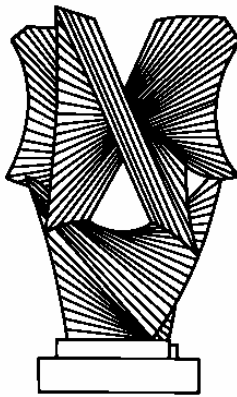


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EMERGENCIES AND DEMOCRATIC FAILURE

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Abstract. Critics of emergency measures such as the U.S. government's response to 9/11 invoke the *Carolene Products* framework, which directs courts to apply strict scrutiny to laws and executive actions that target political or ethnic minorities. The critics suggest that such laws and actions are usually the product of democratic failure, and are especially likely to be so during emergencies. However, the application of the *Carolene Products* framework to emergencies is questionable. Democratic failure is no more likely during emergencies than during normal times, and courts are in a worse position to correct democratic failures during emergencies than during normal times. The related arguments that during emergencies courts should protect aliens, and should be more skeptical of unilateral executive actions than of actions that are authorized by statutes, are also of doubtful validity.

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EMERGENCIES AND DEMOCRATIC FAILURE

In recent debates about the government's response to terrorism, and more generally about the relationship between emergencies and constitutionalism, a prominent argument has been that malfunctions in the political system will cause antiterror policies to systematically harm the interests of political, ethnic or ideological minorities. Of course in a partially majoritarian democracy, minorities will often lose. Yet those who advance this sort of argument have something more specific in mind. Self-interested majorities will cause government policy to provide too much security, relative to an impartial baseline somehow defined, because those majorities do not bear the full costs of increased security. Rather democratic majorities partially externalize the costs of increased security onto minorities. "[A]s almost always happens, the individuals whose rights are sacrificed are not those who make the laws, but minorities, dissidents and noncitizens. In those circumstances, 'we' are making a decision to sacrifice 'their' rights – not a very prudent way to balance the competing interests."¹ We dub this view and its variants the democratic failure theory.

Rational and well-motivated governments will provide more security as threats increase. On what grounds might one want constitutional rules to block this shift? One class of arguments focuses on the risk that governments will act irrationally, due to panic or other decisionmaking pathologies that afflict officials or voters. A different class of arguments, which is our sole focus here, suggests that government will act rationally, but not to maximize the welfare of the whole polity. Government will wholly or partially externalize the costs of security onto nonvoters or other politically unrepresented groups. The structure of representation will thus cause government to provide too much security, from the social point of view.

On several counts, however, the democratic failure theory is puzzling, and our aim here is to express skepticism about it. First, it is not clear what the account has to do with emergency. The structures of voting and representation that are said to produce democratic failure are the same in both emergencies and normal times. Perhaps the emergency causes a loss for society as a whole. But it is still unclear why the new, post-emergency equilibrium will be relatively worse for the minority than was the old, pre-emergency equilibrium; the minority should get the same proportional slice of the social product it had before, albeit from a smaller pie. The possibility that a majority will externalize costs onto nonvoters or other minorities is just a general structural charge against democratic decisionmaking, one that can apply at any time, not merely in time of emergency or terrorist threat. There is little evidence, and no theoretical reason to believe, that democratic failure is more likely in emergencies. Indeed, there is some evidence that minorities fare especially well in times of emergency, because government has more need

¹ GEOFFREY R. STONE, *PERILOUS TIMES* 531 (2004). Other versions of this position include Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 *Journal of Political Philosophy* 191, 194 (2003) (expressing a worry that changes in security policy may "involve[], in effect, a proposal to trade off the liberties of a few against the security of the majority"); David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, 31 *Int. J. Legal Information* 290, 304 (2003).

of their contributions. Emergencies have often been an engine of progressive government and policy reform.

Second, just as the democratic failure theory is not really tied to emergencies, so too it does not necessarily imply that government will provide excessive security. Political distortions may arise whenever the majority does not bear the full costs of its policies; when this occurs, public goods will be supplied at the wrong levels. But security is just one public good among others. Another such good is liberty, which depends upon government provision of the public goods that protect liberty, such as law enforcement.² It is equally consistent with the democratic failure theory that majorities will cause government to supply excessive liberty – insufficient regulation of terrorist threats – when majorities do not bear the full expected costs of terrorism, perhaps because those costs are concentrated in particular areas. Majorities may externalize the costs of liberty as well as the costs of security.

The best construal of the democratic failure theory is that it is not really about security policy in times of emergency. On this version, the account just applies during emergencies the standard approach of representation-reinforcing judicial review, derived from the *Carolene Products* case³ and the work of John Hart Ely.⁴ Courts should presumptively require government to proceed through general laws and policies, as opposed to narrowly targeted ones. Government action directed against dissenters, the disenfranchised, or discrete and insular groups among the citizenry should be strictly scrutinized to smoke out animus or opportunistic scapegoating of ideological, political or ethnic minorities, and this is true in both emergencies and normal times.

We will suggest, however, that the *Carolene Products* framework misfires during times of war or other emergency, whatever its value in ordinary settings. Here aliens and citizens present different cases. Where resident aliens and other de jure nonvoters are concerned, there is a serious problem, well-known in democratic theory and elsewhere, that affects the democratic failure theory. Why should the interests of resident aliens be included in the social welfare function that, in the democratic failure theory, provides the baseline for measuring political “distortion”? After all, many governmental decisions affect the interests of residents of Canada, or China, despite their lack of representation in the American political system. The puzzle is why the interests of resident aliens should be deemed as weighty as those of citizens, while the interests of nonresident aliens need not be. These problems exist during normal times, but are much accentuated during times of emergency, when the status and regulation of aliens become a more pressing problem.

Where political or ethnic minorities among the citizenry are concerned, the problem of defining the scope of the demos does not arise, but other problems remain. When faced with government action during emergencies, the costs of the searching judicial review recommended by *Carolene Products* increase, often to unacceptable levels. Smoking out government animus or opportunism requires information the judges do not have in times of emergency; the costs of judicial mistakes are higher, because judicial invalidation of a policy necessary for national security may have disastrous

² See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* 50 (1999).

³ *Carolene Products Co. v. United States*, 323 U.S. 18 (1944).

⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST; A THEORY OF JUDICIAL REVIEW* (1980).

consequences; and the sheer delay created by vigorous judicial review is more costly as well, because in emergencies time is typically at a premium. The judges know all this, which is why they defer heavily to government in times of emergency, even with respect to policies that democratic failure theorists find, in hindsight, to be infected with animus or opportunism.

The upshot is that the *Carolene Products* approach should neither be accepted nor rejected wholesale; much depends upon the political setting and upon the nature of the groups and interests at issue. Emergencies strain the *Carolene Products* framework, and in some places the framework cannot hold up. At the retail level, we will propose the following views. (1) We will accept for the sake of argument that *Carolene Products* is a sensible approach to judicial review of laws affecting citizens in normal times.⁵ (2) We suggest that *Carolene Products* cannot justify genuine heightened scrutiny – nondeferential review – of laws affecting citizens in times of emergency, and that the judges will predictably refuse to engage in such scrutiny even if it were desirable. (3) We are skeptical that *Carolene Products* can coherently be applied to laws affecting aliens and other persons who are not obviously members of the political community, either in times of emergency or in normal times. The problem of the boundaries of the political community is, however, most serious in times of emergency, where the regulation of aliens becomes a more pressing issue.

The article is organized as follows. Part I sets out a cost-benefit baseline for security policy and disentangles some conceptual questions. In Part II we define “democratic failure” and contest the assumption, common to the theories we examine, that there is a necessary link between democratic failure and excessive security. We suggest that the democratic failure theory cannot uniquely predict excessive government provision of security; self-interested majorities may also provide excessive levels of other public goods, including liberty. Just as political distortions in normal times cause policy to supply inadequate regulation of firearms and other dangerous goods, so too in times of emergency political distortions may cause insufficient protection of minorities’ security, perhaps by inadequate regulation of terrorist threats whose expected costs fall disproportionately on minorities.

Parts III and IV examine two different versions of the democratic failure theory, which hold different views about the relationship between democratic failure and emergencies. In the first version, democratic failure is especially likely in times of emergency. Part III questions this view. Even on the internal logic of the theory, democratic failure is not more likely in times of emergency. If the structure of voting and representation cause government to act on behalf of a majority rather than on behalf of all, this is equally true in normal times as well as during emergencies. An emergency is just an exogenous shock that reduces the size of the social pie but that need not change the proportions of the pie that are enjoyed by different groups. There is little historical evidence that democratic failure is especially likely in times of emergency; to the contrary, emergencies have often bettered the position of minorities, because government has greater need of their political, economic and military contributions.

⁵ One of us has argued that *Carolene Products* review should not apply even in normal times. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (Harvard University Press, forthcoming 2006). But we will bracket that broader position here.

Part IV addresses a different (and in our view better) version of the democratic failure theory. On this version, democratic failure is no more likely in emergencies than in normal times, but no less likely either. The same *Carolene Products* framework that applies during normal times applies during emergencies. General laws are presumptively valid, because they force majorities to internalize the social costs of their actions, but policies or laws that target racial, ethnic or political minorities should be given strict scrutiny, and are presumptively invalid.

As against this view, we suggest that the standard *Carolene Products* approach comes unglued during times of emergency. Judges face a risk of committing errors in two directions: they may erroneously validate policies that stem from democratic failure, or they may erroneously invalidate measures necessary for national security. The risks and costs of the first type of error are constant across both normal times and emergencies, but in emergencies the risks and costs of the second type of error spike upward. In times of emergency, the judges' information is especially poor, their ability to sort justified from unjustified policies especially limited, and the cost of erroneously blocking necessary security measures may be disastrous. Included among those costs is the cost of delay, which amounts to a temporary blockage of new policies, and which is especially serious during emergencies, where time is all. In general, the difference in the stakes between emergencies and normal times makes the limited capacities of judges decisive. The judges themselves have typically recognized this.

These institutional points apply to both citizens and aliens, but Part IV also considers the distinctive problems that resident aliens pose for the democratic failure theory. We suggest that resident aliens are if anything less likely to be subjected to arbitrary discrimination than are discrete and insular subgroups among the citizenry. If aliens lack the vote, they possess an exit option that citizens realistically do not; the structure of the international order will constrain majoritarian oppression of aliens; and aliens' welfare will itself be a component of the majority's welfare, which government is assumed to maximize on the democratic failure theory. A brief conclusion follows.

I. THE DEMOCRATIC FAILURE THEORY

We begin by setting forth a simple account that typically serves as the implicit foil for the democratic failure theory. We assume that there is a basic tradeoff between security and liberty.⁶ Both are valuable goods that contribute to social welfare, so neither good can simply be maximized without regard to the other. Of course, at certain levels, security and liberty are complements as well as substitutes. Liberty cannot be enjoyed without security, and security is not worth enjoying without liberty. And there is something like a Pareto frontier for liberty and security; in some situations rational

⁶ Waldron offers a series of cautions about this assumption. Most importantly, Waldron cautions that "diminishing liberty might also diminish security against the state, even as it enhances security against terrorism," Waldron, *supra*, at 195, and that a proposal may "trade off the liberties of a few against the security of the majority." The latter point is the focus of our argument. The former point identifies a cost of increasing security, and is thus internal to the tradeoff we assume. More generally, Waldron expresses skepticism about the tradeoff assumption, but the cautions he supplies just identify considerations that can be folded into the balancing analysis, as we do throughout.

policymakers can increase security at no cost to liberty, or increase liberty at no cost to security. But it is plausible to assume that advanced liberal democracies are typically at or near the frontier already. In their circumstances, an appreciable increase in security will require some decrease in liberty, and vice-versa.⁷ The problem from the social point of view is one of optimization: it is to choose the point along the frontier that maximizes the joint benefits of security and liberty. (Here and later we bracket and ignore all of the well-known problems with aggregative social welfare functions that compare goods across persons). Neither security nor liberty is lexically prior; no claims of the type “liberty is priceless” or “security at all costs” will be admitted.

Suppose then that government is both rational and well motivated. Rational here just means that the government makes no systematic errors in assessing the likely effects of increases or decreases in security and liberty. Although government makes mistakes, those mistakes are randomly distributed; thus government’s assessments are correct on average. Well-motivated means that the government acts so as to maximize the welfare of all persons properly included in the social welfare function. This formulation is deliberately vague, because we bracket for now the problem of whose welfare, exactly, should enter into the social welfare function. In Part IV we examine more and less expansive views on this question: perhaps the welfare only of citizens should be taken into account, or of citizens plus resident aliens, or of all persons affected by government policies wherever they reside.

How will a rational and well-motivated government respond to terrorist threats? As the benefits of security increase due to exogenous threats such as terrorism, a well-functioning government will supply more security and less liberty, because the value gained from the increase in security will exceed the losses from the decrease in liberty. Again, government may make mistakes, but is no more likely to make mistakes about security policy than it is about more routine business, and there will be no predictable or systematic skew in governmental decisionmaking.

If this simple picture is right, then it is hopeless for judges to attempt to second-guess government security policy. In particular cases judges may do better than government at assessing the relative likelihood of threats to security and liberty, or the overall costs of particular policies. But this will be wholly fortuitous, and judges who think they have guessed better may guess worse instead. Judges are generalists, and the political insulation that protects them from current politics also deprives them of information,⁸ especially information about novel threats and necessary responses to those threats. If government can make mistakes, adopting unjustified security measures, judges can make mistakes as well, sometimes invalidating justified security measures. If the simple picture is correct, there is no general reason to think that judges can do better than government at balancing security and liberty. Constitutional rules do no good, and some

⁷ We assume a budget constraint. We assume, in other words, that the courts cannot simply order the government to spend more money in order to enhance liberty (for example, more elaborate procedures at airports that do not unduly delay travelers) without reducing security. This never seems to be an issue in the cases, perhaps because courts recognize that more expensive measures are not politically feasible, so that the actual effect of such an order would be to reduce security.

⁸ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994).

harm, if they block government's attempts to adjust the balance as threats wax and wane. When judges or academic commentators say that government has wrongly assessed the net benefits or costs of some security policy or other, they are amateurs playing at security policy, and if government's decisionmaking is undistorted, then there is no reason to expect that it can be bettered in any systematic way.

But of course the commentators frequently deny that the simple picture we have set out is correct. The basic claim is the government's decisionmaking is subject to systematic distortions of cognition (including emotional reactions) or of motivation. Commentators either deny that government acts rationally, deny that it acts as a well-motivated decisionmaker, or deny both assumptions.

One class of arguments denies that government chooses policies rationally; we label this the panic account.⁹ Government officials panic, or else government officials are rational but act as tightly constrained agents who supply the irrational policies that panicked constituents demand. Some versions of the panic account center on the role of emotions, such as fear, in governmental decisionmaking; some are more strictly cognitive, focusing on heuristics and biases such as availability; some emphasize social influences, such as herding and group polarization. In any of these versions, however, the panic account holds that government does not form accurate (on average) assessments of threats, and will thus provide excessive security.

