Notre Dame Law Review

Volume 78 | Issue 1

12-1-2002

The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights

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THE JUDICIAL RESTRAINT AMENDMENT:
POPULIST CONSTITUTIONAL REFORM IN THE
SPIRIT OF THE BILL OF RIGHTS

Jack Wade Nowlin*

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INTRODUCTION

Recent decisions of the U.S. Supreme Court have once again sparked debate about the contours of the proper role for courts in the American constitutional order. Indeed, some observers have been willing to characterize the Supreme Court of the last decade as a "judicial minimalist" one, in the sense that it decides "one case at a time" and "leaves things undecided" in order to keep open more "breathing" space for democracy. Others have remained profoundly skepti-

cal of that characterization, viewing many putatively "minimalist" cases rather as obvious "wedge" decisions laying the groundwork for future waves of "maximalist" activism.\(^2\) In fact, several decisions in recent years suggest that the skeptical view is a considerably more accurate assessment of the current trend in decisionmaking on the Court.\(^3\) It is certainly clear, at the very least, that the Court's last few terms have been a disappointment to the reform proponents of judicial nonpartisanship and restraint.

Indeed, a large number of decisions in the last few terms on issues such as federalism,\(^4\) congressional enforcement of the Fourteenth Amendment,\(^5\) abortion,\(^6\) religion,\(^7\) free expression,\(^8\) capital punishment,\(^9\) and affirmative action\(^10\) should be at least troubling to any proponent of principled judicial restraint. Of course, the Court's recent and highly controversial decision in *Bush v. Gore*, ruling five to four in favor of ending recounts in the disputed 2000 presidential election, has also been widely criticized as an extravagant, unprinci-

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7 See, e.g., *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating local school district's policy of allowing students to vote on whether to have an "invocation" at a high school football game and to vote on the person to deliver that invocation).


9 See, e.g., *Atkins v. Virginia*, 122 S.Ct. 2242 (2002) (holding that executions of the mentally retarded are cruel and unusual punishments prohibited by the Eighth Amendment).

pled, and partisan decision. Notably, commentators across the political spectrum have criticized the Court in recent years for its general "arrogance," "hubris," "contempt for the competing views of the political branches," and "strategic concern for [the Court's] own institutional prerogatives," as well as for its displays of political "feuding," constituency-serving, results-oriented judging, excessive "partisan[ship]," and lack of "respect for the dignity and authority of the law."

In light of the Court's tendency to engage in dubious exercises of judicial power, scholarly concern about expansive judicial policymaking has also continued across the political spectrum. For instance, in recent years Cass Sunstein has endorsed a mild form of judicial restraint, which he calls "judicial minimalism"; Judge Richard Posner has advocated a moderate form of judicial restraint grounded in legal pragmatism; Jeffrey Rosen has also defended the virtues of a traditional form of judicial restraint; and Mary Ann Glendon has advocated what she calls the "classical" model of judging, also a traditional form of judicial restraint. Additionally, other scholars have objected to an expansive judicial role along other dimensions or aspects of the judicial power. For instance, Hadley Arkes has opposed judicial supremacy, endorsing instead a Lincolinian form of departmentalism; Robert P. George has rejected a conception of judicial supremacy that requires the President and Congress to submit to "unconstitutional exercises of judicial power" by the Supreme Court that


13 See Rabkin, supra note 3, at 24.
14 Sunstein, supra note 1, at 3-14.
15 Posner, supra note 2, at 154-55, 249-52.
16 Rosen, supra note 3; Rosen, supra note 11.
are destructive of the "constitutional order"; Jeremy Waldron has voiced his opposition to judicial review as a practice inimical to individual participatory rights; Mark Tushnet has advocated an amendment to the Constitution to abolish the practice of judicial review; and Robert Bork has (at least briefly) supported an amendment granting Congress the power to override the Supreme Court's exercise of judicial review. It is evident, then, that both the question of the proper judicial role in American government and the closely linked constitutional imperative of robust representative democracy continue to be debated across the political spectrum and that various forms of judicial restraint continue to engage the imagination of reform-minded scholars of both the political left and right. A reexamination of reform proposals designed to restrain judicial power is therefore a very timely subject of inquiry.

Of course, the question of judicial overreach is scarcely a new issue in American politics. Indeed, the question of the proper judicial role dates back to the founding, as well as to the early Republic and the clashes between Federalists and Anti-Federalists, Hamiltonians and Jeffersonians. The role of the Supreme Court was also controversial during the Jacksonian era, the years leading up to the Civil War, and during Reconstruction. Moreover, democratic reform

26 See Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Abraham Lincoln, First Inaugural Address, in Great Issues, supra note 25, at 389–97; see also McCloskey, supra note 24, at 70–74; Schwartz, supra note 23, at 109–24.
movements championing the participatory rights of ordinary Americans have made the elite judicial “usurpation” of democratic authority a regular part of our political discourse since the turn of the last century, when the state and federal courts first began to exercise the power of judicial review routinely and aggressively.\textsuperscript{28} For instance, both the populist and progressive reform movements, faced with the reactionary and imperialist judiciary of the \textit{Lochner} era, advocated a number of reform proposals—including a number of constitutional amendment proposals—to limit the Court’s capacity to exceed its authority in violation of the political rights of American citizens.\textsuperscript{29} In the post-World War II era, the Court’s use of highly expansive judicial power in the area of civil liberties has also been seriously questioned by scholars from both the left and right.\textsuperscript{30} Additionally, the Supreme Court’s very active federalism jurisprudence in the last decade has come under fire from many scholars.\textsuperscript{31} It should be clear, then, that a constitutional question such as the proper scope of judicial power, which has been such a perennial subject of debate for a century or more, is likely to remain one of continuing interest indefinitely. A reexamination of reform proposals designed to restrain judicial power is thus not only of current interest but is also certain to continue to remain of interest to scholars and jurists for the foreseeable future.

While this Article is chiefly concerned with the question of restraining judicial power through the use of constitutional amendment, its foundations require a discussion of such overlapping constitutional questions as judicial interpretive theory, the proper scope of judicial power, and the best structural interpretation of the role of the Supreme Court in the republican governmental framework of the American constitutional design.\textsuperscript{32} This Article approaches

\begin{itemize}
\item\textsuperscript{27} See McCloskey, \textit{supra} note 24, at 70–74; Schwartz, \textit{supra} note 23, at 138–44, 154–55.
\item\textsuperscript{29} See infra Part II.C.
\item\textsuperscript{30} See supra notes 14–22 and accompanying text; see also infra Part II.
\item\textsuperscript{31} See, e.g., Peter M. Shane, Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism, 45 VILL. L. REV. 201 (2000); Louise Weinberg, Fear and Federalism, 23 OHIO N.U. L. REV. 1295 (1997); see also Alden v. Maine, 527 U.S. 707 (1999) (Souter, J., dissenting).
\item\textsuperscript{32} For discussion of this cluster of questions, see, for example, Jack Wade Nowlin, The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis, 89 Ky. L.J. 387 (2001) [hereinafter Nowlin, \textit{Constitutional Illegitimacy}]; Jack Wade Nowlin, The Constitutional Limits of Judicial Review: A Structural Interpretive Ap-
these questions from a moderate judicial restraint standpoint, and from an innovative theoretical perspective that views the question of the proper judicial role as essentially a question of structural constitutional interpretation. Thus, this Article is concerned with the perennial problem of judicial overreach as a "structural" problem in light of the logic of judicial review and the fundamental structural principles of the American constitutional design that expansive judicial power erodes. Indeed, the problem posed by expansive judicial power is fundamentally one of constitutional structure, and therefore also one of structural constitutional interpretation, given the implications of expansive judicial power on popular sovereignty, representative democracy, the separation of powers, and federalism.

Responding to these concerns, reform movements over the years have sought to shape and limit judicial power in several ways. Judicial "mistakes" about the meaning of the Constitution have typically provoked a number of remedial responses, involving a general "debate, litigate, legislate" strategy intended to bring the issue before the Court a second time in the hope of correction. More far-reaching concerns about judicial (mis)conduct have usually involved a concentration on a broader long-term "nominate" strategy, involving support for the appointment of "restraint" reform judges to the federal bench.

There is, however, good reason to question whether even a quite diverse strategy—involving debate, litigation, legislation, and nomination of judges committed to judicial restraint—will ultimately be successful in keeping the judicial power within constitutional lim-

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33 See infra Part II.B.
34 See Nowlin, Constitutional Illegitimacy, supra note 32.
36 Nowlin, Constitutional Limits, supra note 32, at 396–97.
37 Daniel Patrick Moynihan, What Do You Do When the Supreme Court Is Wrong?, PUB. INTEREST, Fall 1979, at 3, 8.
38 See, e.g., 2000 Republican Party Platform, infra note 393 (noting that "the most important factor" in restraining judicial power to "restore the separation of powers and reestablish a government of law" is "the appointing power of the presidency").
Indeed, something very like the problem of contemporary expansive judicial power has been a perennial cause for concern among reformers for over a century, at least since the 1880s and the rise of the *Lochner* era. There is some reason, then, to consider whether advocating a more directly structural and systemic response—such as a structural amendment to the Constitution, as a more fundamental and far-reaching remedy for such a serious, intractable, and likely systemic structural problem—would be a beneficial course of action. Moreover, it is quite possible that even a mere amendment proposal itself could have a significant political and educative effect that would complement and enhance existing reform efforts, substantially increasing their overall effectiveness.

This Article, then, will address the historically progressive reform project of using constitutional amendment to minimize the scope of the judicial power. The purpose of this reform project is to restore the traditional republican design of the Constitution and also better fulfill the populist aspirations of the evolving American political and constitutional tradition. This latter goal involves not only re-

39 *See* Tushnet, *supra* note 21, at 174–76 (noting that amending the Constitution is the only effective strategy in addressing the problem of judicial power); Bork, *supra* note 22, at 117.

40 *Kammen, supra* note 28, at 185–216.

41 *See* *Unintended Consequences of Constitutional Amendment* (David E. Kyvig ed., 2000) [hereinafter *Unintended Consequences*].

42 The term “populist” in this Article is used to refer both to the principle of popular sovereignty as the proper *foundation* of government, and a very robust “populist” or majoritarian form of representative democracy as the proper *form* of government. The term “populist constitutional law” is used here largely to refer to a structural-procedural understanding of constitutional law where courts play a very limited role in substantive policymaking on basic questions of justice and a highly significant but not exclusive role in more restrained and “legalistic” forms of constitutional interpretation. Thus, populist constitutional law as defined here also envisions a much greater role for the American people and their elected representatives in the resolution of basic questions of justice and the common good, and it also contemplates a somewhat more significant role for political actors in constitutional interpretation, such as the popular/political/extra-judicial resolution of the constitutional limits of the judicial power and Congressional interpretation of the Fourteenth Amendment via its section five enforcement power. This view of populist constitutional law is similar to, but less extreme than, that of Mark Tushnet. *See* Tushnet, *supra* note 21, at 177–94 (advocating a structural-procedural version of the of the kind of populist constitutional law advocated here, one entirely rejecting judicial review of constitutional questions). For a discussion of “thin” populism of the kind endorsed by Tushnet and by this Article and its relation to a “thick(er)” conception of populism identified with actual populist movements in American history, see Mark A. Graber, *Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change*, 96 Geo. L.J. 233 (2001). For a comparison of constitutional popu-
straining judicial power but also revitalizing the traditional and once robust practice of populist/extra-judicial forms of debate about constitutional meaning. In light of these reform goals, this Article engages the following principal issues. First, what kind of structural amendment would most effectively restrain judicial power and promote forms of constitutional populism? Second, what kind would have the greatest likelihood of ratification? And third, what kind would maximize its political and educative impact, furthering diverse reform efforts, even as a simple proposal? The last of these three considerations is at least as important as the first two considerations, given the small probability that any amendment will actually be formally proposed by Congress or ratified by the states.


44 See infra Part IV.C.3.
Three of the more common reform amendment proposals—each with an extensive historical pedigree dating back to earlier reform movements—involves establishing (1) a congressional override or "veto" of the Supreme Court; (2) electoral controls, such as a recall election, on the Justices; and (3) a requirement of a supermajority vote (of perhaps six or seven) of the Justices to strike down a law as a constitutional violation. A fourth, more recent proposal by Mark Tushnet, is an amendment which abolishes judicial review by declaring the Constitution non-justiciable. Each of these proposals has something to be said for it, but this Article will ultimately advocate another very different approach—an amendment that uses the original structural understanding of the Bill of Rights as a model for constitutional reform.

In brief, the Founders' original understanding of the Bill of Rights is that of a document (1) heavily structural in substance, echoing the great design themes of the Philadelphia Constitution—popular sovereignty, representative democracy, federalism, and the separation of powers; (2) largely declaratory in its structural effect, clarifying and reinforcing those existing design themes rather than involving a substantive alteration in the constitutional architecture; (3) primarily political in its immediate effect, empowering in the political arena constitutional objections to governmental acts in violation of the Bill of Rights; and (4) principally educative in its long-term effects, fostering a national political culture which would cherish and guard the rights and rights-driven structural principles articulated in the Bill of Rights. As shall be shown, the founding generation placed a very high value on constitutional structure as a primary means of preserving rights, and it also strongly supported the solemn and formal expression of principles of free government in constitutive documents as a means of shaping political debate and culture, providing rights whose ultimate security lay in a representative form of government and longstanding and deeply rooted popular support.

Thus, while reform movements as various as the Reconstruction Republicans, the populists, the progressives, New Dealers, and the contemporary judicial-restraint left and right have suggested several possible amendment proposals to limit judicial power, this Article advocates a fundamentally new approach—one that finds its inspiration in the constitutional theory and practice of the founding generation,

45 See infra Part II.C.
46 See Tushnet, supra note 21, at 174–76 (discussing these constitutional amendment proposals).
47 See infra Part III.
as evinced by the Virginia Declaration of Rights, the Declaration of Independence, the Philadelphia Constitution, the Bill of Rights, and the Eleventh Amendment. This new approach—from a traditional perspective—involves the use of a judicial restraint amendment with distinctive characteristics and effects. First, the amendment would be structural in its focus, emphasizing that structural constitutional norms such as popular sovereignty, representative democracy, the separation of powers, and federalism mandate judicial restraint as a matter of constitutional limits on the judicial power. Second, the amendment would be declaratory of the implicit pre-existing constitutional design, properly interpreted, rather than a structurally innovative proposal for altering the constitutional design. Third, the amendment would be political in its immediate and day-to-day effect, shaping American political discourse and sharpening political objections to highly expansive judicial power as a violation of constitutional structure. And finally, the amendment would be educative in its long-term effects, ultimately shaping American political culture on the question of the judicial power and promoting a civic culture that recognizes the constitutional imperative of judicial restraint and places a high value on robust understandings of structural norms such as representative democracy. This proposal is both more moderate in its effect on the judicial power and better grounded in the architectonic design of the Constitution and the evolving American constitutional tradition than are other contemporary reform proposals. It also will effectively promote judicial restraint because it is directed, as a political and educative matter, precisely at fostering a proper popular understanding of the root of the controversy over judicial power—the existence and the enforcement of the constitutional limits on the Supreme Court.

This Article, then, advocates a judicial restraint amendment as a fundamental and far-reaching structural response to what is in fact a serious, intractable, and troubling problem of constitutional structure, as well as a complement to diverse reform efforts involving a “debate, litigate, legislate” and a judicial restraint appointment or “nominate” strategy. This new approach is fundamental and far-reaching because it functions in a crucial populist educative and political manner, by promoting politically structural constitutional objections to expansive judicial power and ultimately by instilling a better understanding of the structure of the American constitutional design in the national sentiment. These important political and edu-

48 For an example of how such an amendment might be drafted, see infra Part IV.B.
cative effects in turn will strongly encourage both judicial self-restraint and the moderate use of checks on the judiciary, as well as other various reform efforts by the political branches and through the political process. The amendment will therefore greatly facilitate a diverse range of reform efforts in the area of the judicial power while still preserving the legitimate and important functions of the judiciary. Indeed, in light of the clear elite dominance of the judicial process, use of a broader political and educative measure to promote constitutional objections to expansive judicial power and to foster a political climate that strongly empowers diverse judicial restraint reform efforts may be the most practical way to enforce limits on the Supreme Court without seriously altering the constitutional design or impeding the legitimate exercise of judicial power.

Part II of this Article will discuss the concerns of reformers in the area of judicial power and the question of the constitutional limits of judicial review, which an amendment proposal could clarify. Part III will discuss the necessity and value of an amendment proposal as a general reform strategy and examine several prominent proposals and their historical pedigrees. Part IV will examine the original populist reform "spirit" of the Bill of Rights—the Founders' constitutional theory and practice—as a model for constitutional reform, examining the Bill of Rights and a series of related founding-era constitutional measures. Part V will examine and evaluate the concept of a judicial restraint amendment and will put forth and evaluate a specific amendment proposal: the Constitutional Rights Restoration Amendment.

I. THE CONSTITUTIONAL LIMITS OF JUDICIAL REVIEW

A. Judicial Review in the American Constitutional Design

The fundamental assumption underlying this Article, but one which will not be defended here in any detail, is that there is what one may call a structural constitutional objection to the sort of highly expansive judicial power often asserted by Justices such as William Brennan,49 defended by theorists such as Ronald Dworkin,50 and used to


support constitutional decisions such as *Roe v. Wade*,\(^5^1\) *Lochner v. New York*,\(^5^2\) and *Dred Scott v. Sandford*,\(^5^3\) among others.\(^5^4\) This expansive or

\(^{51}\) 410 U.S. 113 (1973).

\(^{52}\) 198 U.S. 45 (1905).

\(^{53}\) 60 U.S. (19 How.) 393 (1857).

\(^{54}\) Notably, *Brown v. Board of Education*, 437 U.S. 483 (1954), attacked by segregationists at the time as insufficiently supported by legal materials and a usurpation of state legislative authority, is in fact not an exercise of highly expansive judicial power and has a much better grounding in traditional legal materials than is often recognized. While space constraints preclude a full discussion, a few points are worth making here. First, the specific purpose of the Reconstruction Amendments was to protect African-Americans from hostile state legislation, and the Court’s holding in *Brown* falls squarely within that purpose defined at a fairly specific level of generality. *See*, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 303 (1880) (observing that the Fourteenth Amendment is “one of a series of constitutional provisions have a common purpose; namely, to secure to a recently emancipated race, which had been held in slavery through many generations, all the civil rights that the superior race enjoys”). Even the *Plessy* Court acknowledged that “[t]he object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law . . . .” *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896). Second, as also noted by the *Brown* Court at the time and by scholars today, the view that public school and other forms of “social” segregation are unconstitutional was within the range of original understandings of the Equal Protection Clause, though that may not have been the predominant understanding. *See Brown*, 347 U.S. at 489 ("The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States.’"); *Michael W. McConnell, Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) (contending that the prohibition of school segregation under the Equal Protection Clause is consistent with the original understanding of the framers of the Fourteenth Amendment). Thus, the Court’s decision in *Brown* has significant support in the range of original understandings of the Amendment. Third, even if one were to accept the *Plessy* Court’s apparent distinction between protected civil (presumably civil-economic) and political rights and unprotected “social” rights, the rise of modern public education and its importance to economic success and political participation, as the Court’s analysis in *Brown* demonstrates, warrants treating school attendance as a protected civil and political right rather than an unprotected “social” right. *See Brown*, 347 U.S. at 493. In fact, more broadly the “social” forms of segregation imposed by state governments prior to *Brown* and its progeny had the clear purpose and effect of limiting the exercise of civil-economic and political rights by African-Americans, rights which even the *Plessy* Court recognized as protected by the Reconstruction Amendments. Thus, even if one were to accept the *Plessy* Court’s view that “social” segregation is not in itself prohibited by the Fourteenth Amendment directly, "social" segregation’s purpose with respect to and impact on uncontestedly protected constitutional rights warrants its invalidation as a form of indirect prohibited civil/political discrimination. *See*, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that discriminatory purpose in combination with discriminatory effects establish sufficient discrimination to trigger heightened scrutiny under the Equal Protection Clause). Further, even if the “separate but equal” standard under the Equal Protection Clause, solidified in *Plessy’s* progeny, is thought to have signifi-

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"activist" conception of the judicial role is one that is non-deferential, does not require that decisions be strongly grounded in traditional legal materials, allows judges to exercise a substantial amount of political discretion in determining the meaning of the Constitution, and accepts, even celebrates, judicial policymaking in areas of political importance and controversy. The structural problem with this view of the judicial function, most simply put, is its incompatibility both with (1) the essential structural logic of judicial review as expressed in traditional and authoritative sources as Federalist No. 78 and Marbury v. Madison and (2) the best understandings of fundamental structural constitutional principles such as popular sovereignty, representative democracy, civic republicanism, federalism, and the separation of powers. Thus, expansive judicial power is inimical to both the structural logic of judicial review and the basic structural features of the constitutional design.

While space constraints prevent a careful elaboration of these points in this Article, a few observations will be helpful in clarifying them. First, the basic logic of judicial review is widely understood as being linked to the judiciary's function as interpreter of law and the nature of the Constitution as law—not the putative higher quality of the judiciary's moral-political judgments and/or the nature of the Constitution as a set of evolving moral-political aspirations. There is simply no obvious reason to endorse final judicial resolution of constitutional questions if those questions largely pivot on moral-political

cant support in traditional legal materials, the Court in Brown was still plainly right in holding that such "separation" in practice is inherently unequal as a simple empirical matter. Brown, 347 U.S. at 494-95; see also Robert H. Bork, The Tempting of America: The Political Seduction of the Law 82-83 (1990). In short, then, the Court's conclusion in Brown that public school segregation is unconstitutional, while not a highly restrained legal judgment, is also not highly activist, but rather it is a conclusion that has substantial support in traditional legal materials. Thus, it should not be viewed as suspect on judicial power grounds.

55 Nowlin, Constitutional Illegitimacy, supra note 32, at 435.
56 The Federalist No. 78, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by judges as, a fundamental law. It therefore belongs to them to ascertain its meaning . . . .").
57 5 U.S. (1 Cranch) 137, 177 (1803).
59 Marbury, 5 U.S. (1 Cranch) at 177; see The Federalist No. 78 (Alexander Hamilton).
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rather than legal-historical judgments.60 This fact is strongly suggestive of a more narrow, apolitical, and legalistic understanding of judicial review.61 Therefore an exercise of the judicial power which pivots primarily on the Justices' broad moral-political views rather than their narrower legal-historical judgment is not an exercise consistent with the logic of the structural choice of judicial review.

Second, a sweeping lawmaking role for the unelected federal judiciary is ultimately incompatible with robust conceptions of other constitutional principles of fundamental importance, including popular sovereignty, representative democracy, separation of powers, and federalism, suggesting, again, the constitutional necessity of a more restrained, and much less aggressively political, judicial role.62 Indeed, a court engaging in (quasi-)legislative activity—rather than an elected bicameral legislature subject to executive veto—plainly erodes the constitutional principles of representative democracy, the separation of powers, bicameralism, and presentment.63 In short, expansive judicial power defeats the obvious purposes of the constitutional design, including that of making political power generally accountable to the people and broadly diffusing it across a range of institutions. Indeed, there is little purpose in setting up elaborate constitutional architecture featuring strict constitutional requirements for formal

60 See, e.g., Scalia, supra note 58, at 854 ("Central to [the analysis in Marbury] . . . is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of 'law' that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in law.")

61 A legalistic role for the Court is compatible with a broad range of interpretative approaches to constitutional meaning, as long as judicial political discretion is limited, a "tight" fit with legal materials is maintained, judicial discretion is minimized, and judicial review is exercised with due deference to authority of legislative bodies as policymaking institutions. On the "modalities" of legal interpretation, see Philip Bobbitt, Constitutional Fate 11-22 (1990).

62 See, e.g., Carey, In Defense, supra note 35, at 123-33; Robert A. Dahl, Democracy and Its Critics 65-79, 186-92 (1989) (criticizing anti-democratic judicial "quasi-guardianship" as a governmental structure); Robert F. Nagel, The Implosion of Federalism (2001) (contending that the Court has been a vehicle of radical centralization undermining the fundamental constitutional principle of federalism); Sandel, supra note 42, at 3-119 (discussing the displacement of the civic republican/communitarian understanding of the American Constitution by the "procedural republic/liberal individual conception" in the mid-twentieth century). See generally Waldron, supra note 20 (discussing the tension between representative democracy and judicial review); Michael Walzer, Philosophy and Democracy, 9 Pol. Theory 379 (1981) (discussing the tension between judicial review and democracy and endorsing a form of judicial restraint, as opposed to the rule of "philosopher judges").

63 Nowlin, Constitutional Illegitimacy, supra note 32, at 398.
constitutional amendment and the exercise of legislative authority, if the judicial arm of the government may simply circumvent both these sets of strictures at will, making social policy by engaging in highly creative and politically driven "interpretations" of abstract constitutional provisions.\textsuperscript{64}

For instance, if the meaning of the Eighth Amendment's prohibition of "cruel or unusual punishments"\textsuperscript{65} was thought to pivot on a broad inquiry into the moral philosophy of crime and punishment\textsuperscript{66} rather than on a narrow inquiry into traditional legal materials such as text, original understanding, legal traditions, and predominant state practice, there would be no obvious structural reason to assign final interpretive authority to the Supreme Court rather than to Congress.\textsuperscript{67} On this understanding of constitutional interpretation, judicial constitutional review of the provision simply has no special logical force as a deduction from the structure of the constitutional design.\textsuperscript{68} This is a very telling point, given that the text of the Constitution does not expressly grant the power of judicial review to the Supreme Court\textsuperscript{69} and that power rests precisely upon such a structure-based deduction.\textsuperscript{70} Moreover, as noted, such an assignment of political power to the courts also undermines the basic populist-federal-republican design of the Constitution, allowing for what are in effect judicial constitutional amendments and/or politically discretionary (i.e., legislative) control by the judiciary of the punishment aspect of the substantive criminal law.\textsuperscript{71} Notably, then, this expansive judicial power would be exercised by simple majority vote of as few as five Justices who are unelected and electorally unaccountable. Clearly

\textsuperscript{64} Notably, scholars who both support and oppose expansive judicial power recognize that the Founders had no intent or expectation that the Supreme Court would engage in global policymaking. See, e.g., Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 322–36 (2d ed. 1997) (opposing expansive judicial power and noting that "the judiciary was excluded from policymaking" by the Founders); Leonard W. Levy, Origins of the Bill of Rights 243 (1999) (defending expansive judicial power while acknowledging the "historical truth" of the proposition that "the Framers did not intend the Court to act as a constitutional convention or to shape public policies by interpreting the Constitution").

\textsuperscript{65} U.S. Const. amend. VIII.

\textsuperscript{66} Cf. Dworkin, Taking Rights Seriously, supra note 50, at 149 (advocating "a fusion of constitutional law and moral theory").

\textsuperscript{67} See, e.g., Scalia, supra note 58, at 854.

\textsuperscript{68} Id.

