NOTE

POLITICS, CONSTITUTIONAL INTERPRETATION, AND MEDIA ECOLOGY: AN ARGUMENT AGAINST JUDICIAL MINIMALISM*

INTRODUCTION

There is a venerable tradition of judicial humility in American constitutional law. The modern conception of judicial restraint[1] can be traced back to an article written by Professor James Bradley Thayer in 1893.[2] Thayer's argument that the Court should give all possible deference to Congress's interpretation of the Constitution[3] influenced Justice Holmes, who employed it in his battle against economic due process doctrine and the perceived excesses of a conservative Court.[4] But it was Justice Holmes's friend and colleague Justice Brandeis who distilled minimalism to a specific set of doctrines in his 1936 concurrence in *Ashwander v. Tennessee Valley Authority*.[5]

In 1962, Professor Alexander Bickel picked up and expanded the argument for restraint. He added the term "passive virtues" to the vocabulary of judicial restraint,[6] building on Justice Brandeis's 1936 opinion.[7] According to Professor Bickel, judicial restraint is necessary because of the tenuous legitimacy of

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* This Note was inspired in part by remarks of Professor John Baker at an event sponsored by the Federalist Society in Little Rock, Arkansas. *See* John S. Baker, Jr., Professor, La. State Univ. Law Ctr., Who's the Commander-in-Chief: Is Congress Going Too Far By Setting a Deadline for U.S. Troops To Leave Iraq? (Apr. 10, 2007), *available at* http://www.fed-soc.org/publications/pubID.296/pub_detail.asp.

1. Though mindful of possible differences, I use the terms "humility," "restraint," and "minimalism" interchangeably throughout this Note.

2. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 451 (1994). The article was James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

3. *See* Thayer, *supra* note 2, at 144.

4. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

5. *See* Ashwander v. TVA., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

6. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111 (Yale Univ. Press 1986) (1962).

7. *See id.* at 119–22.

judicial review in a democratic system. The unelected, insulated nature of our courts means that "it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government."[8]

Modern judicial minimalism has found a new home in conservative constitutional theory. The specter of substantive due process has been reborn,[9] and like Justices Holmes and Brandeis a century earlier, conservative legal scholars have found in the doctrine of restraint an effective weapon against judicial excess—excess spawned, this time, from the Left.[10] Indeed, the new Chief Justice, widely identified as a conservative, has spoken in favor of restraint,[11] making an exploration of the doctrine a timely enterprise. This Note attempts such an exploration from a broadly originalist vantage point, assuming for present purposes that the Framers' understanding of the Constitution is relevant to our own understanding of that document.

Parts I and II examine the doctrine of judicial minimalism in light of a familiar approach to original understanding: Would the Framers have been comfortable with Chief Justice Roberts's assertion that "[i]f it is not necessary to decide more to dispose of a case . . . it is necessary not to decide more";[12] or would they have opposed such a notion? Part III introduces the academic discipline of media ecology, the study of how changes in media technology affect institutions. Media ecology asks questions such as, "how do television and the Internet affect the type of political discourse that Americans engage in?" This line of inquiry reveals ways in which the modern media environment has affected the institutional strengths of the political framework envisioned by the Framers. Finally, Part IV contends that the advocates of judicial minimalism are mistaken both about the Framers' vision and the ways in which our political institutions have developed.

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8. *Id.* at 200.
9. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973).
10. *See id.* at 174 (Rehnquist, J., dissenting).
11. Cass R. Sunstein, *The Minimalist*, L.A. TIMES, May 25, 2006, at B11, *available at* http://www.law.uchicago.edu/sunstein-minimalism-roberts.html.
12. *Id.*

I. THE FRAMERS AND CONSTITUTIONAL INTERPRETATION

A. *The Constitutional Conversation*

Some proponents of judicial minimalism describe the Court's role in constitutional interpretation in terms of "dialogue."[13] Indeed, Bickel idealized judicial review as a "colloquy with the other institutions of government."[14] Referring to constitutional interpretation as a colloquy rather than a monologue highlights an important aspect of judicial minimalism: by taking a more subdued role in interpreting the constitutional text, the Court invites the other two branches of government to engage more actively in the enterprise.[15]

Although the Framers may not have couched their vision in terms of dialogue, they would have been comfortable with the idea that the two political branches had a role to play in constitutional interpretation. The records of the 1787 Convention show that the Framers hoped the President would play a role in interpreting the Constitution. In the early days of the Convention, the delegates from Virginia set forth their proposal for what the new government should look like.[16] The eighth article of this Virginia Plan proposed "that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate."[17]

Less than a month later, the Virginia Plan's Council of Revision ran into trouble. Several delegates seemed to worry that combining the executive and the judiciary in this way improperly mixed the two powers.[18] The objections carried the debate.[19] But scarcely a month later, delegates again proposed combining the judiciary with the executive in a revisionary

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13. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653–80 (1993).

