Structural Rights

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Constitutional theory commonly casts individual-rights provisions and structural provisions as conceptual opposites. Conventional wisdom suggests that structural provisions establish and empower government institutions, and rights provisions protect individual freedoms. Although scholars have long explored how government structure can affect individual liberty, its mirror image has been neglected. Scholars have largely assumed that individual rights have little resemblance to constitutional structure. The result is an imbalanced discourse that misses the structural implications of individual-rights provisions and their consequences for constitutional theory.

This Article fills a scholarly gap by identifying and elucidating structural rights, which straddle the rights–structure dichotomy and complicate contemporary constitutional theory. Although rights are commonly assumed to restrict government institutions, this Article argues that rights can generate and distribute power, similar to structural provisions. Specifically, the Article analyzes how rights can aggrandize legislative and executive power, expand judicial review, give rise to complementary political institutions, and promote or facilitate the democratic political empowerment of the citizenry. In so doing, the Article probes the place of rights in constitutional theory and challenges the standard narrative of rights as restrictions on government power.

This descriptive theoretical account suggests several normative conclusions that go against the grain of prevailing constitutional theory. First, individual rights with structural consequences are far more important, and the label attached to constitutional provisions far less material, than assumed. By pigeonholing provisions into "structure" and "rights" categories, constitutional theory misses opportunities to examine how they fit into a coherent, harmonious whole. Second, this analysis has important consequences for judicial doctrine, which erroneously attaches undue significance to the rights–structure distinction. Finally, the Article's descriptive account challenges the Madisonian skepticism of individual rights. A long line of constitutional thinkers dating back to James Madison have dismissed individual rights as parchment barriers and argued that structural provisions are self-reinforcing in a way that individual-rights provisions are not. In showing how individual rights can exhibit structure-like

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characteristics, the Article suggests that the inefficacy of individual rights has been greatly exaggerated and explains why structural rights can achieve some level of stability and self-reinforcement.

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INTRODUCTION

Constitutional theory establishes a dichotomy between constitutional structure and constitutional rights.[1] Conventional wisdom suggests that certain consti-

1. *See, e.g.*, Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005) (book review) (analyzing the rights–structure dichotomy in the context of election law); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 27 n.96 (1998) ("Rights and liberties are not to be confused with a structural restraint on congressional

tutional provisions are structural in nature because they establish and empower the basic institutions of government. For example, provisions related to federalism, separation of powers, and checks and balances—which appear in the first three articles of the U.S. Constitution—are firmly considered structural.[2] In contrast, other provisions, such as those that appear in the Bill of Rights, are considered rights provisions because they restrict government power and protect the individual from the government.[3] The rights–structure dichotomy is also reflected in the education curriculum of many law schools in two separate constitutional law classes: Constitutional Law I, which focuses on structure, and Constitutional Law II, which focuses on individual rights. Rights and structure, in short, are commonly cast as conceptual opposites.

Despite this well-established conceptual difference, scholars have long explored the relationship between structure and rights. Numerous constitutional thinkers dating back to James Madison have contemplated how structure can protect liberty. Madison famously argued that the "mere demarcation" of individual rights would be insufficient to guard liberty against majoritarian abuse, derisively labeling rights as "parchment barriers" that can be ignored by self-interested government officials.[4] Instead, he argued in Federalist No. 51 for the implementation of structural protections to prevent aggrandizement of power by government institutions, with "[a]mbition . . . counteract[ing] ambition."[5] Indeed, the original U.S. Constitution contained no Bill of Rights in part because the Federalist Framers believed that structural protections would provide a more secure and durable guarantee of individual liberty.[6] This view has

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power."); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1449–50 (2013) (explaining how the Framers of the U.S. Constitution distinguished individual rights from structure); Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1293 (2012) ("A conventional divide in constitutional law separates structure from rights."); Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1631 (2013) (noting the "long pedigree" of the rights–structure dichotomy in the context of the U.S. Constitution's application to government actions abroad); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494 (1987) (explaining the view of Justice Oliver Wendell Holmes Jr. that, unlike individual-rights provisions, "separation of powers questions are essentially nonjusticiable, because the relevant institutions are able to protect themselves"); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–58 (1954) (distinguishing between federalism, separation of powers, and individual-rights provisions).

2. *See infra* notes 24–26 and accompanying text.

3. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996).

4. THE FEDERALIST NO. 48, at 252, 255 (James Madison) (Ian Shapiro ed., 2009); *see also* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* THE PAPERS OF JAMES MADISON 297–300 (William T. Hutchinson et al. eds., 1977) (noting that a Bill of Rights would not guarantee individual liberties because "[r]epeated violations of these parchment barriers have been committed by overbearing majorities in every State"); Levinson, *supra* note 1, at 1294 ("Madison doubted that constitutional rights could do much to prevent political majorities or other powerful factions from having their way.").

5. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

6. *See* THE FEDERALIST NO. 84, at 435 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("[T]he [structural] Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF

retained significant currency to this day.[7]

Although scholars have explored, and continue to explore, how constitutional structure affects individual liberty, its mirror image has been left understudied. Scholars have largely assumed that individual rights have little resemblance to constitutional structure.[8] The U.S. Supreme Court, which has generally refused to view individual rights in structural terms, is also in accord with the standard narrative.[9] The result is an imbalanced discourse that misses the structural

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RIGHTS."); ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 64–65 (1989) (noting that the Framers of the U.S. Constitution viewed structure as "the great protection of the individual, not the 'parchment barriers' that were later (and with modest expectations) added to the document"); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 540 (1969) ("[I]t would be very extraordinary to have a bill of rights, because the powers of Congress are expressly defined." (quoting James Wilson)). Ironically, it was Madison who later authored and introduced the Bill of Rights in Congress. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 302–03. Despite his continuing skepticism, Madison reluctantly championed the Bill of Rights primarily to ensure ratification of the Constitution and fulfill his congressional campaign promises. *Id*. at 303.

7. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 4–5 (1995) ("[B]ecause the political structure envisioned in the Constitution is so central to the values that inhere in the concept of limited government (namely, the avoidance of tyranny and the preservation of individual liberty), the provisions that dictate that structure need to be enforced . . . with . . . consistency and enthusiasm . . . ."); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515–16 (1991) (arguing that "the Madisonian goal of avoiding tyranny through the preservation of separated powers should inform the Supreme Court's analysis in cases raising constitutional issues involving the structure of government"); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 866 (1994) ("Obviously, any separation of structure of government from individual liberties is questionable because structural features such as separation of powers and federalism are designed to prevent tyranny and safeguard individual rights."); Levinson, *supra* note 1, at 1293 ("[S]eparating structure from rights misses the point that the original design of the Constitution relied primarily on structural arrangements to protect rights."); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1688 (2004) ("[O]ur Madisonian tradition teaches that structural provisions not only confer collective rights upon popular majorities, but safeguard individual liberty by diffusing power."). Other literature challenges the asserted link between structure and individual liberty and argues that structural provisions do not necessarily protect liberty. *See* Aziz Z. Huq, *Libertarian Separation of Powers*, 8 N.Y.U. J.L. & LIBERTY 1006, 1037 (2014) ("The effect of separation-of-powers principles on liberty . . . depends on the fickle intricacies of partisan political circumstances."); Huq, *supra* note 1, at 1484 (arguing that "[n]o . . . strong correlation exists" between structural provisions and the vindication of liberty interests).

8. *See* sources cited *supra* notes 1–3, 6–7.

9. *See* Peretz v. United States, 501 U.S. 923, 936 (1991) ("[L]itigants may waive their personal right to have an Article III judge preside over a civil trial. The most basic rights of criminal defendants are similarly subject to waiver." (citation omitted)); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 117 (1989) (Kennedy, J., dissenting) ("Pre-emption concerns the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals."); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960) (distinguishing a due process claim from a structural claim on the basis that due process "deals neither with power nor with jurisdiction, but with their exercise"); Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938) (holding that the right to counsel is not a constitutional prerequisite to the court's jurisdiction to convict and can be waived by the defendant); Patton v. United States, 281 U.S. 276, 298 (1930) (interpreting the right to a jury trial as an individual right waivable by the defendant and not a structural requirement of a criminal conviction), *abrogated on other grounds by*

implications of individual-rights provisions and their consequences for constitutional theory.

This Article fills this scholarly gap by identifying and elucidating structural rights, which are a recurring, yet surprisingly underexplored, feature of the constitutional world. These rights straddle the rights–structure dichotomy and complicate constitutional theory. Although rights are commonly assumed to restrict government institutions, this Article argues that rights can generate and distribute power, similar to structural provisions. Rights can aggrandize both legislative and executive power, expand judicial review, and give rise to complementary supporting institutions even where those institutions are nowhere mentioned in the constitutional text. Constitutional rights can also empower citizens by facilitating their participation in democratic governance and enabling them to serve as a structural check on government institutions. Unpacking these dynamics reveals a theoretical picture much more complicated than the prevailing dichotomous approach to rights and structure.

The Article's descriptive account suggests several conceptual and normative conclusions that go against the grain of contemporary constitutional theory. At a basic level, individual rights with structural consequences are far more important, and the labels attached to constitutional provisions far less material, than assumed. By pigeonholing provisions into "structure" and "rights" categories, constitutional theory misses opportunities to examine how they fit into a coherent, harmonious whole.

This conclusion also has important consequences for judicial doctrine, which erroneously attaches undue significance to the rights–structure distinction.[10] For example, under current doctrine, individual rights may be waived, but structural requirements may not.[11] According to some judges and scholars, the extraterritorial application of the U.S. Constitution turns on whether the provision at issue is structural (in which case the Constitution applies) or an individual right (in which case it does not).[12] If, as I argue, rights can exhibit structural characteristics, there is no obvious reason why doctrinal consequences should turn on this distinction. Also, on a doctrinal level, where rights have structural consequences, courts should be cognizant of the structural implications of their

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Williams v. Florida, 399 U.S. 78 (1970); Lobel, *supra* note 1, at 1651–52 (noting that the U.S. Supreme Court has assumed that structural limitations should be treated differently from provisions in the Bill of Rights); *see also* Boumediene v. Bush, 476 F.3d 981, 995–96 (D.C. Cir. 2007) (Rogers, J., dissenting) (drawing a distinction between individual rights, which "confer rights to the persons listed" and structural provisions that "make[] no reference to citizens or even persons"), *rev'd*, 553 U.S. 723 (2008); Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371, 424 (2012) (noting that the rights–structure distinction is embedded in constitutional doctrine).

10. *See* Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 276 (2008) (noting that the rights–structure distinction is "elusive at best, if not downright illusory" in the context of the Suspension Clause).

11. *See Peretz*, 501 U.S. at 936; *Ins. Corp. of Ir.*, 456 U.S. at 702–03; *Johnson*, 304 U.S. at 467–68; *Patton*, 281 U.S. at 298.

12. *See* Vladeck, *supra* note 10, at 275–76.

individual-rights rulings.[13]

In addition, perhaps the most significant descriptive takeaway from this Article has been neglected in the scholarly discourse. In traditional legal thinking, rights are assumed to restrict government institutions by prohibiting certain policies and protecting their intended constituencies: the individuals. Contrary to this perceived wisdom, I argue that individual rights can empower the government. For example, rights can empower the judiciary because the judiciary can better secure compliance with its decisions if they are framed as an enforcement of textually protected individual rights. The legislature can also obtain leverage from individual rights where it is authorized to enforce them via legislation, as in the case of the Reconstruction Amendments. Rights can also be a wellspring of authority for the executive by creating a rights bureaucracy. For example, in the United States, executive power expanded significantly during the Civil Rights Era with the establishment of agencies to enforce and protect individual rights, such as the Civil Rights Division of the U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission. Finally, the adoption of rights can foment support in government institutions to effectuate the underlying substantive commitment. For example, the adoption of a right to counsel in criminal proceedings can provide public defenders' offices with incentives to protect the underlying rights.

This analysis probes the place of rights in constitutional theory and challenges the standard narrative of rights as restrictions on government power. My argument is broader than a claim that rights serve as mere jurisdictional allocations of power to government institutions. Rights do more than allocate authority; they bolster it. A universe without rights would leave many government institutions much weaker because rights endow these institutions with additional authorities. This can create a deeply troubling dynamic where rights empower the very institutions they are intended to constrain. In some cases, a right may thus hamper, rather than advance, individual liberty—such as when government institutions enforce rights for ulterior purposes.

Another significant payoff relates to a basic, yet highly contested, question in constitutional theory of whether individual rights matter. Beginning with Madison, numerous constitutional thinkers have argued that individual rights are easily ignored "parchment barriers" and that structural provisions are self-

13. Other scholars have made a similar argument in the context of election law. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1352 (2001); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 39–40 (2004). *But see* Bruce E. Cain, Commentary, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1603 (1999) (same); Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719 (1998) (critiquing the structural school of election-law scholarship); Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1515–16 (2003) (same).

reinforcing and obtain government respect in a way that rights do not.[14] On Madison's account, individual rights "however strongly marked on paper will never be regarded when opposed to the decided sense of the public."[15] According to Madison, the mere codification of an individual right gives the powerful, whom individual rights are supposed to limit, no incentives to observe the right. Rather, Madison argued that "[t]he only effectual safeguard to the rights of the minority, must be laid in such a basis and structure of the Government itself."[16] This Madisonian argument has retained its popularity. Numerous contemporary constitutional theorists have also expressed skepticism about the efficacy of individual rights as compared to structural protections.[17] Structure, these scholars argue, is self-reinforcing because structural provisions, unlike individual rights, selectively empower decision makers with incentives to enforce them.[18]

This Article suggests that the inefficacy of individual rights has been exaggerated. The Madisonian premise, though tempting, errs in treating all individual-rights provisions as equals and collectively dismissing them as parchment barriers. But individual rights are not all equal. Although some rights are not worth the parchment they are written on, others can exhibit structure-like characteristics. There is nothing intrinsic about individual rights that creates an enforcement problem. Conversely, there is nothing intrinsic about structure that automatically generates incentives of compliance. If structural provisions achieve stability because they empower decision makers with a stake in enforcing the underlying rules,[19] the same result can be obtained for some individual rights. Where, as I describe below, rights create or empower constituencies with

14. *See* sources cited *supra* note 4.

15. *See* Letter from James Madison to Thomas Jefferson, *supra* note 4.

16. James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), *in* 9 THE WRITINGS OF JAMES MADISON, 1819–1836, 358, 361 (Gaillard Hunt ed., 1910).

17. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) (emphasizing structural elements in constitutional design and arguing that "the selection and accommodation of substantive values is left almost entirely to the political process"); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 727 (2000) (arguing that the most optimal way to prevent tyranny is to set up a government where a democratically-elected legislature is "checked and balanced by a host of special-purpose branches, each motivated by one or more of the three basic concerns of separationist theory"); John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1948–49 (2003) (noting that structural provisions, unlike individual rights, are "substantially self-executing" because they "inspire reflexive conformity with their stipulations"); David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 892 (2013) (finding that "the mere recitation of rights in a constitution does not translate into actual respect for those rights in practice"); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 731 (2011) ("[W]e expect the kinds of institutional arrangements that qualify as constitutional structure to display greater political stability than the particularistic policy prohibitions represented by rights."); Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 620–21 (2010) (analyzing how separation of powers deters tyranny by informing and empowering the electorate).

18. Levinson, *supra* note 17, at 670.

19. *See id.* at 687.

incentives to protect the underlying substantive commitments,[20] they can begin to achieve stability and self-reinforcement.

Before I proceed, a final introductory note is in order. I am not the first scholar to notice the incoherence of the rights–structure dichotomy. Other scholars have also argued that rights should not be viewed myopically as mere protections of individual liberties and that they serve other predominant purposes.[21] I engage with this literature, but my analysis differs from the existing scholarship in two significant ways.

