

# UC DAVIS

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## LAW REVIEW

UNIVERSITY OF CALIFORNIA, DAVIS, SCHOOL OF LAW • VOL. 41, No. 1, Nov. 2007

### America’s Statutory “constitution”

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In 1968, the State of California offered income support for employees who lost their jobs or were laid off temporarily because they were disabled. This program applied to almost any kind of physical disability, but did not cover layoffs of pregnant employees.<sup>1</sup> Many school districts in the state required pregnant teachers to take an unpaid leave of absence for the duration of their pregnancies.<sup>2</sup>

Would these governmental discriminations be constitutional today? Do they violate constitutional rights that mothers, or women in general, have in our constitutional system? Do they cut against fundamental norms that are now considered instinctive in our political system? Most Americans would say yes to at least one of these questions, and perhaps to all three. So would most law students, based upon the following reasoning:

- (1) The Fourteenth Amendment of the U.S. Constitution requires states to provide every person with "equal protection of the laws." The U.S. Supreme Court has interpreted the Equal Protection Clause to require state sex-based discriminations to be supported by a substantial state interest that cannot easily be met by an ungendered law.<sup>3</sup>
- (2) State discrimination because of pregnancy is sex-based discrimination. For that reason, it must be supported by a substantial state interest that an ungendered law would not meet.<sup>4</sup>
- (3) The state cannot easily make such a showing because it deploys pregnancy exclusions either for administrative convenience, which the Court has held is not a substantial state interest, or to prevent pregnant women from being publicly visible, almost an invalid state interest under today's jurisprudence.<sup>5</sup>

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<sup>1</sup> See generally CAL. UNEMP. INS. CODE § 2626 (West 1970).

<sup>2</sup> E.g., *Cleveland Bd. Educ. v. LaFleur*, 414 U.S. 632, 635-39 (1974) (describing pregnancy leave policies for boards of education in Cleveland, Ohio; Chesterfield County, Virginia; and other jurisdictions).

<sup>3</sup> *United States v. Virginia*, 518 U.S. 515, 532-34 (1996) (holding state sex discrimination requires "exceedingly persuasive" justification showing that it is "substantially related" to achievement of "important government objective").

<sup>4</sup> Because pregnancy discrimination will only be suffered by women, its application is, in effect, because of sex. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (treating municipal building ordinance as race discrimination when applied almost entirely to persons of Chinese descent).

<sup>5</sup> *Virginia*, 518 U.S. at 519, 540-46 (striking down state sex discrimination in collegiate admissions, rejecting justifications rooted in administrative convenience and

Therefore, these pregnancy discriminatory policies are inconsistent with the U.S. Constitution.

The foregoing argument was the basis for a Constitutional challenge by Cleveland schoolteachers to a policy conclusively presuming they were unable to conduct their classes during and shortly after pregnancy. The Supreme Court in *Cleveland Board of Education v. LaFleur* ducked their argument and decided the case on due process arbitrariness grounds: the strict mandatory leave periods had no rational connection to the state's asserted interest in effective classroom management.<sup>6</sup> Concurring only in the result, Justice Powell wondered whether equal protection was not the appropriate framework.<sup>7</sup> The Court answered his question later in the year when it evaluated the California unemployment insurance exclusion for pregnant workers in *Geduldig v. Aiello*.<sup>8</sup>

The Court's answer was no. A 6-3 majority (including Justice Powell) ruled that pregnancy-based discrimination is not sex discrimination per se, because it does not categorize by sex. While pregnant women are excluded from state benefits, the people included are non-pregnant women as well as men.<sup>9</sup> The Court further ruled that the state discrimination, however described, was justified by the large costs that pregnancy coverage would impose on the state program, assertedly rendering it financially unworkable.<sup>10</sup>

The Supreme Court has never overruled or even softened its *Geduldig* holdings.<sup>11</sup> In *General Electric Co. v. Gilbert*,<sup>12</sup> the Court followed and expanded upon *Geduldig* when it ruled that Title VII's rule against workplace sex discrimination did not bar employers from pregnancy discrimination. The Court presumed Congress intended to

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in arguable distraction female students would pose to state college's educational program).

<sup>6</sup> 414 U.S. 632, 646-51 (1974).

<sup>7</sup> *Id.* at 651-57 (Powell, J., concurring).

<sup>8</sup> 417 U.S. 484 (1974).

<sup>9</sup> *Id.* at 497 n.20.

<sup>10</sup> *Id.* at 495-97.

<sup>11</sup> For an overview and discussion of the Court's pregnancy cases, see Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 *CARDOZO WOMEN'S L.J.* 501, 547-56 (2004), and Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing Its Reversal*, 23 *N.Y.U. REV. L. & SOC. CHANGE* 59 (1997). For an interesting look at Chief Justice Rehnquist's evolving position in the pregnancy cases, see Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 *STAN. L. REV.* 1871 (2006).

<sup>12</sup> 429 U.S. 125, 138-46 (1976).

follow the Constitutional understanding of sex discrimination when it enacted Title VII in 1964. Therefore, *Geduldig* was a presumptive guidepost. Because there was almost no useful legislative history of the sex discrimination provisions of Title VII, the Court more or less deployed *Geduldig* as the primary legal basis for its decision in *Gilbert*.<sup>13</sup> Almost two decades later, in *Bray v. Alexandria Women's Health Clinic*, the Court applied *Geduldig* to hold that pregnant women are not a protected class for purposes of the Civil Rights Act of 1866.<sup>14</sup>

Notwithstanding *Geduldig*, *Gilbert*, and *Bray*, Americans are correct in thinking women have a fundamental right to be free of discrimination because they are pregnant. Although that right has not found recognition in judicial constructions of the Constitution, and certainly has no clear basis in the common law, it has been recognized by statute — namely the Pregnancy Discrimination Act of 1978 ("PDA")<sup>15</sup> — and the Equal Employment Opportunity Commission ("EEOC")'s regulations issued pursuant to that statute.<sup>16</sup> It may strike some gentle readers as anomalous and wrong-headed that fundamental anti-discrimination rights find their positive origin in a statute and administrative regulations and not in the Constitution and its precedents. The purpose of this Article is to demonstrate that the United States now enjoys, and has long enjoyed, a *statutory constitution*. That is, legislation and its regulations are, and long have been, the primary source of constitutional structures, rules, and rights in our polity. Indeed, the process typified by the PDA is a better methodology for constitutional elaboration than the process typified by *Marbury v. Madison*.<sup>17</sup>

## I. AMERICA'S CONSTITUTION OF STATUTES

Aristotle's *Politics* is the first systematic account of constitutionalism. "A constitution is the organization of offices in a state, and determines what is to be the governing body," as well as the interconnection among the various offices and that governing body.

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<sup>13</sup> *Id.* at 133-35, 145.

<sup>14</sup> *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993).

<sup>15</sup> Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

<sup>16</sup> EEOC Employment Policies Relating to Pregnancy and Childbirth, 44 Fed. Reg. 23,805 (Apr. 20, 1979) (codified at 29 C.F.R. § 1604.10 (2007)). For a contemporary look at the PDA and its effect, see Sarah E. Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U. L. REV. 591 (1982).

<sup>17</sup> 5 U.S. 137 (1803).

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The constitution also announces “what is the end of each community. But laws are not to be confounded with principles of the constitution; they are the rules according to which the magistrates should administer the state, and proceed against offenders.”<sup>18</sup> By Aristotle’s influential account, a nation’s constitution is its rules and practices for ordering the institutions of government, determining who participates in political life, and establishing fundamental principles that should guide the government. The constitution should be contrasted from ordinary laws, which establish ordinary positive rules of conduct for those subject to the state’s power. Under such an understanding, America’s (small “c”) constitution is not exhausted by the rules and principles found in the U.S. (Large “C”) Constitution.<sup>19</sup>

Today, in fact, special “super-statutes” — framing statutes that set forth robust rules for government structure, electoral activities, and public values — articulate a great many of the applicable rules and principles of our Constitution as well as our constitution. Put it another way: If all you read was the Large “C” Constitution, you would not know where most legal rules come from, how democratic our polity is, and what principles represent our highest aspirations; nor would you have any idea about the details of institutional arrangements and public values. You can only know those things by studying America’s super-statutes and their implementing regulations.

#### A. *Institutions of Government*

The Constitution gives us the basic structure of government (i.e., three-branch national government; bicameralism and presentment for statutes; federalism) and sets forth some qualifications for officials.<sup>20</sup> But statutes and non-Constitutional rules make three important contributions to American governance: (1) they fill in important details of the Constitutional structure; (2) they alter that structure; and (3) they have ultimately created a new structure centered around administrative law.

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<sup>18</sup> ARISTOTLE, POLITICS, BK. IV, § 1, *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 2046 (Jonathan Barnes ed., 1984). For other discussions of the concept of “constitution,” see *id.* BK. II (giving comparative survey of constitutions in ancient Greece) and *id.* BK. III (discussing various categories of constitutional arrangements).

<sup>19</sup> Henceforth, this Article will use small “c” *constitution* to indicate the broader, Aristotelian meaning of the term, and Large “C” *Constitution* to indicate the written document, as amended and interpreted by the Supreme Court.

<sup>20</sup> U.S. CONST. arts. I-III (separating powers of government into three branches); *id.* art. I, § 7 (creating bicameralism and presentment requirements for lawmaking); *id.* amends. IX-X (detailing limits of federalism).

### 1. Filling in the Details for Each Branch

Although Articles I through III of the Constitution establish the three branches of the national government and define their powers, the very nature of each branch has been shaped by statute and regulation. This is particularly true of the judiciary. Article III establishes only a Supreme Court and leaves it to Congress's discretion whether there will be any "inferior" federal courts.<sup>21</sup> The Judiciary Act of 1789<sup>22</sup> established inferior federal courts and vested them and the Supreme Court with precise subject matter jurisdiction. Enacted by a Congress chock full of framers, this structure placed the Supreme Court atop a pyramid, presiding not only over possibly unruly state courts, but also over a specialized federal judiciary that could be expected to follow the Court's directives more faithfully. The effect of this decision was to facilitate the establishment of a nationwide rule of law. Without this statute, the work of Chief Justice John Marshall (1801-1835) would have been difficult if not impossible.<sup>23</sup> Subsequent statutes have expanded federal court jurisdiction and established an ever more elaborate judiciary, including intermediate appeals courts, specialized tribunals, and magistrates to assist federal trial judges manage their workload.<sup>24</sup>

Section 34 of the Judiciary Act of 1789 made an independent contribution to the structural evolution of American government because it required federal courts to apply state law in diversity cases.<sup>25</sup> Although the Supreme Court originally construed section 34 narrowly, this provision was the basis for *Erie Railroad Co. v. Tompkins*,<sup>26</sup> which is one of the foundational Supreme Court opinions defining the ramifications of our federalist system. Although Justice Brandeis's famous opinion for the Court mentioned the Constitution

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<sup>21</sup> *Id.* art. III, § 1.

<sup>22</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.).

<sup>23</sup> For an excellent discussion of the passage of the Judiciary Act of 1789 and its effect, see Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 700 (1995) (noting "participants [in the debate about passing the Act] all agreed uniformity of decisions . . . would be essential").

<sup>24</sup> See Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1115 (2006). See generally Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 911-12 (1990) (describing caseload of various federal courts).

<sup>25</sup> Judiciary Act of 1789 § 34, 28 U.S.C. § 1652 (2000).