14. BICKEL, *supra* note 6, at 70–71.

15. *See, e.g.*, Friedman, *supra* note 13, at 653–58.

16. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–23 (Max Farrand ed., 1911) [hereinafter FARRAND]. The Virginia Plan was proposed on the floor by Edmund Randolph, *id.*, but James Madison was its main architect, *see* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 472 (1969).

17. 1 FARRAND, *supra* note 16, at 21.

18. *Id.* at 97–98.

19. *Id.* at 98–105.

council, and Madison spoke vigorously in its favor.[20] The separation of powers objection was raised once again: if the judiciary was to have the power to declare laws unconstitutional, it would be improper for them to "be influenced by the part they had taken, in framing the laws."[21] The objections proved insuperable, and the proposal failed for the final time.

By rejecting the Council of Revision, however, the Convention was by no means denying the executive a role in constitutional interpretation. Instead, the Convention determined that this role would be embodied in the veto power. On the same day that the delegates first decided against the Council of Revision, they agreed to place the power to veto the laws of the legislature solely in the hands of the executive.[22] The only debate over the veto power was whether it was to be absolute or qualified. With the memory of an abusive monarch fresh in their minds, the Convention would agree only to the negative power if it could be overruled by two-thirds of the legislature.[23] The Framers thus invited the President to participate in the constitutional conversation, but assured that his voice would not drown out all others.

One of the motivations behind the veto power was clearly to give the President a role in constitutional interpretation. Writing in 1788, Alexander Hamilton expected that the President would use his veto power both to protect himself from legislative encroachments and to curb "the enaction of improper laws."[24] In his *Commentaries*, written four decades later, Joseph Story echoed Hamilton's dual justification for the veto power: not only was there a "constitutional necessity of arming [the Executive] with powers for its own defence," but such a power would be "important, as an additional security against the enactment of . . . improper laws."[25] Thus the veto power was intended to protect the Constitution in two ways: (1) by giving the President the ability to defend his office and protect the separation of powers, and (2) by causing the legislative enactments to pass under another pair of eyes, providing a check against unconstitutional laws.

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20. 2 FARRAND, *supra* note 16, at 73–80.
21. *Id.* at 75.
22. 1 FARRAND, *supra* note 16, at 104.
23. *Id.* at 98–104.
24. THE FEDERALIST NO. 73, at 470 (Alexander Hamilton) (Modern Library ed. 2000).
25. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 320 (Carolina Acad. Press 1987) (1833).

The legislative branch was also intended to have a role in the enterprise of constitutional interpretation. Both houses of Congress would implicitly engage in interpretation of the constitutional text as they authored and passed legislation,[26] but the Framers looked especially to the Senate to "seasonably interpose [against] impetuous counsels"[27] and to provide an "additional impediment . . . against improper acts of legislation."[28] The point is illustrated by an oft-quoted anecdote. Upon returning from France, Thomas Jefferson is said to have asked George Washington, at the breakfast table, why he agreed to a second legislative chamber. "Why," Washington replied, "did you pour that coffee into your saucer?" "To cool it," said Jefferson. "Even so," Washington returned, "we pour legislation into the senatorial saucer to cool it."[29]

Indeed, Professor Vikram Amar has argued that providing a check against unconstitutional legislation was "a primary reason the Senate was created."[30] Professor Amar notes that the Senate has an important role in "four constitutional processes: legislation, impeachment, appointment, and amendment."[31] Each one of these processes requires the Senate to interpret the constitutional text. The Senate, House, President, and Judiciary all have to agree on the constitutionality of each law before it is effectively applied, and the Senate and the House interpret the "high crimes and misdemeanors" Clause[32] when considering impeachment and jointly engage in "constitutional interpretation of a sort" when considering amendments.[33] Finally, when considering appointments, each Senator, along with the President, "must not only consider his own substantive visions of constitutional provisions, he must also consider and compare those of the nominees."[34] From this analysis, Professor Amar argues, "an interesting pattern begins to appear. The federal judiciary interprets the Constitution in only one, the President

26. *See* Eugene W. Hickok, Jr., *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217 (1986); *see also* Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986).

27. 1 FARRAND, *supra* note 16, at 422.

28. THE FEDERALIST NO. 62, *supra* note 24, at 396 (James Madison).

29. 3 FARRAND, *supra* note 16, at 359.

30. Vikram D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1116 (1988).

31. *Id.* at 1112–13.

32. U.S. CONST. art. II, § 4.

33. Amar, *supra* note 30, at 1112–13.

34. *Id.* at 1119.

in two, the House in three, and the Senate in all four of these constitutional processes."[35]

As we have seen, the Framers never considered the judiciary to be the sole interpreter of the Constitution. They intended both the President and the Senate to play significant roles. Although advocates of judicial minimalism are right to recognize the importance of non-judicial actors, close examination reveals that judicial minimalists are right for all the wrong reasons.