First, I take no position on which of these diverse scholarly accounts most accurately describes the predominant purpose of rights. Unlike prior scholarship, I am agnostic on the question of predominant purpose. Rather, my analysis is functional. I sketch a comprehensive theoretical account of how some constitutional rights—regardless of their predominant purpose—can serve the structural functions of generating and distributing power. Because scholars have been preoccupied with conceptualizing the predominant purpose of rights, they have failed to examine how constitutional rights can serve divergent—and often conflicting—structural functions of both constraining *and* empowering government institutions. As multiple entities attempt to leverage rights for their own purposes, rights can become the centers of constitutional contestation.

Second, unlike prior scholarship, this Article creates a generalizable theory about the structural functions of constitutional rights provisions, divorced from the historical context of the U.S. Constitution.[22] Although I focus primarily on

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20. *See* Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575 (2016) (finding, in a quantitative study, that constitutional rights that establish organizations that are collectives of individuals are more likely to obtain government respect than rights that are practiced only on an individual level).

21. *See, e.g.*, ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS (2010) [hereinafter BHAGWAT, MYTH OF RIGHTS] (arguing that constitutional rights in the United States serve the primary purpose of restricting government power, not protecting individual autonomy); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998) (arguing that the predominant purpose of rights is to prohibit certain rules, rather than protect individual entitlements); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132–33 (1991) (using originalist history to conceptualize the Bill of Rights in primarily majoritarian terms and arguing that its historical core was to facilitate popular participation in government, not to vest minorities with substantive rights); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) (arguing that the Ninth Amendment, under its original meaning, serves to guard the federalist structure in the U.S. Constitution by entrusting the identification and protection of natural rights to the states); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 761 (1998) (viewing rights as "the legal technique for realizing various common goods"); *see also* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 982 (2011) [hereinafter Bhagwat, *Associational Speech*] (discussing the structural functions of First Amendment rights to speech, association, and petition); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (examining the separation-of-powers functions of the Due Process Clause); Lobel, *supra* note 1, at 1654–55 (arguing that the right to a jury trial and the warrant requirement reflect structural concerns); Vladeck, *supra* note 10, at 276 (noting the dual purposes of the Suspension Clause).

22. *See, e.g.*, Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 1001 (1999) (reviewing AKHIL REED AMAR, THE BILL OF

the U.S. Constitution, my account is not originalist and, where proper, I supplement it with examples from state constitutions and foreign constitutions.

The Article proceeds as follows. Part I begins with theoretical and definitional preliminaries. After this introductory section, the Article builds a theory of structural rights. In Part II, I examine how individual rights can serve the counterintuitive function of generating and distributing power to the government. Specifically, I discuss how rights can serve the structural functions of empowering the legislature and the executive; legitimizing and expanding judicial review; and generating complementary political decision-making institutions. Part III explains how rights can promote or facilitate the democratic political empowerment of the citizenry. Within each Part, I discuss the normative implications of structural rights for constitutional theory and doctrine. Although a full-fledged normative analysis is beyond the scope of this Article, some preliminary observations will help lay the groundwork for future study.

I. DEFINITIONAL AND METHODOLOGICAL PRELIMINARIES

I begin with two definitional points. The first relates to the meaning of "structure." Despite its prevalence in constitutional vocabulary, no settled definition exists for constitutional structure.[23] Constitutional theory generally bestows the label of "structure" on constitutional provisions that establish, organize, and grant authorities to government institutions.[24] Separation of powers, federalism, and checks and balances are commonly placed on the structure side of the rights–structure dichotomy, and so are the enumerations of government authorities.[25] For example, Article I, Section 8 of the U.S. Constitution—a paradigmatically structural section—dictates the boundaries of congressional power, defining certain categories of activity that Congress may regulate.[26] If the exercise of

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RIGHTS: CREATION AND RECONSTRUCTION (1998)) (noting that Amar's conceptualization of the Bill of Rights relies on "originalist history"); Lash, *supra* note 21 (uncovering the original meaning of the Ninth Amendment).

23. *See* Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 662 (2008) (noting that "[t]he term 'structure' has multiple meanings in constitutional law").

24. In this Article, I focus on the substantive definition of structure and set aside the use of constitutional structure in constitutional interpretation. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 23 (1969) (arguing that the structural method should be used in constitutional interpretation "whenever possible"); Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289 (2007) (offering a critique of federal common law using interpretive methods based on constitutional structure); Green, *supra* note 23, at 662–63 (critiquing the use of structural arguments in constitutional interpretation while acknowledging their importance).

25. *See* Levinson, *supra* note 17, at 662–65.

26. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) ("[T]he Commerce Clause cases turned on what was ostensibly a structural limit of federal power . . . ."); Dennis v. Higgins, 498 U.S. 439, 453 (1991) (Kennedy, J., dissenting) ("By its own terms as well as its design, as interpreted by this Court, the Commerce Clause is a structural provision allocating authority between federal and state sovereignties."); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010) (noting that the Commerce Clause is "closely linked to the general structural purpose of Congress's enumerated powers as articulated by the Framers"); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1985 (2011) (noting the Necessary and Proper Clause

congressional power falls outside of those categories (and others mentioned in the Constitution), the congressional action is unconstitutional.

The second definitional point relates to the meaning of rights. Constitutional theory places individual rights in two categories: positive and negative.[27] Positive constitutional rights require the government to provide certain socioeconomic entitlements, such as health care, shelter, and education. Although absent in the U.S. Bill of Rights, positive rights are ubiquitous in state constitutions in the United States and foreign constitutions.[28] For example, most state constitutions require the legislature to establish or maintain public school systems.[29] Environmental rights and labor rights—such as rights to workplace safety and wage and hour provisions—are also ubiquitous at the state level.[30] Positive rights are also quite popular globally. Based on available data, ninety-five foreign constitutions guarantee free education and twenty-nine secure health care at least for specified groups within the population.[31]

Negative rights make up the bulk of the U.S. Constitution.[32] Negative rights are theoretically different than positive rights because the former *prohibit* the government from doing something, whereas the latter *require* the government to do something.[33] Examples of negative rights include the First Amendment, which prohibits Congress from, among other things, making laws infringing upon free exercise of religion, and the Fourth Amendment, which prohibits unreasonable searches and seizures.[34] But the negative–positive rights distinction is somewhat overstated because even negative rights can require affirmative government action to be effective.[35]

Structural rights lie at the intersection between constitutional structure and rights. Textually, these provisions are rights provisions because they either prohibit the government from taking certain actions that interfere with individual liberties, or mandate the government to take action to protect individual liberties. At the same time, however, these provisions exhibit structure-like

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is "perhaps the most central of the [Constitution's] structural clauses"); Wilkinson, *supra* note 7, at 1691 (discussing "the structural provisions of Article I, Section 8" and their enforceability through judicial avenues).

27. Nicole Huberfeld, *Federal Spending and Compulsory Maternity*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 281, 282 (Beverley Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012).

28. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 71 (2013).

29. *Id.* at 67.

30. *Id.* at 109–10, 150.

31. Varun Gauri & Daniel M. Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, *in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 1, at 1 (Varun Gauri & Daniel M. Brinks eds., 2008).

32. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties.").

33. ZACKIN, *supra* note 28, at 40–41.

34. U.S. CONST. amends. I, IV.

35. *See infra* notes 172–97 and accompanying text.

characteristics because they serve the functions of generating and distributing power.

All rights have the capability of generating structural consequences, albeit to varying degrees. It is useful to conceptualize structural rights on a one-dimensional spectrum, with rights that generate direct structural consequences on one end of the spectrum, and rights that impose only indirect consequences on the other end. Some rights provisions generate direct structural implications by increasing the powers of the legislature, executive, and judiciary, or by resulting in the formation of supporting government structures.[36] In contrast, the structural consequences of other rights provisions are indirect. For example, the right to vote can affect government structure by allowing citizens to select, reward, and punish their representatives who, in turn, shape government policy.[37] But even where the structural implication is one step removed from the underlying right, the right can still be structurally salient.[38]

Rights can become self-reinforcing where they create or empower constituencies capable of protecting the underlying commitments.[39] In this context, self-reinforcement means that the adoption of an individual right can foment a set of forces and institutions that, for the reasons elaborated below, reinforce and strengthen that right.[40] Where that occurs, rights can obtain government respect and compliance.

This is not to suggest, however, that all individual rights will inevitably convert themselves to politically stable rules. Many will not. Where rights do not empower a critical mass of stakeholders, they may remain unenforced or underenforced. In addition, in some cases, the constituencies empowered by rights may have different incentives that trump rights enforcement, as elaborated below. What is more, political conflict over rights can also stymie their enforcement. Where rights empower divergent constituencies, they can foment disagreement about the content and scope of the right, as different groups ascribe different meaning to the same language. Disagreement, in turn, can undermine self-reinforcement. Therefore, the enforcement, or underenforcement, of the right can also affect where the right lies on the one-dimensional spectrum mentioned above. But rights that are enforced in practice are sufficiently prevalent that the theory developed here has real bite.

I end this Part with two notes on methodology. First, although I rely primarily on the U.S. Constitution, where appropriate, I also cite state constitutions within the United States, as well as foreign constitutions. In doing so, my aim is to show that the phenomenon described here is not limited to the United States. But I do not mean to suggest that the phenomenon is universal. Although rights are *capable* of performing the functions that I analyze, they may not do so for

36. *See infra* Section II.A–D.
37. *See infra* Section III.A (discussing the structural implications of the right to vote).
38. *See infra* Section III.A.
39. *See infra* Section III.G.
40. Scott E. Page, *Path Dependence*, 1 Q.J. POL. SCI. 87, 88 (2006).

the reasons described in the previous paragraph. Second, although the vast majority of the examples I use in the Article are constitutional, on occasion, I invoke rights that are codified in federal statutes in the United States. Domestic statutory examples—such as labor rights and education rights—are relevant because they are codified in state and foreign constitutions.

II. INDIVIDUAL RIGHTS AS GOVERNMENT EMPOWERMENT

As noted above, a traditional purpose of individual rights is the limitation of government power.[41] Individual rights are assumed to target failures in the legislative process by removing certain issues from democratic discourse. In providing individuals with certain rights, the Constitution prohibits the government from violating them.[42] If individuals are guaranteed the right to a jury trial, for example, the government cannot convict without a jury's approval. If congressional regulation of commerce infringes on the right to free speech, that regulation is unconstitutional.

Yet some individual rights can also serve the opposite, and understudied, function of government empowerment. Put differently, rights can empower the very institutions they are intended to constrain. In this Part, I will explain how rights can empower the legislature, the executive, and the judiciary; give rise to complementary government structures; and in so doing, obtain some level of stability and self-reinforcement.

A. LEGISLATIVE EMPOWERMENT

Two different types of rights can empower the legislature: rights that *authorize* legislative action and rights that *require* legislative action. In the former category, the legislature has flexibility in determining the scope of rights enforcement. For example, if the legislature is constitutionally authorized to regulate the right to education, it may choose not to enforce the right at all or not to pursue a course of aggressive enforcement. In the latter category, the rights provision can be restricting because it may require the legislature to take certain actions that it otherwise would not take or obligate it to make expenditures that it otherwise would not make. For example, Pennsylvania's 1874 Constitution required the legislature to spend at least one million dollars to support public schools.[43] Even in this latter category, however, the legislature may accept these "requirements" with alacrity and employ them to its benefit. In other words, and as I illustrate below, rights that authorize and rights that require legislative action both have the capability of aggrandizing legislative power.

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41. *See* BHAGWAT, MYTH OF RIGHTS, *supra* note 21, at 65 ("[R]ights are really the mirror-image of powers, an exception to rather than a grant of authority.").

42. *See* Jessica Powley Hayden, Note, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237, 242 (2007).

43. PA. CONST. of 1874, art. X, § 1.

First, consider Congress's enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments. Although the Reconstruction Amendments are primarily considered individual-rights provisions, all amendments also contain virtually identical provisions permitting Congress to enforce each amendment "by appropriate legislation."[44] The Amendments were intended to give Congress broad powers to protect civil liberties in the aftermath of the Civil War.[45] Although it may be possible to divide the Amendments into two categories—"structure" for the congressional empowerment portion and "rights" for the individual-rights portion—this dichotomy is ultimately unsatisfactory. Unlike other distributions of congressional authority in the Constitution, the Reconstruction Amendments expressly authorize Congress to enforce individual rights.[46] As such, they are better conceptualized as straddling the rights–structure dichotomy.

This understanding of the Reconstruction Amendments is further bolstered by their significant downstream structural consequences. Although the Amendments codify individual rights, they also had the effect of significantly expanding federal power at the expense of the states.[47] The Reconstruction Amendments provided the constitutional foundation for a plethora of landmark federal legislation aimed at the states, including, among others, the Civil Rights Act of 1866,[48] the Enforcement Act of 1870,[49] the Ku Klux Klan Act of 1871,[50] the Civil Rights Act of 1875,[51] the Voting Rights Act of 1965,[52] the Americans with Disabilities Act of 1990,[53] the Family and Medical Leave Act of 1993,[54] and the Violence Against Women Act of 1994.[55]

The U.S. Supreme Court also interpreted the Reconstruction Amendments to provide extraordinary authorities to Congress. The Amendments, in the words

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44. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

45. Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010).

46. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

47. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy Federalism for a Third Century*, 88 COLUM. L. REV. 1, 46 (1988) ("Congressional power to enforce [the Reconstruction] amendments, therefore, 'necessarily overrid[es]' any 'principles of federalism that might otherwise be an obstacle to congressional authority.'" (quoting *City of Rome*, 446 U.S. at 179)).

48. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981–1982 (2000)).

49. Enforcement Act of 1870, ch. 114, 16 Stat. 140, *amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433.

50. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

51. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

52. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

53. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (2012).

54. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2012).

55. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified at 42 U.S.C. § 13981).

of the Court, allow Congress to "prohibit[] conduct which is not itself unconstitutional and [to] intrud[e] into legislative spheres of autonomy previously reserved to the States."[56] The Court has further concluded that Congress can use its enforcement authorities under the Reconstruction Amendments to abrogate the states' Eleventh Amendment immunity, which Congress cannot do under its other authorities.[57] Likewise, several scholars have argued that the anticommandeering doctrine—which ordinarily prohibits Congress from commandeering state legislatures and executive officers—does not apply when Congress acts pursuant to the Reconstruction Amendments.[58] Although the Supreme Court has been criticized in recent years for narrowing the reach of the Reconstruction Amendments,[59] the historical pedigree of the Amendments and the transformation they effected in constitutional structure remain salient.

Similar to the negative rights contained in the Reconstruction Amendments, positive, socioeconomic rights can also serve as the foundation for expansion of government power. Consider, for example, educational rights in state constitutions. Many of these provisions—which authorize or require the state government to establish or maintain public schools—were created in part to permit active government intervention.[60] Even though these provisions are couched as legislative mandates, they also authorize states to shift the responsibility for education from the family to the government.[61] In so doing, these rights permit legislative power to creep into private social and economic life to protect children from poverty.[62] Educational rights also permit the states to serve a redistributive function by levying taxes and using those taxes to finance public schools.[63]

In addition to using rights as the foundation for legislation, legislatures can also leverage rights to shield controversial legislation from hostile courts. For example, during the Progressive Era, labor legislation was frequently chal-

56. City of Boerne v. Flores, 521 U.S. 507, 517–18 (1997) (internal quotation marks and citation omitted).

57. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 122 ("Similarly, despite increasingly solicitous regard for 'the Eleventh Amendment, and the principle of state sovereignty which it embodies,' the Court has remained clear that in the exercise of its power under the Reconstruction Amendments, Congress may impose otherwise impermissible liability on the states in federal courts." (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976))).

58. Adler & Kreimer, *supra* note 57, at 119 (arguing that the anticommandeering principle only applies to statutes adopted under the Commerce Clause and that statutes passed under the Reconstruction Amendments "will fall outside of the prohibition on commandeering"); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 888 (1998) (arguing that "the Court's *New York* doctrine . . . might not limit Congress's enforcement powers under section 5 of the Fourteenth Amendment").

59. *See generally* Balkin, *supra* note 45; James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 942–48 (2004).