\textsuperscript{69} See U.S. Const. art. III.

\textsuperscript{70} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); The Federalist No. 78 (Alexander Hamilton).

\textsuperscript{71} Nowlin, Constitutional Illegitimacy, supra note 32, at 398.
both the amending power and general legislative power, in accordance with the constitutional design, must be exercised by the governments of the states and by the Congress.

Therefore, as has been argued elsewhere, support for expansive judicial power is rooted in a basic misreading or misinterpretation of the structural nature of the American constitutional design.72 Indeed, highly authoritative basic sources of law, such as constitutional text, original understanding, early constitutional practice, and evolving consensus-based practice confirm this judgment as to the meaning of the Constitution.73 Even a broader, "moral" reading of the Constitution’s design for government, one drawing openly on more controversial moral-political arguments, is unlikely to support convincingly a sweeping, quasi-legislative role for unelected federal judges, given, at the very least, the great moral-political value of representative democracy.74

In particular, there is no good reason to suppose either that judges’ moral judgments are generally more trustworthy than those of legislators and voters or that the Court, the decisions of which are often marked by partisanship, power politics, and pragmatism, is some special "forum of principle" with special insight into difficult moral questions.75 Furthermore, shifting political authority from represen-

72 Id. at 472–74; see also Robert P. George, Natural Law, the Constitution, and the Theory and Practice of Judicial Review, 69 Fordham L. Rev. 2269, 2280 (2001) (rejecting the view that the structure of the Constitution, properly interpreted, "confer[s] upon judges the power to enforce their views of natural law and natural rights, even in the absence of textual or historical warrant for their views").

73 See Nowlin, Constitutional Illegitimacy, supra note 32 (arguing that an interpretation of the structure of the Constitution to determine the proper constitutional limits of the judicial power should be rooted firmly in sources of law with strong popular sovereignty pedigrees and that such a "populist" structural interpretation of the constitutional design establishes the constitutional illegitimacy of expansive judicial power).

74 Nowlin, Constitutional Limits, supra note 32, at 561–62; Nowlin, Natural Law, supra note 32, at 171.

75 Amy Gutmann and Dennis Thompson observe, "Without much more empirical analysis than anyone has yet undertaken, no one can say, even if the contrast exists in some form, whether either the motives or the decisions of legislators are more or less principled than the motives or decisions of judges." AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICTS CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT 46 (1996). Even Ronald Dworkin has admitted that the moral insights of judges often do not seem "spectacularly special." DWORKIN, FREEDOM'S LAW, supra note 50, at 74; see also Nowlin, Natural Law, supra note 32, 111–13 (concluding that there is no firm or clear connection between the putative institutional advantages of courts in moral reasoning and the generation of superior moral conclusions because of the extent to which largely "unreasoned" moral intuitions shape our moral reasoning and determine our general
tative institutions to the judiciary over the long run simply dilutes the political influence of ordinary Americans, including working families, the poor, racial minorities, and religious minorities while increasing the political power of elite, upper-middle class professionals who dominate the legal profession as judges, lawyers, and legal scholars. Moreover, there is good reason to believe that differences in social class are strongly correlated to differences in political views on a range of important issues, suggesting that the political consequences of expansive judicial power are significant and to the detriment of ordinary Americans. Finally, there is little enough reason to hope for a consistent policy of noblesse oblige in this area from political elites, even if such a position were not repugnant to the participatory rights of American citizens in all walks of life, and even if it were not premised upon their putative comparative incapacity for self-government. Therefore an interpretation of the structure of the Constitution granting highly expansive power to the Supreme Court is neither properly moral conclusions on the issues which actually divide contemporary America); cf. Michael S. Moore, Justifying the Natural Law Theory of Constitutional Interpretation, 69 Fordham L. Rev. 2087 (2001) (discussing the institutional advantages of judicial moral reasoning in comparison to legislative moral reasoning). For a comprehensive discussion of the institutional capacity question as it relates to legislatures, see Tushnet, supra note 21, at 54–71.

76 As John Hart Ely has observed, [T]here is a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of upper-middle, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn. People understandably think that what is most important to them is what is important, and people like us are no exception. Thus the list of values the Court and commentators have tended to enshrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy, even the right not to be locked in a stereotypically female sex role and supported by one's husband. But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't fundamental.

ELY, supra note 42, at 59 (emphasis added) (footnotes omitted).


78 Mary Ann Glendon maintains that the "[c]ommon [elite] attitude that the educated are better equipped to govern the masses finds its institutional expression in a disdain for ordinary politics and the legislative process, and a preference for extending the authority of courts, the branch of government to which [elites] have the easiest access." Mary Ann Glendon, Rights Talk: The Impoverishment of Political Disclosure 178 (1991); Parker, supra note 42, at 54–60.
grounded in traditional legal materials nor a morally attractive reading of the constitutional design.

B. The Constitutional Requirement of Judicial Restraint

This Article, then, assumes that the architecture of the republican Constitution, properly interpreted, protects individual liberties primarily through the establishment of democratic institutions, the diffusion and balancing of political power, and the cultivation of civic virtue among the voters. In this framework of government, the unelected judges of the federal judiciary should play an important—but by contemporary standards fairly minimal, modest, or restrained—supplementary role in the protection of individual rights. This restrained role for judges complements rather than erodes the fundamental republican structures of the Constitution. Thus, what one may call the judicial restraint or republican understanding of the American constitutional design envisages the proper exercise of judicial review as one that is firmly grounded in traditional legal materials, that minimizes the political discretion of judges, that strives to be apolitical, that shows considerable deference to the judgment of democratic political actors, and that results in a set of fairly “thin” and consensus-based, judicially enforceable constitutional norms. A broad definition of restraint would also include those originalist judges who justify judicial originalism primarily as a means of limiting judicial discretion, adhering to the structural logic of judicial review, and preserving the contours of the constitutional design.

80 See Nowlin, Constitutional Illegitimacy, supra note 32, at 394–96 passim.
81 See, e.g., Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 37–47 (1998). There is also a real question whether “originalists” in the fashion of Robert Bork or Antonin Scalia are truly proponents of a form of judicial restraint. See Charles Fried, Order and Law: Arguing the Reagan Revolution 56–70 (1991); Sunstein, supra note 1, at 209–43 (1999); see also Bork, supra note 54, at 153–55. Bork maintains that the originalist judicial role “corresponds to the original understanding of the place of courts in our republican form of government.” Id. at 153. In fact, Bork further contends, No other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters, perhaps radically, the design of the American Republic. The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution. Id. at 155. Notably, originalist judges and Justices such as Antonin Scalia have often been more activist in recent years than their rhetoric in the abstract would seem to suggest. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Bush
this structural understanding of the judicial power, greater discretionary political authority is exercised by voters and their elected representatives in accordance with constitutional norms of representation, separation of powers, bicameralism, presentment to the executive, and federalism. Less discretionary power, comparatively speaking, is exercised by unelected federal judges given the strict limits placed here on more aggressive forms of judicial review. This conception of the constitutional design might then also be fairly called a populist, republican, democratic, or federalist understanding.  

Further, as noted, this is scarcely a new conception of the structure of the Constitution or of the proper judicial role therein. On the contrary, it is rather a traditional model possessing a very distinguished and venerable judicial pedigree. Indeed, Mary Ann Glendon has described this broad conception of the proper judicial role as the “classical” conception of judging. It is a conception of the judicial role that recognizes (at least implicitly) the important structural constitutional constraints on the judicial power and that therefore emphasizes the necessity of rendering deferential, non-ideological, and non-partisan judicial decisions firmly grounded in traditional legal materials. Some of the most obvious exemplars of this view of the judicial role among American judges would include Oliver Wendell Holmes, Learned Hand, Benjamin Cardozo, Felix Frankfurter, John Marshall Harlan III, and Byron White. Admittedly, this is a very broad prescription and one that is also ultimately aspirational in character, closely tied to the Constitution’s republican past and its evolving populist future. A number of more particular conceptions of the proper judicial role fit within these broad “judicial restraint” requirements. Even so, the central thrust of judicial restraint remains clear and unambiguous: it is the effort to minimize aggressive, discretionary, judicial lawmaking in areas of political importance and controversy.

v. Gore, 531 U.S. 98 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997). Of particular concern here would be questions of the (in)consistent application of originalism, the historical clarity of the “understanding” asserted as the “original” one, and the question of changed underlying circumstances to the application of the original understanding.

82 See Nowlin, Constitutional Limits, supra note 32, at 550–51.
83 Glendon, supra note 17, at 117–29.
84 Id. at 391.
Thus, it is an understanding of the proper judicial role well within this broad conception of judicial restraint—the conception of Holmes, Cardozo, Frankfurter, and Harlan—that this Article terms "judicial restraint." This Article also maintains that this broad form of judicial restraint is not only "good policy" or essential to the Court's "legitimacy" in some political sense of the term but is actually required by the structure of the Constitution.87 This constitutional requirement of judicial restraint is rooted in the structural imperative that the Court adhere to the structural logic of judicial review and respect the contours of fundamental constitutional values such as popular sovereignty, representative democracy, separation of powers, and federalism. In short, then, this Article maintains that highly expansive or "activist" judicial power (far) exceeds the scope of the Supreme Court's authority under Article III of the Constitution. Such expansive judicial power is incompatible with the logic of judicial review and conflicts with core constitutional norms of the most fundamental importance. In sum, expansive judicial power may, itself, be fairly deemed not only morally or politically objectionable, but constitutionally illegitimate or, stated more bluntly, unconstitutional.88

C. The Judicial Power and Constitutional Illegitimacy

Nor should the use of terms such as "constitutionally illegitimate" or "unconstitutional" in this context be thought at all quixotic or inappropriate. While it is true that the discourse of "unconstitutionality" has generally not been favored in the context of debates about the legitimate use of judicial interpretive methodologies and the proper degree of judicial deference to elected officials,89 it is also true that

87 Nowlin, Constitutional Illegitimacy, supra note 32, at 472–74.
88 Id.
89 But see Dickerson v. United States, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting) (contending that "[t]he Court therefore acts in plain violation of the Constitution when it denies effect" to an act of Congress without an assertion that the act violates a constitutional provision rather than a judge-made prophylactic rule); Griswold v. Connecticut, 381 U.S. 479, 521 (1965) (Black, J., dissenting) (contending that "[t]he adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts" (emphasis added)); Carey, In Defense, supra note 35, at 136 (noting that by exercising expansive judicial power "the Court has itself violated the manifest tenor of the Constitution"); Robert P. George, Natural Law and the Constitution Revisited, 70 FORDHAM L. REV. 273, 274 (2001) (contending that the Supreme Court "acted unconstitutionally in the 1856 decision of Dred Scott v. Sandford [and] in the 1905 decision of Lochner v. New York" (emphasis added) (footnotes omitted)); George, supra note 19, at 34 (contending that a proper conception of judicial supremacy does not require the executive and legislative branches to defer to "uncon-
the use of the language of "(un)constitutionality" is analytically justified in discussions of the judicial power\textsuperscript{90} and is expressly recognized as such in a closely related area of debate over the proper scope of the federal judicial power: the constitutional limits Article III places on the jurisdiction of the Supreme Court.\textsuperscript{91} Indeed, then, this recognition of constitutional limits on the federal judicial power is warranted in the area of judicial interpretation and judicial deference as well as in the area of jurisdiction for a number of reasons. First, the Supreme Court is a branch of the constitutionally limited national government, constitutional exercises of the judicial power" which are "blatant and destructive of the constitutional order"); \textit{see also} Nowlin, \textit{Constitutional Limits, supra} note 32, at 563 (asserting a tentative conclusion that "structural interpretive analysis of the role of courts in the American constitutional design is suggestive of decided [implicit] constitutional limits on the exercise of judicial review" in favor of a more "traditional, lawyerly, and limited role for courts"); Nowlin, \textit{Constitutional Illegitimacy, supra} note 32, at 394 (concluding that "expansive judicial power is... constitutionally illegitimate, that such a conception of the judicial function exceeds the scope of power allocated to the Supreme Court by the Constitution"); Jack Wade Nowlin, \textit{A Dangerous Branch: Interpretation, Illegitimacy, and Judicial Constitutional Violations} (article in progress; preliminary draft presented before the Annual Conference of the Southern Political Science Association (Nov. 8, 2001)) (contending that "[t]he Supreme Court can violate the Constitution by exceeding the scope of its power under Article III") [hereinafter Nowlin, \textit{A Dangerous Branch}]. Nowlin further contends that sound and substantial structural objections to decisions of the Supreme Court—those objections grounded in the concern that a particular exercise of the judicial power undermines other important structural constitutional norms such as representative democracy, the separation of powers, or federalism—are often better articulated in the language of judicial constitutional violations [rather] than as mere interpretive criticism of the Court's decisions.

Nowlin, \textit{A Dangerous Branch, supra}, at 1–2.

\textit{90} \textit{See generally} Nowlin, \textit{A Dangerous Branch} (discussing judicial interpretive methods, deference, and other aspects of the debate over judicial restraint and judicial activism).

\textit{91} \textit{See} U.S. \textit{Const.} art. III, § 2. Article III lists the subject-matter jurisdiction of the Supreme Court in terms of the nature or content of the litigation and the status of the parties; it also mandates the "case" or "controversy" requirement; and it defines the original and appellate jurisdiction of the Court. For a general discussion of these constitutional limits on the jurisdiction of the Supreme Court, see, for example, \textit{Erwin Chemerinsky, Constitutional Law: Principles and Policies} 49–178 (2d ed. 2002). Notably, the Eleventh Amendment also places a constitutional limit on the federal jurisdiction. U.S. \textit{Const.} amend. XI. \textit{See Chemerinsky, supra}, at 178–228; \textit{see also infra} Part III.D. More controversially, the Supreme Court in recent years has recognized additional constitutional limits on the federal judicial power arising from the federal structure of the Constitution and the federalist retention of sovereign immunity by the state governments in the absence of a congressional abrogation of that immunity under Section Five of the Fourteenth Amendment. \textit{See Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 46 (1996).}
and there is no reason to suppose that the Court's power is unlimited by the Constitution or that the Court is somehow institutionally incapable of exceeding the constitutional limits on its power. In fact, even a moment's reflection demonstrates that the Supreme Court is a creature of the Constitution, that its only source of authority is the Constitution, and that the scope of its power is clearly limited by the Constitution—just as are the powers of the President and the Congress.92 Certainly if the legislative or executive branches may act unconstitutionally by exceeding the scope of their constitutional authority and/or by violating constitutional norms related to, say, representative democracy, federalism, or the separation of powers, surely the judicial branch may contravene the national charter in a similar manner.93 Notably, Article III, the text of which expressly grants the Supreme Court the "judicial power," also contains express textual constitutional limits on the judicial branch,94 which are expressly recognized as such by the Supreme Court and by scholars.95 The power of judicial review is itself a textually implicit power derived principally from arguments related to the supremacy and structure of the Constitution.96 Thus there is also every reason to suppose that the proper

92 See U.S. Const. art. III.


94 See supra note 91.

95 For instance, on the question of original and appellate jurisdiction, the Supreme Court in Marbury recognized that its original jurisdiction was established by Article III and that Congress could not authorize—nor the Court itself exercise—additional original jurisdiction without violating the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The Court has also recognized that the outer limits of its subject-matter jurisdiction are determined by the Constitution. On the question of the "case" or "controversy" requirement, the Supreme Court has, for example, held that "standing" is the "irreducible constitutional minimum" necessary to meet the justiciability standard to be considered a "case" or "controversy" under Article III, Section 2. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Thus an assertion of jurisdiction without standing would violate Article III.

96 As Erwin Chemerinsky notes, "Article III never expressly grants the federal courts the power to review the constitutionality of federal or state laws or executive actions." CHEMERINSKY, supra note 91, at 37. The Supreme Court established the power of judicial review in Marbury, where the Court's decision relied heavily on the argument that the judiciary has a special duty to interpret laws and resolve legal disputes, an argument ultimately based in the separation of powers. Marbury, 5 U.S. (1 Cranch) at 167. The assertion that the Court should be the ultimate arbiter of the meaning of the Constitution or otherwise play a preeminent role in constitutional
scope of judicial review is determined by implicit constitutional limits on the power of judicial review, also derived from the supremacy and structure of the Constitution. In short, then, a structurally based implicit constitutional grant of authority is likely to have structurally based implicit constitutional limits defining the contours of the grant.

Indeed, the very logic of judicial review itself as well as the necessity of making its exercise cohere with other fundamental constitutional values such as democracy, separation of powers, and federalism suggests strongly that implicit constitutional limits constrain the exercise of the implicit power of judicial review. It is by no means self-evident, then, that the Supreme Court may constitutionally exercise the power of judicial review in any fashion it happens to choose. For instance, Alexander Hamilton, one of the earliest proponents and great defenders of judicial review, implicitly recognized that the Supreme Court could indeed violate the Constitution’s separation of powers by “usurpations” and “encroachments” on the legislative authority. In fact, Hamilton made a sharp distinction between judicial “judgment” and legislative “will,” as an expression of the separation of powers, and recognized that a judicial exercise of the latter in the guise of the former was a “usurpation” of the authority of Congress that potentially warranted removal from the federal interpretation over and against the federal executive and legislature are routinely derived from similar structural arguments about the Court’s special institutional role as a court in resolving legal disputes.

97 Cf. Furman v. Georgia, 408 U.S. 238 (1972) (Rehnquist, J., dissenting). Justice Rehnquist observed that

[w]hile overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves. . . . The very nature of judicial review, as pointed out by Justice Stone in his dissent in the Butler case, makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the Framers. It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review.

Id. at 470 (emphasis added).

98 See Nowlin, Constitutional Illegitimacy, supra note 32, at 399–401.

99 Id.

100 The Federalist No. 81, at 451–52 (Alexander Hamilton) (Clinton Rossiter ed., 1999). As Hamilton writes, “There can never be a danger that the judges, by a series of deliberate usurpations on the authority of legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations” through the impeachment power. Id. at 485.
Such a "usurpation" of congressional authority would undermine the Constitution's requirement of separation of powers and thus may be easily characterized as a constitutional violation.

Second, the Supreme Court itself has never claimed to be above the constitutional limitations of the Basic Law—and has, quite the contrary, recognized at least some important constitutional limits on its own authority in the area of jurisdiction. Notably, *Marbury v. Madison*, the case first establishing the doctrine of judicial review, was itself premised on the constitutional limits that Article III places on the jurisdiction of the Supreme Court. The Supreme Court's holding that its original jurisdiction is established by Article III of the Constitution and cannot be altered by Congress should also make it plain that the Court's original jurisdiction cannot be altered by the Supreme Court itself. The Court has further recognized the requirement that it resolve only "cases" or "controversies," and thus, for instance, that it is forbidden to issue advisory opinions. Further, Supreme Court Justices and other judges often use language at the very least suggestive of the unconstitutionality of particular Supreme Court decisions in their opinions, despite the obvious institutional self-interest in avoiding such language. Notably, Justice Scalia recently asserted that a Supreme Court decision striking down a law of Congress without a good faith belief in the law's unconstitutionality is itself a "plain violation" of the Constitution by the Supreme Court.

101 Id. at 470.
103 Id.
104 Id. at 173–74.
105 U.S. CONST. art. III, § 2. During the Washington administration, in response to a request for an advisory opinion by Secretary of State Thomas Jefferson, "the Supreme Court said that it was constitutionally forbidden to issue 'advisory opinions'—opinions on the constitutionality of legislative or executive actions that did not grow out of a case or controversy." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 86 (4th ed. 2001) (emphasis added).

It takes only a small step to bring today's opinion out of the realm of power-judging and into the mainstream of legal reasoning: The Court need only go beyond its carefully couched iterations that "Miranda is a constitutional decision," that "Miranda is constitutionally based," that *Miranda* has "constitutional underpinnings," and come out and say quite clearly: "We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States." It cannot say that, because a majority of the Court does not believe it. The Court there-
Third, the question of judicial constitutional violations is clearly not resolved by the Supreme Court’s own implicit “supreme” affirmation of the constitutionality of its use of judicial power, though it is doubtless true that the lack of an official binding remedy in the form of an “official” declaration of unconstitutionality by a legally superior institution has obscured the very concept of judicial constitutional violations. As Justice Robert Jackson observed,

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.¹⁰⁸

As Justice Jackson’s remarks suggest, judicial “finality” with respect to justiciable constitutional questions renders the Supreme Court “infallible” only in the narrow formal or procedural sense that its decisions are not subject to further binding “official” review within the system by a higher “super-Supreme Court.”¹⁰⁹ Judicial finality is not grounded in any notion of factual or substantive infallibility, that the Court is necessarily always right about the meaning of the Constitution, including, of course, the question of the constitutional limits on its own power.

Indeed, it is hard to imagine a basis for the view that the Court is substantively infallible, that it cannot get the meaning of the Constitution “wrong,” other than the simple “legal skeptic’s” position that law itself is best defined as the decisions of the courts and therefore that the Constitution itself simply is whatever a majority of the Justices of the Supreme Court say it is at any given time.¹¹⁰ Both simple logic and our longstanding legal practices reject the skeptic’s position and maintain a clear and important distinction between the actual mean-

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¹⁰⁹ Id.
ing of the Constitution and the opinions of Supreme Court majorities about the meaning of the Constitution. Indeed, the Constitution cannot simply be whatever the Supreme Court “says it is” because the Constitution predates the Supreme Court and established it as an institution of the federal government. Moreover, the very logic of the traditional practice of Supreme Court dissents rests upon this important distinction, that a Supreme Court majority can be mistaken about the meaning of the Constitution, not, of course, on the non-sensical proposition that the majority is mistaken about its own opinion about constitutional meaning. The Supreme Court, of course, has also overruled its own decisions countless times—despite the weight of the principle of stare decisis—typically expressly holding that its earlier decision was wrong about constitutional meaning.

Further, the venerable tradition of scholarly commentary criticizing Supreme Court decisions as “mistaken” also exemplifies a rejection of this “legal realist” position. As Justice Jackson’s point suggests, a “higher” court, including the metaphorical court of scholarly opinion and constitutional history, will often vote to “reverse” the Supreme Court. In sum, the internal logic of our constitutional practices, therefore, reaffirms the crucial distinction between procedural finality and substantive infallibility: the majority of the Supreme Court can indeed misinterpret the Constitution and issue decisions that are wrong about the meaning of the Constitution.

What follows from these three points: the existence of constitutional limits on the Court, the Court’s recognition of such limits, and the fallibility of the Court in resolving questions of constitutional meaning? The implications of this analysis for the question of judicial constitutional violations should be clear: if the authority of the Supreme Court is limited by the Constitution and if the Court can misinterpret the Constitution, then it can misinterpret the constitutional limits on its own authority, exceed those limits even in good faith, and thereby violate the Constitution. Thus as a simple analytic matter, it is

111 See id. One important aspect of Hart’s essential position is that the “legal realist” assertion that “law is what the courts say it is” or “a prophecy of what courts will rule” inevitably founders analytically on the necessity of a form of law prior to any court to create the courts which legal realists of this type view as the creators of law. Id. at 136–37. An infinite regression of law-creating courts is obviously not a satisfactory answer. Notably, even the creation of the Supreme Court itself required further legal action in addition to the ratification of the Constitution: the passage of enabling legislation by the U.S. Congress, the Judiciary Act of 1789, determining the details of the Court and its operation. See Judiciary Act of 1789, ch. 20, 1 Stat. 73; see also Schwartz, supra note 23, at 16.
clear that the Court is not only a "guardian" of the Constitution but also a potential threat to the Constitution.

Why is this point important? Because while there is obviously no appeal from the Supreme Court and no "higher" institution to issue a formal ruling of unconstitutionality overturning a Supreme Court decision, there are a range of appropriate remedial responses to improper judicial decisions, including debating, litigating, legislating, nominating justices, and seeking constitutional amendment. The use of these remedial responses are affected by our understanding of the judicial power. Notably, then, it is crucial to the effective use of these political checks on the judiciary that objections to highly expansive judicial power be properly articulated and understood politically as constitutional objections to judicial constitutional violations because of the effect that a proper understanding of the constitutional limits of judicial review may have on the reactions of political actors to judicial misconduct. The active and effective use of these various methods of checking the Supreme Court may very well depend on precisely how political actors understand what the Court has done. Is the judicial decision in question viewed as (1) a "mere" mistake about constitutional meaning, (2) a decision that is "illegitimate" in some ill-defined political or prudential sense of the term, or (3) a judicial violation of the structure of the Constitution that citizens and elected officials have a civic duty and a constitutional obligation to attempt to correct? Certainly the dangers inherent in the limited nature of the widely agreed upon methods for checking the Supreme Court are further aggravated substantially by the failure to recognize that the Court itself sometimes poses a threat to the Constitution. Fostering a proper understanding of the Supreme Court's potential role as a violator of the Constitution—in additional to its important role as vindicator—is therefore of supreme importance to the project of keeping the federal judiciary within the constitutional limits on its powers.

In sum, then, this Article maintains that the Supreme Court's authority is limited by the Constitution, that some moderate form of judicial restraint is mandated by the structure of the Constitution, that expansive judicial power is fairly viewed as violative of the Consti-

112 See Moynihan, supra note 37, at 8.
114 Other methods for checking the Court exist as well, though the propriety and constitutionality of their use may be in question. These would include alteration of the Court's appellate jurisdiction, (partial) de-funding of the Court through the appropriations power by Congress, and simple refusal to enforce decisions by the executive branch.
tion's republican design for government, and, therefore, that citizens and elected officials have an obvious civic obligation to uphold and defend the integrity of the American constitutional order through the prudent and constitutionally sound use of the various methods of checking the judiciary. Those readers who disagree with these basic assumptions will also likely dispute the need for the kind of constitutional reform in the area of judicial power advocated here, but it is also clear that strong objections to more expansive conceptions of judicial power are held by a large number of reform-minded jurists, scholars, theorists, elected officials, and others more broadly across the political spectrum. Therefore, this Article's discussion of reform proposals will be of interest to a large number of readers.