In other work, we have expressed skepticism about the panic account, on several grounds.¹⁰ Fear can improve decisionmaking as well as hamper it, because fear supplies motivation that can overcome preexisting inertia. In some circumstances fear can even sharpen the assessment of threats. Cognitive failings and social influences have no inherent valence; although they are capable of generating security panics, which cause government to supply excessive security, they are equally capable of generating libertarian panics, which cause government to supply inadequate security measures. In any event, there is no class of decisionmakers who can be insulated from panic at acceptable cost, not even judges.

Here we focus on a different class of arguments, the democratic failure theory. This account differs from the panic account because it accepts that government officials are rational, and act as agents for a majority of citizen-voters who are also rational. (Later we discuss the possibility that officials enjoy agency slack). What is distinctive is a further assumption: the citizen-voters are not only rational, but self-interested, and this causes their governmental agents to supply security policies that benefit the majority at the expense of political, ideological or ethnic minorities. Government chooses security policy rationally, but its goal is to maximize the welfare of current democratic majorities, rather than the overall welfare of the polity. From the social point of view, government acts rationally but not in a well-motivated fashion.

There are several important variants of this theory. One dimension of variation involves the identity of the relevant majorities and minorities. Sometimes "the majority" refers to political majorities in a strict sense: citizens, who are also voters, make up the

⁹ See STONE, *supra*; Cass R. Sunstein, *Fear and Liberty*, 71 SOCIAL RESEARCH 967 (2004).

¹⁰ See Eric Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003); Adrian Vermeule, *Libertarian Panics*, 36 RUTGERS L.J. 871 (2005).

majority, and those who cannot vote make up the minority. Although the class of non-voters includes some citizens, such as children and (in some states) ex-felons, the emphasis in this version is typically upon resident aliens, illegal immigrants, and other outsider groups who are formally barred from the franchise. Here an important claim is that security policy after 9/11 has imposed large and differential burdens upon aliens and immigrants; according to this view, the disenfranchisement of these groups ensures that majoritarian politics will not adequately represent their interests. The voting majority instead externalizes all or part of the costs of security. For examples, consider the detention of illegal immigrants on security grounds;¹¹ the Presidential order establishing military commissions, which applied only to non-citizens;¹² the Patriot Act's special provisions for noncitizens;¹³ and the treatment of aliens detained at Guantanamo Bay.¹⁴

In another version, "minority" refers to some ethnic or racial minority, such as Arab-Americans, and the "majority" refers (usually implicitly) to whites. Here the claim, although usually implicit, is that ethnic minorities are formally entitled to vote, but lack effective political power, ensuring that democratic decisionmaking will not adequately weigh their interests. After 9/11, on this view, new security policies have imposed differential burdens on minorities. Consider the claim that federal officials have been engaging in ethnic profiling in airport screening and other security-related searches,¹⁵ or the inclusion of some Arab-Americans in the FBI's program of interviewing "persons of interest" who might pose security risks.¹⁶ The sometime emphasis on ethnic minorities blurs the boundaries between the panic account and the democratic failure theory. To the extent that security policies such as ethnic profiling are said to embody invidious discrimination, rather than statistically rational discrimination, then democratic failure may stem from irrational standing passions and ethnic animus.

There is some overlap between these two versions of the democratic failure theory. Important policies after 9/11 have applied only to non-citizens, yet within that category have focused on ethnic minorities. Examples include the special registration program, now defunct, which required aliens in the United States from a designated list of (almost exclusively) Muslim nations to register with the INS; the Absconder Initiative, under which aliens from nations with substantial Al Qaeda presence were targeted for removal; and Operation Liberty Shield, which subjects asylum applicants from such nations to mandatory detentions.¹⁷ Such programs combine selective regulation of non-citizens with selective regulation of Arabs or Muslims or both.

¹¹ See Mary Beth Sheridan, *Immigration Law as Anti-terrorism Tool; Use of charges to detain or deport suspects criticized by Muslim groups*, Wash. Post, June 13, 2005, at A1.

¹² See Tim Golden, *U.S. Is Examining Plan to Bolster Detainee Rights*, N.Y. TIMES, March 27, 2005, at A1.

¹³ See Daphne Eviatar, *Foreigners' Rights in the Post-9/11 Era: A Matter of Justice*, N.Y. TIMES, October 4, 2003, at B7.

¹⁴ See Neil A. Lewis, *Guantanamo Prisoners Seek to See Families and Lawyers*, N.Y. TIMES, December 3, 2002, at A22.

¹⁵ See Laurie Goodstein, *A Nation Challenged: Civil Rights; American Sikhs Contend They Have Become a Focus of Profiling at Airports*, N.Y. TIMES, November 10, 2001, at B6.

¹⁶ See Eric Lichtblau, *U.S. Holds Virginia Man After Taping at Bridge*, N.Y. TIMES, August 25, 2004, at A14.

¹⁷ Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 413-14 (2004).

If the diagnosis is democratic failure, what is the prescription? Either in the case of non-citizen non-voters such as resident or temporary aliens, or in the case of dissenters or ethnic minorities among the citizenry, the democratic failure theory applies or adapts to emergencies the idea of representation-reinforcing judicial review of democratic decisionmaking, stemming from the *Carolene Products* case¹⁸ and from the work of John Hart Ely.¹⁹ If government cannot be trusted to engage in ordinary balancing of security and liberty, because systematic distortions produce excessive levels of security, judges should develop rules that produce a kind of second-order balancing.²⁰ The aim of these second-order rules is to push governmental decisions on the security-liberty tradeoff back towards the optimum. One prescription is prophylactic overprotection of free speech, although this is typically tied to the panic account, which supposes that emergencies will produce a “pathological perspective”²¹ that causes government officials to overregulate political speech. For the democratic failure theory, the crucial prescription is generality: laws must apply generally to all affected classes of citizens or persons, in order to ensure that majorities do not impose selective burdens that voters would be unwilling to bear themselves.²² In Justice Jackson’s words, “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”²³ In our terms, generality ensures that democratic majorities internalize the costs of government policies.

It is not clear, however, what the *Carolene Products* framework has to do with emergencies; it is a standard framework for judicial review in normal times on purely domestic issues. Theories of democratic failure often leave the connections among emergencies, democracy and *Carolene Products* review unspecified or opaque. We may distinguish three possible views, as follows:

(1) Judicial review should be stricter in emergencies than in normal times. This is a straightforward entailment of the panic account, which theorists frequently run together with the democratic failure theory. In the pure form of the democratic failure theory, however, it is unclear why democratic failure should be more worrisome in times of emergency. The basic mechanism of democratic failure – the mismatch between formal voting rights or de facto political influence, on the one hand, and the population whose welfare government should promote, on the other – exists both in emergencies and in normal times. Democratic failure theorists seem to worry that majorities will scapegoat minorities during emergencies or seize on the emergency to harm minorities in

¹⁸ *Carolene Products*, *supra*.

¹⁹ ELY, *supra*.

²⁰ Sunstein, *supra*, at 984.

²¹ See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985)

²² See FRIEDRICH VON HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); JAMES M. BUCHANAN & ROGER D. CONGLETON, *POLITICS BY PRINCIPLE, NOT INTEREST: TOWARDS NONDISCRIMINATORY DEMOCRACY* (1998); Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47; Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002).

²³ *Railway Express Agency v. People of State of New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

opportunistic fashion, but that worry lacks a direct connection to the mechanisms of distortion that these theorists typically adduce. We expand upon these puzzles in Part III.

(2) Judicial review should be equally strict in emergencies and in normal times. This does not follow from the panic view, which supposes that governmental decisionmaking suffers from special distortions in times of emergency. The democratic failure theory might best be understood to adopt this position, however; the account would cheerfully concede that there is nothing special about emergencies. It is just that the same representation-reinforcing approach that always applies, still applies in times of emergency. We suggest in Part IV that this is the best version of the democratic failure theory. But if it is, then democratic failure is not a distinctive lens through which to view security policy.

(3) Judicial review should be less strict, more accommodating or deferential, in emergencies than in normal times. Courts cannot systematically improve upon government's first-order balancing of security and liberty. Whatever hope they have of doing so in normal times, as in ordinary criminal settings where security and liberty trade off against each other, is dramatically attenuated during times of emergency, because the judges' information is especially poor and the costs of judicial mistakes are especially high.

Our view is that position (3) is correct and that positions (1) and (2) are wrong. One might claim that this view attacks a straw man. On this claim, even the most vociferous critics of judicial passivity during emergencies agree that judges should be more deferential during emergencies than during normal times; the critics' complaint is only that judges go too far, and are more deferential than circumstances warrant. We agree that this is a possible reading of the critics, though they are hardly clear on this point. However, their relentless assault on past judicial practice suggests that if they do think judges should be more deferential during emergencies than during normal times, then they believe that emergency-level deference should still be extremely low. Our view, by contrast, is that emergency-level deference should be extremely high. It is impossible to quantify this difference, or describe it with specificity, of course; but the practical implications are clear. The critics think that history shows that judges have exercised too much deference; we think that history shows that judges have acted correctly. The critics urge judges to strike down post-9/11 Bush administration policies; we think that judges should defer, as they always have done, though we have no view about whether these policies are correct.

Note that the strictness of judicial review refers to the actual level of deference to government that judges afford, rather than to the nominal rules of scrutiny that judges employ. We may illustrate with the case of nongeneral laws that impose differential burdens on ethnic minorities or aliens. Suppose that judges apply some form of strict or at least heightened scrutiny to such laws in normal times, but admit an exception for cases in which government has an especially important or compelling interest. In times of emergency, judges might say either that nongeneral laws receive reduced scrutiny, or that nongeneral laws are to receive the "same" heightened scrutiny that they would receive in normal times. But even the latter position could be compatible with increased deference to government, if judges recognize a broader range of compelling government interests in emergencies than in normal times. In what follows, we will focus solely on the

operational level of judicial deference to government, which may be either high or low, rather than on the nominal rules. In our terminology, to increase the range of interests that count as compelling, or to decrease the weight of interests counted as compelling, amounts to increasing the deference that is afforded to government.

For completeness, we will mention several further complications surrounding the democratic failure theory. The first issue involves the standard question whether democratic failure should be measured against a welfarist baseline or against some nonwelfarist theory of rights. We will largely ignore this complication; for simplicity, we have stated the democratic failure argument in welfarist terms. This need not be a sectarian or contentious assumption, nor does it produce a major distortion of the arguments. For one thing, rights are themselves an important component of welfare; more importantly, the differences between welfarist and nonwelfarist accounts of rights are not relevant to the issues we discuss. Differences between foundational theories of rights rarely make a difference to the institutional issues surrounding emergencies and democratic failure, so our welfarist statement of the theory is just an expository convenience.

Second, the democratic failure theory is sometimes combined with a concern about the ratchet effects of security policies. “The argument that we are only targeting aliens’ rights, and therefore citizens need not worry, is in an important sense illusory, for what we do to aliens today provides a precedent for what can and will be done to citizens tomorrow.”²⁴ The panic account is also (sometimes) combined with the ratchet concern. We have criticized that concern elsewhere, because ratchet accounts typically lack any mechanism that makes policies spill over into new areas or that makes them stick after the emergency has passed, and because there is no evidence for ratchets in the history of American security policy.²⁵ We will ignore the ratchet issue here.

Third, some strands of the democratic failure theory emphasize that laws and policies should be “general.” Is this the same as the *Carolene Products* approach? We will treat praise for generality as a minor variant of *Carolene Products*. “Generality” cannot be taken literally; a statute that applies only to a very small class C is fine, not even presumptively bad, so long as there is some normatively valid reason to target C. The rationale for the classification is still general, in the sense that it would apply to anyone similarly situated. (The Supreme Court once said that a statute applying only to Richard Nixon defined “a legitimate class of one.”²⁶) “Generality,” by itself, has no normative appeal: “[r]acial, religious and all manner of discrimination are not only compatible [with] but often institutionalized by general rules.”²⁷ The question is what counts as a valid reason for targeting or selectively burdening a subgroup, and the appeal to “generality” does not help with that question. The real worry is that the relevant class will be defined along prejudiced or invidious lines, according to some entirely independent theory of prejudice or invidiousness. A theory of judicial review under which judges should ensure the generality of laws and policies is either untenable, or else

²⁴ David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, 31 Int. J. Legal Information 290, 304 (2003).

²⁵ See Posner & Vermeule, *supra*, at 612.

²⁶ *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977).

²⁷ Joseph Raz, *THE AUTHORITY OF LAW* 216 (1979).

morphs into a theory of judicial review that aims to weed out prejudiced or invidious laws and policies. That is the core of the *Carolene Products* enterprise, which we examine below.

Finally, just as either the panic account or the democratic failure theory can be combined with a concern about ratchets, so too either account can be combined with a concern about agency slack between voting majorities and government officials. With respect to the panic account, consider the suggestion that security panics are produced by self-interested security entrepreneurs: government officials and interest groups who whip up security panics for political advantage.²⁸ The microfoundations of the account are typically left unspecified. How exactly does expanding the power of the governmental security apparatus personally benefit self-seeking officials and groups?²⁹ And it seems equally possible that officials, candidates for office, and interest groups may act as self-interested libertarian entrepreneurs -- we might think of the ACLU and Michael Moore most recently -- who whip up a libertarian scare, exaggerating reports of governmental intrusion in order to establish a public climate that is hostile to governmental power, to oust a disfavored incumbent, or to increase membership and donations. Most simply, however, it is not clear that this variant adds very much to the panic account. Either democratic majorities panic and constrain their agents to adopt panicky policies, or autonomous officials whip up panics among a pliable populace; either way, the important point is that policies are biased towards excessive security.

There is a similar variant of the democratic failure theory. Instead of emphasizing cost-externalization by self-interested majorities acting through tightly constrained agents, one might emphasize the risk that officials who enjoy agency slack will opportunistically promote their individual or institutional interests; perhaps such officials would even use their freedom to harm political or ethnic minorities. Here too it is not clear how much this variant adds. If the principal worry is that autonomous officials will scapegoat minorities to augment their individual or institutional power, then the presupposition must be that there is some pre-existing susceptibility to political or ethnic hatred among the population, and it does not very much matter whether that hatred vents itself through majorities acting through their agents or through autonomous officials generating or exploiting the hatred for self-interested reasons. Either way, excessive security is the problem, not the precise mechanism that produces it; and in any event the focus on popular emotions shades back into the panic account again. In what follows, we will note these shadings and variants when relevant, but will focus principally on the most straightforward version of the democratic failure theory, under which rationally self-interested officials act as agents for rationally self-interested majorities.

II. DEFINING DEMOCRATIC FAILURE

What exactly is a “democratic failure”? In Section A, we offer a simple definition that is implicitly presupposed by the theories we examine. In Section B, we suggest that democratic failure theories focus too narrowly on the risk that government will

²⁸ STONE, *supra*, at 533-35.