60. ZACKIN, *supra* note 28, at 72.

61. *See id.*

62. *See id.*

63. *Id.* at 72, 88.

lenged in the judiciary, which presented a formidable obstacle to the labor reform agenda.[64] As a result, state legislatures acted *ex ante* and *ex post* to protect themselves from constitutional challenges. The Vermont legislature amended its constitution to protect the constitutionality of a proposed workmen's compensation law before the law was even enacted.[65] After New York's highest court struck down legislation protecting an eight-hour work day, the legislature responded by constitutionalizing the right and overriding the court decision.[66] The constitutional amendment had the effect of "shift[ing] the ultimate authority to establish (or decline to establish)" work day limits from the judiciary to the legislature.[67] Likewise, the 1874 Pennsylvania Constitution codified a right to education in part to insulate from judicial review legislation establishing common school systems for all pupils.[68] In each of these examples, rights served as tools of self-defense for the legislative branch against the judicial branch.

The codification of rights can also create conflicts between rights. Those conflicts, in turn, can license the legislature to act in the name of reconciling competing rights claims. For example, conflicting claims to property rights may necessitate legislative action to resolve the conflict.[69] Likewise, conflicting rights claims between criminal defendants and victims may permit the legislature to enact procedures to preserve a balance.[70] To cite one example, every state in the United States, and foreign governments such as Australia and Canada, has enacted "rape shield laws" that limit a criminal defendant's right to introduce evidence about the victim's prior sexual behavior.[71] The legislatures that have codified these laws have resolved the conflict between the defendant's right to offer evidence and the victim's right to privacy in favor of the victim.[72] Likewise, in Germany, the legislature has invoked the constitutional provisions that obligate the state to protect human dignity[73] to resolve conflicting rights claims between the pregnant woman and the fetus in the abortion context.[74] In

64. *Id.* at 123–24.

65. ZACKIN, *supra* note 28, at 56.

66. *Id.*

67. *Id.* at 126.

68. *Id.* at 94–96.

69. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 171 (1971).

70. *See* David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 672 (2008) ("From the defendant's perspective, providing crime victims a significant participatory role in criminal proceedings echoes back to injustices of the colonial period when alleged crime victims played a dominant role in criminal prosecutions through a system of private prosecution.").

71. MEREDITH G. F. WORTHEN, SEXUAL DEVIANCE AND SOCIETY: A SOCIOLOGICAL EXAMINATION 344 (2016); I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 828, 831 n.15 (2013).

72. *See* Capers, *supra* note 71, at 831 n.15.

73. *See* GRUNDGESETZ [GG] [BASIC LAW], art. 1 § 1, *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [https://perma.cc/MC4B-78H7] ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.").

74. *See* Gerald L. Neuman, Casey *in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 277–79 (1995).

exercising that authority, the legislature passed a 1992 law to permit first-trimester abortions after mandatory counseling and a three-day waiting period.[75] The German Constitutional Court acknowledged that "the legislature had some room for discretion" when balancing these conflicting rights claims and ultimately upheld the central premise of the law while invalidating certain provisions.[76] As an increasing number of constitutions continue to codify an increasing number of rights,[77] the collision between rights will continue to serve as a wellspring for legislative intervention.

Rights that purport to limit state power may actually augment it by presupposing a broad scope of state power.[78] Put differently, in specifying what the state cannot do in a particular area, individual rights can implicitly acknowledge that the state has the authority to regulate that area.[79] For example, the codification of a right to marry presupposes the authority of the state to regulate marriage.[80] After all, if the state could not regulate marriage in the first instance, then the codification of a right to marry would be relatively meaningless. As a result, the inclusion of more rights does not necessarily restrict the permissible space for government action. To the contrary, the codification of rights can reinforce, rather than limit, a broad conception of legislative power.[81]

In sum, individual rights can expand legislative power. They can serve as foundations for legislation and protect legislation from hostile courts. Legislatures can also obtain leverage from rights where conflicts between rights invite legislative intervention, or where rights presuppose, and therefore reinforce, a broad scope of legislative authority. So conceptualized, rights can serve the same functions as structural provisions, such as the Commerce Clause, that generate and distribute authority to the legislative branch.

B. EXECUTIVE EMPOWERMENT

In addition to aggrandizing legislative power, individual rights can also expand executive powers. The Executive, among other things, enforces laws enacted by the Legislature. And where individual rights form the foundations for legislation, the executive branch can invoke them to expand its enforcement powers. The codification of rights can thus create a massive rights bureaucracy.

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75. *See id.* at 277.

76. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28,1993, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 88, 203; Neuman, *supra* note 74, at 279.

77. *See* Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61, 63 (2013) (finding that both the number of rights included in national constitutions and the number of national constitutions with rights has increased steadily); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1195 (2011) (documenting that "[o]ver the last six decades . . . the number of rights in the average constitution has crept upward").

78. *See* Law & Versteeg, *supra* note 77, at 1225.

79. *See id.*

80. *Id.*

81. *See id.*

In the United States, the executive expansion of power through individual rights has been most prominent in the civil rights context. Consider, for example, the Civil Rights Act of 1957, which was enacted primarily to ensure voting equality under the Fourteenth and Fifteenth Amendments.[82] The Act created the United States Commission on Civil Rights, a fact-finding executive agency that investigates complaints about voting-rights violations and discrimination on certain protected grounds, such as race and religion, and submits recommendations to the President and Congress.[83] The Civil Rights Act of 1957 also gave rise to the Civil Rights Division of the U.S. Department of Justice, led by the Assistant Attorney General for Civil Rights—a position created by the Act.[84] For the first six years after its creation, the Division focused its litigation efforts on voting discrimination and violations of civil rights laws.[85] The Civil Rights Act of 1964 broadened the Division's authority to include racial, ethnic, and some gender-based discrimination by private employers, recipients of federal financial assistance, public schools, and other public facilities.[86] The Division's authority continued to expand with the passage of the Voting Rights Act of 1965,[87] the Civil Rights Act of 1968,[88] the Education Amendments of 1972,[89] and other laws that were enacted primarily to enforce constitutional rights.[90] The passage of the Civil Rights of Institutionalized Persons Act of 1980 brought within the Division's purview the protection of individuals in state institutions, such as jails and prisons, public nursing homes, and mental health facilities.[91]

Reflecting its increasing rights enforcement powers, the Civil Rights Division has grown exponentially in size and scope.[92] In 1958, the Division consisted of

82. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

83. *See id.* §§ 101–05.

84. *See id.* § 111; Drew S. Days, III, *Vindicating Civil Rights in Changing Times*, 93 YALE L.J. 991–92 (1984).

85. Days, *supra* note 84, at 991.

86. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.); Days, *supra* note 84, at 991.

87. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

88. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 42 U.S.C.).

89. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

90. Briscoe v. Bell, 432 U.S. 404, 414–15 (1977) (noting that the Voting Rights Act of 1965 was enacted pursuant to Congress's enforcement powers under the Fourteenth and Fifteenth Amendments); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964) (noting that Congress relied both on the Fourteenth Amendment and the Commerce Clause in enacting the 1964 Civil Rights Act); United States v. Hunter, 459 F.2d 205, 214 (4th Cir. 1972) (noting that the source of the Civil Rights Act of 1968 was the Thirteenth Amendment); Days, *supra* note 84, at 991.

91. Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349 (codified as amended at 42 U.S.C. § 1997 (2012)); *see also* Days, *supra* note 84, at 992.

92. *About the Division*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., http://www.justice.gov/crt/about-division [https://perma.cc/DC94-HKHE].

only fifteen attorneys and had a budget of $180,000.[93] By 1980, the budget approached $17 million and the staff surpassed 400, roughly half of whom were attorneys.[94] In 2015, the Division requested a budget of over $161 million and 787 staff positions, including 643 full-time equivalent employees and 419 attorneys.[95]

Consider also the U.S. Equal Employment Opportunity Commission (EEOC). The Commission was created by the Civil Rights Act of 1964, which Congress enacted under its authority to regulate commerce and enforce the rights guaranteed by the Fourteenth and Fifteenth Amendments.[96] The EEOC is authorized to administer and enforce federal civil rights laws against employment discrimination.[97] Although the Commission initially lacked substantial enforcement authority—earning itself the "toothless tiger" distinction—Congress in 1972 provided the Commission with additional enforcement authority and greatly expanded its jurisdiction.[98] In 2015, the Commission received nearly 90,000 discrimination charges[99] and filed 174 lawsuits.[100]

The power to enforce can also include the power to interpret. In the United States, where executive agencies are charged with administering particular statutes, they also interpret them, and these interpretations are awarded some level of deference from the judiciary.[101] Consider, again, the EEOC, which interprets the federal discrimination laws it is charged with enforcing. Most recently, in 2015, the Commission interpreted Title VII of the Civil Rights Act of 1964 to prohibit sexual-orientation discrimination on the basis that it is sex discrimination, which is expressly prohibited by the statute.[102] The EEOC's interpretation came on the heels of an earlier, 2012 interpretation of the same statute to protect transgender employment rights, which has been broadly

93. Days, *supra* note 84, at 994; *see also* John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 2 (1997).

94. Days, *supra* note 84, at 994.

95. *General Legal Activities*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., https://www.justice.gov/sites/default/files/jmd/legacy/2013/12/17/crt.pdf [https://perma.cc/7L4C-BUK9].

96. Civil Rights Act of 1946, Pub. L. No. 88-352, 78 Stat. 241; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964).

97. Civil Rights Act of 1946 § 705.

98. FREDERICK D. ISLER ET AL., HELPING EMPLOYERS COMPLY WITH THE ADA: AN ASSESSMENT OF HOW THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IS ENFORCING TITLE I OF THE AMERICANS WITH DISABILITIES ACT 39 (1998); Robert C. Lieberman, *Private Power and American Bureaucracy: The State, the EEOC, and Civil Rights Enforcement*, *in* BOUNDARIES OF THE STATE IN US HISTORY 259, 263–64 (James T. Sparrow, William J. Novak & Stephen W. Sawyer eds., 2015).

99. *Charge Statistics, FY 1997 Through FY 2015*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/H5B8-ZSZ5].

100. *EEOC Litigation Statistics, FY 1997 Through FY 2015*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm [https://perma.cc/AP3B-J8AT].

101. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

102. Complainant v. Foxx, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

accepted by the federal courts.[103] In expanding its interpretation of Title VII to include sexual orientation, the EEOC's 2015 ruling rejected as "dated" several circuit court opinions that had reached the opposite conclusion.[104] If the ruling is not reversed by the judiciary, the EEOC will have achieved what decades of legislative advocacy has been unable to.[105]

In sum, the codification of constitutional rights can lead to the creation of an executive rights bureaucracy. In enforcing the underlying rights, executive branch agencies can also expand their own authorities. The next section turns from the executive to the judiciary and explains how courts can also obtain leverage from rights enforcement.

C. JUDICIAL EMPOWERMENT

In a typical constitution, structural provisions distribute authority across different branches of government.[106] For example, Article I, Section 8 of the U.S. Constitution authorizes Congress, among other things, to regulate interstate and foreign commerce,[107] to tax and spend for the general welfare of the United States,[108] and to declare war.[109] A similar set of provisions exists for the Executive in Article II. The President has the authority, among other things, to make treaties[110] and to appoint officers of the United States.[111] Constitutions also delegate authority to the judiciary, albeit often in a more amorphous fashion. Article III of the U.S. Constitution, for example, is remarkably shorter and less detailed than Articles I and II. It does not expressly recognize the power of constitutional review, instead merely extending judicial power to specified categories of cases and controversies.[112]

The comparatively lackluster nature of the judiciary's textual powers is somewhat misleading. The textual powers in Article III do not fully capture the complete set of tools available to the judiciary to wield and expand its authorities. That set of tools also includes provisions that protect individual rights and liberties. In wielding the power of judicial review over individual-rights provisions, the judiciary can not only defend individual rights, but also use that authority to protect and expand judicial power. The judiciary is commonly

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103. *See* K. Abel Knochel & Jean K. Quam, *Lesbian, Gay, Bisexual, and Transgender Aging in These Divided States*, *in* GAY, LESBIAN, BISEXUAL, AND TRANSGENDER CIVIL RIGHTS: A PUBLIC POLICY AGENDA FOR UNITING A DIVIDED AMERICA 213, 219 (Wallace Swan ed., 2015).

104. *Foxx*, 2015 WL 4397641, at *8 n.11.

105. Dale Carpenter, *Anti-Gay Discrimination Is Sex Discrimination, Says the EEOC*, WASH. POST (July 16, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/16/anti-gay-discrimination-is-sex-discrimination-says-the-eeoc/ [https://perma.cc/3TM9-M37U].

106. *See* Levinson, *supra* note 17, at 662–65 (explaining how the scholarship characterizes constitutional enumerations of government authority as structure).

107. U.S. CONST. art. I, § 8, cl. 3.

108. *Id.* art. I, § 8, cl. 1.

109. *Id.* art. I, § 8, cl. 11.

110. *Id.* art. II, § 2, cl. 2.

111. *Id.*

112. *See id.* art. III, § 2.

singled out as the institution responsible for expounding and enforcing individual constitutional liberties and serving as a check on the political branches of government. The enforcement of individual rights projects the appearance of a judiciary doing what it is supposed to do: review laws to ensure constitutional conformity. That, in turn, can increase the ability of the judiciary to persuade and ensure compliance with its decisions. Thus understood, individual-rights provisions also serve a secondary structural function of distributing authority to the judicial branch.

I define judicial power as the authority of courts to secure compliance with their decisions.[113] So defined, judicial power is distinct from the more nebulous concept of judicial legitimacy.[114] Judicial legitimacy is often conceptualized as a form of judicial currency that the judiciary can develop over time by issuing popular decisions, and deplete through unpopular, partisan, or otherwise controversial decisions.[115] But the judiciary can be powerful without being popular.[116] Put differently, courts can secure compliance with their decisions and coordinate behavior on the outcomes they announce, even where their decisions foment controversy.[117]

The relationship developed here between individual rights and judicial power is not meant to be a causal one. In other words, I do not argue that the codification of individual rights *causes* the expansion of judicial authority. Judicial power can be influenced by numerous factors, including the structure and composition of the judiciary and the sociopolitical environment in which it operates. And in some cases, the addition of constitutional rights can actually *weaken* the judiciary by overriding court decisions or insulating statutes from constitutional challenges.[118] For example, provisions guaranteeing labor and education rights were codified in several state constitutions in part to protect controversial statutes from constitutional challenges.[119] I also separate the normative from the positive and refrain from discussing whether the expansion of judicial power is desirable.[120] Rather, my claim here is more modest:

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113. *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 733 (2009).

114. *See* William Connolly, *Introduction: Legitimacy and Modernity*, *in* LEGITIMACY AND THE STATE 1, 8–18 (William Connolly ed., 1984) (reviewing definitions of legitimacy); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (distinguishing between legal, sociological, and moral legitimacy).

115. Law, *supra* note 113, at 778–80.

116. *Id.* at 780.

117. *Id.* at 782.

118. *See* ZACKIN, *supra* note 28, at 94.

119. *See supra* notes 64–68.

120. On this question, there is a spirited debate in the literature. *Compare* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004), MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999), *and* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006), *with* DWORKIN, *supra* note 3, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001), *and* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

Individual rights can provide a strategic judiciary with a set of structural tools to increase its institutional powers and wield those powers against the other branches.

Consider, for example, the Due Process Clause of the Fifth and Fourteenth Amendments.[121] Textually, the Clause amorphously prohibits government deprivation of an individual's "life, liberty, or property, without due process of law."[122] Seizing on its inherent interpretive ambiguity, the judiciary has used due process as a versatile tool for wielding and expanding its authority and jurisdiction into politically contentious areas. The Court has deployed the weapon of due process to strike down laws concerning subjects as diverse as maximum working hours,[123] contraceptive use by married persons,[124] abortion,[125] sodomy,[126] and same-sex marriage.[127]

To be sure, the expansion of judicial power through the trumpeting of individual rights does not insulate the judiciary from challenges and can even open it up to them. For example, the increase of judicial power through the due process vehicle has been characterized by some—including some Justices—as judicial aggrandizement and the exercise of "raw judicial power" under the garb of individual-rights protection.[128] The U.S. Supreme Court's controversial decisions on rights cases in areas concerning affirmative action, abortion, criminal law and procedure, and rights of corporations and unions to free speech, just to name a few, prompted backlash against the Court under the rubric of judicial activism.[129] Although these decisions had a textual basis, their opponents criticized the Court primarily for lacking a sufficient textual anchor and for enforcing rights that exist only in the penumbras of the Bill of Rights.[130] All things being equal, the less tethered a court decision is to a specifically enumerated individual right, the more possibility for backlash.

