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Toward a Political Theory of Constitutional Default Rules

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TOWARD A POLITICAL THEORY OF
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John Ferejohn & Barry Friedman

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TOWARD A POLITICAL THEORY OF CONSTITUTIONAL DEFAULT RULES

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I. INTRODUCTION

The question we explore here is whether “default rule thinking” can enlighten the theory or practice of constitutional law. Such thinking is prevalent in private law scholarship, particularly that regarding contractual relations. There, numerous commentators have explored the notion that some legal rules are not absolute restrictions on what parties may do, but may be set aside by them (or “contracted around”) in certain circumstances.¹ Our intention here is to provide a first cut at seeing constitutional law through this distinctive lens. As is the case with all such first cuts, we are certain there are many places for elaboration and improvement on what we have done.

We begin by noting that good reasons for skepticism exist about such a project. In contract theory itself, recent scholarship seems less enamored of the idea of default rules than it was some years ago. Alan Schwartz has expressed doubt about discovering generally ap-

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1. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) (“Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them.”); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390 (1993) (“[A] default rule can be defined as a rule that parties are free to change.”).

plicable default rules that should apply across the whole contractual domain, both because that domain is too diverse and because the normal range of informational problems are too difficult (for contractors as well as for courts).² He thinks that general contract law therefore has few such rules and that fewer still remain to be discovered, though he is more sanguine about the utility of default rules in such narrower contexts as corporate law or employment law. Eric Posner has argued that default rule thinking has not really been very productive in the contracts area.³ He argues it not only fails to describe contracts doctrine—because it usually shows how existing doctrine is inefficient in various ways—but its normative recommendations are either vague or unusable.⁴

Deeper reasons for skepticism arise from the difficulty of applying default rule thinking in the public realm. Formally, the notion of default rules would seem to have little application to the Constitution, which commonly is understood as relatively obdurate given the unwieldy Article V procedures. Theoretically, while the private law domain is centrally concerned with regulating voluntary transactions that have limited third-party effects, public law essentially is centered on coercive laws enacted by majorities or administrative fiat. The Constitution is a limitation on what officials can do; it was put in place to protect individual liberty. The very notion that public officials may change or override certain constitutional protections may seem, on this account, simply incoherent as a view of constitutional law.

Even more problematically, the “parties” to a constitutional transaction do not negotiate with one another to get around a default in the same way as contracting parties do. Rather, a rule is in place, and the government acts. If challenged, a court later determines if the government action meets constitutional scrutiny. Not only does the fact that government is the primary and often sole actor create distributional difficulties that we discuss below, but it deprives the default rule idea of its common structure. When we speak of default rules in constitutional law, we typically are talking about specifications of ways the government can act (or modify its behavior) to get around a constitutional prohibition.⁵

2. See generally Schwartz, *supra* note 1, at 390 (Default rule “scholarship is illuminating but less helpful than it could be . . . [because] there are several types of default rules but the literature does not distinguish adequately among them . . .”).

3. See generally Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

4. See *id.* at 830 (“[T]he predictions of [contract] models are indeterminate, and the normative recommendations derived from them are implausible.”).

5. This difficulty is somewhat alleviated if we see courts as a party to constitutional transaction. In that case, the government takes an act which will stand if courts do not overturn it. See *infra* note 15 and accompanying text.

As trenchant as these criticisms are, however, we believe the default rule paradigm remains valuable conceptually as a way to characterize the structure and practice of contract law (even if it does not actually deliver new default rules), and such conceptual clarity may be useful in the constitutional domain as well.⁶ Our focus here is on judicial interpretations of the Constitution. Common wisdom is that judicial decisions represent relatively rigid rules, in that they are subject to displacement only by judicial overruling or successful use of the Article V amendment procedures. Here, we challenge common wisdom, demonstrating that judicial decisions frequently create default rather than mandatory rules, thereby providing opportunities for political actors to displace those rules.⁷ Moreover, because virtually every mandatory constitutional rule involves rejection of a default alternative, the decision to employ a default is made tacitly if not explicitly. Better to bring this sort of thinking to the surface, so that the difficult normative choices involved are themselves explicit. The central point we hope to establish is that not only is default rule thinking useful with regard to those judicial rules, but it is practically unavoidable.

Part II examines serious normative difficulties that attend any effort to bring default rule thinking to constitutional law. The most basic questions central to any default regime are fraught with normative complexity when asked in the public law context. For example, while efficiency provides a clear metric for assessing rules of contract law, the normative basis for constitutional rules is both varied and contestable. In light of this normative complexity, how is one then to know whether a default rule is appropriate, let alone the circumstances under which it can be contracted around? What are the standards by which such a rule is to be evaluated? Who, even, are the parties that may contract around a default rule?

Part III proceeds to explain that despite the complexity of these questions, they must be pursued because default rules are pervasive and likely inevitable in constitutional law. Part III provides a typology of constitutional default rules, tracking roughly the categories and definitions of defaults commonly identified in the contracts lit-

6. For a similar—but far more extensive—project directed at judicial statutory interpretation, see Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) [hereinafter Elhauge, *Preference-Eliciting*]; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002) [hereinafter Elhauge, *Preference-Estimating*]. Elhauge offers both a descriptive and normative account of the use of default rules in statutory interpretation, and accounts, among other things, for many of the canons of interpretation.

7. If political actors do create a new rule then, as we discuss, courts faced with a challenge to the new policy must accede to that creation either by letting it stand as a matter of substance or by refusing jurisdiction to permit its contest. See *infra* note 15 and accompanying text.

erature. Again, we pay primary attention to rules established by judicial decisions construing the Constitution.

Part IV then provides a tangible example of how rigorous application of default rule thinking in the constitutional area can have a normative payoff. Our focus here is on application of positive political theory regarding pivot points and legislative gridlock to two prominent types of default rules, majoritarian and penalty defaults. Seeing constitutional rules as defaults necessarily requires asking how they can be contracted around. Our application of positive theory explains how default rule thinking can be used to enhance the democratic pedigree of constitutional decisions.

II. POLITICAL THEORY AND CONSTITUTIONAL DEFAULT RULES

Constitutional and contract law differ in important ways regarding both their normative commitments and the way they are operationalized. Those differences complicate default rule thinking in the constitutional realm enormously. Answers to even the most basic of questions are contested, and the values that would inform default thinking are diverse and controversial and do not always yield consistent answers in individual cases. This Part details the array of complex considerations that come to bear once default thinking is moved into the public arena.

A. *The Normative Complexity of Constitutional Defaults*

To get a theory of default rules off the ground, there are certain basic issues that need to be resolved. A normative theory of default rules requires (1) a specification of who is to set the defaults, (2) a specification of who is entitled to negotiate around the defaults, and (3) a standard or objective according to which actions can be evaluated. Although contract law rests on certain premises rooted in political theory, that theory is straightforward enough that these questions have fairly apparent answers. That is not the case in constitutional theory.

To begin, no question in constitutional theory may be of longer-running contest than who is entitled to put the constitutional default rule in place. In contract law, the default rules are put in place by judges or legislators. That is not the case in constitutional law. Obviously, the people retain the ultimate capacity to set default rules—as they did during foundational moments such as the time period of 1787-1788, or following the Civil War. Such authority is exercised

through the medium of the states as established in Article V.⁸ But given the difficulty of amending the Constitution, the familiar practice of judicial review gives primacy to courts in this regard. In theory, at least, the judicial establishment of constitutional rules sticks, subject only to judicial overruling or constitutional amendment. We intend to sidestep the controversy over judicial review here,⁹ taking the practice as a given. We also highlight but walk past the analytic question of whether the Article V amendment is, at this point in time, a mechanism for contracting around, or for putting a new constitutional rule (which may be either a default or mandatory rule) in place. Rather, focusing solely on judicial review, what we come to show in Part III is that constitutional law is shot through with default rules, which can be overturned far more easily and by many more actors than constitutional theory about judicial review typically would suggest.

Taking the judicial establishment of default rules as a given, the second question is, Who is entitled to displace those default rules? This raises a thorny question of who are the parties to a constitutional “transaction” empowered to contract around a default rule.¹⁰ In contracting, the parties are two or more private entities that have determined to make a deal they believe to be utility maximizing. Judicial and other contract rules serve as background to the transaction, but in the rubric of default rule thinking, the parties to the deal can contract around existing background norms.¹¹ In most cases once they do so, the deal proceeds and rarely returns to court for further scrutiny of the parties’ choices.

A sort of parallel to the private transaction is not unheard of in the public law realm, but it is not the typical case. It is true that one party—the government—may wish to do something, and with constitutional requirements in the background, might “contract” with private parties. Aware of the prohibition of taking property without just

8. See U.S. CONST. art. V (Proposed amendments “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.”).

9. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) (“For decades, legal academics have struggled with the countermajoritarian difficulty: the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy.”); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

10. For a similar distinction in a different context, see Tamar Frankel, *What Default Rules Teach Us About Corporations; What Understanding Corporations Teaches Us About Default Rules*, 33 FLA. ST. U. L. REV. 697, 703-13 (2006). Frankel distinguishes between private and public contracts, finds certain corporate law provisions “public” in nature because of, *inter alia*, third party effects, and recognizes the fact that there are more “parties” to the transaction than those formally part of the contract. *Id.*

11. See, e.g., Ayres & Gertner, *supra* note 1, at 87 (“Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them.”).

compensation,¹² the government wishing to condemn property might approach a property holder and make an offer. The deal might be consummated after further negotiation. Similarly, the government might have reason to wish to search private space. Aware of the strictures of the Fourth Amendment, the government might negotiate to conduct a consent search.¹³ More commonly, though, in a constitutional transaction the government decides to utilize its coercive power, and private entities feel the force of that authority. How does default rule thinking apply in this more common case?