²⁹ See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

excessively reduce the liberties of minorities while providing too much security to the public. In fact, the democratic failure theory does not necessarily predict that government will supply too much security. It is equally possible, given the theory, that a government pandering to self-interested majorities will supply minorities with too much liberty, or inadequate security.

A. “Democratic Failure”

To identify a democratic failure, one needs to know what counts as a “democratic success.” In welfarist terms, the following benchmark is common.³⁰ Imagine a society with a political system that implements policies that affect the welfare of citizens. Certain policies would, if implemented, be Pareto-improving: they would make at least one person better off while making no one else worse off. The political system either does or does not implement these policies. If it does, there is a democratic success; if it does not, there is a democratic failure.

The Pareto standard is too austere for a real government, however. Virtually no policy can survive that standard. We might, then, define success more loosely: a success occurs when laws are passed that enhance overall welfare. A democratic failure occurs when such laws are not passed, or laws are passed that reduce overall welfare. Defining a social welfare function that aggregates across persons is notoriously difficult³¹ – that is why the conceptually simpler Pareto standard is usually used in the literature – but we will stipulate, roughly, that overall welfare increases when a project makes nearly everyone better off and virtually no one worse off, or a substantial number of people significantly better off at the expense of a relatively small number of people who are made only trivially worse off.³²

Why might a political system implement a policy that fails to maximize overall welfare or that even reduces overall welfare? There are many possible answers to this question. One answer focuses on the risks of majoritarianism: if the government is elected by majority rule, and wishes to be reelected by the same majority, it will be in the interest of the government to pass laws that benefit the majority, even if those laws inflict greater harms upon the minority. But there are other, nonmajoritarian theories of democratic failure as well. In Part I we mentioned agency-cost theories, which hold that governments – including elected officials and bureaucrats – choose policies that favor their own interests or ideologies, or the interests of supporters, at the expense of the majority; because the majority cannot perfectly monitor the government’s activities, the government has freedom to use public resources for private interests. These theories come in many different flavors. Some scholars emphasize the perverse incentives of

³⁰ Timothy Besley and Stephen Coate, *Lobbying and Welfare in a Representative Democracy*, 68 REV. ECON. STUD. 67, 77 (2001).

³¹ For an overview of the problems, see SHAUN HARGREAVES HEAP, *THE THEORY OF CHOICE* (1992).

³² Another approach would be to stipulate that a democratic failure occurs whenever the majority’s will is thwarted. This approach is plainly inadequate for understanding the *Carolene Products*-style concerns that motivate this paper: the problem, according to *Carolene Products*, is not that the majority’s will is thwarted; the problem is that it is honored, but at the expense of minorities.

bureaucracies.³³ Others argue that governments favor organized interest groups such as trade organizations and unions at the expense of the majority; these groups pool resources to lobby the government, while the majority is diffuse and unorganized.³⁴ A third group focuses on problems created by asymmetric information;³⁵ a fourth on commitment problems.³⁶ There are also various theories that focus on the difficulties of aggregating preferences in a way that produces consistent, nonarbitrary social choices.³⁷

These theories have had less influence on the mainstream constitutional law literature than has the majoritarian version of democratic failure theory. There are two reasons for this. First, the agency-cost theories lack solid empirical foundations and have ambiguous implications for evaluation of law and policy.³⁸ Second, the theories do not imply that judges, even well motivated judges who seek to act in the public interest, can solve the democratic failures that the theories identify.

The second problem is the one we focus on. The problem is that even if judges are well motivated, it is unlikely that they have the institutional capacity to correct the failures predicted by agency-cost theories. Consider, for example, the interest group approach, which suggests that virtually all laws reflect the influence of interest groups. The implication of the theory is that courts should scrutinize all laws to smoke out socially harmful rent-seeking, a task that modern courts are unwilling and unable to execute, and have not since the New Deal.³⁹ It has been suggested that courts might restrict the influence of interest groups by employing proxies, such as a rule of thumb that laws providing concentrated benefits and dispersed costs harm diffuse majorities more than they benefit well-organized minorities, and therefore should be struck down.⁴⁰ Yet the proxy is too crude. Laws that provide concentrated benefits and dispersed costs will often increase overall welfare, if the beneficiaries of the redistribution have a higher marginal utility for income than does the majority, or if the beneficiaries are being given incentives to provide social goods. Laws and projects as diverse as Social Security (which benefits the elderly) and funding of basic research (which benefits universities) would be suspect. Experience has taught us that courts are in no position to evaluate such

³³ WILLIAM A. NISKANEN, *BUREACRACY AND REPRESENTATIVE GOVERNMENT* (1971).

³⁴ Gene M. Grossman & Elhanan Helpman, *Electoral Competition and Special Interest Politics*, 63 *REV. ECON. STUD.* 265 (1996).

³⁵ Besley & Coate, *supra*; for an argument that combines asymmetric information and interest group politics, see Timothy Besley & Stephen Coate, *On the Form of Transfers to Special Interests*, 103 *J. POL. ECON.* 1210 (1995) (arguing that asymmetric information leads to inefficient forms of redistribution that are hard to observe).

³⁶ Daron Acemoglu & James A. Robinson, *Inefficient Redistribution*, 95 *AMER. POL. SCI. REV.* 649 (2001) (arguing that inefficient forms of redistribution may result from the efforts of groups to increase their political influence in the future).

³⁷ The literature stems from KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951).

³⁸ For a critique, see DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE* (1995); for a brief but lucid critical survey, see Bryan Caplan, *Rational Irrationality and the Microfoundations of Political Failure*, 107 *PUB. CHOICE* 311 (2001) (emphasizing the importance of irrationality).

³⁹ See DAVID AUSTEN-SMITH, *INTEREST GROUPS: MONEY, INFORMATION, AND INFLUENCE*, IN *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 296, 321 (Dennis C. Mueller ed. 1997) (“[W]e cannot say much, on the basis of the current formal literature, about the extent to which interest groups influence policy, and we can say even less about the normative properties of such influence.”).

⁴⁰ See JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973).

laws for impermissible interest group influence. The same reasoning applies to the other types of agency cost theories.

As for the social choice paradoxes, they are mostly a theoretical possibility; it is not at all clear that they materialize in real-world legislative institutions.⁴¹ Whatever the case, the problem with these theories is that they either suggest that government policy cycles arbitrarily, in which case a court could do nothing to improve the situation, or that policies will be dictated by a self-interested agenda-setter, which is just a version of the agency-slack theory. For these reasons, we will downplay the competing accounts of democratic failure and confine our attention to the most straightforward, majoritarian version of democratic failure theory.

For all its problems, the majoritarian version of the democratic failure theory – the *Carolene Products* version – does not seem as vulnerable to objection as the agency cost and social choice versions. The reason is probably that the majoritarian version is compatible with a moderate role for the courts, one to which we are accustomed. Not all laws are the result of democratic failures, thus courts need not scrutinize every law that is passed. Only certain types of laws – those that are not general but that target a discrete and insular minority – need to be scrutinized. The burden placed on courts thus seems reasonable. In addition, the theory seems plausible – or, at least, has been considered plausible by many constitutional law scholars – even if it relies on a simplistic conception of democratic politics, as we discuss in Part III. The notion that majorities exploit minorities has an extremely long intellectual pedigree, is reflected in American constitutional history going back to the founding, and, in particular, seems to have been spectacularly confirmed by the history of race relations in the United States. For all these reasons, we will focus, for the most part, on the majoritarian version of the democratic failure theory.

B. Democratic Failure, Security and Liberty

If there is a democratic failure of the majoritarian sort, how will the majority accomplish its ends? Here we suggest that the democratic failure theory has no intrinsic connection to security. In particular, the theory cannot uniquely predict that government will provide excessive security and insufficient liberty. Given the structural premises of the account, it is equally possible that government will provide minorities with inadequate security, or excessive liberty.

Recall the simple view sketched in Part I, according to which government supplies some mix of security and liberty. Failure theorists emphasize the risk that majorities will cause government to supply too much security, because they do not bear the full costs of security. But the mechanism of democratic cost-externalization is pitched at too high a level of abstraction to produce the conclusion that failure theorists want to reach. If the structure of the political system allows democratic majorities to externalize costs onto minorities and outsiders, they may externalize any sort of cost, not merely the

⁴¹ See GERRY MACKIE, *DEMOCRACY DEFENDED* (2003). For responses, see Don Herzog, *Dragonslaying*, 72 U. Chi. L. Rev. 757 (2005); Saul Levmore, *Public Choice Defended*, 72 U. Chi. L. Rev. 777 (2005).

costs of purchasing security. In particular, it is quite possible that democratic majorities will externalize the costs of liberty onto minority and outsider groups, purchasing too little security because majorities do not bear the full costs of insecurity.

Majority-dominated governments have a range of policy instruments at their disposal: direct regulation, taxation, and spending, among others. Theorists of democratic failure focus on the dangers of regulation, in particular the danger that regulation will impose excessive security restrictions on minorities in order to benefit majorities. Yet when other instruments are brought into the picture, it is clear that majorities can exploit minorities, in the sense of exploitation we have defined above, through other instruments as well, and in ways that need not yield excessive security. In addition to regulation, taxation might explicitly or implicitly take from minorities to benefit majorities. Less intuitively, majorities might exploit minorities through regulation or spending that insufficiently protects minorities' security, relative to the welfarist baseline.

We may begin with some analogies from normal times and from purely domestic policy settings. Consider the claim, in debates over criminal-justice policy, that the political system invests too little in protecting minority communities from crime, especially in urban areas. "[T]o the extent that crime victims, or those who live in fear of becoming crime victims, are diffuse and poorly organized, and to the extent that a large part of the population need not share the fear that these victims bear, crime losses may be undervalued by local and state authorities, and are certainly undervalued by federal government officials."⁴² A less qualified version of the claim would run as follows. The costs of crime are borne disproportionately by minorities who live in urban areas. Yet those minorities lack a full measure of political influence, as compared to affluent libertarians who support expansive definitions of constitutional rights – rights that protect the criminals who prey upon minority communities. The affluent libertarians do not bear anything like the full costs of crime, and thus support a more expansive scheme of civil liberties than would be produced if poor minority communities had proportionate influence in the political system.

Another possible example involves government (under)regulation of firearms. Rural voters who use firearms for hunting and other purposes might object to government regulation of firearms even if increased regulation would be beneficial from the social point of view. The rural voters who block firearms regulation do not bear the full social costs of gun violence, which are partially externalized onto city dwellers. This is not solely a just-so story; there is some evidence that, whatever the prevalence of symbolic politics in other domains, voters act in strictly self-interested fashion where firearms regulation is concerned,⁴³ and voters in southern and western states are much more likely to oppose gun control than voters in states such as California and New York.⁴⁴

The common theme in these examples is that the political system shoves off the costs of liberty onto a subset of the community that lacks a full share of political power.

⁴² Saul Levmore & Kyle Logue, *Insuring against Terrorism – and Crime*, 102 Mich. L. Rev. 268, 319 (2003).

⁴³ Robin Wolpert & James Gimpel, *Self-Interest, Symbolic Politics, and Public Attitudes toward Gun Control*, 20 Political Behavior 241 (1998).

⁴⁴ *Gun Politics*, Wikipedia, available at http://en.wikipedia.org/wiki/Gun_control (last modified June 24, 2005).

The same mechanism might operate in the terrorism context. Consider the possibility that majorities who live outside of the large urban areas that are the best target for terrorism will cause the political system to invest too little in terrorism prevention, because they do not bear the full expected costs of terrorist threats. One possibility is that the red-state voters who supported the Republican party in 2000 and 2004 might cause the national political process to provide inadequate security for blue-state urban centers. Consider that a large share of federal block grants for terrorism prevention go to rural western states,⁴⁵ whereas a rational policy would, as a first approximation, spend zero dollars protecting such areas.⁴⁶ Too little is being spent on security in the most threatened areas, and too much in the least threatened areas.

The misallocation of terrorism funding no doubt represents an example of the allocative distortions produced by the Senate's geographical basis of representation. But that is the point: if the structure of Senate representation causes political distortions, those distortions have no particular valence with respect to the tradeoff between security and liberty. Political distortions may produce excessive liberty in some domains as well as excessive security in others. Moreover, the political distortions of terrorism policy go beyond appropriations to include regulation. Consider the concern that federal inspection of cargo containers entering large urban ports is insufficiently vigorous,⁴⁷ perhaps because such ports, although among the areas most threatened by terrorism, are not part of the red-state coalition.

Stories of this sort may be true or false. The point is that there is no general reason to think that cost-externalization systematically tilts in the direction of producing too much security, rather than too much liberty. Security is a public good. But there are many other public goods, including freedom from private violence, which must be protected and supported by government expenditures on security and order.⁴⁸ Whatever the optimal supply of public goods at a given time, and whatever political forces produce the actual supply at a given time, the appeal to democratic cost-externalization is compatible with insufficient as well as excessive security.

We have not yet said anything about judicial review, a topic we defer to Parts III and IV. Suppose that democratic failure can produce either excessive security or excessive liberty; perhaps it even produces both, at different times, in different places, or on different policy dimensions. Democratic failure theorists can sensibly say that courts should police both forms of democratic failure. Courts should police excessive provision of security by government, when that occurs; it is neither here nor there that government

⁴⁵ Dean E. Murphy, *Security Grants Still Streaming to Rural States*, N.Y. TIMES, October 12, 2004, at A1; Keven Diaz, *Pork-barrel security; Federal money to protect Americans from terrorism may not be going to states that need it the most. Formulas and politics are behind the disparities*, STAR TRIBUNE (Minneapolis-St. Paul), September 11, 2004, at 1A; Elizabeth Shogren, *More Federal Aid Sought for Cities at Risk of Attack; Under the current rules, a large chunk of such funds goes to less vulnerable areas. Efforts to redirect money have stalled in Congress*, L.A. TIMES, August 10, 2004, at A21.

⁴⁶ This is only a first approximation because terrorists may engage in second-order dynamic responses, shifting to targets in unprotected areas even if those targets are of lower value.

⁴⁷ See David Rosenbaum, *Under Pressure, Mischaracterizations and Misstatements*, N.Y. TIMES, October 14, 2004, at A1; GAO-04-557T, *Homeland Security: Summary of Challenges Faced in Targeting Ocean-going Cargo Containers for Inspection*, March 31, 2004.

⁴⁸ Holmes & Sunstein, *supra*.

can also supply inadequate protection to minorities. Courts might also police the latter, perhaps under the rubric of “equal protection of the laws,” whose core historical meaning encompasses governmental failure to protect minorities from third-party harms.

In practice, however, it is striking that democratic failure theorists say little or nothing about the problem of excessive liberty. No theorist has suggested that courts should reallocate anti-terrorism appropriations to beef up the security apparatus where it is most needed, or should second-guess the government’s policies for protecting blue-state ports from terrorist attack. The reason, presumably, is that judicial review of this sort would prove infeasible, and possibly counterproductive. Courts might suspect democratic failure in the underprovision of security to minorities, but would be hard-pressed to know what the optimal arrangements would be, and hard-pressed to enforce those arrangements even if they were known; government might circumvent the courts’ decisions by reallocating funding on other margins, or simply by ignoring them.