B. The Majoritarian Difficulty?

"The root difficulty," according to Professor Bickel, "is that judicial review is a counter-majoritarian force in our system."[36] The hard reality, said Bickel, is "that when the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[37] Bickel assigned a more humble role to the judiciary because of its lack of democratic legitimacy, and urged deference to the constitutional judgment of the other branches when possible because he saw them as more representative of the majority's will. This argument is fundamental to minimalism because it points out what minimalists believe to be the judiciary's most fundamental weakness. As an original matter, however, this argument gets it exactly backwards. The Framers assigned the role of constitutional interpretation to the judiciary, President, and Senate not because of their democratic pedigree, but because of their insulation.

It is important to remember that the presidency originally was far from a majoritarian institution. The selection of the President, wrote Robert Dahl, "was to be insulated from both popular majorities and congressional control."[38] The complicated system of electors which emerged out of the Constitutional Convention reflected a fear that "[t]he people are uninformed, and would be misled by a few designing men."[39] Popular election of the President would invite only "tumult and disorder."[40]

35. *Id.* at 1113.
36. BICKEL, *supra* note 6, at 16.
37. *Id.* at 16–17.
38. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 16 (2001).
39. 2 FARRAND, *supra* note 16, at 57.
40. THE FEDERALIST NO. 68, *supra* note 24, at 435 (Alexander Hamilton).

It was hoped that the President would bring a national character to the new government.[41] As Joseph Story put it, the President "is the representative of the whole nation in the aggregate; [the legislators] are the representatives only of distinct parts; and sometimes of little more than sectional or local interests."[42] Because the manner of his selection would make him responsible to the entire nation, the Framers hoped that the President would use his veto power to check legislation that favored sectional interests and prejudices.[43]

Nor was the Senate a popularly elected body as originally conceived. The original constitutional scheme called for Senators to be chosen by the legislatures of each state, not by the people.[44] John Dickinson, who formulated this scheme of indirect election,[45] saw the states as an American counterpart to the English baronies,[46] and remarked that "[i]n the formation of the Senate we ought to carry it through such a refining process as will assimilate it as near as may be to the House of Lords in England."[47] To provide them with further insulation, Senators were given terms three times as long as their counterparts in the House, and these terms were staggered to ensure that only a third of the Senate could be replaced at each election.[48]

This insulation was precisely why the Convention gave the Senate such an important role in the constitutional conversation.[49] Madison saw the Senate as a "temperate and respectable body of citizens" that, when the passions of the people militated against their own interests, would help to "suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind."[50] The Senate would bring to the new government a

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41. "If Congress . . . tends to reflect the 'local spirit' predicted by Madison, the prime organ of a compensating 'national spirit' is, of course, the President—both as the Chief Executive and as the leader of his party." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States In the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 552 (1954).

42. STORY, *supra* note 25, at 321.

43. *Id.* at 320-21.

44. U.S. CONST. art. I, § 3, cl. 1.

45. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 213–15 (1985).

46. *Id.* at 215.

47. 1 FARRAND, *supra* note 16, at 136.

48. *See* U.S. CONST. art. I, § 3, cl. 1–2.

49. *See supra* Part I.A.

50. THE FEDERALIST NO. 63, *supra* note 24, at 404 (James Madison).

needed measure of stability and help to check excesses of the lower house.[51] The Senate is perhaps the best evidence that the difficulty with which the Framers seemed to struggle the most was not Bickel's counter-majoritarian one; instead it was the problem of constructing a government that restrained the majority while at the same time enabling it to rule effectively.[52]

The counter-majoritarian framework of selecting the President and Senators did not endure. The Electoral College proved awkward and unworkable from the beginning.[53] Although still reflected in the constitutional text,[54] it was soon revised dramatically.[55] Growing majoritarian pressures and charges of corruption and deadlock culminated in the adoption of the Seventeenth Amendment[56] in 1913,[57] which ended forever Dickinson's vision of an American House of Lords.[58]

The effects wrought by these structural changes on our constitutional system have arguably lessened the insulation of the modern Presidency and Senate. These effects have been discussed elsewhere,[59] and are beyond the scope of this Note. The

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51. *See* C. H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 15–26 (1995).

52. "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." THE FEDERALIST NO. 51, *supra* note 24, at 331 (James Madison).

53. *See* DAHL, *supra* note 38, at 77–79.

54. U.S. CONST. art. II, § 1, cl. 2–3, *amended by* U.S. CONST. amend. XII. Much ink has been spilled over the Electoral College. *See, e.g.*, Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467 (2007); *see also* Birch Bayh, *The Electoral College: An Enigma in a Democratic Society*, 11 VAL. U. L. REV. 315 (1977).

55. *See* Wechsler, *supra* note 41, at 553–58.

56. "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years." U.S. CONST. amend. XVII.

57. *See* HOEBEKE, *supra* note 51, at 53–108.