In the typical constitutional transaction, the parties are better understood to be the composite actors who ultimately hold the authority to contract around a constitutional default rule. If, as we explain below, courts put in place prohibition *X*, which can potentially be worked around by solution *X*•, then the relevant parties are those with authority to put *X*• in place. That might be the legislature, composed of many individual legislators who will negotiate with one another to adopt *X*•; it might be the members of an independent executive agency; and so on.

Even when one focuses solely on the government party to the transaction, which governmental entity is the relevant one may itself be subject to contest. In American political theory, the power of the state is divided vertically and horizontally among governmental actors in at least two ways. The execution of governmental power is understood to be both politically and administratively divisible between the states and the federal government and is, in fact, divided along these lines.¹⁴ State authority is further devolved to local entities. At each level there are still further divisions along horizontal lines, the separation of powers model being most familiar, perhaps, though variants exist particularly at the local level. In formulating any given default rule, then, the question of which level of government may displace it is itself subject to contention.

Moreover, it is necessary to regard courts themselves as parties in the constitutional domain and not as actors external to the transac-

12. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

13. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”); see also *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (“In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”).

14. See, e.g., U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see also *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (“Although the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’” (quoting THE FEDERALIST NO. 39, at 245 (James Madison))).

tions. The reason for this is that if a constitutional actor or actors attempt to put a new rule in place, courts are ordinarily open to hear challenges to that rule. Indeed, the ubiquity of third-party effects in state action makes the availability of opportunities to challenge governmental action an imperative of political morality. A new rule need not be challenged in the courts, but parties still tend to negotiate about the new rule in the shadow of potential judicial review. Of course, courts can and sometimes do duck constitutional challenges on jurisdictional grounds.¹⁵

Finally, what is the metric by which constitutional default rules might be judged? In contract theory, efficiency plays the normative role in choosing among default rules¹⁶ (with perhaps a cameo part for some notion of justice). There are, of course, various efficiency concepts that could be employed, ranging from austere Pareto efficiency to the Kaldor-Hicks criterion, and any specific notion of efficiency counts as a political theory in the sense that each has distinct distributive implications. Those who put contract rules in place are thought to pick rules that will induce efficient contracting behavior: to arrange background conditions so that contractors will agree to efficient contracts, make appropriate investments, disclose information where appropriate, and fulfill contractual obligations when they should.¹⁷ Sometimes efficiency may require that parties negotiate explicit contractual terms that fit their actual circumstance rather than relying on default presumptions.¹⁸

Efficiency works in two ways; in the normal case, parties are left free to enter into voluntary arrangements as long as there are not significant effects on other parties. Presumably they would not rationally enter into a contract unless each expected to gain by it. So long as there are no significant effects on third parties, voluntary agreements presumptively increase efficiency. The substantive value of efficiency is achieved by putting in place certain procedures that

15. See generally *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (side-stepping, on jurisdictional grounds, the constitutionality of a teacher-led recitation of the Pledge of Allegiance, holding that the father lacked prudential standing to bring action in federal court).

16. See, e.g., Ayres & Gertner, *supra* note 1, at 93. With efficiency as the underlying goal, Ayres and Gertner suggest that “penalty defaults are appropriate when it is cheaper for the parties to negotiate a term *ex ante* than for the courts to estimate *ex post* what the parties would have wanted.” *Id.*

17. See, e.g., Schwartz, *supra* note 1, at 390-92 (recognizing that multiple categories of default rules are necessary for efficient contracting, some of which are designed to remedy informational disparities while others aim to provide terms to the contract favorable to both parties to encourage fulfillment of the obligations therein).

18. See, e.g., Ayres & Gertner, *supra* note 1, at 91 (introducing “penalty” default rules, which are default rules “purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties” and accordingly negotiate explicit contractual terms).

ensure the voluntary consent of the contracting parties. Second, as much recent work in the area has shown even in the standard bilateral case, appropriately chosen default rules can remove imperfections that arise from informational asymmetries (as well as other kinds of market imperfections) by inducing the parties to disclose private information.¹⁹ Thus, while parties act voluntarily, default rules can be chosen to induce efficient action. Obviously, such rules may also be chosen to achieve distributional objectives as well.²⁰

Put this way, it is clear that contractual doctrine and default rule thinking are not devoid of political/normative aspects. But that theory seems implicit and more or less natural to the normal contractual setting. The political theory that seems most in evidence is one that sustains a picture of robustly independent contractors, fairly evenly matched in bargaining abilities and external options, who can be trusted for the most part to agree only to things that are in their interests as they see them.²¹ Certainly, one can worry that this model may apply uncomfortably to more asymmetric contracting such as the standard form, fine print-dominated, opt-out contracting between retailers and their customers, and worry that some players are confused or overmatched in contractual settings. But these are treated as peripheral cases rather than the core of contract theory.²² At minimum then the voluntaristic starting point of contracts privileges both the precontractual status quo and the background or default rules that govern the way a contract will be understood in court. In view of this, the normative theory of default rules asks which extra-contractual default or background conditions will lead contractors to behave well (that is, enter into efficient contracts and not do egregiously unfair things to their partners).

In constitutional law, the range of normative values that may be applicable to appraising outcomes is both wider and more controversial than is the case in the contractual setting. Nothing resembling a voluntaristic starting point can be privileged in the political realm: people are not free to leave or stay out of collective affairs; others will act for them and to them in any case. A natural starting point must deal with the unavoidability of coercion and mutual interference.

19. *See id.* at 97-104.

20. *See id.* (arguing for penalty default rules as a means of encouraging the distribution of information); *see also* Schwartz, *supra* note 1, at 390-91 (suggesting that "information-forcing" default rules work to encourage the distribution of information from sophisticated parties to unsophisticated parties).

21. *See* Posner, *supra* note 3, at 842 (explaining that rational parties to a contract "enter contracts only when it is in their self-interest, and . . . will agree only to terms that make them better off").

22. *See id.* at 842-45 (recognizing that while contracts are usually enforced, sometimes courts refuse to enforce contracts because of unequal bargaining power or asymmetrical information).

Thus, default thinking in constitutional law immediately confronts the question of what principles justify the inevitable government interference with private ordering. We take this question up below but note that even the sources of such principles are controversial and contested. Some principles apt for this circumstance are found, not surprisingly, in the Constitution itself. But throughout history a diverse set of additional texts—including the Federalist Papers,²³ the Declaration of Independence,²⁴ and the Gettysburg Address²⁵—have contributed values of which constitutional law takes account. Constitutional norms also are located in broader notions of democracy, popular sovereignty, and the rule of law, as well as various theories of justice, all unquestionably related to our constitutional tradition but lacking any precise or definite location in it.²⁶

B. Political Theory, Contestability, and Constitutional Defaults

Each of the questions we discuss above is deeply contested in the constitutional realm. Each has been the subject of a vast literature. In order to demonstrate that complexity, we briefly examine just one of those questions: What set of norms ought to govern the use of default rules in constitutional law?

We indicated above that it is usually not important to focus on political (that is, distributional) aspects of contracting. Except in peripheral cases, efficiency considerations provide the relevant normative judgments. Default rules may raise distributional issues more explicitly because—especially in asymmetric settings—such rules can have nonnegligible distributive consequences, but for the most part, these consequences are subordinated to the pursuit of efficiency and not pursued for their own value.²⁷ Obviously third-party effects complicate this in some subset of cases, but the normal or paradigm case of contract is one in which contractors are symmetrically situated, third-

23. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2003) (Souter, J., concurring in part and dissenting in part) (citing THE FEDERALIST NO. 51 (James Madison) in support of the constitutional principle of checks and balances).

24. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 255 (2003) (Scalia, J., concurring in part and dissenting in part) (citing the Declaration of Independence in support of the proposition that money is speech and that campaign expenditures are constitutionally protected under the First Amendment).

25. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 27-28 (2004) (Rehnquist, C.J., concurring) (citing President Lincoln's reference to God in his famous Gettysburg Address as support for the constitutionality of the term "under God" in the Pledge of Allegiance).

26. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) ("[A] 'fundamental principle of . . . democracy' . . . [is] that 'the people should choose whom they please to govern them.' . . . Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States." (citations omitted)).

27. Penalty defaults may expose one or both parties to adverse outcomes, but the point of the default is to induce the parties to negotiate to an efficient outcome and not to directly reallocate wealth.

party effects are absent, and issues of unconscionability do not arise.²⁸ It may not even be necessary to choose between procedural and substantive values in the contractual realm; voluntary contractual procedures can be expected to produce substantively good (efficient) outcomes as long as appropriate background conditions are met.

These moves seem unavailable in the political or constitutional realm. There are two main reasons for this. First, political action often has explicitly unavoidable distributional effects: indeed, the very reason for political action often is distributional, and in any case—as we have said—political actions generally interfere with others without their consent. Second, there is no strong reason to think that normatively good procedures automatically will produce normatively attractive outcomes, in the way that voluntary agreements are presumed to be efficiency enhancing. As attractive as majority rule might be as a decision procedure, there is nothing stopping a majority from taking advantage of a minority.²⁹

Indeed, the core issue of political theory has to do with evaluating (and justifying) collective coercive (state) action, and distributionally motivated actions are the ones most in need of justification. For example, Hobbes argued that the point of government was to apply coercion (or the threat of it) necessary to produce social peace, which is the precondition for prosperity.³⁰ The justification of the use of governmental force lies in allowing people to live outside the brutal conditions of nature. Of course, Hobbes could not ignore the distributional implications of his theory. Someone or somebody would have to exercise sovereign powers and that entity was authorized to make law whatever it deemed convenient. He accepted those consequences as concomitants of social peace and thought that we should rationally do the same.³¹

Possibly we can find the source of some constitutional defaults in the unadorned Hobbesian perspective. For example, the familiar presumption against judicial interference with government decisions found in frequent resort to “rational basis” tests might be grounded

28. See *supra* note 21 and accompanying text.

29. James Madison warned of the so called “tyranny of the majority,” which he understood to mean a majority of the citizenry “who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.” See THE FEDERALIST NO. 10 (James Madison).