There are two lessons here, which we draw out in Part IV. First, the same problems of judicial capacity that constrain judicial review of inadequate security also constrain judicial review of excessive security. The courts’ institutional capacities are the same, whatever the mechanism of democratic failure. Thus, if critics of judicial deference do not believe courts should scrutinize laws that enhance liberty during times of emergency – such as the provisions of the Patriot Act that strengthen privacy protections – they need to explain what it is about security-enhancing laws that justifies special judicial scrutiny. Second, systemic effects and dynamic governmental responses also undercut judicial review of policies that impose excessive security. If courts police policies that produce excessive security but not policies that produce excessive liberty, government may tend to substitute the latter type of exploitation for the former. Here we merely note these problems of judicial capacities and systemic effects.⁴⁹ Part IV elaborates these points into an argument against *Carolene Products* review during times of emergency.

III. DEMOCRATIC FAILURE AND EMERGENCIES

We turn now to a critique of the two main versions of the democratic failure theory. In this Part, we criticize the version which holds that democratic failure is more likely, or more damaging, in emergencies than in normal times, so that judicial review must be more strict during emergencies.⁵⁰ Part IV turns to the view that democratic failure is equally likely in normal times and in emergencies, so that judicial review must at least be equally strict in both settings. In Part IV we also give affirmative arguments for our alternative view, which is that judicial review should be more deferential in emergencies than in normal times, even where facially discriminatory laws are at issue.

⁴⁹ For a general treatment of these two considerations, see Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

⁵⁰ This is how we read, for example, Cole and Stone, *supra*. Waldron, *supra*, also seems to suggest that democratic failure is more likely in emergencies, but says little about judicial review, and in other work is deeply skeptical of its value. See Jeremy Waldron, *Law and Disagreement* (1999).

Section A examines the principal approach to judicial review that democratic failure theorists endorse: the *Carolene Products* theory. Surprisingly, the literature is barren of efforts to model *Carolene Products* review. This is not the place to attempt our own model; thus, we will confine ourselves to some conceptual observations that set up the subsequent analysis. In Section B, we suggest that neither democratic failure theory generally, nor *Carolene Products* review in particular, can logically be tied to emergency. The structural mechanisms that are said to produce failures, primarily the structure of voting and representation, operate equally in emergencies and in normal times; nor is there historical evidence that democratic failures are systematically more likely, or more harmful, in emergencies. To the contrary, we examine mechanisms and evidence suggesting that emergencies often improve the political and economic position of minorities.

A. The *Carolene Products* Theory

The *Carolene Products* theory, unlike the agency-cost theories of democratic failure canvassed in II.A, appears to have straightforward normative implications and straightforward implications for the role of courts. If majorities exploit minorities by enacting laws that target the minorities, then courts should have a preference for general laws, which require the self-interested majority to internalize costs. Courts should be less deferential toward targeted laws than toward general laws.

But the concern that self-interested majorities will impose excessive costs on targeted minorities is itself ambiguous. Virtually all laws, taken in isolation, harm a minority of the population: gas taxes save energy but hurt poor people who drive a great deal; gun control laws save lives but harm people who need guns to protect themselves; environmental laws protect the environment but may harm people who hold certain jobs; and so forth. Thus, the *Carolene Products* theory assumes that a law cannot be evaluated in isolation.⁵¹ A law that benefits a majority while injuring a minority may be acceptable as long as it is not the case that the political process generates only (or mostly) laws that have a similar effect. Rather, a well-functioning political process sometimes produces laws that benefit any given minority. Because different coalitions assemble on different issues, there are no groups who are repeat losers or structurally disfavored minorities.

This is probably why *Carolene Products* refers not to any minority, but to (1) a “discrete and insular minority” that (2) is historically oppressed because of (3) “prejudice.”⁵² The people who belong to a discrete and insular minority that is historically oppressed are likely to be in the political minority always or almost always, rather than in a political minority sometimes but in a political majority at other times. By contrast, the *Carolene Products* theory imagines that majority prejudice bars minorities, especially African-Americans, from joining the winning coalition on issue after issue – tax policy, education policy, defense policy, and so forth. We can say that a law reflects a democratic failure when (1) the benefit to the majority is less than the loss to the

⁵¹ See Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Cf. Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002)

⁵² *Carolene Products*, 323 U.S. at n. 4.

minority, or (2) the benefit to the majority is more than the loss to the minority on a particular law, but the members of the minority rarely find themselves in winning coalitions, so that their losses from the political process over some lengthy period of time exceed their gains.

Carolene Products does not say that courts will evaluate every law, and reject all laws that are democratic failures as defined above. The problem is one of institutional capacity: courts are not in a good position to evaluate the gains and losses from a law. In a world in which African-Americans are poorer on average than whites, any non-progressive form of taxation might be said to be a democratic failure, according to our revised definition; determining whether this is the case would require a very complicated evaluation of people's preferences, people's views about the proper distribution of wealth, and so forth.

Given their limited capacities, courts cannot conduct such an analysis. Rather, they presume that laws that explicitly burden African-Americans are democratic failures, and laws that do not are not democratic failures. The implicit logic is that facial discrimination is a proxy for democratic failure. When there is no facial discrimination, and no other obvious indication of discrimination such as evidence of overt racial animus in the legislative history, most of the time no democratic failure has occurred. The distinction between general and targeted laws is a rough-and-ready means to measure whether the majority shares in the law's burdens, and thus internalizes the law's social cost.

There are many standard criticisms of the *Carolene Products* approach, even in ordinary times.⁵³ First, its assumption that majorities exploit minorities, in the sense of exploitation described in Part II, does not have a sound theoretical foundation. As we mentioned above, a contrary thesis is that minorities exploit majorities. Public choice theory suggests that interest groups sometimes cause governments to adopt policies that transfer wealth from the diffuse and unorganized majority to a well organized minority.⁵⁴ Public choice theory has many problems, but it surely reflects an important truth, especially when minorities are in a defensive rather than offensive position,⁵⁵ and can benefit from blocking legislation that would benefit the majority even more. Similarly, we might expect discrete and insular minorities to organize and form groups that exercise disproportionate political power.

Second, *Carolene Products* assumes that the majority is monolithic, when in fact policy is created by shifting majorities that comprise diverse groups.⁵⁶ The *Carolene Products* theory implicitly assumed a very crude story, in which a majority of whites oppress a minority of African-Americans. This story simplifies unacceptably. White liberals, workers, government employees, and urban dwellers often find themselves in coalitions with African-American civil rights proponents, workers, government

⁵³ See Ackerman, *supra*.

⁵⁴ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

⁵⁵ Saul Levmore, *The Case for Retroactive Taxation*, 22 J. OF LEGAL STUDIES 265 (1993).

⁵⁶ ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956).

employees, and urban dwellers, because their interests converge with respect to discrete issues. But if the story did contain some truth in the past, it is even less plausible in the present, and in the context of the 9/11 emergency. Jose Padilla is a Hispanic, yet there was no effort to target Hispanics after his arrest, in part because Hispanics as a group have shown no general disposition to support al Qaeda, but also because Hispanics have considerable political power. So do Arab-Americans, who occupy a swing state in presidential elections.⁵⁷

Third, *Carolene Products* assumes that people in the majority do not care about the well-being of people in the minority. This assumption may, again, have been a rough truth in the past, when whites and African-Americans were segregated and mutually hostile. But, today, thanks in part to civil rights laws and perhaps even to the *Carolene Products* line of cases, the population is much more integrated. Although residential segregation persists, there is much more intermarriage between whites, on the one hand, and Hispanics, Asian-Americans, and even African-Americans, on the other hand. Educational, class, and wealth differences do not overlap with racial and ethnic differences to the extent that they once did. African-Americans remain a special case, but no one thinks that post-9/11 emergency regulation should target African-Americans. If people are less likely to support laws that discriminate against their spouses, children, relatives, coworkers, and neighbors, then the risk of democratic failure at the expense of ethnic or racial minorities is lower than it used to be. On this picture, judicial review according to *Carolene Products* may itself have undermined the very conditions that originally made it an attractive approach.

Our purpose here, however, is not to criticize *Carolene Products* generally, but to focus on the relationship between democratic failure and emergency. We thus bracket these standard criticisms of *Carolene Products*, and focus on the special case of the emergency. Critics of the 9/11 emergency policies argue that judicial review should be enhanced during the emergency because the probability of democratic failure increases during an emergency. We are now in a position to see why this argument is unsound.

B. The *Carolene Products* Theory and Emergencies

The defining characteristic of an emergency is that ordinary life, and the bureaucratic routines that have been developed to regulate it, are disrupted. In the case of wars, including the “war on terror,” the government and the public is not aware of a threat to national security, at time 0. At time 1, an invasion or declaration of war by a foreign power reveals the existence of the threat, and may at the same time cause substantial losses. At time 2, an emergency response is undertaken.

Several characteristics of the emergency are worthy of note. First, the threat reduces the social pie – both, immediately, to the extent it is manifested in an attack, and prospectively, to the extent that it reveals that the threatened nation will incur further damage unless it takes costly defensive measures. Second, the defensive measures can be more or less effective. Ideally, the government chooses the least cost means of defusing

⁵⁷ R.W. Apple Jr., *Trying to Push State Off the Fence*, N.Y. TIMES, October 23, 2000, at A18.

the threat; typically, this will be some combination of military engagement overseas and enhanced policing at home. Third, the defensive measures must be taken quickly, and – because every national threat is unique, unlike ordinary crime – the defensive measures will be extremely hard to evaluate. There are standard ways of preventing and investigating street crime, spouse abuse, child pornography, and the like; and, within a range, these ways are constant across jurisdictions and even nation states. Thus, there is always a template that one can use to evaluate ordinary policing. By contrast, emergency threats vary in their type and magnitude, and across jurisdictions, depending heavily on the geopolitical position of the state in question. Thus, there is no general template that can be used for evaluating the government’s response.

None of these characteristics are related to the concerns reflected in the *Carolene Products* theory. The shrinking of the social pie is something that happens all the time, due to random exogenous shocks, such as an economic downturn or a bad crop season. The majority’s reaction to such losses will often be facially neutral policies that may or may not burden a minority. Under the *Carolene Products* theory, these policies will not be checked by courts even if they may cause a disparate impact. In the case of a recession, the policy may be the reduction of interest rates and the creation of jobs programs. In the case of an emergency, the policy may be the sealing of borders and the introduction of new security procedures in airports. Analytically, we have the same case: a policy in response to a threat.

Crucially, the structure of voting and representation remains the same as it was before the emergency. The political constraints need not shift,⁵⁸ even if society as a whole is poorer than before. The majority has no greater ability to impose costs on a minority in the emergency case than in the nonemergency case. The structural mechanisms of voting and representation that are said to produce democratic failure operate the same way both in emergencies and in normal times. Suppose that the structure of voting and representation allows a 60% majority to take 80% of the social pie. If an emergency shrinks the pie, the structure of voting does not change, and the minority will still get its 20%, just of a smaller pie. Perhaps some more elaborate account of democratic failure might predict that the minority’s share would itself shrink; but any such account would require a theory running well beyond the simple voting mechanisms that are the stock in trade of the democratic failure theory.

Sometimes theorists of democratic failure emphasize the worry that minorities will be subject to “scapegoating” during emergencies. The scapegoating concern is a hybrid of rational and nonrational accounts of democratic failure, or else equivocates between the two; it also equivocates among various possible assumptions about the motives of officials and about the agency slack that officials hold. Sometimes the picture is of a majority actuated by standing passions or animus against minorities, animus that remains latent during normal times but that becomes overt during emergencies,

⁵⁸ This retracts the view, which now seems to us overbroad, that “during emergencies the boundaries of the politically possible change.” Eric A. Posner & Adrian Vermeule, *Emergencies and Political Change: A Reply to Tushnet*, 56 STAN. L. REV. 1593, 1594 (2004). Below we also consider the alternative thesis that during emergencies political constraints do shift, but in ways that favor minorities.

particularly if minorities are aliens from a country or group that has become an enemy by virtue of the emergency. Sometimes the picture is that majorities or interest groups harbor a desire to expropriate the assets of minorities, a desire that is constrained by politics during normal times but that can be satisfied during emergencies, for unclear reasons. On either picture, officials implement the majority's nonrational animus or self-interested aims through emergency policies. On yet another picture, self-interested officials seize upon emergencies to scapegoat minorities, as a pretext to expand their own power; in this version, latent animus present in the population is whipped up by officials who enjoy some agency slack.

In any of these versions, there is further a question about which groups can be made into scapegoats. *Carolene Products* assumes that some set of discrete and insular minorities can be identified. Talk of scapegoating sometimes makes it sound as though the choice of targets is entirely unconstrained, so that political entrepreneurs can define new target groups as emergencies arise, even if the target groups have no relation to the source of the emergency. It is obvious that there must be some constraints on the choice of targets – could the class of all left-handed people be made into scapegoats? – but these constraints are never clearly specified. It is hard to evaluate the scapegoating idea, which is vague about the mechanisms at work, and which supports no clear predictions about which groups can be scapegoated, under what conditions.

Whatever sense one attaches to the idea, it is dubious that scapegoating increases during emergencies. Minorities undoubtedly are scapegoated during emergencies, but they are during normal times as well, albeit in less visible ways; it is not clear that emergencies change anything other than the rhetoric or rationalizations surrounding the majority's actions. Indeed, as against the view that scapegoating increases during emergencies, emergencies actually enhance the political position of minorities in several ways. First, because emergencies capture the attention of the public, it will be more difficult for the government to conceal oppressive or redistributive policies, making it easier for minorities to mobilize opposition to such policies. Second, because redistributive policies create deadweight costs, they become less attractive during emergencies. When the survival of the pie is at stake, only the most dysfunctional government will further endanger it by adopting bad policies that ensure that the majority gets a disproportionate slice. A respectable body of thought holds that nations are most likely to adopt efficient macroeconomic policies during financial emergencies, and most likely to adopt inefficient redistributive policies when the nation's finances are not in crisis.⁵⁹ Above, we suggested that emergencies do not change the political constraints under which majorities and officials operate. Here we suggest, alternatively, that even if the boundaries of the politically possible do shift, the shift can often help minorities rather than hurting them. We provide evidence for this suggestion below.

⁵⁹ See PETER GOUREVITCH, *POLITICS IN HARD TIMES: COMPARATIVE RESPONSES TO INTERNATIONAL ECONOMIC CRISES* (1986); STEPHEN HAGGARD AND ROBERT KAUFMAN, *THE POLITICS OF ECONOMIC ADJUSTMENT* (1992); DORNBUSCH AND EDWARDS, *REFORM, RECOVERY, AND GROWTH: LATIN AMERICA AND THE MIDDLE EAST* (1995).

