

# Institutional Flip-Flops

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*Many people vigorously defend particular institutional judgments on such issues as the filibuster, recess appointments, executive privilege, federalism, and the role of the courts. These judgments are defended publicly with great intensity and conviction, but some of them turn out to be exceedingly fragile in the sense that their advocates are prepared to change their positions as soon as their ideological commitments cut in the other direction. For example, institutional flip-flops can be found when Democratic officials, fiercely protective of the filibuster when the President is a Republican, end up rejecting the filibuster when the President is a Democrat. Other flip-flops seem to occur when Supreme Court Justices, generally insistent on the need for deference to the political process, show no such deference in particular contexts.*

*Our primary explanation is that many institutional flip-flops are a product of “merits bias,” a form of motivated reasoning through which short-term political commitments make complex and controversial institutional judgments seem self-evident (thus rendering those judgments vulnerable when short-term political commitments cut the other way). We offer evidence to support the claim that merits bias plays a significant role.*

*At the same time, many institutional judgments are essentially opportunistic and rhetorical, and others are a product of the need for compromise within multimember groups (including courts). Judges might join opinions with which they do not entirely agree, and the consequence can be a degree of institutional flip-flopping. Importantly, some apparent flip-flops are a result of learning, as, for example, when a period of experience with a powerful president, or a powerful Supreme Court, leads people to favor constraints. In principle, institutional flip-flops should be reduced or prevented through the adoption of some kind of veil of ignorance. But in the relevant contexts, the idea of a veil runs into severe normative, conceptual, and empirical problems, in part because the veil might deprive agents of indispensable information about the likely effects of institutional arrangements. We explore how these problems might be overcome.*

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## Introduction

What is the legitimate authority of the President, Congress, and the Supreme Court? What is the proper relationship between the national government and the states? Many people have firm views about such questions. The puzzle is that in numerous cases, those responses seem to depend on the answer to a single (and apparently irrelevant) question: who currently controls the relevant institutions? Because the answer to that question changes over time, history is full of what we shall call *institutional flip-flops*: judgments that shift dramatically with changes in the political affiliations and substantive views of those who occupy the offices in question.

Consider a few recent examples. Under President George W. Bush, Democratic senators aggressively defended the use of the filibuster, while Republican senators vigorously opposed it.<sup>1</sup> Under President Barack Obama, the two sides essentially flipped. Republican senators vigorously defended the use of the filibuster, which was sharply opposed by Democrats.<sup>2</sup>

Or consider this question: does the President have broad power to make recess appointments? Frustrated by Democratic opposition to many of his nominees, President Bush certainly thought so.<sup>3</sup> Many Republican senators agreed while prominent Democratic senators did not.<sup>4</sup> Under President

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1. See, e.g., Carl Hulse, *Filibuster Fight Nears Showdown*, N.Y. TIMES (May 8, 2005), <http://www.nytimes.com/2005/05/08/politics/08judges.html> [http://perma.cc/VW3Y-WSN7] (quoting Senator Charles Schumer defending the filibuster as part of “the age-old checks and balances that the founding fathers placed at the center of the Constitution and the Republic,” and reporting on Republican criticism of filibustering Democrats as “uncompromising obstacles to popular legislation”).

2. See, e.g., Jeremy W. Peters, *Democrats Poised to Limit Filibusters, Angering G.O.P.*, N.Y. TIMES (July 11, 2013), <http://www.nytimes.com/2013/07/12/us/politics/showdown-nears-in-senate-over-filibusters-change.html> [http://perma.cc/X6FR-49FQ] (reporting Democratic insistence on limiting the filibuster to remedy “dysfunction,” while Republicans claimed that such limits would “do irreversible damage to [the Senate as] an institution”). We acknowledge that there would be no flip-flopping if a senator thought, “President X chose good people, whereas President Y chose political hacks, and so I filibuster only the latter.” What we are identifying is not different evaluations of nominees, but different standards for evaluating them.

3. See, e.g., Neil A. Lewis, *Bypassing Senate for the Second Time, Bush Seats Judge*, N.Y. TIMES (Feb. 21, 2004), <http://www.nytimes.com/2004/02/21/us/bypassing-senate-for-second-time-bush-seats-judge.html> [http://perma.cc/F3YA-HNT5] (reporting on President Bush’s appointment of Judge William H. Pryor Jr. during a weeklong Congressional recess); Jim Rutenberg, *Bush Uses Recess to Fill Envoy Post and 2 Others*, N.Y. TIMES (Apr. 5, 2007), [http://www.nytimes.com/2007/04/05/washington/05bush.html?fta=y&\\_r=0](http://www.nytimes.com/2007/04/05/washington/05bush.html?fta=y&_r=0) [http://perma.cc/BPL9-DQSC] (reporting on President Bush’s appointment of Sam Fox, Andrew Biggs, and Susan E. Dudley during a similar Congressional recess).

4. See, e.g., Lewis, *supra* note 3 (reporting that “Republican Senate officials suggested . . . that there may be more such recess appointments as a response to the Democrats’ tactic of using filibusters or the threat of extended debates to block confirmation of the president’s judicial nominees” while quoting Senator Charles Schumer as calling the recess appointment a “questionably legal and politically shabby technique”); Rutenberg, *supra* note 3 (quoting then-Senator John Kerry’s statement that President Bush “abuse[d] the power of the presidency” by appointing the ambassador to Belgium over the Senate’s objections).

Obama, Republicans were outraged, and Democrats were supportive or quiet.<sup>5</sup> Similarly, President Bush issued a large number of signing statements, in which he asserted the constitutional prerogatives of the President as the basis for questioning legislation that, in his view, intruded on those prerogatives.<sup>6</sup> Democrats vehemently objected to the use of signing statements, in a way that seemed to signal a deep and enduring institutional opposition to them.<sup>7</sup> By contrast, President Obama's signing statements have not produced much protest from Democrats<sup>8</sup> (even though several involved contested issues with respect to presidential authority to protect national security).<sup>9</sup>

There is a closely related type of flip-flop where a person's position on an institutional question does not depend so much on *who* currently controls the relevant institutions but on *what particular political outcome will result*. Consider a lawsuit brought by the attorneys general of Nebraska and

5. See, e.g., David Nakamura & Felicia Sonmez, *Obama Defies Senate, Puts Cordray in Consumer Post*, WASH. POST, Jan. 5, 2012, at A1 (reporting that Senate Democrats "defended the administration's move"); Sheryl Gay Stolberg, *Obama Bypasses Senate Process, Filling 15 Posts*, N.Y. TIMES (Mar. 27, 2010), <http://www.nytimes.com/2010/03/28/us/politics/28recess.html> [<http://perma.cc/98NP-F8Y5>] (reporting a "flurry of angry statements" from Republican Senators).

6. See, e.g., Statement on Signing the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, 44 WEEKLY COMP. PRES. DOC. 1346 (Oct. 14, 2008) ("Provisions of the Act . . . purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations . . ."); Charlie Savage, *Bush Declares Exceptions to Sections of Two Bills He Signed into Law*, N.Y. TIMES (Oct. 14, 2008), <http://www.nytimes.com/2008/10/15/washington/15signing.html> [<http://perma.cc/9SFA-LQP7>] (reporting on President Bush's use of signing statements to bypass parts of legislation that he viewed as unconstitutional constraints on presidential power).

7. See, e.g., Carl Hulse, *Lawmakers to Investigate Bush on Laws and Intent*, N.Y. TIMES (June 20, 2007), <http://www.nytimes.com/2007/06/20/washington/20cong.html> [<http://perma.cc/8H4Q-ZMLJ>] (quoting Senator Robert Byrd objecting to President Bush's use of signing statements: "Federal law is not some buffet line where the president can pick parts of some laws to follow and others to reject.").

8. See, e.g., Karen Tumulty, *Obama Circumvents Laws with 'Signing Statements,' a Tool He Promised to Use Lightly*, WASH. POST (June 2, 2014), [https://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a\\_story.html](https://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a_story.html) [<https://perma.cc/79ZY-NWE7>] (quoting a member of an American Bar Association panel criticizing the use of signing statements: "When Bush was issuing signing statements, the Republicans didn't care. When Obama was doing it, Democrats didn't care.").

9. For institutional judgments, there is a pervasive possibility of path dependence, as when people become committed to some such judgments at Time 1 and are therefore unwilling or unable to extricate themselves at Time 2, thus reducing flip-flops. A prominent example might be New Deal liberals of the 1930s and 1940s who adopted a firm position against an aggressive judicial role, making it difficult for them to approve of the role carved out by the Warren Court. Justice Felix Frankfurter is probably the most famous case in point. Many theories of judicial review are an effort to respond to a charge of institutional flip-flopping. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131–32 (1977) (discussing the response to the Warren Court's perceived flip to judicial activism); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 207 n.24 (1980) (discussing several commentators' discomfort with the Warren Court's judicial activism and their reactions to some of its decisions).

Oklahoma, seeking to block Colorado's legalization of marijuana possession on the ground that federal law criminalizes possession.<sup>10</sup> These same attorneys general have also argued that the Affordable Care Act is unconstitutional because it violates states' rights.<sup>11</sup> Critics argue that the attorneys general have flip-flopped. "It is as if their arguments about federalism and state autonomy were not arguments of principle but rather an opportunistic effort to challenge federal policies they don't like on other grounds."<sup>12</sup> On this view, they are "fair-weather federalists"<sup>13</sup> who promote or deride federalism based on their views of the substantive political outcomes at stake.

From these and other examples of real or apparent institutional flip-flops, it is tempting to conclude (for example) that when some people make broad and seemingly universal pronouncements about the importance of respecting executive power, what they mean is that they like and trust the current president. And when some legislators emphasize the importance of allowing Congress to check the power of the President as such, they mean that they dislike and distrust the current president. Their purportedly neutral institutional judgments are motivated and determined by the occupant of the office at the time that they are making those judgments.

We might also conclude that when people make an argument based on federalism or executive primacy in some domain, they really mean that they care about a specific policy outcome that happens to be advanced in that particular instance by the states (as opposed to the national government) or the President (as opposed to Congress). To say the least, it is disturbing if firm and apparently timeless statements about institutional authority are in fact an artifact of short-term judgments about substance and not institutions at all.<sup>14</sup>

Some people might argue that the institutional flip-flops that we have identified are not genuine flip-flops—that the apparent inconsistencies can be explained away. As we will see, that argument is convincing for some, but not all, of the examples. But even when it is right, another puzzle arises, which is why people constantly accuse each other of flip-flopping when flip-flops do not occur. The most plausible explanation is that real flip-flops

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10. Petition for Writ of Certiorari at 3, 21, *Nebraska v. Colorado* (Dec. 18, 2014) (No. 144), 2014 WL 7474136, at \*3, \*21.

11. Shadee Ashtari, *11 GOP Attorneys General Criticize Obama For 'Flatly Illegal' Obamacare Fixes*, HUFFINGTON POST (Jan. 3, 2014, 1:27 PM), [http://www.huffingtonpost.com/2014/01/03/attorneys-general-obamacare-illegal\\_n\\_4537104.html](http://www.huffingtonpost.com/2014/01/03/attorneys-general-obamacare-illegal_n_4537104.html) [<http://perma.cc/A3BE-WSG8>].

12. Jonathan H. Adler, *Are Nebraska and Oklahoma Just Fair-Weather Federalists?*, WASH. POST: VOLOKH CONSPIRACY (Dec. 19, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/are-nebraska-and-oklahoma-just-fair-weather-federalists/> [<http://perma.cc/4LFM-U63R>].

13. *Id.*

14. We discuss below the complication introduced by the view that institutional judgments must, in the end, be defended by their substantive effects.

occur frequently enough to lend plausibility to accusations of flip-flopping even when those accusations turn out to be spurious.

Institutional flip-flops, real or at least apparent, also play a role within the Supreme Court. Within the federal judiciary, a flip-flop might result from an overriding interest in who controls relevant institutions, or more broadly on whose ox is likely to be gored—about the short-term substantive effect, in the case at hand, of one or another approach to a disputed issue. Should the Court defer to legislative fact-finding or to agency interpretations of law? Should it follow the Constitution's original meaning? Should it give the political process the benefit of every doubt? Should it give respect to the decisions of the states? On all of these questions, it is possible to find real or apparent flip-flops.<sup>15</sup>

Particular examples will be controversial, because there may be justifications for apparent inconsistencies (a point to which we shall return). But to take a prominent and much-discussed example, many people who abhor *Lochner v. New York*,<sup>16</sup> seeing it as a form of illegitimate judicial activism, are quite comfortable with *Roe v. Wade*.<sup>17</sup> In the same week in which Justice Antonin Scalia joined an opinion striking down § 4 of the Voting Rights Act,<sup>18</sup> he issued a wide-ranging dissenting opinion from the Court's decision to strike down the Defense of Marriage Act emphasizing the importance of judicial restraint.<sup>19</sup> Within the Court and the legal profession generally, are institutional judgments a product of an assessment of the likely composition of Supreme Court majorities? If so, is that a problem? Is it a problem if Supreme Court Justices who are committed, in principle, to following the original understanding fail to do so in cases that involve standing, affirmative action, or commercial advertising (a species of institutional flip-flopping)?

In the same vein, debates over national power are replete with at least apparent institutional flip-flops. Those who believe that the federal government should have broad power to preempt state efforts in the domain of immigration may be reluctant to conclude that the federal government should have broad power to preempt state tort law.<sup>20</sup> Here, as in the judicial context,

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15. See, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825–26 (2006) (observing that the most conservative members of the Supreme Court are less likely to validate liberal agency statutory interpretations and the least conservative members of the Court show the opposite pattern).

16. 198 U.S. 45 (1905).

17. 410 U.S. 113 (1973); Jack M. Balkin, "Wrong the Day it was Decided": *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 689 (2005) (describing the arguments that connect *Lochner* and *Roe* and how liberal scholars attempted to demonstrate that *Lochner* was consistent with liberal judicial decisions in the 1970s).

18. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (decided June 25, 2013).

19. *United States v. Windsor*, 133 S. Ct. 2675, 2697–98 (2013) (Scalia, J., dissenting) (decided June 26, 2013).