58. There is also a fairly robust field of scholarship dealing with the Seventeenth Amendment and its effects. *See* HOEBEKE, *supra* note 51; *see also* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996); Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997). For a normative argument that because of the structural changes enacted by the Seventeenth Amendment, the Supreme Court should vigorously enforce the bounds of federalism, see Roger G. Brooks, Garcia*, The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (1987). For a contrary argument, see RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 233–80 (2001).

59. *See supra* notes 55, 58.

important point for present purposes is that although the Framers would have been comfortable with the argument made by Bickel and his fellow advocates of judicial restraint that the political branches have a role to play in constitutional interpretation, they would have been at a loss to understand Bickel's difficulty with counter-majoritarianism. Indeed, the methods of selecting the Senate and the President are not the only elements of the Constitution that "thwart[] the will of representatives of the actual people."[60] The Constitution itself is fundamentally counter-majoritarian.

II. THE COUNTER-MAJORITARIAN CONSTITUTION

The fundamental purpose of a constitution like ours is not to enable majorities to govern but to restrain them from governing too much.[61] To enable majorities to govern, it is sufficient for a constitution to give all power to a popularly elected legislature, or perhaps directly to the people themselves. Our Constitution does much more than that; indeed, it restrains majorities and protects minorities in two ways: by structurally dividing and balancing the governing authority against itself to encourage discourse and favor the status quo, and by placing certain substantive rights off-limits for all but the most dedicated and sustained supermajorities.[62]

A. Structural Protections

One structural division of power embedded in the Constitution is federalism. By leaving the bulk of the power in the States and consigning to the central government only those functions pertaining to the nation as a whole, the Framers hoped to establish a government that was "neither wholly *national* nor wholly *federal*."[63] Contrary to the expectations of the Framers, the power

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60. BICKEL, *supra* note 6, at 16–17.

61. "It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (Amy Gutmann ed., 1997).

62. The structure-substance distinction is of course somewhat artificial, but it serves to organize our analysis of the Constitution's counter-majoritarian elements.

63. THE FEDERALIST NO. 39, *supra* note 24, at 245 (James Madison). The term "federal" at this time, in part because of the *Federalist*, was transitioning in mean-

of the modern federal government has grown to dwarf that of the States.[64] Nevertheless, the structural device of federalism still roughly serves the purpose of confining national legislation to national interests and state legislation to local interests.

The separation of powers is another structural device designed to restrain the governing majority. This device was viewed as essential to the preservation of individual liberty. As Madison put it, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[65] In addition to separating the three powers from each other, the Framers, mindful that "[i]n republican government, the legislative authority necessarily predominates," divided the legislature into two separate branches.[66] These three structural protections—federalism, separation of powers, and bicameralism—clearly impede the rate at which change can take place. The complexity of the design makes it difficult for the majority to accomplish anything at all without a sustained, deliberate effort.[67]

This complexity has the additional effect of encouraging deliberation.[68] The Framers drew a distinction between two different types of political deliberation. The first type is the "cool and deliberate sense of the community"[69] that may emerge only after "opportunity for . . . cool and sedate reflection."[70] The Founders assumed that this steady, deliberate public will would always have the best interest of the people in mind.[71] The second type of deliberation was marked by the "sudden breeze of passion,"[72] and "temporary errors and delusions."[73]

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ing from referring to a confederacy to referring to a system of divided sovereignty. *See* MCDONALD, *supra* note 45, at 284.

64. *See* THE FEDERALIST NO. 17, *supra* note 24, at 101–05 (Alexander Hamilton); *see also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

65. THE FEDERALIST NO. 47, *supra* note 24, at 307–08 (James Madison).

66. THE FEDERALIST NO. 51, *supra* note 24, at 332 (James Madison).

67. *See* THE FEDERALIST NO. 73, *supra* note 24, at 471 (Alexander Hamilton).

68. "No system could be more admirably contrived to ensure due deliberation and inquiry, and just results in all matters of legislation." STORY, *supra* note 25, at 254.

69. THE FEDERALIST NO. 63, *supra* note 24, at 403 (James Madison).

70. THE FEDERALIST NO. 71, *supra* note 24, at 458 (Alexander Hamilton).

71. *See id.*

72. *Id.*

73. THE FEDERALIST NO. 63, *supra* note 24, at 403 (James Madison).

This unsteady will of the people ran the risk of sacrificing the people's "interests" in favor of their "inclinations."[74]

This mechanism for ensuring that the people's rash impulses would be tempered by wise deliberation corroborates the theory of constitutional interpretation outlined in Part I. The President was given the veto power "as an additional security against the enactment of rash, immature, and improper laws."[75] The Senate was envisioned as "a portion of enlightened citizens"[76] whose "wisdom may best discern the true interest of their country."[77] Interpretation of the Constitution was entrusted to those branches insulated enough to recognize those moments when "the people, stimulated by some irregular passion . . . may call for measures which they themselves will afterwards be the most ready to lament and condemn."[78]