II. STRUCTURAL RESPONSES TO A STRUCTURAL PROBLEM

A. Is an Amendment Necessary?

From a judicial restraint reform perspective, the federal courts in the last several decades have often exceeded their authority under the Constitution, and, given the seriousness of this inconsistency with basic constitutional structures and rights, it is imperative that a more effective set of remedies be found to limit the Court's ability to contravene the basic law. There are, in fact, a number of mutually reinforcing avenues of political reform that could be—and often have been—pursued in this context. Through the years, the various reform defenders of the republican Constitution's traditional design for government and core populist aspirations have sought the appointment of what we may broadly call "restraint" judges to the federal bench and have exhorted those already on the bench to respect the Constitution's judicial restraint structural requirements. Reformers have also encouraged the President and Congress to take more seriously their responsibility to uphold and defend the constitutional design against Supreme Court overreach by qualifying executive enforcement of "expansive" decisions or by limiting judicial power through regulation of its appellate jurisdiction or funding. Additionally, reformers have worked to better acquaint the American people with the best (republican) interpretation of the American constitutional design. Finally, they have also promoted greater

116 See Boot, supra note 115, at 210–18.
117 See Hadley Arkes, First Things (1986); Bork, supra note 22, at 115–17.
118 See Carey, In Defense, supra note 35; see also Tushnet, supra note 21, at 51–53.
public awareness of the judicial process by working to publicize the Justices' views, judicial philosophies, political perspectives, and particular decisions.\textsuperscript{119}

Even so, it might well be thought that such a judicial restraint reform project cannot be achieved simply by attempting to appoint judges with a better understanding of the limits the Constitution places on their power, by keeping these judges "honest" through a more vigorous application of the Constitution's scheme of checks and balances, and by promoting a better public understanding of the issues surrounding the Supreme Court.\textsuperscript{120} It may well be thought that the first strategy has simply failed, that the inevitable political temptations to legislate from the bench are enormous, that politico-cultural elites will generally support such efforts in light of the greater sensitivity of the courts to their views, and thus that a significant number of judges will succumb to more aggressive, politically driven, and "maximalist" conceptions of constitutional interpretation.\textsuperscript{121} It may be thought as well that the second strategy of relying on political checks has and will continue to fail, especially given the hardening of constitutional practice in the twentieth century around "absolutist" versions of judicial supremacy and independence\textsuperscript{122}—excluding the sort of checking function by the President and Congress that Hamilton envisaged.\textsuperscript{123} Finally, it may well be thought that the third strategy of educating the people with respect to constitutional limits on judicial power will fail given the complexity of the issues, the public's general lack of awareness of the problem, and the general opacity and mystique surrounding the judiciary in American political culture. For instance, both Mark Tushnet on the political left and Robert Bork on the political right seem to agree that ordinary political measures will not be successful in properly limiting the judicial power.\textsuperscript{124} One may very well conclude, then, that the extraordinary measure of a constitutional amendment limiting judicial power in some fashion is the only likely means of bringing the Supreme Court back to constitutional legitimacy.\textsuperscript{125}

\textsuperscript{119} See Boot, supra note 115, at 210–18.

\textsuperscript{120} See Bork, supra note 22, at 116–18; see also Tushnet, supra note 21, 174–76.

\textsuperscript{121} Bork, supra note 22, at 116–18.

\textsuperscript{122} Id.

\textsuperscript{123} See The Federalist No. 81 (Alexander Hamilton).

\textsuperscript{124} Bork, supra note 22, at 116–18; Tushnet, supra note 21 at 174–76.

\textsuperscript{125} See Bork, supra note 22, at 117 (advocating a constitutional amendment to override Supreme Court decisions).
B. The Value of an Amendment Proposal

Even if one thinks this view is too pessimistic, one should still seriously consider the question of whether formally to amend the Constitution, as a fundamentally "structural response" to the now deeply rooted structural problem of expansive judicial power. Amending the Constitution can also serve as a means of both restoring a semblance of the earlier and sounder judicial restraint vision of the American constitutional design in light of our evolving democratic traditions and promoting the fulfillment of the populist aspirations at the heart of the American ethos. It is in fact quite possible that the enterprise of keeping the Court within constitutional limits over the long term might require—or at least might be substantially furthered by—an effort to pass a structural amendment to the Constitution, an amendment whose purpose would be to achieve some approximation of the restraint reform goal with, of course, the minimum of impairment to the Court’s ability to engage in its important legitimate judicial functions. Such a reform effort would seek to restore the more abstract or overarching structure of the original American constitutional design with its emphasis on protecting rights through establishing democratic institutions, diffusing political power, and promoting civic virtue among the voting public, even if such reform might require a more particularized structural innovation.

Of course, the disadvantages of such a constitutional reform effort are familiar. An initial objection to the amendment process is the danger of “tinkering” with the Constitution, “cluttering” the document with trivial amendments, potentially producing internal incoherence within the Constitution itself, and often simply creating new and difficult questions to be resolved by courts rather than finally “settling” difficult constitutional or political issues. While these concerns should be taken seriously, they are clearly not a basis for rejecting all efforts at amendment. As the discussion above indicates, an amendment to limit the Supreme Court’s power to violate

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126 For discussions of a broad range of questions of constitutional theory surrounding the amendment process, see Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson ed., 1995).
127 As we shall see, the judicial restraint amendment advocated in this Article does not require a structural innovation. See infra Part IV.B.
129 See Tushnet, supra note 21, at 177–81; Sullivan, supra note 128, at 20 ("The Constitution surely should be amended on occasion—for example, when changes consistent with its broad purposes are unlikely to be implemented by ordinary legislative means.").
the Constitution is very likely warranted by the deep gravity of the problem, its obviously intractable response to ordinary political remedies, and its present status as a fundamental constitutional question. Indeed, the proper scope of the judicial power is a constitutional question because it implicates both the integrity of the design of the Constitution and the constitutional rights of the American people, even in the absence of a constitutional amendment proposal.

A more generalized objection to the amendment process is rooted in veneration of the constitutional text, and is thus an objection to altering what might be thought of as the "sacred scripture" of the Constitution. While veneration of the Constitution is an important aspect of the American civil religion, rightly understood it provides no basis for objections to the amendment process. First, a proper veneration for the Constitution, even understood narrowly as the text alone, necessarily includes veneration for the text of Article V, outlining the amendment process. A proper respect for this important textual provision surely would include a willingness to use the process it establishes should a problem arise that is thought to warrant it. Second, there is no reason to limit one's veneration of the Constitution to the text alone, rather than to extend it as well to the other constituent parts of the operational Constitution: its foundational principles, history, structure, and organic development. Thus, it is unclear why one would suppose that constitutional change through the amendment process—even though it alters the text of the Constitution—necessitates any more (implied) criticism of the "pre-change" Constitution than any other form of constitutional change, such as novel judicial interpretations. Such interpretations could conceivably alter the meaning of the Constitution much more dramatically than would many amendments. Third, proper veneration of the Constitution, however one defines it should involve critical reflection on its merits, rather than mere unthinking allegiance, to remain more faithful to the Enlightenment spirit of the founding and thus to the philosophical foundations and origin of the Constitution. In short, profound reverence for the Constitution—an important and salutary

130 See Sanford Levinson, Constitutional Faith 29 (1988) (discussing "What is the Constitution?" and describing a "protestant" approach that views the Constitution as the "text alone").

131 U.S. Const. art. V.

132 See, e.g., Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996). Notably, the founding generation, broadly understood, critically appraised constitutional matters, as evidenced by its support for the American revolution, its ultimate rejection of the Articles of Confederation, its debates over the adoption of the Philadelphia Constitution, and its adoption of the Bill
part of American civil religion—is in no way inconsistent with recourse to the amendment process, when circumstances warrant.

Further, there is reason to suppose that veneration arguments may in fact mask dubious forms of anti-populism. Notably, generalized opposition to the constitutional amendment process is often asserted by persons who also support routine judicial alterations of the Constitution through the expansive use of judicial review. As noted above, it is unclear why an alteration of the constitutional text via the super-majoritarian amendment process of Article V should be thought intrinsically more objectionable than alterations of the meaning or substance of the Constitution by a vote of the Justices of the Supreme Court, particularly if the judicial decision is poorly grounded in legal materials. In fact, one suspects that much of the actual root of such objections to amendment is a reaction against its assertion of popular control of constitutional meaning in the face of elite judicial control. In such cases, the objection is “explicitly anti-populist,” driven by a “deep-rooted fear of [the] voting” power of ordinary Americans, rather than by any actual objection to constitutional change per se. Thus, this view is in tension with the best understanding of the American constitutional order as grounded in the moral and political imperative of popular sovereignty. In sum, general objections to the use of the Article V amendment process are highly unpersuasive when those concerns are rooted in a narrow, selective,

of Rights (1792), the Eleventh Amendment (1798), and the Twelfth Amendment (1804).

133 See Levinson, supra note 130, at 149–51 (discussing judicial review and the amendment process).

134 It would involve an aspect of what Sanford Levinson calls a “catholic” approach to the question of who has authority to engage in constitutional interpretation. A “catholic” approach is centered around the Court as sole or primary interpreter and would be hostile to attempts to override the Court’s authority via constitutional amendment. In contrast, the “protestant” approach involves recognition of broader interpretive authority and would not object to an assertion of popular constitutional lawmaking. (Though as noted above, those who also take a “protestant” position of the question, “What is the Constitution?”, might object to an alteration of the constitutional text.) For a discussion of these approaches to constitutional interpretation, see Levinson, supra note 130, at 29.


136 Tushnet, supra note 21, at 177; cf. Glendon, supra note 78, at 178.

137 See U.S. Const. pmbl., arts. V, VII; Nowlin, Constitutional Illegitimacy, supra note 32, at 401–04.
and visceral veneration of constitutional text (rather than a broad, comprehensive, and reflective veneration of the operational Constitution) or based on discomfort with the popular sovereignty basis of the Constitution (rather than enthusiastic acceptance of our basic law’s populist moral-political foundations).\textsuperscript{138}

Even so, the practical disadvantages of reform through the amendment process are worth considering. First, the amendment process is cumbersome, requiring “supermajority” support,\textsuperscript{139} something that would be almost impossible to achieve for any major substantive alteration in the constitutional design. Second, partisan proponents of expansive judicial power will likely have some success in their predictable efforts to portray constitutional reformers who support structural innovations as “radicals” who want to “subvert” our historic Constitution rather than as proponents of judicial restraint and constitutional populism, which they actually are. Third, the practical effects of reforms that advocate serious structural innovations in the constitutional design are generally very difficult to predict, leading to serious concerns about unintended and perhaps ultimately self-defeating consequences.

Still, the great advantages of such an approach are undeniable as well. Indeed, simply proposing an amendment in a serious fashion has great potential to generate important educative, political, and symbolic effects. As David Kyvig writes, “An amendment ma[kes] a terse statement of principle as to how the government should operate. Advancing one c[an] provoke intense discussion and ignite passionate enthusiasm. Suggesting an addition to the nation’s basic charter offer[s] a vivid symbol of a precept its proponents consider[ ] vital.”\textsuperscript{140}

Indeed then, even if an amendment was almost certain to fail it could, potentially, have a number of important and related reform benefits. First, such a proposal could, as a “terse statement of principle,” reflect a broader understanding of the American constitutional design in capsule form, making it easier to communicate to the general public and thus potentially increasing the view’s visibility and popular support. Second, it could help to spark a healthy public debate on the structural issues surrounding judicial power and help to raise public awareness and understanding of the problems surrounding the more extravagant uses of judicial review. It could provide a “vivid symbol”

\textsuperscript{138} Additionally, as shall be shown, the amendment proposal endorsed in this Article involves no substantive alteration of the best structural interpretation of the Constitution or the limits of the judicial power.

\textsuperscript{139} U.S. Const. art. V.

of the constitutional requirement of judicial restraint. In this way, it might provide a political rallying point or cynosure of debate, one which could then help highlight and dramatize the constitutional importance of the issue, build support for various reform efforts, and perhaps promote and further legitimate judicial restraint in broader circles by demonstrating greater popular political support. Finally, it could send a definite message to highly activist judges: that there are serious constitutional limits to judicial power and that many Americans believe judges have overstepped these limits and violated the Constitution’s allocation of power in the American constitutional framework.

C. Some Leading Amendment Proposals

A general reform approach involving amendment proposals to discourage expansive judicial power is not a radical political innovation. In particular, advocating structural constitutional amendments specifically designed to weaken a “usurping” Court—and to communicate disapproval of its misconduct—is as old as the judicial penchant for expanding its power at the expense of other fundamental constitutional values.\textsuperscript{141} For instance, in both the Reconstruction and Populist-Progressive eras, there was significant support among leading reformers for placing more effective limits on the judicial power, either by amendment or (perhaps more dubiously) by simple statute.\textsuperscript{142}

Leading “restorative” and structural reform proposals with solid historical pedigrees include variations of the following: (1) establishing a congressional override of the Supreme Court, (2) placing direct electoral controls on the Court, and (3) requiring a supermajority of the Supreme Court to strike down legislation.\textsuperscript{143} Many of these proposals have had support from both the political “left” and “right” at various times throughout American history. Notably, opposition to

\textsuperscript{141} See, e.g., KAMMEN, supra note 28, at 262–63.

\textsuperscript{142} See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 96 (1998); ROSS, supra note 28, at 130–32; Michael McConnell, Comment, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 HARV. L. REV. 153, 174–81 (1997). For instance, John Bingham, principal author of the Fourteenth Amendment, threatened in 1867 to introduce a constitutional amendment to abolish the Supreme Court. See 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 448–49 (1928). As William Ross writes, a progressive Republican such as Theodore Roosevelt was, by 1912, “beginning to fear that American democracy could not survive the continuation of arrogant judicial assaults on popularly enacted social legislation” and thus advocated a controversial “recall” measure for overturning state judicial decisions. Ross, supra note 28, at 139.

\textsuperscript{143} See, e.g., BOOT, supra note 115, at 206–08.
more expansive judicial power is clearly a predominantly left-wing position in American political history, associated with Jeffersonians, Jacksonians, Lincolnian and “Radical” Republicans, populists, farmer and labor movements, progressives, and New Dealers. Only more recently have political conservatives also emerged as opponents of judicial activism. This is so in part for the obvious reason that opposition to expansive judicial power tends to be populist in nature and also that populism in its various forms is historically a left-wing value in the United States.

The congressional override option has been advanced by such differing individuals as progressive Republican Senator Robert La Follette in the 1920s and conservative Republican Judge Robert Bork in the 1990s. The electoral control option is used in almost forty states with respect to their state supreme courts, whose justices are subject to partisan, non-partisan, or recall elections, often for six-, eight-, or ten-year terms. The electoral option is also strongly associated historically with the American “left,” including Jacksonians, populists, labor unionists, and progressives. The supermajority option also has a long history, and its proponents often claim that it can be established by a simple congressional statute. In 1867, for instance, Reconstruction Republican Thomas William of Pennsylvania “urged a bill for the concurrence of all the Judges in any opinion of a constitutional question.” In the 1920s, leading progressive Republican Senator William Borah revived the proposal, advocating legislation that would “require the concurrence of at least seven members of the Court in any decision that invalidated an act of Congress.” In the 1990s, conservative journalist Max Boot endorsed a similar “two-

144 Some of the more prominent contemporary left-leaning or progressive opponents of highly expansive conceptions of judicial power include Cass Sunstein, Mark Tushnet, Jeffrey Rosen, and Jeremy Waldron. See Sunstein, supra note 1; Tushnet, supra note 21; Rosen, supra note 11; Waldron, supra note 20.
146 See, e.g., Bork, supra note 22, at 117–18; Ross, supra note 28, at 193–217.
148 See, e.g., id. at 97–99.
149 See Boot, supra note 115, at 206–08.
150 2 Warren, supra note 142, at 449. A statutory requirement of eight judges was also proposed at this time by the Chicago Tribune, the leading Republican newspaper in the West. Id.
151 Ross, supra note 28, at 218.
thirds plan," requiring a concurrence of six Justices to strike down legislation as a constitutional violation.152

As noted, Mark Tushnet advocates a fourth option—what we might call an "anti-judicial review" constitutional amendment, which would declare the entire Constitution non-justiciable. Tushnet's amendment reads simply, "The provisions of this Constitution shall not be cognisable by any Court."153 Tushnet draws on the model of the Irish Constitution, the social welfare provisions of which are denominated "directive principles of social policy" which "shall be the care of the [parliament] exclusively, and shall not be cognisable by any Court."154 Tushnet's proposal also has some historical antecedents in the opposition of some in the founding generation to any power of judicial review,155 in the focus on popular/political enforcement of bills of rights in the pre-judicial review era,156 and in some of the strongest anti-judicial power statements of Reconstruction Republicans.157 Indeed, in early 1867, Representative John Bingham, the principal author of the Fourteenth Amendment, which had issued from Congress only six months earlier, proposed "sweeping away at once the Court's appellate jurisdiction in all cases" if the Court were to threaten important Reconstruction measures.158 Therefore, even a drastic measure such as Tushnet's has significant historical precursors.

What can be said of these four proposals by way of evaluation? Each has its obvious strengths and weaknesses, and a lengthy examination of them will not be attempted here.159 What is worth noting here is that the first two options examined, the congressional override and electoral options, would represent quite drastic, though arguably restorative, alterations in the American constitutional design. These proposals would certainly require a constitutional amendment, would be unlikely to achieve any significant degree of support given the procedural conservatism of the American people with respect to constitu-

152 Boot, supra note 115, at 206–08.
153 See Tushnet, supra note 21, at 175.
154 Id.
155 For instance, in the debates over the Judiciary Act of 1802, Senator John Breckenridge, a Jeffersonian, asserted that "the Legislature [Congress] have the exclusive right to interpret the Constitution, in what regards the law-making power, and the judges are bound to execute the laws they make." 1 Annals of Cong. 178–80 (Joseph Gales ed., 1802).
156 See infra Part III.
158 2 Warren, supra note 142, at 448–49.
159 For a comparative examination of structural approaches, including the congressional override, judicial term limits, and two-thirds plan, see Boot, supra note 115, at 201–08. Boot endorses the two-thirds plan. Id. at 206–08.
tional reform, and thus, given these proposals' limited visibility and support, would have quite limited political and educative value even as simple proposals such as these. Further, serious concerns about unintended consequences also inevitably arise with proposals such as these involving major structural innovations in the constitutional design. All these objections apply as well to the fourth option, Tushnet's proposal, which is also questionable for its quite radical "root and branch" rejection of the practice of judicial review in all its forms.

Therefore, the third measure, the supermajority option, appears to be by far the best proposal of the four, given both its quite modest structural alteration of the status quo and the fact that it is arguably achievable by a simple statute. It has two concomitant drawbacks. First, its results would be modest, eliminating only 5-4 decisions that strike down laws, and eliminating them whether they were beyond the proper scope of the judicial authority or not. Second, if passed as a statutory measure, it would be subject to a simple congressional repeal, as well as to a serious challenge to its constitutionality as an unprecedented congressional regulation of judicial voting procedures. In any event, there should be no doubt that a serious public debate on the pros and cons of these measures would very beneficial to the constitutional order.

D. A New Amendment Proposal from an "Older" Perspective

Even so, this Article advocates a very different kind of structural measure, a fifth option, an amendment that lacks the impressive historical pedigrees of the congressional override, electoral control, and supermajority proposals, but one that is also much more directly in line with the founding generation's understanding of the spirit of reform reflected in the Bill of Rights and the American constitutional tradition more broadly. It is a measure more moderate in nature and yet at the same time ultimately much more far-reaching in its implications for American constitutional development and one that would preserve the practice of judicial review properly understood while diminishing the instances of its improper use. Finally, it is a measure

160 See id. at 207-08.
161 Still, although such a provision might have altered the outcomes in Lochner and Casey, see Lochner v. New York, 198 U.S. 45 (1905) (striking down a New York state law regulating baker's hours as a violation of due process); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming the right to abortion), it would not have altered the outcome in Dred Scott. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (holding that African-Americans, slave or free, could not be citizens of the United States and that the Fifth Amendment Due Process Clause contains a substantive right to own slaves as "property").
that would maximize its political and educative value even as an amendment proposal unlikely ever to be formally proposed by Congress or ratified by the states. As will be demonstrated, there is in fact every reason to suppose that our contemporary reform efforts can benefit from a careful analysis of the political thought of the first generation of American "reformers"—the men who wrote the Virginia Declaration of Rights, the Declaration of Independence, the Philadelphia Constitution, the Bill of Rights, and the Eleventh Amendment. One may turn, then, to the original "spirit" of the Bill of Rights and to the broader origins of the American constitutional tradition, as a possible model for constitutional reform.

III. THE BILL OF RIGHTS AS A MODEL OF CONSTITUTIONAL REFORM

A. The Bill of Rights in Structural Perspective

As one considers the question of how to amend the Constitution in order to restore it to a more robustly republican form, it is worthwhile to turn from the Jacksonians, Reconstruction Republicans, populists, progressives, and New Dealers to the Founders who originally wrote and ratified our national charter and to ask this question: what would the founding generation have done if faced with the structural problem of expansive judicial power? One might begin to answer this question by examining the structural original understanding of the first set of "reform" amendments to the Constitution, our celebrated Bill of Rights. How, then, was the Bill of Rights originally understood by the Founders? There are various reasons for examining original understanding in this context. One reason, of course, is because one may believe that constitutional meaning is ultimately dependent upon original understanding. Another reason, as historian Jack Rakove has observed, is because one may believe that the political "meditations about popular government that we encounter there remain more profound than those that the ordinary politics of our endless democratic present usually sustain[ ]." While this Article is not unconcerned with the first rea-

162 As noted, constitutional historians across the political spectrum recognize that the Founders had no desire or expectation that the Supreme Court would engage in expansive judicial policymaking. See sources cited supra note 64.

163 For an analysis of some of the interpretive questions surrounding the theory of originalism, see INTERPRETING THE CONSTITUTION (Jack Rakove ed., 1990). For defenses of originalism, see BORK, supra note 54; and CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (1994).

164 Rakove, supra note 132, at 368 (emphasis added).
son, it is the second reason that is the primary purpose of the inquiry here: to seek inspiration for future constitutional reform in the "profound meditations" of the Founders on constitutional government rather than to advocate a full restoration of the original understanding of our constitutional past. One is thus interested in the "original understandings" of the Bill of Rights in this context not because there is any hope or desire to restore the original understanding after more than two centuries of constitutional development, but rather because it may well serve as an inspiration—or even a quite practical model—for future constitutional reform in the area of judicial power.

One may note here as well that the range of original understandings sought here is not the specific substantive meaning of provisions—whether, say, the prohibition on "cruel and unusual punishment" was understood to preclude flogging in general or the death penalty for minor offenses—but rather the broader structural, functional, or operational meaning of the Bill of Rights as a whole and as an addition to (and an elaboration of) the Philadelphia Constitution. What was the purpose of the Bill of Rights? What was it meant to do? Who was to interpret and enforce it? How was it to protect rights and from whom? How did it fit with, complement, reinforce, or alter the original Constitution?

In examining this question, one must get beyond the common, contemporary, and clearly anachronistic misunderstanding of the original meaning of the Bill of Rights. This misunderstanding assumes that the Bill of Rights is an anti-majoritarian document meant to protect a broad range of individual rights through judicial review in combination with a powerful, politically insulated, and creative judici-

165 For instance, the lack of support expansive judicial power has in such basic legal materials as the constitutional text, original understanding, and "original" (i.e., early) constitutional practices provides the primary legal foundation for the contention that such judicial action exceeds the scope of the Court's authority under Article III and violates the constitutional design. See Nowlin, Constitutional Illegitimacy, supra note 32, at 421 passim. As Robert George has observed, Any argument seeking to establish the authority of courts to invalidate legislation by appeal to natural law and natural rights ungrounded in the constitutional text or history, therefore, will itself have to appeal to the constitutional text and history. This is by no means to suggest that there is anything self-contradictory or necessarily illicit about such arguments. There is no reason in principle why a Constitution cannot, expressly or by more or less clear implication, confer such authority on Courts. It is merely to indicate that the question whether a particular constitution in fact confers it is, as I have said, one of positive, not natural, law.

ary that routinely vetoes the moral, political, and constitutional judgments of the people's elected representatives in Congress and the states. As will be discussed, that is largely a modern, post-1920s development, which has only very limited antecedents before the 1890s and which is much more dependent upon the Fourteenth Amendment and the precedents of the Warren Court than upon the original Bill of Rights.

Justice Robert H. Jackson, in his opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), a case striking down compulsory flag salutes, provides one of the clearest and earliest statements of the new understanding of the Bill of Rights that had gradually developed in post-Civil War America, one anachronistically projected back by Jackson to the founding as the "original understanding." Jackson writes, "The very purpose of a Bill of Rights was 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." *Id.* at 638.

This view of the Bill of Rights is quite wrong as a matter of history. See infra Part III.C. For a discussion of the development of this view and its major reinterpretation of American constitutional theory and structure, see *Sandel, supra* note 42, at 26–54. See also Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 256 (1991) (noting that the constitutional theory of Jackson in *Barnette* and of scholars such as Ronald Dworkin is "fundamentally at odds with the restricted nature of judicial review in antebellum America and the constitutional tradition up to around World War II").

See, e.g., Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998) (observing that the Bill of Rights as originally understood was primarily structural in nature and majoritarian in emphasis rather than rights-oriented in nature and counter-majoritarian); Kamen, *supra* note 28, at 31, 336–37 (observing that the judiciary did not enforce the Bill of Rights for more than a century after its ratification and that the Bill of Rights thus remained in an important sense undiscovered in American jurisprudence until the mid-twentieth century); Sandel, *supra* note 42, at 38 (noting that "the Bill of Rights [did not] play an important role in protecting individual liberties against federal infringement" for "the first century of its existence"). For a brief discussion of these points, see Nowlin, *Constitutional Illegitimacy, supra* note 32, at 433–39.

Notably, Amar traces the modern understanding of the Bill of Rights as "counter-majoritarian" to incorporation and to the countermajoritarianism of the Fourteenth Amendment. *Amar, supra* note 167, at xiii, 284–94; Sandel, *supra* note 42, at 39–42. Amar, however, likely over-estimates the "counter-majoritarian" nature of the original understanding of the Fourteenth Amendment, given the substantial evidence of the Reconstruction Congress's emphasis on the primacy of congressional enforcement of the Amendment's provisions through civil rights legislation rather than judicial "enforcement" through creative forms of constitutional interpretation. See William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 122 (1988) (noting that "the framing generation anticipated that Congress rather than the courts would be the principal enforcer of section one"); Cass R. Sunstein, *The Partial Constitution* 152 (1993) (observing that "[t]he framers of the Fourteenth Amendment were entirely correct in thinking that Congress, rather than the courts, should be the prin-
Indeed, if one seeks to discover the Founders' true "original understandings" of the Bill of Rights, one will find that it was primarily (1) structural in substance, echoing the basic "design" themes of the Philadelphia Constitution; (2) declaratory and complementary in its effect on constitutional structure, clarifying, emphasizing, and reinforcing those "design" themes rather than substantively altering them in any way; (3) political in function, empowering the people's constitutional objections to tyrannical acts by their government; and (4) educational in its long-term effects, helping to instill basic respect in America's evolving political culture for foundational constitutional principles, structures, and values. These claims warrant examination in more detail.