30. THOMAS HOBBS, LEVIATHAN 92 (Richard Tuck ed., 1996) (“[E]very man, ought to endeavour Peace, as farre [sic] as he has hope of obtaining it; and when he cannot obtain it, . . . he may seek, and use, all helps, and advantages of Warre [sic].”); see also *id.* at 124 (“[I]t belongeth of Right, to whatsoever Man, or Assembly that hath the Sovereignty [sic], to be Judge both of the meanes [sic] of Peace and Defence.”).

31. See *id.* at 125 (“[I]t is annexed to the Soveraigntie [sic], the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe [sic], without being molested by any of his fellow Subjects.”).

in the idea that courts should not lightly interfere with core governing capacities.³² This notion probably finds its starkest expression in the reluctance of courts to interfere with military operations, especially on the battlefield (or near it) and during wartime.³³

But for the most part, we are reluctant to endorse Hobbes's nearly blank check concept of authorization. Except for extreme cases we care about how the government takes its actions and insist that government action conform with various procedural and formal conditions. For example, we want our government to work by means of general laws, announced in advance, rather than secret or informal orders.³⁴ Moreover, we insist on regulated processes of lawmaking and have rules about law application and adjudication. These ideas arise not only from bare notions of legality but also from a republican heritage that insists on a separation of powers which requires that rulemaking be institutionally separated from rule enforcement and adjudication. It appears various default rules can be grounded in these principles, such as the presumptions that lawmaking be accomplished prospectively and that statutorily enacted administrative schemes are not intended to displace judicial review.³⁵

We also hold deeper proto-republican values that insist that government's authority is drawn from the people through frequent elections. This encourages us not only to say that the legislature should be the chief source of general rules but also to insist that legislatures are chosen in fair, open, and regular elections.³⁶ This republican tradition gives reasons for courts to insist that general rules originate in

32. See, e.g., *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-89 (1955) (holding that state legislatures are due deference in regulating business so long as their decisions are rational).

33. See *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.")

34. This is a complex idea that spans the notion of rule by law (a preference for general laws rather than specific decrees) and rule of law (resistance to informal or arbitrary forms of rule).

35. See *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (stating that the absence of judicial review would raise "a serious constitutional question of the validity of . . . [a] statute as so construed"); see also *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (construing a statute to provide judicial review of executive agency action to avoid the "serious constitutional question" that would arise if . . . [the statute were] to deny a judicial forum for constitutional claims arising" thereunder).

36. In a broader democratic tradition, the notion that an elected legislature should be the source of rules is controversial. The Athenians (and indeed many ancient peoples) insisted that the power to establish general legal principles was retained by popular assemblies which could not be delegated. See JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE* 7-8 (1989) ("The key decision-making body of the Athenian state was the Assembly. Open to all citizens [i.e., men born in Athens], the Assembly met frequently (forty times per year in the later fourth century) to debate and to decide state policy.").

the legislature rather than in executive agencies, unless this power has been delegated in an appropriate way.³⁷ Of course, there are countervailing considerations of efficiency that, in practice, have led courts to a relatively generous delegation principle. Still, judicial suspicion against excessive delegations of rulemaking authority does lead courts to force agencies to utilize rulemaking processes that may serve as functional equivalents of or substitutes for actual legislative deliberation.³⁸

We also take note of democratic norms that go beyond the republican ideas that legitimate power arises from the people as expressed through regular and fair elections, to notions of deliberation. The idea that policy ought to be grounded in reason, perhaps in public reason, may also ground certain constitutional defaults.³⁹ Such defaults would go beyond the notions of notice or publicity that we identified in the republican tradition and might require that Congress deliberate explicitly in certain ways in order for its policies to have full force.⁴⁰ "Clear statement" rules that say that Congress will be understood to have taken certain actions only if it makes such actions explicit and unambiguous might best be understood in these terms.⁴¹

Still further, there obviously is a commitment to a set of fundamental rights that curtail governmental authority even when sanctioned by rules established by the people's representatives in the regular manner. Definitions of these rights vary widely and are deeply contested in their own right, but at a minimum they seem to

37. See *Loving v. United States*, 517 U.S. 748, 771 (1996):

It does not suffice to say that Congress announced its will to delegate certain authority. Congress as a general rule must also "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.

Id. (alteration in original) (citations omitted).

38. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) (stating that the notice and comment requirement of the Administrative Procedure Act allows agencies the opportunity to consider multiple variations of a rule before deciding which it deems most sound).

39. See, e.g., Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-90 (1984) ("The equal protection clause allows a state to distinguish between one person and another only if there is a plausible connection between the distinction and a legitimate public purpose.").

40. See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 235-51 (1976) (suggesting that due process in lawmaking focuses not only on what law was made, but establishes minimum procedures legislators must follow in the course of lawmaking thereby forcing deliberation).

41. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

include three general considerations: rights essential to minimally effective political participation, basic equality, and the core guarantees explicitly set out in the Bill of Rights.⁴² Whatever one thinks of attendant judicial interpretations of these rights, the default presumption of judicial protection found in footnote four of *Carolene Products*⁴³ has found wide acceptance. Similarly apt is heightened scrutiny for government actions that curtail speech or individual liberty, making noninterference the default position.⁴⁴ This is the very structure of heightened scrutiny review.

Of course, it goes virtually without saying that this complex of values permits grave disagreement in individual cases. Not only is each value subject to differing definition, but the values cannot help but to collide. Most familiar is the tension between majority rule and rights protection. But disagreements over narrower principles also are pervasive, such as between the right to speak and the right to be free from being subjected to certain forms of speech.⁴⁵

C. *The Structure of Constitutional Default Rules*

These normative ideas allow us to characterize the typical structure of constitutional default rules. The key idea is that either the constitutional text or judicial determination fixes the content of default rules against which government officials take action. These actions can take legislative or administrative form and may, at times, represent a departure from a constitutional default. Such departures will normally attract court challenges which may result in change in the original rule. But courts may, and often do, find ways to avoid hearing such challenges or, if they do not refuse to do so, defer to the agency or to Congress. Either course of judicial action or inaction will not upset prior doctrine but will amount to judicial assent to governmental practice.

This characterization implies that the standard way of contracting around a constitutional rule involves one or more political actors

42. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 173-79 (1980). In describing "process rights," Ely focuses on these very factors: effective political participation, equality, and the various rights codified in the Bill of Rights.

43. *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (stating that special scrutiny is in order when dealing with certain religious, national, or racial minorities).

44. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality." (citations omitted)).

45. See *Virginia v. Black*, 538 U.S. 343, 358-59 (2003) (While the First Amendment "affords protection to symbolic or expressive conduct as well as to actual speech," it does permit "restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (citations and internal quotation marks omitted)).

coming to a kind of implicit agreement with courts. Given that the governmental actors represent only a majority, the fact of third-party effects requires that courts be seen as constitutional actors in this sense. Their duty to protect minority rights implies that they have an unavoidable role to play in ratifying or agreeing to any attempt to “go around” a constitutional rule.

III. THE INEVITABILITY OF CONSTITUTIONAL DEFAULT RULES: A TYPOLOGY

The complications of default rule thinking in constitutional law are so great that one might wonder whether the effort is worth the candle. This Part establishes the nonoptional nature of constitutional default thinking. When fashioning rules of constitutional law, judges have a range of choices, from those that are relatively mandatory to those that permit government actors to suggest or implement alternatives. Take, for example, the Fifth Amendment’s requirement that no person “shall be compelled in any criminal case to be a witness against himself.”⁴⁶ A court could implement this by banning all interrogation, banning coercive interrogation, banning interrogation without reading *Miranda* warnings,⁴⁷ and so on. Each step along this analytic range adopts or rejects some form of default. This sort of choice pervades constitutional law, and thus is made tacitly, if not explicitly. We argue here and in the next Part that explicit attention to the question might improve the quality of constitutional decisionmaking.

What follows is a typology of constitutional decisions that loosely tracks the development of default rule thinking in contract theory. Although the normative considerations that inform these rules differ, at least at the level of description, there is more similarity than one would imagine. Applying the contracts categories makes clear that constitutional law is shot through with default rules. This regime is so prevalent that it calls into question the acuity of much of the rhetoric surrounding Supreme Court constitutional decisionmaking. Many constitutional rulings can be circumvented in ways other than constitutional amendment or judicial overruling.

A. *Substantive Constitutional Rules and Mandatory Contract Rules*

At first blush, the default rule literature appears to fit awkwardly alongside prevailing understandings of what a court does when it decides a case on constitutional grounds. In common interpretation, constitutional decisions are binding and only can be changed by judi-

46. U.S. CONST. amend. V.

47. See *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966) (“[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.”).

cial overruling or constitutional amendment. This is what people mean when they talk about the Supreme Court's role as "ultimate arbiter" of the Constitution and what they have in mind when they complain about judicial supremacy.⁴⁸ They mean to say that getting around a Supreme Court constitutional decision is tough, which is what calls into question in the minds of some the democratic legitimacy of judicial rulemaking.