<sup>26</sup> 304 U.S. 64, 70-73 (1938) (overruling *Swift v. Tyson*, 41 U.S. 1 (1842), which probably misinterpreted section 34); see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88 (1923).

as a key justification for overruling precedent, *Erie's* holding was a matter of statutory interpretation.<sup>27</sup> Future elaborations of the *Erie* doctrine have emphasized its statutory rationale.<sup>28</sup> The *Erie* doctrine has reshaped the nature of the federal arrangement in this country.<sup>29</sup>

Article II is no more detailed in its articulation of the executive branch than Article III, which establishes the chief official, the President, and leaves to Congress's discretion the establishment of other executive officials and the definition of their duties.<sup>30</sup> Hence, it was Congress that established Cabinet departments and their responsibilities.<sup>31</sup> In some framework statutes, Congress has channeled presidential duties in ways that have fueled the "Imperial Presidency" of the last century. For example, the Budget and Accounting Act of 1921 required the President to develop a budget and funded a bureau to do so within the Treasury Department (duties now performed by the Office of Management and Budget), but also created the Government Accounting Office to give Congress some capacity to evaluate the President's proposals.<sup>32</sup> Other framework statutes, such as the War Powers Resolution of 1973, have sought to rein in and define more carefully the conflict-initiating powers of the President.<sup>33</sup>

Article I of the Constitution provides much greater detail as to the make up, powers, and responsibilities of Congress. The bicameral nature of Congress, the size of each chamber, and the terms of its members have a pervasive effect on American governance. For instance, the requirement that statutes have the approval of both chambers of Congress and must be presented to the President makes

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<sup>27</sup> Compare *Erie*, 304 U.S. at 77-80 (suggesting Constitutional problems with Court's previous interpretation motivated Court's reconsideration), with Warren, *supra* note 26, at 74-77 (emphasizing statutory purpose as important reason for overruling prior precedent).

<sup>28</sup> See, e.g., *Guar. Trust Co. v. York*, 326 U.S. 99 (1964) (developing *Erie* doctrine entirely from statutory purposes and not from unelaborated constitutional concerns).

<sup>29</sup> See *Hanna v. Plumer*, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring) (arguing that *Erie* is now cornerstone of modern federalism).

<sup>30</sup> See generally Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing President's authority is in large part molded and determined by statutory authorizations).

<sup>31</sup> See, e.g., Act of Sept. 15, 1789, ch. 14, 1 Stat. 68 (renaming Department of Foreign Affairs the Department of State); Act of July 27, 1789, ch. 4, 1 Stat. 28 (creating Department of Foreign Affairs).

<sup>32</sup> Pub. L. No. 67-13, 42 Stat. 20, 20-23 (codified in scattered sections of 31 U.S.C.).

<sup>33</sup> Pub. L. No. 93-148, 87 Stat. 555, 555-56 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2000)).

drastic legislative changes in the status quo much less likely.<sup>34</sup> But statutes have had a strong influence as well. The Constitution grants Congress the authority to tax and spend, but the processes that seek to channel congressional energies into largely productive, rather than rent-seeking directions, are products of framework statutes and not the Constitution. For example, the Congressional Budget and Impoundment Control Act of 1974, as amended, created the Congressional Budget Office to regularize the budget process and imposes a timetable and special process rules to facilitate an orderly budget process.<sup>35</sup> Other statutes, such as the Omnibus Budget Reconciliation Act of 1990,<sup>36</sup> seek to bring discipline to congressional tendencies to overspend.<sup>37</sup>

## 2. Restructuring National Power

Some of the framework laws not only provide structure for the branches of government to carry out their Constitutional duties in the public interest, but reshuffle responsibilities and interactions between the branches in ways that go beyond, and sometimes against, the Constitution's original assumptions about separation of powers. Many of these novelties, such as the Office of Independent Counsel, have not been lasting innovations, but others have been.<sup>38</sup>

Probably most dramatic have been statutes that have expanded Congress's authority beyond the limits suggested by Article I, Section 8. An early example was the statute creating the first U.S. Bank.<sup>39</sup> Although the framers at the Philadelphia Convention rejected such a

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<sup>34</sup> U.S. CONST. art. I, § 7; see William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-33 (1992).

<sup>35</sup> 2 U.S.C. §§ 601-602 (2000).

<sup>36</sup> Pub. L. No. 101-508, 104 Stat. 1388 (1990) (codified in scattered sections of 2 U.S.C.). The Omnibus Budget Reconciliation Act of 1990 superseded the famous Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act). tit. II, Pub. L. No. 99-177, 99 Stat. 1038, 1038-1101 (codified in scattered sections of 2 U.S.C.; 31 U.S.C.; 42 U.S.C.).

<sup>37</sup> See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 417-83 (3d ed. 2001) (giving detailed examination of budget process).

<sup>38</sup> The Ethics in Government Act of 1978 introduced a "special prosecutor," who was later to become the independent counsel. Pub. L. No. 95-521, 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (2000)) (creating special prosecutor); see also Ethics in Government Act Amendments of 1982 § 2, Pub. L. No. 97-409, 96 Stat. 2039, 2039-40 (1983) (changing name from "special prosecutor" to "independent counsel").

<sup>39</sup> Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

power for Congress, Alexander Hamilton persuaded the Washington Administration and Congress to adopt such a law as needed for the rational development of the national economy.<sup>40</sup> The revolutionary norm underlying the Bank Act was that the federal government was responsible for guaranteeing a national financial foundation that would enable manufacturing and commerce to flourish. This norm held up when his adversary James Madison proposed the second chartering in 1816 after the First Bank had expired,<sup>41</sup> when Chief Justice Marshall upheld its Constitutionality,<sup>42</sup> and when President Van Buren successfully pressed for legislation creating a Treasury Department organ to perform the same economy-managing duties after the Second Bank's charter had expired.<sup>43</sup> A more recent example is the Civil Rights Act of 1964,<sup>44</sup> whose public accommodations title was successfully applied against a barbecue joint simply because it purchased food in interstate commerce.<sup>45</sup>

As illustrated by the barbecue case, the revolution in Congress's jurisdiction to regulate economic and social problems at the local as well as interstate level came over decades of legislation and litigation. In striking contrast, statutory reallocation of federal sentencing in criminal cases came almost overnight. The Sentencing Reform Act of 1984<sup>46</sup> removed most trial judge discretion in criminal sentencing and created an evolving set of sentencing guidelines presided over by the Sentencing Commission, one of the most unorthodox bureaucracies in our nation's history.<sup>47</sup> Even in the wake of Constitutional problems

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<sup>40</sup> David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 796-819 (2001).

<sup>41</sup> Act of Apr. 10, 1816, ch. 44, 3 Stat. 266, 266-77 (expired 1836).

<sup>42</sup> *McCulloch v. Maryland*, 17 U.S. 316, 401-02 (1819) (starting with strong presumption of Bank's constitutionality, as essentially settled in early debates).

<sup>43</sup> See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 360-74 (2005) (telling story of President Jackson's successful attack on Bank because it was anti-democratic); *id.* at 457-65, 498-99 (describing President Van Buren's revival of Bank principle but putting it under democratic control in Treasury Department). For a history of the First and Second Banks, see EDWARD S. KAPLAN, *THE BANK OF THE UNITED STATES AND THE AMERICAN ECONOMY* (1999).

<sup>44</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000e-16, 2000e-17-2000h-6 (2000)).

<sup>45</sup> See *Katzenbach v. McClung*, 379 U.S. 294, 298-305 (1964).

<sup>46</sup> 18 U.S.C. §§ 3551-3742 (2000); 28 U.S.C. §§ 991-998 (2000). See generally KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998) (analyzing structure and highlighting shortcomings of Sentencing Reform Act).

<sup>47</sup> The Sentencing Commission is located within the judicial branch, yet its members are appointed by the President and confirmed by the Senate for limited

with the 1984 Act's removal of important matters from jury deliberation, federal courts have continued to apply the guidelines as advisory.<sup>48</sup> Over the resistance of many judges themselves, this framework statute has significantly altered the judicial function in criminal cases and, potentially, the spirit of the federal judiciary as well.

### 3. Administrative State

The biggest change in the Constitutional structure has been Congress's establishment of independent agencies outside the direct control of the executive branch, and its delegation of significant *lawmaking* and *adjudicatory* authority to these agencies and similar organs within the executive branch.<sup>49</sup> Scholars heatedly disagree as to whether such agencies and such lawmaking or adjudicatory authority are un-Constitutional,<sup>50</sup> but almost no one seriously denies that both phenomena are here to stay and have the effect of altering the structure of power in our national government, either beyond or against the expectations of the Constitutional framers.<sup>51</sup> The framers expected national lawmaking to be the product of the carefully deliberative structure established by Article I, Section 7: legislation had to gain the approval of both chambers of Congress and, in most

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terms. 28 U.S.C. § 991 (2000). This unorthodox structure was upheld in *Mistretta v. United States*, 488 U.S. 361, 371-79, 384-97, 412 (1989).

<sup>48</sup> The Court in *Booker v. United States*, 543 U.S. 220, 233-35, 244 (2005), ruled that the mandatory guidelines were unconstitutional, but that it was constitutional for courts to consider them advisory. Most federal appeals courts still follow the guidelines presumptively. See *Rita v. United States*, 127 S. Ct. 2456, 2462-65 (2007) (upholding circuit courts' practice of applying guidelines as presumptively "reasonable" sentence for federal crimes).

<sup>49</sup> On the history of agencies, see Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986). For a history of the creation of agencies as a product of individual reformers, see RICHARD J. STILLMAN II, *CREATING THE AMERICAN STATE* (1998). For an agency-by-agency look, see *GOVERNMENT AGENCIES* (Donald Whitnah ed., 1983).

<sup>50</sup> Compare DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1994) (arguing broad, vague delegation of legislative powers is un-Constitutional), and Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) (asserting independent agencies are un-Constitutional), with Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (arguing independent agencies, with delegated lawmaking authority, fit comfortably within the Constitution's framework).

<sup>51</sup> Even scholars who support a vigorous nondelegation doctrine have not expressed confidence that it will actually be revived. E.g., SCHOENBROD, *supra* note 50.

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cases, the President as well. Federal adjudication was governed by Article III, which assured judges life tenure, and the Fifth Amendment, which required federal courts to adhere to traditional due process of law. The modern administrative state circumvents both structures: commissions and bureaus promulgate most legally binding rules, and administrative law judges (civil servants with no life tenure) decide thousands of adjudications each year.

The framework for understanding most national lawmaking and much federal adjudication in this country is no longer Article I, Section 7 or Article III of the Constitution, but is instead the Administrative Procedure Act of 1946 (“APA”).<sup>52</sup> The APA scales down the Constitutional rules for lawmaking and adjudication for the modern administrative state, with openness and judicial review as the primary checks on arbitrary agency decisions. For example, Congress may delegate substantive rulemaking authority to an independent or executive agency, whose rules will typically have the force of law, just like an Article I, Section 7 statute.<sup>53</sup> But before adopting a rule, the agency must notify the public of precisely what rule it is considering, receive comments from the public, and respond to the comments before promulgating the final rule.<sup>54</sup> Usually, objecting parties will have access to judicial review,<sup>55</sup> which may overturn the rule if it is arbitrary or capricious, in excess of statutory jurisdiction or otherwise inconsistent with the statute, or without observance of the procedure required by law.<sup>56</sup>

### B. Electoral and Political Rules

The U.S. Constitution is less clearly democratic than most Americans assume. “We the People,” in 1789, did not mean “All of Us.” The Constitution of 1789 provided what Aristotle would have called a mixed government: the House of Representatives was largely majoritarian, but with a small portion of the population allowed to

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<sup>52</sup> Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.)

<sup>53</sup> Cf. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004) (defending Congress’s exclusive power to delegate lawmaking authority to agencies).

<sup>54</sup> Administrative Procedure Act, 5 U.S.C. § 553 (2000) (setting forth notice and comment procedures for substantive rulemaking). See generally CORNELIUS KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* (2d ed. 1999) (providing comprehensive description of agency rulemaking).

<sup>55</sup> 5 U.S.C. §702 (2000) (creating presumption of judicial review).