Although backlash is a real possibility, it does not necessarily correlate with a decrease in judicial power. Even controversial decisions that cause backlash can bolster judicial power, as long as they are obeyed by relevant actors.[131] Mass

121. U.S. CONST. amend. V; *id.* amend. XIV, §1.

122. U.S. CONST. amend. V; *id.* amend. XIV, §1.

123. Lochner v. New York, 198 U.S. 45 (1905).

124. Griswold v. Connecticut, 381 U.S. 479 (1965).

125. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

126. Lawrence v. Texas, 539 U.S. 558 (2003).

127. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013).

128. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting from *Roe* and *Doe*); *see also* Obergefell, 135 S. Ct. at 2631 (Thomas, J., dissenting) (positing that "substantive due process exalts judges at the expense of the People from whom they derive their authority").

129. CHARLES E. HURST, HEATHER M. FITZ GIBBON & ANNE M. NURSE, SOCIAL INEQUALITY: FORMS, CAUSES, AND CONSEQUENCES 164 (9th ed. 2017); RICHARD L. PACELLE, JR., THE SUPREME COURT IN A SEPARATION OF POWERS SYSTEM: THE NATION'S BALANCE WHEEL 20 (2015).

130. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); HERBERT M. LEVINE & JEAN EDWARD SMITH, CIVIL LIBERTIES AND CIVIL RIGHTS DEBATED 13, 56 (1988).

131. Law, *supra* note 113, at 780.

compliance with all judicial decisions, no matter how controversial, can project the appearance of a strong court who can get away with—and even benefit from—controversy.[132]

In addition to the negative constitutional rights (such as due process) discussed above, judicial power can also expand through positive constitutional rights to socioeconomic goods.[133] The enforcement of these rights faces formidable challenges given the limited economic resources of many polities that choose to codify them. But in countries with enforcement capabilities, socioeconomic rights have proven capable of aggressively expanding judicial power into domains traditionally considered legislative. As David Landau observes, the inclusion of socioeconomic rights in constitutions essentially means that any issue can have constitutional implications.[134]

Consider, for example, the 1991 Constitution of Colombia. The constitution includes several positive rights, such as the right to education, housing, health, and social security.[135] The text and structure of the document suggest, however, that the constitutional framers did not intend these rights to be enforceable by the judiciary.[136] Regardless, the Colombian Constitutional Court rejected this position and held that socioeconomic rights are judicially enforceable if a court "believes that not doing so could endanger the petitioner's fundamental right to life, human dignity, and physical integrity, among others."[137]

Empowered by these socioeconomic rights, the Colombian Constitutional Court quickly became one of the strongest in the world. The court, as Landau explains, essentially "acted as a replacement for the legislature at various times by injecting policy into the system, by managing highly complex, polycentric policy issues, and by developing a thick construct of constitutional rights that it uses to check executive power."[138] Using socioeconomic rights as powerful tools, the court issued a number of decisions regarding the state's noncompliance with individual rights in areas as diverse as the social security system, prison overcrowding, and lack of protection for human rights defenders.[139] Although the court left much of the policy and budgetary decision making up to government actors, it monitored their progress and set deadlines by which the identified problems had to be remedied.[140] The achievements of the court's

132. *See id*. To be sure, in some cases, backlash will harm, rather than bolster, judicial power. In the face of unfavorable rulings, political actors can resort to court packing, jurisdiction stripping, and various other strategies to modify judicial outcomes.

133. *See supra* Part I (defining positive rights).

134. David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 324–25 (2010).

135. David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 206 (2012).

136. *Id.* at 206–07.

137. Rodrigo M. Nunes, *Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health*, 52 LATIN AM. POL. & SOC'Y 67, 88 (2010).

138. Landau, *supra* note 134, at 321.

139. César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1670 (2011).

140. *See id.* at 1693.

structural, social-rights jurisprudence have been varied,[141] but the Colombian case is a good illustration of how socioeconomic rights, under the right conditions, can be a powerful tool for the expansion of judicial power.

Consider also the Indian Supreme Court, which is one of the most active in the world. The court has enforced, with varying degrees of success, a number of socioeconomic rights in the Indian Constitution, including the right to a primary education, health, and shelter.[142] The court has been particularly active in the area of food policy. It held, for example, that state governments had to "adopt specific measures for ensuring public awareness and transparency of the programmes" and "provide cooked midday meals for all children in government and government-assisted schools."[143] Using the information it gathered through the judicial process, the court went as far as to specify the minimum quantities of food for each child.[144] The court also issued expansive orders requiring the government to distribute grain to poor families instead of storing it during famine.[145] Through its strategic use of socioeconomic rights, the court morphed into a hybrid legislative–judicial branch.

Consider another example from the domestic context. Rights to education were codified in many state constitutions in part to enable litigation and invite state judges to mandate increased government spending on public education to guarantee equality of educational opportunity.[146] In Florida, Montana, Virginia, and beyond, activists lobbied for constitutional education rights to enable courts to invalidate existing public education financing laws.[147] Many state courts accepted these invitations with alacrity and issued sweeping rulings that placed them at the center of educational policymaking.[148]

To be sure, negative and positive rights provisions are not the only wellspring for expansion of judicial power. The judiciary can also invoke structural provisions to impose limitations on the political branches and confine them to their respective spheres of authority. For example, relying on structural principles, the U.S. Supreme Court has struck down, among other things, the seizure

141. Although the court has been generally successful with regards to persons displaced by armed conflict, intervention in other arenas, such as health care, has been less so. *See* Landau, *supra* note 135, at 225, 227–28 (arguing that the court's decision on internally displaced persons was successful because it started with a clean slate, whereas it faced a pre-existing robust public policy arena in health care). *But see* Rodríguez-Garavito, *supra* note 139, at 1693 (contending that the court took a "dialogic approach" in the displaced persons case by deferring to the other branches of government to decide both the funding and content of programs, which contributed to its success vis-à-vis its monologic rulings).

142. S. Muralidhar, *India: The Expectations and Challenges of Judicial Enforcement of Social Rights*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 102, 110–16 (Malcolm Langford ed., 2008).

143. *Id.* at 117.

144. *Id.*

145. Landau, *supra* note 135, at 236.

146. ZACKIN, *supra* note 28, at 97–99.

147. *Id.* at 99–101.

148. *Id.* at 102.

of steel mills by President Truman,[149] the line-item executive veto,[150] and the one-House legislative veto.[151]

Although structural provisions can also be powerful tools for the judiciary, the most dramatic expansions of judicial power, as explained above, have occurred under the banner of individual-rights protection. Early constitutional theorists anticipated this expansion. Thomas Jefferson, for example, argued that individual-rights provisions would put a "legal check . . . into the hands of the judiciary."[152] James Madison, an early skeptic of the Bill of Rights, likewise explained that if individual rights

> are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[153]

These ideas have retained currency to the present. Building on previous work by Herbert Wechsler,[154] Jesse Choper famously argued that constitutional review in the United States should be limited to the protection of individual rights.[155] According to Choper, federal courts should not expend their limited institutional capital on cases concerning federalism, separation of powers, and other structural considerations, which he argues are best left to the political process.[156]

I concur with much of the criticism levied against Choper's thesis.[157] But Choper's theory resonates more broadly with a prevalent assumption that the protection of individual rights—particularly those of "discrete and insular minorities" unable to protect themselves through the political process[158]—is squarely within the judicial domain. Although judicial enforcement of structural provisions may be contested, few would disagree with the judiciary's enforcement of individual rights. Constitutional rights create what David Law describes as

149. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

150. Clinton v. City of New York, 524 U.S. 417 (1998).

151. INS v. Chadha, 462 U.S. 919 (1983).

152. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl76.php [https://perma.cc/6F2V-AKDC].

153. 1 ANNALS OF CONG. 439 (1789) (Joseph Gales ed., 1834).

154. Wechsler, *supra* note 1.

155. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); *see also* Wechsler, *supra* note 1, at 560 n.59.

156. *See generally* CHOPER, *supra* note 155.

157. *See, e.g.*, Redish, *supra* note 7, at 17–20 (criticizing Choper's thesis in light of, among other things, the U.S. Constitution's extension of judicial power to all cases arising under the U.S. Constitution and its focus on structural devices to prevent undue concentrations of power).

158. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

"mutual dependency or symbiosis" between the judiciary and the people.[159] An independent judiciary can protect individual liberties, but judicial independence requires some level of popular support from the beneficiaries of those liberties.[160] Absent popular support, judicial power can be undermined by the political branches.[161] This mutual dependence, in turn, can provide the judiciary significant leverage to capitalize on constitutional rights to expand its powers.[162]

Because the judiciary is capable of expanding its authority into democratic politics, political elites threatened with the loss of power may entrench judicial review into a constitution as "political insurance."[163] A carefully structured constitutional court, empowered to enforce individual liberties, can continue to enforce the elites' policy preferences under the guise of rights protection.[164] Even if the elites lose power, the judiciary can provide an alternative forum where the elites can contest, and override, legislation passed by the political victors.[165] Constitution-makers may therefore entrench individual rights not because of a genuine, altruistic commitment to rights protection, but to serve the structural purpose of providing a veto over democratically enacted legislation to judges who are relatively insulated from the pressures of partisan politics.[166] The origin of rights review in countries as diverse as Canada, Israel, Korea, Mongolia, New Zealand, South Africa, Taiwan, and Turkey, can be explained, at least partially, by the desire to maintain political power.[167]

In sum, individual rights can serve as both sword and shield for the judiciary. Negative, and particularly positive, rights can be powerful swords that the judiciary can deploy to undo political action. Rights can also serve as shields because the judiciary can invoke individual rights to defend its decisions from political backlash. Although judicial review is not a prerequisite to meaningful individual-rights enforcement, where it exists, the power of constitutional review can expand through the strategic invocation of textually specified individual rights. So conceptualized, individual rights can be brought into the same frame of analysis as structural provisions that distribute authority to the judiciary.

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159. Law, *supra* note 113, at 792.

160. *Id.*

161. *Id.* at 792–93.

162. Political actors will also have incentives to obey unfavorable judicial rulings where their short-term costs are outweighed by the long-term benefits of having a neutral, independent arbiter to enforce constitutional rules. *See* Levinson, *supra* note 17, at 738.

163. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003); *see also* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

164. *See* GINSBURG, *supra* note 163, at 18.

165. *See id.*

166. *See* HIRSCHL, *supra* note 163, at 2.

167. *See* GINSBURG, *supra* note 163, at 18–19 (Korea, Taiwan, and Mongolia); HIRSCHL, *supra* note 163, at 1–2 (South Africa, Canada, Israel, New Zealand); Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1688 (2015) (Turkey).

D. ESTABLISHMENT OF GOVERNMENT STRUCTURES

In addition to empowering the legislative, executive, and judicial branches of government, some individual rights give rise to government structures. A clear initial example are positive constitutional rights, which require or authorize the government to provide certain socioeconomic entitlements, such as health care, shelter, and education.[168] To be effective, these positive rights often need supporting structures. Consider, for example, a positive constitutional right to public education. To effectuate that guarantee and establish a comprehensive education system, the polity would need to construct schools, hire teachers and other staff, and purchase supplies, all of which can give rise to complementary bureaucratic structures. Likewise, the creation of positive constitutional rights to welfare benefits (such as social security, unemployment, and disability benefits) can give rise to the establishment of administrative agencies responsible for effectuating the underlying positive rights. Although these entitlements are statutory rights held at the federal level in the United States, they have been codified into the constitutions of many states and foreign countries.[169]

Positive rights, in one sense, are an easy case. Because they generate affirmative obligations on the part of the government, supporting structures may be necessary to effectuate them. Perhaps less intuitively, some negative rights, which make up the bulk of the U.S. Constitution,[170] can also impose affirmative obligations on the government. Negative rights, which prohibit the government from engaging in certain actions,[171] can require the government to take affirmative actions, including the establishment of supporting structures, to protect the underlying right. The examples below offer a sense of how negative rights, to varying degrees, generate downstream structural consequences.

Take, for example, the right to due process. The procedures that may be required by due process—such as notice, hearing, and decision on the record—serve as limitations on the exercise of government power.[172] They restrict arbitrary, unreasonable, or unfair government actions that harm individual rights.[173] To enforce due process rights, ancillary structures—such as a neutral tribunal or a court—must be established, if they do not already exist, in order to determine the legality of government deprivations of life, liberty, or property.[174]

In the United States, due process rights have spawned the establishment of administrative tribunals. In *Goldberg v. Kelly*, the Supreme Court held that

168. *See supra* Part I (defining positive rights).

169. *See, e.g.*, *supra* notes 28–30 and accompanying text (discussing state constitutions in the United States), notes 135–41 and accompanying text (discussing the Constitution of Colombia), and notes 142–45 and accompanying text (discussing the Constitution of India).

170. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties.").

171. *See supra* Part I (defining negative rights).

172. Brown, *supra* note 7, at 1556.

173. *Id.*

174. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886–87 (1986).

welfare constitutes a legitimate property interest under the Due Process Clause and that recipients must be given notice and an opportunity to respond at a fair hearing before their benefits may be terminated.[175] The *Goldberg* decision influenced federal, state, and local agencies to establish fair hearing systems for various public benefits, including food stamps and Medicaid, among others.[176] These systems closely matched the guidelines in the *Goldberg* decision.[177] Since then, the requirement of a tribunal for a fair hearing has functioned as the "central element of due process" for termination of various public entitlements.[178] Most recently, the due process guarantees for Guantanamo Bay detainees recognized in *Rasul v. Bush*[179] and *Hamdi v. Rumsfeld*[180] led to the establishment of Combatant Status Review Tribunals to determine whether each detainee was properly classified as an enemy combatant.[181]

Consider also the right to counsel in the United States. In criminal prosecutions, the Sixth Amendment reads, a suspect "shall enjoy the right . . . to have the Assistance of Counsel for his defence."[182] In *Gideon v. Wainwright*, the Supreme Court interpreted this individual right to impose an affirmative obligation on the government to provide counsel to indigent defendants in criminal proceedings.[183] Although many states provided court-appointed counsel before *Gideon*, they served limited geographical regions within those states. California, Texas, and Georgia, to cite a few examples, had only one public defenders' office for the entire state.[184] *Gideon* proved to be the driving force for the full institutionalization of public defenders' offices.[185] For example, in Florida—the state from which *Gideon* originated—the legislature immediately passed legislation creating public defenders' offices in every judicial circuit.[186] At the federal level, the Criminal Justice Act of 1964 represented the most significant post-*Gideon* transformation and established an institutionalized public defender sys-

175. 397 U.S. 254, 267–68 (1970).

176. Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1315–16 (2012).

177. *Id.* at 1324.

178. *Id.* at 1315.

179. 542 U.S. 466 (2004).

180. 542 U.S. 507 (2004).

181. PETER JAN HONIGSBERG, OUR NATION UNHINGED: THE HUMAN CONSEQUENCES OF THE WAR ON TERROR 126 (2009).

182. U.S. CONST. amend. VI.

183. 372 U.S. 335, 339–45 (1963). *Gideon* was the latest in a series of cases expanding the right to counsel. *See* Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938) (holding that indigent persons charged in federal criminal proceedings must be afforded the right to counsel under the Sixth Amendment); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that, under some circumstances, due process requires the appointment of counsel in capital cases).