Are there other possible mechanisms that could cause unjustified discrimination against minorities to increase during emergencies? No author has concretely identified such a mechanism; the literature is almost entirely conclusory. To be sure, such mechanisms could exist. Perhaps emergencies enable groups that during normal times compete for resources to create temporary majority coalitions because an emergency-related minority is a focal point that they can rally around. Perhaps emergencies raise public awareness and increase public monitoring of politics, so that minorities find it more difficult to exercise influence to protect themselves behind the scenes. Perhaps emergencies increase the power of the executive because the legislature rationally delegates power to it, and then the executive uses its power to exploit minorities. Perhaps emergencies – in extreme cases – directly interfere with the political process by shutting down courts, preventing citizens from casting votes, or hindering elected officials from congregating, whereupon residual power holders exploit minorities. We suggest these possibilities not because we think they are plausible. All of these theories leave open the possibility that a minority will itself exploit an emergency by joining the winning coalition (perhaps with other minorities), rather than being exploited. We suggest these theories as examples of the type of argument that the critics must come up with before they can be taken seriously.

So much for theory; what of the evidence? Have democratic failures occurred more often during emergencies than during normal times? This question is extremely difficult to answer because of the difficulty of identifying democratic failures and emergencies in a noncontroversial way. But a few observations can be made.

If we think of democratic failures from the *Carolene Products* perspective as large-scale, systematic transfers of wealth from minorities to majorities, then the most plausible examples of democratic failure in American history are the transfers of land from American Indians to whites, often in violation of treaties, throughout the nineteenth century; Jim Crow and other racial structures or policies targeted against African-Americans (especially) and various immigrant minorities such as the Chinese of the west coast; and the repression of religious minorities such as the Mormons prior to their migration to Utah. None of these policies were based on an emergency, or justified by reference to an emergency, unless we define emergency in an implausibly broad sense;⁶⁰ they were mainly peacetime policies adopted by the national government or the state governments with the acquiescence of the national government. The view that minorities are treated worse during emergencies glosses over the long record of democratic failure during normal times.

Treating these nonemergency deprivations as a baseline, we find it difficult to find examples of clear democratic failure during war or emergencies. We can generalize as follows. First, consider cases where the targeted minority was associated in some way

⁶⁰ In some of these cases, interested parties justified discriminatory policies by appealing to security concerns. Long-term concerns about being “overrun” by Chinese immigrants, for example, were mentioned in the Chinese Exclusion Case, *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889). But if emergency were defined so broadly, then there would be few occasions on which an emergency did not exist. We offer a narrower definition of emergencies in Part IV.

with the enemy. These cases include the treatment of Confederate sympathizers during the civil war, ethnic Germans during World War I, Eastern European immigrants during the Red Scare, Japanese-Americans during World War II, Communist sympathizers during the early cold war, and Arab- and Muslim-Americans since 9/11. In most of these cases, the connection between the minority group and the enemy, not the political weakness of the minority group, is the most plausible explanation for the policies in question: without the benefit of hindsight, and acting in the fog of war, the government had reasonable grounds to fear that members of the targeted minority would be disloyal.⁶¹ Indeed, in the cold war case, the minority was defined by the crisis – those who seemed sympathetic with the goals of the enemy, the Soviet Union – and not by ethnicity. The policies adopted during the emergencies may have been wrong, but, if so, of a piece with the numerous other policies adopted during emergencies that had nothing to do with the treatment of minorities.

Second, the treatment of minority groups often improves during emergencies; historically, emergencies have often been an engine of progressive government. Times of crisis demand good policy. During emergencies the government needs the skills and loyalty of minority groups, on both the military and economic fronts, and is willing to pay for them. More broadly, a large body of political theory and science emphasizes that the military and economic needs of the nation-state have tended, over time, to expand the scope of the franchise, reduce class privileges, and improve governmental accountability and the rule of law, because national governments were constrained to offer an ever-broader range of groups political benefits commensurate with their political contributions.⁶²

For examples, consider Lincoln's decision, at the height of the civil war, to proclaim emancipation for slaves behind enemy lines, with the hope of enlisting their sympathies and assistance and of causing disruption to the enemy; the genesis of federal assistance for minorities in post-Civil War programs, such as the Freedmen's Bureau; the creation of national programs for poverty relief during the Depression and New Deal; the entry of women into the labor force during World War II; the desegregation of schools and workplaces during the Cold War, and the integration of African-Americans into the

⁶¹ Then why did the U.S. government target Japanese-Americans, but not German- and Italian-Americans during World War II? The most plausible explanation is that the latter two groups were too large to intern or subject to legal disabilities and too well assimilated; by contrast, German-Americans were targeted during World War I when they were less well assimilated. In addition, peacetime discrimination against Japanese-Americans was greater than peacetime discrimination against German- and Italian-Americans. The differential treatment of these groups during World War II is not evidence for the proposition that emergency increases the probability of political failure; rather it is consistent with the view that the peacetime baseline holds (however good or bad that baseline was). A final point is that the failure to discriminate against German- and Italian-Americans during World War II is a problem for the failure theorists: it cuts against the claim that enhanced discrimination against emergency-relevant minorities is predictable during emergencies.

⁶² See Stephen Holmes, *Lineages of the Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW* 19 (Maravall & Przeworski eds. 2003); Eric A. Posner & Adrian Vermeule, *Emergencies and Political Change: A Reply to Tushnet*, 56 *STAN. L. REV.* at 1595. We have profited from Mark Graber's excellent historical overview. See Mark A. Graber, *Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime*, in *The Constitution in Wartime: Beyond Alarmism and Complacency* (Mark Tushnet ed. 2005).

armed forces during World War II and the Cold War. The last two developments occurred because a series of national governments saw improving the position of African-Americans as an important part of the propaganda war against communism, and saw African-Americans as an underutilized pool of capable workers and soldiers.⁶³

This minority-protecting mechanism applies with equal force to emergency-relevant minorities – the minorities who have some connection to a perceived enemy, and are thus conspicuous targets for scapegoating. Indeed, even while targeting Arab- and Muslim-American aliens after 9/11, the U.S. government poured prosecutorial resources into enforcement of hate crime laws for their protection,⁶⁴ while the United Kingdom government enacted a law protecting Muslims from hate crimes in the days immediately after the 7/7 attacks in London.⁶⁵ At least in the American case, the government is quite candid that the struggle against terrorism makes the skills and contributions of Muslim and Arabic citizens more useful, not more dispensable.⁶⁶

We do not argue that invidious discrimination systematically tends to decline during emergencies, though it may. The minimum point we make is that the evidence is ambiguous: there is no systematic evidence that democratic failures occur more often during emergencies than during nonemergencies. If we are correct, there is no reason to believe that an emergency law that targets a minority, even a minority connected to the crisis, is more likely the result of democratic failure than a non-emergency law that targets a minority. Democratic failure theorists typically acknowledge the judges' limited capacity for handling emergencies. But the critics resist the argument that limited capacity implies limited deference; to do so they argue that, as a result of scapegoating or the like, democratic failure is systematically more likely during emergencies. If that were true, judicial scrutiny might be justified as a way to protect minorities, despite the costs in reduced security. But it is not true.

The main difference between normal times and emergencies is that courts may have greater difficulty evaluating an emergency measure than a nonemergency measure, a point we expand upon in Part IV. The point for now is that there is no reason to think that democratic failure is more likely to occur during an emergency than during normal times. It might be the case that government error is more likely during an emergency, but error by itself is not democratic failure, and courts have no expertise advantage over the political branches. We now turn to the latter point – the problem of judicial capacities.

IV. DEMOCRATIC FAILURE: CITIZENS, ALIENS, AND JUDGES

In Part III we criticized the idea that democratic failure is more likely during emergencies than during normal times. We now turn to an improved version of the

⁶³ See Mary L. Dudziak, *Cold War Civil Rights* (2000) (discussing how concerns about America's image abroad during the cold war led the federal government to support civil rights legislation).

⁶⁴ See James Zogby, *One Year Later, Arab American Rights Are Defended*, September 2, 2002, available at: <http://www.aaiusa.org/wwatch/090202.htm> (after 9/11, "the DOJ and the FBI ... have made an unprecedented effort to find and punish those who committed crimes of hate against Arab Americans.").

⁶⁵ *Religious Hate Law Aimed at Protecting Muslims Passes U.K. Vote*, CNSNews (July 12, 2005).

⁶⁶ *CIA is Reviewing its Security Policy for Recruitment*, New York Times (June 8, 2005).

democratic failure theory. On this construal, the theory suggests that democratic failure is as likely and as damaging in emergencies as in normal times – no more, but certainly no less.⁶⁷ On the remedial side, courts in times of emergency should, just as in normal times, ensure that laws are general, and should strictly scrutinize laws that are facially discriminatory. *Carolene Products* applies to the same extent during emergencies as during normal times.

There is a third possibility, however, the one we propose here: *Carolene Products* should not apply during emergencies, or only in weakened form. In Section A, we argue that even if the *Carolene Products* theory justifies strict scrutiny of targeted or facially discriminatory laws during normal times, it does not justify strict scrutiny of such laws passed in response to emergencies (or, equivalently, strict scrutiny should be easier to satisfy in emergencies than in normal times). Thus, if courts should strike down statutes that target minorities during normal times, they should be more deferential during emergencies. In Section B, we consider what counts as “government”: the Executive acting alone, or the Executive acting under statutory authorization. We criticize the twin ideas, sometimes allied with or appended to the *Carolene Products* theory, that courts should apply greater scrutiny to executive branch action that is unauthorized by statute, and that courts have historically done so. In Section C, we consider what counts as an “emergency,” and who decides whether an emergency is present. In Section D we consider some distinctive problems concerning aliens, and argue that the *Carolene Products* theory does not justify strict scrutiny of laws that burden aliens either during normal times or during emergencies.

A. Citizens

The democratic failure theory holds that political dissenters and ethnic or racial minorities are exploited by the majority, and therefore ought to be protected by courts in normal times. We assume, for the sake of argument, that this theory is correct, and ask, to what extent does it justify strict scrutiny of targeted or facially discriminatory laws passed in response to emergencies? We argue that it does not justify strict scrutiny of such laws; alternatively, if strict scrutiny is adhered to as a nominal framework, claims of compelling governmental interest should be accepted more readily. Whatever the doctrinal framework, courts should defer heavily to nongeneral laws passed in response to emergency.

A preliminary problem is the one we mentioned in Part II. Democratic failure theories propose that courts should monitor and invalidate policies that impose excessive security regulation on minorities (defining excessiveness as above) in order to benefit the majority. No extant theory, however, suggests that courts can or should invalidate policies that provide excessive liberty or inadequate security. Presumably democratic failure theorists shy away from the latter problem because judicial review of inadequate security is infeasible; it would require affirmative judicial oversight of funding and

⁶⁷ In Part III, we did note some reasons for thinking that democratic failure is less likely during emergencies, but we do not insist on them; our point was simply that theory and evidence are too ambiguous to support the view that democratic failure is more likely during emergencies.

regulatory decisions. Given this asymmetry in the structure of judicial review, however, a rational and ill-motivated government may simply substitute one type of exploitation for another. If courts block government from pandering to the self-interested majority by imposing security restrictions on minorities, or if courts make that form of pandering more costly, then government may switch instruments, pandering to the majority by spending too little on minorities' security, or by providing minorities with insufficient regulatory protection. Substitution of this sort is never costless, so the possibility does not show that judicial review of excessive security is pointless. The risk of substitution does, however, reduce the benefits to be gained from judicial review of policies that impose excessive security restrictions.

Let us now turn to the costs of minority-protecting judicial review; we argue that these costs rise in times of emergency. To fix ideas, imagine an official racial profiling policy after 9/11: Arab-Americans are stopped at airports and interviewed and searched at a higher rate than other Americans. The law that authorizes the profiling explicitly targets a discrete and insular minority. Under the *Carolene Products* approach, as normally understood, the court would apply strict scrutiny. Although it is conceivable that a court might find that the profiling system is a sufficiently tailored instrument for achieving a compelling state interest, we know from past experience that this is unlikely. Strict scrutiny usually means that the law is overturned.

As we noted, emergency policies adopted by the government balance the competing values of liberty and security. The racial profiling policy affects this balance in a special way: the reduction in liberty is suffered only by the minority group, while the benefits from enhanced security are enjoyed by all. The fact that the benefits and burdens are not equally shared, of course, hardly distinguishes this law from any other. In the case of ordinary regulatory laws, the numerical minority is outvoted, but the regulations are accepted because, in some rough sense, the benefits to the majority outweigh the losses to the minority, and the minority that loses in this case may participate in different majorities that win in other settings. The mere fact that a particular policy reduces the liberty of one group in order to enhance the security of another group does not show that it is the result of a democratic failure. What is special, under the *Carolene Products* theory, is not the presence of a law that benefits some and burdens others; it is the burdening of political dissenters or of a historically oppressed minority group. The concern is that such a group will repeatedly be on the losing end of the lawmaking transaction.

This implies that democratic failure is an aggregate theory. To set the benchmark against which failure is identified, the theory aggregates across a large set of laws, and finds a democratic failure only if a persistent minority or minority group is repeatedly sacrificed for the benefit of a persistent majority. Courts, however, must proceed at retail, examining laws one at a time, and this makes it difficult for courts to implement the democratic failure theory in any straightforward way. The problem is that, in any given case, a law that targets some minority or subgroup may be justified by real security concerns. If it is, then, in an aggregate sense there is no democratic failure, and the law just is "general" in the sense that the basis for the targeted classification would apply to

any group that posed a similar security risk. Today's minorities will benefit from increased security just as will today's majority; future laws will be enacted by different coalitions, in which today's minority may participate, and those laws will place burdens on differently-defined minorities.

Courts will often be hard pressed to evaluate whether these conditions hold. But in times of emergency, this problem of judicial capacity is especially acute. Consider a simple picture of the judges' position in normal times, and of their dilemma in times of emergency. Courts review a law, and either uphold it or strike it down. The law either reflects a democratic failure or it does not. If the court falsely believes that a law results from a democratic failure, and strikes it down, then the court commits the type of error known as a false positive. The law is not the result of a democratic failure; the court falsely thinks that it is. If the court falsely believes that a law does not result from a democratic failure, and upholds it, this is a false negative. The law is a democratic failure; the court falsely thinks it is not. The rational basis test, used for laws that do not target minorities or facially discriminate, assumes that the social cost of false positives (striking down legitimate laws) exceeds the social cost of false negatives (upholding illegitimate laws). Laws that are not targeted or facially discriminatory are presumed to be democratic successes. If courts were to frequently strike them down, then they would usually strike down politically valid laws while rarely interfering with a law that is the result of a democratic failure.