B. The Structural Roots of the Bill of Rights

1. Structure and Rights at the Founding

One may shed some light on the question of the original structural understanding of the Bill of Rights through an examination of related founding-era statements of political principle that both demonstrates the theory and practice of the Founders on these issues and also that directly influenced the writing of the Bill of Rights. These would include the Virginia Declaration of Rights, the Declaration of Independence, and the Philadelphia Constitution. It is in these foundational documents that we shall find the crucial historical context for our determination of the original structural understanding of the Bill of Rights and the broad constitutional theory of the founding generation as it relates to natural rights, republican government, constitutional structure, and bills of rights.

principal vehicle for enforcement of the Fourteenth Amendment"; McConnell, supra note 142, at 194 (noting that "[t]he historical record shows that the framers of the Amendment expected Congress, not the Court, to be the primary agent of its enforcement"). For a discussion of the structural/enforcement dimension of the Fourteenth Amendment, see Nowlin, Constitutional Illegitimacy, supra note 32, at 440–51. Notably, the Supreme Court has rejected congressional preeminence in this context in recent years, opting for a restrictive reading of congressional power under Section Five. See City of Boerne v. Flores, 521 U.S. 507 (1997). Perhaps surprisingly, those Justices most sympathetic to historical approaches to determining constitutional meaning have adopted the most—rather than the least—restrictive interpretation of congressional power under Section Five, apparently driven by the desire to promote basic structural principles of federalism and judicial supremacy that the Fourteenth Amendment was in fact originally intended to limit or qualify. For the current division on the Court, see Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).
2. The Virginia Declaration of Rights

The State of Virginia's decision in 1776 to break with the British Empire necessitated the writing of a new state constitution to reflect its assertion of political independence and replace its colonial charter.\(^\text{169}\) Within a month of setting its "irreconcilable grievances" before the British Crown and instructing Richard Henry Lee to propose a motion for independence to the Continental Congress in Philadelphia, the Virginia Convention for Independence promulgated a formal "Declaration of Rights" for the State of Virginia.\(^\text{170}\) This was done in June of 1776, a few weeks before the writing of a formal state constitution establishing the institutions of its post-commonwealth government, for which this initial Declaration would serve, in effect, as both a Preamble and a Bill of Rights.\(^\text{171}\) The Virginia Declaration was written principally by George Mason,\(^\text{172}\) and its language provided an important source of inspiration for a number of American constitutional documents, including the Preamble to the Declaration of Independence,\(^\text{173}\) the bills of rights of several other states,\(^\text{174}\) and the federal Bill of Rights.\(^\text{175}\) It is well worth examining some of its salient features in detail to illuminate our inquiry into the original structural understanding of the Bill of Rights.

The Virginia Declaration begins by characterizing itself as "[a] Declaration of Rights made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government."\(^\text{176}\) Its penultimate provision states in part "that no free government, or the blessing of liberty, can be preserved to any people but by . . . frequent recurrence to fundamental principles."\(^\text{177}\) As shall be shown, the Virginia Declaration is itself best understood as a broad statement of "fundamental [political] principles" concerning the "basis and foundation of government" as it relates to republican constitutional structures and rights. These fundamental principles of rights

\(\text{171}\) Rutland, supra note 169, at 35–39.
\(\text{172}\) Id. at 36–39.
\(\text{173}\) Pauline Maier, American Scripture: Making the Declaration of Independence 104, 192–93 (1997); Rutland, supra note 169, at 36.
\(\text{174}\) Maier, supra note 173, at 192–93; Rutland, supra note 169, at 41–77.
\(\text{175}\) Rutland, supra note 169, at 202 (noting that Madison's original draft of the Bill of Rights "leaned heavily on the Virginia Declaration of Rights").
\(\text{176}\) Va. Declaration of Rights pmbl. (1776).
\(\text{177}\) Id. art. 15.
and structures range from the very abstract and foundational\textsuperscript{178} to the much more particular and derivative in nature.\textsuperscript{179}

What is most important in this context is the decided emphasis on the fundamental structural principles one finds in the Declaration of Rights. Indeed, structural and foundational issues, rather than direct statements of individual rights, concern the clear majority of the Declaration's provisions, despite what one might conclude from its title alone and our modern usage of the term "rights." The Virginia Declaration in fact includes a broad statement of popular sovereignty and a number of overtly structural provisions concerning issues such as separation of powers, representation, and jury trial, in addition to several specific articulations of individual rights. In fact, of its sixteen articles enumerating "rights," nine relate to the fundamental principles of republican government, such as popular sovereignty, separation of powers, rotation in office, and representation, and only seven relate to the specific rights of individuals.\textsuperscript{180}

For instance, in addition to its support for popular sovereignty,\textsuperscript{181} the Virginia Declaration endorses republicanism,\textsuperscript{182} a form of legislative supremacy,\textsuperscript{183} representation,\textsuperscript{184} separation of powers,\textsuperscript{185} and rotation in office.\textsuperscript{186}

\textsuperscript{178} \textit{E.g.}, \textit{id.} art. I ("That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.").

\textsuperscript{179} \textit{E.g.}, \textit{id.} art. XI ("That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.").

\textsuperscript{180} \textit{Rutland, supra} note 169, at 38–39.

\textsuperscript{181} \textit{Va. Declaration of Rights} art. II (1776) ("All power is vested in, and consequently derived from, the people.").

\textsuperscript{182} \textit{Id.} art. IV ("[N]either ought the Offices of Magistrate, Legislator, or Judge, to be hereditary.").

\textsuperscript{183} \textit{Id.} art. VII ("That all Power of suspending Laws, or the Execution of Laws, by any Authority without Consent of the Representatives of the People, is injurious to their Rights, and ought not to be exercised.").

\textsuperscript{184} \textit{Id.} art. VI ("That Elections of Members to serve as Representatives of the People, in Assembly, ought to be free; and that all Men, having sufficient Evidence of permanent common Interest with, and Attachment to, the Community, have the Right of Suffrage . . . . ").

\textsuperscript{185} \textit{Id.} art. V ("That the legislative, and executive Powers of the State should be separate and distinct from the Judicative . . . . ").

\textsuperscript{186} \textit{Id.} (declaring that "[t]he Members of the [executive and legislative branches] may be restrained from Oppression, by feeling and participating the Burthens of the People, they should, at fixed Periods, be reduced to a private Station, return into that
Other less overtly structural provisions still have an important structural basis, such as the representative democratic and civic republican emphasis on the importance of jury participation in trials.\textsuperscript{187} Indeed, the founding generation valued jury trials precisely for directly structural reasons relating to the overlapping value of what one could call judicial bicameralism (judge and jury), intra-judicial checks and balances (the jury's check on the judge), and judicial representation (people of the community on the jury).\textsuperscript{188} In sum, then, one of the chief values of a right to a jury trial was the benefit to the criminal defendant that a popular check such as a jury could provide on the unjust administration of justice by biased, dishonest, or tyrannical judges. Jury participation was also highly valued for its civic educative effect on the individuals serving as jurors.\textsuperscript{189}

That the Virginia Declaration of Rights is so strongly structural in its emphasis is indicative of the founding generation's view of the close connection between republican constitutional structures and individual rights. What was this connection more precisely? In the view of the founding generation, republican constitutional structures could directly instantiate participatory rights (such as voting, office-holding, and jury participation) and could also indirectly protect non-participatory rights (such as broader natural rights to life, liberty, and property) both by making government accountable to the people and by balancing and diffusing political power across the institutions of government.\textsuperscript{190} In fact, as shown, even some principles articulated as specific individual rights were actually rights to certain governmental structural procedures (such as jury trial) designed chiefly to protect one from other injustices (such as judicial misconduct) and to encourage responsible, habitual, and enlightened political participation by the populace generally, which would also result in greater societal protection of rights. Therefore, on this view, governmental structures designed to balance and diffuse political power, while making it generally accountable to the people, are essential to the preservation of individual rights.

\textsuperscript{187} \textit{Id.} art. XI ("That in Controversies respecting Property, and in Suits between Man and Man, the ancient Trial by Jury is preferable to any other, and ought to be held sacred.").
\textsuperscript{188} \textit{Id.} supra note 167, at 81–104; \textit{Rakove}, \textit{supra} note 132, at 293–302.
\textsuperscript{189} \textit{Amar}, \textit{supra} note 167, at 93–96.
\textsuperscript{190} See \textit{Carey}, \textit{In Defense}, \textit{supra} note 35, at 3–17; \textit{Rakove}, \textit{supra} note 132, at 288–338; \textit{Sandel}, \textit{supra} note 42, at 27.
Another highly important but somewhat different question of constitutional structure arises here as well: how was the Virginia Declaration itself meant to function structurally? How was it meant to protect the rights and rights-driven structural principles that it declared? Who in fact was meant to interpret and enforce it? And against whom? In answering these questions, three things should be noted. First, the Virginia Declaration used the permissive language of “ought” rather than the mandatory language of “shall” in its articles and was thus plainly hortatory in nature rather than legally binding on the legislature. Therefore, the provisions of the Virginia Declaration did not amount to a legal command charging some institution or set of political actors (such as judges) to actually enforce it on the Virginia Legislature. Second, it is also worth noting that judicial review was in its infancy in Virginia, if it even can be said to have existed at all at this time, and therefore judicial enforcement of a bill of rights was not a reasonable structural option, even if the Virginia Declaration had been phrased in legally binding language. Third, the Declaration was written and promulgated by what was essentially the state legislature of Virginia and thus was quite arguably subject to a simple legislative repeal. As Rakove concludes, concerning the function of the state bills of rights of this era, such as Virginia Declaration, “Insofar as these articles did address the legislature, they were meant to guide it in exercising its discretionary authority rather than to restrain legislative power by creating an armory of judicially enforceable rights.”

One may conclude, then, that the provisions of the Virginia Declaration were not subject to judicial enforcement of any kind against

191 See Va. Declaration of Rights (1776).
192 See Rakove, supra note 132, at 307.
193 The first commonly identified direct assertion of the “judicial power to rule on constitutionality” by state courts did not occur until 1780. Schwartz, supra note 23, at 7. Moreover whether these early (pre-1787) cases actually involved assertions of the power of judicial review is often contested. Robert Lowry Clinton, Marbury v. Madison and Judicial Review 48–55 (1989). The earliest arguable assertion of judicial review in Virginia, Commonwealth v. Caton, 8 Va. 5 (1782), was not decided until 1782. See Schwartz, supra note 23, at 8. It has also been contested whether this case actually involves an assertion of the power of judicial review. Clinton, supra, at 49. In any event, the actual invalidation of a governmental act was extremely rare in Virginia, as in other states, until the time of the Civil War. As Friedman notes, up until the year 1860, only four laws or governmental practices were invalidated as unconstitutional in the State of Virginia. See Lawrence M. Friedman, A History of American Law 355 (1985).
194 Rakove, supra note 132, at 307–08.
195 Id. at 307.
the legislators or the voters who put the former into office. Indeed, it is likely that the colonists at this time would have been particularly unimpressed by a proposal to protect rights through the power of judicial review because judges were then seen as subordinate to the royal governors who had engaged in oppression—and as parties to that oppression—and were thus deliberately made subject to an array of checks and procedural limitations.\footnote{196}

What, then, one may ask, was the purpose of the Virginia Declaration? What was its strategy for protecting the rights and structural principles it declared? In fact, Virginia's formal, legislative Declaration of Rights was meant to function in a primarily political and educative manner—a point strongly reinforced by its penultimate provision emphasizing the importance of frequent recurrence to fundamental principles—such as the Declaration of Rights itself articulates in solemn fashion.\footnote{197} Indeed, as a formal statement of guiding political principles, the Virginia Declaration would both (1) canalize political debate about the related questions of constitutional structure and rights, and (2) shape the civic education of the citizens of Virginia, including future generations ("their posterity") as they related to these issues.\footnote{198} Thus, the Virginia Declaration would function to protect rights by empowering politically constitutional objections to acts of government and by shaping the broader political culture of Virginia to cherish certain rights and structures.

As Amar notes, this emphasis on the primacy of the civic republican political and educative value of such declarations or bills of rights was very widely held at the founding.\footnote{199} For instance, Edmund Randolph, Virginia statesman and one of the framers of the Philadelphia Constitution, observed,

In the formation of the [Virginia Declaration of Rights] two objects were contemplated: one, that the legislature should not in their acts violate any of those cannons [sic]; the other, that in all the revolutions of time, of human opinion, and of government, a perpetual standard should be erected, around which the people might rally, and by a notorious record be forever admonished to be watchful, firm and virtuous.\footnote{200}
Indeed, Virginians as radically different in political outlook as Patrick Henry and John Marshall both agreed on the importance of formal declarations of the “maxims of free Government” in bills or declarations of rights for purposes of legislative self-enforcement and for the shaping of political discourse, public opinion, and civic culture—and thus also for protecting rights through the ordinary political process. In fact, as we have seen, the Virginia Declaration’s penultimate provision reads in part “[t]hat no free government, or the blessing of liberty, can be preserved to any people but . . . by frequent recurrence to fundamental principles,” the same fundamental principles (or “maxims”) that the Virginia Declaration itself articulates in solemn form. As Amar has observed, the Virginia Declaration “feature[s] a maxim about the need for maxims,” an expression, as a fundamental principle, of the importance of regular recourse to fundamental principles. Of course, this was done to further emphasize the importance of such a recourse both to guide political debate and to shape civic education. It should be clear, then, that the structural operation of the Virginia Declaration was linked closely to popular and legislative interpretation and to (self-)enforcement politically by the state legislature and people of Virginia. One may conclude that the Virginia Declaration of Rights, a major source of inspiration for many state bills of rights and the federal Bill of Rights, was primarily structural in its emphasis, protecting rights indirectly via constitutional structures. One may also conclude that the Virginia Declaration was understood to function structurally, in an essentially populist, republican, political, and educative manner, depending on popular and legislative self-enforcement for its efficacy in protecting rights.

What value, then, does the Virginia Declaration’s profound meditations on government have for our present reform project? First, one may note that the Virginia Declaration demonstrates a firm commitment to basic principles of republican government, including popular sovereignty, representation, and the separation of powers. If one shares these fundamental commitments of the American constitutional tradition and wishes to honor them, the need for reform in the area of judicial power should be readily apparent. Second, the Virginia Declaration reflects the founding generation’s sophisticated

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201 AMAR, supra note 167, at 131–32.
202 VA. DECLARATION OF RIGHTS art. XV (1776).
203 AMAR, supra note 167, at 131.
204 Id.
205 See supra text accompanying note 180.
understanding of the close connection between republican governmental structures and the rights of individuals. In fact, the basic security of our liberties depends precisely upon the preservation of these important governmental structures. This understanding of the importance of constitutional structure suggests that expansive judicial power, as a threat to republican governmental structures, is ultimately a threat to individual and collective rights. This insight is also suggestive of the need for judicial power reform. Third, the Virginia Declaration itself involves the deployment of a particular strategy for discouraging potential constitutional violations of rights and structures: a populist, republican “declaration” (or “bill”) of rights that solemnizes basic republican principles of free government and that functions to protect rights in a political and educative manner through governmental self-enforcement and the promotion of civic virtue among voters. This strategy therefore operates through popular political "enforcement" rather than through the exercise of judicial review and is suggestive of a particularly relevant approach to constitutional reform: advocacy of a constitutional amendment to protect the structural integrity of the constitutional design through its potential political and educative influence in shaping political debate and civic culture. Indeed, had anything like the contemporary structural problem of expansive judicial power actually existed in Virginia in 1776, it is likely the framers of the Virginia Declaration would have included a hortatory article in favor of the structural principle of judicial restraint, emphasizing its connection to other structural principles of free government. In short, then, the Virginia Declaration of Rights is a rich source of inspiration—and even a quite practical model—for contemporary constitutional reform.206

3. The Declaration of Independence

In this context, it is also well worth examining the Declaration of Independence, the great constitutive founding statement of American political principles—principles that inspired the first generation of reformers to seek political independence from the British Empire. In fact, particularly relevant in the judicial reform context is the sometimes neglected connection between the Declaration’s opening paragraphs (its “preamble”) and its specific list of grievances against

206 Moreover, as we shall see, what the Virginia Declaration reveals about the founding generation’s understanding of the relationship of rights and structure will strongly reinforce our later conclusions about the structural, declaratory, political, and educative aspects of the federal Bill of Rights, even given the important differences between the two documents. See infra Part III.C.
George III and the English Parliament.²⁰⁷ What is the nature of this connection? The “philosophical” preamble to the Declaration explains the colonists’ views of the foundation of government, natural rights, and the closely related basis of the right of revolution. It reads,

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.²⁰⁸

One can see at the outset the importance of the constitutional structural issue of the basis of government in the consent of the people and the concomitant right of revolution (linked also to a popular amendment power) when government becomes tyrannical. The parallels here to the Virginia Declaration are obvious, and there is good reason to suppose that the language of the Virginia Declaration shaped that of the Declaration of Independence in some respects.²⁰⁹ Moreover, both documents are reflections of the “common sense” of the matter as it struck the “American mind” of the era.²¹⁰

The authors of the Declaration of Independence then declare that the American colonists have suffered a “long Train of Abuses and Usurpations” and that “[s]uch has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present King of Great-Britain is a History of Repeated Injuries and Usurpations.”²¹¹ What follows, then, in the text of the Declaration is a litany of evils committed by the British Crown, illustrating in concrete detail what actions the colonists thought so “destructive to the[ ] Ends” of securing natural rights of “Life, Liberty, and the Pursuit of Happiness” that they would warrant an inference of despotic intent justifying revolution.²¹²

²⁰⁷ The Declaration of Independence pmbl. (U.S. 1776).
²⁰⁸ Id. para. 2.
²⁰⁹ See, e.g., Maier, supra note 173, at 123–26.
²¹¹ The Declaration of Independence para. 2 (U.S. 1776).
²¹² See id. para. 1.
As Donald Lutz has noted, the list of grievances "[v]iewed one way" expresses "reasons for breaking with Britain," but, viewed another way, it is a list of "American political commitments" that provide "what amounts to a bill of rights."\textsuperscript{213} In short, the Declaration contains the functional equivalent of a bill of rights, a list of concrete examples of what the American colonists viewed as "rights" or rights-driven structures essential to the preservation of natural rights of "Life, Liberty, and the Pursuit of Happiness."\textsuperscript{214} The Declaration of Independence is itself, then, a bill or declaration of rights.

Moreover, what one finds here—not surprisingly in light of the emphases of the Virginia Declaration of Rights—is a crucial structural emphasis on fundamental principles of republican government and governmental design. As Willmoore Kendall and George Carey have noted, of the list of grievances attributed to George III "[a]t least eleven involve violations (seven of which are the first mentioned)" of the American constitutional principle of "self-government through deliberative processes."\textsuperscript{215} Indeed the following numbered provisions are the first thirteen grievances—charging abuses, usurpations, and injustices that justify revolution—against the British Crown:

1. [George III] has refused his Assent to Laws, the most wholesome and necessary for the public Good.

2. He has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

3. He has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them and formidable to Tyrants only.

4. He has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.

5. He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.

6. He has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of


\textsuperscript{214} THE DECLARATION OF INDEPENDENCE (U.S. 1776).

Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of invasion from without, and Convulsions within.

[7] He has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

[8] He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

[9] He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

[10] He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance.


[12] He has affected to render the Military independent of and superior to the Civil Power.

[13] He has combined with others [i.e., the British Parliament] to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation...

Of the Declaration's fifteen or so remaining complaints, the American colonists include “imposing Taxes on us without our Consent,” “depriving us in many Cases, of the Benefits of Trial by Jury,” “transporting us beyond Seas to be tried for pretended Offences,” “taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments,” and “suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.” The few remaining non-structural complaints deal largely with the military actions of the British crown against the colonists.

One can see that the American colonists' complaints in the Declaration of Independence, alleging serious (indirect) threats to natural rights of “Life, Liberty, and the Pursuit of Happiness” sufficient to warrant revolution, were overwhelmingly concerned with the structural-procedural issues surrounding one large cluster of issues: individual or “federal” colonial self-government through a representative

216 The Declaration of Independence paras. 3–15 (U.S. 1776).
217 Id. paras. 19–24.
218 See id. paras. 26–29.
process supplemented by independent judges, jury trials as a check on judges, and a subordinate (and citizen-volunteer rather than professional-standing) military establishment. In the minds of the founding generation, then, natural rights of “Life, Liberty, and the Pursuit of Happiness” were in fact intimately connected to structural governmental norms such as representation in the legislature, jury trial, and “federal” colonial self-government. A sufficient number of violations of these structural norms, therefore, would necessarily evidence a tyrannical design to violate natural rights and would justify recourse to the right of revolution.

One might also turn to what could be called the “functional” aspect of the Declaration of Independence—what it was meant to do. The specific legal status of the Declaration is a subject of some controversy, but it has appeared in the U.S. Code, is clearly a “constitutional” document in the broadest sense, and is one constitutive of the United States as a political entity. Thus, the Declaration’s status and importance as a foundational and constitutional document should be uncontested. In fact, Mark Tushnet maintains that the Declaration provides the principles of a “thin” Constitution that ordinary Americans should interpret and enforce through the political process, as a form of populist constitutional law. Further, the Declaration,

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219 Of course, it is also worth remembering in this context that one of the great cries of the American Revolution was “[n]o taxation without representation,” a position derived from a more fundamental principle of “[n]o [domestic] legislation without representation.” See, e.g., Bernard Bailyn, The Ideological Origins of the American Revolution, 162, 201-21 (1967); see also Rakove, supra note 132, at 293-97.

220 See The Declaration of Independence para. 2 (U.S. 1776).


222 Maher, supra note 173, at 129 (noting that the Declaration is a “constitutional document” in the sense that it “concerned the fundamental authority of government”).

223 Berns, supra note 221, at 22-23 (noting that an “organic law” is an “organizing or constituting law” and that “[l]ike the Northwest Ordinance and the Constitution, the Declaration is understood to be a law of the United States and, more precisely, an organic law”); see also J. M. Balkin, The Declaration and the Promise of a Democratic Culture, 4 Widener L. Symp. J. 167 (1999) (observing that “[t]he Declaration is our Constitution. It is our constitution because it constitutes us, constitutes us as a people ‘conceived in liberty, and dedicated to a proposition’”).

224 Mark Tushnet sees the Declaration as defining the “thin Constitution” enforced in the political arena and essential to a populist conception of constitutional law, and he maintains that “[t]he Declaration’s principles define our fundamental law.” Tushnet, supra note 21, at 14. Notably, to the extent one sees a conflict be-
as a founding statement of principles, has also been widely regarded as providing great insight into the basic purpose of the later Philadelphia Constitution, and thus serves as a guide to constitutional interpretation.\textsuperscript{225} Even so, it is clear that the Declaration, in and of itself, is not legally "binding" in the ordinary sense of the term and is thus obviously not subject to any sort of (direct) judicial enforcement.\textsuperscript{226} It is also worth noting that the doctrine of judicial review was in its infancy in 1776 and could thus scarcely have provided a structural context of enforcement for the document even if it were thought legally binding in some sense.\textsuperscript{227}

Additionally, the purpose for which the Declaration was written, in its own words, concerned "a decent Respect to the Opinions of Mankind" which required the Colonists to "declare the causes which impel them to the Separation."\textsuperscript{228} While the Declaration was likely meant to influence foreign opinion, it obviously was also meant to influence domestic opinion within the colonies themselves.\textsuperscript{229} It is often forgotten that only about one-half of the politically active individuals of the founding generation supported the American revolu-

tween the Declaration's commitment to robust federal-republican self-government and expansive judicial power, such power is violative of the "thin" Constitution.

\textsuperscript{225} Abraham Lincoln, for instance, saw the principles of the Declaration as the core of the Constitution, stating in essence that the Constitution was written to further the principles of the Declaration. See Berns, supra note 221, at 15–20; Gary Jeffrey Jacobsohn, Apple of Gold: Constitutionalism in Israel and the United States 3–4 (1993); Harry V. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates 374–75 (1959); Tushnet, supra note 21, at 11; see also Scott Douglas Gerber, To Secure These Rights: The Declaration of Independence and Constitutional Interpretation (1995).

\textsuperscript{226} See, e.g., Balkin, supra note 223, at 168 (observing that "[c]ourts today do not hold the Declaration to be part of the Constitution; they do not read the text of the Declaration as if its clauses had the force of law, in the way they read the First Amendment or the Equal Protection Clause"). For a discussion of the Declaration and constitutional interpretation, see Clarence Thomas, The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, 12 Harv. J.L. & Pub. Pol'y 63, 67 (1989) (contending that the Civil War Amendments are properly interpreted as extensions of the promise of the original Constitution, which in turn was intended to fulfill the promise of the Declaration of Independence).

\textsuperscript{227} See supra note 192 and accompanying text.

\textsuperscript{228} The Declaration of Independence para. 1 (U.S. 1776); see also Carl L. Becker, The Declaration of Independence: A Study in the History of Political Ideas 4–7 (1922).

\textsuperscript{229} Pauline Maier writes that the distribution of the Declaration by the Continental Congress as well as the geo-political context of 1776 give "strong reason[s] to think that the Declaration of Independence was designed first and foremost for domestic consumption." Maier, supra note 173, at 130–31; see also Paul Johnson, A History of the American People 154 (1997).
tion and that about as many actually opposed independence. Therefore, a powerful, solemn, public statement of the chief reasons for independence was of paramount importance to the crucial political and military project of maintaining and building support for the Revolution. In particular, it is worth recalling that the signing of the Declaration was an act of treason against the British Crown and thus was fraught with danger, indeed, the risk of imprisonment and execution. This recognition suggests that the primary value of the Declaration was political: its value lay in the way it would shape political debate, educate the public, and thus build support for independence.

Further, as Abraham Lincoln and others believed, a major purpose of the Declaration was precisely an attempt to influence the political views of later generations. Of course, for later generations, the Declaration’s value has been both political and educative. Certainly, the words, ideas, and sentiments of the Declaration of Independence have had that effect, shaping American political thought and discourse for over two centuries. The ideals of the Declaration have often been heard on the lips of reformers, including abolitionists, proponents of civil rights, and feminists. As Pauline Maier observes, “[T]he sacralization of the Declaration of Independence after 1815 made it a powerful text to enlist on behalf of any cause that might conceivably claim its authority” in order to “seize the moral high ground in public debate.” These causes included those of “workers, farmers, women’s rights advocates,” as well as opponents of slavery. For instance, the feminist movement of the mid-nineteenth century invoked the language of the Declaration of Independence in the celebrated Seneca Falls Declaration of Sentiments and Resolutions. Opponents of slavery often used the language of the Declaration of Independence after 1815 made it a powerful text to enlist on behalf of any cause that might conceivably claim its authority” in order to “seize the moral high ground in public debate.” These causes included those of “workers, farmers, women’s rights advocates,” as well as opponents of slavery.