Some constitutional rules do meet the description of the stereotypical binding Supreme Court precedent. Sometimes, and perhaps frequently, when the Supreme Court says the Constitution means *X*, that is the meaning that governs absent amendment or overruling, and officials who violate *X* do so at their peril. The Supreme Court has interpreted the Fourth Amendment generally to require police officers to have a warrant before searching people's homes.⁴⁹ The officer who conducts an unwarranted search of a home faces the risk of monetary liability.⁵⁰ Sometimes, a rule is a rule.

Of course, there are relatively obdurate contract rules as well, in the sense that the parties to a contract cannot avoid them, though the rules can be changed by legislative decision. These commonly are referred to as immutable, or mandatory rules.⁵¹ For example, under the Uniform Commercial Code (U.C.C.) the duty to act in good faith is an immutable part of any contract.⁵²

The difference between mandatory contract rules and substantive constitutional rules lies in the parties entitled to change them. Mandatory contract rules can only be changed by those empowered to es-

48. See Kramer, *supra* note 9, at 15:

[T]he historical development of judicial review [is] hugely ironic. We have moved from a world in which the interpretive authority of the political branches was clear and that of the Supreme Court questionable and uncertain, to one in which the Court's authority stands unchallenged while that of everyone else is under siege.

Id.

49. See *Steagald v. United States*, 451 U.S. 204, 212 (1981) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980))).

50. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) ("That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

51. As pointed out by Adam Hirsch, "immutable" and "mandatory" are used interchangeably. See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1032 n.1 (2004) (citing Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 *NW. U. L. REV.* 1227, 1269 (2003)).

52. U.C.C. § 1-304 (2005); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); see also *Morin Bldg. Prods. Co. v. Baystone Constr., Inc.*, 717 F.2d 413, 414-15 (7th Cir. 1983); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 81 (3d ed. 1986).

establish such rules: usually judges or the legislature. In the constitutional realm, substantive (mandatory) rules will generally be changeable only by a constitutional actor—perhaps an Article V majority or a judge.

We hesitate to call substantive constitutional rules mandatory because even with regard to relatively rigid rules, constitutional actors sometimes can achieve something close to their ends by changing the facts. The police officer who searches a home without a warrant can claim there were exigent circumstances requiring this action. If the claim is fair, the search will be upheld.⁵³

Of course, such contracting around can lead to yet another judicial decision that, as a substantive matter, bars the later version of the practice. Recently, for example, the Supreme Court limited the ability of police to contract around the *Miranda* rule by interrogating detainees prior to reading them the required warnings, then starting afresh.⁵⁴ This point requires underscoring: in our system courts retain the authority (subject to the Article V procedure) to impose a substantive rule and limit contracting around. But frequently judicial decisions approve of fact differences as having constitutional significance, and thus sanction officials contracting around the initial rules.

B. Majoritarian Default Rules

In contract, the early position on default rules was that courts ought to adopt a rule that a majority of contracting parties would favor.⁵⁵ Because contracting around judicial rules involved transaction

53. See *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (“We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, ‘the exigencies of the situation made that course imperative.’” (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948))).

54. See *Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (“Because the question-first tactic effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted, . . . postwarning statements are inadmissible.”).

55. See Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 702 (1982) (stating that default fiduciary duties are derived from a hypothetical contract, imagined by judges, between investors and managers dickering with each other free of bargaining costs); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1433 (1989) (asserting that a default term should be “the term that the parties would have selected with full information and costless contracting”); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1182 (1981) (suggesting that corporate law supply “standard form ‘contracts’ of the sort shareholders would be likely to choose”). Calabresi and Melamed’s analysis may be an early antecedent of the majoritarian rule. They argued that efficiency-minded law would establish default entitlements as the parties would allocate them in a world without transaction costs. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-98 (1972).

costs, efficiency concerns suggested courts often should adopt a rule that most parties would have adopted if left to their own devices. Later literature questioned whether this was always the case, leading to the panoply of default rule possibilities we recognize today.⁵⁶ But at the outset, efficiency concerns seemed logically to require majoritarian defaults, and still that is true in many instances. Take commercial law, for example. The U.C.C. puts courts squarely in the role of interpreting contracts in terms of the hypothetical majoritarian bargain by requiring that gaps or ambiguities be interpreted in accord with common (or majoritarian) commercial practice.⁵⁷

In constitutional law, the idea of majoritarian constitutional rules may seem counterintuitive. Since the New Deal, individual rights protection has been a strong strain of constitutional law.⁵⁸ Even today's conservative Supreme Court recognizes its important role in protecting minority rights.⁵⁹ In many areas of constitutional law, such as equal protection or the protection of individual liberty, one would not expect to find majority preferences the default.

Nonetheless, in deciding constitutional cases, the Supreme Court often mandates a majoritarian default. Constitutional majoritarian default rules can take on two distinct forms. The most common, and least interesting, is the general tendency of courts to adopt legal tests that defer to governmental preferences, outside a defined set of exceptions.⁶⁰ This is accomplished through the structure of the doctrine itself. For example, the rational basis test, pervasive in some form in constitutional law, demands deference to previous government decisions.⁶¹ Of course, the government officials to whom a court defers may not themselves be representative of the relevant majority, a problem we discuss below with regard to the appropriate application of the de-

56. See Schwartz, *supra* note 1, at 390-92 (presenting a typology of default rules: problem-solving defaults, equilibrium-inducing defaults, information-forcing defaults, normative defaults, transformative defaults, and structural defaults).

57. U.C.C. § 2-208 (2005).

58. The basic terms of the New Deal settlement included "a more exacting judicial inquiry" to protect a broad category of individual rights, including those specified in or inferred from the Bill of Rights and Reconstruction Amendments; those pertaining to voting and the political process; and those necessary to protect racial, religious, or other "discrete and insular minorities." Kramer, *supra* note 9, at 122 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

59. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (holding that "retaliation against a person because that person has complained of sex discrimination is a form of intentional sex discrimination encompassed by Title IX's private cause of action"); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding law school's affirmative action plan); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas antisodomy law); *Shaw v. Hunt*, 517 U.S. 899 (1996) (striking down a state's attempt at racial gerrymandering).

60. See Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 56-74 (1989) (discussing the Court's tendency to defer to majority decisionmakers (i.e., government) unless governmental preferences discriminate against an insular and discrete minority).

61. See cases cited *supra* note 32.

fault rules literature in the constitutional arena.⁶² But the thrust of judicial deference is to allow democratic majorities to govern.⁶³

The more interesting majoritarian defaults are substantive rules of constitutional law fashioned deliberately to reflect majority sentiment. The ancient understanding of due process as “the law of the land”⁶⁴ reflects this, as do more modern formulations such as “evolving standards of decency”⁶⁵ and the “emerging awareness” of society.⁶⁶ Even rights-protective aspects of constitutional text sometimes are construed as majoritarian in nature, such as the Eighth Amendment’s proscription of cruel and unusual punishment,⁶⁷ or the Fourth Amendment’s requirement that government searches and seizures must be “reasonable.”⁶⁸

Recalling the discussion in Part II, to say that a test is majoritarian in the constitutional context still begs the question of which majority. Contest in political theory regarding the division of authority is amply reflected in judicial decisions. The Supreme Court often adopts an intriguing tradeoff between federalist and nationalist values, looking for consensus among the states as entities. For example, when it comes to the propriety of execution—for particular crimes or for youthful or mentally infirm suspects—the court often polls the

62. See *infra* Part IV.

63. See Chemerinsky, *supra* note 60, at 61 (attributing the Court’s deferential approach to constitutional decisionmaking to a “dominant paradigm of constitutional law and scholarship, a paradigm that emphasizes the democratic roots of the American polity and that characterizes judicial review as at odds with American democracy”).

64. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1309 (2005) (“The Due Process Clause requires that the government act according to the ‘law of the land,’ that is, through generalized rules serving the public interest.” (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 580-82 (1819) (argument of Daniel Webster))).

65. *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)) (suggesting “cruel and unusual” is an evolving standard).

66. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). In *Lawrence*, the Court based its decision to invalidate the Texas sodomy law, and thereby overrule *Bowers*, on the “emerging awareness” of society, both in America and abroad. *Id.* Specifically, the Court held, “[t]hese references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Id.*

67. The Court’s jurisprudence on capital punishment of minors might be the most blatant adherence to majoritarian sentiment, resting its decisions on “contemporary” or “evolving” standards of decency. Compare *Roper*, 543 U.S. at 563-68 (finding sufficient consensus among the states that the subjection of minors to the death penalty is “cruel and unusual” and thus unconstitutional), with *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989) (indicating insufficient national consensus “to label a particular punishment cruel and unusual”).

68. See U.S. CONST. amend. IV (People are “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no Warrants shall issue, but upon probable cause”); see also *Illinois v. MacArthur*, 531 U.S. 326, 330 (2001) (declaring that the Fourth Amendment’s “central requirement” is one of reasonableness).

states to measure prevailing practice and generally accedes to it.⁶⁹ At the least, the Court requires that a substantial number of states have abandoned a practice before the Court condemns it. This practice of polling the states is apparent in some of the more contentious decisions in recent years. In the pair of gay rights decisions *Bowers v. Hardwick*⁷⁰ and *Lawrence v. Texas*,⁷¹ for example, the trend of public opinion played a large role.⁷² The same was true when the Supreme Court applied the exclusionary rule to the states in *Mapp v. Ohio*.⁷³

At other times, however, the Court's view of a national majority overrides state preferences, whether measured individually or collectively. Thus, in *California v. Greenwood*,⁷⁴ the defendant argued that the unwarranted seizure of his trash violated the Fourth Amendment's reasonableness requirement because, *inter alia*, there were laws against picking through someone's trash and the California Supreme Court had held trash protected from scrutiny by the California

69. First pointed out by Steve Winter, this practice is prevalent in the Court's jurisprudence. See Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679 (1986); see also *Roper*, 543 U.S. at 564 ("[Thirty] states prohibit the juvenile death penalty, comprising [twelve] that have rejected the death penalty altogether and [eighteen] that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach."); *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002) ("[T]he large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."); *Stanford*, 492 U.S. at 370-71 (noting that twenty-two of the thirty-seven death penalty states permitted the death penalty for sixteen-year-old offenders, and, among these thirty-seven states, twenty-five permitted it for seventeen-year-old offenders. These numbers, in the Court's view, indicated there was no national consensus "sufficient to label a particular punishment cruel and unusual."); *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (stressing only two states had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. According to the Court, "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, [did] not provide sufficient evidence at present of a national consensus.").