When the law targets dissenters or facially discriminates against a minority, the strict scrutiny test assumes that the social cost of false negatives exceeds the social cost of false positives. Laws that are targeted or facially discriminatory are presumed to be democratic failures. Courts frequently strike them down because in doing so they usually strike down democratic failures, while rarely interfering with a law that is democratically valid.

This is the standard *Carolene Products* picture, but its empirical premises fail in times of emergency. Both false negatives and false positives have an expected cost, which is a function of two quantities: the risk of error and the cost of the errors that occur. The expected cost of false negatives – of erroneously upholding invalid laws – is the same in emergencies and in normal times. We argued in Part III, and we assume here, that democratic failure is no more likely in emergencies than in normal times; the costs of democratic failure that does occur are also constant, because the harm to minorities is the same in either period.⁶⁸ But the other side of the ledger is not constant. When an emergency occurs, the expected cost of false positives – of erroneously striking down valid laws – increases.

⁶⁸ There is a ceiling on the amount of harm that can be imposed on minorities during both emergencies and normal times – deprivation of their lives and their property. This ceiling remains constant across the emergency and non-emergency settings. The level of actual deprivation in any case depends on the relative political power of the minorities, to be sure; but if our argument in the text is correct that political constraints remain constant across settings, there is no reason to believe that deprivations accountable to democratic failure (as opposed to cost-justified security precautions) are likely to be greater during an emergency than during normal times. As we noted above, peacetime laws targeting African-Americans, Mormons, and other minority groups have been just as severe as emergency regulations.

We begin by bracketing the risk of false positives and focusing on the social cost of the false positives that occur. In times of emergency, the law that is invalidated is no longer a law that makes it easier for police to arrest someone who may rob or kill; the law that is invalidated is a law that makes it easier for the police to stop a terrorist attack. The difference in the magnitude of the potential harm goes a long way toward justifying greater deference in the emergency case, but it is not the only important difference. Terrorism works not just by killing people but by frightening them, so that they urge governments to adopt policies that the terrorists want. Ordinary criminals, by contrast, do not have such a destructive impact on the political process. During an emergency, the social cost of emergency laws incorrectly struck down is so high that greater deference is justified.

In some circumstances an erroneous invalidation will merely have a delaying effect. If an erroneous invalidation produces large costs, government may be able to adopt the needed measure again, and receive deference from the now-chastened judges. But delay is also a cost, a cost that rises during emergencies; indeed the higher cost of delay is a defining trait of emergencies, as we emphasize below. Moreover, delay is a problem even in a purely *ex ante* sense. Commentators sometimes suggest that we do not observe, as a historical matter, judicial protections of liberty that produce serious harms.⁶⁹ But this overlooks the law of anticipated reactions. If government must worry about whether its policies will survive judicial review, it will be slower at adjusting to the emergency; some necessary measures may be foregone altogether, and thus will never give rise to lawsuits. Fortunately, as we discuss below, the reason that we do not observe cases in which judicial protection of liberty produces serious harms is that the judges do not really protect liberty in times of emergency. If they did, they would start to produce harmful mistakes. The commentators who urge greater judicial vigilance extrapolate from the historical record of toothless judicial review to predict that judicial review with real bite would also prove harmless,⁷⁰ but this is fallacious.

So much for the social cost of false positives; let us turn now to the risk of false positives. That risk will also be higher during emergencies (unless the judges recognize the risk and compensate by deferring, as we suggest below they actually do). Emergencies bring novel threats, and the novel security policies chosen by the government will be controversial and hard for judges to evaluate. An emergency calls for large scale reorganization and a change in bureaucratic routines. These routines did not prevent the emergency, and proved inadequate to cope with it; therefore, they must be changed. But if they must be changed, then the normal standards for evaluating existing bureaucratic processes will no longer apply. With hundreds of years of experience, we know how to determine the fairness of a trial of a person who is suspected of routine criminal violation. We can complain if the crime rate goes up, police brutalize suspects,

⁶⁹ STONE, *supra*, at 544: “[T]here is not a single instance in which the Supreme Court has *overprotected* wartime dissent in a way that caused *any* demonstrable harm to the national security. The argument that courts cannot be trusted because they will recklessly shackle the nation’s ability to fight is simply unfounded” (emphases in original).

⁷⁰ *See id.*

innocent people are convicted, or the police department consumes more resources than police departments in other cities. We are much less sure how to evaluate, say, the conduct of soldiers enforcing martial law. The soldiers are not expected to act like police; but how should they act? The policies of other countries do not provide a good basis of comparison because their positions are so different. They have different law enforcement systems, different levels of social homogeneity, different geopolitical stances, and so forth.

To be sure, the risk of false negatives will rise as well. If courts have trouble evaluating an emergency measure for evidence of democratic failure, they will just as often see success in a democratically invalid law as failure in a democratically valid law. The important point is that even if both risks increase by the same amount, the expected cost of false positives will exceed the expected cost of false negatives, because the social cost of error is higher for false positives (justified security measures struck down) than for false negatives (minorities unjustifiably harmed). That is why courts should be more deferential during emergencies than during normal times.

Constitutional lawyers concerned about democratic failure and government opportunism sometimes emphasize the principle of the “least restrictive alternative.”⁷¹ Roughly, the idea is that if government’s goal is to attain a security level of x , and if there are two policies for attaining x , one that requires sacrificing minorities’ interests and one that does not, judges will force government to adopt the latter policy. The problem arises when government claims that, in light of the novelty of the threats and the lumpiness of the possible responses, the minority-respecting policy will only yield a security level of y , much lower than x . In emergencies, judges will be hard pressed to evaluate this claim, and the cost of erroneously rejecting it may be large. The judges know that the government’s claim may be opportunistic, but that knowledge is not useful, as they cannot distinguish opportunism from vigilance. In emergencies, the problem for courts is that they are more likely to make errors when they review emergency laws than when they review normal laws. This means that strict scrutiny brings with it a higher probability of false positives as well as a higher social cost when false positives occur.

Carolene Products requires strict scrutiny of laws targeting dissenters or ideological minorities, not merely of racial and ethnic minorities; where dissenters are concerned, targeted laws may represent a governmental attempt to close off the “channels of political change.” But from the judges’ standpoint, the problems are identical; everything we have said so far applies as well to judicial review of laws that target dissenters or reduce due process protections for narrowly defined classes of suspects. Consider, for example, a law that reduces process for all terrorist suspects, regardless of their race. People who might agree that courts should defer to the government here frequently argue that courts should not defer to the government if the anti-terrorism law is facially discriminatory. But the two cases are exactly the same. In both cases, the standard of review will balance false positives (legitimate laws that are struck down) and

⁷¹ Cf. *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004) (enjoining enforcement of the content-based Child Online Protection Act because alternatives were available that were at least as effective and less restrictive of free speech).

false negatives (democratic failures that are upheld). In both cases, the false positive is more costly during an emergency than during normal times. And in both cases, the false negative is also of substantial concern (an unnecessary burden inflicted on a small group of people), but is constant across normal times and emergencies. We can think of no account of democratic failure that would explain why emergencies should cause courts to scrutinize facially discriminatory emergency laws more strictly than they scrutinize facially neutral emergency laws that impinge on some constitutionally protected value.

The upshot of this discussion is that courts should more readily uphold targeted or facially discriminatory security laws passed in response to emergencies than identical security laws passed during normal times. It is hard to say, in the abstract, how much more deferential courts should be. At the extreme, courts could simply apply deferential rational-basis review to all emergency legislation. There is a residuum of factual uncertainty here, and below we will suggest that emergencies lie on a continuum or sliding scale, so that the judges will calibrate the deference they afford. What is not plausible is that courts should use the same approach in both emergencies and normal times.

Perhaps the best evidence for how the false positives and false negatives net out is that the judges often believe themselves incapable of evaluating governmental decisionmaking in times of emergency. Democratic failure theorists often quote Justice Jackson's concern for generality, and also his dissenting opinion in the *Korematsu* case, which upheld the government's internment of Japanese aliens and Japanese-American citizens during World War II.⁷² Jackson's *Korematsu* dissent is usually quoted for his concern about the ratchet effects of upholding government action during emergencies.⁷³ Yet the core idea of his dissent was arguably different. The core idea was that courts are incapable of sorting justified from unjustified emergency measures, know themselves to be incapable, and thus have no real choice but to defer. As Jackson put it:

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.⁷⁴

In our view, Jackson perfectly captures the institutional dilemma that judges face. Ought implies can; because the judges can do little to evaluate the need for facially discriminatory policies in times of emergency, and because the judges know this, there is

⁷² *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, J., dissenting).

⁷³ E.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011 (2003); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 *Wis. L. Rev.* 273.

⁷⁴ *Korematsu*, *supra*, at 245.

little point asking them to apply genuinely strict scrutiny to such policies. The most that can be hoped for is ex post compensation where society decides, some generations later and with the full benefit of hindsight, that the policy was unjustified.⁷⁵ Such compensation will often be accompanied by self-castigation or (what is even more pleasurable) castigation of others, namely the long-dead judges who, it will confidently be said, violated our commitment to civil liberties. The problem is that, when the next emergency comes around, the judges will defer again – not to the exact same policy, because circumstances will always be different, but to a new emergency policy whose justification the judges know themselves unable to evaluate.⁷⁶

Conventional wisdom among constitutional lawyers fits this picture; it holds that courts defer heavily to government in times of emergency.⁷⁷ (In Section B, we disaggregate “government” and ask whether this deference occurs even where the executive acts unilaterally, without authorization from Congress). Given that the history has been one of judicial deference in times of emergency, we think the burden of factual uncertainty should be on those who urge courts to abandon this historical posture and adopt strict scrutiny. The burden is twofold. It is not only to show that genuine strict scrutiny is desirable, because the expected harms of false negatives will exceed the expected harms of false positives. It is also to show that real judicial scrutiny of government action in times of emergency is feasible in a practical sense, given the institutional dilemma that judges face.

B. “Government”: Congress, the Executive, and Emergencies

So far, we have spoken generally of “government,” and suggested that courts should defer more heavily to government in times of emergency than in normal times. A wave of recent scholarship, however, makes a valuable contribution by suggesting that “government” should be disaggregated. On this view, courts rightly afford more deference to executive action that is authorized by statute than to freestanding executive

⁷⁵ *E.g.*, Civil Liberties Act of 1988, 50 App. U.S.C. 1989 (1988). (granting reparations to Japanese Americans interned during World War II).

⁷⁶ Tushnet, *supra*.

⁷⁷ *See e.g.*, WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE; CIVIL LIBERTIES IN WARTIME (1998); John C. Yoo, *Judicial Review and The War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003); Christina E. Wells, *Interdisciplinary Perspectives on Fear and Risk Perception in Times of Democratic Crisis*, 69 MO. L. REV. 897 (2004); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 Harv. L. Rev. 2673, 2679 (2005) CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948). In an effort to test this view, Lee Epstein and co-authors created a dataset consisting of 3,344 civil rights cases decided by the Supreme Court from 1941 to 2001. *See* Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005). The results of the study are puzzling. For the entire data set, the Court favored the government more during wartime than during peacetime. But for cases involving war-related laws, the Court was no more likely to rule for the government during wartime than during peacetime. *Id.*, at 70-74. These results support neither of the hypotheses. Neither of them implies that the Court would, during wartime, defer to the government’s actions that are unrelated to war, but at the same time would not extend such deference to government actions that are related to the war. Both the deference view and the nondeference view imply that the Court would not defer to non-war-related actions during wartime. Thus, the Epstein et al. study provides no reason for doubting the conventional wisdom.

action.⁷⁸ We will call this the “authorization requirement,” explore how it might be combined with *Carolene Products* review, and express skepticism about it on both normative and descriptive grounds

Two further distinctions are in order. First, statutory authorization of executive action may be interpreted as a necessary condition for constitutionality, a sufficient condition for constitutionality, or both. We are interested only in the possibility that authorization is a necessary condition. We will suggest that, in times of emergency, courts should defer even to freestanding executive policies that target dissenters or racial and ethnic minorities – although we will also claim that there will rarely be any such freestanding policies, because the same emergency circumstances that produce the policies also tend to produce statutory authorization for the policies. Second, we will distinguish descriptive and normative versions of the authorization requirements. One claim is that courts should require statutory authorization of emergency policies, another is that courts in practice do so. Typically, however, commentators who advance the authorization requirement hold both views.

We begin with the normative questions. On our view, the expected costs of *Carolene Products* review rise sharply in times of emergency. How can we interpret the authorization requirement here? The most straightforward interpretation is that the requirement reduces the risks and costs of the false negative – erroneously upholding policies that oppress dissenters or discriminate against minorities – because congressional involvement reduces the number of objectionable policies that are adopted. Congress, on this view, is a more deliberative institution than is the Executive, and this deliberation will tend to weed out laws that are bad according to the *Carolene Products* criteria. The President is elected by a national constituency on a winner-take-all basis, whereas Congress is a summation of local constituencies, and thus affords more voice to political and racial minorities. At the level of political psychology, decisionmaking within the Executive is prone to group polarization and other forms of groupthink,⁷⁹ whereas the internal diversity of legislative deliberation checks these forces. At the level of political structure, Congress contains internal vetogates and chokepoints – consider the committee system and the filibuster rule – that provide minorities an opportunity to block harmful policies, whereas executive decisionmaking is relatively centralized and unitary.

The contrast is drawn too sharply, because in practice the Executive is a they, not an it. Presidential oversight is incapable of fully unifying executive branch policies, which means that disagreement flourishes within the Executive as well, dampening groupthink and providing minorities with political redoubts. For both America and Britain during World War II, it has been shown that institutional competition within the executive branch weeded out draconian proposals and thus provided indirect protection for civil liberties.⁸⁰ Where a national majority is internally divided, the structure of presidential politics creates chokepoints that can give racial or ideological minorities

⁷⁸ Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime* (July 2003) (unpublished manuscript, on file with authors); Sunstein, *supra*.

⁷⁹ Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

⁸⁰ See A.W.B. Simpson, *Round Up The Usual Suspects: The Legacy of British Colonialism and The European Convention on Human Rights*, 41 LOY. L. REV. 629 (1996); Stone, *supra*, at 292-96.

disproportionate influence, just as the legislative process does. We have already mentioned the influence of Arab-Americans in Michigan, a swing state.

It is not obvious, then, that statutory authorization makes any difference at all. One possibility is that a large national majority dominates both Congress and the Presidency and oppresses minorities, in which case authorization does not help. Another possibility is that minorities have real influence in both arenas, in which case authorization is not needed. Authorization only makes a difference in the unlikely case where the Executive is thoroughly majoritarian while Congress safeguards the interests of oppressed minorities.

Even if that condition obtains, however, the argument for authorization goes wrong by failing to consider both sides of the normative ledger. The multiplicity of vetogates within Congress may allow minorities to block harmful discrimination, but it also allows minorities to block policies and laws which, although targeted, are nonetheless good. If Congress is more deliberative, one result will be to prevent groupthink and slow down stampedes towards bad policies, but another result will be to delay necessary emergency measures and slow down stampedes towards good policies.