230 JOHNSON, supra note 229, at 171.
231 See id.; MAIER, supra note 173, at 130–31.
232 See MAIER, supra note 173, at 152–53.
233 See BERNS, supra note 221, at 16–17; JOHNSON, supra note 229, at 154 (maintaining that the Continental Congress “also wanted to give the future citizens of America a classic statement of what their country was about, so that their children and children’s children could study it and learn it by heart”); GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 102 (1992).
234 See MAIER, supra note 173, at 189–208.
235 Id. at 154, 197 (noting that the Declaration ultimately became “a moral standard by which the day-to-day policies and practices of the nation could be judged”).
236 Id. at 197.
237 See Seneca Falls Declaration of 1848, reprinted in AN AMERICAN PRIMER 360 (Daniel J. Boorstin ed., 1966) (“We hold these truths to be self-evident: that all men
tion to articulate their moral objections to slavery. Notably, William Lloyd Garrison invoked "the principles of the Declaration of Independence, whose promises made [America] the admiration of the world," to justify revolution and "the destruction of the Union and the Constitution," which he felt had betrayed the Declaration's principles. Abraham Lincoln also invoked the Declaration to oppose slavery and famously held that the Declaration of Independence was a statement of the basic principles at the heart of the Constitution and thus that the Constitution could be properly understood only in terms of its purpose to fulfill the principles of the Declaration. One hundred years after Lincoln's Emancipation Proclamation and Gettysburg Address, Martin Luther King, Jr. stood beside the Lincoln Memorial and delivered his landmark "I Have a Dream" speech, invoking the principles of the Declaration in opposition to racism and segregation. More recently the pro-life movement has invoked the Declaration's principles in articulating moral-political objections to abortion and

and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

238 See Maier, supra note 173, at 199.
239 See id.
240 See, e.g., Jaffa, supra note 225, at 375; The Complete Lincoln-Douglas Debates 40–42 (Paul M. Angle ed., 1958); Wills, supra note 233, at 99–100. Of course, secessionists also invoked the Declaration of Independence to defend their own putative "declaration of independence" from the United States. See, e.g., Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union (1861), reprinted in Edward McPherson, The Political History of the United States of America During the Great Rebellion 15–16 (1864) (asserting that the government of the United States is subject to "the two great principles" asserted in the Declaration of Independence: "the right of a State to govern itself; and the right of a people to abolish a Government when it becomes destructive of the ends for which it was instituted"). Unionists similarly invoked the Declaration and other founding-era documents, such as the Articles of Association (1774), for the position that the Union pre-dated the Philadelphia Constitution and thus that no state could unilaterally exit the Union by citing a constitutional violation as a putative "breach" of the Constitution's compact among the states. See, e.g., Abraham Lincoln, First Inaugural Address (1861), reprinted in Don E. Fehrenbacher, Abraham Lincoln's Speeches and Letters 1832–1865, at 154–62 (Paul M. Angle ed., 2d ed. 1957).
241 Using a metaphor drawn from Proverbs 25:11, "A word fitly spoken is like apples of gold in a setting of silver," Lincoln maintained that the principles of the Declaration were the "fitly spoken word" that has proved an "apple of gold" and that the Union and the Constitution "are the picture of silver, subsequently framed around it" in order to "adorn" and "preserve it." Berns, supra note 221, at 18–19. Lincoln thus argued that the purpose of the Constitution was to further the principles of the Declaration.
242 See Maier, supra note 173, at 214–15.
has also drawn on the Lincolnian understanding of the Declaration’s relation to the Constitution in articulating the importance of the right to life to the very moral and political foundations of the American constitutional order.\textsuperscript{243}

In the context of judicial power, what inspiration for reform can contemporary reformers find in the Declaration of Independence? First, the Declaration of Independence, like the Virginia Declaration of Rights, displays an obvious commitment to political principles that concern the foundation and structure of government and that are in deep tension with expansive judicial power—namely, popular sovereignty, democratic representation, federalism, and human equality.\textsuperscript{244}

Thus, the Declaration’s substantive commitments to the core values of the American political tradition are suggestive of the need for reform in the area of judicial power. Second, the Declaration is indicative of the founding generation’s profound understanding of the crucial relationship of republican constitutional structures to basic natural rights. The Declaration in fact justifies the American Revolution almost wholly in terms of this relationship. Americans who were denied their traditional rights to federal-republican self-government in the Colonies inevitably found their natural rights of “Life, Liberty, and the Pursuit of Happiness” in danger so grave as to warrant revocation of their consent to be governed and recourse to military revolution to establish a new government. This fact also suggests that an institution that threatens or undermines those same structures today, as the Supreme Court may do when it exercises expansive judicial power, poses a threat both directly and indirectly to the civil, political, and natural rights of citizens. Third, the historical record surrounding the Declaration also bears witness to the great moral-political value of solemn statements of principle in constitutive or organic political documents. This value lies in the power of formalized and solemnized statements to shape political debate and the broader evolution of American political culture and thus to spark political reform in later generations.

One may conclude, then, that the Declaration of Independence also serves as a source of inspiration for a reform project in our own time: a judicial power amendment that would highlight, emphasize, and clarify the close connection between individual rights and republican structures in the Constitution and that would also function in a politi-


\textsuperscript{244} See supra note 224.
cal and educative manner, shaping present and future political discourse and civic education and outlining the proper constitutional scope of judicial power.

4. The Philadelphia Constitution

It is also worth examining the Philadelphia Constitution in this context. At the outset it is important to recognize that the Philadelphia Constitution is primarily a structural and procedural document, and its design reflects the basic structural principles of the American constitutional tradition evinced in the Virginia Declaration of Rights and the Declaration of Independence: popular sovereignty, representation, separation of powers, federalism, as well as bicameralism and checks and balances. Not surprisingly, then, the debates in Philadelphia concerning the framing of the Constitution dealt almost entirely with structural-procedural questions of governmental architecture involving these and related principles. What was the purpose of these structural principles? In essence, the Philadelphia Constitution was designed to protect “natural rights to life, liberty, and the pursuit of happiness” through a strategy of establishing democratic institutions, broadly diffusing political power, and promoting civic virtue among the people. As Michael Sandel has observed, political liberty at the founding and in the early American Republic was “understood as a function of democratic institutions and dispersed power.” Further, political liberty was also understood as depending ultimately upon the civic virtue of the sovereign people.

In this broad context, it is worth examining Hamilton’s assertion in *The Federalist Papers* that the Constitution itself “in every rational sense, and to every useful purpose,” is “A BILL OF RIGHTS.” Hamilton opposed the addition of a bill of rights as simply unnecessary, maintaining that the preamble’s basic statement of popular sover-
eighty—"We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America"—was "a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights and which would sound better in a treatise of ethics than in a constitution of government." Hamilton, more broadly, argued that the Philadelphia Constitution was the functional equivalent of a bill of rights through its formal recognition and structural incorporation of basic principles of free government recognized "aphoristically" in documents such as the Virginia Declaration of Rights. Hamilton is clearly right on this point. The architecture of the Philadelphia Constitution was indeed designed to protect individual rights and was constructed upon political premises recognizing those rights. Therefore, the essential functions of the Constitution are precisely those of a bill of rights, as the function of bills of rights was understood at the founding. Indeed, as Hadley Arkes has observed in this context, "the most fundamental human rights, the most critical premises of personal freedom [are] already reflected in the very structure of constitutional government," the "rights of human beings to be ruled only by their consent, in a government of free elections, a government restrained by law." In short, the very structure of the unamended Philadelphia Constitution, in fact formally recognized, endorsed, and operated to protect basic individual liberties. The Philadelphia Constitution, then, as Hamilton asserts, is a "bill of rights" in a basic, functional sense of the term.

Notably, Hamilton further observes that the security of important freedoms, such as the liberty of the press, do not depend upon the presence or absence of a bill of rights, but rather "must altogether depend on public opinion, and on the general spirit of the people and the government." What protects individual rights, in Hamilton's view, is ultimately: (1) the spirit or foundation and structure of the government, including its popular basis, democratic institutions, and general diffusion and balancing of political power to express, mediate, educate, and refine the popular will; and (2) the spirit of the people, including their civic virtue and their general respect for individual rights and the structure of the government, which will ultimate

255 U.S. Const. pmbl.
256 The Federalist No. 84 (Alexander Hamilton), supra note 254, at 481.
257 See, e.g., Hadley Arkes, Beyond the Constitution 78 (1990).
258 Id.
259 The Federalist No. 84 (Alexander Hamilton), supra note 254, at 482.
mately prevail in any popular form of government. This is consistent with the mainstream of political thought at the founding: political liberty was a function of representative institutions, diffused and balanced political power, and the civic virtue of the people.

Hamilton thus famously opposed the addition of a bill of rights to the Constitution, dismissing the idea as one both unnecessary and potentially dangerously misleading with respect to the question of federal limits on the powers of Congress. In Hamilton’s view, not only did the Constitution, as a kind of “bill of rights,” render a formal bill of rights superfluous, but a poorly drafted bill might in fact undermine by implication important constitutional principles, such as federalism. Still, what Hamilton did not explain (and really could not explain satisfactorily) is why a populist, republican bill of rights that attempted to reiterate, emphasize, clarify, and deploy “aphoristically” the key structural themes of the Philadelphia Constitution (the “spirit” of the government) and to privilege them politically and reinforce them in the “national sentiment” (the “spirit” of the people) would not have substantial political and educative benefits that would outweigh any potential costs.

In fact, as discussed, this was precisely the view of many members of the founding generation, such as James Madison, who came to view a formal solemn statement of ethical “aphorisms” of free government as providing an additional form of popular political check on the government through its political and educative effects on the political process and civic culture. If the Constitution itself serves as a “bill of rights,” as Hamilton suggested, it is quite evident that a bill of rights could serve as a “supplement” to or elaboration upon the foundational principles of the Constitution. Indeed, as Amar argues, our Bill of Rights is itself a sort of Constitution, a basic corollary of Hamilton’s assertion that the Constitution is itself a bill of rights. Certainly, a carefully drafted bill of rights with no “misleading” implications could substantially promote constitutional values through its educative and political effect, reinforcing in the “spirit” of the people the proper respect for the “spirit” of the government. Still, even if Hamil-

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260 See id. at 478–81.
261 See id. at 481–85.
262 See id. at 478–88. Hamilton also did not explain why any potentially misleading implications of a bill of rights could not be cleared up through careful drafting. In fact, the Ninth Amendment was written precisely to address Hamilton’s concerns. See infra notes 297–98 and accompanying text; see also U.S. Const. amend. IX.
263 See infra note 340 and accompanying text.
ton was wrong to deride the Bill of Rights, he was right to consider the Philadelphia Constitution as a kind of bill of rights and also to identify a bill of rights as formal statements or "aphorisms," stating principles of free government.

What inspiration for constitutional reform may one derive from the Philadelphia Constitution? One may conclude, first, that the Philadelphia Constitution involves a strong substantive commitment to fundamental principles of free government that conflict with expansive judicial power. This fact should strongly reinforce modern commitment to reform of judicial power to the extent that one takes the structural integrity of the Constitution seriously and desires to promote it. Second, the analysis here also reinforces earlier conclusions about the Founders' view of the close relationship between republican constitutional structures and constitutional rights in a republican form of government. This fact also suggests, again, that to the extent that the Supreme Court erodes basic republican structural principles, it is a direct and indirect threat to individual rights. In short, to the extent that the Supreme Court renders political authority less democratic and less diffused and tends to enervate the civic virtue of the people, it undermines political liberty. This suggests the need for substantive structural reform to preserve, restore, or fulfill the basic rights and structures of the Constitution. Third, precisely because of the close relationship mentioned previously, the Philadelphia Constitution is itself a kind of "bill of rights," given its direct recognition of popular political rights and its provisions for indirectly protecting non-participatory rights through diffusion and balance of political power, making it accountable to the people, and promoting civic virtue. Therefore, a reform amendment designed to preserve or restore the constitutional structures associated with such rights would itself be a supplement to (and reform in the spirit of) the Philadelphia Constitution as a "bill of rights."

C. The Original Structural Understanding of the Bill of Rights

1. The Bill of Rights as a Structural Measure

Is it possible, then, that the Bill of Rights itself, as a complement to the Philadelphia Constitution, was originally understood as having a strong structural emphasis? It is worth noting at the outset that the ratification of the proposed Constitution was ultimately made conditional on the promise of amendments to form a bill of rights and also that many of the structural objections to the new Constitution were at

265 See, e.g., CAREY, FEDERALIST, supra note 35, at 138-45.
least partially allayed by the potential to “improve” the document through an amendment process. In fact, the primary proponents of a Bill of Rights were Anti-Federalists whose chief objections to the Philadelphia Constitution were fundamentally structural in nature. Among the amendments they hoped a federal bill of rights would include were limits on the power of the national government, such as restrictions on the power of Congress to lay direct taxes.

In fact, structural amendments that would have radically altered the governmental framework of the Philadelphia Constitution were defeated in the Federalist-controlled Congress, which proposed a very different kind of bill. The Federalists’ bill, written principally by James Madison, was still structural in its orientation and focus, but declaratory of and complementary to the original constitutional design, rather than designed to alter it and weaken federal power. Anti-Federalists, therefore, voted almost unanimously against Madison’s bill, and Federalists, who had tended to deprecate the need for a bill, voted almost unanimously for it.

Thus, as Akhil Reed Amar and others have observed, the Bill of Rights, as originally understood by the founding generation, was heavily structural in nature and reflected key “design” themes of the Philadelphia Constitution—such as deliberative democracy, civic republicanism, federalism, bicameralism, and the separation of powers. As Amar argues,

A close look at the Bill reveals structural ideas tightly interconnected with the language of rights; states’ rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous citizenry. The main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.

266 See Levy, supra note 64, at 31–32.
267 Id. at 14.
268 Id. at 27–32. This restriction was proposed by, among others, the ratification conventions of the states of Massachusetts, New Hampshire, New York, and South Carolina. Creating the Bill of Rights: The Documentary Record from the First Federal Congress 14–16, 25 (Helen E. Veit et al. eds., 1991).
271 Amar, supra note 264, at 1131–32.
272 Id. at 1132.
It will be worthwhile to look at a few of its provisions in somewhat greater detail in light of their structural basis and implications. It is, for instance, well worth noting that the First Amendment's freedoms of speech, press, assembly, and petition are rights all directly related to both the federal republican and populist structural norms of the Constitution. It is the national government, rather than those of the states that is enjoined by the Bill of Rights—in accordance with the fundamental constitutional principle of federalism. In fact, it was widely argued at the ratification debates that Congress simply had no delegated and enumerated power on which to base an invasion of expressive rights, making specific rights provisions protecting speech, press, and assembly superfluous. Even so, many members of the founding generation, after their experience with the British Crown, simply did not trust the distant national government with even a potentially implicit power over political expression. They therefore sought to clarify further that this power was not delegated to the Congress, that it was instead retained by the people, and that it would be found, if at all, in the domain of the state governments, which were “closer” to the people and in the views of many in the founding generation, much less likely to become oppressive.

Second, the rights themselves—speech, press, assembly, and petition—are directly related to the healthy functioning of a representative form of government and thus to what the Founders viewed as the fundamental and preeminent right to representation. In fact, the founding generation typically viewed the right of representation as a preeminent “sheltering” right, one which, by providing a popular check on the government, also indirectly protects a broad range of other rights from governmental violation. In short, then, a deprivation of these rights of expression and association would undermine

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273 Id. at 1146–62.
274 See, e.g., Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (noting that the limitations on power expressed in the federal constitution are “necessarily applicable to the government created by the instrument” and not to the states).
275 See, e.g., THE FEDERALIST No. 84, supra note 254, at 481–83; see also Levy, supra note 64, at 121.
276 Of course, the colonists had generally argued that the taxation policies of the King in Parliament violated the unwritten British Constitution. See Bailyn, supra note 219, at 66–77, 175–98, 208.
277 Cf. THE FEDERALIST No. 10, at 52 (James Madison) (Clinton Rossiter ed., 1999) (noting that influence of factions “will be less apt to pervade the whole body of the Union than a particular member of it”).
278 Amar, supra note 167, at 20–21, 26–27.
279 Rakove, supra note 130, at 293 (contending that in the view of the Founders, “[i]f the rights to representation and to trial by jury were left to operate in full force,
the right to representation and the broad range of additional rights that depend upon, and could be frustrated without, these closely related rights to political expression.\textsuperscript{280}

As one would expect, these rights are also further related to the foundational constitutional norm of popular sovereignty and the concomitant right of revolution. These rights, stated in the Virginia Declaration, Declaration of Independence, and the Constitution’s Preamble, obviously require for their effective exercise broad rights to freedom of expression and association.\textsuperscript{281} Indeed, with the passage of the Sedition Act in 1798, a partisan measure criminalizing certain forms of criticism of the federal government, James Madison made the following points in the Virginia Resolutions: the Sedition Act exceeded the delegated and enumerated powers of the U.S. Congress, violated the constitutional principle of federalism, and was incompatible with the representative democratic and populist structure of the American constitutional design.\textsuperscript{282} Madison thus argued that the Sedition Act was unconstitutional under both the original Philadelphia Constitution as well as the First Amendment’s structural and declaratory protections of freedom of expression.\textsuperscript{283}

The First Amendment provisions relating to the non-establishment and free exercise of religion also have important structural implications and are in fact best understood as structural federalism provisions.\textsuperscript{284} Indeed, the federalist proponents of the original Constitution firmly denied that the constitutional plan contained any delegated or enumerated power that could be used by Congress to establish a religion and that, therefore, the federal structure of the Constitution made such a specific prohibition unnecessary.\textsuperscript{285} Amar notes that the “original establishment clause, on a close reading, is not antiestablishment but pro-states’ rights; it is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally.”\textsuperscript{286} The amendment, then, given its agnosticism on the establishment issue, did not even implicitly con-

\textsuperscript{280} Id.
\textsuperscript{281} \textit{Amar, supra} note 167, at 20–32.
\textsuperscript{283} Mayton, \textit{supra} note 282, at 126–28.
\textsuperscript{284} \textit{Amar, supra} note 167, at 20–45.
\textsuperscript{285} \textit{Levy, supra} note 63, at 80–81.
\textsuperscript{286} \textit{Amar, supra} note 167, at 34.
JUDICIAL RESTRAINT AMENDMENT

demn the establishment of religion\(^{287}\) that existed in several states at the time of the ratification of the Bill of Rights. It is thus better understood as a federalism provision protecting the rights of states to establish or disestablish state religions than one of substantive religious liberty. Again, the founding generation’s chief concern here was with maintaining the strict limits on the delegated and enumerated powers of the national government rather than directly with individual rights per se.

Moreover, the strong emphasis of the Bill of Rights on the importance of juries, which is guaranteed in three separate amendments,\(^{288}\) is also closely related to structural concerns; it embodies the founding generation’s civic and republican preference for popular “representation” in the judicial branch, for a “sheltering” right providing a powerful check on judges, and for the educative value of jury service for citizens of a democratic republic.\(^{289}\) Indeed, as Rakove reminds us, trial by jury and legislative representation were the two rights to which Americans gave “preeminent importance,” reasoning that if “the rights to representation and to trial by jury were to operate in full force, they would shelter nearly all the other rights and liberties of the people.”\(^{290}\) As Rakove observes, “representatives and jurors . . . shared parallel constitutional duties” that were chiefly “to protect people against the abuse of power” by arbitrary government.\(^{291}\) Juries thus “evolved into a bastion of popular rights”\(^{292}\) and served as “Populist Protectors,”\(^{293}\) “play[ing] a leading role in protecting ordinary individuals against governmental overreaching.”\(^{294}\) It is particularly worth noting in the context of judicial reform that the great value placed on juries in the Bill of Rights is premised in part precisely on distrust of judges as potentially tyrannical governmental actors.

Additionally, jury duty served the important republican educative goal of allowing ordinary citizens a great measure of political participation\(^{295}\) and affording an opportunity to learn about their government.\(^{296}\) Juries then served the important purposes of providing a popular check on judges and prosecutors, and of providing additional

\(^{287}\) Id. at 41.

\(^{288}\) U.S. CONST. amends. V, VI, VII.

\(^{289}\) Amar, supra note 264, at 1182–95.

\(^{290}\) Rakove, supra note 132, at 293.

\(^{291}\) Id. at 294.

\(^{292}\) Levy, supra note 64, at 219.

\(^{293}\) Amar, supra note 167, at 83.

\(^{294}\) Id. at 84.

\(^{295}\) Id. at 94.

\(^{296}\) Id. at 93.
opportunities for political participation and civic education. One may further note that the Fourth Amendment’s provision disfavoring search warrants is premised precisely on the fact that they could be issued by judges who were not subject to the check of a jury. 297 Finally, when combined with right to trial in the district where the crime occurred, juries instantiate the structural principle of localism in the Constitution, parallel in many ways to that of federalism.

The Ninth Amendment is also closely related to populism (or the popular sovereignty basis of government), to federalism, and to republican notions of civic education through formal statements of principles or maxims of free government. The Ninth Amendment’s language concerning rights “retained” by the people is indicative of the popular sovereignty principle of the founding generation. The language of the amendment also implicates federalism and was meant in part to belie the commonplace Federalist concern that enumeration of certain rights in the federal Constitution would imply that the national government had power—beyond its strictly delegated and enumerated powers—to violate rights not enumerated. 298 Therefore, a provision negating this implication provided additional security for the federal structure of the Constitution.

The Ninth Amendment also implicates civic republican concerns related to political argument and culture. In fact, to the extent that the Bill of Rights had an important educative and political function, a provision such as the Ninth Amendment would also limit the potentially misleading political and educative implications of an omission of important rights from the Bill: that rights not mentioned in it were in fact unimportant and unworthy of respect. Indeed, if one thought that the primary function of a bill of rights was to provide a stronger basis for political objections to governmental action or to foster popular respect for certain basic principles of free government, then the harm of an incomplete listing of rights is a very real one, weakening the political and educative force of rights left unenumerated. But an “unenumerated rights” provision could substantially mitigate such harm. The Ninth Amendment would thus provide a powerful response to any claim that a right not listed in the Bill of Rights is by virtue of its omission not an actual or important right of the people. Through the Ninth Amendment, the Bill of Rights itself states that it is not an exhaustive list of rights because the “enumeration” of “certain

297 Id. at 68–69.
298 See, e.g., The Federalist No. 84 (Alexander Hamilton), supra note 254, at 478–83.
rights shall not be construed to deny or disparage others retained by the people."

Along these lines, Leonard Levy ultimately concludes that the Ninth Amendment, in its original understanding, refers in part to important "positive" and natural rights not listed in the Bill of Rights but articulated in other founding-era sources, such as the various state bills of rights and the Declaration of Independence. Notably, this view has decided implications for both the structural dimension of the Bill of Rights and the question of judicial power under the constitutional design. The Virginia Declaration and the Declaration of Independence contain a large number of important structural principles relating to popular sovereignty, representation, separation of powers, and federalism. Indeed, the Ninth Amendment may be read as incorporating by reference the "rights" related to the structural provisions of those documents discussed above: popular sovereignty, representation, separation of powers, and federalism, among others. What this should suggest is the existence of what one might call a Ninth Amendment "right to judicial restraint" as a corollary to these fundamental structural principles that are strongly supportive of judicial restraint. In short, the numerous array of structural "rights" on display in the Virginia Declaration of Rights and the list of grievances (illustrative of grave threats to natural rights) in the Declaration of Independence, if implicitly incorporated in the Ninth Amendment, would in essence create a Ninth Amendment right to judicial restraint. This right would be defended, in light of the original structural understanding of the Bill of Rights, via popular and legislative interpretation and political "enforcement" through the political process, rather than through the courts. Notably, this interpretation of the Ninth Amendment also conforms to the pattern of predominance of structural concerns in the other provisions of the Bill of Rights.

In any event, whatever one may think of the precise content of the Ninth Amendment and its relationship to federalism or other

299 U.S. Const. amend. IX.
300 Levy, supra note 64, at 254–55.
301 Notably, Levy does not see the tension between recognizing unenumerated rights and supporting sweeping power by unelected judges to create new controversial rights via the Ninth Amendment, thus circumventing these crucial rights-driven constitutional constraints on the exercise of federal political power. Even so, Levy recognizes that the Founders were not advocates of expansive judicial power and were highly likely to have opposed it had it been raised as a potential aspect of the constitutional plan. Id. at 243.
302 See Amar, supra note 167, at 120–23 (discussing popular enforcement of rights provisions).
structural principles, its text demonstrates an unequivocal grounding in popular sovereignty, providing that rights are "retained" by the people and that only limited powers are delegated by the people to their state or national governments (including courts as governmental actors). As Amar concludes, to see the Ninth Amendment as "a palladium of countermajoritarian individual rights [to be enforced on the people by unelected judges] . . . is to engage in anachronism."303

Moreover, the Tenth Amendment, as Amar notes, "fit[s] together snugly" with the Ninth Amendment304 as a forthright statement of the federal-populist basis of the Constitution. This amendment provides that the peoples of the individual states delegate authority to their state governments and also to the national government, though whether this second delegation is accomplished directly or through the state governments is a matter of some contention.305 It thereby reinforces federalism and popular sovereignty and complements the Constitution’s specific provisions, such as Articles V, VII, and the Preamble. Indeed, the original Constitution, as revised by the Bill of Rights, opens with the Preamble and closes with the Tenth Amendment, demonstrating parallel popular sovereignty provisions.306 Notably, the phrase "the people," typically understood at the time as referring to the "sovereign citizenry,"307 appears only once in the entire Philadelphia Constitution—in the Preamble—but it occurs an additional five times within the short space of the first ten amendments, thereby establishing the American people "as an integral part of the Constitution, in a way they had not been before."308 Thus, the Bill of Rights as a whole, and the Ninth and Tenth Amendments in particular, place a high value on populism. One may conclude, then, that

303 Id. at 120.
304 Id. at 123.
305 See, e.g., U.S. Term Limits v. Thornton, 514 U.S. 779, 840 (1995) (Kennedy, J., dissenting) (rejecting the contention that "because the States ratified the Constitution, the people can delegate power only through the States or by acting in their capacities as citizens of particular States"); id. at 846 (Thomas, J., dissenting) ("The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."). In The Federalist, James Madison maintained that "ratification is to be given by the people not as individuals . . . but as composing the distinct and independent States to which they respectively belong." The Federalist No. 39, at 211 (James Madison) (Clinton Rossiter ed., 1999); see also Forrest McDonald, States’ Rights and the Union: Imperium in Imperio, 1776-1876, at 8-9 (2001) (describing the "nationalist" interpretation as "unteachable").
306 Amar, supra note 167, at 120-21.
307 Id. at 120.
308 See Goldwin, supra note 269, at 178.
these are structural provisions that provide an additional constitutional basis in the Bill of Rights for objecting to expansive judicial power.

What conclusions may one draw from this structural emphasis? The original understanding of the Bill of Rights is highly structural in nature and emphasizes rights-driven structural norms indicative of foundational constitutional principles such as popular sovereignty, representation, federalism, and civic republicanism. The Bill of Rights was simply not understood originally as either primarily countermajoritarian in form or directly focused on individuals' rights qua individual rights. Rather, its focus is largely populist/majoritarian in substance and structural in nature, protecting rights implicitly and indirectly by reinforcing and complementing the original structure of the Philadelphia Constitution. Amar concludes rightly that “[t]he essence of the Bill of Rights was more structural than not, and more majoritarian than counter.”