70. 478 U.S. 186 (1986).

71. 539 U.S. 558 (2003).

72. See *id.* at 572-73. The Court meticulously documented reactions to *Bowers v. Hardwick* among the states. It found that "25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct." *Id.* at 573. The Court continued, "[i]n those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private." *Id.* The Court concluded, "[t]hese references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572.

73. 367 U.S. 643, 651 (1961). The Court again rested its decision on majoritarian practice. It noted that prior to *Wolf*, nearly "two-thirds of the States were opposed to the use of the exclusionary rule." *Id.* (citing *Wolf v. Colorado*, 338 U.S. 25 (1949)). Now, despite *Wolf*, "more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule." *Id.*

74. 486 U.S. 35 (1988).

Constitution.⁷⁵ The Supreme Court preemptorily dismissed the notion that a state's law might govern the national concept of reasonableness: "We have already concluded that society possesses no such understanding with regard to garbage left for collection at the side of a public street."⁷⁶ In other search cases the Court has held police conduct reasonable despite state trespass laws.⁷⁷

On some questions the Court will defer to a state or even a sub-state actor as representing the relevant majoritarian decisionmaker. The Supreme Court's Eleventh Amendment jurisprudence can be understood in this way. In a series of cases, the Supreme Court has held that Congress may not abrogate state sovereign immunity, except in limited areas.⁷⁸ However, nothing precludes states from abrogating their own immunity, making themselves liable for violations of state or federal law.⁷⁹ Rather than immunizing states, then, what the Supreme Court's decisions do is relegate to state decisionmakers the power to determine the level of state immunity, and thus constitutional protection. Similarly, in assessing what speech is "obscene" and thus outside First Amendment protection, the Supreme Court's test explicitly takes into account the values of local majorities.⁸⁰

Particularly contentious at the moment is jurisprudence suggesting that the relevant majority on some issues includes international consensus.⁸¹ In issues as divisive as gay rights and the death penalty,

75. *Id.* (citing *People v. Krivda*, 486 P.2d 1262 (Cal. 1971)).

76. *Id.* at 43-44.

77. *See* *Oliver v. United States*, 466 U.S. 170 (1984) (holding that police officers who trespassed upon posted and fenced private land did not violate the Fourth Amendment, despite the fact that their action was subject to criminal sanctions); *Katz v. United States*, 389 U.S. 347 (1967) (making plain that the question whether the disputed evidence had been procured by means of a trespass was irrelevant); *Olmstead v. United States*, 277 U.S. 438, 466-69 (1928) (deeming the illegality under state law of a wiretap that yielded the disputed evidence irrelevant to its admissibility); *Hester v. United States*, 265 U.S. 57, 59 (1924) (trespass in "open fields" does not violate the Fourth Amendment).

78. *See* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 683 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."); *Alden v. Maine*, 527 U.S. 706, 712 (1999) ("[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress lacks power under Article I to abrogate the states' sovereign immunity "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area").

79. *Alden*, 527 U.S. at 755 ("Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.'") (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

80. *See, e.g.,* *Roth v. United States*, 354 U.S. 476, 490 (1957) (supporting jury instruction that obscenity is to be judged based on its perception of community consensus).

81. *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (acknowledging international views regarding a minimum

the Justices have sparred over whether it is appropriate, or even sensible, to conceive the United States Constitution as taking account of international opinion. While Justice Kennedy believes it “proper” to “acknowledge the overwhelming weight of international opinion,”⁸² Justice Scalia contends that “the basic premise of the Court’s argument—that American law should comport to the laws of the rest of the world—ought to be rejected out of hand.”⁸³

The salient point about all these tests is that based as they are on majority sentiment, the relevant majority easily has it in its control to change the pertinent constitutional rule—at least outside the international norms context. Thus it was that in the years between *Bowers* and *Lawrence*, twelve states got rid of their proscriptions on homosexual sodomy,⁸⁴ and in the years between *Wolf* and *Mapp*, roughly seventeen states moved to some version of the exclusionary rule.⁸⁵ States may seem to be, or even believe they are, simply changing the rule within the state, but in a sense they are voting on the national norm as well.

C. Penalty Defaults: Forcing Information and Deliberation

It was not long before contracts scholars realized that the transaction costs of contracting around could be brought into the service of better (meaning typically, although not exclusively, more efficient) outcomes. If, for example, contracting parties were operating in an environment of asymmetric information and if forced revelation of the information would lead to a more efficient outcome, then perhaps a court should adopt a default rule that served precisely to require the release of information. The classic example here (although disagreement rapidly developed as to how it should play out) is *Hadley*

age for the death penalty)); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (surveying international consensus regarding gay rights and sodomy); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (surveying international perspective with regard to affirmative action); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing international law and consensus as to the death penalty for the mentally retarded); see also Stephen G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1106 (2004) (“[F]oreign court decisions are relevant to policy making, but not to [constitutional] interpretation.”); Lori Fislser Damrosch & Bernard H. Oxman, *Agora: The United States Constitution and International Law—Editor’s Introduction*, 98 AM. J. INT’L L. 42, 42 (2004) (suggesting that current opinions represent “a long-term trend toward a more cosmopolitan jurisprudence”); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999) (arguing the relevance of international law to constitutional interpretation concerning affirmative action).

82. *Roper*, 543 U.S. at 578.

83. *Id.* at 624 (Scalia, J., dissenting).

84. See *Lawrence*, 539 U.S. at 573 (“The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”).

85. See discussion *supra* note 73.

v. Baxendale, which holds that a contracting party cannot be held liable for unusual consequential damages of which it was not made aware.⁸⁶ At least in one interpretation, the rule of *Hadley* will force the party facing unforeseeable consequential damages to reveal those circumstances, permitting the contracting party to make an efficient decision regarding whether to contract and on what terms.⁸⁷ Another example comes from the common law, the maxim that documents will be construed against the drafter.⁸⁸ Many of the prominent examples of penalty default rules in the contractual area serve the purpose of information-forcing in the service of efficiency. There is, at the moment, a certain degree of skepticism about such rules in the contracts area,⁸⁹ though unquestionably the center of the literature recognizes such rules and they plainly exist in some instances, even if those instances are limited.⁹⁰

Penalty defaults can be found in constitutional law decisions as well, though—as we explored above—they play by different rules, and there is a broader range of normative goals. To be sure, one purpose of constitutional defaults can be information-forcing, just as in the contractual area. Consider in this regard the common form of judgment in a habeas corpus case. If the prisoner succeeds, the executive is ordered to release the prisoner by a fixed date, absent another trial being held. The penalty—release of the prisoner—is sufficiently harsh that the executive is forced to reveal any information it has justifying detention. If the executive lacks adequate evidence of guilt, then detention is inappropriate.⁹¹ Similarly, the probable cause requirement of the

86. (1854) 156 Eng. Rep. 145 (Exch. Div.).

87. See, e.g., Ayres & Gertner, *supra* note 1 (introducing the idea of “penalty defaults” and suggesting that such defaults provide incentive to contract around this default, thereby resulting in the production of information); William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. LEGAL STUD. 241 (1983) (suggesting that the *Hadley* rule could promote efficient revelation of information); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980) (positing that the limitation on damages for unforeseeable consequences of breach can increase efficiency by stimulating the provision of information between bargainers). But see Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547, 1547 (1999) (suggesting that the “structure of penalty-default theory as derived from *Hadley* rests on a faulty implicit premise . . . that damages from breach of contract are certain . . . [and thus] overlooks the potential incentive of a party to conceal information even though the party is subject to a penalty-default rule”).

88. See Schwartz, *supra* note 1, at 391 n.3 (“Information-forcing defaults originated in the common law maxim that a document will be construed against the drafter. The default rule is supposed to create a stronger incentive for disclosure than the common law rule.”).

89. See *supra* notes 2-4 and accompanying text.

90. See Ayres & Gertner, *supra* note 1 (suggesting that contract rules are either immutable rules or default rules); Schwartz, *supra* note 1, at 390-92 (producing an introductory list of contractual default rules). See generally Symposium on *Default Rules and Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 1 (1993).

91. See, e.g., RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 667-70 (4th ed., Matthew Bender & Company, Inc., 2001) (nothing that a

Fourth Amendment generally is designed to force revelation of government reasons that justify the invasion of personal privacy. Also pertinent is the *Brady* rule, which penalizes the government for failing to disclose exculpatory evidence to the defendant.⁹²

The information-forcing possibility of rules like this in constitutional law is demonstrated by the differing approaches of the Justices in *Hamdi v. Rumsfeld*.⁹³ *Hamdi* involved the question whether the government could hold indefinitely and for purposes of interrogation a U.S. citizen captured on or near the battlefield, without affording any process to determine if such detention was warranted. By an 8-1 majority, the Court effectively reversed the United States' position that such indefinite detention was warranted, but the different opinions implied very different consequences.⁹⁴

Justice O'Connor's plurality decision in *Hamdi* effectively adopted a substantive constitutional rule, of the sort identified in Part III.A, above. Her opinion took the position that such detention was inappropriate absent an authorizing act of Congress. She found the Authorization of the Use of Military Force Act (AUMF) adopted after the September 11, 2001, attacks to be sufficient.⁹⁵ Nonetheless, she held that detention was impermissible without certain procedural safeguards such as notice and counsel.⁹⁶ She thus remanded the case in light of that rule requiring the government to provide the procedures (or release the detainee). Justice O'Connor's rule is one that the relevant parties (here Congress and/or the Executive branch) can contract around.