<sup>56</sup> *Id.* § 706(2)(A)-(D) (setting standards for judicial review of substantive rules).

vote; selected by elites, the Senate and Supreme Court were oligarchic; and the President, chosen by a largely unspecified Electoral College, was potentially monarchical. Amendments to the Constitution have opened up the franchise somewhat, but our current status as a democracy with wide participation is mainly a creature of statute and state constitutional provisions.

### 1. Who Can Vote?

The Constitution does not guarantee anyone the right to vote. Instead, at every turn, it relies on voting rules established by state law. Article I says that House members will be elected every two years, by a vote of the "electors of the most numerous Branch" of the state legislature; the Seventeenth Amendment announces the same rule for Senate elections.<sup>57</sup> For presidential elections, Article II creates an Electoral College, whose members are chosen in each state "in such manner as the Legislature thereof may direct."<sup>58</sup> In the early nineteenth century, most states restricted the franchise to white men who owned property or paid taxes, a small portion of the total population.<sup>59</sup> Although the Fifteenth Amendment formally opened the franchise to people of color, it was immediately taken away by new state regulations.<sup>60</sup> Doubling the pool of eligible voters by including women, the Nineteenth Amendment was the most significant expansion of the franchise by the Large "C" Constitution.

Most of the extension of the right to vote, and therefore, the creation of an inclusive democracy, came through state statutes and constitutional provisions. In the nineteenth century, states succumbed to popular pressure to terminate economic requirements for voting and extended the franchise to most free white men.<sup>61</sup> Post-Civil War restrictions related to race and ethnicity, including poll

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<sup>57</sup> U.S. CONST. art. I, § 2, cl. 1 (setting rules for House elections); *id.* amend. XVII, § 1 (setting rules for Senate elections).

<sup>58</sup> *Id.* art. II, § 1, cl. 2.

<sup>59</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 6-7, 34-35, 50 (2000).

<sup>60</sup> J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 45-46 (1974).

<sup>61</sup> WILENTZ, *supra* note 43, at 116-25 (describing expansion of franchise in states during Jefferson presidency); *id.* at 177-78 (describing same during Madison presidency); *id.* at 181-202 (describing same during Monroe presidency); accord ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 228 (Isaac Kramnick ed., Gerald E. Bevan trans., 2003) (1835) (noting that by 1831, when author visited America, franchise was almost universal among white males).

taxes, literacy tests, and residency requirements, had the effect of excluding most people of color and immigrants from voting.<sup>62</sup> The major constitutional change at the national level was the Voting Rights Act of 1965 (“VRA”),<sup>63</sup> as extended and strengthened in 1970, 1975, and 1982. The VRA abolished literacy tests, prohibited racially motivated gerrymanders, and established a screening mechanism for any electoral change proposed by a jurisdiction with low minority voting in 1965 (almost all in the South). Not only did the VRA actually transform Southern politics, more than the Fifteenth Amendment was able, but it has become a foundational forum for political manipulation as well as debate.<sup>64</sup>

## 2. Rules for Elections

Articles I and II of the Constitution leave the details of election rules and process to Congress and the states. In response to the contested election of 1876, Congress set a detailed timetable for the Electoral College, statutory rules that emerged as a significant feature of the contested election of 2000.<sup>65</sup> More significant are the jurisdictional rules for House elections, which are mostly statutory (the Constitution’s Seventeenth Amendment lays out the main rules for Senate elections). The Constitution stipulates that House members will be elected by each state, with the largest states having more Representatives, and requires a reapportionment every ten years to take account of population changes. These are important rules, but equally important are congressional statutes fixing the size of the House of Representatives at 435;<sup>66</sup> specifying the process for decennial reapportionments;<sup>67</sup> prohibiting at-large Representatives, and therefore, requiring states to have single-member, first-past-the-post

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<sup>62</sup> KOUSSER, *supra* note 60, at 239 tbl.9.1 (cataloguing precise new voting restrictions adopted by Southern states between 1871 and 1908).

<sup>63</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973, 1973a-1973p (2000)).

<sup>64</sup> On the success of the Voting Rights Act in actually securing a broad franchise, see *THE FUTURE OF THE VOTING RIGHTS ACT* (David L. Epstein et al. eds., 2006). For a look at the VRA’s history and impact, see *THE VOTING RIGHTS ACT: SECURING THE BALLOT* (Richard M. Valelly ed., 2006).

<sup>65</sup> See Electoral Count Act of 1887, 3 U.S.C. §§ 5-7, 15-18 (2000). The Supreme Court applied the Electoral Count Act in *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>66</sup> Act of Aug. 8, 1911, ch. 5, 37 Stat. 13, 14 (setting composition of House at 433, to be increased by one member each when Arizona and New Mexico joined union).

<sup>67</sup> Act of June 18, 1929 § 22, ch. 28, 46 Stat. 26 (codified at 2 U.S.C. § 2a (2000)).

districts;<sup>68</sup> and requiring administrative preclearance to prevent race-based vote dilution for most Southern states.<sup>69</sup>

Equally fundamental have been federal laws regulating fund raising and expenditures in connection with elections for Congress and President. Preceded by important but ineffectual laws, the foundational statute is the Federal Election Campaign Act Amendments of 1974.<sup>70</sup> Its project was to make campaign finance more transparent through disclosure rules and to remove the impression as well as the possibility that elected representatives will effectively be purchased by donors through contribution and expenditure limits. While this law and its subsequent amendments and elaborations have proven highly controversial, their basic principles have certainly changed the way electoral politics works in the United States.<sup>71</sup> The same can be said of the Lobbying Disclosure Act of 1995.<sup>72</sup>

### 3. Freedom of Press and Information

As dynamically interpreted by federal judges, the First Amendment has become an important protection for a democratic process that has been largely constituted by statute. The First Amendment provides some protection for dissent, occasionally including rowdy and objectionable public protests against governmental policies;<sup>73</sup> shores up a powerful mass media while providing some freedom of expression on the unruly Internet;<sup>74</sup> and episodically blocks

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<sup>68</sup> Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581, 581 (codified at 2 U.S.C. § 2c (2000)).

<sup>69</sup> Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2000).

<sup>70</sup> Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of the U.S. Code) (substantially upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)). The 1974 law was toughened and updated in the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.) (substantially upheld in *McConnell v. FEC*, 540 U.S. 93 (2003)).

<sup>71</sup> For wildly contrasting accounts of precisely *how* electoral politics has changed, compare Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049 (1996) (describing how campaign finance limitations favor incumbents), with David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 *YALE L. & POL'Y REV.* 236 (1991) (arguing campaign finance reform offers possible relief against political domination by wealthy).

<sup>72</sup> Pub. L. No. 104-65, 109 Stat. 691, 691-99 (codified as amended at 2 U.S.C. §§ 1601-1612 (2000)).

<sup>73</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down state law making desecration of American flag crime in case involving anti-war protester).

<sup>74</sup> See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (providing press

governmental regulation of political parties and partisan activities.<sup>75</sup> The last generalization raises a point of caution. Notwithstanding the First Amendment, the Supreme Court has generally *upheld* state laws requiring votes by secret ballot,<sup>76</sup> closely regulating write-in voting,<sup>77</sup> and even limiting access to the ballot in a variety of ways.<sup>78</sup> These statutory regulations that have been largely immune from Constitutional scrutiny have major implications for the operation of the democratic process. For example, their collective effect has been to lock up state elections to the two major parties.<sup>79</sup>

The partisan lock-up laws are not the only area where statutes structure the democratic process in ways that have been substantially unregulated by the First Amendment. In some instances, First Amendment gaps have been filled by federal statutes. Perhaps the best example is the Freedom of Information Act of 1966 (“FOIA”).<sup>80</sup> The Supreme Court has not construed the First Amendment to create a public “right to know” information collected by the government, but Congress provided such a right in FOIA. Even a conservative Supreme Court has acknowledged FOIA’s anti-secrecy mandate, and this transformative law has been the basis for steady information flows from the government to the press and to the people.<sup>81</sup>

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significant First Amendment protection against libel lawsuits); *see also* *Reno v. ACLU*, 521 U.S. 844 (1997) (extending First Amendment protection of lewd but not obscene images to Internet).

<sup>75</sup> *See, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down California’s “blanket” (wide-open) primary statute on ground that it interferes with associational rights of political parties); *Democratic Party v. LaFollette*, 450 U.S. 107 (1981) (striking down Wisconsin’s open primary statute).

<sup>76</sup> *E.g.*, *Burson v. Freeman*, 504 U.S. 191, 210 (1992).

<sup>77</sup> *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 439-41 (1992).

<sup>78</sup> *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding Minnesota “antifusion” law prohibiting candidates from appearing on ballot affiliated with more than one party); *Storer v. Brown*, 415 U.S. 724 (1974) (upholding all but one of California’s numerous limits on independent candidate access to ballot on ground that state can channel acceptable forms of political sentiment) (followed in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)).

<sup>79</sup> Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643, 680 (1998).

<sup>80</sup> Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552 (2000)).

<sup>81</sup> *E.g.*, *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 11-16 (2001) (interpreting FOIA’s exemptions narrowly in order to carry out Congress’s broad purpose of opening up governmental processes); *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (noting “broad disclosure, not secrecy,” is statutory objective).

### C. Private Rights and Public Norms

The Constitution is most famous for its protection of individual rights, enumerated in the Bill of Rights and the Fourteenth Amendment. As the PDA suggests, however, statutes typically play an important role here as well. Sometimes they are the exclusive mechanism by which public norms have formed around the protection of individual or minority rights.

#### 1. Individual Rights

The Supreme Court is best known for landmark individual rights decisions such as *Brown v. Board of Education*, which construed the Equal Protection Clause to bar state racially segregated public education.<sup>82</sup> The Court has been unable or unwilling, however, to give sharp enforcement teeth to *Brown*. Public education in the decade after *Brown* remained substantially segregated. It was not until Congress enacted the Civil Rights Act of 1964, barring the use of federal funds in programs discriminating on the basis of race, and the Elementary and Secondary Education Act of 1965, providing significant federal funds to local schools, that *Brown's* anti-discrimination principle had teeth against Southern school districts.<sup>83</sup> In the last generation, a process of re-segregation has undermined even federal statutory efforts, such that today the most effective integrative campaigns have been local legislative ones that have bused students across school district boundaries.<sup>84</sup>

Like protections against race discrimination, protections against sex discrimination enjoy both Constitutional and statutory recognition. The difference is that in the arena of sex discrimination, the statutory protections came first and are more extensive. Well before the Supreme Court formally recognized sex as a Constitutionally (quasi-)suspect classification,<sup>85</sup> Congress barred private and, after

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<sup>82</sup> 347 U.S. 483, 495-96 (1954).

<sup>83</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.); Civil Rights Act of 1964, tit. VI, § 601, Pub. L. No. 88-352, 78 Stat. 241, 252-53 (codified at 42 U.S.C. § 2000d to 2000d-4 (2000)). See generally James Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967) (tracing dramatic impact of CRA and ESEA on school integration).

<sup>84</sup> See, e.g., SUSAN EATON, *THE OTHER BOSTON BUSING STORY: WHAT'S WON AND LOST ACROSS THE BOUNDARY LINE* (2001) (detailing participant experiences and merits of Boston's school busing program).

<sup>85</sup> See *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (recognizing "sex" as quasi-suspect classification, triggering intermediate scrutiny — less severe than strict

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1972, public employers from discriminating because of sex.<sup>86</sup> Title IX of the Education Amendments of 1972 barred private and public schools from receiving federal funds if they discriminated on the basis of sex, which the Department of Education and the Supreme Court has interpreted to include sexual harassment by other students as well as teachers and staff.<sup>87</sup> The PDA, of course, recognized pregnancy-based discrimination as sex discrimination, notwithstanding authoritative Supreme Court holdings to the contrary.