Overall, adding congressional involvement increases the costs of adopting new emergency policies, and thus has several cross-cutting effects. It reduces the number of laws that embody unjustified discrimination, which is good, but it also reduces the number of laws that embody justified security measures targeted against minorities, which is bad, and it adds delay to the system, which is especially dangerous in times of emergency. To be sure, the worry that Congress will block needed security measures is just a possibility, not a systematic empirical finding. Democratic failure theorists, however, provide little systematic evidence for the assumption that requiring authorization improves outcomes, on net, because Congress blocks unjustified security measures. As a normative matter, the requirement of authorization is simply ambiguous.

This point both explains and draws support from congressional practice. Legislators know that Congress is not well suited for emergency action. Rather than trying to legislate for emergencies during emergencies, legislators act beforehand, authorizing the President and executive agencies to act if an emergency arises, and generally granting them massive discretion.⁸¹ Legislative action during emergencies consists predominantly of ratifications of what the Executive has done; authorizations of whatever it says needs to be done; and appropriations so that it may continue to do what it thinks right. Aware of their many institutional disadvantages – lack of information about what is happening, lack of control over the police and military, inability to act quickly and with one voice – legislators otherwise confine themselves to expressions of support or concern. Thus, common factors explain congressional and judicial passivity during emergencies.

⁸¹ See e.g., Authorization for Use of Military Force Joint Resolution Pub. L. No. 107-40, 115 Stat. 224; 10 U.S.C. § 821 (2000); Gulf of Tonkin Joint Resolution of Aug. 10, 1964, 78 Stat. 384 (1964); International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§1701-1706 (1976); National Emergencies Act (NEA), 90 Stat. 1255, 50 U.S.C. §§ 1601-1651 (2000); Emergency Detention Act, 64 Stat. 987, 50 U.S.C. §§ 811-826 (1950) (repealed).

The assumption that the historical record of emergency-driven ratifications, authorizations, and appropriations shows that the deliberative processes of Congress have been engaged, and that therefore executive action based on them, or in some way related to them, is of higher quality than executive action unauthorized by statute, ought to be treated with skepticism. The more plausible explanation is that Congress, knowing itself helpless before the emergency, looks to the Executive for leadership, gratefully defers to its judgment, and provides it with any legislation that it may desire. On this view, unauthorized executive action ought to be rare – and indeed it is, as we shall note below. When it does occur, one does not know whether to blame the Executive for acting hastily or Congress for failing to overcome its institutional disabilities despite an emergency.

Does the authorization requirement explain judicial practice? The problem with this claim is that there is little truly unilateral executive action. Qualitative legal analysts observe that the authorization thesis “fits” a large number of Supreme Court cases decided during wartime.⁸² The observation is quite correct, but the comparison group is too small; we just have too few cases in which the judges were squarely forced to decide whether statutory authorization is necessary for emergency action by the Executive.⁸³ Part of the problem is that authorization is an endogenous product of the President’s decision to adopt a given policy, which will often produce authorization from a cooperative Congress. Consider the Japanese internment policy, which was initially based upon an executive order, but received statutory ratification from Congress a month later;⁸⁴ or Lincoln’s emergency policies, undertaken without statutory authorization in the early months of the Civil War, which were later ratified by statute.⁸⁵

More simply, the massive number and scope of statutory delegations since the New Deal, especially in areas impinging upon national security and foreign policy, means that there is almost always a statute lurking somewhere in the picture. Judges have considerable discretion to read statutes more or less broadly, or at higher or lower levels of generality, so as to suggest that Congress has authorized the executive action. Consider the plurality opinion in *Hamdi v. United States*,⁸⁶ which arguably stretched a general congressional authorization to use military force by reading it to authorize detention of U.S. citizens alleged to be enemy combatants, despite the presence of an earlier statute requiring that detention be specifically authorized.⁸⁷ A clearer example is *Hamdi*’s

⁸² Sunstein, *Minimalism at War*, *supra*, provides the best and most comprehensive version of this account.

⁸³ This problem also renders untestable Epstein et al.’s conjecture (Epstein, *supra*, at 74-75) that the authorization requirement may explain the puzzling finding that courts hold for the government more often during wartime than during peacetime, but no more in wartime war-related cases than in peacetime war-related cases. To test this conjecture, one would need to compare cases that review authorized executive actions and cases that review unauthorized executive actions. The problem is that virtually none of the 134 war-related cases in Epstein et al.’s data set involved a unilateral executive action. If all of the cases involve statutes, then one cannot test a theory that makes outcomes turn on whether a case involves a statute or not.

⁸⁴ See Exec. Order No. 9066, 3 C.F.R. 1092-93 (Feb. 19, 1942); Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (1942).

⁸⁵ DANIEL FARBER, *LINCOLN’S CONSTITUTION* (2003)

⁸⁶ The plurality’s reading is ably defended by Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and The War On Terrorism*, 118 HARV. L. REV. 2047 (2005).

⁸⁷ See *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2653-56 (2004) (Souter, J., concurring in part, dissenting in part).

predecessor, *Ex Parte Quirin*,⁸⁸ in which the Court relied upon a general and non-explicit statutory provision to find congressional authorization for the President to try U.S. citizens, accused of being enemy combatants, by military commission.⁸⁹ Clearest of all is *Dames & Moore v. Regan*,⁹⁰ which threw a set of largely inapposite statutes into a blender and mixed up an authorization for the President to suspend claims pending in the United States courts against a foreign nation. Many other cases touching on war, the military or foreign affairs are similar.⁹¹

If judges strain to find statutory authorization for executive action in times of emergency, why do they do so? We previously described the institutional dilemma facing judges who must review the Executive's emergency policies, which the judges lack competence to evaluate. The judges know that the Executive might be acting opportunistically or from bad motives, but they also know that the policy might be a vitally necessary security measure, or was not authorized because Congress moved too slowly. Worst of all, the judges know they do not know which of these possibilities is actually the case; they cannot sort opportunism from executive vigor. In a situation of this sort, the judges will be powerfully tempted to defer, on the one hand, while also finding some relevant statute to suggest that Congress too has approved the policy, on the other. The finding of statutory authorization, however strained, is largely costless to the judges, reassures the public by denying that the Executive is running around without a leash, and preserves the principle of statutory authorization for a future day on which the judges might rouse themselves to apply it seriously. The point is not that judges are acting out of disreputable motives; quite the opposite. On our view, judges tend to defer because the stakes are high and the judges' information is poor, and this course is quite sensible.

In decisions of this sort, the statute is not really a moving part, although later commentators may correctly point out that the judges referred to the statute as authority for the executive action. Again *Korematsu* is a good example. Although the internment order was ratified by a later statute, and although the Court mentioned the statute in passing, the Court was quite candid that the basis for deference was simply that the conditions under which the internment order was issued allowed no other course of action. "Congress, reposing its confidence in this time of war in our military leaders – as inevitably it must – determined that they should have the power to [order internment]. There was evidence of disloyalty on the part of some, the military authorities considered

⁸⁸ *Ex Parte Quirin*, 317 U.S. 1, 44 (1942).

⁸⁹ Bradley & Goldsmith, *supra*, at 2131.

⁹⁰ *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In the same vein is *Regan v. Wald*, 468 U.S. 222 (1984). Here is Professor Tribe's assessment of *Regan*: "[F]ive Justices purported to find, in a factual situation that should probably have been deemed at best ambiguous, clear congressional authorization for the Reagan administration's summary ban on travel to Cuba." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 3d ed. 677 n. 30 (2000).

⁹¹ *See* *Loving v. United States*, 517 U.S. 748 (1996) (the authority delegated to the president by the Uniform Code of Military Justice implicitly included authority to proscribe aggravating factors in death penalty sentencing); compare *Kent v. Dulles*, 357 U.S. 116 (1958) (invalidating a State Department regulation that denied passports for communists in light of administration practice before the relevant statute) with *Zemel v. Rusk*, 381 U.S. 1 (1965) (holding that the same statute implicitly authorized such area restrictions) and *Haig v. Agee*, 453 U.S. 280 (1981) (reading the statute to allow revocation of a passport where the holder's activities abroad would compromise national security).

that the need for action was great, and time was short.”⁹² Note the suggestion, very damaging to the authorization requirement, that the Congress too has little real choice but to defer to the Executive in times of crisis. If this is so, then we are back to the initial point that statutory authorization or ratification will predictably be forthcoming during emergencies, making a judicial requirement of statutory authorization rather hollow.

This is not the whole picture. There are cases in which the Court has construed statutes narrowly to deny the Executive authority in quasi-military or quasi-emergency settings.⁹³ On one interpretation, this is especially likely where the President acts contrary to accepted historical practices and traditions,⁹⁴ whatever the statutory texts say, which suggests that statutory authorization is a placeholder for an inquiry that the judges conduct by using extra-statutory heuristics or rules of thumb. There are also a very few cases in which the Court seems to have actually taken risks by holding that a sitting President was adopting emergency policies without statutory (or constitutional) authority. The *Youngstown* case,⁹⁵ in which the Court invalidated Truman’s order taking control of production at the Nation’s steel mills to prevent a threatened strike, is an example, albeit a slightly muddied one, because the decision came late in a stalemated foreign war rather than in a time of genuine emergency.⁹⁶ The *Hamdi* decision, on the other hand, is not a real example of judicial courage, because the decision may well turn out to have been largely costless to the government. The Court’s holding that the government must afford some review of citizens’ detentions has yet to be cashed out, and might amount to very little if review is very deferential and if military tribunals can do the reviewing.

So there are a few cases that do squarely support the authorization thesis, but there are also a few cases that squarely contradict it. The clearest is *In re Debs*, in which the Court granted the President an injunction to continue the operation of the railways in the face of a massive strike, despite the lack of any statutory authorization at all.⁹⁷ *Debs* is a stark contrast to *Youngstown*.

The point is not to tote up cases on either side, but to emphasize how few cases squarely put the authorization thesis to the test. In times of emergency, executive action and statutory authorization correlate tightly, although not perfectly. This makes it difficult to falsify our view that statutory authorization is not decisive in most emergency cases, but it also makes it difficult to falsify the authorization thesis, because we rarely observe unauthorized executive action. Recall the conventional wisdom, among constitutional lawyers, that the courts defer heavily to government in times of emergency. Our suggestion here is that the deference runs mostly to the Executive, not to Congress. The observation that the authorization thesis fits most of the cases is too fragile to show

⁹² Korematsu, *supra*, at 223-224.

⁹³ See *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Although *Ex Parte Endo*, 323 U.S. 283 (1944), is sometimes offered as another example of the statutory authorization requirement, *Endo* involved an executive agency that exceeded its authority under the relevant executive order as well as the statute. See 327 U.S. at 297-304. *Endo*, then, is at best an ambiguous precedent on the statutory authorization question.

⁹⁴ Bradley & Goldsmith, *supra*.

⁹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁹⁶ See also *New York Times v. United States*, 403 U.S. 713 (1971) (Marshall, J., concurring) (government lacks necessary statutory authorization to seek and injunction). However, the majority did not consider the statutory authorization issue, and decided the case directly on free speech grounds.

⁹⁷ *In re Debs*, 158 U.S. 564 (1895).

the contrary, because a finding of authorization may often be a rationalization of the judges' decision rather than a causal factor in the judges' decisionmaking, and there are too few cases to discriminate between the two possibilities.

To sum up: as an alternative to the hypothesis that congressional approval validates executive action and justifies judicial deference, while congressional silence justifies judicial scrutiny, we propose the hypothesis that courts *and* Congress defer to the Executive during emergencies because their institutional advantages during normal times are overwhelmed by the Executive's advantages during emergencies. When the Executive acts without statutory authorization, this may say more about congressional incapacity than executive overreaching, and thus courts have no reason to treat congressional silence as a signal that the executive action is suspect.

C. "Emergencies"

We have suggested that the *Carolene Products* approach misfires in emergencies, and that in emergencies judges should defer to laws and policies that would receive strict scrutiny under normal *Carolene Products* standards. But two stock questions are, what is an emergency, and who decides?

As to the first question, the logic of our view is that emergencies lie on a continuum, or sliding scale. At one end are routine domestic policies adopted in peacetime, where bureaucracies churn out incremental policy changes, judges repeatedly see similar issues and become familiar with the costs of blocking or permitting government action, and the stakes of particular judicial decisions are low. At the other end are policies adopted in times of fullblown crisis, when it might be reasonable to believe that serious harms threaten the nation, as in the immediate aftermath of Pearl Harbor or 9/11. Novel threats, heightened public concern, and deaths arising from hostile attacks typify these situations; the ordinary routines of bureaucratic policymaking are suspended, and elected officials quickly intervene to redirect resources and reorient policies. Time is of the essence, and the stakes of blocking necessary government action are possibly catastrophic. In between are situations in which government policy is unusually consequential for foreign policy or for national security, but where some or all of the features that describe a fullblown emergency are absent. Moreover, emergencies have a half-life and will decay over time. As time elapses since the beginning of the emergency, and as enemy attacks or other catastrophic harms dwindle away or stop altogether, judges will defer less.

The answer to the second question is: it depends. Often, all branches of government will agree that an emergency exists and the "who decides" question does not arise. World War II, the immediate aftermath of 9/11, and the early cold war illustrate this case. The most difficult questions arise when the Executive claims there is an emergency and the judges disagree. But we have emphasized that this case will be rare, because judges who are aware of their limited capacity to evaluate the Executive's claims will usually defer, although the pressure to defer tends to diminish as the events that gave rise to the emergency recede. If the Executive branch and the judiciary do disagree, then, as always is the case with a constitutional crisis, the outcome depends on whether the public, the elites, or the military have confidence in the Executive or the judiciary. For example, Lincoln prevailed over Justice Taney at the outset of the Civil War, by defying

Taney's habeas corpus order,⁹⁸ but the executive branch acquiesced in the judiciary's skepticism about emergency measures in the second decade of the cold war.

Our argument presupposes that judges are capable of making a second-order determination whether conditions are such that their own first-order judgments are likely to be informed and valuable rather than uninformed and irrelevant.⁹⁹ Cases where judges determine that their own involvement would not be valuable are common; the political question doctrine is the conventional illustration. An implication of this view is that the judges themselves will calibrate deference as events move along the continuum between normal times and fullblown emergencies. As the urgency of government action increases, the stakes grow higher, and the costs of frustrating needed security measures grow ever more daunting, the judges will be more constrained to defer. Conversely, as the emergency decays, the judges will move back to a less deferential stance. *Youngstown* fits this pattern, as does the judges' increasing assertiveness after the Cold War had passed its peak.