20. See *infra* note 62 and accompanying text.

apparent inconsistencies of this kind can be justified once we specify the appropriate principles. But in the area of preemption, as in other areas that involve the relationship between the federal government and the states, the driving force behind some people's institutional judgments seems to be the answer to this question: On the matter at hand, should we prefer the substantive judgments of the national government or instead the states? If that is indeed the driving force, institutional flip-flops are inevitable, at least over a sufficiently long period of time.

In principle, of course, the answers to institutional questions should not depend on short-term considerations such as the political affiliations and beliefs of those who currently occupy particular offices.<sup>21</sup> The long-term effect on the public interest is what matters. Some kind of veil of ignorance might be invoked to provide enduring answers. The idea of the veil is that if people imagine that they do not know their party affiliation, or even many of their interests, they can more easily agree on the institutional norms that would advance the public interest. In many contexts, however, there is a pervasive problem: If we put ourselves behind such a veil, we might find it exceptionally difficult to identify clear answers to institutional questions.

In the abstract, what is the right approach to the filibuster, recess appointments, signing statements, preemption, or the exercise of moral judgments by the Supreme Court? It is in large part because of the difficulty of answering such questions that people's judgments tend to be overwhelmed by short-term considerations of substance. More interestingly, the very idea of a veil of ignorance runs into plausible objections because it seems to deprive people of indispensable information. Nor is it exactly easy to encourage participants in institutional debates to focus on the long term because of the strong incentives they face to do otherwise.

Some people might even wonder whether flip-flopping is a significant problem. Maybe the accusations of flip-flopping are often baseless, an easy but unfair way to score political points against people who can provide justifications for their changes in position. Even when it is real, flip-flopping seems like a species of hypocrisy, and hypocrisy in politics is as old as politics itself.<sup>22</sup> In our view, however, flip-flopping accusations are so com-

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21. We can imagine qualifications. Suppose, for example, that with a certain otherwise appealing approach to institutional questions, the result would be certain catastrophe in the short term. If so, it might seem best to avoid the catastrophe. Of course, there is a question whether judges or others could take account of potential consequences of that kind. See JOSEPH RAZ, PRACTICAL REASONS AND NORMS 39–40 (Princeton Univ. Press 1990) (exploring “exclusionary reasons” as negative second-order reasons—reasons to refrain from acting for some reasons).

22. Of course, there is a great deal of work exploring the phenomenon of hypocrisy in politics. See, e.g., HANNAH ARENDT, ON REVOLUTION 81, 96–106 (1963) (relating the history of hypocrisy in politics); MARTIN JAY, THE VIRTUES OF MENDACITY: ON LYING IN POLITICS 16 (2010) (exploring the relationship between politics and mendacity); DAVID RUNCIMAN, POLITICAL HYPOCRISY: THE MASK OF POWER, FROM HOBBS TO ORWELL AND BEYOND 12–15 (2008) (chronicling the development of hypocrisy in modern political thought); JUDITH N. SHKLAR,

mon only because the ubiquity of actual flip-flopping makes the accusations credible. And flip-flopping causes distinctive harm, both because it leads to unproductive debates and because it produces bad outcomes (sometimes in the form of inaction).

Suppose, for example, that senators of one or another party block presidential nominees because of an institutional position that they cannot defend in neutral terms, or that federal courts invalidate agency action because they dislike the president who is responsible for it (and thus abandon a principle of deference that they would otherwise apply), or that rulemaking agencies or courts preempt state law because of disagreement with its content (and thus abandon principles of federalism that they would otherwise respect), or that members of Congress object to an “imperial presidency,” and take steps to cabin it, when their only real objection is to the substance behind the current president’s decisions. In at least some of these cases, and possibly in all of them, flip-flopping can produce significant damage.

Moreover, the flip-flop accusation often arises because the person in question fails to explain his or her reasons in an adequate fashion. A justice who praises the will of the people in decision *X* but then strikes down their will in decision *Y* might have good legal reasons in each case, but we ought to demand that the justice provide those reasons rather than inconsistent rhetorical positions. As long as the justice is willing to strike down a statute, the “will of the people” can never be a sufficient reason for a decision and is most likely empty rhetoric.

As we shall see, continuous flip-flopping reveals disagreements about institutional norms that ought to be resolved for the sake of good governance. As we shall also see, flip-flopping is often a form of bad reasoning that should be strongly discouraged. In the context of the judiciary, institutional flip-flopping can compromise rule of law values. Because accusations of flip-flopping are as promiscuous as flip-flopping itself, it is important to distinguish flip-flops from learning and other innocent forms of behavior.

Our principal goal in this Article is to elaborate on the concept of institutional flip-flops and to explain why they are so pervasive. In Part I, we provide examples and derive some typologies from them. In Part II, the heart of the Article, we offer explanations. First, some flip-flops seem to be naïve, in the sense that people’s views about institutional values vary depending on the short-term political outcomes they desire, but they may well be unaware of that fact. In such cases, people’s short-term substantive commitments have a kind of psychological priority, so much so that the supportive institutional judgment (“of course the President cannot have *that* authority”) seems self-evident, even if the opposing institutional judgment would seem self-evident (“of course the President has *that* authority”) if the substantive

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ORDINARY VICES 2–4 (1984) (expounding on hypocrisy and other vices and the role they play in moral political society).

commitments were otherwise. In such cases, institutional flip-flops result from what we shall call *merits bias*, which amounts to a form of motivated reasoning. We offer some empirical support for our claim that merits bias is both real and important.

When merits bias is at work, people's institutional judgments are motivated by their substantive commitments. But it is also true that many flip-flops among political insiders and judges are tactical. In such cases, institutional arguments are made opportunistically, and hence it is no surprise that they flip.

We also show that positions that may appear to be flip-flops may turn out to be nothing of the sort. What is true for objections to apparent hypocrisy is also true for objections to apparent flip-flopping: An investigation of people's actual beliefs might reveal that such objections have no merit. As we have noted, some kind of principle might account for apparent flip-flopping. Some people think that it is flip-flopping to favor aggressive judicial protection of free speech rights without favoring aggressive judicial protection of property rights, but familiar theories of constitutional interpretation might be invoked to show that there is no inconsistency. For example, one might believe that free speech rights are necessary to protect democratic self-government, while ordinary politics ensure sufficient protection of property rights.<sup>23</sup> If a judge has a particular theory of constitutional interpretation, her apparently aggressive approach to one statute might not be inconsistent with her apparently passive approach to another.

The governing principle might be complex and fine grained, and once it is identified, an apparent flip-flop might disintegrate. In addition, and perhaps more interestingly, changes in institutional judgments might reflect one or another form of learning. The most complex setting involves people's adjustments of their institutional commitments as a result of learning that those commitments lead to unfortunate substantive outcomes (and not merely in the short-term), thus justifying those adjustments.

In Part III, we explore a way forward. We argue that flip-flops arise in the first place because it is difficult for people—as a matter of both psychology and politics—to differentiate optimal institutional design (“the rules of the game”) and the specific, short-term political outcomes they care about, especially when in the midst of political debate. Yet the “gotcha” response is unhelpful; changing one's institutional views may well be justified. In general, the best way to adjudicate alleged flip-flops is to enlist the veil of ignorance—a device that forces people to evaluate institutional arrangements abstracted away from their short-term substantive commitments. But in the relevant contexts, the idea of a veil runs into genuine

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23. See, e.g., ELY, *supra* note 9, at 105–06 (justifying the rationale for the judiciary to be heavily involved in free speech rights).

normative, conceptual, and empirical problems, in part because the veil might deprive agents of indispensable information about the likely effects of institutional arrangements. We explore what the veil of ignorance should be taken to mean in this context and how those problems might be resolved.

## I. Examples and Typologies

### A. *Flip-Flops: Real or Merely Apparent?*

*1. Relevant Distinctions.*—An institutional flip-flop is a reversal of one's position on an institutional value based on partisan or political interests or substantive commitments. Here is a way of specifying the idea: People flip-flop when (1) at two distinct points in time they take different positions on the validity of a claim of institutional authority for a set of policy decisions, and (2) there are no relevant differences that would justify the shift.<sup>24</sup>

We distinguish two types of institutional flip-flops. A *partisan* institutional flip-flop occurs when the reversal results from the change in party control of the relevant institution. A Democrat who decries presidential power when the president is a Republican and defends it when the president is Democratic engages in a partisan institutional flip-flop. A *substantive* institutional flip-flop occurs when the reversal results from differences or changes in the policies of the relevant institutions. A conservative who invokes federalism to defend states that restrict abortion but then invokes the supremacy of national power when Congress limits same-sex marriage engages in a substantive flip-flop (unless some principle is available to justify the different invocations). While we note this distinction, we think that these types of flip-flops are essentially the same phenomenon and will use examples of both throughout our discussion.

It is important to begin by distinguishing between genuine flip-flops, in which there is no neutral justification for the flip, and less clear cases, in which a neutral justification can be identified, raising a question of whether a flip-flop is involved at all. Suppose, for example, that a Democratic senator vigorously defends filibustering federal judges who are nominated by a Republican president, but later contends that it is unacceptable to filibuster federal judges who are nominated by a Democratic president. If so, a flip-flop is likely to be involved. In such cases, the institutional commitment appears weakly held or even nonexistent: the senator's position on the legitimacy of the filibuster is wholly derivative of his views about the

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24. We are grateful to Aziz Huq for help with this formulation. We are bracketing the question whether there must be, in principle, a relevant difference, or whether it is sufficient for the agent to believe that there is a relevant difference. For some purposes, the distinction might be real: An agent might think, for example, that there is a difference between free speech rights and property rights, but she might be wrong to do so. For most of our purposes here, the distinction generally does not matter, but our discussion below of naïve and tactical flip-flops suggests its relevance.

President; and it is hard to identify a relevant difference between the two situations that would justify the shift.<sup>25</sup>

The matter is far more complicated if a judge votes in favor of upholding (say) the Affordable Care Act but not the Defense of Marriage Act. A critic might be tempted to argue that the judge has flip-flopped, perhaps by taking different positions on judicial authority, or on federalism and national power. But in cases of this kind, we may have an apparent rather than real case of flip-flopping. Different constitutional problems and provisions are involved, and no simple position on judicial authority is likely to cut across problems and provisions.

In the example at hand, for example, a judge might endorse some form of democracy-reinforcing judicial review,<sup>26</sup> calling for a deferential approach to congressional action under the Commerce Clause (and hence to the Affordable Care Act), but a more aggressive approach to the Equal Protection Clause (and hence to the Defense of Marriage Act). So too, judges who vote to invalidate a physical invasion of private property under the Takings Clause need not be engaged in any kind of flip-flop if they vote to uphold restrictions on commercial advertising. Perhaps those judges are originalists,<sup>27</sup> and perhaps their view of the original understanding calls for invalidation of physical invasions but validation of restrictions on advertisements. If so, we have no flip-flop at all.

2. *A Possible Objection.*—We will return to the role of neutral justification below, but at the outset, it is important to explore a possible objection. It is plausible to insist that on institutional questions, any particular position has to be defended on some substantive ground. We might favor an institutional judgment—say, a system of checks and balances of one or another kind—on the ground that it will increase social welfare, or promote democratic self-government, or increase national security, or safeguard liberty. The Senate filibuster, or the presidential power to act unilaterally to protect the nation against immediate threats, might be justified on one or another such ground.

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25. Perhaps the clearest flip-flops may be found among interest groups, whose influence rests on raw political power rather than reasoned argument. See, e.g., Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities*, 45 ENVTL. L. 1, 2–5 (2015) (discussing industry and environmental groups' flip-flop on marketable permit schemes).

26. See ELY, *supra* note 9, at 86–87, 105, 136 (arguing that judges should, when interpreting the Constitution, do so in such a way as to reinforce representation).

27. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (discussing the difficulties of applying originalism and the doctrine's requirements).

Institutions are normally seen as arrangements that produce bundles of expected policy outcomes—not as entities that are intrinsically appealing or valuable in themselves.<sup>28</sup> It is hardly embarrassing to support an institutional arrangement with the claim that it will lead to good outcomes, all things considered. In this light, we might be inclined to raise a question about the whole category of institutional flip-flops. When people take one position on the filibuster under a Republican president and another position under a Democratic president, is this apparent inconsistency due to divergent judgments about the consequences of filibusters? Is that a flip-flop at all? In what sense?

Suppose that someone's considered position is this: "I favor the filibuster under Republican presidents, but not under Democratic presidents." Or this: "I approve of the legitimacy of aggressive signing statements by Republican presidents, but not by Democratic presidents." On this approach, the expected (short-term) political commitments of the relevant institutions are part and parcel of the governing institutional position. And indeed, we shall give evidence that many people seem to think in these terms. But it is noteworthy that they do not explain themselves in this way, which suggests that views of this sort would be hard to defend publicly. In fact, they would seem both self-serving and preposterous, because they would settle the rules of the game by direct reference to the political views of the relevant players. In public debate, people usually make institutional arguments that purport to appeal across partisan divides and across disagreements about policy outcomes; that is why no one would publicly argue that an institutional arrangement is justified because it favors one party or leads to a specific political outcome that is controversial.

On social-welfare grounds, reasonable people might refuse to play by the rules of the game—and reject agreed-upon institutional norms—if and because they lead to extremely bad outcomes. For example, we could imagine a view that would support a shift in institutional arrangements if political power were suddenly obtained by fascists or communists. (Note, however, that if fascists or communists really obtained power, an institutional shift on the part of those who resisted them would be unlikely to take hold.) Some people think that democrats in Egypt, after supporting the move to elections, repudiated democracy when they saw that it could lead to Islamist rule.<sup>29</sup>

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28. We are grateful to Adrian Vermeule for this formulation and for pressing this point. While it is not impossible that some people believe that, for example, democracy and other fundamental institutional arrangements are intrinsically, rather than, or as well as, instrumentally valuable, our argument does not depend on whether institutional preferences are instrumental or noninstrumental.