B. Substantive Protections

The Constitution also restrains the majority in a more substantive way: by safeguarding certain individual rights against majority legislation.[79] By protecting individual rights in Article I, Sections 9 and 10, and in the Bill of Rights,[80] the Framers ensured that the Constitution would empower majorities to rule while protecting minorities from unrestrained majoritarianism. Madison, especially, felt that minorities needed to be given special protection, noting that "[i]f a majority be united by a common interest, the rights of the minority will be insecure."[81]

The Framers' efforts to protect minority rights demonstrate the centrality of deliberation in the constitutional scheme. Minority rights were protected not only by imposing "parchment barriers,"[82] but also by establishing "a body in the Gov[ernment] sufficiently respectable for its wisdom [and] virtue, to aid . . . the preponderance of justice by throwing its weight into that scale."[83] The Framers also hoped that the Senate and the Presi-

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74. *See* THE FEDERALIST NO. 71, *supra* note 24, at 458 (Alexander Hamilton).
75. STORY, *supra* note 25, at 320; *see also supra* Parts I.A and I.B.
76. 1 FARRAND, *supra* note 16, at 422; *see also supra* Parts I.A and I.B.
77. *See* THE FEDERALIST NO. 10, *supra* note 24, at 59 (James Madison).
78. THE FEDERALIST NO. 63, *supra* note 24, at 404 (James Madison).
79. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1978).
80. U.S. CONST. amends. I–X.
81. THE FEDERALIST NO. 51, *supra* note 24, at 333 (James Madison).
82. THE FEDERALIST NO. 48, *supra* note 24, at 316 (James Madison).
83. 1 FARRAND, *supra* note 16, at 423.

dent, with their insulation from popular passions and their superior deliberative capacities, would provide a powerful check against legislation that treated vulnerable minorities unjustly.

The Constitution, by setting up a structure that fosters deliberation and safeguards individual rights, is fundamentally counter-majoritarian. Because the Constitution does not create a purely majoritarian form of government, some scholars have argued that the Framers and the Constitution were undemocratic,[84] the last hurrah of a patriarchal society made obsolete by its obsession with monarchy and nobility.[85] Others have faulted the Framers for erecting a counter-majoritarian framework allegedly designed to protect the fatness of their own pocketbooks.[86] These criticisms err because they confuse as synonymous the terms "majoritarian" and "democratic."

Professor Dworkin has asserted that a majoritarian government cannot be defined as democratic unless it protects certain fundamental values from the tyranny of the majority.[87] If democracy is so defined, the Constitution does not succumb to contentions that it is anything less than democratic. A closer look at statements made by the Framers reveals a commitment to this principle of democracy. For example, in justifying the counter-majoritarian institution of judicial review, Alexander Hamilton argued that the institution did not "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both."[88] The executive's veto power was justified on the same grounds.[89] Because the Constitution was to be adopted by popular convention, the Framers could always have recourse to the principle of popular sovereignty that justified the whole system.[90]

Even if the Constitution is democratic, it undeniably contains certain counter-majoritarian elements that the Framers deemed too important to be left to the whims of popular opinion—the impulsive, second type of deliberation. The Framers looked to

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84. *See* DAHL, *supra* note 38, at 15–27.

85. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 11–24 (1992) (arguing that pre-Revolutionary America was fundamentally hierarchical).

86. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 73–151 (Free Press 1986) (1913) (arguing that the Constitution protected economic interests of the classes with which the Framers most identified).

87. RONALD DWORKIN, JUSTICE IN ROBES 133–34 (2006).

88. THE FEDERALIST NO. 78, *supra* note 24, at 499 (Alexander Hamilton).

89. *See* WOOD, *supra* note 16, at 452–53.

90. *See id.* at 372–83.

the President, the Senate, and the judicial system to protect individual rights precisely because these institutions were insulated from the temporary fits and spurts of the popular will, and thus well suited to engage in cool deliberation. Over two centuries later, the capability of these institutions to perform their deliberative role is in question. Insights gathered from the academic field of media ecology are useful in addressing this issue.

III. MEDIA ECOLOGY AND INSTITUTIONAL CHANGE

Media ecology is an interdisciplinary academic field that examines the effects on society and institutions brought about by developments in media and technology. The field is often associated with Marshall McLuhan, a media theorist who popularized the concept that "the medium is the message."[91] This insight highlights an enduring theme of media ecology: as the method of communication changes, the effects of the communication change as well.[92]

Others followed McLuhan, notably Walter Ong and Neil Postman.[93] Although Postman, who was highly critical of the effects of television, was regarded as a "neo-Luddite,"[94] media ecology is not opposed to technological change, but merely examines the effects of that change on society. Postman never argued that technological change was an evil, much less a necessary one. Rather, he argued that technological change was a tradeoff, bringing bad effects along with the good.[95] It is in such a spirit that this Note will use the insights of media ecology to examine the effects of the modern media on the presidency and the Senate.