All this is quite conventional, because constitutional law already requires judges to determine whether emergency conditions exist, with the most prominent special case of emergency being war. Consider doctrines holding that contract and property rules may be abrogated or limited in times of emergency,¹⁰⁰ doctrines that grant government heightened "war power,"¹⁰¹ and doctrines that grant the President "protective" powers where Congress is not in session, or emergency legislation has not yet been put in place, or existing law somehow contains gaps that have been exposed by novel threats. The questions "what is an emergency and who decides" are questions to which constitutional law already provides answers. What we add to this conventional doctrine is that *Carolene Products* review is no more immune to the pressure of emergency than is any other approach to judicial review. Even targeted laws and policies that would receive strict *Carolene Products* scrutiny in a normal setting will receive deference in times of emergency, as the judges define it.

D. Aliens

The foregoing points apply to all kinds of *Carolene Products* review during times of emergency, whether conducted to protect resident aliens and other nonvoters, or to protect political and ethnic minorities among the citizenry. Here we round out our account by considering some distinctive problems that involve aliens. The connection to emergencies is that such problems, although always present, become more focal and more urgent during emergencies.

At first sight, the *Carolene Products* argument seems even stronger when applied to aliens than when applied to political or ethnic minorities. Since the end of Jim Crow, African-Americans have had the right to vote, both de jure and de facto. Hispanics have significant and increasing political power. Even Arab-Americans have substantial political power. Aliens, by contrast, have no right to vote. Because they cannot vote, they

⁹⁸ *Ex Parte Merryman*, 17 F. Cas. 144 (1861)

⁹⁹ *Cf.* Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 *Ethics* 5 (1999).

¹⁰⁰ *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

¹⁰¹ *See* *Block v. Hirsch*, 256 U.S. 135 (1921); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

cannot directly affect political outcomes, and thus would seem especially vulnerable to exploitation by the majority. Courts, on the *Carolene Products* theory, should offer aliens maximal protection by applying strict scrutiny to laws that discriminate against people on the basis of alienage. Such reasoning seems to have influenced the House of Lords, which recently struck down a British law that permitted the Home Secretary to detain without trial foreign nationals who pose a terrorist threat.¹⁰² The court singled out the law's facial discrimination against aliens; it did not apply to British nationals.¹⁰³

There are several reasons for doubting the application of the *Carolene Products* theory to aliens. Initially, the argument raises the puzzle of why America's duties to aliens are so much greater when the aliens reside in American territory than when they reside in their home countries. It is uncontroversial that the U.S. government has much less responsibility over the welfare of aliens living in foreign countries than it has over American citizens, here and abroad. It is also relatively uncontroversial that the U.S. government need not respect the rights of foreign citizens living abroad to the same extent that it must respect the rights of American citizens. And no one thinks that foreigners should have the right to vote in American elections even though American foreign policy heavily influences their interests.¹⁰⁴ Thus, the question is why all this should change merely because a foreigner crosses the American border.

One possible answer is that it is easier for the U.S. government to protect people on its own territory than people who live abroad. But the U.S. government goes to great effort to protect Americans living abroad. Whatever the practical and logistical differences, they are not extreme enough to justify such a great difference between the treatment of aliens abroad and the treatment of aliens on American soil.

Another possible answer is that the U.S. government does not have any special duties toward aliens generally, but only for aliens who reside in the United States for a sufficiently long period of time – resident aliens. We will address this argument below. For now, it is important to note that if this view implies that *Carolene Products* should protect resident aliens but not nonresident aliens, then much of the criticism of the U.S. government's 9/11 policy loses its force. Except for the interviews, that policy did not target resident aliens; its brunt was borne by nonresident aliens, who were rounded up and deported if their papers were not in order.

The second reason for doubting the application of the *Carolene Products* theory to alienage is that the treatment of aliens is not as bad as that theory implies would be the case for a group that lacks the franchise. This is true in the United States, even though constitutional protections of aliens are far less than would be required by *Carolene*

¹⁰² *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56.

¹⁰³ "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another." *Id.*, para. 68. The detainees were released in March 2005, four months before the July 7 terrorist bombings in London. Eight Terror Detainees Released, BBC News, March 11, 2005.

¹⁰⁴ *But see* IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 52-53 (2003) (suggesting that aliens should have the right to vote on issues that affect their basic interests).

Products; and this is true in foreign countries where there are no constitutional rights to speak of at all. During normal times, aliens who are on American territory are not taxed any more heavily than Americans are; they are not deprived of legal protections; they are not mistreated or discriminated against in any overt way, unlike African-Americans during the Jim Crow era. The post 9/11 emergency did not lead to discrimination against aliens qua alien; it led to discrimination against only certain aliens – those with some connection to Afghanistan, Pakistan, Saudi Arabia, and other countries with a significant Muslim or Arab population. And although aliens from these countries were subject to more discrimination than American citizens who share their national origin, that was surely because aliens are assumed to be loyal to their home countries, whereas immigrants are assumed to be loyal to the U.S. Whatever one thinks about ethnic or religious discrimination of this sort, it is clear that the government did not use 9/11 as a pretext to discriminate against alienage as such; for if it did so, it would not have limited discrimination to only these aliens.

Why don't states engage in greater discrimination against aliens? A fallacy in the *Carolene Products* view is to overlook that the welfare of aliens is itself a component of the welfare of the voting majority, so the self-interest of the majority need not produce exploitation of the minority. The welfare of aliens enters the welfare function of the voting majority in several ways.

First, the voting majority wants foreigners to come to their country – as tourists, who consume goods and services; as students, who pay tuition; and as employees, who bring needed skills. The voting majority hopes that some of these aliens will eventually settle and become citizens. States attract aliens by providing an environment in which discrimination against aliens is discouraged. If states regularly discriminate against aliens, people will be less likely to come. It is this exit option – or the option not to enter – that, as we will discuss shortly, ensures that aliens' interests are respected by governments.

Second, recent immigrants maintain family and ethnic ties to aliens, and object when these aliens are subjected to government discrimination. Mexican-Americans, for example, protested when the American government adopted harsh border control strategies that affected only Mexican nationals and not Mexican-Americans. Clearly, Mexican-Americans worried about the effect of these strategies on friends, relatives, and coethnics who had not been naturalized. Arab-Americans objected to many of the 9/11 strategies that affected only Arab aliens, not Arab-Americans. Its tradition of welcoming immigrants and its mosaic of ethnic groups ensure that, in the United States, aliens are treated quite well.

Third, the voting majority itself travels abroad, becoming aliens in other countries, and knows that their good treatment in foreign countries depends on good treatment of aliens in the United States. If the U.S. wants to protect Americans abroad, it must promise to protect aliens on American soil. Thus, we can see the mechanism by which aliens obtain political power in the United States. The millions of Americans who enter foreign countries as tourists, students, and employees are members of the

“majority” who, under the *Carolene Products* theory, have disproportionate influence on government policy. This majority lobbies the U.S. government to ensure that foreign governments do not engage in unreasonable discrimination against them. The foreign governments demand in return that the U.S. government not engage in unreasonable discrimination against aliens on American soil. These understandings are embodied in countless international conventions and treaties which oblige states to extend various protections to aliens on their soil, reflecting the simple reciprocal logic of alienage.¹⁰⁵ Thus, indirectly, aliens have quite substantial political influence in the United States.

A small but telling example of the power of reciprocation occurred in the wake of 9/11. In order to enhance control of migration, the U.S. government required that aliens entering American territory be fingerprinted. This was a small imposition, but enough to generate retaliation by states that believed that the American response was unreasonable. Brazil, for example, retaliated by requiring that Americans entering Brazil be fingerprinted.¹⁰⁶ Other states confined themselves to diplomatic protest, but even diplomatic protest cannot be ignored. The U.S. needed to decide whether fingerprinting was important enough that it would be willing to tolerate fingerprinting of Americans, or other intrusive security measures, when Americans entered other countries. Whatever the right decision, our point is that aliens do not lack influence on the American government despite their disenfranchisement. They have influence because Americans are disenfranchised in foreign countries.

There are many other examples of this phenomenon. The Mexican government has joined Mexican-Americans in protesting America’s treatment of Mexicans, including its border control policies and the application of the death penalty to Mexicans convicted of capital crimes. Indeed, Mexico brought proceedings against the United States in the International Court of Justice, arguing that the United States violated the Vienna Convention on Consular Relations by failing to notify several dozen Mexican nationals of their right to seek advice from the Mexican consulate after they were arrested for committing serious crimes.¹⁰⁷ Germany and Paraguay brought similar proceedings against the U.S.¹⁰⁸ Conversely, the U.S. has protested when Americans are treated poorly in other states.¹⁰⁹

To sum up the argument so far, various factors ensure that governments do not treat aliens much more harshly than their own citizens. The most important, in our view, is the implicit contractual relationship between the alien and the host government – one that is enforced by the alien’s exit option and the alien’s own government. In order to

¹⁰⁵ See, e.g., Vienna Convention on Consular Relations, *entered into force* March 19, 1967, 596 U.N.T.S. 262.

¹⁰⁶ Larry Rohter, *Brazil Fingerprints Americans (To U.S. Dismay)*, INT. HERALD TRIBUNE, January 10, 2004, at 1.

¹⁰⁷ Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J. 128 (March 31).

¹⁰⁸ Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States), 1998 ICJ 248 (April 9); LaGrand Case (Germany v. United States), 2001 I.C.J. 466 (June 27).

¹⁰⁹ See e.g., Philip Shenon, U.S. Teenager Resigned to Singapore Caning, N.Y. TIMES, April 20, 1994, at A5.

attract and retain aliens who have valuable skills or resources, governments must treat aliens relatively well. This is not to say that this mechanism is perfect. Some governments might not bother to protect their citizens abroad; some governments may be unable to maintain a consistent policy toward aliens; and so forth. But democracy is far from perfect also, and people who are in a political minority but not a “suspect class” entitled to special constitutional protections will often find that the government ignores their interests.

We mentioned above that one might make a distinction between a nonresident alien and a resident alien. Joseph Carens, for example, makes the apparently logical argument that a democracy exists only if government policy rests on the consent of the governed; resident aliens, unlike foreign tourists or students, are governed in their everyday lives by the law of the state in which they live; therefore, resident aliens ought to have all the rights of citizens, including even the right to vote.¹¹⁰ If they are nonetheless deprived of the right to vote, the *Carolene Products* theory would seem to provide a case for strict scrutiny of laws that discriminate against them.

This argument is flawed. A resident alien is simply at the midpoint between a nonresident alien and a citizen. Unlike a nonresident alien, the resident alien has numerous local ties (employers, friends, perhaps relatives) who will support the resident alien’s interests in the political arena. This kind of “virtual representation” is not sufficient in itself, of course; but, in addition, the resident alien, unlike the nonresident alien, can expect to have the right to vote after the period of naturalization is over. A government that discriminates against resident aliens today takes the risk of negative votes tomorrow. Further, unlike a citizen, the resident alien retains the exit option, even if stronger local ties and weaker foreign ties make it less valuable for the resident alien than for the nonresident alien. And, unlike a citizen, the resident alien retains for the short term a “foreign” vote that, as long as the alien’s government is democratic, can be used to cause the alien’s government to influence the host government’s policies toward aliens. Thus, the resident alien has three weak instruments for influencing the host government (weak exit option, future vote, current “foreign” vote), whereas the citizen has one strong instrument (vote); but these three weak instruments may well be as good as one strong instrument. Finally, governments have an interest not only in attracting aliens, but also in encouraging some of them to become permanent residents. Aliens can choose for themselves whether they prefer to become residents or not. If the government unreasonably discriminates against resident aliens, then aliens – prior to become residents – can take this into account.

All of these considerations fade when our focus turns from resident aliens to the children of resident aliens. Children – especially children raised in the host state – will have strong ties with the host state, and thus their exit option will be weak. Once they become adults, they are in the position described by Carens: subject to regulation, and therefore entitled to representation. Happily, in the U.S. such children automatically obtain citizenship, however; so the *Carolene Products* problem does not come into

¹¹⁰ Joseph H. Carens, *Immigration, Democracy, and Citizenship*, 8 (2005) (unpublished manuscript, on file with authors).

existence. This leaves only the case of people who are born abroad, brought to the U.S. as young children, and then raised in the U.S. These people have strong ties to the U.S., no ties to foreign nations, and no vote. This small class of people could potentially be brought under the *Carolene Products* umbrella, though again, as far as we know, they are not subject to the kind of intensive discrimination that motivates the theory of strict scrutiny.

Marginal cases aside, the extension of the *Carolene Products* theory from local minorities to aliens is unsound. Aliens, unlike ethnic or religious minorities, have an exit option and enjoy the protection of foreign governments. Although these advantages may not necessarily be more valuable than the right to vote in American elections (though they may be), the right to vote is not the appropriate baseline because aliens do not belong to the *demos*, or do so only in a limited and imperfectly understood fashion. In the terms we have used here, strict review of laws and policies targeting aliens is unjustified.

CONCLUSION

We began with a simple view of security and liberty. This view suggests that a rational and well-motivated government will engage in “first-order balancing”¹¹¹ of the value of security and liberty, recalibrating the level at which both goods are provided as circumstances change over time. The major criticisms of this view are the panic theory, which we have considered elsewhere, and the democratic failure theory, whose legal corollary is *Carolene Products*.

There is no need to repeat our criticisms of the democratic failure theory; but we will underscore the consequences of rejecting it. If the panic theory is off the table, and if *Carolene Products* review comes unstuck in times of emergency, we are back to first-order balancing. A model judicial opinion for our view is *Dennis v. United States*, which applied first-order balancing of liberty interests and security needs to uphold the convictions of Communists who advocated the overthrow of the United States government.¹¹² As in *Korematsu*, Justice Jackson’s concurrence in *Dennis* explains the institutional dynamics that make deference predictable in this sort of case:

If we must decide that this Act and its application are constitutional only if we are convinced that petitioner’s conduct creates a ‘clear and present danger’ of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experience politicians. . . . No doctrine can be sound which requires us to make a prophecy of that sort in the guise of a legal decision.¹¹³

The Court later disavowed or limited *Dennis* by construing the relevant anti-Communist statutes more narrowly,¹¹⁴ and eventually by announcing a tighter constitutional test.¹¹⁵ An important defense of this sequence portrays it as the development of a sort of “second-order balancing,” one which places a libertarian thumb on the scales of the first-

¹¹¹ Sunstein, *supra*.

¹¹² *Dennis v. United States*, 341 U.S. 494 (1951).

¹¹³ *Id.*, at 570 (Jackson, J., concurring).

¹¹⁴ *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961).

¹¹⁵ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

order balance to compensate for predictable pressures towards deference.¹¹⁶ In our view, the sequence is just part of the cycle of libertarian self-castigation that arises whenever the emergency has passed. Faced with a violent conspiracy of great but uncertain magnitude, governments will predictably strike, and judges will predictably allow them to do so, in part because they appreciate the institutional dilemma that Jackson outlines in *Dennis* and *Korematsu*. This sequence is neither irrational nor ill-motivated. Later generations will bemoan the violation of liberty, but that will not prevent yet later generations from doing the same when the hour of emergency comes round again.

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¹¹⁶ Sunstein, *supra*.

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