29. See, e.g., Jackson Diehl, Opinion, *Jackson Diehl: Egypt's 'Democrats' Abandon Democracy*, WASH. POST (July 21, 2013), [http://www.washingtonpost.com/opinions/jackson-diehl-egypts-democrats-abandon-democracy/2013/07/21/58beace0-efc8-11e2-9008-61e94a7ea20d\\_story.html](http://www.washingtonpost.com/opinions/jackson-diehl-egypts-democrats-abandon-democracy/2013/07/21/58beace0-efc8-11e2-9008-61e94a7ea20d_story.html) [<http://perma.cc/7KB2-2Q6P>] ("What happened to Egypt's young liberals? Five years ago, they were the most promising [democratic] movement in [the] Arab world . . . . Now the vast majority of them are cheering [the military coup] . . . .").

Moreover, any position on, say, the authority of the President and the federal judiciary has to depend on the appropriate level of trust in those who occupy the relevant offices. As new information arrives—including new information about likely performance or preferences—judgments about appropriate institutional authority might change, not least because predictions about the effects of one or another allocation might change. As we will see, shifts of that kind reflect learning. They might well be flip-flops, but there is nothing dishonorable about them—a point to which we shall return.

### B. *Political Debate*

Within Congress, unambiguous institutional flip-flops are easy to find. We have already catalogued a number of them. Many public officials have switched position on both filibustering and signing statements, taking the pro-executive side when their party holds the Presidency and rejecting that side when the Presidency is held by the opposing party. An especially vivid example can be found in 2013 and 2014, when the Senate's Democratic majority enacted filibuster reform that it vigorously resisted under President Bush<sup>30</sup> and that met exceptionally fierce resistance from Senate Republicans<sup>31</sup>—who themselves flipped to support the reform when they attained a majority.<sup>32</sup> Here is a confident prediction: If a Republican president is elected in 2016, we will see further flips on these issues.

In a related case, Republicans objected when the Democrats used reconciliation—a procedure normally used for budget bills which enabled them to avoid the filibuster—in order to pass the Affordable Care Act in 2010.<sup>33</sup> Yet Republicans had used reconciliation fourteen times since 1981

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30. See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?ref=politics> [<http://perma.cc/Q9DT-ZA9C>] (reporting changes to the Senate rules made by the Democratic majority that removed the minority party's ability to filibuster most presidential nominees); Jeremy W. Peters, *New Senate Rules to Curtail the Excesses of a Filibuster*, N.Y. TIMES (Jan. 24, 2013), <http://www.nytimes.com/2013/01/25/us/politics/bipartisan-filibuster-deal-is-reached-in-the-senate.html> [<http://perma.cc/8HGX-ABU8>] (describing modest changes to Senate procedural rules that limit the ability of the minority to delay votes on bills and some presidential nominations).

31. See 159 CONG. REC. S8415–16 (daily ed. Nov. 21, 2013) (statement of Sen. McConnell) (“If you want to play games, set yet another precedent that you will no doubt come to regret . . . you will regret this, and you may regret it a lot sooner than you think.”).

32. See Carl Hulse, *Mitch McConnell's New Senate Goal: Turn Republican Dial to Yes*, N.Y. TIMES (Dec. 22, 2014), <http://www.nytimes.com/2014/12/23/us/politics/mitch-mcconnells-new-senate-goal-turn-republican-dial-to-yes.html> [<http://perma.cc/HEM7-XV46>] (“McConnell does not seem inclined to push ahead [on reversing the Democrats' rule change lowering the threshold for breaking a filibuster to a simple majority], despite earlier indications from him that Republicans should do so.”).

33. See Jonathan Chait, *A Brief Reconciliation Primer*, NEW REPUBLIC (Feb. 19, 2010), <http://www.newrepublic.com/blog/jonathan-chait/brief-reconciliation-primer> [<http://perma.cc/9YVK-C6ZY>] (explaining that “[r]econciliation is a legislative procedure for passing changes to the budget . . . [which] only requires a majority in the Senate”); J. Taylor Rushing & Eric

to pass legislation they cared about.<sup>34</sup> After Republicans won a majority of seats in the Senate in 2014, some of them proposed using reconciliation to repeal the Affordable Care Act.<sup>35</sup>

For another example, consider the parties' positions on war powers. In 1999, many Republicans in Congress objected when President Clinton sent military forces into Serbia without congressional consent.<sup>36</sup> They argued that under the U.S. Constitution, the President may go to war only with the consent of Congress; and under the War Powers Act, the President must withdraw forces from hostilities if he has not received congressional authorization.<sup>37</sup> Many Republicans also complained when President Obama used military force without congressional authorization against Libya and threatened to do so against Syria.<sup>38</sup> Yet Republicans did not object when President Reagan used military force without congressional authorization in Grenada, nor did they object when President George H.W. Bush used military force without congressional authorization in Panama.<sup>39</sup> Meanwhile, many

Zimmerman, *Senate GOP: Dems Lack Votes to Use Partisan Tactic on Health Reform*, HILL (Feb. 20, 2010, 11:00 AM), <http://thehill.com/homenews/senate/82421-senate-gop-dems-dont-have-votes-to-use-partisan-tactic-on-health-reform> [<http://perma.cc/DX8M-B85P>] (reporting McConnell's claim that if Democrats used reconciliation, it "would be an acknowledgment that there is bipartisan opposition" to the healthcare bill and a clear signal that Democrats had decided to ignore the will of the American people).

34. Robert Farley, *Reid Says Republicans Have Used Reconciliation More than Democrats*, POLITIFACT (Feb. 25, 2010, 12:37 PM), <http://www.politifact.com/truth-o-meter/statements/2010/feb/25/harry-reid/reid-says-republicans-have-used-reconciliation-more/> [<http://perma.cc/TH4U-2QWE>].

35. Scott Wong, *Republicans Eye Obscure Budget Tool to Repeal ObamaCare*, HILL (Dec. 21, 2014, 5:00 PM), <http://thehill.com/homenews/house/227795-gop-eyes-obscure-budget-tool-to-repeal-obamacare> [<http://perma.cc/2LZN-ZZTJ>].

36. See John M. Broder, *Clinton Says Force is Needed to Halt Kosovo Bloodshed*, N.Y. TIMES (Mar. 20, 1999), <http://www.nytimes.com/1999/03/20/world/conflict-balkans-overview-clinton-says-force-needed-halt-kosovo-bloodshed.html> [<http://perma.cc/5WSJ-5GQW>] (quoting a Republican senator stating, on the Senate floor, that "[t]hey are going to come home in body bags, and they will be killed in a war Congress has not declared"); Helen Dewar, *Kosovo Policy Further Strains Relations Between Clinton, Hill*, WASH. POST (Mar. 27, 1999), <https://www.washingtonpost.com/archive/politics/1999/03/27/kosovo-policy-further-strains-relations-between-clinton-hill/f7837d3b-85b4-4733-b062-7f3c6f0a62c4/> [<https://perma.cc/XG8H-C8GQ>] ("The Senate Republicans accused President Clinton of having . . . abused his power and 'abrogated his constitutional duty.'").

37. See Bill Miller, *Clinton's War Powers Upheld*, WASH. POST (June 9, 1999), <http://www.washingtonpost.com/wp-srv/national/daily/june99/dismiss09.htm> [<http://perma.cc/T4GF-CQ2Z>] (describing a lawsuit filed by twenty-six members of Congress against President Bill Clinton contending that the U.S. military involvement in Kosovo was illegal because Clinton never obtained congressional authorization).

38. See Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES (Mar. 21, 2011), <http://www.nytimes.com/2011/03/22/world/africa/22powers.html> [<http://perma.cc/G5LW-L9XT>] (describing opposition to President Obama's use of military force in Libya originating from both Democratic and Republican members of Congress).

39. See Dan Balz et al., *The Invasion of Grenada*, WASH. POST (Oct. 26, 1983), <https://www.washingtonpost.com/archive/politics/1983/10/26/the-invasion-of-grenada/18d2aa63-f54f-4e76-932b-275fae48c3ea/> [<http://perma.cc/XWN4-YJXJ>] (reporting that Republicans "rallied

Democrats objected to these uses of unilateral presidential power by Republican presidents<sup>40</sup> and did not complain when President Obama used military force without congressional consent in Libya<sup>41</sup> nor when President Clinton did so in Serbia.<sup>42</sup>

The parties also appear to flip-flop over the relevance of statutory constraints on other presidential powers. During the George W. Bush administration, prominent congressional Democrats complained that Bush disregarded statutes that restricted interrogation practices, surveillance, and criminal prosecution of detainees alleged to be terrorists.<sup>43</sup> During the Obama administration, prominent congressional Republicans have complained that Obama has disregarded immigration, education, and health statutes.<sup>44</sup> In a short time, we have thus witnessed a dramatic partisan flip-flop over whether the Presidency has become too powerful—whether an imperial presidency exists that needs to be reined in.<sup>45</sup> Of course some people

around President Reagan's decision to invade the island of Grenada"); Thomas L. Friedman, *Fighting in Panama: Reaction; Congress Generally Supports Attack, but Many Fear Consequences*, N.Y. TIMES (Dec. 21, 1989), <http://www.nytimes.com/1989/12/21/world/fighting-panama-reaction-congress-generally-supports-attack-but-many-fear.html> [<http://perma.cc/RHL2-WXB7>] (explaining that most Republicans adhered to a view of "strong support" for Bush's decision).

40. See Balz et al., *supra* note 39 (reporting that most Republicans felt Reagan's actions were justified but that Democrats were divided on the issue); Friedman, *supra* note 39 (quoting Democrat Charles Rangel criticizing President Bush's military action in Panama: "As much as I would like to get rid of the bum in Panama, I don't see the legal authority of the use of the military.").

41. Jeff Zeleny, *Airstrikes in Libya; Questions Back Home*, N.Y. TIMES (Mar. 20, 2011), <http://www.nytimes.com/2011/03/21/world/africa/21prexy.html> [<http://perma.cc/JXB8-AD92>] (noting that "[t]he action against Colonel Qaddafi's forces drew support from many Democrats" but also drew concern from some liberal Democrats about congressional authorization).

42. See Dewar, *supra* note 36 ("As many Democrats see it, the Republican attacks on Clinton's Kosovo policy arise more from a sense that Clinton has largely escaped injury on domestic issues, leaving foreign policy as a weakness worth exploring.").

43. See, e.g., Scott Shane, *Democrat Says Spy Briefings Violated Law*, N.Y. TIMES (Jan. 5, 2006), <http://www.nytimes.com/2006/01/05/politics/05nsa.html> [<http://perma.cc/575F-6ZF5>] (reporting that a "top Democrat" on the House Intelligence Committee wrote a letter to President Bush complaining that the limited congressional briefings the Bush Administration had provided on an eavesdropping program violated the law); Jonathan Weisman, *Bush's Challenges of Laws He Signed is Criticized*, WASH. POST (June 28, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/27/AR2006062700145.html> [<http://perma.cc/JK39-CZDZ>] (highlighting that Democrats "blast[ed]" President Bush's use of signing statements and reporting that a Democratic Senator deemed Bush's use of signing statements as "a grave threat to our constitutional system of checks and balances").

44. See Eric Posner, *Boehner's Lawsuit Against Obama is a Loser*, SLATE (July 11, 2014, 12:46 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2014/07/boehner\\_s\\_lawsuit\\_against\\_obama\\_is\\_a\\_loser\\_because\\_of\\_american\\_ideas\\_about.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/07/boehner_s_lawsuit_against_obama_is_a_loser_because_of_american_ideas_about.html) [<http://perma.cc/6WU3-D3KG>] (analyzing House Speaker John Boehner's effort to "sue President Obama for overstepping the limits of executive authority" and highlighting that Obama's critics argue that "in addition to Obamacare, the president has refused to enforce the immigration laws" and "has issued waivers to states freeing them from compliance with the test score requirements of No Child Left Behind").

45. See, e.g., Lauren Camera, *Obama Education Policies Add Fuel to Lawsuit Bid*, EDUC. WK. (Aug. 19, 2014), <http://www.edweek.org/ew/articles/2014/08/20/01lawsuit.h34.html> [<http://perma.cc/6WU3-D3KG>].

have a general objection to what they see as excessive presidential authority, cutting across partisan divides.<sup>46</sup> What we are emphasizing here is that in the public domain, institutional flip-flops are pervasive.

It is true that some of these cases may involve apparent rather than real flip-flops. Democrats objected that Bush exceeded his constitutional war powers.<sup>47</sup> Republicans tended to argue that Obama violated relevant statutes by underenforcing them in a manner inconsistent with the prosecutorial discretion that is vested in the President.<sup>48</sup> With their various views on these particular issues, both Democrats and Republicans need not have flip-flopped. Without flip-flopping, one might believe that the President has broad authority over the use of force without having broad authority not to enforce domestic legislation. It is thus possible, depending on one's views about the President's constitutional authority, to believe that neither party flip-flopped (or that both did). But to say the least, politicians have not tried very hard to show that their positions have been consistent, and in some cases, the inconsistency has been palpable.

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.cc/237Z-6SNM] (describing a lawsuit filed by House Republicans accusing President Obama of abusing his legal authority through his executive actions and waiving of work requirements for welfare recipients under the No Child Left Behind Act); Katie Zezima & Robert Costa, *Republicans Challenge Obama's Executive Actions, File Lawsuit over Obamacare*, WASH. POST (Nov. 21, 2014), [https://www.washingtonpost.com/politics/republicans-call-obama-executive-actions-damaging-to-presidency-file-lawsuit-over-obamacare/2014/11/21/d3720d0e-7192-11e4-893f-86bd390a3340\\_story.html](https://www.washingtonpost.com/politics/republicans-call-obama-executive-actions-damaging-to-presidency-file-lawsuit-over-obamacare/2014/11/21/d3720d0e-7192-11e4-893f-86bd390a3340_story.html) [https://perma.cc/Q7GD-LUBF] (describing a lawsuit filed by House Republicans accusing President Obama of violating immigration statutes and the Affordable Care Act).

46. For an early version, see ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). See also DANA D. NELSON, *BAD FOR DEMOCRACY: HOW THE PRESIDENCY UNDERMINES THE POWER OF THE PEOPLE* 4–5 (2008) (arguing that presidentialism, a concept used to describe how we look at the sitting president for national strength and unity, “encourages citizens to believe that their democratic agency depends on presidential power, instead of the other way around” and that these trained feelings can pull us in powerfully antidemocratic directions); ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 285 (2005) (concluding that although the executive office has received a lot of renovation, both by those who have held it and those who have beheld it, it cannot be said to be complete and that writing “a happy ending—to ensure that presidential power does not become presidential government—is the task of all those concerned with the American experiment in democracy”); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* 328–29 (2007) (contending that the President to be sworn in on January 20, 2009, whether a Democrat or Republican, would inherit all the “new and expanded executive powers created by the Bush-Cheney White House” and that this President’s choices will play an “important role in the unfolding story of the executive branch’s attempted takeover of the American government”).