A. The President

More than two-hundred years ago, Alexander Hamilton boasted that "[t]he process of election affords a moral certainty, that the office of President will seldom fall to the lot of any man

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91. *See* LANCE STRATE, ECHOES AND REFLECTIONS: ON MEDIA ECOLOGY AS A FIELD OF STUDY 21–23 (2006).

92. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 18–35 (W. Terrence Gordon ed., Gingko Press 2003) (1964).

93. *See* STRATE, *supra* note 91, at 5.

94. *Id.* at 53.

95. Neil Postman, Five Things We Need to Know About Technological Change (Mar. 27, 1998), http://www.mat.upm.es/~jcm/neil-postman--five-things.html.

who is not in an eminent degree endowed with the requisite qualifications."[96] Today, such a statement may be viewed with skepticism. Lawrence Grossman, former president of NBC, remarked that at one time, presidential candidates "*stood* for election, rather than *ran* for election as they do now, in the belief that presidents should preserve the dignity of the high office by staying off the campaign trail."[97] Grossman contrasted this with modern practice by noting that "[i]n 1992, candidate Bill Clinton got more mileage out of joking with a raunchy morning radio talk show host and playing saxophone and wearing dark shades on a late night television talk show than discussing his ideas on health care or welfare reform."[98]

Media scholar Michael O'Neill wrote in 1993 that "[n]ow the qualities needed to win an election are unrelated to the capacity to govern, while the qualities needed to govern are irrelevant to election success."[99] Neil Postman echoed this sentiment in explaining "we may have reached the point where cosmetics has replaced ideology as the field of expertise over which a politician must have competent control."[100] In another work, Postman mused, "I have often wondered how Abraham Lincoln would have fared on television."[101] One wonders whether Postman, author of the seminal 1985 work *Amusing Ourselves to Death*, would have been amused by the 2006 film *Man of the Year*, which depicts a Jon Stewart-style political comedian's rise to the presidency.[102] Postman might have been even less amused when, in 2007, satirist Stephen Colbert announced his own bid for the White House.[103] Postman would probably quote again the words of another actor who ran for President: "Politics," Ronald Reagan said, "is just like show business."[104]

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96. THE FEDERALIST NO. 68, *supra* note 24, at 437 (Alexander Hamilton).

97. LAWRENCE K. GROSSMAN, THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE 107 (1995).

98. *Id.*

99. MICHAEL J. O'NEILL, THE ROAR OF THE CROWD: HOW TELEVISION AND PEOPLE POWER ARE CHANGING THE WORLD 106 (1993).

100. NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 4 (Penguin Books 1986) (1985).

101. NEIL POSTMAN, BUILDING A BRIDGE TO THE 18TH CENTURY: HOW THE PAST CAN IMPROVE OUR FUTURE 51 (1999).

102. MAN OF THE YEAR (Universal Pictures 2006).

103. Katharine Q. Seelye, *Colbert's Presidential Bid Ends After a 'No' in South Carolina*, N.Y. TIMES, Nov. 2, 2007, at A18. That the presidential bid was likely a publicity stunt does not contradict the point, but rather underscores it.

104. Quoted in POSTMAN, *supra* note 100, at 125 (footnote omitted).

One focus of the modern presidential campaign is the televised debate. Of course, pre-television campaigns featured debates as well. Postman described how the format of the August 1858 Lincoln-Douglas debates "provided that [Stephen A.] Douglas would speak first, for one hour; Lincoln would take an hour and a half to reply; Douglas, a half hour to rebut Lincoln's reply."[105] These time limitations were likely prompted by an earlier debate, formatted as follows: "Douglas delivered a three-hour address to which Lincoln, by agreement, was to respond. When Lincoln's turn came, he reminded the audience that it was already 5 p.m. . . . He proposed, therefore, that the audience go home, have dinner, and return refreshed for four more hours of talk. The audience amiably agreed . . . ."[106] Today's televised debates present viewers with a different experience entirely: for example, "the [1984] debates were conceived as boxing matches, the relevant question being, Who KO'd whom? The answer was determined by the 'style' of the men—how they looked, fixed their gaze, smiled, and delivered one-liners."[107]

Once elected, the President is still dependent on public opinion to lead effectively.[108] "The message to American [P]residents" is clear: "the only way to get elected and then stay in power is to submit completely to TV's way of life. Every public appearance, every statement, every visual prop, every TV ad has to be manipulated to win visibility and attract viewers."[109] In an era when the presidency is trivialized by the "show business" atmosphere of television, and the President is almost entirely dependent on viewing majorities, it is time to rethink the ability of the President to engage in cool deliberation and protect the rights of disfavored minorities.