Nor should these observations be surprising when one recalls how intertwined for the founding generation were questions of governmental structure and the rights of individuals, as evidenced by the Virginia Declaration of Rights, the Declaration of Independence, and the Philadelphia Constitution. It was quite natural that a number of structural and related provisions were advocated in the debates over the Bill of Rights and that the final ten amendments to the new Constitution should have strong structural bases and implications that reinforced the Philadelphia Constitution’s basic architectural principles. One may conclude, then, that constitutional reform designed to reinforce or restore the basic populist/republican structures of the Constitution in order to protect individual rights would indeed be reform in the spirit of the Bill of Rights. Therefore a reform amendment in the area of judicial power designed to limit the Court’s power to erode or circumvent these basic structures would itself be well within the spirit of the Bill of Rights—in addition to a textual elaboration upon the implicit content of the Ninth and Tenth Amendments.

2. The Bill of Rights as a Declaratory Measure

The Bill of Rights was not only heavily a structural measure, but also heavily a declaratory and complementary one. In other words, it did not purport to alter the structure of the Philadelphia Constitution in any significant way, but rather was designed primarily to emphasize, clarify, and reinforce its basic pre-existing structure. As Goldwin ob-

309 See Amar, supra note 264, at 1133.
serves, Madison's emphasis in defending the Bill of Rights was (1) "on the expected favorable public reaction" to the provisions and the popular support for the new Constitution it would help to build, and (2) "on their substantive harmlessness, that they would make no meaningful change in the Constitution," altering or weakening the Constitution's basic design.\textsuperscript{310}

This is, of course, precisely the reason why so many Anti-Federalists, who desired a weakening of the federal government in favor of states' rights, were so disappointed with the Bill of Rights as it came to be written, and why they ultimately declined to support its ratification.\textsuperscript{311} It is also one of the reasons why so many Federalists in Congress did eventually vote to propose the Bill of Rights—once it was understood that it generally reflected, complemented, and reinforced rather than altered or weakened the structure of the new Constitution.\textsuperscript{312} It is, moreover, the principal reason why there was such a lack of fanfare accompanying the final ratification of the Bill of Rights, given that it was seen largely by its ultimate supporters, the Federalists, as a simple (and perhaps superfluous) restatement and clarification of the basic principles of the Philadelphia Constitution designed mostly to forestall abuses they considered generally unlikely to occur.\textsuperscript{313}

One might note, as an example of the "declaratory" structural aspect of the Bill of Rights, Madison's defense—in the face of the Sedition Act of 1798—of the "individual" right to free speech. As noted above, Madison claimed that the right to free speech and press was in fact implicit in both the federal and republican structure of the Philadelphia Constitution and therefore actually predated the First Amendment, which only restated and emphasized the federal government's general lack of a delegated power to censor political speech.\textsuperscript{314} Hamilton had also earlier argued that the federal government had no delegated and enumerated power in Article I to regulate the press and, therefore, that there was no need to add a "free press" rights provision to the Constitution.\textsuperscript{315} Notable also is that the Sixth Amendment

\textsuperscript{310} Goldwin, supra note 269, at 93.

\textsuperscript{311} Id. at 79–81; Hutson, supra note 270, at 96–97.

\textsuperscript{312} Goldwin, supra note 269, at 90–93, 255–57.

\textsuperscript{313} Id. at 173–74.


\textsuperscript{315} The Federalist No. 84 (Alexander Hamilton), supra note 254, at 481–82.
right to jury trial is also largely declaratory of the Article III jury trial requirement. As we have seen, the same can be said for other provisions of the Bill of Rights, including the Establishment Clause and the Ninth and Tenth Amendments; they prohibit the national government from taking actions that were already typically outside its delegated and enumerated powers, and they restate, for purposes of emphasis, principles of popular sovereignty already expressly and impliedly incorporated within the original Constitution. The Ninth Amendment in part negates the potential mistaken impression that the Bill of Rights might have created, i.e., that the federal government has power beyond its delegated and enumerated powers to engage in any conduct not prohibited by the provisions of the Bill of Rights. The Tenth Amendment further reinforces this federalist principle, holding that all powers not delegated to the federal government are retained by the states or, if not delegated to the states by the people of the states, retained by the people. In short, the original structural understanding of the religion and expression clauses of the First Amendment, as well as the Ninth and Tenth Amendment, are essentially declaratory in nature, designed to clarify and emphasize the pre-existing constitutional structure. Thus, reform designed to clarify and emphasize the meaning of the Constitution’s republican architecture through a declaratory amendment is reform in the broad spirit of the Bill of Rights.

3. The Bill of Rights as a Political Measure

How was the Bill of Rights to function? What was its strategy for protecting rights? There are two basic points that must be kept in mind to avoid falling into anachronism. First, the Framers did not view the Supreme Court as a powerful institution or assume that it would be a wholly benign guardian of constitutional rights and structures. On the contrary, the founding generation viewed the Court as

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316 U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . trial . . . by an impartial jury of the State and district wherein the crime shall have been committed.").
317 U.S. Const. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.").
318 See Amar, supra note 167, at 119–33.
319 See id.; Levy, supra note 64, at 243.
320 See Amar, supra note 167, at 119–33; Levy, supra note 64, at 243.
321 See Amar, supra note 167, at 119–33; Levy, supra note 64, at 243.
322 See Nowlin, Constitutional Illegitimacy, supra note 32, at 434–38.
by far the weakest institution of the federal government.\textsuperscript{323} In light of the uncertain status of judicial review circa 1790 and the general quiescence of the judiciary at this period, this perspective is not at all surprising.\textsuperscript{324} Moreover, those who did claim to view the Supreme Court as a potentially powerful institution were invariably the Anti-Federalists, whose political interests were furthered by painting the proposed Court as a threat to state governments and the rights of the people.\textsuperscript{325} Second, the clear concern of the majority of the Framers involved general oppression of the governed rather than majoritarian oppression of minorities.\textsuperscript{326} Such oppression, of course, could include oppression by courts, and the judiciary, as the least representative branch of the federal government, might be thought to pose a particularly serious threat.\textsuperscript{327} Nor is it likely that the Founders would have thought that giving federal judges a wide-ranging policy veto over the elected branches of government would have been a particularly thoughtful or impressive solution to the inevitable dangers of democratic government.\textsuperscript{328} This understanding of the tenuous link between the Bill of Rights as originally understood and the practice of judicial review is further reinforced by the widely recognized and longstanding tradition in the nineteenth and early twentieth centuries of almost total judicial non-enforcement of the Bill of Rights.\textsuperscript{329}

How, then, did the Founders think the Bill of Rights would protect rights from the government? As Rakove reminds us, the Founders, Anti-Federalists and Federalists alike, "regarded bills of rights as standards that would enable the people to judge the behavior of their governors, to know when their legitimate rights and interests were be-

\textsuperscript{323} The Federalist No. 78, supra note 56, at 433 (noting that the Court is the "the least dangerous" branch to the political rights of American citizens).

\textsuperscript{324} On the general weakness of the Supreme Court in the 1790s, see McCloskey, supra note 24, at 19-23; and Schwartz, supra note 23, at 15-31.


\textsuperscript{326} See, e.g., Rakove, supra note 132, at 336.

\textsuperscript{327} See, e.g., U.S. Const. amend. IV, V, VI.

\textsuperscript{328} See The Federalist No. 51, at 288-93 (James Madison) (Clinton Rossiter ed., 1999) (noting in the context of monarchy that attempting to protect minority rights by "creating a will in the community independent of the majority" is but a "precarious security" because a power independent of the majority "may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both" (emphasis added)). This criticism applies as well to the judiciary acting as a countermajoritarian "will independent of the majority" involved in policymaking on moral-political issues via expansive judicial review. See generally Christopher Wolfe, Judicial Activism: Bulwark of Freedom or Precarious Security? (rev. ed. 1997) (making a case for the democratic character of moderate judicial activism).

\textsuperscript{329} See supra Part III.A.
Thus, the traditional and widely held view of the principal function of a bill of rights was one of providing the sovereign people with an express constitutional standard from which to (1) judge whether an action of the government violated a constitutional right or structure and (2) use as a cynosure of political debate in opposition to unconstitutional acts. The purpose of a bill of rights, then, was to provide citizens with both an express standard of judgment and a political rallying point from which to oppose abuse of power by their government. Amar notes that both Madison and Jefferson emphasized the link between a bill of rights, “popular education,” and “popular enforcement” through the political process, including the actions of juries, as remedies for and deterrents to unconstitutional conduct. For instance, Jefferson endorsed this view when he observed that “[w]ritten constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people; they fix too for the people the principles of their political creed.” This, of course, was also the original structural understanding of the Virginia Declaration of Rights, which functioned in a purely political and educative manner and which was valued by the founding generation precisely for those effects.

This structural understanding of the Bill of Rights also explains why a number of its provisions are limitations on courts rather than political actors. This was so not because courts were going to be “judges in their own case” as to whether they themselves were acting oppressively, but rather because in the view of the Founders, the people needed a written standard to answer that question for themselves and to oppose potential acts of judicial tyranny. Indeed, as Gerard Bradley has observed, several “amendments in the Bill of Rights (the Fourth, much of the Fifth, the Sixth, Seventh, and Eighth Amendments) reveal a lack of confidence in the judiciary: they guarantee rights within judicial proceedings.” It is clear, then, that the widely agreed-upon view of the chief value of a bill of rights at the founding was what can be termed a political function: it would provide a written standard

330 Rakove, supra note 132, at 336.
331 Goldwin, supra note 269, at 65.
332 Amar, supra note 167, at 131–32.
334 See supra Part III.B.2.
for the people when judging whether any of the institutions of government were acting tyrannically. Thus, while the potential role for federal courts in enforcing the Bill of Rights did not go completely unremarked upon, it was a generally new, unfamiliar, and uncertain approach, which was further undermined by the general weakness of the judiciary in the founding era.

The Sedition Act controversy also provides an illustration of the political function of the Bill of Rights. There the First Amendment speech and press clauses chiefly functioned as a political measure, sharpening the Jeffersonians' objections to censorship by the federal government. The First Amendment thus contributed to the defeat of the Federalists in the elections of 1800, even though the Sedition Act was not in fact struck down by the courts. A reform amendment proposal that was designed to work politically by shaping discourse on public affairs and providing an express standard and "rallying point" to empower constitutional objections to expansive judicial power, would fall well within the original spirit of the Bill of Rights.

4. The Bill of Rights as an Educative Measure

It should be noted that James Madison was somewhat skeptical of the traditional political value of a bill of rights simply because in a republican form of government the people themselves were already in control. Given the popular control of a republic, the people would be judging and rallying against themselves. This objection is of especially limited value in the present context, however, where the political function is being asserted against unelected and electorally unaccountable judges. In short, Madison's initial doubts about the value of a bill of rights are much less applicable when the institution one seeks to limit is subject to only very indirect and limited popular control. Still, it is worth examining what Madison did think was the chief value of the Bill of Rights. He thought the Bill of Rights might have an important educative, civic use, helping to instill republican virtues in the populace and thereby limiting majoritarian tyranny. Indeed, Madison observed that "the political truths declared in that solemn manner [i.e., by constitutional amendment] acquire by degrees the character of fundamental maxims of free government, and as they become incorporated with the national sentiment, counteract the im-

337 See, e.g., id. at 132.
338 See, e.g., AMAR, supra note 264, at 1150–52.
339 GOLDWIN, supra note 269, at 65; RAKOVE, supra note 132, at 332–33.
pulses of interest and passion."\textsuperscript{340} This view did not originate with Madison but was in fact a common view in colonial Virginia, and it underlay the functional value of the Virginia Declaration of Rights.\textsuperscript{341}

Therefore, even in a government premised on a structural plan of protecting rights through democratic institutions and dispersed political power, a bill of rights could still indirectly augment those protections by fostering civic virtues among the voters, such as respect for the legitimate rights of others, particularly those rights directly or indirectly related to the republican structure of the government.\textsuperscript{342} It could also foster greater respect for the constitutional structural principles themselves. Indeed, as Madison thought, the fostering of a political culture and "national sentiment" strongly supportive of foundational constitutional principles could effectively restrain the passions and interests which might lead individuals to reject them or violate them in particular cases.\textsuperscript{343} Thus, as Jefferson also thought, fixing the principles of the American political creed in a constitutive document could have a powerful effect on political rhetoric and culture.\textsuperscript{344} In particular, there is every reason to believe that the Constitution in general and the Bill of Rights in particular, as "basic symbols of legitimacy," have played a central role in shaping American political culture, including our understandings of the rights of the individual and the proper structure of government.\textsuperscript{345} It is also true, of course, that the major influence the Supreme Court has had on how Americans think about rights is derivative of its interpretive function with respect to the Constitution and is therefore at least partly parasitic of the educative value of the Bill of Rights.\textsuperscript{346} Thus, the Bill of Rights has operated for much of its history—and to a significant extent still does so today—in a political and educative fashion. A reform

\textsuperscript{340} 3 \textit{The Roots of the Bill of Rights} 616 (Bernard Schwartz ed., 1980), quoted in Goldwin, \textit{supra} note 269, at 72. Rakove writes that "[b]ills of rights [in Madison's view] would best promote the cause of republican self-government if they enabled republican citizens to govern themselves—to resist the impulses of interest and passion that were the root of factious behavior." Rakove, \textit{supra} note 132, at 336.

\textsuperscript{341} See \textit{supra} Part III.B.2.

\textsuperscript{342} Cf. \textit{The Federalist} No. 84 (Alexander Hamilton).

\textsuperscript{343} See \textit{supra} note 332 and accompanying text.

\textsuperscript{344} See \textit{supra} note 333 and accompanying text.


\textsuperscript{346} See, e.g., id. at 345; John E. Semonche, \textit{Keeping the Faith: A Cultural History of the U.S. Supreme Court} (1998) (arguing that the Justices' primacy in constitutional interpretation allows them to play a special role as "prophets" of an American civil religion rooted in and centered around the Constitution).
amendment proposal designed to work educatively by shaping American political culture over generations and creating a favorable climate for objections to expansive judicial power would fall well within the spirit of the Bill of Rights.

5. The Bill of Rights and the Judicial Power

As the previous discussion demonstrates, the original understanding of the Bill of Rights was that of a measure largely structural and declaratory in substance and political and educative in function. The substance of the Bill of Rights, as originally understood, was largely declaratory of and complementary to the Philadelphia Constitution and its basic structural norms. There is good reason to think that the American constitutional design, properly interpreted, precludes expansive judicial power, given its propensity to undermine basic constitutional principles. Thus, the Bill of Rights is correctly read as reinforcing a constitutional design that prohibits expansive judicial power. Indeed, the basic themes of the Bill of Rights—populism, federalism, civic republicanism, separation of powers—are in stark tension with a highly expansive judicial role. Moreover, the Ninth Amendment in particular can be read as textual reinforcement or incorporation of basic structural principles of American constitutionalism—principles apparent in the design of the Philadelphia Constitution and in the text of the Virginia Declaration of Rights and the Declaration of Independence. Therefore, the Ninth Amendment itself can be said to contain, as a corollary of its structural commitments, an implicit "right to judicial restraint." To that extent, then, the Ninth Amendment, like the Tenth, is simply declaratory of the pre-existing American constitutional design. Even so, the analytic, normative, and rhetorical value of this view should not be underestimated.

Further, the Bill of Rights, as originally understood, was thought to function primarily in an educative and political fashion, protecting constitutional structure and rights by shaping the national political culture and political debate on these crucial matters. In short, the primary method by which the Bill of Rights was thought to protect rights was through civic promotion of popular respect for rights and rights-driven structures. In particular, judicial review in this era was a new, unfamiliar, and generally uncertain alternative strategy for en-

347 Cf. Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting) (observing that the Ninth Amendment "was passed . . . to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication").
forcing bills of rights that was also vitiated by the general weakness and quiescence of courts. Thus, it is worth emphasizing that the contemporary association of the Bill of Rights with a strong Supreme Court, routine use of judicial review, and countermajoritarian individual rights is largely an early and mid-twentieth century development. Moreover, while judicial review under the Bill of Rights has been in many ways a valuable constitutional development worth preserving, its dangers to the constitutional order and the degree to which its expansive exercise undermines many of the core values of the Bill of Rights and Philadelphia Constitution must be fully recognized.

In sum, then, the Bill of Rights not only provides no positive support for expansive judicial power, but it also provides strong support for the contention that such power exceeds the authority of the Supreme Court and violates the structure of the Constitution. A judicial reform amendment designed to make this implicit reading of the structure of the Constitution textually explicit therefore clearly falls well within the spirit of the Bill of Rights.

D. The Bill of Rights and the Eleventh Amendment

Moreover, the founding generation’s recognition of the value of judicial reform can also be seen in its broad support for the Eleventh Amendment. This amendment was ratified in 1794, shortly after the Bill of Rights became law, and it overturned the Supreme Court’s decision in Chisholm v. Georgia, which held that the judicial power under Article III extended to “suits for money against a state government” by a citizen of that state or any other state. The language of Article III extending the judicial power to controversies “between a State and citizens of another State” read literally and in isolation would seem to support such a contention. Even so, many of the Constitution’s most prominent proponents—including Madison, Hamilton, and Marshall—had expressly disclaimed this interpretation during the ratification debates as inconsistent with the fundamental

348 See supra Part III.A.
349 See, e.g., Nowlin, Constitutional Illegitimacy, supra note 32, at 472–74.
350 U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).
351 2 U.S. (2 Dall.) 419 (1793).
352 Id. at 420.
353 U.S. CONST. art. III.
background constitutional principle of federalism. This interpretation was thus viewed by many as precluded by the structural design of the Constitution and the concomitant proper structural context of the interpretation of Article III. Indeed, the evidence strongly suggests that *Chisholm* was widely viewed by the founding generation as a misinterpretation of the Constitution, resting on an overly literal reading of the text of Article III in isolation from the broader structural context of the American constitutional design. This misinterpretation allowed federal courts to exceed the scope of the national judicial power, undermining both state power and the crucial federal structure of the Constitution.

In response to *Chisholm*, Congress hastened to propose and the states swiftly ratified the Eleventh Amendment: "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Indeed, the fact that the text uses the language of construction (i.e., "the judicial power shall not be construed to extend . . .") rather than simple alteration (i.e., "the judicial power shall not extend . . .") also supports the contention that the Eleventh Amendment was not seen by its framers and ratifiers as a substantive alteration of Article III of the Constitution, but rather as a declaratory provision clarifying its pre-existing meaning and correcting the Supreme Court's misconstruction of that meaning.

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354 McCloskey, *supra* note 24, at 21. Overall the Framers' views on these questions were mixed, with proponents and opponents of the Constitution expressing opinions on both sides of this reading of Article III. See Chemerinsky, *supra* note 91, at 182–83.


357 It took only three weeks. *Stone*, *supra* note 105, at 230.

358 They ratified within a year, although the official proclamation of ratification was not made until 1797. *Id.*

359 U.S. Const. amend. XI.

360 *Alden*, 527 U.S. at 722 (observing that "the text and history of the Eleventh Amendment . . . suggest that Congress acted not to change but to restore the original constitutional design" (emphasis added)).
The Eleventh Amendment, then, ratified by the founding generation less than a decade after the ratification of the Constitution and the Bill of Rights, likely rests upon the following premises: first, that the Supreme Court can misinterpret the scope of the judicial power under Article III by failing to attend to background structural norms of the Constitution such as federalism. Second, that such misinterpretations can lead the federal courts to exceed their authority under Article III and undermine important structural constitutional norms. And, third, that such misinterpretations by the Court are subject to correction, and the Constitution to clarification, by declaratory amendment. In short, the founding generation did not hesitate to clarify the meaning of Article III, as understood “holistically” in light of the Constitution’s architecture, even when this required a constitutional amendment to overturn the Supreme Court’s (mis)understanding of the scope of judicial power.

The Eleventh Amendment, then, is constitutional reform well within the spirit of the Bill of Rights: it is primarily declaratory and structural in nature and that is meant to function in an important educative and political manner. The Eleventh Amendment thus reinforces the important reform lessons of the Bill of Rights (as well as other founding-era documents) and demonstrates their specific application in the area of judicial power under Article III. This amendment, therefore, may also serve as an additional model and inspiration for our contemporary constitutional reform efforts. One may conclude, then, that an amendment proposal designed to overturn or limit the judiciary’s power to misconstrue its own powers under Article III and erode fundamental structural principles is a mode of constitutional reform well within the spirit of the founding generation’s understanding.

E. Constitutional Rights, Constitutional Structure, and the American Constitutional Design

In the final analysis, the range of “original understanding(s)” of the Bill of Rights, as supplemented by our examination of the Virginia Declaration of Rights, The Declaration of Independence, the Philadelphia Constitution, and the Eleventh Amendment, is one of a document primarily structural, declaratory, political, and educative in nature. This original understanding is broadly reflective of the importance that the founding generation placed upon fundamental principles of constitutional structure, the close relationship of structure to

361 The amendment was ratified by 1794, although the official proclamation did not occur did not occur until 1797.
rights, and the great political and educative value of formal statements of principles of constitutional structure and rights in a declaration or bill of rights.

Of course, the purpose of this exploration of the original understanding of the Bill of Rights has not been to argue against the legitimacy of the development of restrained judicial review, but rather to reinforce our concerns about expansive judicial power and to seek inspiration for our contemporary judicial restraint reform project in the founding generation's profound meditations on constitutional government. There is every reason to suppose that our modern reform efforts can greatly benefit from a close study of the political theories and practices of the Founders. Indeed, the original understanding of the Bill of Rights can provide us with an important inspiration and a practical model for reform. This model can guide our reform project and thus restore a more populist, republican understanding of the Constitution's design. The original structural understanding of the Bill of Rights, then, is highly suggestive of the potentially great value of an amendment that functions in a chiefly political and educative manner to clarify, reinforce, and emphasize the important implications of fundamental structural principles as they relate to the constitutional limits of Article III and the constitutional rights of American citizens.

F. Constitutional Reform in the Spirit of the Bill of Rights

What form, then, might modern constitutional reform in the spirit of the Bill of Rights take? The original understanding of the Bill of Rights was of a document structural, declaratory, political, and educative in nature. Therefore, first and foremost, constitutional reform in the "spirit" of the Bill would be structural, reinforcing the basic design of the Constitution—such as representative democracy, federalism, and separation of powers—and clarifying and deploying these designs' relationship to the closely related questions of (1) individual rights under the Constitution and (2) their more particular constitutional implications with respect to structural questions such as allocation of power among various institutions.

How, then, might these principles be deployed to limit expansive judicial power? A judicial reform amendment would seek to reinforce these fundamental structural values and emphasize and clarify their implications for the proper judicial role, including the important (implicit) structural limits on the exercise of judicial review and the relationship of judicial restraint to the fundamental rights of the
individual.\textsuperscript{362} As shall be shown, such an amendment might particularly emphasize the constitutional imperative of judicial restraint, requiring judges to ground their decisions firmly in traditional legal materials, minimize their political discretion in the area of constitutional interpretation, and exercise the power of judicial review deferentially—all in order to preserve fundamental constitutional values.

Second, constitutional reform in the spirit of the Bill of Rights would be largely declaratory in nature. It would avoid any important substantive innovations in the design of the Constitution and would seek instead simply to emphasize, clarify, and reinforce its preexisting (if partially implicit) fundamental structure. A judicial power reform amendment would avoid obvious structural innovations—such as congressional override, recall elections, or supermajority requirements for the exercise of judicial review—meant to "improve" the Constitution. Such an amendment, then, would simply (re)state the implicit preexisting constitutional limits on the exercise of the judicial power in constitutional cases—and do so as plainly and precisely as possible.

Third, constitutional reform in the spirit of the Bill of Rights would be political in nature, providing a statement of principles of constitutional structure and rights, as well as their implications for the judicial power and specifically what actions by the judicial branch violate the Constitution. A judicial reform amendment would, therefore, be designed to promote popular objections to judicial usurpation of legislative authority by (1) evincing in the constitutional text (further) distrust of unelected judges,\textsuperscript{363} (2) attempting to clarify what legitimate rights (related to structural principles such as representative democracy and federalism) expansive judicial power would violate, and (3) indicating more precisely which judicial actions are in fact constitutional violations. The amendment's ultimate goals would be to provide a more explicit standard for the proper use of judicial power and to serve as a rallying point for opposition to the expansive use of the judicial power. These developments in turn would facilitate the use of, and clarify the proper scope and dimensions of, the various politi-

\textsuperscript{362} See Waldron, supra note 20 (arguing that a broad belief in individual rights rooted in human dignity entails a belief in the basic democratic rights that are violated when unelected judges enforce their own controversial conceptions of rights against those of democratic majorities).

\textsuperscript{363} Such distrust would be in addition to that implicit in the Fourth, Fifth, Sixth, and Seventh Amendments. See U.S. Const. amends. IV (conditioning the issuance of warrants), V (requiring indictment of a grand jury for capital crimes, prohibiting double jeopardy, and requiring due process of law), VI (ensuring the right to a jury trial in all criminal prosecutions), VII (ensuring preservation of jury trial rights in suits at common law and limiting the reexamination of jury verdicts).
cal checks on the judiciary as well as other strategies for correcting judicial overreach.

Finally, constitutional reform in the spirit of the Bill of Rights would be educative in nature. It would be concerned with declaring political truths in a highly visible and solemn manner in order to educate the public, shaping American political culture and limiting “factious” passion- and interest-driven behavior. Thus, a judicial reform amendment would hope to foster a national political culture that is sensitive to the dangers of juristocracy, that recognizes the value of representative democracy, and that opposes the “factious” pursuit of partisan political agendas—whether slavery, laissez-faire, or abortion—from the federal bench.

IV. AN OVERARCHING REFORM MEASURE: THE JUDICIAL RESTRAINT AMENDMENT

A. The Idea of a Judicial Restraint Amendment

What measures should reformers pursue to rein in the Court, restore the republican structure of the Constitution, and promote its fundamental populist aspirations? Certainly reformers should continue to pursue diverse political and educative avenues of reform, seeking the appointment of restraintist judges to the federal bench, promoting greater public awareness of the American constitutional design, and identifying the highly suspect status of expansive judicial power in our framework of government.

What may be most needed, however, is an overarching avenue of reform that encompasses, complements, and transcends these more specific political and educative efforts by organizing, promoting, reinforcing, and legitimating them. A judicial restraint amendment would serve these needs. In particular, it could give the judicial reform movement a dramatic, single unifying goal or rallying point around which to organize and concentrate its efforts. An amendment in the spirit of the Bill of Rights could potentially further judicial reform purposes in four ways. First, it could clarify and reinforce the structural nature of the American constitutional design by igniting and concentrating debate directly on the most fundamental structural interpretive issues at stake. Second, it could render implicit constitutional limits more explicit in a declaratory fashion rather than substantively altering the constitutional design in a controversial and unpredictable manner. Third, it could empower political objections to expansive judicial power in an effective fashion. And, finally, it could educate and shape elite and popular opinion with respect to the
danger and constitutional (il)legitimacy of expansive judicial power in the pursuit of controversial partisan and ideological ends.