Other individual rights are entirely statutory and regulatory creations. Just as the PDA and its regulations have created an anti-discrimination norm for workplace pregnancy, other federal statutes have extended the anti-discrimination norm to include disabled persons,<sup>88</sup> older persons,<sup>89</sup> and, potentially, lesbian, gay, bisexual, and transgendered people.<sup>90</sup> The purpose of these statutes is to extend *Brown's* anti-discrimination principle to groups the Supreme Court has not protected under the aegis of the Equal Protection Clause.

## 2. Security

In his State of the Union address of January 11, 1944, President Roosevelt announced a "Second Bill of Rights." He maintained that the government should assure all Americans, "regardless of station, race, creed," rights to (1) employment with (2) compensation adequate to meet their needs; (3-4) free and fair markets; (5) decent housing; (6) adequate medical care; (7) security against old age, sickness, accident, and unemployment; and (8) a good education.<sup>91</sup>

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scrutiny but more critical than rational basis scrutiny).

<sup>86</sup> Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (1964) (codified at 42 U.S.C. §§ 2000e to 2000e-4 (2000)) (prohibiting private workplace discrimination "because of sex"); see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 5 U.S.C. §§ 5108, 5314-5316 (2000); 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17 (2000) (expanding Title VII to cover public employers).).

<sup>87</sup> Education Amendments of 1972, tit. IX, Pub. L. No. 92-318, 86 Stat. 235, 373-75 (codified at 20 U.S.C. §§ 1681-1686 (2000)); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>88</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 29 U.S.C.; 42 U.S.C.; 47 U.S.C.).

<sup>89</sup> Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634 (2000)).

<sup>90</sup> Employment Non-Discrimination Act, H.R. 2015, 110th Cong. (2007), *reprinted in* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* app. 5 (2d ed. 2004).

<sup>91</sup> President Franklin D. Roosevelt, Message to the Congress on the State of the

Roosevelt did not believe that these rights were embedded in the original Constitution, nor did he propose a Constitutional amendment to add them. Although constitutions elsewhere in the world require governments to provide affirmative assistance or safety nets for their citizens, our Constitution does not say anything explicit along these lines, and federal judges have rarely recognized anything resembling such positive Constitutional rights.

Roosevelt assumed that his constitutional program would be debated and adopted through federal statutes. The fourth right was already embodied in the Sherman Anti-Trust Act of 1890.<sup>92</sup> The Roosevelt Administration was committed to vigorous enforcement of the Sherman Act protections against conspiracies and other combinations that coerce businesspeople to accept artificially high prices, among other monopolistic business practices.<sup>93</sup> A start toward the first and second rights was the National Labor Relations Act of 1935.<sup>94</sup> The Act protected workers against workplace domination by giving them opportunities to form labor unions that could bargain collectively for their interests, theoretically under circumstances where individual bargaining would be ineffective. The PDA can be viewed as a further statutory implementation of Roosevelt's first and second rights: female employees ought not lose their jobs or suffer economically when they have children.

Many social welfare laws protect individuals against forms of domination associated with poverty and destitution, President Roosevelt's seventh right. His Social Security Act of 1935<sup>95</sup> is the model for statutes committed to insuring people against poverty

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Union (January 11, 1944), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: VICTORY AND THE THRESHOLD OF PEACE, 1944-45*, at 41 (1950). See generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004) (exploring reasons for absence of Roosevelt's Second Bill of Rights in U.S. Constitution and highlighting merits of Second Bill of Rights).

<sup>92</sup> 15 U.S.C. §§ 1-7 (2000). The Sherman Act was later significantly expanded by the Clayton Act. Act of Oct. 15, 1914, ch. 323, 38 Stat. 730 (codified in scattered sections of 15 U.S.C.; 18 U.S.C.; 29 U.S.C.).

<sup>93</sup> THURMAN ARNOLD, *FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE* 113-30 (1951) (giving account of vigorous New Deal trust-busting by former Assistant Attorney General); ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 426-28 (1966).

<sup>94</sup> 29 U.S.C. §§ 151-169 (2000). The NLRA was significantly amended by the Taft-Hartley Act. Act of June 23, 1947, ch. 120, 61 Stat. 136 (codified in scattered sections of 18 U.S.C.; 29 U.S.C.).

<sup>95</sup> Social Security Act (Old Age Pension Act), ch. 531, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.).

brought on by old age, disability, and the loss of a family breadwinner. The California unemployment compensation law in *Geduldig* is a state example of such social security legislation. The federal government has continued to advance statutory social security protections since the New Deal. For example, the Employee Retirement Income Security Act of 1974<sup>96</sup> is one of the most ambitious regulatory regimes in American history; it protects employees' pension rights against employer fraud, self-dealing, or simple imprudence.

Indeed, the Second Bill of Rights, as ambitious as it was, does not capture all of the security needs of Americans. As 9/11 reminded us, "We the People" desire and need security from foreign and domestic terrorist threats. The Large "C" Constitution says almost nothing about the goal of national security and the balance between that and individual privacy rights. As a nation, we have not yet settled on a consensus formula, but the effort to do so has been and will continue to be one where Congress and the President determine the exact nature of the goal and the sacrifices we need to make to achieve that goal. The USA Patriot Act of 2001,<sup>97</sup> for example, is a statute that seeks to realign the nation's values in the wake of 9/11. Whether it is a lasting solution remains to be seen, but the constitutional deliberation has found little guidance in the Constitution itself.<sup>98</sup>

### 3. Public Norms

Small "c" constitutions reveal a nation's normative aspirations and commitments, another area where our Large "C" Constitution is inadequate. As the late Dean John Hart Ely famously maintained, the inflexible, hard-to-change Constitution is not hospitable to substantive as opposed to procedural norms, as illustrated by the terrible experience the nation suffered when big norms were incorporated therein, namely, slavery in the Constitution of 1789 and prohibition in the Eighteenth Amendment.<sup>99</sup> Apart from freedom of expression,

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<sup>96</sup> Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 26 U.S.C.; 29 U.S.C.).

<sup>97</sup> USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S. Code.).

<sup>98</sup> For the view that the Patriot Act struck a poor balance of values, see Timothy Edgar & Witold Walczak, *We Can Be Both Safe and Free: How the PATRIOT Act Threatens Civil Liberties*, 76 PA. B. ASS'N. Q. 21 (2005). For the opposite take, see Joseph G. Poluka, *The PATRIOT Act: Indispensable Tool Against Terror*, 76 PA. B. ASS'N. Q. 33 (2005).

<sup>99</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 99-101 (1980).

privacy, and equal protection, each of which is implemented by statutory regulations as much as by Constitutional precedents, America's great public values are generally those announced exclusively in federal, and sometimes state, statutes and regulations thereunder.

For example, environmental statutes enacted and implemented in the last generation, since Earth Day in 1970, have created national commitments to the values of biodiversity,<sup>100</sup> non-degradation of water and air quality,<sup>101</sup> and clean up after environmentally disruptive operations.<sup>102</sup> To be sure, all of these statutory schemes are riddled with compromises and exceptions, and their implementation is uneven. The same can be said of *Brown*, of course. But, they announce great normative commitments, and those commitments have produced tangible consequences that our citizens have applauded: America's air and water are cleaner than they were thirty years ago, wasted land and resources have been reclaimed, and many species have been saved from extinction.<sup>103</sup> Indeed, we have had greater success in meeting aspirations in the environmental area than in meeting the aspiration of *Brown*, namely, the actual integration of public schools.<sup>104</sup>

Another example of a great public value is universal public education, Roosevelt's eighth right in his Second Bill of Rights. Although the U.S. Constitution has nothing to say about schools,<sup>105</sup>

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<sup>100</sup> Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2000)).

<sup>101</sup> Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, *amended by* Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7401-7640 (2000)).

<sup>102</sup> Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (2000)).

<sup>103</sup> See ENVTL PROT. AGENCY, EPA PUB. NO. 260-R-02-006, DRAFT REPORT ON THE ENVIRONMENT, at i-vi (2003), *available at* [http://www.epa.gov/indicators/roe/pdf/EPA\\_Draft\\_ROE.pdf](http://www.epa.gov/indicators/roe/pdf/EPA_Draft_ROE.pdf) (comprehensive analysis finding that United States enjoys significantly cleaner air, purer water, and better ecological conditions today than it did 30 years ago).

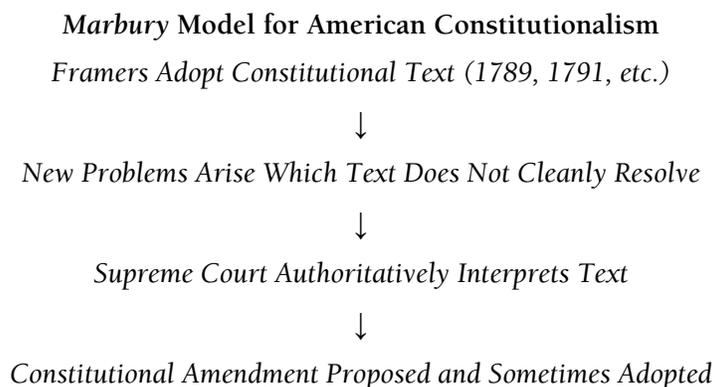
<sup>104</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (describing frustrating pattern of continued school segregation in Seattle and Louisville school districts, but invalidating race-based plans those districts had adopted to solve their problem); GARY ORFIELD & SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996) (detailing subtle ways in which *Brown*'s gains have been diminished as school districts trend towards re-segregation).

<sup>105</sup> The Constitution's text says nothing about public education. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-36 (1973).

most state constitutions officially commit their jurisdictions to provide fair and efficient educational opportunities to everyone.<sup>106</sup> Hence, schooling for everyone and universal literacy are values created by a consensus of state constitutions and statutes, to such an extent that they have become part of our national constitution. Federal statutes such as the No Child Left Behind Act of 2001<sup>107</sup> have contributed to this public value, which many Americans believe is threatened with decline.

## II. THE PDA AS A MODEL FOR A NEW AMERICAN CONSTITUTIONALISM

The traditional model for American Constitutionalism is the one reflected in *Marbury*, or at least our modern reading of that foundational case. It looks something like this:



Theoretically, this model reconciles our relatively brief but long-lived Constitution with three important values, the first of which the United States substantially innovated:

- (1) *Popular Sovereignty*. Sovereignty resides in “We the People,” and so the ground rules for our system must be directly traceable to popular deliberation.

<sup>106</sup> See James Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266-72 (1999) (providing comprehensive description and analysis of state constitutional claims for equalizing local school funding).

<sup>107</sup> Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

- (2) *The Rule of Law*. Both citizens and governmental officials must operate under limits established by law that is knowable according to well-established rules of recognition.
- (3) *Adaptability*. In a fast-changing world, the government must be adaptable, so that it can address new threats and new social and economic problems.

The *Marbury* model accommodates these different values to the short-and-sweet Constitution by vesting the Supreme Court with the authority to resolve issues definitively in the short term, leaving Constitutional amendments available to settle those issues where the Court's resolution does not go far enough or goes too far.

The *Marbury* model has never worked perfectly well. It was almost extinguished by the Taney Court (1836-1864), whose decision in *Dred Scott* provoked a Constitutional crisis that was only resolved by the bloodiest war in our history.<sup>108</sup> The Reconstruction Amendments solved the *Dred Scott* problem, but that quandary was succeeded by the *Plessy* problem (statutory apartheid in the South), which the amendments did not solve, at least as they were tepidly applied by the Supreme Court.<sup>109</sup> Moreover, the new rights recognized in the Reconstruction Amendments created new difficulties, such as the *Lochner* problem, where the Court riled the nation by striking down many labor laws as a violation of the Due Process Clause.<sup>110</sup> The *Lochner* problem led to the crisis during the New Deal, where the Court backed away from its Constitutional activism in the face of what seemed like overwhelming public opposition.<sup>111</sup>

By the time the Court decided *Brown*, the *Marbury* model was substantially broken. Not only was the Supreme Court an unreliable interpreter of Constitutional commands, but the last step was no longer working as a corrective. That is, Constitutional amendments

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<sup>108</sup> See *Dred Scott v. Sandford*, 60 U.S. 393, 406-10 (1857) (holding all descendants of black Africans not citizens of United States and invalidating the Missouri Compromise); DONALD E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 514-50 (1978) (describing political turmoil and Constitutional crisis precipitated by *Dred Scott*).