47. See Eric Lichtblau & Scott Shane, *Basis for Spying in U.S. is Doubted*, N.Y. TIMES (Jan. 7, 2006), <http://www.nytimes.com/2006/01/07/politics/07nsa.html> [http://perma.cc/YCW4-N6QG] (explaining that many Democrats pointed to findings by the Congressional Research Service as “perhaps the strongest indication that [President] Bush might have exceeded his authority in fighting terrorism”).

48. See Savage, *supra* note 38 (noting that many Republican lawmakers shared the sentiment that President Obama had exceeded his constitutional authority by authorizing the attacks of Libyan air defenses and government forces without congressional permission).

### C. *Constitutional Law*

Within the Supreme Court, it is also easy to find at least apparent flip-flops, especially on the question of whether judges should defer to the political process. In *United States v. Windsor*,<sup>49</sup> for example, a majority of the Supreme Court struck down the Defense of Marriage Act (DOMA), which denied federal tax and related benefits to same-sex married couples.<sup>50</sup> Justice Kennedy, writing for the Court, ruled that DOMA violated the Equal Protection Clause because Congress had singled out persons in same-sex marriages for disparagement.<sup>51</sup> In his dissent, Justice Scalia complained that the Court's holding would distort "democracy" by interfering with the public debate on same-sex marriage.<sup>52</sup> "We might have let the People decide," he lamented.<sup>53</sup> And yet in two other cases decided the same week, Justice Scalia joined opinions that did not let the People decide but struck down duly enacted statutes or programs—§ 4 of the Voting Rights Act in *Shelby County v. Holder*<sup>54</sup> and the affirmative action program at issue in *Fisher v. University of Texas at Austin*.<sup>55</sup> In its various forms, the phrase "We might have let the People decide" seems to be used opportunistically.

Justice Kennedy launched his discussion of the merits in *Windsor* with a paean to the federalist system and the central role of states in defining marriage,<sup>56</sup> and yet in *Fisher*, he wrote a majority opinion that did not explore the possibility that Texas may have an interest in experimenting with affirmative action programs or that states play a traditional role in determining educational policy.<sup>57</sup> Justice Ginsburg wrote an eloquent dissent in *Shelby County* noting the importance of giving "deference" to congressional fact-finding while joining Kennedy's majority opinion in *Windsor*, which gave Congress's views on same-sex marriage no deference at all.<sup>58</sup>

We surveyed colleagues for their favorite (or least favorite) example of institutional flip-flops in the Supreme Court. We offer them here not

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49. 133 S. Ct. 2675 (2013).

50. *Id.* at 2695–96.

51. *Id.*

52. *Id.* at 2710 (Scalia, J., dissenting) (contending that the result of the Court's holding will be a "judicial distortion of our society's debate over marriage" because prior to this decision, there had been "plebiscites, legislation, persuasion, and loud voices—in other words, democracy" on all sides of the issue that was before the Court).

53. *Id.* at 2711.

54. 133 S. Ct. 2612, 2631 (2013) (decided June 25, 2013).

55. 133 S. Ct. 2411, 2415 (2013) (decided June 24, 2013).

56. *Windsor*, 133 S. Ct. at 2691–92.

57. *See Fisher*, 133 S. Ct. at 2415–22 (holding that a university's affirmative action policy is subject to strict scrutiny while making no mention of a state's traditional role in developing its education policies).

58. *Shelby Cty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting); *Windsor*, 133 S. Ct. at 2681–82.

necessarily as real rather than apparent illustrations—no flip-flop is necessarily involved—but as reflecting a sense of the terrain offered by specialists. Among the notable answers:

1. *Bush v. Gore and Federalism*.—Chief Justice Rehnquist and Justice O'Connor, two of the Court's most vigorous advocates of federalism,<sup>59</sup> joined a majority opinion that disregarded Florida election law and handed the 2000 presidential election to George W. Bush.<sup>60</sup> Dissenters, including Justices Ginsburg and Breyer, emphasized the value of federalism, which had not been a defining feature of their other opinions.<sup>61</sup>

2. *Federalism and Preemption*.—Similarly, conservative Justices who advocate federalism—in addition to Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas—are the most likely to find preemption of state law when business interests are at stake, causing liberal justices who vote the other way to accuse them of flip-flopping, and exactly the same charge could be made against those same liberal Justices, who are normally less enthusiastic about the rights of states.<sup>62</sup>

3. *Lawrence v. Texas and Stare Decisis*.—Justice Kennedy delivered an opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>63</sup> that provided an elaborate justification for stare decisis in explaining why he would not overturn *Roe v. Wade*.<sup>64</sup> But then in *Lawrence v. Texas*,<sup>65</sup> he

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59. Their advocacy of federalism can be seen in cases such as *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (“In the tension between federal and state power lies the promise of liberty.”); *New York v. United States*, 505 U.S. 144, 187 (1992) (holding that the Constitution “divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day”); and *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (striking down a section of a federal statute which “operate[d] to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions”). See also *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding a federal statute unconstitutional which required state law enforcement agents to participate in a federal regulatory program). For a useful discussion, see generally Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994), which defines federalism, argues that federalism interrupts rather than promotes the diffusion of governmental power, and asserts that federalism disrupts national community.

60. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (reversing the Supreme Court of Florida's judgment ordering a recount of the ballots, holding “there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards”).

61. See *id.* 135–36 (Ginsburg, J., dissenting) (denouncing the Court for not deferring to the judgment of the Florida Supreme Court in the interpretation of state law); *id.* at 146–47 (Breyer, J., dissenting) (contending that a Florida court, rather than the Supreme Court, should make decisions under Florida law).

62. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEXAS L. REV. 1097, 1167–68 (2006).

63. 505 U.S. 833 (1992).

64. *Id.* at 853–69.

65. 539 U.S. 558 (2003).

disregarded the recent precedent of *Bowers v. Hardwick*<sup>66</sup> in the course of striking down a law that criminalized sodomy between people of the same sex.<sup>67</sup>

4. *Printz and Textualism.*—Justice Scalia is famous for his advocacy of textualism, the doctrine that judicially enforced norms must be grounded in the text of statutes or the Constitution.<sup>68</sup> Yet in *Printz v. United States*,<sup>69</sup> he found that a statute that required state officials to enforce federal gun-control regulations unconstitutional despite the absence of any textual ban on “commandeering.”<sup>70</sup> Empirical research suggests that Justices sometimes invoke interpretative canons opportunistically while achieving ideologically preferred results.<sup>71</sup>

5. *The First Amendment and Originalism.*—Justice Scalia is the Court’s most vigorous proponent of the doctrine of originalism, and Justice Thomas has proclaimed himself an adherent of that doctrine on numerous occasions.<sup>72</sup> They have written numerous opinions based on originalist arguments.<sup>73</sup> Yet few scholars believe that they have given persuasive originalist justifications for their claims that the First Amendment blocks campaign-finance regula-

66. 478 U.S. 186 (1986).

67. See *Lawrence*, 539 U.S. at 578 (overruling *Bowers* and concluding that the statute, which criminalized same-sex sodomy, was unconstitutional because it violated the Due Process Clause).

68. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (advocating the benefits of adopting a judicial approach that requires statutory or constitutional bases when evaluating whether a certain concept is an established social norm).

69. 521 U.S. 898 (1997).

70. *Id.* at 925–33.

71. Lawrence M. Solan, Response, *Opportunistic Textualism*, 158 U. PA. L. REV. PENNUMBRA 225, 233–34 (2010), <http://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENNumbra-225.pdf> [<http://perma.cc/B3H5-KGBH>].

72. *60 Minutes: Justice Scalia on the Record* (CBS television broadcast Apr. 27, 2008), <http://www.cbsnews.com/news/justice-scalia-on-the-record/> [<http://perma.cc/RS94-6N3P>]; see, e.g., *Gonzalez v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (“[T]he Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. The Clause’s text, structure, and history all indicate that, at the time of the founding, the term ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.”) (citations omitted); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (“Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.”).

73. See, e.g., *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 689–90 (1996) (Scalia, J., dissenting) (“The relevant and inescapable point is this: No court ever held, and indeed no one ever thought, prior to our decisions in *Elrod* and *Branti*, that patronage contracting could violate the *First Amendment*.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (“At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved.”); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (advocating tempering the Court’s Commerce Clause jurisprudence such that it is more faithful to the original understanding of the Commerce Clause).

tions,<sup>74</sup> that the Fourteenth Amendment blocks affirmative action programs,<sup>75</sup> or that Article III forbids Congress from conferring standing on citizens.<sup>76</sup> Frequently, they say nothing at all about the original understanding of the relevant constitutional provisions.<sup>77</sup>

6. *Boumediene and Congressional Authorization of Emergency Measures*.—In his one-page concurrence in *Hamdan v. Rumsfeld*,<sup>78</sup> Justice Breyer explained that the Court’s ruling that the executive lacked the authority to try Al Qaeda suspects in military commissions was based on a simple principle: “Congress has not issued the Executive a ‘blank check.’”<sup>79</sup> But when Congress took out its checkbook and authorized military commissions in the Military Commission Act, Justice Breyer joined an opinion that struck down a provision in the Act on the ground that it violated the Suspension Clause of the Constitution.<sup>80</sup>

7. *Delegation and Chevron*.—In *Clinton v. City of New York*,<sup>81</sup> the Supreme Court struck down the line-item-veto statute as an impermissible delegation of legislative power to the President.<sup>82</sup> Yet the author of the majority opinion—Justice Stevens—also wrote the majority opinion in *Chevron*,<sup>83</sup> which provided the legal foundations of the administrative state

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74. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 386 (2010) (Scalia, J., concurring).

75. *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring).

76. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992); see, e.g., Marvin H. Lett, Grutter, Gratz, and Affirmative Action: Why No “Original” Thought?, 1 STAN. J.C.R. & C.L. 417, 423 (2005) (claiming the Supreme Court did not look to “original understanding” in the *Grutter* case); William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1258 n.49 (2011) (stating the original meaning of the First Amendment does not support the *Citizens United* holding); Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 969 (1999) (claiming Scalia ignored originalism in fashioning new Article III doctrine in *Lujan*).

77. See, e.g., *Grutter*, 539 U.S. at 346–49 (Scalia, J., concurring) (failing to argue any originalist interpretation of the Fourteenth Amendment).

78. 548 U.S. 557 (2006).

79. *Id.* at 636 (Breyer, J., concurring).

80. *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008).

81. 524 U.S. 417 (1998).

82. *Id.* at 421.

83. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

by holding that courts must defer to Executive Branch statutory interpretations based on congressional delegations of legislative powers to regulatory agencies controlled by the President.<sup>84</sup>

8. *Rules, Standards, and Sebelius*.—In *Caperton v. Massey*,<sup>85</sup> Chief Justice Roberts wrote a dissent criticizing the majority's holding that a state judge was required to recuse himself when his actions create a "probability of bias," pointing out that this standard "fails to provide clear, workable guidance for future cases," and then listing forty interpretative questions that the standard raises.<sup>86</sup> Yet Chief Justice Roberts' opinion in *NFIB v. Sebelius*<sup>87</sup> that Congress's commerce power does not extend to economic "inactivity"<sup>88</sup> creates at least as many interpretative questions. (We can think of forty-one but will not list them.)

## II. Explanations

### A. *Naïve Flip-Flops, Merits Bias, and Motivated Reasoning*

1. *Empirical Tests*.—A naïve flip-flop is one in which a person's institutional beliefs depend on the identity of the person or party currently in power or on the short-term substantive outcome that follows from a particular institutional configuration. Recall the example of a Democratic senator who supports aggressive use of the filibuster when the president is a Republican, but who deplores such use when the president is a Democrat. If the senator genuinely believes that the filibuster is legitimate when the president is a Republican, and genuinely believes that the filibuster is illegitimate when the president is a Democrat, then the senator has engaged in a naïve flip-flop.<sup>89</sup>

One might doubt whether the beliefs of real people could be so unstable. We conducted our own empirical test of that question. Using Amazon Mechanical Turk, we asked about 200 people this question:

President Bush was often blocked by the Democratic Senate, which frequently refused to confirm his nominees. Frustrated by its intransigence, he resorted to "recess appointments," which bypass the Senate by installing nominees while the Senate is out on what President Bush considered a "Senate recess." Do you think that President Bush did the right thing?

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84. See *id.* at 843–44 (giving "controlling weight" to regulations, "unless they are arbitrary, capricious, or manifestly contrary to the statute").

85. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

86. *Id.* at 893–98.

87. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

88. *Id.* at 2589.

89. Subject to a possible learning explanation that we discuss below.

A strong majority of Republicans (58%) thought that he did. By contrast, a strong majority of Democrats thought that he did not (68%).<sup>90</sup>

We asked a different group of people the same question, with just one difference: the name “Obama” was substituted for the name “Bush.” With that change, the vast majority of Republicans (89%) opposed the recess appointments, whereas the strong majority of Democrats (66%) supported them.<sup>91</sup> Though the result is not unambiguous, the best explanation is that people’s institutional judgments are rooted in their beliefs about the merits.<sup>92</sup>

We conducted a second empirical test using a different question:

In the aftermath of the attacks of 9/11, President George W. Bush was sometimes concerned that legislation, enacted by Congress, intruded on his constitutional authority in the area of national security. Bush issued “signing statements,” which set out his own views. Some of Bush’s signing statements said that he would ignore congressional enactments that did, in his view, intrude on his authority. Do you approve of such signing statements?