B. A Specific Proposal: The Constitutional Rights Restoration Amendment

If we have established the basic lineaments of a judicial restraint amendment, what might such an amendment actually look like more specifically? One might formally entitle it the “Constitutional Rights Restoration Amendment” (CRRA), and it could read something like this:

THE CONSTITUTIONAL RIGHTS RESTORATION AMENDMENT

SECTION 1

The authority of the Supreme Court and lower federal courts to review the constitutionality of state and federal legislation and executive and judicial acts in potential conflict with the justiciable provisions of the Constitution is itself derived from and limited by the structure of the Constitution. In order to protect the basic rights reflected in and preserved by fundamental constitutional principles such as popular sovereignty, representative democracy, the separation of powers, and federalism, the judicial power shall not be construed to exceed its constitutional limits.

SECTION 2

This amendment recognizes the constitutional requirement of judicial restraint. When exercising the power of judicial review, the Justices of the Supreme Court and other federal judges shall ground their decisions firmly in constitutional text, history, and structure; minimize any degree of discretion they may have in the interpretation of constitutional provisions; strive to be non-partisan and non-ideological in rendering decisions; and defer to the judgment of state and federal elected representatives except in cases involving a clear violation of the Constitution.

SECTION 3

This amendment recognizes that an exercise of judicial review in violation of this standard exceeds the scope of the authority of the federal courts under the Constitution, undermines the republican design of the Constitution, and threatens the constitutional rights of the people. Such an exercise of judicial power is therefore a violation of the Constitution.

SECTION 4

The President and Congress have a constitutional obligation to uphold and defend the Constitution. In light of this obligation and in accordance with the system of checks and balances established by the Constitution, this amendment recognizes the preexisting and
concurrent authority of the elected branches to check and limit judicial violations of the Constitution. The constitutional question of the degree of deference the elected branches must extend to the decisions of the judicial branch may be determined by the elected branches independently of the views of the judiciary.

SECTION 5

The enumeration of judicial interpretative authority in this amendment shall not be construed to deny or disparage the ultimate interpretive authority reserved to the Sovereign People of the United States, who ordained and established this Constitution and its amendments, or any other interpretive authority granted to their elected representatives in the state and federal governments by the Constitution.

SECTION 6

All political power in the United States is vested in, and consequently derived from, the Sovereign People of the United States, who bear the final responsibility for the preservation of their constitutional order and their constitutional rights; no free government, or the blessings of liberty, can be preserved by any People except by popular vigilance and frequent recurrence to fundamental principles of republican government.

Such a structural amendment is, in fact, modeled quite closely on what we have seen of the "original understanding" of the Bill of Rights: it is primarily structural, declaratory, political, and educative in nature.

It is structural, of course, not only in the sense that it is an attempt to remedy the problem of expansive judicial power, but that it, like the Bill of Rights, echoes, restates, clarifies, emphasizes, and deploys the implicit basic structural and foundational principles of the Constitution. These include the following: popular sovereignty, representation, federalism, and separation of powers, as they relate to the proper scope of the judicial power. In particular, both its title, the "Constitutional Rights Restoration Amendment," and its textual provisions emphasize the important relationship—recognized by the Founders and reflected in the Virginia Declaration, the Declaration of Independence, the Philadelphia Constitution, and the Bill of Rights—between constitutional structure and constitutional rights. Special emphasis is placed on the ultimate dependency of constitutional rights, both participatory and non-participatory, upon the interaction of constitutional structure with the civic virtue of the people.

The amendment is declaratory in the sense that it does not purport to—and does not—substantively alter or "improve" the Constitution but simply clarifies and emphasizes the implicit
unconstitutionality of expansive judicial power in light of the Constitution’s basic architecture. It therefore follows the Bill of Rights, many of whose provisions were declaratory of and complementary to the structure of the Philadelphia Constitution. In fact, a judicial restraint amendment might be seen as simply a textual elaboration upon a preexisting Ninth Amendment structural “right to judicial restraint.”

The CRRA also echoes the declaratory language of the Eleventh Amendment regarding the manner in which the judicial power of the United States shall be “construed,” limiting the Supreme Court’s potential misunderstanding of its own power under the Constitution.

The CRRA is functionally political in that it would derive its force not purely from judicial self-enforcement, but from facilitating objections by political actors to expansive judicial power, and by providing an express standard and rallying point for criticism of judicial decisions incompatible with the constitutional design. It would thus raise significantly the salience of the issue of judicial constitutional violations, encouraging both the appointment of “restraint” judges to the bench and moderate checking activities by the political branches, including the traditional and widely accepted “debate, litigate, legislate,” and “nominate” strategies.

Finally, the CRRA is educative in its basic function: one hopes and expects that it would help to foster a political culture that recognizes the existence of constitutional limits on the judicial power and that opposes the passion- and interest-driven “factional” misuse of judicial review in violation of the Constitution to further controversial political agendas—whether slavery, laissez-faire, or abortion. Ultimately, such a view of the judicial power might become so deeply ingrained in the national sentiment that the “factional” litigation strategy of the American Civil Liberties Union (ACLU), centered around the impermissible circumvention of the Constitution’s political processes, would become as politically anachronistic as monarchy, state churches, or sedition acts.

In fact, the only major functional difference between the numerous structural and declaratory provisions of the Bill of Rights and the CRRA is that the former was designed largely to forestall future mistaken constitutional practices, and the latter is designed to correct

364 See supra Part III.C.1.
365 See supra Part III.D.
366 Moynihan, supra note 37, at 8.
367 See id.
contemporary mistaken practices that have actually achieved substantial support, at least in elite circles and in the practice of the Supreme Court. In this respect, then, the amendment actually has more in common with the founding generation's Eleventh Amendment, clarifying the importance of state sovereign immunity and overturning the Supreme Court's misinterpretation of the constitutional design and judicial overreach.\textsuperscript{369} The CRRA is, then, an amendment well within the original reform spirit of the Bill of Rights and the Philadelphia Constitution, reinforcing both documents and reflecting the implicit political judgment of the Founders as to the nature of structural constitutional reform. In particular, it would complement the Bill of Rights by clarifying the limits that the basic structural values of the Philadelphia Constitution place on judicial review of the Bill's provisions, thereby correcting mistaken structural practices the Framers of the Bill of Rights did not foresee and had thus had no reason to expressly prohibit—those surrounding the rise of an anti-republican, anti-populist federal judiciary.

C. Evaluating the Amendment

Even if a judicial restraint proposal such as the CRRA falls within the spirit of the Bill of Rights, it is possible that it is still deeply flawed as a practical matter and thus inferior to amendment proposals already placed on the table by earlier generations of republican reformers. Furthermore, one might criticize both the general idea of a judicial restraint amendment and the particular amendment put forth here. It therefore makes sense to attempt to evaluate both the general idea and the specific proposal, even if this must be done in a somewhat rough-and-ready fashion given space constraints. One might look, then, at three related lines of inquiry: (1) potential effectiveness in limiting expansive judicial power; (2) relative likelihood of ratification at some point in the foreseeable future; and, finally, (3) political and educative value as a mere proposal in complementing and furthering political reform efforts.

1. Effectiveness in Limiting Judicial Power

a. Direct Effects of the Amendment on the Judiciary: Promoting Self-Restraint

What, then, would be the advantages of the CRRA if it was actually ratified? Would it effectively limit expansive judicial power, keep-
ing the Supreme Court within its constitutional limits and promoting populist aspirations without impairing unduly the Court’s legitimate constitutional functions? A critic might contend that such a provision would simply require judges to enforce the amendment themselves, allowing them to dilute it substantially through the very sort of politically driven “creative” interpretation the amendment was meant to prohibit. Indeed, judges might even attempt to stand the amendment on its head, arguing that its provisions somehow support more expansive judicial power, perhaps by recognizing that judges sometimes have some degree of discretion or that they cannot always be wholly apolitical. There is, of course, a measure of truth in these points. There is something paradoxical about using a textual provision that will be interpreted by judges to direct those same judges’ interpretation of other textual provisions, particularly when the provision is premised upon distrust of the judiciary’s ability to understand or willingness to respect the constitutional limits placed on its own power. Still, one must be careful not to underestimate the direct and indirect effect such an express provision might have on judicial behavior, even as a purely hortatory and commonsensical matter.

First, with the passage of this amendment, it seems certain that basic structural constitutional issues relating to judicial power would be brought to the fore as overt questions of structural interpretation concerning the constitutional limits of the judicial power. By clarifying and emphasizing the basic point that expansive judicial review by the Court can itself be a violation of the Constitution and is subject to constitutional objection and political criticism, the CRRA would ensure serious debate about the proper scope of the authority of the Supreme Court under the Constitution, at least in any case involving a controversial use of the judicial power. In particular, dissenting Justices are very likely to raise CRRA-based objections to the Court’s decisions, asserting that the majority’s exercise of judicial review violates the Constitution. Plainly, dissents of this sort will pressure the Justices engaging in judicial overreach to address the question of the constitutional scope of judicial power in their opinions and to reconcile their use of judicial review with the judicial restraint amendment. Thus, discussion of the question of the constitutional limits of the power of the Supreme Court—so seldom raised and debated on the Court today—would be very difficult for the Court to avoid in its decision making.

Second, one can fairly assume that the members of the Supreme Court possess a sincere desire to enforce the Constitution to the best of their ability and understanding and that they do not wish to violate the Constitution by exceeding the scope of their authority. Certainly,
the language of the amendment—and likely context of its passage—would make it quite difficult for a Justice holding a highly expansive conception of the judicial power to make a plausible claim in good faith that his view is consistent with the CRRA, given the amendment's express requirements that judges exercise "restraint," ground their decisions "firmly" in traditional legal materials, "minimize" their political discretion, "strive" to be "non-ideological," and strike down laws only in "clear" cases.370 Thus to the extent that the plain language and obvious import of the provision discourages judicial expansionism, the members of the Court would likely react to it in good faith and embrace more restrained judicial philosophies, shifting the entire spectrum of the debate over judicial power substantially in the direction of judicial restraint. In short, then, a judicial restraint amendment would both tend to force members of the Court to defend expansive judicial power in express terms as a constitutionally sound use of the Court's power and also to make it much more difficult for them to do so in a plausible and good faith manner.

b. Indirect Effects of the Amendment on the Judiciary: Checking the Courts

Even so, it is quite possible that the amendment's greatest impact on the courts will occur indirectly through the political process and through popular (i.e., political) enforcement efforts. It is often forgotten that the founding generation did not value the provisions of the original Bill of Rights primarily for what they thought judges would do with them, but rather for the important political and educative consequences they expected the amendments would have for political debate and culture.371 Indeed, by far the most common understanding among the Founders of the chief value of a bill or declaration of rights was the express political standard it could provide the people for judging for themselves whether their governmental actors, including judges, were acting unconstitutionally.372 Its value, then, lies in the way it would politically empower objections to the violation of certain rights by the government. Madison and other Founders also valued a bill of rights much more for its educative function, for the way in which a solemn declaration of political principle in the Constitution could help to inculcate basic precepts of free govern-

370 See supra Part IV.B.
371 See supra Part III.C.1.
372 See supra Part III.C.3.
ment in the national sentiment and thus counteract the impulses of interest and passion.\footnote{378}

Similarly, simply rendering the Constitution's implicit structural requirement of judicial restraint explicit and strongly emphasizing it in its own particular textual provision is likely to have important long-term political and educative consequences. First, the amendment will indeed establish an immediate express judicial restraint political standard for judicial behavior against which the actual practices of the judges can be measured to determine if those practices themselves violate the Constitution. As some of the Founders recognized this political function of a Bill of Rights is of much greater importance when the governmental actor in question is not elected, increasing the likelihood of elite tyranny against the will of the people.\footnote{374} Such an express provision, given the weakness of democratic controls on the federal courts, is of particular importance in this area as a political standard and rallying point for critics of judicial overreach. Voters, representatives, and even dissenting Justices, rather than simply decrying "judicial activism," could point directly to the CRRA, arguing much more persuasively that extravagant uses of judicial power are explicitly unconstitutional. What this would mean is that every expansive exercise of judicial power would provoke immediate and serious questions as to its own structural constitutionality under the new amendment, raising structural-interpretive issues as to the proper judicial role in a more obvious, direct, easily understandable, and overtly judicial restraint form. There is every reason to believe that this would encourage a much more active use of checks on the judicial process, involving the traditional "debate, legislate, litigate" and "nominate" strategies, as well as the promotion of other methods of checking the Court. It would thus significantly chill the expansive exercise of the judicial power.

Second, the amendment will also serve an educative function, helping to entrench the political truths most directly related to the constitutional requirement of judicial restraint into our national sentiment, as fundamental maxims of free government, and counteracting the use of expansive judicial power for narrow partisan or ideological ends such as in \textit{Dred Scott}, \textit{Lochner}, and \textit{Roe}.\footnote{375} In particular, it will sensitize American political culture to the simple incompatibility of expansive judicial power with other fundamental constitutional values.

\footnote{373} \textit{See supra} Part III.C.4.
\footnote{374} \textit{See Goldwin, supra note} 269, at 72; \textit{Rakove, supra note} 132, at 336.
such as popular sovereignty, representative democracy, separation of powers, and federalism. The doctrine of judicial review has obscured the important nature of the constitutional limits that other foundational constitutional values implicitly place on the judiciary’s powers. This reform amendment will raise the salience of this insight and underscore the importance of a restrained judiciary to the integrity of the constitutional design and the preservation of the rights of citizens. It will therefore foster a larger political climate conducive to checking the judiciary.

It will further help ordinary citizens, legislators, and even judges to recognize that the arbitrary judicial imposition of moral-political conclusions with which they may strongly agree is deeply repugnant to both the foundational structural principles of the Constitution and the fundamental rights which the design of the Constitution protects, reflects, and instantiates. It will therefore discourage attempts to bypass the ordinary amendment processes that are subject to the Constitution’s strict structural-procedural requirements in favor of petitioning the judiciary to engage in “super-legislative” judicial policymaking. Such behavior, however tempting in light of ever-present political passions and interests, is still ultimately factious, tyrannical, and as illegitimate as political censorship or the disenfranchisement of voters with whom one disagrees politically. The amendment will, finally, reinforce the American people’s fundamental commitment to basic constitutional values. It is quite evident, then, that the educative value of such a reform amendment could be immense, perhaps altering the way in which Americans think about judges, courts, and the Constitution. The amendment could promote the restoration of something closer to the Founders’ vision of the constitutional design in light of the populist evolution of the American political tradition. Ultimately, therefore, a president, congressman, dissenting judge, or ordinary citizen could invoke the CRRA and the strongly held American beliefs it would reinforce and foster to correct expansionist judicial decisions.

2. Reinforcing Crucial Constitutional Insights

a. The Crucial Relation of Rights and Structures

It is worth emphasizing that the CRRA would clarify, emphasize, and reinforce several additional and broader crucial constitutional insights. It would, for instance, make textually explicit the founding

376 Obviously, a great deal of this change would occur during the debates surrounding the proposal and ratification of the amendment.
generation's understanding of the (often neglected) intimate relationship between constitutional structures and constitutional rights—a view we have seen displayed in the original understanding of the Bill of Rights, the Philadelphia Constitution, the Declaration of Independence, and the Virginia Declaration. In particular, the amendment would underscore the simple but decisive fact that basic structural values directly instantiate our fundamental participatory rights and protect our non-participatory rights indirectly by diffusing and balancing political power and by promoting civic virtue among voters and officeholders. Therefore, the CRRA could strongly emphasize the point that the security of our rights is ultimately dependent upon the integrity of the constitutional structure. Indeed, the amendment's suggested title straightforwardly attests the simple truth that only by reestablishing the fundamental principles of the American constitutional design can one hope fully to restore genuine constitutional rights, including the full substance of the basic right to political participation.

b. Supreme Court Constitutional Violations

The amendment would also work to clarify and emphasize the simple precept that the Supreme Court itself can violate the Constitution, promoting the view, quite familiar to the Founders, that judges, as well as voters, legislators, and executives, pose a potential threat to our basic law and to our political liberties. A moment's reflection shows this to be true, but the Court's role as primary interpreter of the Constitution has tended to obscure this simple fact. Indeed, the Court itself is a creation of the Constitution, its power is limited by the Constitution, and its decisions can violate the Constitution by exceeding the authority of Article III and by conflicting with the structural principles of the Constitution. There should be no doubt that a Supreme Court decision striking down a state or federal law as unconstitutional can itself be as unconstitutional as any law passed by a state legislature or Congress if the exercise of judicial power exceeds the scope of the Court's proper authority under Article III or undermines constitutional structures. An express articulation of even a broad standard for proper judicial decisionmaking within implied constitutional limits and placed in the Constitution as the "Twenty-Eighth Amendment" would greatly strengthen and reinforce this crucial insight. Moreover, the clarification of this important constitutional principle

377 See supra Part III.
378 See supra Part I.C.
379 See supra Part I.
would likely have profound consequences over time for the political culture regarding use of the various avenues for correcting judicial mistakes and constitutional violations.

c. Guarding the Guardians

And, indeed, if the Supreme Court, the institution widely viewed reflexively as the guardian of the Constitution, can and does violate the Constitution, the question then arises: who will guard the guardians? A judicial restraint amendment will help to render more intelligible to judges, scholars, and the public the principle, widely accepted at the founding, that the President and Congress have serious roles to play in checking the Supreme Court and containing its power within the limits set by the Constitution. This point clearly follows from sections 1, 2, and 3 of the CRRA, but it is particularly emphasized in section 4, which recognizes that the Court, as Hamilton expected, is subject to the same system of checks and balances as the other branches of the federal government.

Section 4 of this amendment would also recognize that the question of the range and nature of legitimate political checks on the judiciary is a constitutional question that must necessarily be answered by the democratically elected political branches independently of the views of the judiciary. Indeed, even the now widely accepted doctrine of judicial supremacy reinforces rather than refutes this basic point. Obviously, the doctrine of judicial supremacy is not based upon the Supreme Court's bare assertion of that power in, say, United States v. Nixon or Cooper v. Aaron. That claim would simply be tautological, justifying judicial supremacy in terms of adherence to the Supreme Court’s decisions and justifying adherence to the Supreme Court’s decisions in terms of judicial supremacy. Rather, judicial supremacy is necessarily based upon the executive and legislative branches’ independent judgment respecting the scope of judicial power in the Constitution’s design for government. The coordinate political branches have already, of necessity, made an independent, i.e., departmentalist, (provisional) judgment concerning the proper role for courts in the framework of government created by the Constitution. Thus, section 4 of the CRRA, while not displacing the practice of judicial supremacy, recognizes that judicial supremacy has itself a necessarily departmentalist basis—the conclusion of all three

380 See The Federalist Nos. 78, 82 (Alexander Hamilton).
381 See The Federalist No. 78 (Alexander Hamilton).
branches of the federal government in favor of judicial supremacy—and is subject to revision upon that same basis.\textsuperscript{384}

Thus, whether the elected branches of government will continue to adhere to an interpretation of the constitutional design that includes the practice of judicial supremacy—and thus whether their legitimate checking actions have to be consistent with that practice—is inherently a question that cannot be resolved by the judiciary alone.\textsuperscript{385} It is worth noting here that judicial supremacy has been rejected earlier in our history on constitutional grounds related to the separation of powers by Thomas Jefferson, Andrew Jackson, and Abraham Lincoln, the last of these in the context of the \textit{Dred Scott} decision, slavery, and the citizenship of free African-Americans.\textsuperscript{386} Moreover, even if a general rejection of judicial supremacy were thought unde-

\textsuperscript{384} Section 5 of the CRRA also ensures that it cannot be read as an endorsement of judicial supremacy, although it clearly does not constitutionalize a rejection of judicial supremacy.


\textsuperscript{386} Thomas Jefferson, Letter to Abigail Adams (Sept. 11, 1804), \textit{in} \textit{Writings of Thomas Jefferson}, XI, 50-51 (Andrew A. Lipscomb ed., 1903) ("The opinion which gives to the judges the right to decide what laws are constitutional and what are not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch."); Andrew Jackson, Message on Veto of the Bank Bill (July 10, 1832), \textit{in} \textit{2 A Compilation of the Messages and Papers of the Presidents, 1789-1897}, at 576, 582 (James D. Richardson ed., 1961) (vetoing the Bank of the United States as unconstitutional despite the Supreme Court’s ruling to the contrary and declaring that "[t]he opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both"); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), \textit{in} \textit{Inaugural Addresses of the Presidents of the United States}, S. Doc. No. 101-10, at 139 (1989) ("The candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal."). On departmentalism and Lincoln’s position, see also Arkes, \textit{supra} note 257, at 42 (discussing the Lincoln administration’s issuance of passports and patents to free African-Americans as citizens of the United States despite the Supreme Court’s decision in \textit{Dred Scott}, holding that blacks, slave or free, could not be U.S. citizens); and Hadley Arkes, \textit{Prudent Warnings and Inprudent Reactions}, \textit{in} \textit{The End of Democracy?}, \textit{supra} note 243, at 44–85, 79 (observing that departmentalism is “already embedded in the Constitution and confirmed in notable precedents—namely, Lincoln’s teaching on the authority of the political branches to interpret the Constitution and limit the power of the courts").
sirable given the doctrine’s obvious strengths and its status as a settled constitutional practice, the elected branches should still seriously reconsider their support for judicial supremacy at the margins, that is, as applied to judicial constitutional violations. The question here is one of a simple modification of the application of the doctrine of judicial supremacy as applied to judicial decisions that are not “mere” mistakes by the Court about constitutional meaning, which the branches would continue to regard as “supreme,” but rather decisions that are themselves judicial constitutional violations undermining foundational constitutional principles, structures, and rights of republican government.\textsuperscript{387} Such a marginal modification of judicial supremacy, as it applies to judicial violations of the Constitution, is worth serious consideration, given the dangers the Court itself poses to the Constitution.

In short, then, the potential bases for interpretations of the constitutional design allowing for more equitable distributions of interpretive power across the three branches of the federal government warrant continued thought and debate. The CRRA could revive these lines of argument and promote serious political debate about the relationship of constitutional structure to the institutional dimensions of constitutional interpretation by making textually explicit these implicit constitutional principles relating to the checking functions of the elected branches and the inevitably departmentalist foundations of judicial supremacy. Such an amendment, then, would very likely help to shift an important degree of power (back) from the judiciary to the President and Congress, helping to re-establish the judiciary as once again “the least dangerous branch.”\textsuperscript{388}

d. Populist Constitutional Responsibilities of a Sovereign People

Finally, the amendment will also render more intelligible to ordinary Americans the notion that the sovereign people in a republic must retain ultimate interpretive authority with respect to their Constitution. Indeed, the sovereign people must retain final interpretive responsibility as part of their civic duty to elect men and women who will defend the integrity of the Constitution—by appointing and confirming Justices who will adhere to the constitutional design and by discouraging constitutional violations by ambitious Justices. This point, of course, would tend to follow quite naturally from sections 1, 2, 3, and 4 of the CRRA, but it is also rendered more emphatic in

\textsuperscript{387} Cf. George, \textit{supra} note 89 and accompanying text.

\textsuperscript{388} \textit{The Federalist} No. 78 (Alexander Hamilton), \textit{supra} note 56, at 433.
section 5’s recognition of the “populist” interpretive authority to the sovereign people and their elected representatives.

This point is further driven home by section 6’s provision echoing the popular sovereignty language of the Virginia Declaration of Rights, the Declaration of Independence, the Preamble to the Constitution, and the Ninth and Tenth Amendments of the Bill of Rights. Again, making this implicit constitutional principle textually explicit—in the specific context of the judicial power—will help foster a political culture that encourages citizens to take democratic self-government more seriously and to resist the temptation to delegate (de facto or de jure) unchecked political authority to unelected judges or other political actors. The Constitutional Rights Restoration Amendment would, then, tend to reinforce the basic constitutional principle that the sovereign American people are the ultimate source of the political authority of the Constitution and that they therefore must also serve as the Constitution’s ultimate interpreters and guardians. Finally, section 6 of the CRRA borrows language from the Virginia Declaration of Rights, constitutionalizing and thus formally solemnizing a principle of popular vigilance and frequent recourse to fundamental principles, emphasizing the necessity of civic education to the ultimate preservation of freedom in a democracy.

3. Promoting Diverse Avenues of Reform

One can see how this amendment would complement other avenues of reform, promoting, facilitating, legitimating, and reinforcing them. It would make it easier to appoint avowed proponents of judicial restraint to the Court, given the necessity that judges take an oath to uphold the Constitution, which would include the requirements of the CRRA. It would make it easier to exhort the sitting Justices to eschew expansive judicial power, given the obvious language of the amendment and therefore the greater ease with which persuasive objections to activist decisions could be articulated by other judges, elected representatives, and citizens. It would thus make it easier to encourage the President and Congress to engage in moderate checking activities to discourage judicial overreach, especially given both the need for some sort of check on the judiciary and the language in the amendment expressly recognizing the constitutional propriety of such measures. Finally and most fundamentally, it would sensitize the American people to the notion that judges themselves can violate the

389 "That no free Government, or the blessing of liberty, can be preserved to any people but... by frequent recurrence to fundamental principles." VA. DECLARATION OF RIGHTS art. XV (1776).
Constitution, that expansive judicial power directly conflicts with fundamental constitutional principles, that the judicial "guardians" must themselves be "guarded," and therefore that the Supreme Court like all governmental institutions must be monitored and subjected to political checks. In sum, the broad political and educative consequences of such an amendment would go a long way toward re-establishing judicial restraint as a constitutional norm and restoring the republican constitution to its original vigor. It would thus promote the fulfillment of the populist democratic aspirations of our evolving constitutional tradition. Finally, given the predominance of anti-populist elites in the judicial process, a populist measure strongly facilitating political checks on the judiciary through educative and political effects is likely the best practical measure for enforcing constitutional limits on the judiciary—at least without radically altering the structure of the Constitution or significantly undermining the ability of the judiciary to perform its central functions.

4. Pluralism, Judicial Restraint, and Democratic Debate

Judges would likely react to the CRRA directly and would be forced to react to it indirectly by virtue of its wider political and educative consequences. The amendment therefore would foster judicial restraint and strongly discourage the exercise of expansive judicial power. Of course, just as judicial restraint is consistent with a number of more particular conceptions of the judicial role, a restraint amendment would leave room for interpretation and reasonable disagreement with respect to the precise contours of the proper judicial role. For instance, whether the proper judicial role best reflects the broad judicial philosophy of an Oliver Wendell Holmes, a Benjamin Cardozo, a Felix Frankfurter, a John Marshall Harlan III, a Byron White, or of someone else broadly in the restraint camp, would still be

390 For instance, Justices across the current spectrum on the Court have serious claims to important aspects of the judicial restraint mantle. Justice Scalia's general support for textualism, originalism, and traditionalism as interpretive approaches and his emphatic rejection of discretionary judicial policymaking on controversial social issues such as abortion are obviously central aspects of any sound theory of judicial restraint. See Scalia, supra note 58. On the other hand, Justice Breyer's tendency to defer to Congress as a co-equal branch of government and his deference to government more generally in, say, the area of free speech law and federalism also give him an arguable claim to represent important facets of judicial restraint, even though his overall approach to judging is in fact moderately expansive. See Jeffrey Rosen, Modest Proposal, THE NEW REPUBLIC, Jan. 14, 2002, at 22-25; see also Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 377 (2001) (Breyer, J. dissenting) (arguing that the Court should not have declared 42 U.S.C. § 12202 unconstitutional because "Con-
largely an open question. And, no doubt, there would also be attempts (though, one imagines, largely disingenuous) to defend more expansive conceptions of judicial power as meeting the amendment’s requirements, despite its plain language concerning the firmness of the legal grounding in traditional legal materials, the minimizing of judicial political discretion, and the “clear” mistake standard as well as its obvious purpose of limiting actual abuses of judicial power.