184. John A. Lentine, Gideon *at Fifty: The Broken Promise*, 37 AM. J. TRIAL ADVOC. 375, 379–80 (2013); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 476 (noting that only three percent of counties nationwide had public defenders' offices by 1961).

185. Lentine, *supra* note 184, at 381.

186. *See* FLA. STAT. ANN. § 27.51 (West 2014); Paul M. Rashkind, Gideon v. Wainwright*: A 40th Birthday Celebration and the Threat of a Midlife Crisis*, 77 FLA. B.J. 12, 16 (2003).

tem for federal criminal cases.[187] The creation of public defenders' offices, which can be considered an institutional part of the judicial branch,[188] was therefore in large part a product of individual rights and their interpretation by the judiciary.

The constitutional right to unionize—absent from the U.S. Constitution, but ubiquitous in foreign constitutions[189]—provides another example. The creation of the statutory right in the United States illustrates how it has spawned not only unions, but also government tribunals to adjudicate labor disputes and enforce the underlying substantive labor rights. Enacted during the New Deal, the National Industrial Recovery Act (NIRA) granted employees the right to collectively bargain.[190] Specifically, section 7(a) of NIRA provided that no employee may be forced to join or refrain from joining a particular union and required employers to comply with maximum hours, minimum pay, and other conditions approved by the President.[191] To assist in the implementation of section 7(a), President Roosevelt created the National Labor Board (NLB) by executive order.[192] Because the NLB lacked an enforcement mechanism to force employer compliance with the statutory collective bargaining rights, employers continued to resist recognition of unions.[193] This prompted the establishment of the National Labor Relations Board (NLRB), which was authorized to investigate violations of the NIRA and issue enforceable orders in furtherance of NIRA's objectives.[194]

The constitutional right to vote is yet another example of a right that can lead to the establishment of supporting political structures. The right can generate a variety of institutions to provide resources and support to voters, test and certify voting procedures, enforce campaign finance laws, administer elections, and tally and compile election results. In the United States, for example, the Federal Election Commission administers and enforces federal campaign finance laws, and the Election Assistance Commission serves as a national clearinghouse for

187. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified at 18 U.S.C. § 3006A); Lentine, *supra* note 184, at 381.

188. *See* Lentine, *supra* note 184, at 383. *But see* GA. CODE ANN. § 17-12-1 (West 2015) (making the Georgia Public Defender's Council an independent agency within the executive branch of state government).

189. *See* Rita Falk Taubenfeld & Howard J. Taubenfeld, *Some Thoughts on the Problems of Designing Stable Democracies*, 24 INT'L LAW. 689, 707 n.30 (1990).

190. National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195.

191. *Id.* § 7(a).

192. CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 25 (2005); J. Warren Madden, *The Origin and Early History of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 234, 236 (1960).

193. MORRIS, *supra* note 192, at 31; Madden, *supra* note 192, at 236–37.

194. MORRIS, *supra* note 192, at 47; Madden, *supra* note 192, at 237–38. The Supreme Court later declared NIRA an unconstitutional delegation of legislative power. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935). This ruling prompted the enactment of the National Labor Relations Act, which prohibited specific "unfair labor practices," preserved the staff of the National Labor Relations Board, and contained new enforcement provisions. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449; Madden, *supra* note 192, at 239–41.

administering federal elections.[195] Similar commissions also exist at the state level.[196] Although these commissions are creations of statutes,[197] their authority can be traced to an underlying individual right to vote, without which these institutions would not exist.

None of this is to say that individual rights inevitably give rise to supporting institutions. Where rights are unenforced or underenforced in practice, these complementary structures may not develop.[198] In addition, rights are occasionally added to a constitution to confirm what is already in place. In New York, for example, a constitutional right to education was codified after a public school system had already been established in order to confirm that the state government remains responsible for providing education.[199] Where the complementary structures are already in place, the codification of rights may not give rise to new institutions. Even then, however, rights can strengthen the existing institutions by constitutionalizing their foundations and ensuring their continued operation to enforce the underlying rights commitment.

E. SELF-REINFORCEMENT THROUGH GOVERNMENT EMPOWERMENT

In this context, self-reinforcement means that the adoption of a constitutional right foments "a set of forces or complementary institutions" that reinforce and strengthen the right.[200] Individual rights can become self-reinforcing when the three branches of government obtain leverage from their enforcement. For example, when the underlying right has the capability of fueling judicial power, the judiciary may have strategic incentives and, depending on context, the means to protect the underlying right. Socioeconomic rights in various parts of the world have obtained teeth in part because a strong judiciary was incentivized to enforce the underlying rights to expand its own powers into domains traditionally considered legislative.[201]

Likewise, where the enforcement of an individual right has been entrusted to the legislature or the executive, the right may be more likely to be enforced. In those cases, the political branches will have a powerful incentive to protect the underlying commitment to safeguard and expand their own powers. To cite one

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195. 2011 ACTIVITIES REPORT, U.S. ELECTION ASSISTANCE COMM'N 5 (2011), https://www.eac.gov/assets/1/Documents/EAC%20Activities%20Report%202011_508%20test.pdf; *About the FEC*, FED. ELECTION COMM'N, http://www.fec.gov/about.shtml [https://perma.cc/QAG8-UXM2].

196. *State Election Offices*, FED. ELECTION COMM'N, http://www.fec.gov/pubrec/stateelection.shtml [https://perma.cc/86JJ-ZT2N].

197. The U.S. Election Assistance Commission was established by the Help America Vote Act and the Federal Election Commission was created by the 1974 Amendments to the Federal Election Campaign Act. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1665; Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1972).

198. *See, e.g.*, ZACKIN, *supra* note 28, at 72 (noting that "state constitutions were not always sufficient or even necessary to motivate a state to establish a public school system").

199. *Id.*

200. Page, *supra* note 40, at 88.

201. *See supra* Section II.C.

example, the Reconstruction Amendments proved to be particularly powerful in part because Congress had an institutional interest in enforcing them.[202] Likewise, rights against racial discrimination obtained some teeth in part through aggressive enforcement efforts by executive agencies such as the Civil Rights Division.[203] In protecting the underlying rights, Congress and the Executive were able to enlarge their own powers vis-à-vis the states and the other branches of the government. To be sure, as the composition of the legislative and executive branches changes over time, so can their interpretation of the underlying right, which can turn the right into an object of ongoing political contestation. For example, a Republican administration may interpret the right to bear arms more expansively than a Democratic one. But the right itself, regardless of its evolving and contested meaning, will continue to serve as a potential wellspring of legislative and executive power.

Self-reinforcement can also result where individual rights generate complementary government structures. Rights can create what Douglass North calls "the interdependent web of an institutional matrix" by requiring complementary organizations and support networks.[204] As the concomitant matrix of laws, institutions, and expectations expands—in other words, as the individual right becomes more structure-like—the right can become self-reinforcing as its alteration grows costlier over time.

Consider a polity that has created an individual right to government-provided health care. To effectuate that guarantee, the polity will need to construct government hospitals; hire doctors, nurses, and other hospital staff; and purchase medical equipment. Over time, these complementary bodies may develop specialized skills and expand relationships with other institutions, which in turn reinforces their own stability and generates increasing benefits and powerful inducements to remain on the same constitutional path.[205] The alteration of this right would generate significant transition costs by requiring the reconfiguration of settled expectations and complementary institutions.

In addition, these complementary institutions will resist attempts to significantly modify or abolish the constitutional arrangements that prompted their creation.[206] Likewise, members will have incentives to protect these institutions

202. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (explaining how the Reconstruction Amendments generated new equality and voting guarantees enforceable against the states).

203. *See* Joel Wm. Friedman, *The Impact of the Obama Presidency on Civil Rights Enforcement in the United States*, 87 IND. L. J. 349, 363 (2012).

204. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 95 (1990).

205. *See* Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 255, 259 (2000).

206. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 20 (2009).

where they obtain career and reputational benefits from their membership.[207] For example, an individual public defender may have strong incentives to strengthen and protect the office of the public defender because the institution offers the individual, among other things, meaningful employment. For these institutions and their members, the failure to protect the underlying individual rights can amount to institutional suicide. This can create a feedback loop where the underlying right generates an institution that, in turn, has strong incentives to reinforce the right.

An obvious objection to this analysis is that it is the supporting structure, not the underlying right, that is responsible for the resulting self-reinforcement. This constitutional chicken-or-egg objection is ultimately inapposite. Where, as in the above cases, the complementary institution would not exist without the underlying right, the right deserves at least some credit for the resulting self-reinforcement. For example, where a right to counsel becomes self-reinforcing through the establishment of public defenders' offices, the right itself bears some responsibility for its success because the public defenders' offices would not exist absent the right.

It was self-reinforcement through complementary institutions that bolstered the longevity of the New Deal in the United States. Although Roosevelt considered adopting a second socioeconomic Bill of Rights to consolidate his gains, his New Deal agenda became self-reinforcing through the creation of a massive bureaucracy to support the underlying substantive commitments.[208] As noted above, for example, the creation of the statutory right to unionize subsequently led to the establishment of the NLRB to enforce the underlying right, which in turn reinforced the substantive-rights commitment.

This theory has some early empirical support. In a recent study, Adam Chilton and Mila Versteeg find that constitutional rights that establish organizations are more likely to obtain government respect than rights that are practiced only on an individual level.[209] They argue that organizations, as compared to individuals, are more likely to have the means and the incentives to strategically safeguard their rights because the collective action problems that often hamper rights enforcement at the individual level are not as salient at the organizational level.[210] Their study finds, for example, that the right to form political parties and unions are more likely to secure compliance than the freedoms of expression and movement, which are typically practiced at a more individual level.[211]

Although rights can become self-reinforcing when they empower government institutions, this is not necessarily a cause for celebration for rights activists. In

207. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 60 (1971).

208. Chilton & Versteeg, *supra* note 20, at 577; McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 201 (1999).

209. Chilton & Versteeg, *supra* note 20, at 575–76.

210. *Id.* at 575–76, 578.

211. *Id.* at 576.

some cases, the resulting enforcement may hamper, rather than advance, individual liberty when government institutions enforce rights for ulterior purposes. For example, the establishment of government bureaucracies for the purported purpose of enforcing socioeconomic rights such as health care and education may create opportunities for corruption. Where a polity lacks sufficient mechanisms for rooting out these problems, the enforcement of rights may prove to undermine, rather than promote, social welfare.[212]

If, as I argue here, rights can become self-reinforcing when they empower government institutions, what explains the scores of countries with abysmal records of rights recognition? Although rights can serve as a potential wellspring of power, this does not guarantee their enforcement. In some circumstances, the benefits of enforcing the underlying right may be outweighed by its political costs. The political branches may lack the necessary incentives when, for example, the right itself is a source of political conflict and the invocation of the right may generate pushback from a significant constituency. In a democratic system of government, where legislators stay in power by advancing their constituents' interests, the underlying right may remain dormant or underutilized. Institutional incentives thus may not overlap with individual ones.

This potential lack of incentive compatibility,[213] however, is not unique to individual-rights provisions. The political branches may lack the necessary incentives to enforce other provisions (including provisions traditionally considered "structural") where it is not in their political interest to do. For example, a federal legislator in the United States may choose not to use her Commerce Clause powers to their fullest extent if she might obtain political benefits by championing a states' rights platform. My point, therefore, is simply that rights provisions, like structural provisions, can empower the political branches and incentivize them to advance the underlying right. But in some cases, these incentives may be outweighed by other considerations.

A final explanation for lack of enforcement is conflict. Where rights empower more than one government institution, they can foment conflict about the scope and content of the right. That conflict, in turn, can hamper enforcement. Consider the enactment of the Religious Freedom Restoration Act (RFRA).[214]

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212. A full-fledged analysis of this problem is outside the scope of this Article, but, for present purposes, I note that corruption in the area of health care rights is particularly illustrative. The informational asymmetry that plagues the relationship between the user and the administrator of the health care system drastically increases the opportunity for corruption. *See* TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2006, at 5–6 (2006), http://www.transparency.org/whatwedo/publication/global_corruption_report_2006_corruption_and_health [https://perma.cc/5JPE-WHEK]. Consider the case of Colombia. Despite active judicial involvement in protecting and promoting the right to health in its constitution, Colombia has experienced corruption in many aspects of its health care system, including widespread insurance fraud, bribery of government officials, and skyrocketing pharmaceutical costs. Paul Christopher Webster, *Health in Colombia: A System in Crisis*, 184 CAN. MED. ASS'N J. E289, E289 (2012).

213. *See* TUSHNET, *supra* note 120, at 95–96; Levinson, *supra* note 17, at 670.

214. 42 U.S.C. § 2000bb (2012).

Congress passed RFRA by huge bipartisan majorities in response to the U.S. Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[215] In *Smith*, the Court held that the Free Exercise Clause did not permit exemptions from generally applicable laws on religious-exercise grounds.[216] The plaintiffs in *Smith* were members of the Native American Church who were denied unemployment benefits after being fired for ingesting peyote for religious purposes in violation of an Oregon law.[217] Dismayed by the Court's narrow interpretation of the Free Exercise Clause, Congress enacted RFRA to subject federal and state laws that substantially burden religious exercise to strict scrutiny.[218]

The conflict between Congress and the Court did not end there. In *City of Boerne v. Flores*, the Court struck down RFRA as applied to the states in part because Congress exceeded its enforcement powers by redefining the scope of the right to free exercise of religion.[219] That task, the Court underscored, was within the judicial, not congressional, domain.[220] The right thus became an object of contestation between the Court and Congress, hampering its enforcement.

To conclude, although rights constrain government agents, they can also serve the understudied function of empowering them. Where government institutions have incentives to enforce substantive rights guarantees, the right can obtain some level of self-reinforcement, though not necessarily in ways that benefit individual liberty. In the next Part, I examine a more intuitive function of rights: empowerment of citizens. The connection of citizen empowerment to constitutional structure may be less obvious than government empowerment. Yet, as I analyze below, rights provisions that empower citizens can also serve significant structural functions.

III. INDIVIDUAL RIGHTS AS CITIZEN EMPOWERMENT

The familiar separation of powers scheme, premised on Locke's and Montesquieu's seminal works, consists of the legislature, executive, and judiciary.[221] Yet there is an oft-unacknowledged, but conspicuous, omission in this tripartite structural scheme—the people. Although citizens compose the vast majority of the polity, they are left out of the separation of powers framework unless they serve as legislator, administrator, or judge.

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215. 494 U.S. 872 (1990).

216. *Id.* at 881–82.

217. *Id.* at 874.

218. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

219. 521 U.S. 507, 519, 536 (1997).

220. *Id.* at 519 (noting that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation").

221. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 382–92 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 154–66 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

This Part resists this omission. In a typical constitution, the people are a collective, structural entity—albeit an entity with divergent preferences and interests—and are empowered with individual rights. Similar to the authorities provided to government institutions, these rights facilitate or promote the people's participation in democratic governance. In Federalist No. 84, discussing the individual liberties in the original constitution, Alexander Hamilton highlighted that "one object of a bill of rights [is] to declare and specify the political privileges of the citizens in the structure and administration of the government."[222] It is for this reason that the U.S. Constitution refers to "the People" in collective terms.[223] Likewise, the Tenth Amendment speaks of the powers reserved to "the people" in the same breath as the powers delegated to the federal government and reserved for the states.[224]

Individual rights serve the structural functions of empowering the citizenry, supporting the democratic structure of the state, and permitting individuals to serve as a check on government institutions. For example, the right to vote allows citizens to select the officials to serve on the executive and legislative branches of government. Freedom of speech permits citizens to influence these officials after their selection. Collective action problems, which can undermine the effective exercise of popular sovereignty, can be overcome through the exercise of assembly, association, and petition rights. The right to a jury trial authorizes citizens to play a direct role in the administration of civil and criminal laws. The right to resist authorizes citizens to resist and overthrow a tyrannical government. Equal protection can bolster the political power of traditionally powerless groups.