<sup>109</sup> *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528, 544-45 (1899) (upholding local decision to close its "colored" high school and to leave minority students without any public education); *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding state law requiring racial segregation in railroad trains).

<sup>110</sup> E.g., *Lochner v. New York*, 198 U.S. 45, 59-65 (1905) (striking down New York's maximum hours law for bakeries as violation of Due Process Clause of new Fourteenth Amendment).

<sup>111</sup> BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 255-420 (1998).

were too hard to achieve under the super-majority requirements of Article V (two-thirds majorities in each chamber of Congress plus three-quarters of the states).<sup>112</sup>

The Warren Court (1953-1969) rescued the Court from an immediate sense of crisis by standing up to Southern apartheid. The Burger Court (1969-1986), however, squandered some of the Court's political capital on a series of poorly reasoned and controversial opinions, one of which was *Geduldig*. Decided on the heels of *Roe v. Wade*,<sup>113</sup> where the Court recognized a Constitutional right to choose abortion that has proven controversial, *Geduldig's* denial of a Constitutional right proved more problematic. In *Roe*, the Court seemed not to understand the argument that abortion might be the taking of human life; in *Geduldig*, the Court seemed not to understand the argument that pregnancy discrimination disables women from participation in the workplace.

The Pregnancy Discrimination Act was not a Constitutional change according to the *Marbury* model. The norm that pregnancy discrimination is illegitimate sex discrimination was embedded in no Constitutional amendment (the Reconstruction strategy),<sup>114</sup> nor did feminists mount a long-term litigation and political effort to persuade the Court to change its mind and overrule *Geduldig* (the *Brown* strategy). Instead, Sue Ross, Ruth Weyand, Wendy Williams, Mary

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<sup>112</sup> Since the Twenty-First Amendment repealed Prohibition in 1933, U.S. CONST. amend. XXI, the Constitution has been amended only to add procedural protections, U.S. CONST. amend. XXII (limiting president to two terms); U.S. CONST. amend. XXV (providing for new vice president when that office becomes vacant and for vice president's assumption of duties of president); U.S. CONST. amend. XXVII (requiring that congressionally authorized pay increases for Senators and Representatives not take effect until after intervening House election), or to expand the right to vote, U.S. CONST. amend. XXIII (giving citizens of District of Columbia right to vote in presidential elections); U.S. CONST. amend. XXIV (prohibiting poll taxes); U.S. CONST. amend. XXVI (giving 18-year-olds right to vote).

<sup>113</sup> 410 U.S. 113 (1973).

<sup>114</sup> In 1976, the Equal Rights Amendment ("ERA") was pending before the states. Because the ERA only barred state sex-based discrimination, it is unclear that the *Geduldig* Court would have applied it to pregnancy discrimination. See Brief for Alaska Airlines et al. as Amicus Curiae Supporting Petitioner-Respondent at 22, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (No. 74-1589 & No. 74-1590) (arguing congressional background of ERA refuted proposition that sex discrimination includes pregnancy-based distinctions); see also Brief of Westinghouse Electric as Amicus Curiae Supporting Petitioner-Respondent at 19-26, *Gen. Elec. Co.*, 429 U.S. 125 (No. 74-1589 & No. 74-1590) (arguing legislative history of ERA "indicates that denial of maternity benefits should not be regarded as discriminating on the basis of sex"). In any event, by 1976 knowledgeable observers realized the ERA would probably not be ratified by the necessary 38 states (representing three-quarters of 50).

Dunlap, Ruth Ginsburg and their allies created the "Campaign to End Discrimination Against Pregnant Workers."<sup>115</sup> The Campaign included religious traditionalists as well as feminists, labor activists as well as academics, and Republicans as well as Democrats. It dialogued with skeptics among employers and insurance companies as well as corporate supporters. Within days of the Supreme Court's decision in *Gilbert*, the Campaign petitioned Congress for an amendment to Title VII that would treat workplace discrimination because of pregnancy as a form of "sex discrimination" prohibited by the statute.<sup>116</sup>

The Campaign's case to Congress was normatively the same as its brief in *Geduldig*, and many of the same lawyers, such as Wendy Webster Williams and Sue Deller Ross, were involved in both. In detailed testimony before both House and Senate committees, they made three important points.<sup>117</sup> First, employer discrimination against pregnant women was catastrophic for many female workers. Almost forty-four percent of American adult women were in the workforce, most of them because their income was necessary to support themselves or their families.<sup>118</sup> One such woman was Sherry O'Steen, a plaintiff in *Gilbert* and a witness before Congress.<sup>119</sup> General Electric ("G.E."), her employer, forced her into unpaid sick leave when it learned of her pregnancy. Although G.E. had guaranteed employees insurance and leave benefits for temporary disabilities arising for any medical reason, from vasectomies to hair transplants, the company made an exception, its only exception, for pregnancy.<sup>120</sup> As O'Steen recalls today, her husband "got so upset with me, thinking I quit work and us struggling that he left. He was thinking I quit because I didn't want to work."<sup>121</sup> Left alone to provide for her two-year-old daughter

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<sup>115</sup> For a discussion of the Campaign, see Kevin S. Schwartz, *Equalizing Pregnancy: The Birth of a Super-Statute* (2005) (unpublished manuscript, on file with author).

<sup>116</sup> *Id.* at 59-61.

<sup>117</sup> I shall emphasize *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the H. Comm. on Education and Labor, 95th Cong.* (1977) [hereinafter *1977 House Hearings*]. There was similar testimony in *Hearings on S. 995 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong.* (1977).

<sup>118</sup> CHAIRMAN OF COUNCIL OF ECON. ADVISORS, *ECONOMIC REPORT OF THE PRESIDENT, THE ECONOMIC ROLE OF WOMEN* 91 tbl.21 (1973) (detailing women's participation in workforce from 1900 to 1972).

<sup>119</sup> *1977 House Hearings*, *supra* note 117, at 50-51 (statement of Sherry O'Steen, Plaintiff in *General Electric v. Gilbert* and IUE).

<sup>120</sup> *Id.* at 51.

<sup>121</sup> Interview by Kevin S. Schwartz with Sherry O'Steen (Apr. 8, 2005) (quoted in Schwartz, *supra* note 115, at 93).

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and her pregnancy without any source of income, Sherry's electricity and gas were cut off because she could not pay the bills.<sup>122</sup> In the cold months of November and December, Sherry and her daughter lived without any light, heat, refrigeration, or a stove. "It was devastating," she said. "It was a part of your life that you want to put in the closet and leave it there."<sup>123</sup>

The Campaign's second point was systemic: the workplace would *never* be one where women would stand on an equal plane with men so long as companies could discriminate against them on the basis of pregnancy. Pregnancy-based leaves or dismissals interrupted the careers of female employees. Even the possibility of pregnancy was a common excuse for not hiring or promoting women.<sup>124</sup> Because there was no evidence that pregnant women were unable to do their jobs as well as men or non-pregnant women, this kind of pervasive discrimination suggested the perseverance of gender-based stereotypes or even prejudices against women in the workplace. Those old-fashioned attitudes were not only unfair to women as a group — a group which Congress realized constituted a majority of voters — but also economically unproductive.<sup>125</sup> Women were in the workplace to stay, and practices that made their careers unnecessarily rough ought not be tolerated.

Finally, the Campaign argued that pregnancy discrimination is anti-family. Both the pro-life Roman Catholic Church and pro-choice feminists like Williams and Ross pressed the norm that pregnant women should be supported rather than harassed.<sup>126</sup> For Sherry O'Steen, pregnancy-based discrimination literally destroyed her marriage and almost cost this mother the life of her child. Other women, such as Sally Armendariz, another *Geduldig* plaintiff, suffered arbitrary treatment and unnecessary hardship as a result of their

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> 1977 *House Hearings*, *supra* note 117, at 11-20 (statement of Wendy W. Williams, Professor of Law, Georgetown University Law Center and attorney in *Geduldig*); *id.* at 30-42 (statement of Susan Deller Ross, Co-Chair, Campaign to End Discrimination Against Pregnant Workers).

<sup>125</sup> *Id.* at 173-89 (statement and testimony of Alexis Herman, Director, Women's Bureau of Employment Standards Administration, U.S. Department of Labor). Director Herman also responded to the argument that the PDA would be costly to employers. *See id.* at 180-86 (letter from Alexis Herman, Director, Women's Bureau of Employment Standards Administration, U.S. Dept. of Labor, to Rep. Augustus Hawkins, Subcommittee Chair).

<sup>126</sup> *See generally* Schwartz, *supra* note 115 (giving comprehensive history of coalition-building underlying PDA).

pregnancies.<sup>127</sup> The Campaign and its allies argued that the state had an obligation to protect not only these women, but their children and their families, against arbitrary treatment.<sup>128</sup> Buried within the Campaign's case for the PDA was an overarching policy that the state should make the workplace more "family-friendly" for mothers and fathers.

After extensive hearings and debate, Congress rejected the position taken by the Chamber of Commerce and the National Association of Manufacturers, who opposed the bill for cost reasons.<sup>129</sup> Our nation's legislators enacted the PDA as an amendment to Title VII. Its sponsors and supporters understood the PDA to be more than just correcting an oversight in the original legislation. They understood the statute to be a renunciation of a normative stance that could not understand pregnancy-based discrimination as sex discrimination. In short, Congress explicitly rejected the reasoning as well as the result of *Gilbert*.<sup>130</sup>

With an angry Congress across the street, the Supreme Court beat an immediate retreat from *Gilbert* in its Title VII jurisprudence. The process began in *Los Angeles Department of Water & Public Works v. Manhart*.<sup>131</sup> With the PDA nearing its final stages, the Brethren signaled that they were not inclined to read *Gilbert* broadly. Writing for five Justices, Justice Stevens, a *Gilbert* dissenter, wrote the opinion for the Court, holding that an employee pension plan requiring female employees to contribute more than male employees was unjustified sex discrimination in violation of Title VII. *Manhart* was not a pregnancy case, and, therefore, offered no occasion to revisit the idea that pregnancy exclusions were not sex discriminations. Justice Stevens' opinion rejected *Gilbert's* approach of allowing sex discriminations when employer plans treated female and male employees in a roughly equal manner from a cost-benefit perspective.<sup>132</sup> Chief Justice Burger in dissent charged the Court with

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<sup>127</sup> See Brief of EEOC as Amicus Curiae Supporting Appellees at 6-13, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640); Brief for Appellees at 39-43, *Geduldig*, 417 U.S. 484 (No. 73-640).

<sup>128</sup> Brief for Appellees, *supra* note 127, at app. 43-45 (statement of Dr. Andre Hellegers, Director, Joseph & Rose Kennedy Institute, Georgetown University).

<sup>129</sup> H.R. REP. NO. 95-948, at 9-10 (1978), as reprinted in 1978 U.S.C.C.A.N. 4749, 4757-58 (rejecting cost arguments against PDA, based upon Department of Labor's analysis, *supra* note 118).

<sup>130</sup> H.R. REP. NO. 95-948, at 2-3.

<sup>131</sup> 435 U.S. 702 (1978).