In contrast with the substantive rule-like form of the O'Connor plurality, the separate opinions of Justice Souter (joined by Justice Ginsburg) and Justice Scalia (joined by Justice Stevens) are more in the nature of penalty defaults. Justice Souter did not believe the AUMF provided the necessary authorization for detention. He simply would have ordered release of the detainee absent "a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that [a federal statute barring

summary judgment motion, and thus release, may be granted if the answer fails to bring facts into dispute—i.e., if the executive fails to assert facts which implicate petitioner's guilt).

92. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

93. 542 U.S. 507 (2004).

94. *Id.*

95. *Id.* at 516-19.

96. *Id.* at 536. ("[W]hile the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.").

detention of U.S. citizens was] unconstitutional.”⁹⁷ Justice Scalia would have gone further and held that no such detention was permissible absent criminal charges or suspension of the writ of habeas corpus by Congress, something justified only when the public safety requires it in times of rebellion or invasion.⁹⁸

The separate opinions of Justices Souter and Scalia in *Hamdi* demonstrate the information-forcing functions of default rules in constitutional law. In effect, Justices Scalia and Souter were seeking two sorts of information, and they were prepared to adopt a rule that would produce it. Either they wanted the government to come forward with evidence that Hamdi was guilty of a crime, one the government felt it successfully could prosecute in criminal court, or they wanted the Congress to provide clear evidence that it supported the indefinite detention of American citizens and under what conditions.

This example also demonstrates that in constitutional law, penalty default rules also can be deliberation-forcing.⁹⁹ In addition to mandating that the government divulge information, the separate opinions of Justices Scalia and Souter would have required congressional deliberation regarding the propriety of indefinite detention of American citizens under wartime conditions. As *Hamdi* demonstrates, that deliberation could be required within the Executive Branch or more broadly within the Congress and the country itself.

This same approach might have been used in *Rasul v. Bush*, involving the detention of supposed enemy aliens at the naval base at Guantanamo Bay¹⁰⁰—“supposed” because the United States has refused to afford process to the detainees, some of whom dispute their characterization as enemy aliens. The majority of the Court adopted a minimalist approach to the case, holding only that the District Court had jurisdiction to hear the claims and saying nothing about

97. *Id.* at 553 (Souter, J., dissenting).

98. *Id.* at 578 (Scalia, J., dissenting). Justice Scalia stated:

If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an “invasion,” and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court.

Id.

99. The same can be true in the area of statutory interpretation. Einer Elhauge refers to such penalty defaults as “preference-eliciting.” Elhauge, *Preference-Estimating*, *supra* note 6. Elhauge would constrain the use of such rules to situations where politically influential groups are likely to be able to move the political process on the issue if legislative preferences are in accord. *See, e.g., id.* at 2105. We advance a similar argument normatively. *See infra* notes 135-37 and accompanying text.

100. *Rasul v. Bush*, 542 U.S. 466 (2004).

what process was required.¹⁰¹ This disposition has led to much bantering and confusion in the lower courts, something the Supreme Court ultimately may have to step up and resolve.¹⁰²

The Court might, however, have gone a bit further and used a penalty default rule to resolve the matter more efficaciously, and also perhaps consistent with democratic norms. Hints of one approach are seen in Justice Kennedy's concurring opinion. Although he purports to be narrowing the majority's holding that habeas always lies to hear claims of inappropriate detention so long as the detainee's warden is within the jurisdiction of an Article III court, in effect he demands more than the majority by stating that he would disapprove detention when it is indefinite and without procedures adequate to determine the status of the detainees.¹⁰³ Under Justice Kennedy's approach, release follows absent development of the necessary procedures and their implementation, an information-forcing function.

A more dramatic course might have been to adopt the Souter or Scalia approach of *Hamdi* and, having found that habeas lies, ordered the release of the prisoners absent clear congressional authorization and a legislatively established set of circumstances and procedures for holding them. Such a decision would have forced deliberation in the U.S. Congress (and undoubtedly among the American

101. The Court concluded that section 2241 "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." *Id.* at 484. As to the requisite process, however, the Court simply stated that such are "matters that we need not address now." *Id.* at 485.

102. *See, e.g., Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (holding that President's war powers and Congress's Authorization for Use of Military Force authorized President to issue order for capture and detention of combatants); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (holding that detainees had the fundamental Fifth Amendment right not to be deprived of liberty without due process of law). The Supreme Court may shed some light on this question when it hands down its opinion in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005). However, the Court first must determine that intervening congressional legislation did not disturb its jurisdiction.

103. Justice Kennedy would have adopted the approach taken in *Johnson v. Eisen-trager*, 339 U.S. 763 (1950). *See, e.g., Rasul*, 542 U.S. at 485-88 (Kennedy, J., concurring). *Eisen-trager* considered a number of factors in finding the jurisdiction proper. First, the Court considered the "ascending scale of rights" afforded individuals depending on their connection with the United States. *Eisen-trager*, 339 U.S. at 770. Such rights are heightened when the detainee is a citizen of or physically present in the United States. *Id.* Next, the Court looked to whether the detainees were actual enemies of the United States. *Id.* at 778. Finally, the Court considered the extent to which judicial intervention would interfere with war efforts and thus executive control. *Id.* at 779. From *Eisen-trager*, Kennedy concluded that there is "a realm of political authority over military affairs where the judicial power may not enter." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring). But "as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." *Id.* at 488. By adopting this approach, Justice Kennedy sought to avoid automatic statutory authority to adjudicate claims, but left the door open to such authority by resting on military exigency. The longer a detainee is held, the less exigent the situation becomes and the more justified the court is in intervening.

people) as to the appropriate treatment of the Guantanamo detainees. It is worth observing that this would not necessarily require Congress itself to resolve all aspects of the problem: Congress could, after debate, have determined to delegate the matter to the Executive with greater or lesser discretion. Then, however, Executive authority would have been warranted.¹⁰⁴

Default rules such as these are not meant to displace the possibility of substantive rulemaking. Suppose, in the *Hamdi* case, that the Court had adopted Justice Souter's position and Congress had passed a statute authorizing detention indefinitely and without any process. Surely the Court would remain free when the next case arose to state that such a statute itself failed to pass constitutional muster, perhaps under the due process clause.

D. Normative, Transformative, and Model Defaults

The next category of default rules is a bit of a hodgepodge, but the basic thrust is that they are adopted in the hopes of changing the law in normatively desirable ways.¹⁰⁵ Judges may have opinions as to what sorts of terms or practices are best, and can use their decisions to cajole, persuade or encourage that sort of contracting. Rather than adopting a majoritarian default, for example, a judge can simply pick the rule that seems normatively attractive and hope that contracting parties see the wisdom and follow it. In the contract area the only real difference between this approach and a majoritarian default is whether the court believes it can lead a majority of contracting parties to a place it might otherwise not be. Of course, if rules are sticky—if they involve serious transaction costs to contract around—then a judicial proposal might adhere for reasons other than normative desirability, derogating from efficiency.

Although these normative or transformative default rules receive less attention in the contracting literature, they play a potentially

104. In fact, Justice Thomas made this point in dissent of *Hamdi*. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting). Justice Thomas argued that the Constitution places in the President the “authority to protect the national security and that this authority carries with it broad discretion.” *Id.* at 581; see also U.S. CONST. art. II. Alternatively, Justice Thomas suggested that where, as here,

[T]he President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress[, and i]n such a case the executive action “would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”

Hamdi, 542 U.S. at 584 (citations omitted).

105. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (analyzing the American Law Institute's practice of suggesting normatively desirable rules for courts to apply); Schwartz, *supra* note 1, at 391 (“[A] normative default rule directs a result that the decision maker prefers on fairness grounds but is unwilling to require.”).

large role in constitutional law. Whether they should or should not is complicated by the difficulty of contracting around the default rule, as we explain at some length below. For now, it is enough to observe how common it is for constitutional decisions to impose rules believed to be normatively-attractive, even as they permit the parties to contract around them in various ways.

First, some constitutional decisions serve as what we will call a *model default*, suggesting one way government can solve a constitutional problem, while leaving open other alternatives. The paradigm here is the rule of *Miranda v. Arizona*.¹⁰⁶ *Miranda* recognized that police custodial interrogation poses constitutional problems in that it may overbear the will of suspects.¹⁰⁷ Yet, given the nature of custodial interrogation—it commonly takes place with the suspect incommunicado and beyond public scrutiny—it is often difficult *ex post* to determine whether the will has been overborne. Thus, *Miranda* held that if statements made to police officers while in custody in response to interrogation are to be admitted, suspects must be read the now familiar *Miranda* warnings.¹⁰⁸

Miranda was not a substantive rule, it was a model default. The *Miranda* Court was quite clear in stating that the rule handed down applied in the absence of some other way of assuring voluntary confessions.¹⁰⁹ Although some governments now are experimenting with videotaped confessions,¹¹⁰ there has been no genuine effort by gov-

106. 384 U.S. 436 (1966).

107. *See id.* at 469 (“The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators.”).