B. The Senate

Much of the criticism surrounding the television-era electoral process applies to the Senate as well. The political discourse of election season is a kind of deliberation, but what kind is it? Is it the cool, deliberate sense of the people, or is it marked by temporary delusions and sudden breezes of passion?[110] O'Neill

105. *Id.* at 44.
106. *Id.* (footnote omitted).
107. *Id.* at 97.
108. GROSSMAN, *supra* note 97, at 64.
109. O'NEILL, *supra* note 99, at 119.
110. *See supra* Part II.A.

suggested the latter: "The emphasis is on emotions and personality, slogans instead of ideas and image instead of reality. The method is to impress rather than to reason because there is no space in a sound bite for thought and no time for . . . deliberative debate."[111] "The problem," according to Postman, "is not that television presents us with entertaining subject matter but that all subject matter is presented as entertaining."[112] The result is that "Americans are the best entertained and quite likely the least well-informed people in the Western world."[113] Television campaigning, said Senator John Danforth of Missouri, "has locked candidates into ridiculous positions because only ridiculous positions can be compacted into 30-second commercials."[114]

Television has had a marked effect on the Senate, and not just at election time: "In the United States, government has become a permanent political campaign."[115] The existence of a public opinion poll for every issue has dampened the deliberative capacity of the Senate. As political scholar Harry Boyte explained, "We have public opinion now, which is people's private reflexes. But we don't have public judgment."[116] Congressional scholars Thomas Mann and Norman Ornstein reported that there has been "a measurable decline in the quantity and quality of deliberation" in both houses of Congress.[117] "Congressmen," O'Neill wrote, "now are so afraid to lead they wait for the polls to tell them what to think and do."[118]

A study of the Senate's changing institutional norms during the last century revealed that although institutional expectations in the 1960s frowned on "show horse" speeches calculated to gain media attention,[119] by 1990 it was "no longer the case that a proper senator is expected to take a vow of abstinence from the attractions of the mass media . . . . Increasingly, those who play

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111. O'NEILL, *supra* note 99, at 106–07.

112. POSTMAN, *supra* note 100, at 87.

113. *Id.* at 106.

114. Michael Oreskes, *American Politics Loses Way as Polls Displace Leadership*, N.Y. TIMES, Mar. 18, 1990, at A1.

115. GROSSMAN, *supra* note 97, at 64.

116. Oreskes, *supra* note 114.

117. THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 216 (2006).

118. O'NEILL, *supra* note 99, at 133.

119. John R. Hibbing & Sue Thomas, *The Modern United States Senate: What is Accorded Respect*, 52 J. POL. 126, 135 (1990).

nothing but the quiet, behind-the-scenes game are viewed as unusual."[120] Such pandering to the cameras was precisely the fear that motivated the opponents of televising the Senate in the late 1980s.[121]

The modern Senate described by these media theorists seems a far cry from the Framers' vision of "a portion of enlightened citizens, whose limited number, and firmness might seasonably interpose ag[ainst] impetuous counsels."[122] It is no longer reasonable to expect the modern Senate to protect the "interests" of the people without yielding to their "inclinations."[123]

Television's effect on the Senate, both during and after the campaign season, has produced an important byproduct: the heightened influence of money. "The whole character of Congress has changed. Between image-making and raising money to pay for image-making, the members have little time to run the government."[124] Mann and Ornstein have documented "the startling rise of earmarking" as "[a]nother sign of the decline of the deliberative process."[125] "Earmark fever," they allege, "has completely taken over the appropriations process."[126] Professor Cass Sunstein explained the origin of this development:

> [T]he original constitutional framework was based on an understanding that national representatives should be largely insulated from constituent pressures. . . . That system of insulation has broken down with the decline of the electoral college, direct election of senators, and, most important, technological developments that have enabled private groups to exert continuing influence over representatives. In these circumstances, it is neither surprising nor inappropriate that the judicial role has expanded . . . .[127]

Professor Sunstein's conclusion concerning the expanded judicial role is the subject of the final Part of this Note.

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120. *Id.* at 143.

121. Richard F. Fenno, Jr., *The Senate Through the Looking Glass: The Debate over Television*, 14 LEGIS. STUD. Q. 313, 324 (1989).

122. 1 FARRAND, *supra* note 16, at 422.

123. THE FEDERALIST NO. 71, *supra* note 24, at 458 (Alexander Hamilton).

124. O'NEILL, *supra* note 99, at 133.

125. MANN & ORNSTEIN, *supra* note 117, at 175.

126. *Id.* at 176.

127. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985).