<sup>132</sup> *Id.* at 714-18. Justice Stevens distinguished *Gilbert* on the ground that the prior case involved discrimination based upon *pregnancy* and not *sex per se*. *Id.* at 715-16.

abandoning *Gilbert*,<sup>133</sup> and Justice Blackmun's concurring opinion openly confessed that the Court's reasoning could not be squared with *Gilbert*, which he had joined.<sup>134</sup>

After Congress enacted the PDA in October 1978, Eleanor Holmes Norton, an original supporter of the original pregnancy guidelines and then Chair of the EEOC, announced that employers must now treat pregnancy the same as any other disability. Working closely with the coalition that supported the PDA's enactment, the EEOC, in the spring of 1979, reissued and expanded its earlier pregnancy discrimination guidelines.<sup>135</sup> In the new guidelines, the EEOC posed a number of questions and interpretive answers. One of them instructed employers that their health and medical insurance policies could no longer deny pregnancy benefits to *wives* of employees, as well as employees themselves.<sup>136</sup>

Some employers believed the new spousal rule to be inconsistent with the statute, and the EEOC sued one of them. The lawsuit reached the Supreme Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.<sup>137</sup> As in *Gilbert*, the Fourth Circuit agreed with the EEOC, as did Justices Brennan, Marshall, and Stevens. Unlike *Gilbert*, however, they were joined by Chief Justice Burger and Justices White and Blackmun, as well as newly appointed Justice Sandra Day O'Connor. Justice Stevens again wrote for the Court. His opinion detailed the history and purpose of the PDA, and formally announced that Congress had not only overridden the *Gilbert* result, but also its reasoning.<sup>138</sup> Deferring to the EEOC, Justice Stevens interpreted the PDA very broadly, in light of its remedial purpose to eradicate pregnancy-based classifications in employer policies.<sup>139</sup>

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But of course the *Gilbert* dissent, which Stevens joined, strongly attacked that very distinction. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 161-62 (1976). The PDA would write this distinction out of Title VII. 42 U.S.C. § 2000e(k) (2000).

<sup>133</sup> *Manhart*, 435 U.S. at 726-28 (Burger, C.J., dissenting).

<sup>134</sup> *Id.* at 723-25 (Blackmun, J., concurring).

<sup>135</sup> EEOC Employment Policies Relating to Pregnancy and Childbirth, 29 C.F.R. § 1604.10 (2007).

<sup>136</sup> *Id.* quest. 21.

<sup>137</sup> 462 U.S. 669 (1983).

<sup>138</sup> *Id.* at 678 ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision."); *see id.* at 679 n.17 (citing numerous references to committee reports and bipartisan statements that PDA was repudiation of *Gilbert* and its way of thinking).

<sup>139</sup> *Id.* at 682-85. Ironically, there were better statutory arguments for the employer in *Newport News* than there had been in *Gilbert*. The new employer policy (*Newport News*) did not seem to violate the plain meaning of the PDA in the way the earlier

After *Newport News*, the PDA's new norm has become conventional wisdom among public lawyers of all loyalties and ideologies. Former opponents have acquiesced in the norm that any kind of discrimination because of pregnancy is questionably sex discrimination. Not only have employers changed their policies in response to the PDA, but states like California have changed their discriminatory statutes, including the unemployment compensation scheme that gave rise to *Geduldig*. More importantly, the PDA opened an even broader normative debate about the extent to which employers ought to accommodate *families*, not just pregnant women.<sup>140</sup>

The PDA experience reflects a different approach to the evolution of fundamental public — small "c" constitutional — norms than the *Marbury* model does for the evolution of Large "C" Constitutional law. The PDA model looks something like this:

#### The PDA Model of American constitutionalism

*Congress Enacts a Framework-Shifting Statute,  
After Extensive Hearings and Public Debate*



*Agency Issues Regulations or Brings Lawsuits  
That Upbend Common Law Baselines*



*Challenges to Agency View in Court, Congress, White House*



*Agency Regulations Survive  
Challenge; Congress Acquiesces*



*Agency Elaborates New Norm,  
With New Challenges*



*Agency's Policy Innovations  
Blocked*



*Congressional Override, Ratifying  
New Norm*



(G.E.) policy had. *See id.* at 687-89 (Rehnquist, J., dissenting). Nor did it undermine women's economic and career opportunities in any way, unlike the G.E. policy in *Gilbert*. *See id.* at 689-94. Nonetheless, seven Justices joined Justice Stevens' opinion, including four of the *Geduldig-Gilbert* Justices (Burger, White, Stewart, and Blackmun).

<sup>140</sup> *See* 5 U.S.C. §§ 6381-6387 (2000) (requiring employers to accommodate male as well as female employees seeking leave to care for children or other family responsibilities); Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (2000)).

I offer the PDA model not as a replacement of the *Marbury* model. Judicial elaboration of our Large “C” Constitution is not only part of our small “c” constitutional culture, but is a useful part of that culture, because courts can sometimes break political logjams and lower the stakes of politics.<sup>141</sup> But the PDA does more than supplement the *Marbury* model, for it is in fact the *primary* mechanism for small “c” constitutional change. Moreover, for most issues, the PDA model is a better way for constitutional values to evolve in our democracy.

#### A. *More Reliably Dynamic*

No one can seriously doubt that the nation’s normative commitments must evolve. The substantial exclusion of women from public life that was acceptable in 1789, when the Constitution went into effect, or in 1868, when the Fourteenth Amendment was ratified, is no longer acceptable today. This is a reality that our constitution would have to reflect, sooner rather than later; and the sooner was statutory, with Constitutional recognition coming later.

Thus, in a decade when the Supreme Court was upholding each and every sex discrimination that came before it, President Kennedy’s Commission on the Status of Women concluded in 1963 that “equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land.”<sup>142</sup> Congress responded to this challenge with Title VII’s bar to workplace sex discrimination, which the EEOC interpreted quite broadly in its 1972 Pregnancy Discrimination Guidelines and its 1980 Sexual Harassment Guidelines, to take two notable examples. Congress adopted Title IX’s bar to sex discrimination in educational programs receiving federal funds in 1972, the same year it passed the ERA by

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<sup>141</sup> See ELY, *supra* note 99, at 102-03 (arguing courts should play “representation-reinforcing” role in governance, breaking up political lockouts of dissenters and protecting “discrete and insular minorities” from prejudice-based oppressions); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005) (arguing courts should also lower stakes of pluralist politics, lest group conflict escalate into mutually destructive culture wars).

<sup>142</sup> PRESIDENT’S COMM’N ON THE STATUS OF WOMEN, AMERICAN WOMEN, in AMERICAN WOMEN: THE REPORT OF THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION 65 (Margaret Mead & Frances Balgley Kaplan eds., 1965); see CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN’S ISSUES, 1945-1968, at 126-34 (1988); Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 222-31 (1998).

huge margins and sent it to the states for ratification.<sup>143</sup> The failure of that Constitutional amendment to be ratified has, thus far, been the death of serious Article V activity in this country.<sup>144</sup> Although the Supreme Court followed Congress and filled the gap with an activist equal protection jurisprudence starting in 1976, the Court left pregnancy discrimination unprotected until Congress angrily overrode *Gilbert* with the PDA.

Can we generalize the PDA experience, where an impossible system for amending the Constitution combined with a sluggish Supreme Court left most constitutional norm elaboration to Congress and agencies? I think we can. There are many examples where the Justices have simply not understood the normative issues or the social facts underlying important constitutional values to particular situations. In addition to pregnancy-as-sex discrimination, such issues include the use of literacy tests by Southern states as an effective means to exclude people of color from voting,<sup>145</sup> the application of a normative privacy right to consensual sodomy,<sup>146</sup> and the allowance of armed forces personnel to impose unreasonable restrictions on religious minorities.<sup>147</sup> This cannot be surprising. Given the Court's small size and life tenure, the Justices are rarely representative of America's normative diversity. There will always be issues for which their age or lack of relevant experience effectively disables them from mature decision making. In fact, it is a testament to the intelligence of the Justices and the pragmatism of the Court's "center" that the Court does not commit *Geduldig*-esque blunders more often.

More important, the Supreme Court is institutionally incapable of giving bite to what Professor Larry Sager calls "underenforced" Constitutional norms.<sup>148</sup> The Court operates under severe practical limitations: the federal judiciary has long been understaffed, depends

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<sup>143</sup> Education Amendments of 1972, tit. IX, Pub. L. No. 92-318, 86 Stat. 235, 373-75 (codified at 20 U.S.C. §§ 1681-1686 (2000)).

<sup>144</sup> Since the failure of the ERA in 1982, there has been just one Constitutional amendment, which was ratified more than two centuries after it had been submitted to the states. A Constitutional change of trivial dimensions, the Twenty-Seventh Amendment says Congress cannot increase its own salary. U.S. CONST. amend XXVII.

<sup>145</sup> *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54 (1959), *superseded by statute*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973, 1973a-1973p (2000)).

<sup>146</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192-95 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003).

<sup>147</sup> *Goldman v. Weinberger*, 475 U.S. 503, 508-11 (1986).

<sup>148</sup> Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212-13 (1978).

on the political branches for enforcement of its judgments, and has scarce political capital that it must use cautiously.<sup>149</sup> As a matter of prudent judgment and institutional limitation, the Court cannot institutionally carry out a public values program that applies the Constitution to private action, for example. Nor can the Court realistically monitor laws and state practices having disparate impacts upon religious and racial minorities or review legislative or presidential decisions pertaining to the commitment of troops abroad, the political give-and-take over budgetary authority, or the delegation of broad authority to agencies. The Supreme Court's state action requirement,<sup>150</sup> its lenient scrutiny for laws having only disparate impacts on minorities,<sup>151</sup> and its political question doctrine<sup>152</sup> are hardly inevitable readings of the U.S. Constitution, but institutional limitations help explain why Justices from a variety of ideological commitments have read these kinds of limits into the Constitution.<sup>153</sup>

### B. *Better Protection of Freedom as Security*

The founders of the American Republic and the framers of the Constitution fought for the creation of a polity where people would enjoy freedom or liberty. This much is well understood. What has been lost to subsequent generations is the founders' and framers' understanding of freedom and liberty. Today, many Americans, including lawyers, think of freedom as *non-interference*: I am free if the government allows me to choose to do and say whatever I want. Most of our nation's founders and framers would have found this modern definition of freedom shallow and self-indulgent. For them, and for many modern thinkers, freedom "involves emancipation from . . . subordination [and] liberation from . . . dependency. It requires the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of arbitrary interference over

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<sup>149</sup> See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 244-72 (1962) (defending Supreme Court's remedial judgment in *Brown*, "with all deliberate speed," as required by political and social circumstances in which Court was deciding case).

<sup>150</sup> E.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 348 (1974); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 172 (1972).

<sup>151</sup> E.g., *Washington v. Davis*, 426 U.S. 229, 240-44 (1976).

<sup>152</sup> E.g., *Nixon v. United States*, 506 U.S. 224, 228-29 (1993).

<sup>153</sup> See, e.g., Alexander M. Bickel, *The Supreme Court, 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 77 (1961) (discussing Court's occasional tendency to take stand on issues "well within its own experience").

another.”<sup>154</sup> President Roosevelt put the matter thus: “Democracy in order to live must become a positive force in the lives of its people. It must make men and women whose devotion it seeks, feel that it really cares for the security of every individual.”<sup>155</sup>

Under these conceptions of freedom, both Sally Armendariz, the hairdresser whom California excluded from its unemployment compensation scheme, and Sherry O’Steen, the employee dismissed by G.E., were unfree. Neither California nor G.E. explicitly told them they could not bear children. Nor did either interfere with these women’s pregnancies in an affirmative sense. But both the state and the company treated these women arbitrarily, such that the victims of the discrimination were not just Armendariz and O’Steen, but all female workers who were aware their careers could be affected and their lives ruined for a morally squalid reason, namely, their potential or actual pregnancies.