108. *See id.* at 444 (holding that statements obtained from defendants during incommunicado interrogation in a police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination).

109. *See id.* at 467. Specifically, the Court held:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

Id.

110. *See* Robert Schwaneberg, *Suspects Must Be Recorded*, STAR-LEDGER (Newark, N.J.), Oct. 18, 2005, at 21 (reporting that the New Jersey Supreme Court announced that “[p]olice will be required to . . . record interrogations from the moment a suspect has been informed of his rights”).

ernments to advance something like videotaped confessions as an alternative to the *Miranda* procedure. This is odd given the fact that *Miranda* continues to be controversial in some quarters.¹¹¹ We return to the *Miranda* example below as we discuss some of the normative difficulties with applying default rules in the constitutional context.

Another example of a model default involves remedies for constitutional torts. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that individuals subjected to constitutional torts could sue the responsible government officials for money damages.¹¹² In creating a constitutional money damages remedy, however, the Supreme Court made clear that its rule was a model default. The *Bivens* Court stated that its remedy stood absent Congress developing an alternative remedy that was equally efficacious in protecting the underlying right.¹¹³ Subsequent cases reveal a dialogue in which the Court and Congress have worked out the contours of such alternative remedies in various areas.¹¹⁴

A second sort of normative default is exemplified by an increasingly rich literature recognizing that institutional characteristics limit the breadth to which courts can go in stating and enforcing constitutional rights. Seminal here is Lawrence Sager's idea of constitutional underenforcement.¹¹⁵ Sager's point was that the Constitution may be understood as requiring more than courts themselves can or should necessarily enforce. This is how Sager explains, for example, the power of Congress to exceed judicial interpretations of Four-

111. See, e.g., Brief for Nat'l Dist. Attorneys Ass'n et al. as Amici Curiae Supporting Petitioners, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525) ("The *Miranda* Rule of automatic suppression—as distinct from the giving of warnings in themselves—diserves the victims of crime and frustrates the efforts of police and prosecutors to secure proper, probative statements from criminal suspects.”).

112. 403 U.S. 388, 395 (1971).

113. See *id.* at 397 (“[W]e have here no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.”); cf. *Bush v. Lucas*, 462 U.S. 367 (1983) (holding that because the claims arose out of an employment relationship that was governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, it would be inappropriate for the court to supplement that regulatory scheme with a new nonstatutory damages remedy).

114. See Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 767-73 (1991) (describing a “dialogic theory of remediation” in which courts “defer[] to the interests of rights-violators in shaping remedies and then negotiat[e] with those same bodies as to enforcement”).

115. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); see also LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 84-92 (2004) (suggesting that the “thinness” of the Constitution is due in large part to judicial underenforcement—i.e., the refusal to enforce the Constitution to its outermost margins).

teenth Amendment rights through the exercise of its Section 5 enforcement power.¹¹⁶

These second sorts of normative defaults might be thought of as *constitutional bottoms*. For a variety of pragmatic or conceptual reasons, a court's prescriptions might leave room for other constitutional actors to take a more aggressive posture toward rights enforcement. A familiar *constitutional bottom* is the understanding that the federal Constitution provides a substantive floor below which states may not fall but does not limit more rights-protective action under a state constitution.¹¹⁷ Thus, many state courts have ordered minimally adequate school funding or funding parity, whereas the federal courts have declined to order this remedy under the federal Constitution.¹¹⁸ Similarly, state courts have protected a woman's right to choose abortion more aggressively than the federal courts.¹¹⁹ In the criminal procedure arena, state courts frequently provide safeguards under the state constitutions that are stronger than those under the federal Constitution.¹²⁰

E. Structural Defaults

There is one final type of default rule whose application in the constitutional area may make more sense than in contracting. Contracts scholars have identified the "structural" default, which is nothing more than a set of rules that tells contracting parties how to create an enforceable contract.¹²¹ A familiar example is the statute of frauds,

116. Sager asserts there are "institutional" and "analytical" limitations to judicial enforcement. The institutional limitations stem in large part from the countermajoritarian difficulty and judicial manageability of a particular rule. Thus, to overcome the underenforcement of the Fourteenth Amendment, Congress should be given greater leeway. While this may not address the analytical limitations, it would address the institutional limitations thereby remedying the problem of underenforcement. See SAGER, *supra* note 115, at 114-15.

117. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (recognizing that states may afford greater protection to individual rights and, when done, the states' decisions be left "free and unfettered by [the Court] in interpreting their state constitutions" (citations omitted)).

118. Compare *Brigham v. Vermont*, 692 A.2d 384, 397 (Vt. 1997) (holding that the "educational financing system in Vermont violates the right to equal educational opportunities under chapter II, section 68 and chapter I, article 7 of the Vermont Constitution"), with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.")

119. Compare *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (employing strict scrutiny standard of review), with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (setting forth the "undue burden" standard of review).

120. See, e.g., *State v. Barnett*, 909 S.W.2d 423, 430 n.6 (Tenn. 1995) (stating that courts are "always free to expand the minimum level of protection mandated by the federal constitution" (citations omitted)).

121. See Schwartz, *supra* note 1, at 391 (noting that structural defaults tell "parties how to make their agreement legally binding"). For further analysis of structural default rules, see Avery Katz, *Transaction Costs and the Legal Mechanics of Exchange: When*

which requires written contracts under certain circumstances. The difficult problem with the notion of structural contract defaults is that the category may be all encompassing. In some sense all contract rules are specifications on how to form a binding contract.

Structural constitutional rules are important. From the Constitution itself we have the familiar example of bicameralism and presentment as a means of enacting a valid law.¹²² Judicial decisions can also create structural defaults. Imagine a more robust nondelegation doctrine, in which certain regulations also would have to be enacted by Congress to have the force of law. Restrictions on the exercise by private parties of governmental authority also provide a structural default specifying not what power may be exercised, but how it must be.¹²³

IV. POSITIVE THEORY AND CONSTITUTIONAL DEFAULT RULES

Despite the variety and pervasiveness of default rules, one might reasonably wonder if there is any purchase to default rule thinking in constitutional theory. Default thinking shapes normative inquiry in particular ways, to be sure, but still the questions are familiar ones. Concerns about the normative basis of a default rule implicate long-standing questions regarding constitutional values, just as the question of which body can set a default raises the familiar debate about judicial review.

We believe that default thinking not only emphasizes the necessity of answering these questions in individual cases, it also serves them up in ways that can provide new insights. The frame in which one asks a question often affects the answer one reaches. To make good on that hypothesis, we look in this Part at the problem of “contracting around” in constitutional law. Our hope is to show that one common assumption of constitutional law is deeply problematic, while another idea that may seem nutty on first impression actually contains a germ of good sense.

Should Silence in the Face of an Offer Be Construed as Acceptance?, 9 J.L. ECON. & ORG. 77 (1993); Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621 (1993).

122. See *INS v. Chada*, 462 U.S. 919, 954-55 (“Congress can implement [a law] in only one way; bicameral passage followed by presentment to the President.”).

123. Congress may delegate power to nongovernment entities if the delegation of power provides for sufficient oversight of the private entity. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (finding that Congress, in delegating some price-fixing authority to a private industry entity, the Bituminous Coal Code, had entrusted sufficient oversight and authority to a government entity, the National Bituminous Coal Commission, to make the delegation constitutional).

A. *Transaction Costs and Bargaining Models*

Transaction costs loom large in the contractual literature on default rules.¹²⁴ Absent transaction costs, the Coase Theorem suggests what rule a court adopts matters little, as the parties will bargain to the most efficient outcome. Even here there will be distributive implications as different rules correspond to different distributions of property. But transaction costs, like gravity and friction, do exist. This makes the correct placement of a legal rule of some allocative as well as distributive importance, and also motivates the strategic use of default rules to solve dysfunctions of contracting such as asymmetric information.

Generally speaking, the transaction costs of contracting pale in comparison to those in the constitutional realm. Formally, the default rule perspective is similar to that taken by sequential bargaining models employed in the study of legislatures. In that approach, the bargain that the parties will agree to depends on what is variously called the “status quo” or reversion point.¹²⁵ In political science, of course, attention is restricted neither to bilateral negotiations nor to rules requiring unanimous acceptance for agreement. Instead attention has mostly been given to majority rules.¹²⁶ But then there is no reason for the default rule approach to be restricted in those ways either. From a descriptive standpoint, what the approaches have in common is the centrality of sequence in understanding bargaining and the importance of outside options. What differs between them is the “standard,” or reference, case that serves to generate the main intuitions guiding the theory.

Two basic principles motivate the operation of bargaining models. The first basic principle in the political science literature of bargaining games is that the more unattractive the reversion to a party, the larger the range of options it will accept.¹²⁷ The second basic princi-

124. See *supra* Part III.C.

125. See John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 1, 5-9 (1990) (suggesting that statutory policymaking creates a preexisting status quo which affects subsequent policymaking by an agency or the president).

126. See *id.* at 6-9 (suggesting agency action is often geared toward the median voter in Congress so as to appeal to a majority and thus increase the odds that such action will take effect). See generally KEITH KREHBIEL, *PIVOTAL POLITICS* (1998) (recognizing that winning coalitions in politics are almost always greater than minimum-majority size and providing a theory of who or what is pivotal in U.S. lawmaking—that is, the person or thing on or around which majoritarian lawmaking depends).