IV. JUDICIAL MINIMALISM AND THE EROSION OF POLITICAL DELIBERATION

Judicial minimalism aims to give the political branches as broad a role in the constitutional interpretive conversation as possible.[128] This theory of deference is perhaps most boldly stated by Justice Brandeis in his 1936 concurrence in *Ashwander v. Tennessee Valley Authority*: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[129] This "last resort rule"[130] is not without its advocates; indeed, the current Chief Justice is a minimalist.[131] It remains to be seen whether Chief Justice Roberts will be able to move the Court in the direction of judicial humility.[132]

Judicial minimalism relies on the assumptions that all three branches should have a role to play in interpreting the Constitution, and the Court lacks the democratic pedigree to trump, at least brazenly, the constitutional choices of its counterparts.[133] The Framers also believed that the political branches, notably the President and the Senate, would have important voices in the interpretive conversation because of their insulation from the popular will, not because of their responsibility to it.[134] This insulation was important because of the counter-majoritarian nature of the Constitution itself. Theories of democratic legitimacy and popular sovereignty were vital to the legitimacy of the Constitution, but the Framers were not interested in entrusting the fate of future minorities entirely to the possibly misguided impulses of future majorities. Insulation was therefore a critical attribute for the interpreters of the constitutional text.

With political developments such as the Seventeenth Amendment and technological developments such as the ad-

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128. *See supra* text accompanying notes 1–12.

129. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

130. *See generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (outlining the history of the *Ashwander* avoidance canon's development and application).

131. *See supra* text accompanying notes 11–12.

132. *Cf.* Douglas W. Kmiec, *Overview of the Term: The Rule of Law & Roberts's Revolution of Restraint*, 34 PEPP. L. REV. 495 (2007) (providing an overview of the Court's first term with Chief Justice Roberts presiding in his new role).

133. *See* Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L.J. 23, 23 (2007).

134. *See supra* Part I.

vent of television, this insulation has eroded. In the climate of television-era politics, citizens would be foolish to look to the President and Senate to enforce the constitutional restraints on the majority's will.[135] Recent developments merit a fundamental rethinking of the role of these institutions in interpreting the Constitution. If the President and the Senate are to have a voice in the interpretive conversation, the assumption must be that they have something worthwhile to say. The insights gleaned from the media-ecological analysis of the current condition of these institutions suggest that they are no longer capable of engaging in serious constitutional deliberation. The inference from these premises is clear: if the counter-majoritarian restraints of the Constitution are still worth enforcing, society must look to the courts, and not to the political branches, to enforce them. Although the Framers themselves never made this argument, it is the best way of preserving the original constitutional system now functioning in a world that the Founders would hardly have recognized. It is an originalist's argument, even if it did not originate in the eighteenth century.

The argument is not completely new. In some ways, it is as old as the very concept of judicial review. In *Marbury v. Madison*, Chief Justice Marshall wrote that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[136] Later, he remarked that "[t]he judiciary cannot . . . avoid a measure because it approaches the confines of the [C]onstitution. We cannot pass it by because it is doubtful. . . . [T]o decline the exercise of jurisdiction which is given . . . would be treason to the [C]onstitution."[137] Nearly a century and a half later, Justice Black echoed Chief Justice Marshall in writing that "when judges have a constitutional question in a case before them, and the public interest calls for its decision, refusal to carry out their duty to decide would . . . be an evasion of responsibility."[138] And almost thirty-five years later, Justice Scalia made a similar statement when he referred to the Court's reputation as "working armor [that is] meant to be used and sometimes dented in the service of the public."[139]

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135. *See supra* Part III.
136. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
137. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). The quoted text is dictum and should thus be understood as hortatory rather than obligatory.
138. HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 20 (Knopf 1969) (1968).
139. Greg Pierce, *Scalia Defends Decision*, WASH. TIMES, May 25, 2001, at A6.

The argument here presented is not meant to imply that the Court should be given license to thwart the will of the people whenever it suits the fancy of five Supreme Court Justices. Justice Black recognized, as does Justice Scalia today, that judicial review must be principled and firmly grounded in the text of the Constitution if it is to endure.[140] Vigorously enforcing the provisions of the Constitution does not equate to thwarting the will of the people. Such vigorous enforcement may thwart the desires of a temporary majority, but it does so in favor of constitutional protections that were ratified by the people and given two centuries of tacit consent. These protections may therefore be considered the most genuine embodiment of the people's enduring will.

Perhaps we do not take original understanding to be authoritative; we might no longer believe that the counter-majoritarian restraints embodied in the Constitution are worth enforcing. Perhaps we no longer share the Founders' fear of the "impulse of sudden and violent passions,"[141] or their belief in two types of public deliberation. Perhaps such notions are too undemocratic for today's palate—too elitist, narrow-minded, selfish. But no matter how strong our faith in the people might be, we would do well to listen to Alexander Hamilton's sage advice that "the people commonly *intend* the Public Good. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it. They know from experience that they sometimes err . . . ."[142] If Hamilton is correct, the counter-majoritarian nature of judicial review, far from being the difficulty some suppose, is its greatest recommendation.

John David Ohlendorf

140. *See* BLACK, *supra* note 138; *see also* Scalia, *supra* note 61, at 38.
141. THE FEDERALIST NO. 62, *supra* note 24, at 397 (James Madison).
142. THE FEDERALIST NO. 71, *supra* note 24, at 458 (Alexander Hamilton).