The Large “C” Constitution provided neither woman with a remedy. Although most Constitutional scholars consider Armendariz’s defeat in *Geduldig* a judicial mistake, almost no one criticizes the Court for not extending a Constitutional remedy in O’Steen’s case, because the liberty-denying institution was private (G.E.) rather than public (California). The PDA Model for small “c” constitutionalism therefore has an immediate advantage over the *Marbury* Model because it reaches liberty-denying oppression by private as well as public centers of power.

Its advantage is deepened by the fact that *Geduldig* was not just a random “mistake” by a bunch of aging judges. The Supreme Court has most vigorously enforced equality guarantees when the state is intruding into people’s private lives and has been least willing to enforce those guarantees when the state is apportioning public money, as in *Geduldig*, or when the state is managing its own personnel (*LaFleur*, the pregnant schoolteacher case).

Thus, we should not read *Geduldig* simply as a case where the Justices closed their eyes to obvious sex discrimination; indeed, that error was confined to a footnote to the Court’s opinion.<sup>156</sup> What the opinion emphasized was that imposing new financial obligations on the state could undermine the entire unemployment compensation

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<sup>154</sup> PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 5 (1997).

<sup>155</sup> President Franklin D. Roosevelt, Radio Address (Nov. 4, 1938), in *OUR DEMOCRACY IN ACTION: THE PHILOSOPHY OF FRANKLIN D. ROOSEVELT* 167 (Nat’l Home Library Found. ed., 1940).

<sup>156</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

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program.<sup>157</sup> This emphasis had roots in both institutional limits and ideology. Institutionally, the Court finds it easier to stop the government from doing objectionable things than to require the government to do necessary things. This is one unfortunate lesson from the desegregation cases — the Court was much more successful in ending formal apartheid than it was in requiring actual integration of public schools. The more conservative Justices are, at most, open to an understanding of freedom as non-interference; liberal Justices understand freedom more broadly. Hence, a liberty as non-interference case is much more likely to garner five votes (the liberals plus a random conservative or two who is outraged by the government's intrusion) than a liberty as non-domination case where the liberals would have to vote as a block and persuade one or more conservatives that relief should be granted for some precedential or pragmatic reason.

In short, it is implausible that the Supreme Court, per the *Marbury* Model, will ever vigorously enforce Constitutional values to protect freedom as non-domination; and 200 years of precedent and prudence prevent the Court from applying Constitutional values to private institutions. If our democratic society is to provide security from non-domination to its citizens, a security that I maintain is fundamentally important, it cannot rely on the *Marbury* Model and must rely on the PDA Model. This is exactly what our nation has been doing for the last hundred years. Securities that we now take for granted, which are more important to our lives than most of the Constitutional rights of non-interference, are guaranteed by statute — including rights to a safe and non-discriminatory workplace, to be free from domestic violence, freedom to compete in a free market, and freedom to social safety nets in the event of disability or old age. The Second Bill of Rights has been substantially implemented, and its implementation has been in the U.S. Code.

### C. *More Legitimate*

Now that the Article V process for amending the Constitution is no longer workable for all but the most trivial issues, the primary engine for Constitutional updating under the *Marbury* model is the Supreme Court. However, even if the Court were populated by a rainbow coalition of wise women and men and not constrained by scarce resources and two centuries of conservative libertarian readings of the Constitution, its resolution of important normative issues would still

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<sup>157</sup> *Id.* at 494-97.

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operate under clouds of illegitimacy. In the democracy that our country has become, mostly through federal statutes and state constitutions, a really thoughtful decision by nine unelected wise people is not as legitimate as a decision made by elected officials with popular input and the possibility of serious contestation afterwards.<sup>158</sup>

Consider a homely example. You are a small business owner who believes that your modest profit margin cannot accommodate increased health insurance costs for pregnant employees. As a result, you exclude pregnancy benefits from your employee health care package. If the Supreme Court, operating under the *Marbury* Model, interpreted the Constitution to forbid this kind of "discrimination," you would not only be unhappy with the substantive result, but you would also have some reasonable objections to the process. That is, you would grumble that you had no possible input into the Supreme Court's decision, the decisionmakers were several old persons who are out of touch with the realities of running a business but, as a practical matter, cannot be removed from office for irresponsible decisions, and there is no way to override the decision given the impossibility of Constitutional amendments. The Supreme Court's decision would be *illegitimate* from your point of view, and you would be more likely to evade it.<sup>159</sup> Your evasion of that decision might encourage you to evade other legal obligations as well.

If the same duty were imposed upon you by the PDA, you would still be unhappy with the substantive result. But you would have much less cause for grievance as to the process because you probably voted for at least one or two of the Senators and Representatives who enacted the law, and you had the opportunity to write to them urging opposition to the law. Your small business association vigorously lobbied against it and now has the opportunity to lobby for a further amendment to Title VII that would expand the exemption for small businesses like yours from the law. You and your association may also express your point of view to the EEOC, which might create an exemption for small businesses like yours, or at least allow a transition period. You might find the new statutory duties unappealing, but you

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<sup>158</sup> By "legitimate," I mean that even those adversely affected by a government rule or decision will have a content-independent reason to want to adhere to that rule or decision.

<sup>159</sup> There is a fair amount of empirical work suggesting that Americans are more likely to disobey governmental decisions in which they do not participate (or have a chance to participate), than decisions in which they participate or which are handed down by governmental officials accountable to them. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006) (1990).

will not likely have much quarrel with their *legitimacy*. Indeed, the PDA Model draws you *into* the political process, as you agitate for broader small business exemptions, in ways that the *Marbury* Model usually does not.

### III. IMPLICATIONS OF THE PDA MODEL OF CONSTITUTIONAL CHANGE FOR AMERICAN PUBLIC LAW

The primary normative implication of this Article is that law schools, which have been fetishizing Constitutional law for the last several generations, need to reorient themselves toward a greater emphasis on legislation, statutory interpretation, and administrative law, for these are the arenas in which the nation's public values are playing out. The cautious trends I have noted for Constitutional law will, I think, be particularly pronounced for the Roberts Court, which is dominated by strong conservative voices that revel in not updating our obsolescent Constitution to adapt to new problems<sup>160</sup> and cautious liberals who will update only when encouraged by legislation.<sup>161</sup> There are also many implications of my model for public law. I shall touch on only a few.

#### A. *Statutory Interpretation and Administrative Law*

Political scientist John Ferejohn and I identified as *super-statutes* a law or series of laws that “(1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law. . . .”<sup>162</sup> The Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978 are super-statutes, as are most of the other large ambition statutes mentioned in this Article. We suggested that courts should interpret super-statutes liberally to carry out their great public purposes.<sup>163</sup> The further lesson I draw from the PDA in this Article is that judges interpreting such statutes should be particularly attentive to agency interpretations and the reasons given by an agency.

Superficially, this recommendation matches up with the Supreme Court's *Chevron* doctrine, which instructs lower courts to defer to any

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<sup>160</sup> E.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

<sup>161</sup> E.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

<sup>162</sup> William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

<sup>163</sup> *Id.* at 1247.

reasonable agency interpretation of statutes for which Congress has delegated them lawmaking authority, unless Congress has addressed the issue itself.<sup>164</sup> On closer examination, however, my take on regulatory deference is quite different from *Chevron*. First, I offer a distinctive normative justification for judicial deference to agencies. The traditional reason for deference was that agencies brought expertise to bear on complicated regulatory problems, and generalist judges should usually not second-guess the experts.<sup>165</sup> *Chevron* added a new reason for deference: because they are accountable to the elected President, agency policy choices are more democratically legitimate than judicial policy choices when Congress has left interpretive gaps in the statute.<sup>166</sup> *Chevron's* staunchest defenders make much of the presidential control of agencies as a reason for deference, but that precise line of defense has some big holes: most agency decisions do not have any meaningful presidential input; Congress remains the most accountable branch, and its purposes should trump some presidential interventions, especially when they come through the back door, as they often do.<sup>167</sup>

*Chevron's* democratic accountability point is most cogent when the agency elaboration of statutory policy is "public interactive." An agency policy is public interactive when the agency has notified the public of alternatives it is considering, received and seriously considered feedback, and has given reasons for its policy choice that are cogently tied to congressional purposes. Unlike *Chevron*, therefore, I would insist that the democratic accountability reason for deference be considered more from the bottom up (American people interacting with the agency) rather than just the top down (President directing the agency to act). The EEOC's Pregnancy Discrimination Guidelines, issued in 1972, substantially meet this justification, because the agency announced them only after seven years of continuous interaction with employers and a series of public decisions by the Commission telling employers that outright exclusion of

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<sup>164</sup> *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). There is a vast literature examining *Chevron* as applied by the Court, but the best introduction is Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

<sup>165</sup> See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding agency factual and legal materials are "entitled to respect" by judges and considered for their "power to persuade").

<sup>166</sup> *Chevron*, 467 U.S. at 864-66.

<sup>167</sup> See, e.g., Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 128-29 (2000); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231-42 (2006).

pregnancy benefits from employee packages was illegal sex discrimination.<sup>168</sup> The Guidelines would be more cogent, under my model, if they had been issued after notice-and-comment rulemaking.<sup>169</sup>

Second, and more important, the Court has required an official congressional delegation of lawmaking responsibility to the agency before it will apply *Chevron* deference. Hence, the Court has reaffirmed *Gilbert*'s holding that such deference does not apply to EEOC interpretations of Title VII because Congress in that statute did not grant the EEOC substantive rulemaking power.<sup>170</sup> *Gilbert* applied what the Court calls *Skidmore* deference, which considers the agency's input on the merits. In an empirical study Lauren Baer and I conducted of the Supreme Court's *Chevron* and *Skidmore* cases from 1983 through 2006, we found the verbal formulation of the deference test had no statistically significant effect on the Court's willingness to go along with agency interpretations.<sup>171</sup> The conclusion I draw from this study is *not* that *Chevron* deference means nothing, but instead that *Skidmore* deference means a lot more than judges and lawyers have traditionally assumed. I endorse that as a normative as well as descriptive matter. Federal judges' review of agency statutory interpretations should turn less on the precise test (*Chevron* versus *Skidmore*) and more on the quality of the agency's deliberation, the information the agency brings to bear, and the relationship between the agency view and the statutory purposes.

Third, and most important, I should criticize the Court for following or purporting to follow an excessively mechanical approach to agency deference. In *Chevron* cases, the Court often trumps agency interpretations by insisting on dogmatic readings of statutory texts that are unmoored from statutory purposes.<sup>172</sup> In *Skidmore* cases, as well as in many *Chevron* cases, the Court faults the agency for

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<sup>168</sup> Schwartz, *supra* note 115, at 9-32 (giving detailed account of EEOC's internal debates about how to characterize and treat employer policies discriminating or excluding because of pregnancy).

<sup>169</sup> Title VII does not give the EEOC authority to issue so-called "legislative" rules, which ordinarily do require notice and comment. But agencies can notify the public, receive comments, and explain final *interpretive* rules without more formal statutory authority.

<sup>170</sup> EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991).

<sup>171</sup> William N. Eskridge, Jr. & Lauren E. Baer, *The Supreme Court's Deference Continuum, An Empirical Study* (*Chevron to Hamdan*), 96 GEO. L.J. (forthcoming Apr. 2008).

<sup>172</sup> E.g., *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *City of Chi. v. Envtl. Def. Fund*, 511 U.S. 328 (1994).

changing its mind about the proper interpretation. This was the main reason the *Gilbert* Court gave for disregarding the EEOC's Pregnancy Discrimination Guidelines.<sup>173</sup> What is relevant, however, is not *whether* the agency modifies its interpretation, but *why* it does so. Agency shifts due to behind-the-scenes lobbying, including presidential strong-arms, undermine our confidence that the agency is elaborating congressional or popular purposes. Conversely, agency shifts in response to the education its staff receives as it implements the statute, or in response to new legal or social developments, ought to be applauded rather than denigrated.