127. See generally Thomas Romer & Howard Rosenthal, *Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy*, 93 Q.J. ECON. 563 (1979).

ple is that the structure of decision rules influences bargains that can be reached.¹²⁸

For American national institutions the consequence of these two notions has been gridlock, as summarized by Keith Krehbiel in his book, *Pivotal Politics*.¹²⁹ In that study he shows that there is a large set of outcomes, which he calls the gridlock interval, that cannot be overturned by ordinary (Article I, Sections 5 and 7) procedures.¹³⁰ That set is defined on one side by the size a sufficient majority to sustain a presidential veto (one-third of either the House or Senate) and, on the other, by the majority required to prevent a cloture vote against a filibuster threat in the Senate (nowadays forty Senators but who knows how long that will last). Typically this is a large set that contains many outcomes that majorities of one or the other chamber find unacceptable.

B. Majoritarian and Penalty Defaults Reexamined

The implications of this line of research complicate default rule thinking. To make this point, we focus on two sorts of defaults, majoritarian and penalty. Majoritarian defaults involve courts deferring to more majoritarian institutions, in order to further democratic values. Penalty defaults for this reason may seem problematic, as they involve courts forcing majoritarian institutions to act. We intend to problematize both of these assumptions.

In light of bargaining models, majoritarian default analysis becomes ambiguous. Take the instance in which the Supreme Court defers to a preexisting norm. It could be that the norm's existence reflects majoritarian sentiment, but it equally could be the case that the norm is simply sitting in the gridlock zone such that it would take a supermajoritarian response to move it. In this case the Court has compounded the injury by constitutionalizing a norm to which a majority would not agree. Consider, for example, the Court's recent decision not to constitutionalize euthanasia.¹³¹ The Court's decision rested on an analysis of practice in the fifty states.¹³² However, it is

128. See Ferejohn & Shipan, *supra* note 125, at 5 (stating that the "sequential policy-making model" provides a strategic structure of policymaking in which bargains are reached in pursuit of a specific desired outcome); see also KREHBIEL, *supra* note 125, at 3-39 (recognizing that players and procedures play an instrumental role in U.S. lawmaking).

129. See KREHBIEL, *supra* note 126, at 3-19.

130. Article I, Section 5 states that congressional chambers are entitled to make their own rules; hence, the Senate is free to adopt nonmajoritarian rules and therefore to permit filibusters that can be ended only with the concurrence of sixty Senators. See U.S. CONST. art. I, § 5, cl. 2. Article I, Section 7 specifies the required congressional majority to override a veto. See U.S. CONST. art. I, § 7, cl. 2. These two sections jointly define the gridlock interval.

131. See generally *Washington v. Glucksberg*, 521 U.S. 702 (1997).

132. *Id.* at 710 ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices." (citations omitted)).

entirely possible that state rules rest in the gridlock zone and cannot be changed easily even if majority sentiment favored euthanasia under limited circumstances.

Common sense tells us that default outcomes in the gridlock region may penalize ordinary majorities of either the population as a whole or of the Congress. Such outcomes cannot be overturned, so they will be sustained politically even though there are ordinary majorities that would be willing to overturn them. These decisions become some sort of super penalty default: we might call these *penalizing defaults* and note that such outcomes are presumably unattractive.

Ironically, the problem is even greater if the Court makes a decision that protects liberty and thereby limits government's freedom of movement. In the euthanasia case, majority sentiment ultimately could move in such a way as to lead to a new constitutional rule. Many rules involving sexual autonomy or criminal procedure have evolved in just this way.¹³³ But when the Court adopts a constitutional norm that limits government regulation based on majority sentiment, constitutional change is frozen. Suppose, based on a change in state practice (ostensibly reflecting majority sentiment), the Court were ultimately to find a limited right to euthanasia. Just as majority sentiment shifted in a way that led the Court to permit the practice, so it could theoretically shift in favor of banning it again. Yet, the very existence of the Court's rule would bar states from changing their practices in response to majority (or supermajority) sentiment, making it harder for the Court to see such a shift in public views. Such rules tend to operate as a one-way ratchet.

This reasoning does suggest somewhat greater caution on the Court's part before it constitutionalizes a rule limiting government's regulatory authority. It also raises cautions about the entire approach. If the Court's decisions in cases such as these are, in fact, premised on majoritarian principles, deferring to practices that are themselves subject to pivotal politics simply may be inapt. The Court's antennae simply may not be attuned to what positive theory can teach us about how ostensibly majoritarian politics operates. At the least, the Court perhaps ought to limit the use of this approach to cases where a very large majority exists, especially when it is constitutionalizing a rule that limits government's regulatory authority

The opposite problem arises in the case of penalty defaults: from the standpoint of the designer, penalty defaults are not supposed to be played in "equilibrium." Indeed, this seems part of the definition

133. Compare, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that Georgia's sodomy statute did not violate the fundamental right of homosexuals), with *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers*, finding laws criminalizing certain intimate sexual conduct between two consenting adults of the same sex unconstitutional).

of a penalty default (as opposed to a default that is merely punishing one or more of the parties). The whole point of a penalty default is to force the parties to contract around it, perhaps disclosing privately held information to the other parties, and this implies the resulting legislation has desirable properties.¹³⁴ It also requires the resulting legislation to be feasible.

By definition, the parties cannot contract around defaults inside the gridlock interval, so no such default could work as a penalty default. Rather, it might work as a penalizing default. This might explain the curious failure of any governmental body of which we are aware to adopt interrogation procedures to replace the *Miranda* rule. As we discussed above, *Miranda*—at least on its face—was a plain invitation to governments to come up with alternative procedures to safeguard voluntary confessions.¹³⁵ Perhaps no government did so because *Miranda*—though undesirable—fell within the gridlock zone. Alternative hypotheses are available, of course. Perhaps the Court recognized this and purposely set the policy where it did as a normative default. Or, perhaps the Court is quite agile politically and set the default in just the right place: despite rhetoric challenging *Miranda*, many officials have not really found the decision so debilitating.¹³⁶ These arguments suggest that the politics of default rules is complex and, further, that those who seek to set such rules have reason to be cautious in employing penalty defaults. Lacking information about the gridlock region, such defaults seem likely to lead to normatively unattractive outcomes.

Ironically, then, the way to make penalty defaults work may simply be to move policy so far to one extreme or another that it falls outside the gridlock zone and motivates the parties to act. Our suggestion above, that the *Rasul* Court might simply have ordered the release of all the Guantanamo prisoners, might have seemed far-fetched. How would the Court be justified in taking such draconian action? But draconian action might be just the thing to force Congress out of gridlock. The questions of detention and process involved in Guantanamo have proven to be extremely important to this country's international standing. A draconian remedy might have fostered needed congressional debate.

Deliberation-forcing defaults of this sort could find much broader use within constitutional law. In the area of sexual privacy, for example, some commentators have suggested the Court would have done better to rely on desuetude as a basis for decision, rather than

134. See *supra* notes 86-90 and accompanying text.

135. See cases discussed *supra* note 111.

136. See generally Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001) (concluding that *Miranda* has had a very limited impact (positive or negative) on the criminal justice system).

adopting a substantive rule.¹³⁷ In *Griswold v. Connecticut*, for example, the Court struck down a Connecticut statute that banned married couples from using contraceptives. But there had been no prosecution under the statute for years, and the discussion of majoritarian defaults suggests why assuming state practices represent majority will might be an error. In cases such as this, with longstanding statutes of a recently controversial nature, the Court might simply strike the law relying on desuetude, leaving it to the state legislature to decide whether to reenact it. Think of this as a sort of constitutional sunset provision. If the law is in fact popular, this sort of judicial action will serve as a penalty default, revealing that information. Obviously the idea needs working out, but positive politics suggests it needs to be.

Similarly, the Supreme Court has described a general preference that police conducting searches possess warrants, but the warrant requirement is now riddled with exceptions, in part because of the inexorable pressure of cases featuring bad guys who will go free if the requirement is enforced. The Court faces a seeming Hobson's choice. On the one hand it can, as it has, cave on a case-by-case basis to police demands that certain practices be permitted. On the other, it can invalidate police practices, let bad types go, and face the possibility of public wrath. Moreover, even if the Court wanted to stick to its guns, the Court might not itself have enough information to know if warrant exceptions are required for the police to do their job. But there is a third alternative: the Court could deny approval to unwarranted searches—at least absent exigent circumstances—unless those types of searches are sanctioned by the proper representative body. This sort of rule could help the Court in ascertaining public support for the practices, as well as necessity.¹³⁸

V. CONCLUSION

Default rule thinking in constitutional law has its own set of complexities, distinct from those in private law. At the same time, we hope to have demonstrated that such thinking may not be optional. To the

137. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 148-56 (1962); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 5-7 (1982); Calabresi, *supra* note 81, at 1115-19.

138. More narrowly, the Court could require legislative authority for regulatory searches. One of the truly confounding aspects of the Fourth Amendment is how to apply its strictures when the purpose of a search seems to be regulatory, aimed at deterrence, rather than evidence-detecting based on cause. Examples include drunk-driving roadblocks and workplace safety inspections. There is a natural police tendency to use whatever tool at their means, leading to a distortion of the regulatory purposes of such searches. The Court has had an extremely difficult time fitting its regulatory search doctrines alongside its crime-detection warrant jurisprudence. A solution, again, would be to permit regulatory searches approved by legislative bodies.

extent default thinking can embrace the set of options governmental actors face in response to judicial decisions, our point is that how a case is decided will influence the subsequent conduct. Courts (and commentators) ought to pay attention to these options, for they can have a great impact on both constitutional law and constitutional politics. At the least, we hope to have shown that the use of majoritarian defaults—while common—is quite problematic. We also hope to have raised the intriguing question of whether judicial remedies in default cases ought not to be more activist, to the end of energizing political responses. Although this notion can raise complicated questions of agenda-setting, in light of the difficulty with deferring to supposed majorities, these sorts of questions may be unavoidable.