This is not to say that citizens are on equal footing with government actors in terms of their role in constitutional structure. Government actors tend to be more powerful because they possess constitutional decision-making powers that ordinary citizens lack. Government actors in the legislature, executive, and judiciary can enact legislation, issue executive orders, and strike down laws as unconstitutional. Setting aside the special case of the referenda power (discussed below), citizens ordinarily do not play a direct role in democratic governance. Yet the exercise of the rights discussed below empowers citizens to indirectly shape government structure and check the three branches of government.

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222. THE FEDERALIST NO. 84, at 435 (Alexander Hamilton) (Ian Shapiro ed., 2009); *see also* BHAGWAT, MYTH OF RIGHTS, *supra* note 21, at 37 (noting that constitutional rights "were conceived by the framing generation not as a source of individual autonomy, but as a tool for the People collectively to protect themselves against an oppressive government"); WOOD, *supra* note 6, at 61 ("In 1776 the solution to the problems of American politics seemed to rest not so much in emphasizing the private rights of individuals against the general will as it did in stressing the public rights of the collective people against the supposed privileged interests of their rulers.").

223. BHAGWAT, MYTH OF RIGHTS, *supra* note 21, at 3.

224. U.S. CONST. amend. X.

The rights that I discuss here go beyond those rights that scholars have identified as necessary to democratic governance.[225] John Hart Ely, for example, defends judicial review in the United States on the basis that rights enforcement by the judiciary corrects malfunctions in the democratic process.[226] On Ely's account, freedom of speech "clear[s] the channels of political change" and equal protection rights protect the political rights of minorities.[227] Although I engage with this important literature, my analysis includes rights, such as the right to a jury trial, that are not fundamental components of a democratic process that nevertheless serve structural functions. As detailed below, all rights, to varying degrees, have the potential for collective citizen empowerment.

My emphasis here is on collective rights, but my analysis is not intended to be utilitarian. Put differently, I do not argue that individuals are mere pawns for improving collective societal welfare. Rather, I acknowledge the individual utility of rights and simply build upon that understanding by analyzing how rights can also serve to facilitate or promote collective political empowerment.

Although a plethora of rights can serve that function, a number of rights particularly stand out. In this Part, I discuss, in turn, the right to vote; the freedom of speech; the freedom of assembly, association, and petition; the right to resist; the right to a jury trial; and equal protection. These rights are not an exhaustive list of rights that increase the political efficacy of their intended constituents. Other rights—including welfare rights, privacy rights, education rights,[228] and property rights—can also facilitate political empowerment in a myriad of ways. But for the purposes of this Article, I will focus on the core rights of democratic participation. Following a discussion of these rights, I will explain why rights that protect identifiable constituencies can achieve some level of stability over time.

A. RIGHT TO VOTE

Under any definition of democracy, the right to vote forms the core of structural democratic governance. It is through the right to vote that citizens select their executive and legislative representatives that make up their constitutional structure of government. Constituents can prospectively vote into office competent politicians who are likely to be aligned with their preferences and screen out politicians likely to diverge from their interests.[229]

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225. Scholars disagree on which rights form the core components of democracy. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 248–49 (1999); Adrienne Stone, *Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law*, 60 U. TORONTO L.J. 109, 123 (2010).

226. ELY, *supra* note 17, at 103.

227. *Id.* at 105, 135–36.

228. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting); ZACKIN, *supra* note 28, at 73 ("[A]dvocates of public education generally justified their support for [constitutional education] rights by arguing that education is necessary to maintain a republican government.").

229. Nzelibe & Stephenson, *supra* note 17, at 624.

Elections also permit constituents to retrospectively punish poor, abusive, or untrustworthy political performers and reward successful ones.[230] As a result, the right to vote creates powerful incentives for incumbents to use their structural authorities to advance their constituents' interests.[231] To use terminology from law and economics, electoral discipline can assist in reducing agency costs, which refer to the deviation between the actions of the political representatives (the agents) and the preferences of their constituents (the principals).[232] Although political representatives are supposed to exercise their power in the best interests of the citizenry, their interests may diverge and political officeholders can abuse their delegation of power by shirking their responsibilities, concealing information about their behavior from their constituents, and turning their powers against the principals.[233] Competitive national elections and vigorous campaigns supplement voter information and provide better cues to uninformed voters to enable them to make more meaningful choices that cause elected officials to act with more discipline.[234] Elections can also generate a "focal point" for resistance or rebellion against the government if the incumbents do not abide by the results.[235] Through these mechanisms, the right to vote can become a self-enforcing tool for ensuring government accountability.[236]

Beyond its role in prospective selection, and retrospective punishment and reward of political representatives, the right to vote can also take the form of referenda, the most direct form of popular governance. Referenda have a significant historical pedigree, dating back to ancient Athens.[237] In the contemporary world, referenda allow people to participate in the political decision-making process directly by casting votes on legislation, constitutional amendments, and other political matters. Twenty-six states in the United States, and the U.S. Virgin Islands, authorize the enactment of statutes or constitutional amendments through popular referenda.[238] For example, citizens of California, where the initiative process is particularly popular, have thus far adopted 123 initiatives by popular referendum, fifty-two of which were constitutional amend-

230. *Id.*

231. *Id.*

232. *See* Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756–57 (1984).

233. Law, *supra* note 113, at 731, 745.

234. *See* Scott J. Basinger & Howard Lavine, *Ambivalence, Information, and Electoral Choice*, 99 AM. POL. SCI. REV. 169, 181, 183 (2005).

235. Levinson, *supra* note 17, at 684.

236. *Id.*

237. Paul Cartledge, *Referendums Ancient and Modern*, HISTORY & POLICY (Apr. 26, 2016), http://www.historyandpolicy.org/opinion-articles/articles/referendums-ancient-and-modern [https://perma.cc/PW8V-QE29].

238. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM STATES (Dec. 2015), http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx [https://perma.cc/L8UG-2SNR].

ments.[239] Likewise, Swiss citizens routinely casts their votes in referenda concerning subjects as diverse as abortion, free movement of workers across the European Union, and minimum wage.[240] Although the referendum is subject to abuse by self-interested political leaders,[241] it is the most intuitive illustration of how the right to vote can enable citizens to directly effectuate changes in government structure and operation.

B. FREEDOM OF SPEECH

Freedom of speech is essential to a well-functioning democratic government structure.[242] On some accounts—most notably Alexander Meiklejohn's—the single most important function of free speech is the facilitation of public deliberation.[243] Freedom of speech allows citizens to discuss issues of national import, form opinions, and inform their representatives of their desires.[244] Without a robust guarantee of free speech, government officials can subvert and suppress undesirable speech, which, in turn, can hamper the channels of political turnover and disrupt the functioning of a democracy.[245] As Cass Sunstein puts it, "if the government forecloses political argument, the democratic corrective is unavailable."[246]

Political argument is essential for a structural democracy for several reasons. First, it enables information to flow from constituents to politicians. In political

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239. These numbers are current as of November 2014. *History of Initiative and Referendum in California*, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_and_Referendum_in_California#cite_ref-1 [https://perma.cc/VYE7-SUDX].

240. Leonid Bershidsky, *Brave Swiss Vote Down Fat Minimum Wage*, BLOOMBERG.COM (May 19, 2014), https://www.bloomberg.com/view/articles/2014-05-19/brave-swiss-vote-down-fat-minimum-wage [https://perma.cc/WF5R-F747].

241. *See, e.g.*, David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 204–05, 207 (2013) (explaining how political leaders in Venezuela and Ecuador used referenda to replace existing constitutions and neutralize political opposition).

242. The seminal explication of the structural role of free speech in a deliberative democracy appears in ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). For modern treatments of the same question, see Bhagwat, *Associational Speech*, *supra* note 21, at 994 (noting that "in recent decades the most prominent and widely accepted theory of free speech is . . . its role in [democratic] self-governance"); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 145 (1989) ("Free speech can contribute to the possibility that [citizens], and their representatives, can grasp truths that are significant for political life; it can enhance identification and accommodation of interests; and it can support wholesome attitudes about the relations of officials and citizens."); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 487 (2011) ("The most normatively desirable account of the First Amendment is to conceive its fundamental purpose as protecting the processes of opinion formation that are necessary for democratic self-governance."); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 262 (1992) ("[T]he First Amendment is best understood by reference to the democratic process.").

243. MEIKLEJOHN, *supra* note 242, at 39 (distinguishing between "a private right of speech which may on occasion be denied or limited, though such limitations may not be imposed unnecessarily or unequally" and "the unlimited guarantee of the freedom of public discussion").

244. *See* Post, *supra* note 242, at 482.

245. *See* Greenawalt, *supra* note 242, at 145–46; *see also* Sunstein, *supra* note 242, at 262 (noting that "the overriding goal of the [First] [A]mendment . . . is to protect politics from government").

246. Sunstein, *supra* note 242, at 306.

science, the "decibel meter" refers to the feedback that politicians receive from their constituents about bureaucratic performance.[247] A nonfunctioning or malfunctioning decibel meter can deprive political representatives of their ability to adjust policies in response to their constituents' wishes. And when the decibel meter is sufficiently high, political representatives can take corrective action, lest they be sanctioned at the ballot box. Free speech can thus enable a healthy, and sometimes scathing, dialogue between the people and their representatives. It is for this reason that the U.S. Supreme Court in *New York Times Co. v. Sullivan* highlighted our "profound national commitment" to "uninhibited, robust, and wide-open" public debate, including "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[248]

Beyond the information flow from constituents to representatives, freedom of speech can also facilitate a feedback loop in the opposite direction: from representatives to constituents. This feedback loop is salient both before and after elections. Before elections, it is through speech that political candidates communicate their proposed platforms to the public. Speech allows transparency into the candidates' political ideology, competence, honesty, and work ethic, as demonstrated by prior experience in politics and other fields. These rough proxies permit voters to screen political candidates that may deviate from the voters' interests once in office.[249]

After elections, speech is also important to allow voters to observe the politicians' behavior and mitigate the informational asymmetry that often exists between politicians and the citizenry.[250] Transparency, in turn, is critical in informing citizens about the government's work and ensuring that politicians conform their behavior to the voters' interests.[251] By contrast, if political representatives enjoy significant informational advantages over the public, they can more easily avoid accountability. The voters' lack of information about their representatives' policy positions may permit the representatives to make choices inconsistent with their constituents' desires.[252] Free speech can mitigate this informational asymmetry, at least to some extent, and allow more effective punishment and reward of political representatives.

In addition to enabling the reward or sanction of political behavior, freedom of speech also protects the rights of social movements to organize and disseminate their views. These movements are important components of a structural democracy because they promote government accountability and influence legal reforms. In the United States, as Bill Eskridge explains, the Free Speech Clause

247. Moe, *supra* note 232, at 767.

248. 376 U.S. 254, 270 (1964).

249. *See* Moe, *supra* note 232, at 755.

250. *Id.* at 761.

251. *See* TIMOTHY BESLEY, PRINCIPLED AGENTS?: THE POLITICAL ECONOMY OF GOOD GOVERNMENT 158 (2006) ("Transparency is fast becoming the motherhood and apple pie of good governance.").

252. *See* Anke S. Kessler, *Representative Versus Direct Democracy: The Role of Informational Asymmetries*, 122 PUB. CHOICE 9, 10 (2005).

became the "first resort of whatever identity group is the current object of state (re)education—from homosexuals in the 1950s and 1960s, to right-to-lifers picketing abortion clinics in the 1980s and 1990s."[253] As long as minority groups are "willing to abide by the rules of the game"—"no violence and adherence to reasonable time, place, and manner restrictions"—freedom of speech protects their efforts to educate and mobilize.[254] These protections lower the costs of embracing the social movement and forming effective organizations, which in turn can bolster their political power.[255]

In sum, freedom of speech is essential to the democratic structure of a state. In addition to serving this function, free speech also allows the exercise of related and mutually reinforcing rights with structural implications: freedom of assembly, association, and petition.[256] The next section discusses these rights.

C. FREEDOM OF ASSEMBLY, ASSOCIATION, AND PETITION

The freedoms of assembly, association,[257] and petition have traditionally been neglected in constitutional theory and doctrine and considered subservient to the freedom of speech.[258] Recent scholarship has ended this tradition of neglect by demonstrating the historical pedigree and structural significance of these three interrelated freedoms to a deliberative democracy.[259]

These interrelated freedoms can serve structural democratic purposes. Aside from voting, which can be exercised on an individual basis, political participation often requires citizens to act together in associations and assemblies.[260] Yet collective action problems can impede the effective exercise of popular sovereignty.[261] People may be reluctant to respond to abusive political behavior by speech, rebellion, or otherwise, unless they have assurances that others will do

253. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 507 (2001).

254. *Id.* at 506 & n.295, 511.

255. *Id.* at 482 ("Once the Stonewall riots inflamed the consciousness of thousands of previously closeted gay men, lesbians, and bisexuals, more of them were willing to become involved in that social movement, engaging in expressive, often obnoxious, activities so clearly within the protection of the Speech Clause that seething police and censors did not even try to stop them.").

256. *See* Bhagwat, *Associational Speech*, *supra* note 21, at 998 ("It is hard to imagine how assemblies or associations can be created without speech.").

257. Although "association" and "assembly" are often used interchangeably, they have distinct historical origins. *Id.* at 982–83 ("[A]ssembly was understood historically to refer to ad hoc gatherings of citizens, while association was understood to refer to more permanent citizen organizations, whether formally constituted or not.").

258. *Id.* at 980.

259. *See id.*; John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).

260. Bhagwat, *Associational Speech*, *supra* note 21, at 993.

261. *See* Barry R. Weingast, *The Political Foundations of Limited Government: Parliament and Sovereign Debt in 17th- and 18th-Century England*, *in* THE FRONTIERS OF THE NEW INSTITUTIONAL ECONOMICS 213, 237 (John N. Drobak & John V. C. Nye eds., 1997) (noting that citizens confront "a massive coordination problem that hinders their ability to police limits on sovereign behavior").

the same.[262] Without collective action, solitary upheaval runs the serious risk of being extinguished by a tyrannical government.[263]

The freedoms of assembly and association mitigate collective action problems by permitting the aggregation of individual preferences into a powerful whole.[264] As the U.S. Supreme Court has recognized, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[265] By permitting public deliberation, assemblies and associations allow the exchange of information[266] and collective political action.[267]

Importantly, the freedom of association can also encompass the freedom to establish political parties, which are integral to the structure of a contemporary democracy. The right to form political parties—absent from the U.S. Constitution but protected in many contemporary constitutions[268]—allows individuals to aggregate their opinions and serves as a vehicle through which individuals are mobilized and provided effective expression.[269] Political parties, as Nancy Rosenblum puts it, "are the embodiment of democratic theorists' 'public sphere,'" where public opinions are formed through deliberation and persuasion.[270] Political parties also transmit information to the voters because party identification serves as a rough proxy for ideology.[271] In a system with weak or ineffective political parties, democratic stability can be compromised as other institutions—such as the military—fill the resulting power vacuums through extra-constitu-

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262. *See* ROGER V. GOULD, INSURGENT IDENTITIES: CLASS, COMMUNITY, AND PROTEST IN PARIS FROM 1848 TO THE COMMUNE 18 (1995) ("Potential recruits to a social movement will only participate if they see themselves as part of a collectivity that is sufficiently large and solidary to assure some chance of success through mobilization."); Law, *supra* note 113, at 732.

263. MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 10 (2001) ("[E]ach person is more willing to show up at a demonstration if many others do, perhaps because success is more likely and getting arrested is less likely."); Law, *supra* note 113, at 732.

264. *See* El-Haj, *supra* note 259, at 589 ("The right of assembly protects collective action [because] [i]t protects the people and their aspirations for collective public deliberation on issues of public importance."); Timur Kuran, *Now Out of Never: The Element of Surprise in the East European Revolution of 1989*, 44 WORLD POL. 7, 24 (1991) (discussing "revolutionary bandwagon[s]"); Mazzone, *supra* note 259, at 743 (explaining how "associations . . . enabl[e] people to influence government").

265. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

266. Bhagwat, *Associational Speech*, *supra* note 21, at 1026.

267. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 89 (2003).

