstepped its powers, there is no good waiver-of-rights argument for limiting standing, because if the government acted without authority, it does not matter whether or not the majority consented to the action. The government lacked the power to act in the first place and its action is thus invalid. In the same way, a marriage between two people administered by a poseur is not valid even though the two parties might consent. The unlawfulness of the conduct does not reside solely in

¹⁰⁴ See Owen Fiss, *Imprisonment Without Trial*, in *THE DICTATES OF JUSTICE: ESSAYS ON LAW AND HUMAN RIGHTS* 125 (2011).

¹⁰⁵ *Id.*

¹⁰⁶ Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 *OXFORD J. LEGAL STUD.* 235, 252 (2006).

¹⁰⁷ *Id.*

¹⁰⁸ *Reid v. Covert*, 354 U.S. 1, 4-5 (1957).

¹⁰⁹ *Id.* at 5-6 (footnotes omitted).

the fact that someone's entitlement was violated, but in the conduct itself.

VIII. CONCLUSION

I began this Essay by drawing a distinction between principled and prudential justifications for standing doctrine. I then set out to criticize the principled justifications and show how they are not compatible with reasonable views on the nature of law and democracy. The two principled arguments for standing doctrine—that separation of powers in a democracy requires it, and that it respects people's entitlement to waive the exercise of their rights—both fail because they do not take law seriously and confuse the interests that the majority advocate for what the law requires.

The separation-of-powers argument asserts that if the people support government action that does not hurt minorities, it does not matter if the Constitution forbids it. For when minorities are not concerned, it is not the place of the courts in a democracy to tell the people they are wrong. In my view, however, there can be no democracy without the rule of law, and to disregard our fundamental law is to undermine that which makes democracy possible. Our democracy is *constituted* by a higher law whose framers placed it above the realm of ordinary politics. To respect this Constitution as law, we need to ask not whether the rights of the minority or the majority are concerned, but simply *what the law is*. I argue that both the Constitution and prudential considerations suggest that judges are the appropriate people to take on the task of interpretation.

The waiver argument similarly denigrates the law by misreading its text and downplaying the strength of the social norms it enshrines. It reads the Constitution as granting individuals property interests in freedom from government intrusion, rather than issuing categorical injunctions on government conduct. Thinking of rights as property makes voluntary alienation seem legitimate. Furthermore, the fact of jointness—that people can only exercise or waive certain rights in common—seems to legitimate deciding between exercise and waiver by majority decision. I have argued, first, that the framers knew the difference between an absolute and a qualified injunction, and chose to word certain provisions as absolute injunctions. Second, I have argued that not all rights are property assignments alienable by consent. Many, like the prohibition of slavery or torture, are social norms against

2014

The Lawlessness of Standing

279

particular conduct because society finds it heinous, consensual or not. For these reasons, courts cannot neglect to enforce rights simply because the majority does not clamor for their enforcement.

Law is not simply a “people’s veto.” Instead, it prohibits certain action, whether or not the people may consent. This might be countermajoritarian, but it is the regime we live in, a regime that makes possible the liberal democracy we cherish. The province of the judiciary is to determine *what the law is*, whether or not the people like it or minority rights are concerned. For the standing doctrine to flout the dictates of law in the name of democracy is to not take law seriously. The standing doctrine can make no claim to being required by the Constitution or democratic theory. It is thus not required to legitimate the federal courts’ hearing cases. For the doctrine to survive, it must be justified prudentially. The time has come to take creative alternatives seriously.