### B. Constitutional Law

The PDA Model has important implications for Constitutional law as well as statutory interpretation. The main implication is that when the Supreme Court implements the open textured and highly normative provisions of the Constitution — the Equal Protection and Free Speech Clauses for example — it ought to be attentive to statutory developments as a source of Large "C" Constitutional as well as small "c" constitutional norm elaboration. For example, assume that the *Geduldig* issue returns to the Court.<sup>174</sup> Responding to *Gilbert* but not *Geduldig*, the PDA only applies to workplace pregnancy discrimination, including discrimination by public employers. By its terms, the PDA makes it presumptively illegal for the Sacramento or Davis school boards to require pregnant teachers to take leaves of absence, but does not bar the state from discriminating in its unemployment compensation program.

How would the Supreme Court decide the *Geduldig* issue today? Notwithstanding a stream of allegedly "non-activist" appointments, I doubt that the Roberts Court would simply follow *Geduldig*. A Court majority would probably distinguish *Geduldig*, essentially narrowing the decision to the particular factual record before the Court in 1974, or overrule it as inconsistent with the current body of sex discrimination precedent.<sup>175</sup> As a matter of principle, some, and

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<sup>173</sup> Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976).

<sup>174</sup> A return of the *Geduldig* issue to the Court is highly unlikely, as states like California have abandoned such open pregnancy-based discriminations.

<sup>175</sup> It is hard to see how a Justice today can, with a straight face, maintain that discrimination because of pregnancy is *not* sex discrimination, one basis for *Geduldig*'s holding. This is inconsistent with *Yick Wo v. Hopkins*, 118 U.S. 356, 358, 373-74 (1886), where the Court ruled that a facially neutral statute applied more than 95% of the time to Chinese persons is race discrimination, even though people it was *not* applied to included persons of Chinese as well as European descent. Pregnancy-based

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perhaps most, of the Justices would be persuaded by the PDA's public record and the nation's elaboration of this super-statute that state discriminations because of pregnancy are not only sex discriminations but pretty invidious sex discriminations. They not only disadvantage women as workers and citizens, but do so for cost-benefit reasons that are short-sighted and socially counterproductive.

If this were not enough, some Justices would understand, as a practical matter, that the Court would be inviting the proverbial *firestorm of protest* if it openly reaffirmed *Geduldig*. Journalist Linda Greenhouse would get a banner headline for the story on page one of the *New York Times*: *High Court Approves Blatant Sex Discrimination; Pregnant Women Told They Have No Rights*. There would be national outrage. Fearing this proverbial "Greenhouse effect," even a staunch "non-activist" or two might find a way to distinguish, narrow, ignore, or overrule *Geduldig*.<sup>176</sup>

Where Congress or most state legislatures have spoken clearly on a normative issue, and agencies have elaborated those norms successfully, reflecting broad popular support, that ought to have bite in large "C" Constitutional cases. It is not only evidence about what a norm ought to mean, but also evidence of popular acceptance of such a reading, which has independent value in a democratic constitution such as ours. Such normative evidence not only should be considered, but has actually been decisive in Supreme Court decisions interpreting the Equal Protection Clause,<sup>177</sup> the Due Process Clause,<sup>178</sup> the Eighth

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discriminations apply 100% of the time to women. *Geduldig's* second reason, cost, is at odds with the Court's subsequent sex discrimination jurisprudence, such *United States v. Virginia*, 518 U.S. 515, 550 (1996), which required a state college to spend large sums of money to integrate female students into its "adversative method" of instruction.

<sup>176</sup> I place "non-activist" in quotation marks, because the allegedly "non-activist" judges actually strike down a lot of statutes based upon the same kind of this-general-principle-is-so-important-it-must-be-in-the-Constitution reasoning that "activist" judges are charged with. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (Scalia, J., joined by four other "non-activists" appointed by Presidents Reagan and George H. W. Bush) (striking down Brady Act's directions to local sheriffs on "federalism" grounds, but citing no provision of Constitution with which Act was inconsistent); cf. Saikrishna Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (demonstrating original meaning of Constitution allows federal government to commandeer state administrators, including sheriffs). Even such a strongly conservative "non-activist" type as the late Chief Justice William Rehnquist was willing to strike down sex discriminatory state laws in the last decade of his service. E.g., *United States v. Virginia*, 518 U.S. 515, 550 (1996).

<sup>177</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (relying on congressional super-statutes such as Title VII and Title IX as important reasons for Court to make sex "suspect classification" generating strictest scrutiny

Amendment,<sup>179</sup> and the structural features of the Constitution that fall under the rubrics of federalism and separation of powers.

This kind of popular Constitutionalism can cut against judicial activism as much as for it. For example, the PDA Model provides a reason why the Supreme Court should have been reluctant to invalidate all consensual sodomy laws in 1986, when it decided *Bowers v. Hardwick*.<sup>180</sup> Not only did twenty-four states still make consensual sodomy a crime in 1986, but the District of Columbia's 1981 effort to repeal its law had met a ferocious rebuke from the House of Representatives, which vetoed it by a vote of 281 to 119.<sup>181</sup> Voting with the majority were liberal Democrats such as Representatives Al Gore, Dick Gephardt, and Geraldine Ferraro, as well as moderate Republicans such as Representative Steve Gunderson.<sup>182</sup> These legislative deliberations suggested that the nation was not at rest on the issue and that a Supreme Court opinion sweeping away all these laws would have generated an anti-gay as well as an anti-Court backlash. This analysis certainly does not support the factually ignorant opinion the Court actually issued. Instead, this analysis suggests that the Court should probably have ducked the issue in 1986, perhaps by dismissing the appeal or by overturning the Georgia law on very narrow grounds. More importantly, the PDA Model suggests that it was ultimately wise for the Court to wait until 2003 to overturn these laws.<sup>183</sup> By then, thirty-seven states and the District had repealed their laws, almost enough for a Constitutional amendment, constituting much clearer evidence that the anti-sodomy or anti-homosexuality norm was ripe for review.<sup>184</sup>

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under Equal Protection Clause).

<sup>178</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (interpreting Due Process Clause right to privacy to allow state regulation of consensual "homosexual sodomy," based upon long history of state statutory regulation of such conduct), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (interpreting Due Process Clause to disallow state regulation of consensual "homosexual sodomy," after most states had repealed such laws).

<sup>179</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (interpreting Eighth Amendment as inconsistent with death penalty for minors based upon examination of statutory reforms in United States and other countries).

<sup>180</sup> 478 U.S. 186.

<sup>181</sup> 127 CONG. REC. 22,778-79 (Oct. 1, 1981) (recording roll call vote on House Resolution 208).

<sup>182</sup> *Id.*

<sup>183</sup> *Lawrence*, 539 U.S. at 577-78.

<sup>184</sup> See ESKRIDGE & HUNTER, *supra* note 90, at 102-05 (describing survey of state sodomy laws on eve of *Lawrence*).

Professor Christopher Elmendorf suggested that I pursue this theme one step further: Why not impose a formal *ripeness norm* on Constitutional adjudication? For example, some Constitutional cases reach the Court prematurely because one state supreme court or federal court of appeals strikes down a federal statute, meaning the Solicitor General must appeal the case to the Court, which is all but certain to take the appeal, even if there is no split in the circuits.<sup>185</sup> Under its “passive virtue” jurisprudence, the Court has a variety of mechanisms for purging the system of the lower court opinion without affirming the statute’s Constitutionality.<sup>186</sup> I would add a statutory mechanism that could work at the lower court level. Congress, which has broad authority over the “inferior” federal courts, should consider legislation allowing a court that finds a federal statute inconsistent with the Constitution to stay the effect of her order for a period of time, so that the issue could be litigated elsewhere and other viewpoints, as well as practical evidence, could be considered. Other ideas should be considered by both judges and legislators that would deepen the Court’s ripeness jurisprudence in light of my argument that agency applications provide useful experience that Justices ought to consider when they evaluate a federal statute’s Constitutionality.

### C. Constitutional Design

A final implication of the analysis in this Article involves Large “C” Constitutional design. There is probably an optimal level of difficulty for amending a Constitution, and it is likely that our Article V is not close to optimal. The U.S. Constitution is shorter than every state constitution. This suggests the need for more updating; but the national Constitution is also harder to amend than every state constitution.<sup>187</sup> It is also harder to amend than all but a few written constitutions elsewhere in the world. As political scientist Donald Lutz puts it, “[t]here would seem to be a ‘healthy’ pattern where a constitution is amended at a regular but moderate rate to keep up with change.”<sup>188</sup> That our Constitution is nowhere close to the optimal level is confirmed by our experience with the ERA and *Geduldig*. If it

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<sup>185</sup> See, e.g., *Rumsfeld v. Forum for Academic & Informational Rights*, 547 U.S. 47 (2006) (upholding constitutionality of Solomon Amendment, which denies federal funding to universities which prohibit military recruitment on campus).

<sup>186</sup> BICKEL, *supra* note 149, at 111-98 (discussing passive virtues).

<sup>187</sup> Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 247-49 tbl.1 (Sanford Levinson ed., 1995).

<sup>188</sup> *Id.* at 261-62 tbl.11.

actually worked for important constitutional issues, the Constitutional amendment process of the *Marbury* Model would usually be more legitimate than the PDA Model, because it would be more reliably open and would involve citizens at the state as well as the national level.

Political scientists such as Lutz generally recommend that Article V would work better if it required fewer than three-quarters of the states to ratify proposed amendments; the three-quarters requirement was what killed the ERA, for example.<sup>189</sup> I agree, but would add a further proposal suggested by the PDA Model: a better and perhaps optimal Article V would require a super-majority vote in *two successive Congresses* to send the amendment to the states, where *ratification by two-thirds* would add the amendment to the Constitution. The value of this kind of reform would be to extend the national deliberation in ways that encourage expert as well as popular input: the original congressional vote would be followed by critical feedback, including feedback from voters in the intervening election, before a second round of congressional consideration could confirm the proposal for state ratification.

Something like this approach to Constitutional amendment is already followed in some states. The process has worked in an especially interesting and productive way in Massachusetts. Thus, the Massachusetts Supreme Court interpreted its state constitution to bar the exclusion of same-sex couples from marriage in *Goodridge v. Department of Public Health*.<sup>190</sup> In two successive sessions, the legislature considered an amendment to override that result; the first session narrowly endorsed the amendment, but when the voters supported the opponents in the 2004 election, the next session abandoned the amendment.<sup>191</sup> In 2006 and 2007, opponents of same-sex marriage also pursued an alternative mechanism, based upon an odd constitutional provision that allows one-quarter of two successive legislatures to put a proposed amendment, supported by a large number of voter signatures, before the voters. Although this also failed in the legislature, this more idiosyncratic process strikes me as potentially productive for the marriage issue because I think all the citizens would learn from the experience of four years with lesbian

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<sup>189</sup> JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 98-117 (1986).

<sup>190</sup> 798 N.E.2d 941 (Mass. 2003), *followed by In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

<sup>191</sup> Pam Belluck, *A New Challenge to Same-Sex Marriages*, N.Y. TIMES, June 17, 2005, at A16.

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and gay couples getting married without all the horrendous consequences that opponents predicted.

This discussion of Constitutional design brings us back to this Article's main point: whether we think in Aristotle's terms of a small "c" constitution or in contemporary terms of the Large "C" document, the fundamental institutions and norms of our democracy require a balance of (1) stability over periods of time, (2) adaptability to new socioeconomic and political circumstances, and (3) legitimation through popular deliberation. My argument has been that this balance profits from congressional and administrative deliberation and that our particular Constitution has left such deliberation central to our constitutional democracy because Article V makes Constitutional amendment too unlikely to stir sufficient amounts of serious deliberation. Ironically, if my Constitutional design proposal were accepted, and the Article V process became much easier to achieve, I should have to modify the descriptive theme of this Article. That is, the United States would move away from our *constitution of statutes* and closer to a *constitution of Constitutional amendments*.