268. Richard Pildes, *Political Parties and Constitutionalism* 4 (N.Y.U. Pub. Law & Legal Theory, Paper No. 179, 2010), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1179&context=nyu_plltwp [https://perma.cc/YL4Z-QZ9Y].

269. Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1609 (1999).

270. Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 826 (2000).

271. Steven Levitsky & Maxwell A. Cameron, *Democracy Without Parties? Political Parties and Regime Change in Fujimori's Peru*, 45 LATIN AM. POL. & SOC'Y 3 (2003).

tional changes.[272] Political parties also play a democracy-stabilizing role by supplying a relatively coherent unifying party agenda and continuity from one legislative term to the other.[273]

The right to petition the government is structurally significant as well. The right is a core component of the relationship between the legislator and the citizen.[274] A petition is inherently supported by a combination of citizens, and it is through that collective speech that citizens can make themselves heard by their political representatives. For meaningful democratic self-governance, as Ashutosh Bhagwat notes, "citizens must not only be able to speak among themselves; they must also have some access to public officials."[275]

D. RIGHT TO RESIST

In addition to the functions described above, the freedoms of assembly and association also permit resistance to an abusive state. If political representatives abuse their powers or transcend the legal constitutional limits on their authorities, the people can assemble, protest, and resist.[276] This, in turn, permits people to reassert their sovereignty.[277] When it comes to revolutionary resistance or overthrow, there is strength in numbers.

This right of resistance is expressly codified in approximately twenty percent of foreign constitutions[278] and in many state constitutions. For example, the constitutions of New Hampshire, North Carolina, and Tennessee all contain an identical provision: "The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."[279] The Declaration of Independence also embraced the right of the people, under certain conditions, "to alter or to abolish" their government and "to institute new Government."[280]

The right to resist has obvious structural implications because it authorizes the abolishment of the existing constitutional structure under certain specified conditions. The existence of this right can enable citizens to coordinate in order to resist illegitimate or illegal government action.[281] If citizens are constitutionally authorized to revolt, they can more easily engage in collective action to constrain their government.[282] For example, in 1953, Fidel Castro—at the time,

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272. Ozan O. Varol, *The Military as the Guardian of Constitutional Democracy*, 51 COLUM. J. TRANSNAT'L L. 547, 591 (2013).

273. *See* Rosenblum, *supra* note 270, at 815.

274. BLACK, *supra* note 24, at 40.

275. Bhagwat, *Associational Speech*, *supra* note 21, at 997.

276. *See* Amar, *supra* note 21, at 1162–63.

277. *Id.*

278. Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1217–18 (2013).

279. *Id.* at 1204.

280. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

281. Ginsburg et al., *supra* note 278, at 1190.

282. *See id*.

a young Cuban lawyer—invoked the constitutional right to resist in his defense to a criminal charge of organizing an attack on a military barracks.[283] Castro's defense was later published in a pamphlet titled *History Will Absolve Me* and proved influential in elevating him to an international figure.[284]

The right to resist is particularly salient in countries that have emerged from undemocratic rule. In those regimes, the constitutional drafters might create a right to resist as an insurance policy to prevent a rebound to an undemocratic past. For example, after World War II, certain states within Germany adopted a right to resist,[285] and the constitution of Germany codified an individual "right to resist any person seeking to abolish this constitutional order."[286] Likewise, as a result of Rwanda's history of genocide, the Rwandan constitution proclaims that "[e]very citizen has the right to defy orders received from his or her superior authority if the orders constitute a serious and manifest violation of human rights and public freedoms."[287]

The U.S. Constitution is also illustrative. The "well regulated Militia" in the Second Amendment, characterized as "being necessary to the security of a free State,"[288] invokes the idea of justified resistance against a tyrannical government.[289] The reference to a "free State" is expressly structural and is considered "necessary" to protect popular sovereignty. Framed as such, the Second Amendment right to bear arms is closely connected to the First Amendment freedoms of assembly and petition.[290] If a tyrannical government remains unresponsive to the people's demands, expressed through petition and assembly, the people have the collective right to alter or abolish their government.[291]

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283. *Id.* at 1237.

284. *Id.* at 1237–38.

285. Heiner Bielefeldt, *The Right to Resist*, *in* INTERNATIONAL HANDBOOK OF VIOLENCE RESEARCH 1097, 1100 (Wilhelm Heitmeyer & John Hagan eds., 2003).

286. GRUNDGESETZ [GG] [BASIC LAW], art. 20 § 4, *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [https://perma.cc/MC4B-78H7].

287. CONST. OF THE REPUBLIC OF RWANDA art. 48 (May 26, 2003).

288. U.S. CONST. amend. II.

289. *See* District of Columbia v. Heller, 554 U.S. 570, 597–98 (2008) (noting that the militia was thought to be "necessary to the security of a free State" in part because "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny"); Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 249 (2000).

290. Amar, *supra* note 21, at 1163.

291. Hamilton made this connection explicit in Federalist No. 28:

> If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers, may be exerted with infinitely better prospect of success than against those of the rulers of an individual state. . . . The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.

THE FEDERALIST NO. 28, at 139 (Alexander Hamilton) (Ian Shapiro ed., 2009). Several scholars and judges have resisted this interpretation, arguing that the Second Amendment protects only a right to form state militias, such as National Guard units. *See, e.g.*, *Heller*, 554 U.S. at 637 (Stevens, J., dissenting) ("The Second Amendment was adopted to protect the right of the people of each of the

E. RIGHT TO A JURY TRIAL

In *Patton v. United States*, the U.S. Supreme Court framed the right to a jury trial as an individual right that can be waived by the defendant, and not a structural requirement that mandates the participation of the jury before a criminal conviction.[292] Despite the Supreme Court's conclusion to the contrary and the declining percentage of cases decided by jury trials,[293] this section analyzes how the right to a jury trial can serve structural functions. Specifically, it considers how a jury trial permits citizens to express their sovereignty and serve as a check against government overreach.

1. Expression of Popular Sovereignty

The Framers of the U.S. Constitution conceptualized juries as representative political institutions, similar to legislatures.[294] In *Democracy in America*, Alexis de Tocqueville similarly described the jury as a primarily political—not judicial—body.[295] According to de Tocqueville, the jury trial served as a mode of popular sovereignty by giving people direct control over the administration of justice:

> The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government . . . . Now, the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judges. The institution of the jury consequently invests the people . . . with the direction of society.[296]

Jury service, de Tocqueville thought, was comparable to voting insofar as both permit citizens to express their sovereignty.[297]

The conceptualization of juries as political bodies continued during Reconstruction. The right of disenfranchised African-Americans to serve on juries was

several States to maintain a well-regulated militia."); ELY, *supra* note 17, at 94–95, 227 n.76; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5–2, at 299 n.6 (2d ed. 1988). *But see* Amar, *supra* note 21, at 1166 (resisting the state-militia thesis in the part on the basis that the Second Amendment right to keep and bear arms belongs to "the people," not "the states," and that the contemporary meaning of "militia" meant all citizens capable of bearing arms).

292. 281 U.S. 276, 297–98 (1930).

293. Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 440 (2009) (indicating that approximately ninety-five percent of criminal indictments are decided by guilty pleas); John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 121 n.6 (1992) (observing that in state courts, ninety-five percent of felony convictions take place without a jury trial); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1265 (2014) (noting that less than two percent of federal civil cases and one percent of state civil cases reach a jury).

294. Levinson, *supra* note 1, at 1321.

295. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 361 (Henry Reeve trans., 1898) (1835) ("The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.").

296. *Id.*

297. *See id.*

initially believed to be political in nature, analogous to voting.[298] That right therefore was not protected by the Civil Rights Act of 1866 or the Fourteenth Amendment to the U.S. Constitution, both of which protected only civil rights.[299] Congressional Republicans realized, however, that without African-American representation on local juries, their civil rights could not be protected.[300] As a result, in 1875, Congress barred discrimination against African-Americans in jury service.[301] The political right to jury service was thus employed to bolster civil liberties.[302]

The composition of the jury can also contribute to its function as a political body that permits the expression of popular sovereignty.[303] Although all branches of government are representative of citizens to varying degrees, the jury's representation of the people is more direct.[304] Most adult citizens are qualified to be jurors.[305] Because of their composition, juries can infuse community norms and customs into their decision-making process.[306]

By serving as an avenue for citizens to express their sovereignty, the jury also operates as a democratic microcosm. Jury service requires interaction, debate, and engagement with other citizens and thus mimics democratic political engagement. As Akhil Amar explains, "[t]hrough the jury, Citizens . . . learn self-government by doing self-government."[307] Self-government has a significant virtue beyond the value of democratic engagement: it permits citizens to serve as a direct check on the political branches. The next section discusses that function.

2. The Separation of Powers Role of the Jury

Before its importation into the United States, the jury in England was an essential structural component of the government, which included the Crown, Parliament, and the judiciary.[308] Certain eighteenth-century commentators viewed the jury as "a necessary surrogate for . . . a corrupt and unrepresentative parlia-

298. Levinson, *supra* note 1, at 1321.
299. *Id.*
300. *Id.* at 1321–22.
301. *Id.* at 1322.
302. *See id.*
303. *See id.*
304. Amar, *supra* note 21, at 1185, 1189.
305. *Juror Qualifications*, U.S.COURTS.GOV, http://www.uscourts.gov/services-forms/jury-service/juror-qualifications [https://perma.cc/3HP7-E49D].
306. *See* Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 646–47 (2003).
307. Amar, *supra* note 21, at 1187.
308. Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1201 (2014).

ment."[309] Blackstone, who described the jury trial as "the glory of the English Law,"[310] likewise explained that "[e]very new tribunal, erected for the decision of facts, without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments."[311] The Anti-Federalist Federal Farmer described the jury trial as "a solid uniform feature in a free government."[312] Even Hamilton, who doubted the necessity of a jury, acknowledged in Federalist No. 83 that the jury performs a significant check on the political branches: "As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter."[313]

Although these views were certainly not—and still are not—universally shared, they formed the foundations for the right to a jury trial in the United States. Even before the introduction of the Bill of Rights, the U.S. Constitution protected the right to a jury trial in all criminal cases.[314] The Bill of Rights further explicated the right to a jury trial with three different guarantees.

First, the Fifth Amendment required an indictment or presentment by a grand jury before a person could be held to answer for a capital or infamous crime.[315] Although its significance has decreased in contemporary United States, the grand jury was designed to serve as a bulwark against abusive government prosecutions.[316] It was "to represent the local community and thus act more independently of all the instruments of central authority, including the state or national legislature."[317] Through its power of non-indictment, the grand jury could refuse to apply an unconstitutional or unjust law and prevent an unfounded, unreasonable, or biased prosecution.[318] The grand jury was also designed to serve as a check on the government through its power to investigate suspected government wrongdoing.[319] Perhaps the most prominent contemporary example is the grand jury's Watergate investigation, which led to the resignation of President Nixon and the conviction of several prominent executive-

309. *Id.* (quoting Thomas A. Green, *The English Criminal Trial Jury and the Law-Finding Traditions on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900, at 61 (Antonio Padoa Schioppa ed., 1987)).

310. 3 WILLIAM BLACKSTONE, COMMENTARIES *391.

311. *Id.* at *380.

312. Letter from the Federal Farmer XVI (Jan. 20, 1788), http://presspubs.uchicago.edu/founders/print_documents/v1ch14s32.html [https://perma.cc/3RPD-TPWM].

313. THE FEDERALIST NO. 83, at 422 (Alexander Hamilton) (Ian Shapiro ed., 2009).

314. U.S. CONST. art III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.").

315. *Id.* amend. V.

316. *See* Amar, *supra* note 21, at 1183.

317. Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2369 (2008).

318. Amar, *supra* note 21, at 1183–84; Thomas, *supra* note 308, at 1231.

319. Amar, *supra* note 21, at 1184.

branch officials.[320]

Second, the Sixth Amendment protected the right to a jury in criminal cases, including a public and speedy trial, and an impartial, local jury.[321] Even where a grand jury authorizes prosecution, a petit criminal jury can acquit against the evidence, serving as an additional check against government overreach.[322] The criminal jury checks the legislature, which ratified the law; the executive, which brought the charge against the defendant; and the trial court judge, which took part in the interpretation and application of the law.[323] Jurors can refuse to apply abusive or unjust laws, or reject their application where they can do injustice in particular cases.[324] Although prosecutors may exercise their discretion to not bring charges in such cases, jurors can act as a safety valve against overzealous prosecutions.[325]

Third, the Seventh Amendment protected the right to a jury in common law suits where the value in controversy exceeds twenty dollars.[326] Like criminal juries, civil juries permit the citizenry to play a role in the application of laws. Particularly in suits by citizens against government actors (for example, 42 U.S.C. § 1983 lawsuits), civil juries play a role akin to that of criminal juries: in a clash of conflicting interests, they decide whether the government or the individual should prevail.

So conceptualized, the right to a jury trial can thus be framed as a structural requirement of collaboration between judge and jury before a conviction or civil verdict. John Taylor consequently describes the jury as the "lower judicial bench."[327] Taking Taylor's conceptualization one step further, Amar compares the judiciary to a bicameral legislature: "The judicial structure mirrored that of the legislature, with an upper house of greater stability and experience, and a

320. Michael F. Buchwald, *Of the People, by the People, for the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials*, 5 GEO. J.L. & PUB. POL'Y 79, 82–83 (2007).

321. U.S. CONST. amend. VI.

322. *See* Thomas, *supra* note 308, at 1222.

323. *See id*.

324. *See* David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 90–91 (1995).

325. To be sure, jury nullification is subject to abuse. Most prominently, Southern juries in the 1950s refused to convict white men for lynchings and murders of African-Americans, despite overwhelming evidence of guilt. *See* NANCY J. KING, JURY NULLIFICATION IN THE UNITED STATES 4 (2015), http://www.oxfordhandbooks.com/view /10.1093/oxfordhb/ 9780199935383.001.0001/ oxfordhb-9780199935383-e-103?mediaType=Article [https://perma.cc/5DQT-Q8BU]. In addition, it is difficult for the jury to determine the costs and benefits of nullification in a particular case because cost-benefit analysis requires information that is inadmissible or unavailable to jurors at trial (such as the defendant's criminal record). Orin Kerr, Opinion, *The Problem with Jury Nullification*, WASH. POST (Aug. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/10/the-problem-with-jury-nullification/?utm_term=.77d19706c6d2 [https://perma.cc/AC2G-W4E2]. Finally, there are also normative debates (which I set aside for this Article) as to whether it is appropriate for a criminal jury to override the legislature and alter the application of a law, even in one particular case.

326. U.S. CONST. amend. VII.

327. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950).

lower house to represent popular sentiment more directly."[328]

The importance of juries as a structural check on the political branches is enhanced by several other factors. First, the local nature of most juries ensures that the jury represents local majorities that are often minorities on a national scale.[329] Juries can therefore protect the rights of the local community against abusive national majorities.[330] In addition, where unanimous verdicts are required, even a sole dissenter can be outcome determinative.[331] And even where non-unanimous verdicts are possible, a small number of jurors can still influence the outcome. Finally, the transparent nature of the jury trial, which allows all citizens to observe the judicial process, enhances the structural role of the jury as a check on government power.[332]

Because the jury can serve as a structural check on government institutions, political leaders throughout history have attempted to curb its powers.[333] For example, during the late eighteenth century, colonial juries in the United States shielded patriot practices against British incursion.[334] In response, the British authorities attempted to strip American juries of authority over customs cases and for certain crimes committed by British officers in America.[335] As one of the justifications for independence, the Declaration of Independence consequently listed "depriving [the colonists] in many cases, of the benefits of Trial by Jury."[336] After independence, all state constitutions guaranteed the right to a jury trial.[337]

Despite the historical structural weight of the jury trial, juries play a much less significant role in contemporary United States.[338] Since the ratification of the U.S. Constitution, the authority of juries has shifted to the very government institutions that juries were supposed to check, through the rise of plea bargaining,[339] bench trials, and military tribunals, among other factors.[340] As the importance of the jury decreased, the powers of government institutions—including the Executive, the Legislature, and the Judicial Branch—increased,[341] which underscores the jury's structural salience.