This time only 37% of Republicans said that they approved of signing statements—perhaps because of the current unpopularity of President Bush (even among Republicans), or perhaps because of a general concern among Republicans during the Obama Administration about presidential overreaching. But this was considerably more than the 20% of Democrats who said they approved of signing statements.<sup>93</sup>

When the same question was asked about Obama rather than Bush, the difference became very stark: 68% of Democrats said they approved of signing statements, while only 16% of Republicans approved of signing statements.<sup>94</sup> As before, with both parties, a person was much more likely to support an institutional practice (signing statements) if it benefited a same-party president. While, unlike in the first case, a majority of Republicans rejected signing statements even when Bush used them, our results nonetheless show flip-flopping among numerous Republicans as well as Democrats.

Turning to constitutional law, we asked a large group of subjects the following questions: (1) Do you support same-sex marriage? And (2) Do you believe that the Constitution permits Congress to ban same-sex marriage throughout the country? The first question calls for a substantive judgment; the second calls for an institutional judgment with a constitutional

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90.  $N = 200$ ;  $p < 0.01$ , meaning a high level of statistical significance.

91.  $N = 230$ ;  $p < 0.01$ .

92. The reason that the result is not unambiguous is that the words “the right thing” can be taken in more than one way. Some respondents might have thought that the question invited a substantive judgment, rather than an institutional one. But the structure of the question strongly suggests that an institutional judgment was sought.

93.  $N = 203$ ;  $p < 0.01$ .

94.  $N = 239$ ;  $p < 0.01$ .

foundation. Our hypothesis was that people who support same-sex marriage will believe that Congress cannot ban it and that people who oppose same-sex marriage will believe that Congress can ban it.

The results strongly support this hypothesis. Among same-sex marriage supporters, only 10% believed that Congress could ban it; 90% believed that Congress could not ban it. Among opponents, 49% believed that Congress could ban same-sex marriage; 51% believed that Congress could not ban it.<sup>95</sup>

We also asked the inverse of question (2), namely: Do you believe that the Constitution permits Congress to require all states to recognize same-sex marriage? Again, supporters of same-sex marriage were much more likely to believe that Congress possesses this power (69%) than opponents (6%).<sup>96</sup>

2. *Motivated Reasoning and Institutional Judgments.*—We interpret these results to mean that people’s views on the merits influence and sometimes decide their positions on institutional questions. Republicans are more likely to believe that George W. Bush had the legal power to make recess appointments or issue signing statements than Barack Obama does, because Republicans are more likely to trust Bush to use those powers wisely. Democrats thought similarly. People’s view on the merits of same-sex marriage strongly influences their positions on the institutional question of congressional power.

We suggest that naïve flip-flops reflect the phenomenon of merits bias, through which people sincerely accept an institutional position that fits with their substantive commitments.<sup>97</sup> In such cases, the institutional position is motivated in the sense that it is a product of those commitments; but agents are not aware of that fact. If, for example, members of Congress are genuinely hostile to the incumbent president and believe that his own positions are threatening to freedom and self-government, they are far more likely to accept, and even to find self-evident, an institutional position that fits with those views. But if they trust that president—if, for example, Democratic senators are asked whether they want to deny authority to a Democratic president—that same institutional position might seem preposterous. If a Democratic president acts unilaterally, Democratic legislators might think that he is reasonably exercising his authority in the face of a “broken system.” But if a Republican president acts unilaterally, Democratic senators might insist that he is violating the system of checks and balances. In fact, both the flip and the flop might seem self-evidently correct.

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95.  $N = 200$ ;  $p < 0.01$ .

96.  $N = 201$ ;  $p < 0.01$ .

97. As discussed below, any judgment about an institutional issue must, in the end, turn on some kind of substantive judgment. We are understanding the idea of “substantive commitments” in a narrower sense—not as connoting an ultimate justification for an institutional arrangement, but as separate and often short-term commitments to some kind of outcome that influence an institutional judgment.

Similarly, when people believe that Congress supports their views about same-sex marriage, abortion rights, and so on, and the states do not, they are likely to reject objections to national legislation based on federalism. When people believe that the states take their views more seriously, they are likely to invoke federalism as a reason that Congress should not override state law. In our view, merits bias is pervasive in politics and law, and it helps to account for institutional flip-flops and other puzzling judgments, plausibly including the majority opinion in *Bush v. Gore*.<sup>98</sup>

Merits bias is consistent with a significant body of psychological research, emphasizing the pervasive role of motivated reasoning.<sup>99</sup> If, for example, fans of a particular football team—say, the New England Patriots—watch a game, they are likely to be systematically biased in their assessment of the referee’s neutrality.<sup>100</sup> Typically they will see the referee as favoring the opposing team.<sup>101</sup> Their judgment to this effect is entirely sincere, even though they would have a quite different assessment if they rooted for that opposing team. Notably, they are blind to their own bias.<sup>102</sup> Motivated reasoning can be found in countless contexts, including politics and law.<sup>103</sup>

98. 531 U.S. 98, 100–11 (2000).

99. For the classic account, see generally Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954). See also Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 494 (1990) (suggesting that people seek out information to bolster their existing, biased opinions); Charles G. Lord, Lee Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2103–04 (1979) (presenting results that indicate individuals with different social beliefs come to opposite conclusions about the same data); Diana C. Mutz, *Political Psychology and Choice*, in THE OXFORD HANDBOOK OF POLITICAL BEHAVIOR 80, 87–88 (Russell J. Dalton & Hans-Dieter Klingemann eds., 2007) (explaining that motivated-reasoning models must take into account a focus on goals rather than accuracy).

100. For the seminal study demonstrating a phenomenon of this sort, see Hastorf & Cantril, *supra* note 99, at 130–32, which shows that after Dartmouth used rough tactics in a football game against Princeton, Princeton students “saw . . . twice as many infractions” being made by the Dartmouth players, while Dartmouth students reported that “both sides were to blame” and that both teams had committed “the same number of infractions.” See also Kunda, *supra* note 99, at 488 (explaining that fans of winning teams and fans of losing teams assigned different interpretations to a “fluke” event that occurred during the game); Samuel McNeerney, *Cognitive Biases in Sports: The Irrationality of Coaches, Commentators and Fans*, SCI. AM. (Sept. 22, 2011), <http://blogs.scientificamerican.com/guest-blog/2011/09/22/cognitive-biases-in-sports-the-irrationality-of-coaches-commentators-and-fans/> [<http://perma.cc/EFD5-9VCV>] (discussing how coaches, like most people, ignore information that is contradictory to their biased intuitions, a psychological phenomenon known as “confirmation bias”).

101. Hastorf & Cantril, *supra* note 99, at 130–32 (discussing how opposing fans perceived fairness in the same football game).

102. See, e.g., Emily Pronin et al., *The Bias Blind Spot: Perception of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 371–73 (2002) (demonstrating that participants generally viewed themselves as less susceptible to bias than others).

103. See Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19–26 (2011) (discussing motivated reasoning: the propensity “to process information in a manner that suits” a preferred outcome). For related work by Kahan and his coauthors, see for example Dan M.

What we are suggesting here is that people's assessment of institutional issues is often motivated as well.

Related research finds that people's willingness to accept outcomes based on institutional legitimacy is overridden when those outcomes are truly objectionable.<sup>104</sup> In such cases, the fact that the "right" institution reached that outcome drops out as a normative consideration.<sup>105</sup> Similarly, people tend to emphasize the substantive valence, not institutional considerations, in deciding whether Congress or instead courts should produce certain outcomes.<sup>106</sup> When people care greatly about the substance, their institutional judgments do not much matter.<sup>107</sup>

3. *An Analogy.*—Consider an analogy, involving the use of party affiliation as a kind of heuristic.<sup>108</sup> In a relevant study, people—both Democrats and Republicans—were asked their views about several issues involving welfare reform and related issues.<sup>109</sup> In one experiment, a group of subjects was asked whether they favored a generous welfare policy (with

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Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 859 (2012), which asserts that individuals are more likely to trust and incorporate information in line with their "cultural values".

104. See Linda J. Skitka et al., *Limits on Legitimacy: Moral and Religious Convictions as Constraints on Deference to Authority*, 97 J. PERSONALITY & SOC. PSYCHOL. 567, 568–69 (2009) (arguing that people are less likely to consider institutional authority when it conflicts with their "personal [sense of] right and wrong").

105. See Christopher W. Bauman & Linda J. Skitka, *Moral Disagreement and Procedural Justice: Moral Mandates as Constraints to Voice Effects*, 61 AUSTRALIAN J. PSYCHOL. 40, 47 (2009) (supporting the idea that "morality" impacts how people approach "questions of justice"); Skitka, *supra* note 104, at 568–69.

106. See David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 734 (2012) (suggesting people consider personal opinions about a result rather than what institution produced the result). Fontana & Braman's findings—that people's cultural priors, rather than their institutional preferences, determine their support for political outcomes—could also explain certain kinds of flip-flopping. *Id.* at 760. Our focus is not the influence of people's cultural priors on their institutional preferences, but rather the influence of their preferences for specific policy outcomes on their institutional preferences.

107. We should acknowledge that it is possible, at least as a matter of logic, that the causal direction could go the other way. People start off with a strong position about how much Congress can legislate about marriage, and this position influences their beliefs about the merits of same-sex marriage. On this interpretation, people suffer from a cognitive bias that causes their abstract commitments to congressional power or federalism to influence their views about substantive issues like same-sex marriage, abortion, and the like. This interpretation strikes us as deeply implausible for a simple reason: most institutional commitments (for example, a belief that Congress can overrule the states on marriage) imply exactly nothing about one's substantive views (for or against same-sex marriage, abortion rights, the death penalty, minimum wage laws).

108. Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808, 813 (2003). For a more recent paper that surveys the literature and offers additional experimental results, see John G. Bullock, *Elite Influence on Public Opinion in an Informed Electorate*, 105 AM. POL. SCI. REV. 496, 513 (2011), which found that cues from party elites do not fully displace people's reliance on information about policies.

109. Cohen, *supra* note 108, at 809.

high levels of benefits), and another group was asked whether they favored a strict policy (with much lower levels of benefits).<sup>110</sup> Not surprisingly, Democrats tended to favor the generous policy, while Republicans tended to favor the strict policy.<sup>111</sup>

Otherwise identical groups were then asked about the same issues, but with one difference: They were informed of the views of party leadership.<sup>112</sup> The effect of that information was significant. Regardless of whether the policy was generous or stringent, Democrats tended to favor that policy if they were told that it was favored by Democratic leadership.<sup>113</sup> Republicans showed the same pattern.<sup>114</sup> Armed with information about the views of their party's leadership, people departed from the views that they would have held if they had not been so armed. Stunningly, the effect of the information "overwhelmed the impact of both the policy's objective content and participants' ideological beliefs."<sup>115</sup> At the same time, people were *blind to that impact*; they actually said that their judgments were based solely on the merits, not on the effects of learning about the beliefs of party leaders.<sup>116</sup> Here, then, is clear evidence of the consequences of party affiliation for people's judgments—and of people's unawareness of that fact.<sup>117</sup>

This is an analogy, not an identity. Many people do take the views of party leadership as a kind of heuristic, overwhelming their own private judgments. Use of the "party heuristic" might be purely cognitive (even if it is relatively automatic), and it need not involve any kind of motivated reasoning. With merits bias, by contrast, people resolve hard institutional questions, on which they may have no particular views, by reference to their

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110. *Id.* at 812–13.

111. *Id.* at 812, 814; *see also* David Tannenbaum et al., On the Misplaced Politics of Behavioral Policy Interventions 10–11 (May 2014) (unpublished manuscript), <http://home.uchicago.edu/davetannenbaum/documents/partisan%20nudge%20bias.pdf> [<http://perma.cc/56VF-WUAL>] (finding that people's reactions to the use of certain tools for influencing behavior—such as "nudges"—appear to be strongly influenced by the political valence of the particular use).

112. Cohen, *supra* note 108, at 812–13.

113. *Id.* at 812.

114. *Id.* at 814.

115. *Id.* at 808.

116. *Id.* at 812, 815.

117. We should note that the studies we cite use ordinary people rather than experts, and it may be the case that expert knowledge helps people avoid substantive flip-flops. *See* Dan M. Kahan et al., "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2590054##](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2590054##) [<http://perma.cc/C29P-T5JA>] (finding that legal professionals avoid motivated reasoning when engaging in legal analysis). There is accordingly reason to think that judges and perhaps politicians who flip-flop do so for reasons discussed below.

substantive commitments.<sup>118</sup> What links the party findings with merits bias is a similar blindness, on the part of agents, to the source of their own judgments.

4. *Substantive Flip-Flopping vs. Institutional Flip-Flopping.*—We might call someone a “substantive flip-flopper” if, for example, she believes that the death penalty is just if and only if the party leadership believes that the death penalty is just—and if she flips when and because party leadership does so. A naïve institutional flip-flopper believes (or says) that the filibuster is legitimate if and only if the party leadership believes (or says) that it is legitimate; or, possibly, if and only if the filibuster advances the implementation of her substantive views in particular cases. (For example, such a flip-flopper might generally believe that the Senate should defer to the President’s choice of Executive Branch nominees, but might flip because of her strong views on civil rights.) The latter case can produce flip-flopping that exceeds the pace of change in leadership. The naïve institutional flip-flopper might support the filibuster today because it blocks a judicial nominee of whom she disapproves, and then oppose the filibuster tomorrow because it blocks a new healthcare bill that she likes.

We suspect that naïve institutional flip-flopping is more common than naïve substantive flip-flopping. At least on the very largest issues, people’s substantive views are not highly malleable, and on such issues, they may well be impervious even to reports about the views of party leadership.<sup>119</sup> Most people who oppose the death penalty will continue to oppose it even if the party changes its mind.<sup>120</sup> By contrast, institutional values are far less robust, because they do not trigger immediate or strongly held reactions in the abstract, tend to be derivative of substantive views, and often depend on complex tradeoffs.

Of course it is true that some flip-flops are palpable inconsistencies and might produce a significant degree of embarrassment in the agent (who might have to offer an explanation in terms of learning). But sometimes the embarrassment is tolerable (for reasons explained below<sup>121</sup>) and sometimes it is avoidable. In our example above, the flip-flopper might be able to reason

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118. It is possible that the results in our first two surveys are influenced by the party heuristic. But in the third survey, there is no mention of the party’s position.

119. One of the present authors (Sunstein) is engaged in empirical research (with Todd Rogers and Edward Glaeser) that supports this claim.