What is obvious, then, is that the language and structural logic of the CRRA would serve strongly both directly and indirectly to promote judicial restraint and to de-legitimate expansive judicial power. Indeed, the point of a judicial restraint amendment is certainly not to settle all questions with respect to the proper judicial role, much less choke off debate within reasonable limits, but rather to (1) indicate, however roughly, the outer limits of judicial power under the Constitution through express language, and (2) insure that voters and their elected representatives, as well as elites and unelected judges, determine the more specific answers to questions of judicial power within the broader ambit of judicial restraint. Such an express political debate about the constitutional limits of the judicial power would revive an important tradition of vigorous extra-judicial constitutional interpretation. In this context, then, a continuing debate about the proper role for the judiciary would be a very healthy expression of democratic self-government.

D. Comparative Likelihood of Ratification

The reform proponents of judicial restraint are likely to find the potential benefits of a judicial restraint amendment quite inspiring, but it still does not alter the simple fact that the CRRA would be controversial and that a controversial amendment is unlikely to be ratified. What, then, can be said about its relative degree of controversialit and its relative likelihood of ratification in comparison to other amendment proposals?

In fact, the appeal of this amendment could be fairly widespread, extending well beyond the typical contemporary originalist critic of judicial activism. First, the amendment is fairly modest in nature compared to other prominent proposals for the abolition of judicial review or the creation of a congressional override of the Supreme Court. Indeed, the judicial restraint amendment avoids radical struc-
tural innovations and simply reflects an understanding of the judicial role that is likely quite close to that of the "man on the street," a common-sense, pre-analytic understanding of what law is and what judges are supposed to do. In fact, there is good reason to think ordinary Americans view "law" as something quite distinct from "politics" and further believe that judges should apply the "law," refrain from pursuing "political" agendas from the bench, and respect the Constitution's structural commitment to the democratic process. The reform amendment is also formulated broadly enough to include virtually all opponents of extravagant judicial power, including non-originalists, but it is still narrow enough—given its emphasis on firmly grounding decisions in traditional legal materials, minimizing political discretion, striving to be apolitical, and striking down laws only in clear cases of unconstitutionality—so that its most natural reading and obvious import is strongly prohibitive of expansive judicial decisionmaking. Further, the amendment proposal could also avoid the most serious charges of radicalism, given not only its common-sense and moderate restraint appeal, but also that it is simply a declaratory amendment that does not actually alter the Constitution in any substantive way but merely makes its preexisting, implicit constitutional principles textually explicit for the obvious purposes of clarity and emphasis. It would therefore avoid the political pitfalls associated with indisputably structurally innovative attempts to amend the Constitution, such as placing electoral controls on judges—including the necessity of overcoming the full weight of the (quite salutary) procedural conservatism of the American people in the area of constitutional change.

In fact, the CRRA may well have the potential to win the support of a major political party, given both the Republican Party's strong criticism of judicial activism in recent decades and the recent Republican Party Platform's discussion of the judiciary reads in part: "The federal judiciary, including the U.S. Supreme Court, has overstepped its authority under the Constitution. It has usurped the right of citizen legislators and popularly elected executives to make law by declaring duly enacted laws to be 'unconstitutional' through the misapplication of the principle of judicial review." Republican Nat'l Comm., The 1996 Republican Party Platform, reprinted in Prosperity, Self Government and "Moral Clarity", 1996 CQ ALMANAC D-21, D-27. The 2000 Republican Party Platform also endorses judicial restraint, noting: The sound principle of judicial review has turned into an intolerable presumption of judicial supremacy. A Republican Congress, working with a Republican president, will restore the separation of powers and reestablish a government of law. There are different ways to achieve that goal—setting terms for federal judges, for example, or using Article III of the Constitution

391 DWORKIN, FREEDOM'S LAW, supra note 50, at 3, 5-6.
392 Id.
393 The 1996 Republican Party Platform's discussion of the judiciary reads in part: "The federal judiciary, including the U.S. Supreme Court, has overstepped its authority under the Constitution. It has usurped the right of citizen legislators and popularly elected executives to make law by declaring duly enacted laws to be 'unconstitutional' through the misapplication of the principle of judicial review." Republican Nat'l Comm., The 1996 Republican Party Platform, reprinted in Prosperity, Self Government and "Moral Clarity", 1996 CQ ALMANAC D-21, D-27. The 2000 Republican Party Platform also endorses judicial restraint, noting: The sound principle of judicial review has turned into an intolerable presumption of judicial supremacy. A Republican Congress, working with a Republican president, will restore the separation of powers and reestablish a government of law. There are different ways to achieve that goal—setting terms for federal judges, for example, or using Article III of the Constitution
publican trend of supporting constitutional amendments as a means of political reform, including a balanced-budget amendment, a human-life amendment, a school-prayer amendment, and a flag-protection amendment.\textsuperscript{394} Notably, the last three Republican amendment proposals are clearly tied to overturning activist Supreme Court decisions which would themselves likely have been constitutionally suspect if decided under a judicial restraint amendment. In short, then, the mainstream of the Republican Party has shown itself quite willing to support numerous amendments to the Constitution in recent years, to support amendments specifically to overturn activist Supreme Court decisions, and to declare expansive judicial power incompatible with important constitutional values such as the separation of powers and representative democracy. There is, then, at least some reason to hope that a substantial portion of the mainstream of the Republican Party could be brought to support the CRRA or some other version of a judicial restraint amendment not involving radical structural innovations likely to provoke immediate mainstream objections. There is also real hope that even some degree of support for the amendment could be found in progressive and Democratic Party circles, despite their generally stronger partisan reasons for supporting judicial activism.\textsuperscript{395} Such hope stems from the consistent, long-standing, principled opposition to judicial activism espoused by such voices of liberal reason as \textit{The New Republic},\textsuperscript{396} the disenchanted...
with expansive judicial power expressed in recent years by many left-leaning constitutional and political theorists, the relative moderation of President Clinton's Supreme Court appointees, and the potential threat of a new era of conservative judicial activism. Support for the amendment, then, could be quite broad, and thus its likelihood of ratification substantially higher than its more structurally radically innovative rivals.

E. Political and Educative Value as a "Mere" Proposal

Even so, the actual ratification of the CRRA is highly unlikely simply because the ratification of any amendment on an issue as controversial as this one is highly unlikely. There is, for instance, no reason to suppose that an expansive judicial power amendment designed to legitimate the Warren Court's routine use of expansive judicial power would have any chance of ratification. What, then, more precisely, would be the advantage of simply advocating this amendment even if its eventual ratification were thought something much more to be hoped for rather than expected? As discussed, merely advocating a constitutional amendment has a potentially very powerful political and educative purpose, serving as a prominent "symbol" of reform. Therefore the mere fact of the high probability of an amendment's ultimate failure to be proposed by Congress or ratified by the states is simply not a conclusive reason not to advocate it, given that it can still serve as an important vehicle, indeed, as a catalyst, for political reform.

In fact, an amendment proposal itself, as Kyvig suggests, can be a "vivid symbol" of its proponents' constitutional principles, and thus a judicial restraint amendment could certainly represent and embody the foundational constitutional principle of judicial restraint, its concomitant structural-interpretive bases, and the constitutional principles which it is designed to promote and restore. It could, in particular, dramatize its proponents' view of the great importance of the need for constitutional reform in this area and the great depth of their commitment to that reform. A proposal to amend the constitution, then, could communicate a sense of urgency, seriousness, and

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397 See, e.g., Walzer, supra note 62.
398 On the "moderate" minimalism of Justices Breyer and Ginsberg, see Sunstein, supra note 1, at xiii. On Breyer as a "restrained" judge, see Rosen, supra note 390, at 21.
399 See, e.g., Rosen, supra note 390.
400 Kyvig, supra note 140, at 418-27; see text accompanying note 138.
401 See Kyvig, supra note 140, at 395.
402 Id. at 427.
gravity. It might, therefore, attract significantly more political attention and support than a simple statement of the same principle in a speech or political platform. One might think of the way that the Equal Rights Amendment (ERA) served to spearhead and promote the ideals of the feminist movement in the 1970s despite its ultimate failure to achieve ratification.\footnote{Id. at 394-425.}

The CRRA could therefore help to spark a broader and much more serious debate about judicial power, and, importantly, one focused squarely on the question of the proper role of the Supreme Court in light of the best construction of the American constitutional design. Of course, other reform amendments, such as one providing for a congressional override of the Supreme Court, would also raise many important structural issues, but they would still place the primary focus on the peripheral issues surrounding the structurally radical nature of the reform. An amendment such as the CRRA would put the focus more directly on the central structural-interpretive issues and thereby place the proponents of expansive judicial power precisely where they belong—on the structural defensive. The activist critics of the amendment would have to explain the putative attractions of an interpretation of the constitutional design allowing for judicial activism, with a judiciary that grounds its decisions only loosely in traditional legal materials, that maximizes its political discretion, that pursues ideological or partisan agendas, that strikes down laws that might not be unconstitutional, and that has the sole power to determine the scope of its own authority. Indeed, these are precisely the arguments proponents of expansive judicial power seldom enough venture and which they should be forced to articulate more expressly, systematically, and publicly if they continue to defend expansive judicial power as (implicitly) the best interpretation of the American constitutional design. Finally, it is quite possible that a show of even moderate support for such an amendment might lead at least some activist judges to rethink the political prudence, as well as the constitutional propriety, of expansive judicial power.

A judicial reform amendment would also directly serve as a terse statement of principle and increase public understanding of the American constitutional design, including the importance of fundamental structural principles and their relation to individual rights and judicial power. It would specifically highlight the dubious status of expansive judicial power in that design for government, emphasizing its incompatibility with fundamental structural constitutional values, and the Constitution’s evolving democratic promise. It would also
emphasize the simple but often-forgotten point that the Court itself can violate the Constitution by exceeding its authority under Article III. It would teach, as does the Bill of Rights, that judges as well as elected representatives must be distrusted, monitored, and checked if tyranny is to be avoided and rights are to be preserved. In fact, the CRRA restates, clarifies, reinforces, and emphasizes the basic structural themes of the Constitution and therefore would teach the proper lessons to the American people, shaping the national sentiment in a way that the Founders would be likely to approve.404

This last point is of particular importance because in recent decades a large number of the Justices of the Supreme Court, in what amounts to their de facto role as “prophets” of the American “civil faith,”405 have repeatedly thrown their prestige behind (and thus implicitly “taught”) lessons that are fundamentally anti-democratic, anti-republican, anti-federal, and anti-populist in nature. The CRRA or similar reform amendment could help counter that message and correct the misunderstandings of the spirit of the government that the Court has fostered in the spirit of the people. In fact, the political campaign to have Congress propose and the states ratify the CRRA would promote republican populism over the anti-republican constitutional elitism fostered by the activism of the Supreme Court or the simple majoritarianism or legislative supremacy implicit in many other proposals. Further, one may wonder what lessons other structural amendments might teach. Would electing Supreme Court Justices suggest, perhaps, that judging is intrinsically so political that it must be democratic? Or does the congressional override suggest that the national legislative majority is in some way supreme over the Constitution—or, perhaps, that it would be better to replace our judicial “constitutional law” with a legislative “constitutional politics”? In any event, it seems clear that these more structurally innovative proposals would distract from, as well as tend to distort, the fundamental structural lessons that should be clarified and reinforced in constitutional discourse and the national sentiment. A judicial restraint amendment would communicate both the right structural messages and do so in a vivid, effective, and solemn manner consistent with the actual gravity and constitutional status of the issue.

404 The CRRA, also as with the Eleventh Amendment, would overturn a judicial misinterpretation of the scope of the judicial power under Article III, restoring a proper understanding of the role of the federal courts in the Constitution’s design for government. See supra Part III.D.

405 SEMONCHE, supra note 346, passim.
Finally, the political and educative value of a proposal is also tied to the degree of support and thus exposure and legitimacy it is likely to achieve. The judicial restraint amendment—as a declaratory rather than structurally innovative proposal, as one already largely reflective, at least broadly speaking, of a major political party's general view of judicial power, as well as that of the large majority of ordinary Americans—has the potential to receive significantly greater mainstream support than its rivals. Therefore, while it is true that a judicial restraint amendment is generally unlikely to be ratified, a fact true of virtually all amendment proposals, a judicial restraint amendment proposal has great political and educative value simply as a way of focusing, structuring, and promoting debate. In the final analysis, given its potentially vast political and educative effects, the CRRA is complementary to more diffuse reform efforts, and thus the resources spent on its behalf would not be wasted—even if the amendment failed to be proposed by Congress or ratified by the states.

F. Populist Constitutional Aspirations

What are the ultimate constitutional aspirations of a judicial restraint reform amendment? It is difficult in a discussion such as this one to avoid a heavy concentration on the negative face of the amendment: opposition to expansive judicial power. Therefore, it is also worth strongly (re-)emphasizing here in the context of evaluating the amendment the fundamental reasons for opposition to expansive judicial power, to present firmly and clearly the important populist "positive face" of judicial restraint and of the judicial restraint reform amendment proposal. In brief, the positive face of judicial restraint includes support for: (1) the traditional architecture of the American constitutional design as amended in the direction of robust populist

406 And if it were ratified, it would only be after a successful judicial reform movement had created a political environment broadly opposed to expansive judicial power. See, e.g., David A. Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457, 1505 (2001) (arguing that "our constitutional order would look little different if a formal amendment process did not exist" and that "formal amendments serve the function of mopping up pockets of resistance to a national consensus, making what otherwise would be merely a dominant rule into the universal rule"). Notably, Strauss does not consider the value of amendment proposals as a way of structuring and promoting a chiefly political and educative reform campaign that both supports ratification and also (thus) partly obviates the actual need for the amendment. The reform campaign for the ERA is instructive in this regard. Nor does Strauss seriously consider any political and educative value amendments might have post-ratification in shaping the evolution of American politics and political culture. A judicial restraint amendment would involve both of these potential reasons for recourse to the amendment process.
democratization; (2) the basic overlapping moral, political, and constitutional principles of the American constitutional tradition, including popular sovereignty, representative democracy, separation of powers, federalism, presentment and other basic structural principles related to checks and balances; (3) the individual participatory rights to vote and hold office instantiated in the American constitutional design as part of America's evolving populist political ethos; and (4) the individual rights to "Life, Liberty, and the Pursuit of Happiness," which are protected indirectly through the Constitution's plan of diffusing and balancing political power, making such power accountable to the people and promoting civic virtue among citizens as voters and office-holders. Ultimately, then, it is the desire to preserve, restore, promote, and reinforce these fundamental moral, political, and constitutional principles, structures, and rights that animates support for a judicial restraint amendment.

Additionally, support for the amendment is also driven by a closely related desire to revive and reinvigorate the American tradition of serious debate about constitutional matters outside of the judicial process in the executive and legislative arenas of the state and federal governments. Not only has the assertion of activist judicial power expanded the reach of constitutional matters and thus the scope of judicial power into matters long thought beyond the authority of the judiciary, but it has also often led political actors to abdicate their own constitutional responsibilities. It seems clear that the once robust American tradition of serious debate about constitutional matters in the political arena has been vitiated by growth of the judicial power and its intrusion into controversial political matters. In particular, the Supreme Court in recent years has vigorously asserted an especially extreme judicial supremacist view of American constitutional law that denies other branches of government significant political or interpretive authority even where there is undeniable structural and textual support for such authority. Most notably, the Court has reduced the section 5 power of Congress to enforce the provisions of the Fourteenth Amendment to a minor power only narrowly supplementary to the decisions of the Court. The Court also apparently

407 The Declaration of Independence para. 2 (U.S. 1776).
408 See, e.g., Tushnet, supra note 21, at 57–65.
411 See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364–65 (2001) (stating that "[s]ection 5 of the Fourteenth Amendment grants Congress the power to
intends zealously and aggressively to police these newly created boundaries on congressional power, denying Congress the power to enforce its own reasonable understandings of the requirements of section 1 of the Fourteenth Amendment even as understood by the Supreme Court.\textsuperscript{412} Thus, part of the ultimate aspirations of a judicial restraint amendment should be not only to create more breathing space for rights-based structural values, but also to recognize and revitalize the once-strong tradition of serious democratic political debate about constitutional matters.

It is worth emphasizing that the one common thread running through the above concerns is advocacy of a robustly populist understanding of the Constitution: an understanding that recognizes the populist super-majoritarian foundations of the Constitution;\textsuperscript{413} an understanding that recognizes the populist democratic form of government established by the Constitution and its amendments and thus the full dignity of legislation, of legislatures, and of voters;\textsuperscript{414} and an understanding that also recognizes the important populist dimension of robust political debate about the meaning of the Constitution.\textsuperscript{415}

The advocacy of this form of populist constitutional law obviously necessitates opposition to the elite disempowerment of ordinary Americans through expansive judicial power\textsuperscript{416} and elite manipulation of public opinion through misleading judicial invocations of basic symbols of legitimacy such as the Bill of Rights.\textsuperscript{417} A judicial restraint amendment is thus an important part of the project of promoting a truly populist vision of the Constitution and American constitutional law. In sum, it is a positive belief in the populist rights, structures, and

\begin{footnotes}
\item[412] Id. (stating "§ 5 legislation reaching beyond the scope of § 1 actual guarantees must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end’.").
\item[413] U.S. CONST. pmbl. (stating that the Constitution arises from "[w]e the People of the United States . . ."), arts. V (requiring two thirds of either both houses of Congress or the state legislatures to propose a Constitutional Amendment, as well as requiring three quarters of either the state legislatures or state conventions to ratify the amendment), VII (providing that nine of the thirteen colonies agreed to ratification of the Constitution).
\item[415] Tushnet, supra note 21, at 177–94.
\item[416] See generally Glendon, supra note 17, at 111–73 (describing the expansion of judicial power throughout history).
\item[417] Hunter, supra note 345, at 147–48.
\end{footnotes}
practices at the heart of the evolving constitutional and political tradition that provides the driving force behind both support for judicial restraint and advocacy of a judicial reform amendment.

G. Populist Means and Ends

Moreover, a judicial restraint amendment is especially well-suited for promoting populist constitutional law, given the harmony of the populist means selected and the ends sought. As to means, first, a judicial restraint amendment itself involves the use of a strongly populist form of constitutional law—an amendment to the Constitution necessarily involving a broad national political debate about the constitutional design in order to meet the supermajority requirements of the amendment process. Second, the judicial restraint amendment is meant to function in a populist and civic fashion both as a "mere" proposal and an actual amendment through its political and educative effects in shaping American political debate and culture. Thus, both recourse to the amendment process itself and the use of a political and educative amendment premised upon political enforcement are populist means or methods of constitutional reform. As to the end sought, the objective of a judicial restraint amendment is precisely to promote a more populist understanding of the structure and foundation of the Constitution and to reinvigorate the American tradition of serious debate in the political arena about the meaning of the Constitution. Thus, the means of reform—a political and educative measure in the form of an amendment to the Constitution—and the ends of the reform—limiting the judicial power in order to promote popular sovereignty, robust representative democracy, and revival of serious extra-judicial debate about constitutional matters—are both populist in nature. In fact, the judicial restraint amendment would deploy a vigorous form of populist constitutional law in order to achieve a more populist form of constitutional law.

This harmony of ends and means is important for two reasons. First, this very method of attempting to restrain judicial power in order to promote a more populist ethos involves an exercise of that populist ethos and thus reinforces the ultimate ends of the project. It thus avoids the internal tension and even outright contradictions of attempts to promote democracy by recourse to undemocratic actors, a structural strategy premised on an uneasy combination of democratic

418 See supra Part IV.C.1–3.
aspirations and intrinsic distrust of the democratic process.\textsuperscript{419} Second, given the elite dominance of American constitutional law, there may be no other feasible remedy for expansive judicial power other than attempting to shift the debate outside of narrow, elite circles, promoting a broader popular political debate about the constitutional limits on the judicial power. Indeed, such a debate is probably a prerequisite to any serious attempt to restrain the judicial power though the use of the Constitution's checks and balances. As discussed, a judicial restraint amendment is designed to spark and structure precisely such a serious debate about constitutional meaning in the political arena. Therefore, the harmony of populist ends and means on display in the judicial restraint amendment has an important practical significance for judicial reform.

\textbf{CONCLUSION}

The persistence of the regular use of expansive forms of the judicial power in recent decades presents a serious structural constitutional problem that demands a remedy more far-sighted and far-reaching than a narrow "debate, litigate, legislate" and "nominate" strategy operating through ordinary political processes. Indeed, there is good reason to think that ordinary political and educative reform efforts alone will ultimately fail to reestablish the important constitutional boundaries the federal judiciary has so often violated in recent decades. A more adequate reform strategy for minimizing the constitutional irregularities of activist judges may involve proposing a structural constitutional reform amendment designed to limit the judiciary's capacity to exceed its authority. Even so, amendments proposing radical structural innovations in the Constitution's design for government—such as congressional power to override the Supreme Court or the abolition of judicial review—are ill-advised for a number of reasons: their actual consequences are hard to predict; they will do little to complement or promote other reform efforts; they are likely to teach the wrong structural lessons to the American people; they may significantly impair the Court's legitimate constitutional functions; and they have very little chance of ratification.

One can, however, find inspiration for reform proposals by drawing on the founding generation's profound meditations on the theory and practice of constitutional government. Indeed, if one wishes to honor the founding generation's commitment to the core of the

\textsuperscript{419} See, e.g., Ely, \textit{supra} note 42, at 102-04 (advocating a "representation-reinforcement" role for unelected judges based in part on the lack of incentives for politically insulated judges to block the channels of political change).
American constitutional tradition— a form of constitutional government which protects individual rights by establishing democratic institutions, diffusing and balancing political power, and promoting civic virtue among the sovereign people— one must work to renew the American people’s own commitment to substantive reform in the area of judicial power. Moreover, one can find a quite specific model for reform in the founding generation’s understanding of the basic principles of republican government, the close relationship between constitutional rights and constitutional structures, and the political and educative value of solemn declarations of rights and structural principles in foundational and constitutive documents. As this Article’s examination of the Virginia Declaration of Rights, the Declaration of Independence, the Philadelphia Constitution, the Bill of Rights, and the Eleventh Amendment demonstrates, the founding generation was deeply committed to fundamental constitutional principles, such as popular sovereignty, representative democracy, separation of powers, bicameralism, presentment, and federalism.

The Founders saw these basic structural principles as inextricably related to individual rights, directly incorporating basic participatory rights and indirectly “sheltering” non-participatory rights by diffusing political power and making it accountable to voters. Indeed, in light of these facts, the populist Ninth Amendment may be read as prohibiting expansive judicial power through its implicit incorporation of rights-driven structural principles on display in 1791 in the state bills of rights and in the constitutional commitments of the Declaration of Independence. Moreover, the founding generation further recognized an important populist and republican principle: that in any popular form of government the spirit of the people—their civic virtue—and robust political debate about constitutional matters would provide the ultimate security for individual rights and for the preservation of constitutional government. The Founders therefore strongly advocated solemnizing in constitutive documents maxims or aphorisms affirming the basic principles of republican government in order to shape, guide, and constrain civic culture and political debate. Indeed, in documents such as the Virginia Declaration of Rights and the Bill of Rights, the Founders evinced their faith in a strategy of protecting rights through the diverse political and educative effects of formal declarations of rights and structures in basic constitutional documents. In fact, the Bill of Rights itself was generally understood by the founding generation as this sort of measure: primarily structural, declaratory, political, and educative in nature.

A judicial restraint reform amendment, such as the Constitutional Rights Restoration Amendment, should be written in this spirit,
the populist reform spirit of the original understanding of the Bill of Rights. A judicial reform amendment should emphasize the structural implications of the American constitutional commitment to republican principles of government for the constitutional exercise of the judicial power. It should be a declaratory amendment clarifying the preexisting constitutional limits on the exercise of judicial review rather than a measure seeking to "improve" the Constitution through dubious structural innovations. It should be a political and educative amendment seeking to constrain judicial misconduct both directly and indirectly by providing an express written standard which will empower political objections to expansive judicial power, thus promoting political debate and political culture that recognizes the constitutional requirement of judicial restraint.

Obviously, there is need for further critical evaluation of both the general idea of a judicial restraint amendment and its potential concrete expressions such as the Constitutional Rights Restoration Amendment. Still, even at this early stage it should be clear that such an amendment could be quite effective in limiting expansive judicial power. For instance, the CRRA's express language and obvious import is incompatible with expansive judicial power, and therefore it would facilitate constitutional objections to activist decisions while sensitizing the American people to the dangers of judicial violations of the Constitution. The CRRA could also have significantly broader political support than rival amendment proposals given its strictly declaratory nature and its avoidance of radical structural innovations. Finally, even as a proposal unlikely to achieve ratification, the CRRA could still have very important political and educative value: it could spur structural interpretive debate about the role of courts in the American constitutional design, raise the political salience of constitutional objections to judicial activism, and help educate the American people with respect to the Constitution's design and the limited judicial role therein. The CRRA would thus potentially spearhead a diverse range of political and educative reform efforts, such as appointment of restraintist judges to the federal bench and more vigorous use of the political branches' checks on the judiciary.

In sum, a reform amendment simply declaring the constitutional imperative of judicial restraint, highlighting its connection to foundational constitutional structures and rights, and identifying the Supreme Court as a potential violator of the Constitution could have profound, far-reaching, and highly beneficial consequences for the debate about the proper scope of the judicial power. Indeed, such an amendment would both restrain the judicial power and promote populist forms of constitutional law by encouraging and shaping serious
political debate about the meaning of the Constitution, including the constitutional limits of the judicial power. There is every reason to suppose that this debate, centered around a formal judicial restraint amendment, would strongly promote judicial modesty and serve to promote fundamental constitutional principles such as popular sovereignty, representative democracy, the separation of powers, and federalism from improper judicial incursions. Thus, a judicial restraint reform amendment could reshape the national sentiment as it relates to the complex relationship of the judiciary, judicial review, and the Constitution. Moreover, in light of elite, anti-populist establishment dominance in the judicial process, deployment of a populist measure may be the only practical way to enforce the constitutional limits on the Supreme Court without radically altering the structure of the Constitution. There is, then, good reason to believe that a judicial restraint reform amendment inspired by a profound faith in the American people and designed as a structural constitutional measure in the original populist reform spirit of the Bill of Rights will provide the best means of fulfilling the populist ethos of the American republic.