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328. Amar, *supra* note 21, at 1189.

329. Levinson, *supra* note 1, at 1321.

330. *Id.*

331. *Id.* at 1333.

332. Thomas, *supra* note 308, at 1203.

333. *See* DE TOCQUEVILLE, *supra* note 295, at 362 ("All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury.").

334. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 233 (2005).

335. *Id*.

336. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

337. AMAR, *supra* note 334, at 234.

338. Thomas, *supra* note 308, at 1197.

339. *See* Langbein, *supra* note 293, at 124 ("Plea bargaining achieves just what the Framers expected the jury to prevent, the aggrandizement of state power.").

340. For a thorough treatment, see Thomas, *supra* note 308.

341. *Id.*

F. EQUAL PROTECTION

Equal protection can also play a structural role in bolstering the political participation of marginalized groups. As an initial matter, equal protection is linked to the right to vote, which, as discussed above, forms the core of the democratic process. Universal adult suffrage requires equality in voting, which is often protected by antidiscrimination or equal protection rights.[342] In the U.S. Constitution, universal suffrage expanded over time through the Fifteenth (race, color, and previous condition of servitude), Nineteenth (gender), Twenty-Fourth (poll tax), and Twenty-Sixth (age) Amendments.[343]

Beyond protecting the right to vote, equal protection also allows the eradication of discrimination and the political empowerment of disenfranchised groups.[344] In the United States, for example, the enforcement of equal-protection guarantees played a salient historical role in elevating the political status of African-Americans. Absent equal enforcement of criminal laws, African-Americans would always risk losing their life or property.[345] Without the ability to sue and provide testimony, African-Americans would not be able to enforce contracts, which, in turn, would hamper their ability to obtain meaningful employment.[346] The right to provide testimony itself would be meaningless if African-Americans were excluded from jury service.[347] In enabling the exercise of these rights on a relatively equal footing with other citizens, the enforcement of equal-protection ideals bolstered African-Americans' social and political empowerment.

This conceptualization of equal protection finds a home in political process theory, which posits that some constitutional rights—including equal protection—support or enhance democratic discourse.[348] Commonly cast as at odds with the "countermajoritarian difficulty," process theory conceptualizes individual rights as protectors of disenfranchised or marginalized minorities and enablers of political participation.[349] Process theorists support judicial enforcement of anti-discrimination (or equality) provisions to protect non-citizens, racial and religious minorities, gays and lesbians, and other groups that have relatively little influence in the political process.[350] The political process view is reflected most prominently in the famous footnote four from the U.S. Supreme Court's deci-

342. *See, e.g.*, EUROPEAN COMM'N, COMPARATIVE STUDY OF ANTI-DISCRIMINATION AND EQUALITY LAWS OF THE US, CANADA, SOUTH AFRICA AND INDIA (2012), http://ec.europa.eu/justice/discrimination/files/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf [https://perma.cc/F3EK-S34S].

343. U.S. CONST. amends. XV, XIX, XXIV, XXVI.

344. *See* Eskridge, *supra* note 253, at 511.

345. Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886 (1987).

346. *Id.*

347. *Id.* at 887.

348. ELY, *supra* note 17; *see also* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 750–51 (1991); Levinson, *supra* note 1, at 1303.

349. Levinson, *supra* note 1, at 1303.

350. *Id.* at 1304.

sion in *United States v. Carolene Products Co.*, which calls for a "more searching judicial inquiry" for "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[351] On this account, judicial enforcement of individual rights does not contradict democracy; it enables it.[352] To be sure, process theory has its problems, primarily because it is difficult to find value-neutral methods for identifying groups denied sufficient political participation.[353] For present purposes, however, there is no need to address the merits of these arguments. It is sufficient to recognize that the theory illustrates how enforcement of antidiscrimination rights can serve the structural function of empowering historically marginalized groups.

G. SELF-REINFORCEMENT THROUGH COLLECTIVE EMPOWERMENT

Thus far, this Part has described how rights can empower identifiable constituencies, ameliorate collective action problems, and enable citizens to shape constitutional structure and check government actors. In this final section, I will examine why rights that serve these functions can become self-reinforcing over time and achieve a certain level of stability.

Political action is often mired with collective action problems because individuals have a powerful incentive to free ride.[354] People are more likely to take a stance if they know that others will do so as well.[355] Various individual rights can serve as what game theorists call "a focal point" for individuals with divergent interests to coordinate upon as tools or objects of political change,[356] even where disagreements remain over the meaning of the underlying rights.[357] Rights help define categories of prohibited government action and allow citi-

351. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

352. Levinson, *supra* note 1, at 1303.

353. *Id.* at 1304 n.69; *see, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 739–40 (1985); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073–77 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980). *But see* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1572–79 (2015) (describing an empirical measure of political powerlessness).

354. *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 560 (1991) ("In general, consumers of information, like all large, diffuse groups of individuals with small personal stakes, face serious organizational problems in lobbying and other political activities."); Weingast, *supra* note 261, at 237 (noting that citizens confront "a massive coordination problem that hinders their ability to police limits on sovereign behavior").

355. *See* Eskridge, *supra* note 253, at 451.

356. *See* Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1268 (2004); *see also* Levinson, *supra* note 1, at 1352; Tushnet, *supra* note 345, at 890 (noting that the Fourteenth Amendment "provided some leverage in political debates by rooting contending conceptions of equality in the Constitution, rather than in simple political preference"); Weingast, *supra* note 261, at 251 ("Constitutions . . . can serve to coordinate citizens' reactions so that citizens can police the state.").

357. *See* Tushnet, *supra* note 345, at 885 ("The adoption of the Fourteenth Amendment did not resolve the basic question of what racial equality meant.").

zens to coordinate against actual or potential violations.[358] For example, equal protection rights have served as focal points for divergent groups seeking to achieve equality before the law.[359] Likewise, constitutional rights relating to labor and education became focal points for labor activists to change government policy at the state level in the United States.[360] Despite his dismissal of individual rights as parchment barriers, Madison himself believed that individual rights could guard against the principal–agent problem in democratic politics.[361] Rights, Madison acknowledged, could serve "as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community."[362]

With this acknowledgement, Madison focused on the majoritarian benefits of individual rights. The existence of individual rights, Madison thought, could alert popular majorities to constitutional transgressions by political representatives. These untrustworthy representatives, in turn, could be punished at the ballot box by a majority able and willing to look out for its own interests.[363] Madison did not believe, however, that individual rights could prevent determined majorities from depriving minorities of their rights.[364] Madison's skepticism is confirmed by scores of countries that fail to comply, at least to some extent, with the rights commitments in their constitutions.[365]

The problem with Madison's majoritarian focus is that it is incomplete. Rights, at least in some cases, can also empower minority constituencies deeply committed to enforcing them.[366] History is replete with examples of disadvantaged or marginalized groups that rally around constitutional rights to enhance their credibility, build their movements, organize resources, demand greater freedoms, and sanction their abusive political representatives.[367] For example, people of color demanding integration and equality, women seeking equal suffrage, and LGBT groups demanding equal rights all invoked individual constitutional rights, such as the Due Process Clause, the Equal Protection Clause, and the Free Speech Clause.[368]

Likewise, groups that successfully lobbied for the incorporation of positive rights provisions celebrated the resulting changes as evidence that their message

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358. Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century*, 29 J.L. ECON. & ORG. 278, 285 (2013).

359. *See supra* Section III.F.

360. *See* ZACKIN, *supra* note 28, at 94–96 (education); *id.* at 123, 140 (labor).

361. Levinson, *supra* note 17, at 667.

362. Letter from James Madison to Thomas Jefferson, *supra* note 4.

363. Levinson, *supra* note 17, at 667.

364. Finkelman, *supra* note 6, at 313.

365. *See generally* Law & Versteeg, *supra* note 17.

366. Levinson, *supra* note 17, at 687.

367. *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 11 (1994); ZACKIN, *supra* note 28, at 56–57; Levinson, *supra* note 1, at 1352; *see also* Eskridge, *supra* note 253, at 425 (noting that "[l]aw and legal discourse played an unusually important role" in the formation and endurance of identity-based social movements).

368. *See* Eskridge, *supra* note 253, at 423–24.

had achieved societal acceptance and employed the newly codified rights to foment additional rounds of activism.[369] Especially where the constitutional right is ratified through a statewide referendum, activists could invoke the right as evidence of popular support and lobby the legislature to effectuate the right.[370] The activists could argue that the enforcement of these rights is not only a constitutional obligation for legislatures, but also a potential wellspring for future electoral support from a polity that adopted the constitutional right.[371] Through strategic legislative lobbying, many of these rights became effective without resort to litigation.[372] For example, school reformers in various states invoked constitutional rights to education to encourage legislative action primarily through political, not legal, routes.[373] Finally, as described above, minority rights can also achieve government respect where a judiciary obtains leverage from enforcing them.[374]

Individual rights can also increase the number of proponents for that right, which, in turn, can bolster its political support.[375] For example, immigration and citizenship rights allow a greater number of immigrants to exercise political power. These newly empowered immigrants, in turn, may be more prone to protecting the source of their political rights.[376] The right to form political parties can create a set of institutions (the parties themselves) with an interest in maintaining the underlying right. The freedom of the press and of speech can generate political entrenchment where media institutions begin to obtain leverage from the underlying substantive commitment.[377] The right to vote can enfranchise citizens who, for obvious reasons, will resist their subsequent disenfranchisement.[378] The right to equal protection can enable minorities to obtain property, wealth, and power, which, in turn, can enable them to protect the underlying individual guarantees.[379] Socioeconomic rights to welfare can also become self-reinforcing by creating a constituency of welfare recipients with deep commitments to maintaining the underlying benefits.[380] The right to bear arms can create a constituency of gun owners—and organizations, such as the National Rifle Association—committed to protecting the underlying right. Where these rights, and others like them, develop a critical mass of constituencies, and thereby obtain social and political support, they can become self-reinforcing over time.

369. ZACKIN, *supra* note 28, at 56–57.
370. *Id.* at 60.
371. *Id.*
372. *Id.*
373. *Id.* at 68–69.
374. *See supra* Section II.C.
375. *See* Levinson, *supra* note 17, at 688.
376. *Id.*
377. *See supra* Section V.B–C.
378. Levinson, *supra* note 17, at 689; *see supra* Section II.A.
379. Levinson, *supra* note 17, at 730; *see supra* Section II.F.
380. Levinson, *supra* note 17, at 687.

Self-reinforcement is more likely to occur where the constituencies empowered by individual rights play a pivotal role in certain elections. Where that happens, political leaders may have strong incentives to protect and even expand the underlying right. For example, if a constitutional right to bear arms is significant for a pivotal group of constituents—as is arguably the case in several states within the United States—that can prompt political action to appeal to that group and protect the right. Certain rights—such as the right to religious liberty—can also obtain popularity where they are historically resonant within a certain polity.[381] Recall from the above discussion that Congress enacted the RFRA by bipartisan majorities in direct response to the Supreme Court's narrow interpretation of the Free Exercise Clause in *Employment Division v. Smith*.[382] Some members of Congress were undoubtedly motivated by electoral concerns to protect an individual right that has particular salience with powerful constituencies in the United States.

The self-reinforcement of rights is in part a function of a behavioral bias called the endowment effect. The endowment effect refers to the empirical finding that people tend to overvalue things (including rights and privileges) they already own.[383] Loss aversion, a corollary to the endowment effect, refers to the "tendency to fear losses more than one values gains."[384] Under the endowment effect and loss aversion, those who benefit from existing constitutional rights will value those benefits more than those who would benefit from abolishing or altering them.[385] As a result, one might expect those who benefit from the existing rights to invest more in retaining them than those who would profit from change.[386]

The endowment effect is likely to be particularly salient where the constitutional text specifically identifies the groups to be benefited by the individual right. For example, according to an empirical study by Adam Chilton and Mila Versteeg, the right to form political parties and the right to form unions are likely to obtain government compliance.[387] Importantly, these rights are narrow in scope and clearly identify who will be benefited. This specificity can enable these groups to be more proactive in enforcing the right because the right identifiably belongs to them and them alone.[388]

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381. *See* ANTHONY GILL, THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY (2008).

382. 494 U.S. 872 (1990); *see also supra* Section II.E.

383. Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 31 (2011); Steffen Huck et al., *Learning to Like What You Have—Explaining the Endowment Effect*, 115 ECON. J. 689, 689 (2005); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194 (1991).

384. *See* Tom Ginsburg et al., *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291, 321 (2014).

385. Clayton P. Gillette, *Lock-in Effects in Law and Norms*, 78 B.U. L. REV. 813, 827 (1998).

386. *Id.* at 827–28.

387. *See* Chilton & Versteeg, *supra* note 20, at 576.

388. *Id.* at 578.

None of this is to suggest that all individual rights will obtain stability over time. For numerous reasons, the codification of a right may not empower a critical mass of citizens with incentives to protect it, in which case the right may not become self-reinforcing. For example, according to Chilton and Versteeg's empirical study, the right to freedom of movement, which generally does not generate government respect, is amorphous and fails to identify a specifically protected group or entity.[389] As a result, the endowment effect is likely to be less salient for that particular right.[390] In some cases, the costs of embracing the right can outweigh its benefits. For example, the exercise of free speech rights in a non-democracy may prompt retaliation by a tyrannical government. In that case, a critical mass of proponents for that particular right may not develop.

In addition, although the endowment effect and loss aversion bolster self-reinforcement of rights, over the lifetime of a constitution, the initial coalition that benefited from the adoption of a constitutional right may dissipate.[391] Depending on the time that has elapsed, the coalition for whose benefit the provision was adopted might no longer exist and efforts to recreate it might fail.[392] In such cases, the endowment effect and loss aversion may not generate self-reinforcement. The Prohibitionists are a good example of a group that coalesced only temporarily. Although they successfully lobbied for the adoption of the Eighteenth Amendment, which established Prohibition, they were unable to stop its repeal thirteen years later due in part to the temporary nature of their alliance.[393]

In this Part, the Article focused on a relatively intuitive structural function of rights: the political empowerment of the citizenry. It explained how rights can become self-reinforcing where they empower identifiable constituencies and ameliorate collective action problems. Although rights are neither necessary nor sufficient for empowering citizens, they can nevertheless serve as powerful tools with which to advocate change, check government institutions, and channel majorities and political actors towards rights enforcement.

CONCLUSION

Structural rights, at first blush, may appear to be a paradoxical construct. After all, the dichotomy between rights and structure is well entrenched in constitutional theory and doctrine, which treats them as categorically different phenomena. This Article added complexity to this simple dichotomy by explaining how individual rights can serve the structural function of generating and distributing power. Like structural provisions, many individual rights distribute

389. *Id.* at 578.
390. *Id.* at 578.
391. *See* Gillette, *supra* note 385, at 828.
392. *See id*.
393. *See* Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 119 (1993).

authority to the judiciary, legislature, executive, and citizenry, and give rise to complementary institutions.

This study has several payoffs for constitutional theory and doctrine. It is a theoretical mistake to cast rights and structure as conceptual opposites where rights serve functions similar to structure. The rights–structure distinction is much more elusive and porous than is commonly assumed. By pigeonholing provisions into "structure" and "rights" buckets, constitutional theory also misses opportunities to examine how they fit into a coherent, harmonious whole.

Perhaps most importantly, the study of structural rights should cause constitutional thinkers to hesitate before instinctively casting individual rights aside as parchment barriers. The standard narrative, based on Madison's parchment barriers theory, lacks nuance in an important respect. The Madisonian premise treats all individual-rights provisions as equals and collectively dismisses them as parchment barriers. But individual rights are not all equal. Where, as I describe above, rights create or empower constituencies with incentives to protect the underlying substantive commitments, rights can begin to exhibit structure-like characteristics—including some level of stability and self-reinforcement.