120. The theory of “cultural cognition” explains how one’s political beliefs on issues such as the death penalty and environmental protection are derived from one’s cultural worldview, which precedes party affiliation. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL’Y REV.* 149, 150 (2006).

121. See *infra* section II(B)(2) (discussing flip-flops from a cost–benefit perspective).

to herself that different values are at stake in the case of nominations and statutes, and so her changing position about the filibuster is not really inconsistent.

*B. Tactical Flip-Flops*

*1. Definition.*—A tactical flip-flop takes place when an agent knowingly (as opposed to naïvely) changes institutional positions in order to gain a tactical advantage. Merits bias is not involved. Tactical flip-flops may be cynical; institutional arguments might be invoked for purely strategic or opportunistic reasons. The agent recognizes that her credibility may suffer but believes that the tactical gain outweighs any long-term loss. She might believe that people’s memories are short and hence that she has little to lose from the flip-flop. Or she might believe that the relevant audience consists mainly of naïve flip-floppers who will not believe that the agent’s flip-flop is tactical.

Use of institutional arguments can be good strategy. It is clear that if an agent invokes an institutional or legal position that is independent of the merits, she might be able to obtain agreement from people who fiercely disagree with her on matters of substance or politics. For example, a lawyer might persuade judges, or a judge might persuade colleagues, to vote to uphold an agency’s interpretation of the Affordable Care Act under the *Chevron* principle<sup>122</sup>—and thus bracket disagreements that might break out in the absence of that principle.<sup>123</sup> The problem is that if an institutional position is held only for tactical reasons, there is a pervasive risk of flip-flopping and hence a loss of credibility.

*2. Politics.*—Tactical flip-flops are ubiquitous in politics. Recall that when Republicans hold a majority of the seats in the Senate, many of them decry the use of the filibuster by the Democratic minority, claiming that it is antidemocratic;<sup>124</sup> but when Republicans are in the minority, many of them claim that the filibuster is sanctioned by the Senate’s traditions.<sup>125</sup> Many Democrats make exactly the same arguments according to their position as

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122. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–45 (1984).

123. *See, e.g., King v. Burwell*, 759 F.3d 358, 373–76 (4th Cir. 2014), *aff’d*, 135 S. Ct. 2480 (2015) (applying *Chevron* deference to the Internal Revenue Service’s interpretation of the Affordable Care Act).

124. *See, e.g., Hulse, supra* note 1 (describing consideration given by Republican Senators in 2005 to a vote to “eliminate Democratic filibusters against [Republican President George W. Bush’s] choices for the federal bench”).

125. *See, e.g., Peters, supra* note 2 (reporting that in 2015, Republican Senator Mitch McConnell accused Senate Democrats of “trying to do irreversible damage to an institution that in many ways still functions as it did when the Constitution was drafted” when Senate Democrats proposed a rule requiring fewer votes to confirm federal judges).

majority or minority party.<sup>126</sup> We have given other examples of this phenomenon—recess appointments, court packing, signing statements, unilateral executive action, and so on. In some such cases, flip-flopping is naïve, but in others, it is tactical. While legislators self-consciously invoke institutional considerations, they do so opportunistically, seeking to enlist some apparently principled argument (about checks and balances or the need to break a logjam) in the interest of a substantive goal, which is all that they really care about.<sup>127</sup>

Some tactical flip-flops are in a sense shameless, but others are more subtle. Suppose that a leader of a political party wants to attack a policy initiative from the president who is from the opposing party. Suppose too that the substantive issue (immigration, relations with Cuba, same-sex marriage, climate change) is one on which the leader's own party is divided. The leader might press an institutional claim in the hope of building a large coalition. Some members might be far more willing to agree that "the president has exceeded his authority" than that "the president's policy preferences are objectionable." To be sure, such members would be, in the circumstances, immune from merits bias. But we could easily imagine circumstances in which a party leader attempts to enlist people who are willing to press a claim about institutional overreaching alongside those who object to the president's action on the merits.

Tactical flip-flops are easy to understand, certainly within the political domain. (We will see that the judicial context is more complex.) Consider an analogy.<sup>128</sup> If a lawyer argues for one position on Monday, and for another position on Tuesday, there need be no problem, at least if the lawyer has different clients. In an adversary system, lawyers are entitled to defend their clients vigorously, and there is no requirement of consistency across clients. Perhaps elected officials can be viewed in similar terms. Their job is to defend their constituents, and it is not a problem if the rhetorical resources they deploy in one year are very different from those they deploy five years later.

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126. See, e.g., Hulse, *supra* note 1 (quoting Democratic Senator Chuck Schumer, who accused Senate Republicans of "trying to undermine the age-old checks and balances that the founding fathers placed at the center of the Constitution and the Republic" when Republicans tried to block Democratic filibusters in 2005).

127. See, e.g., Erica Werner, *Democrats Clinch Critical Votes for Iran Nuclear Deal*, ASSOCIATED PRESS (Sept. 8, 2015, 10:29 PM), <http://bigstory.ap.org/article/49a2f41e0fe4432bbfa4afbde3f2fca8/congress-plunging-debate-iran-nuclear-deal> [<http://perma.cc/6S9X-HW8R>] (relating both Republican Senator Mitch McConnell's claim that "the Senate should not hide behind procedural obfuscation to shield the president or our individual views" by filibustering a resolution disapproving of the Iran nuclear accord and Democratic Senator Chris Murphy's assertion that "[i]f we have to go through the procedural charade of a veto, and a vote to sustain the veto, it will be embarrassing for this administration and this country" such that a filibuster of the resolution is better for American credibility around the world).

128. Thanks to David Strauss for raising it.

In any case, the overriding concern of individual legislators is to be reelected,<sup>129</sup> and the goal of each party is to control the government.<sup>130</sup> If legislators want to be reelected, it might well be in their interest to reject the initiatives of a president of an opposing party, lest they be accused of capitulation (and render themselves vulnerable to a primary challenge). At the same time, legislators face a number of pressures, electoral and otherwise, to support the initiatives of a president of the same party. It is true that the electoral self-interest of individual legislators will sometimes lead them to support a president of the opposing party or to oppose a president of the same party, but the general tendency is clear. A Republican member of the House of Representatives in a majority Republican district is unlikely to have much to gain by supporting a Democratic president and might have something to lose.

Some members of Congress are partisans, either by choice or because of the influence exerted by party leadership. To a greater or lesser degree, they want to maximize the authority of their own party. To partisans, of course, the ideal world is one in which their party exercises full control when it holds the majority and can block the other party's attempt to govern when it does not hold the majority. Thus, partisans routinely advance generous interpretations of institutional constraints when out of power and narrow interpretations when in power.

Suppose, for example, that a president makes a series of recess appointments in circumstances in which people reasonably dispute the question of whether he has the legal authority to do so. Most people are unlikely to have clear views on the underlying question. The underlying issues are highly technical, and without a great deal of work, it is not easy to end up with a firm conviction. To be sure, dedicated guardians of legislative power, taken as such, might be expected to insist on the importance of advice and consent; they might have an institutional conviction that outruns short-run considerations about whether a particular president is likely to be able to ensure that his preferred people are in place. And it is possible to identify some legislators who have had some convictions.<sup>131</sup> But in light of the standard incentives

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129. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 16 (1974).

130. See GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 32–33 (2005) (describing how legislative majorities exercise political control by controlling the legislative agenda).

131. See Adam Clymer, *Robert C. Byrd, a Pillar of the Senate, Dies at 92*, N.Y. TIMES (June 28, 2010), <http://www.nytimes.com/2010/06/29/us/politics/29byrd.html> [<http://perma.cc/BP7F-J6B7>] (describing Senator Robert Byrd as a committed “champion of the legislative branch” who opposed both Congress’s granting of line-item-veto power to the President and the invasion of Iraq without congressional declaration of war because he believed both to be contrary to the government structure established by the Constitution).

faced by those who run for public office, and who seek to keep their jobs, it is highly unusual to emphasize, and to stand by, such convictions. For this reason, tactical flip-flopping is not exactly surprising.

From another perspective, however, tactical flip-flops are also puzzling. The flip-flops are so common that one might wonder why anyone ever believes these institutional arguments—and if no one believes them, why politicians would ever bother to make them. One possible explanation is that no one believes them; it is all theater or “cheap talk,”<sup>132</sup> similar to polite conversation. But there is another possibility, which is that many people (including many voters) have short memories, and the sheer plausibility of an institutional argument, on the merits, can ensure that it is not entirely ineffective.

If Republican legislators decry the imperial presidency during a Democratic administration, and if their objections have apparent force, it might not much matter that they defended (similar) presidential authority under a Republican administration. And even if no one is actually persuaded by their objections, at least they might have the functions of intensifying the commitment of the like-minded and appealing to the beliefs of constituents. Under these circumstances, it might well be in the interest of many legislators to flip at Time 1 and to flop at Time 2. From the standpoint of individual agents, the benefits of both actions exceed their costs. The benefits of the initial flip are clear, and the costs of the flop might be small or even zero.

At the same time, it is reasonable to suppose that institutional arguments sometimes do exert some force—but usually not a large amount—at least when the underlying questions are genuinely difficult. Senators from both parties, for example, jointly benefit from common institutional rules that protect political minorities. A current majority is aware that if it adopts rules that greatly weaken the authority of the current minority, it might itself be disempowered in the future. And legislators of both sides are likely to have some respect for the traditional institutional prerogatives of the national legislature, thus ensuring that it will preserve a “core” of those prerogatives. “Turf protection” can sometimes unite legislators across partisan lines, reducing flip-flops.

It is a nice question how a degree of institutional self-protection interacts with the electoral concerns of individual legislators; we could easily imagine and even find cases in which electoral self-interest argued in favor of little interest in institutional questions, even within the “core.” (Imagine cases of recent attacks on the United States, where broad delegation to the executive

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132. In game theory, “cheap talk” refers to communication among players with no direct cost in the game. See Vincent Crawford, *A Survey of Experiments on Communication via Cheap Talk*, 78 J. ECON. THEORY 286, 286 (1998) (“‘[T]alk is cheap’ in the sense that players’ messages have no direct payoff implications . . .”).

might be what voters want.) But some common understandings provide a degree of constraint and thus can be meaningfully invoked in debate, even if they exert influence only on the margin.

3. *Courts*.—Clear tactical flip-flops are much less visible in the courts than in the political arena, but the concept is not unfamiliar in discussions of the judiciary, and tactical flip-flops can sometimes be found within the legal system. To take an admittedly extreme allegation, begin with *Bush v. Gore*, where some people flatly accuse the majority of ruling for Bush in order to ensure that the next several appointments to the Supreme Court would be Republicans.<sup>133</sup> On this view, the Republican Justices who voted for Bush feared becoming a minority as a result of Gore appointments over the next four to eight years, and thus losing their power to shape American law.<sup>134</sup> The Justices were willing to lose some credibility, to adopt an adventurous interpretation of the Equal Protection Clause, or relax their commitment to federalism in order to ensure that they had enough power in order to advance their legal and ideological goals another day.<sup>135</sup>

We do not mean to endorse this set of claims, which we think unfair, accusatory, and wrong. But we suspect that within the federal judiciary, tactical flip-flops are much more common than generally recognized, albeit less dramatic (and far more interesting) than the alleged tactical flip-flop in *Bush v. Gore*. One likely reason that Justices are unable to make fully consistent institutional arguments in all opinions that they join is that it is necessary to form majorities with Justices who may agree on the outcome but disagree with the reasoning. A Justice who does not have a weak commitment to federalism, or who is unenthusiastic about originalism, might be willing to join an opinion that shows a strong commitment to federalism, or a keen interest in originalism, as a way of preventing undue splintering within the Court.<sup>136</sup> It is common for judges or justices to join opinions with which they do not wholly agree,<sup>137</sup> and the result can be a degree of institutional flip-flopping from one case to another.

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133. See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1409 (2001) (criticizing the Supreme Court because “[b]y intervening in the election, the five conservatives installed a President who would appoint their colleagues and successors and would stock the federal judiciary with like-minded conservatives”).

134. See *id.* (criticizing the conservative Justices in *Bush v. Gore* as “appear[ing] to use the power of judicial review to secure control of another branch of government that would, in turn, help keep their constitutional revolution going”).

135. See *id.* at 1426 (labeling the Supreme Court’s Equal Protection argument in *Bush v. Gore* as “a large stretch in the doctrine”).

136. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (in which Justice Kennedy joined Justice Scalia’s highly originalist majority opinion stating that “[t]he 18th-century meaning [of ‘arms’] is no different from the meaning today”).

137. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (in which Justice Kagan joined the part of Chief Justice Roberts’s opinion holding that “[a]s for the Medicaid

Judicial opinions often reflect incompletely theorized agreements, in the form of low-level principles on which diverse people can agree notwithstanding their disagreement on fundamental issues.<sup>138</sup> When incompletely theorized agreements are in place, there will be no flip-flopping. But sometimes incomplete theorization is not possible, perhaps because it is insufficient to resolve the relevant controversy, perhaps because some members of the winning coalition want to offer some reasoning with which other members do not fully agree. In such cases, the opinion might not fully reflect the views of all those who join it, and a degree of flip-flopping will eventually follow.

For example, suppose that in *Windsor*, Justice X believed that DOMA was unconstitutional at least in part on federalism grounds while Justice Y believed that DOMA was unconstitutional entirely on Equal Protection grounds (and hence that federalism was irrelevant). Perhaps Justice X was assigned the opinion, and Justice Y wished to avoid writing a concurrence because she did not want to complicate the law, or increase uncertainty, and perhaps also feared that X might flip his vote (or perhaps would similarly refuse to join X's opinions in future cases). Accordingly, Justice Y joins an opinion whose reasoning may be inconsistent with another opinion written by Justice Y, resulting in what appears to be a flip-flop and indeed is a tactical flip-flop. Justice Y suppresses her reasoning and takes a possible hit to her reputation in order to preserve stability and comity within the Court and her relationship with Justice X (enabling Justice Y to exert greater influence on the law in some future case). If so, Justice Y will engage in tactical flip-flopping, in the sense that she has committed herself to a view with which she does not fully agree and from which she will retreat in time.

### C. *Non-Flip-Flops*

Many cases of alleged or apparent flip-flopping are nothing of the kind. Charges of flip-flopping—like charges of hypocrisy more generally—often disintegrate once we specify the beliefs of the relevant agent. The problem with the charges is that they may depend on taking those beliefs at a high (and obtuse) level of abstraction, when those who hold them do not take them in that way.

Suppose, for example, that a judge is charged with flip-flopping if she favors invalidation of affirmative action programs but has no objection to discrimination on the basis of sexual orientation, or if she is willing to uphold

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expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding”).

138. See Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995) (asserting that judges “try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it.” (emphasis omitted)).

gun-control legislation but is unwilling to uphold restrictions on commercial advertising. At a certain level of abstraction (“Does the judge believe in judicial activism?”), such a judge might be accused of flip-flopping, but the charge might well be baseless in light of the theory of interpretation that the judge actually holds.

A judge who believes that the Equal Protection Clause requires racial neutrality, and no more, is hardly inconsistent if she votes to invalidate affirmative action programs but to allow discrimination on the basis of sexual orientation. A judge who votes to strike down an agency interpretation of law on the ground that it violates the text of the underlying statute is not inconsistent if he later votes to uphold an agency interpretation on the ground that it does not run afoul of any statutory text. We suspect that within the court system, accusations of flip-flopping are frequently and perhaps generally misplaced, because they fail to specify the theory under which the accused judges are operating.

Indeed, it is quite clear that in the contexts of substantive due process and federalism, Chief Justice Rehnquist and Justice Kennedy can raise plausible defenses against flip-flop accusations, certainly if the decisions discussed above are treated in isolation. More broadly, and apart from theories of interpretation, there are two basic responses to a flip-flop accusation that fall well within the conventions of legal reasoning.

*1. Weighting.*—In the context of substantive due process, Justice Kennedy could argue that in both *Casey* and *Lawrence* he took seriously the principle of stare decisis, but the principle had more weight in *Casey* than in *Lawrence*. In *Casey* after all, the precedent, *Roe v. Wade*, was almost twenty years old.<sup>139</sup> Countless judicial opinions had relied on it, as had many state legislatures.<sup>140</sup> Private actors had as well by, for example, moving their households to conservative states or setting up abortion clinics in those states.<sup>141</sup> Politicians had built their careers defending or criticizing *Roe*, suggesting that the Court’s decision had supplied a settled background for a longstanding public debate.<sup>142</sup> In *Lawrence*, the precedent (*Bowers v.*

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

140. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 55–56 (1976) (noting that “[t]his case is a logical and anticipated corollary to *Roe v. Wade*”).

141. See *Casey*, 505 U.S. at 856 (“[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”); *History of Planned Parenthood of the Heartland*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/planned-parenthood-heartland/who-we-are/history> [https://perma.cc/4XXK-R7Z4] (including examples of clinics opened by Planned Parenthood after *Roe v. Wade*).

142. To be sure, it is not clear that this point argues strongly in favor of respecting a contested precedent.

*Hardwick*) was nearly as old, but states generally did not enforce their antisodomy laws, and it is therefore hard to believe that anyone relied on the holding in *Bowers*.<sup>143</sup> On this ground, Justice Kennedy was justified in giving relatively little weight to *Bowers*, while giving much weight to *Roe*. No one believes that stare decisis is absolute.<sup>144</sup> Sometimes the arguments on its behalf are very strong, and sometimes they are weak.<sup>145</sup> It is certainly arguable that the claims for stare decisis were stronger in *Casey* than in *Lawrence*.

Similarly, Chief Justice Rehnquist could argue that federalism concerns in *Bush v. Gore* were far less weighty than the federalism concerns in *Gregory*.<sup>146</sup> On one view, Florida's local law and its (arguably questionable) local judiciary made decisions that would have significant national import. In *Bush v. Gore*, it was contended that the Equal Protection Clause called for a principle of equality in national elections that was not being respected by Florida officials.<sup>147</sup> Retirement ages for state employees, by contrast, really are local in nature, and so federal legislation that attempts to control them runs afoul of weighty federalism concerns. Whether or not this line of argument is ultimately convincing, it is certainly plausible to say that federalism concerns deserve different weights in different contexts—and hence that no flip-flop is involved.

2. *Omitted Institutional Values*.—One institutional value must be weighed against others, and so even if the value about which a court allegedly flip-flops is equally weighty in two cases, the outcomes would still not necessarily be the same. Suppose, for example, that Justice Kennedy believed that gays and lesbians were a politically vulnerable group, one that on the logic of *Carolene Products*<sup>148</sup> was entitled to a special level of judicial

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143. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986); see *Supreme Court Strikes Down Texas Law Banning Sodomy*, N.Y. TIMES (June 26, 2003), <http://www.nytimes.com/2003/06/26/politics/26WIRE-SODO.html> [<http://perma.cc/X697-GC6Q>] (noting that sodomy laws “on the books are rarely enforced”).

144. See, e.g., Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1766–75 (2013) (describing how ambiguity impacts whether stare decisis imposes binding law on future courts); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 7 (2012) (“[S]tare decisis is not an absolute, and even in a system of precedent, earlier decisions can be revisited.”).

145. See Waldron, *supra* note 144, at 9, 21–26 (explaining that stare decisis supports “certainty, predictability, and respect for established expectations,” but that application of these principles is flawed).

146. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

147. *Bush v. Gore*, 531 U.S. 98, 104–08 (2000).

148. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that legislation involving discrete and insular minorities may call for a more searching judicial inquiry).

protection because its members could not defend themselves in the political arena.<sup>149</sup> This institutional factor could cut against *stare decisis*.

As for *Bush v. Gore*, it is possible to speculate that the Supreme Court intervened in order to prevent partisan Florida judges from throwing the election for Gore.<sup>150</sup> If that was a motivation for Chief Justice Rehnquist's vote, he may well have believed that one institutional value—preserving free and fair elections at the national level—superseded the values of federalism that controlled the outcome in cases that did not involve national presidential elections.

The weighting and omitted-values arguments are *potentially* available to the Justices to avoid the flip-flop charge, but they are not necessarily valid. Some people may agree that the weight that should be given to *Roe* is greater than the weight that should be given to *Bowers*; others may disagree. To resolve this disagreement, one must investigate further the underlying theory of precedent. A very simple theory—older precedents are given more weight—could genuinely constrain flip-flopping. Others—for example, better-reasoned precedents are given more weight—might themselves be too spongy to prevent flip-flopping. Similarly, there must be a boundary on the type of institutional values that Justices might invoke to rationalize their decisions. We might be more willing to accept weighting and omitted-values arguments when Justices candidly make those arguments, but they do not always do so—indeed, they did not in *Lawrence* and *Bush*.

#### D. Bayesian Updating

Agents sometimes change their minds about institutional values. When they do so, their decisions may appear to be a flip-flop. But whatever one calls their decisions, the negative connotation of the word “flip-flop” does not seem fair. The change in positions is not naïve; no merits bias and no motivated reasoning need be involved. Nor is it tactical or opportunistic; the agent is being sincere. But the change in position is genuine, in the sense that at Time 2 the agent invokes a value that she repudiated at Time 1. There is no hypocrisy here, no naïveté, and nothing tactical. The agent has changed her mind.

Consider, for example, a hypothetical proponent of executive power who has consistently argued in favor of broad executive authority in general and in such specific manifestations as signing statements, unilateral war

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149. Cf. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718–22 (1985) (using hypothetical scenarios to discuss the doctrinal implications of the “discrete and insular minorities” exception in *Carolene Products*).

150. For an identification but not endorsement of this view, see David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 756 (2001), which rejects the contention that the United States Supreme Court suspected the Florida Supreme Court of a nakedly partisan effort to steal the election.

making, the line-item veto, and so on. Her beliefs are based on her study of history; perhaps she believes that time and again the executive saved the day, while feckless legislatures and courts tried to hold it back. One day, this proponent realizes that her institutional assumptions were wrong. The executive is actually more dangerous than the other institutions and cannot be trusted. She now opposes signing statements, unilateral war making, and the line-item veto.

Or consider a person, living in the 1920s and 1930s, who reveres the Supreme Court and the rest of the federal judicial system, seeing it as the great bulwark against political corruption or tyrannical majorities. But as the Court repeatedly blocks much-needed social legislation, she begins to think that it is a reactionary institution that holds the nation back. By 1937, she is willing to support FDR's court-packing plan, having repudiated institutional values that would have caused her ten years earlier to oppose it. She adopts an approach associated with James Bradley Thayer, arguing in favor of a strong presumption of constitutionality, which she once believed to be indefensible and absurd.<sup>151</sup> She thinks that her new view reflects hard-won wisdom.

We could imagine a similar reversal in more recent decades. Suppose that in the 1960s, observers (and perhaps judges as well) supported an aggressive role for the federal judiciary, seeing courts as indispensable safeguards for politically weak groups.<sup>152</sup> Perhaps the Warren Court seemed to be a desirable model. Perhaps the Supreme Court appeared to be "the forum of principle" in American government.<sup>153</sup> But suppose that in the last decades, people who were once inclined to this view have become disaffected, not on the ground that the Warren Court was wrong but because of a belief that it represented an unusual, and perhaps unique, period in American history. Perhaps they believe that the Court cannot protect politically weak groups, because it is unwilling to do so. Perhaps such people now think that the Court cannot be the forum of principle, because it is not good at moral theorizing. Good Bayesians could reject their previous position on the ground that the Justices are likely to use judicial power in ways that they would reject—and that a restrained judicial position is therefore better. Perhaps they end up embracing some version of Thayerism.<sup>154</sup>

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151. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143–44 (1893) (arguing that courts ought to strike down a law only if its unconstitutionality is "so clear that it is not open to rational question").

152. See ELY, *supra* note 9, at 108 ("[I]t wasn't until we were well into the 1960s (and out of the spell of McCarthyism) that our national self-confidence returned to the point where the Court could be counted on to invalidate legislation making criminals of Communists.").

153. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 516 (1981).

154. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 270 (2006) (justifying Thayerism by suggesting that under conditions

Alternatively, we could imagine people—once frustrated, and even appalled by the approach of the Warren Court and insistent on a restrained judicial role—changing their view in light of the possibility of originalist judging or firm judicial protection of liberty as they understand it. Those who reject progressive constitutional law, of the sort exercised by the Warren Court, might flip from an embrace of Thayerism to strong support for judicial restraint on the power of Congress under the Commerce Clause or on what might be considered to be takings of private property.

Of course, such people could not be fairly accused of an institutional flip-flop if they held the same view all along. But if they shift from Thayerism to some other approach, they are engaged in an institutional flip-flop—not for tactical reasons, but because they have learned over time. In fact, we can easily imagine numerous shifts, at least over a sufficient period of time. People with a particular set of substantive views who favor an institutional position at Time 1 might flip at Time 2 and flip back at Time 3, only to flip again at Time 4, all because of what they learn at relevant periods.

It is possible to accuse people who engage in such shifts of massive flip-flopping across numerous policy areas. But in the cases we have described, the agent will argue that the term is not appropriate because of its negative connotations. She has legitimately changed her mind. Open-mindedness is a virtue, and it is both important and honorable to learn over time. Still, it is not clear that this type of global flip-flop is always, or necessarily, less troublesome than the policy-specific flip-flop. We might be less inclined to trust someone who could be so wrong (by her own lights) for so long.

In any event, we call this type of flip-flop “Bayesian updating” in order to acknowledge that people will rationally update their beliefs about institutional values as they obtain more information about how institutions work and of what they achieve. As they do so, they may change their beliefs about the desirability of specific policy outcomes that are grounded in specific institutional values. A person might think that signing statements are good until she loses trust in the executive as an institution and then rationally believe that signing statements are bad. A person might think that

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of severe uncertainty and bounded rationality, judges should limit themselves to enforcing clear and specific coordinating texts); J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHTS TO SELF-GOVERNANCE* 25–26, 122 n.64 (2012) (“The final reason that it is preferable to have the legislature be the one to update is that judicial updating can strangle democratic vigor. One foundational premise of the American experiment is that self-determination is a valuable good. Popular participation in government creates a whole host of benefits that arise ‘from the vigorous thinking that ha[s] to be done in the political debates . . . , from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience.’ Indeed, even when the fruits of that participation are flawed, there is often great value in ‘the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way.’” (alteration in original) (quoting JAMES B. THAYER, JOHN MARSHALL 106–07 (1901))).

an aggressive judicial role is good until she loses trust in the capacities of the judges and then rationally believe that an aggressive judicial role is bad. Recall that institutional positions require some kind of substantive justification, at least over the long term, and reduced levels of trust certainly bear on substantive justifications.

In some contexts, of course, serious questions might be raised about the legitimacy of Bayesian learning. Suppose that the right theory of constitutional interpretation is originalist, and suppose that that theory leads to a particular set of conclusions about certain issues involving executive power, voting rights, and the Commerce Clause. If so, any flip-flopping, from one era to another, would be illegitimate—the agent’s role is to follow the original understanding. If the agent has learned something about the capacities and propensities of judges, she ought not to flip. She ought to continue to follow the original understanding. The general point is that with respect to institutional matters, Bayesian learning would be legitimate only if what people are learning is legitimately relevant to their decisions.

In the context of executive–legislative relations, some of the underlying questions do not involve constitutional law; they involve issues of policy. And it is possible to think that judgments about constitutional law, or even interpretation as such, depend, in the end, on assessments of consequences, so that understandings about institutional performance and the capacities of judges and legislatures really should inform one’s choice of interpretive theory.<sup>155</sup> If so, institutional flip-flops may in fact reflect a form of permissible updating on the basis of new information. For those who believe (as we do) that an approach to interpretation cannot possibly be blind to consequences, it is not objectionable for someone to shift in the direction of Thayerism when new information supports Thayerism, or to shift away from Thayerism for the same reason. Tactical flip-flopping would not be admirable within the judiciary (putting to one side the practical issues faced by multimember courts), but nothing is wrong with learning from experience.

Judges have on occasion changed their views about legal doctrine as a result of what they saw as learning.<sup>156</sup> For example, Justice Blackmun reversed his stance on the death penalty after voting to uphold it for many years. In an earlier case, he wrote that the wisdom of the death penalty was for legislatures to determine and joined another opinion arguing that it was possible for courts to ensure that racism and other invidious factors did not influence capital punishment decisions.<sup>157</sup> Many years later, he argued that

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155. See VERMEULE, *supra* note 153, at 231 (asserting that ambitious judicial review creates interpretive regimes stretching beyond the particular results envisioned at a systemic cost to our legal order).

156. See Justin Driver, *Judicial Inconsistency as Virtue: The Case of Justice Stevens*, 99 GEO. L.J. 1263, 1274–77 (2011) (collecting examples of Justices who have changed their minds).

157. *Furman v. Georgia*, 408 U.S. 238, 410–11 (1972) (Blackmun, J., dissenting); *id.* at 448–50 (Powell, J., dissenting).

experience had taught that legislatures could not create rules that ensured that the death penalty could be administered fairly, and thus it was unconstitutional.<sup>158</sup> It was the experience of the intervening years that caused him to change his mind—and he appeared to change his mind about institutional values or capacities (the capacity of legislatures to ensure that capital punishment is administered fairly) rather than about the policy itself.

Some people, particularly intellectuals, seem to undergo conversion experiences. They resist the accumulating evidence until it becomes irresistible and then repudiate their old views in one great burst of anguish.<sup>159</sup> Government officials, politicians, and judges seem to change their views more gradually.<sup>160</sup> It is frequently noted that Supreme Court Justices “drift” over time, becoming more liberal or more conservative.<sup>161</sup> This may reflect Bayesian updating. A more concrete example is the claim that Republican Supreme Court Justices lost trust in the Executive Branch and began turning against the Bush administration in the war-on-terror cases after disclosures of executive-branch-ordered torture of suspected terrorists.<sup>162</sup> In that context, there is a plausible argument about judicial learning.

### III. Beyond Flip-Flops? A Way Forward

Flip-flopping is so common that it has generated its own metadiscourse, in which journalists, politicians, academics, and judges not only disagree on the substance but also accuse each other of institutional flip-flopping.<sup>163</sup>

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158. *Callins v. Collins*, 510 U.S. 1141, 1144–45 (1994) (Blackmun, J., dissenting).

159. See, e.g., Andy McSmith, *From Left to Right: On the Mid-Life Political Conversions*, INDEPENDENT (Mar. 14, 2008), <http://www.independent.co.uk/news/uk/politics/from-left-to-right-on-the-midlife-political-conversions-796267.html> [<http://perma.cc/E98F-FU2X>] (discussing examples of midlife conversions).

160. There are also interesting questions about academic flip-flops, both in general (as, for example, when teachers of constitutional law change their minds on certain issues, perhaps for narrowly partisan reasons, perhaps as a result of learning) and in the context of public service (as, for example, when academics depart significantly from their previous views while serving in government, or shift, as academics, away from views that they held while working for government). We do not engage those complex issues here.

161. See, e.g., Driver, *supra* note 155, at 1276 (suggesting that Justices should not shy away from providing an explanation for their reversals because reversals of preceding Justices have been commended as refusals to allow prior thinking to prevail); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007) (announcing that practically every Justice who has served since the 1930s has drifted to the left or right or switched directions several times).

162. Cf. Jeffrey Toobin, *After Stevens*, NEW YORKER (Mar. 22, 2010), <http://www.newyorker.com/magazine/2010/03/22/after-stevens> [<http://perma.cc/UUQ9-K9AV>] (noting Republican appointee Justice Stevens’s repudiation of the Bush Administration’s legal approach to the War on Terror and his assignment of the *Boumediene v. Bush* opinion to Justice Kennedy, another Republican appointee).

163. See, e.g., Maggie Koerth-Baker, *The Mind of a Flip-Flopper*, N.Y. TIMES (Aug. 15, 2012), <http://www.nytimes.com/2012/08/19/magazine/the-mind-of-a-flip-flopper.html> [<http://perma.cc/GH6F-TE73>] (examining why people “flip-flop” and quoting one researcher as stating that political discourse leads us to “accuse our opponents of bad faith and ulterior motives”);

These responses generally amount to little more than “gotcha!” with implicit accusations of hypocrisy and bad faith.<sup>164</sup> As noted, many of these allegations are unjustified. We think that there are more productive ways to approach this debate, though they raise problems of their own.

A. *Identifying the Problem*

Flip-flopping is not inevitable. Indeed, from one perspective, it is surprisingly rare. Imagine that President Bush had announced in 2008 that because of the War on Terror, a state of emergency existed that (1) allowed him to stay in office beyond the end of his term; or (2) entitled him to stand for election to a third term; or (3) allowed him to jail political opponents who undermined the war effort by criticizing his policies. We are confident that if President Bush had made any of these claims, Republicans as well as Democrats would have opposed him, just as Democrats (and Republicans) would object if the president who made such claims were a Democrat. In this context, we think it plain that the parties would not flip-flop—that they would oppose such actions regardless of whether they were taken by a copartisan or a member of the opposite party. In the face of clear constitutional norms, we do not expect to see flip-flopping.

Flip-flopping also is surprisingly rare for a range of longstanding norms that lack a constitutional foundation. It is an established practice for the majority party in the House or Senate to permit members of the minority party to sit on committees and question witnesses.<sup>165</sup> We think, again, that if a leader of the majority party proposed depriving members of the minority party of their traditional seats, that leader would be opposed by copartisans as well as by members of the opposite party. Here again there is no flipping or flopping.

A key precondition of flip-flopping thus seems to be ambiguity as to whether a constitutional or institutional norm exists. Consider whether a norm exists that permits filibusters of presidential nominees to Executive

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Linton Weeks, *Summertime Politics: Bring Out the Flip-Flops*, NPR (Aug. 15, 2011, 1:26 PM), <http://www.npr.org/2011/08/05/139019758/summertime-politics-bring-out-the-flip-flops> [<http://perma.cc/AL3W-28MJ>] (detailing flip-flopping charges brought out by the national debt crisis).

164. See Koerth-Baker, *supra* note 162 (recognizing that “calling someone a flip-flopper is a way of calling them morally suspect . . . [and] unfaithful,” even though it is common for people to change their minds); Dana Milbank, Opinion, *Dana Milbank: Republicans Flip-flop on ‘Judicial Activism,’* WASH. POST (Feb. 26, 2014), [https://www.washingtonpost.com/opinions/dana-milbank-republicans-flip-flop-on-judicial-activism/2014/02/26/39754c5c-9f38-11e3-9ba6-800d1192d08b\\_story.html](https://www.washingtonpost.com/opinions/dana-milbank-republicans-flip-flop-on-judicial-activism/2014/02/26/39754c5c-9f38-11e3-9ba6-800d1192d08b_story.html) [<https://perma.cc/MY5E-75ME>] (presenting examples of politicians accusing others of flip-flopping).

165. See Tim Groseclose & David C. King, *Committee Theories Reconsidered*, in CONGRESS RECONSIDERED 191, 205 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001) (mentioning the unwritten practice of including minority party members on congressional committees).

Branch offices. There is no consensus that the norm exists—or that it does not exist.<sup>166</sup> Disagreement prevails. In this setting, it may not be surprising that politicians flip-flop. The problems with a norm permitting filibusters may be obvious when one's party holds the Presidency and much less so when the other party holds the Presidency. Since disagreement exists as to the existence and value of the norm, people may genuinely come to see costs or benefits that they previously overlooked when a different party held control of the relevant institution.

We explore below the extent to which the problem of flip-flopping results from a failure of enforcement (the topic of supart D, below). What we are emphasizing here is that at least in the United States, flip-flopping is a product of ambiguity, at least in the sense that ambiguity is a necessary, whether or not sufficient, condition. The ambiguity concerns the existence and contours of a purported norm, that is, the extent to which a norm has really been followed or not. For example, there is a long history of filibustering; what is relatively new is the filibustering of Executive Branch nominees (or perhaps the filibustering of a large number of such nominees as opposed to isolated outliers). It may be unclear whether the norm that permitted filibustering of bills extended to Executive Branch nominees or not. Or, to consider another example, the principle of federalism dictates that state governments legislate with respect to local matters, but it is often ambiguous what counts as a local matter and what does not.

In the face of such ambiguity, merits bias is likely to have a great deal of influence. The same is true of tactical changes of position to gain political advantage. It is in the face of ambiguity—rather than clearly established lines—that learning can produce shifts in institutional commitments. And yet, at the same time, norms do come and go,<sup>167</sup> and so it is possible that what once was clear can become ambiguous and vice versa.

### B. *Optimal Institutional Design*

Flip-flopping, then, is connected to the problem of evaluating ambiguous rules of institutional design (including both constitutional and “sub-constitutional” or institutional rules or norms) in the “midst” of normal politics. Parties recognize that some rules define the “game” of political conflict; those rules must be applied impartially to both parties. That is why everyone agrees that the Twenty-Second Amendment applies to Republican and Democratic presidents alike.<sup>168</sup> But, as noted, many rules are ambiguous

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166. See *Developments in the Law — Presidential Authority*, 125 HARV. L. REV. 2057, 2147–49 (2012) (discussing the uncertain norms surrounding the use of filibusters to control executive appointments).

167. Edna Ullmann-Margalit, *Revision of Norms*, 100 ETHICS 756, 756 (1990) (explaining that norms “emerge, endure, [and] pass away”).

168. See Daniel Friedman & Donald Wittman, *Term Limits as Political Redistribution*, in LEGISLATIVE TERM LIMITS: PUBLIC CHOICE PERSPECTIVES 229, 230 (Bernard Grofman ed., 1996)

(including filibustering rules); it is also possible that everyone would recognize the value of new rules. Indeed, new rules are being proposed all the time. Consider, for example, rules that now govern campaign contributions (at least the relatively uncontroversial ones) or that require the Government Accountability Office (GAO) to determine the budgetary impact of proposed laws. The idea behind these rules is that they improve politics, or benefit the nation as a whole, without giving an advantage to a specific party; thus, if the rules are implemented, they must be enforced impartially.<sup>169</sup>

In an ideal world, flip-flopping would be avoided if politicians honestly evaluated these rules and, with the requisite information and impartiality, supported those that improved the political system. Evaluation of the rules would then depend on some kind of social-welfare analysis. For example, a typical argument for campaign-finance reform is that existing rules allow the rich to bias political outcomes in their favor and away from the public interest.<sup>170</sup> If so, public-spirited politicians should support reform. Or consider a narrower justification: Unlimited campaign finance harms both parties by locking them in an arms race where they spend all their time raising money and no time governing.<sup>171</sup> It also harms donors because their increased donations are cancelled out by donations on the other side. Campaign-finance reform that puts limits on donations benefits both parties without harming anyone.

In a more realistic world, agreement on rules that advance the public welfare may be stymied by a number of factors. First and most familiarly, politicians do not necessarily act in the public interest; they are more likely to act in their own electoral interest. In the standard formulation, members of Congress try to maximize the chances of reelection.<sup>172</sup> Thus, we are more likely to see agreement on rules that are mutually beneficial for those who agree to them than on rules that advance the public interest, though to be sure many rules may do both.

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(explaining one perspective of term limits where politicians agree to “limit their ‘weapon’ (long-term incumbency) only if other districts d[o] likewise”).

169. See Nancy Kingsbury, *The Government Accountability Office and Congressional Uses of Federal Statistics*, 631 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 44–46 (2010) (noting the GAO’s independence and nonpartisan nature as a reason for its success and effectiveness).

170. See, e.g., Fred Wertheimer, *Legalized Bribery*, POLITICO MAG. (Jan. 19, 2014), <http://www.politico.com/magazine/story/2014/01/citizens-united-campaign-finance-legalized-bribery-102366> [<http://perma.cc/2P8A-QWTD>] (arguing that the Court’s decision in *Citizens United* opened the door for donors to circumvent campaign-contribution limits).

171. See, e.g., Andy Kroll, *Retiring Senator: Congress Doesn’t Work Because We Fundraise Way Too Much*, MOTHER JONES (Jan. 28, 2013, 9:48 AM), <http://www.motherjones.com/mojo/2013/01/tom-harkin-retire-senator-fundraise-money> [<http://perma.cc/NSB3-QV7U>] (highlighting concerns of Democratic public officials about how much time is spent raising money instead of governing).

172. For the classic discussion, see MAYHEW, *supra* note 129, at 16–17, which postulates that congressmen are single-minded reelection seekers because reelection is a universal goal for office holders.

Second, politicians often face a conflict between their short-term electoral interest and the long-term interest of their parties. For example, politicians may worry that campaign-finance reform may prevent them from winning the next election even if they agree that it would help their party, or even themselves, if they survive that election. Third, and our particular focus here, a politician may have difficulty, both because of the pervasiveness of uncertainty and the role of merits bias, figuring out whether a purported rule that serves her interest when she is in power but harms her when she is out of power (or vice versa) is in aggregate beneficial or harmful for her political interests. It is this last factor that may cause flip-flopping.

Similar points can be made about judicial flip-flops. Consider a judge who strongly opposes abortion but also takes his judicial role seriously and acknowledges that as the law now stands, abortion rights are protected by the U.S. Constitution. Nonetheless, faced with a novel controversy—consider, for example, recent laws that restrict abortions based on purported or real concerns about women’s health<sup>173</sup>—the judge may be tempted (perhaps unconsciously) to allow his beliefs about abortion to influence his decision. He thus may uphold the laws by citing principles of federalism even though in another context he strikes down a state law notwithstanding principles of federalism. The judge flip-flops on federalism, driven by his substantive beliefs.

### C. *The Veil of Ignorance*

1. *In General.*—A (potential) solution to these problems is the veil of ignorance. The veil of ignorance was made famous by John Rawls, who used it to motivate his theory of justice.<sup>174</sup> Rawls’s veil of ignorance, like the state-of-nature constructs used by earlier political theorists, allowed us to imagine the ideal constitutional norms that people would choose under conditions of impartiality.<sup>175</sup> Because people did not know their positions in life, they would choose norms that advanced the public good or met other criteria of justice rather than their own self-interest.

The type of veil we have in mind, however, is less ambitious but for our purposes more familiar and helpful.<sup>176</sup> A politician who considers the merits

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173. See Andrea D. Friedman, *Bad Medicine: Abortion and the Battle Over Who Speaks for Women’s Health*, 20 WM. & MARY J. WOMEN & L. 45, 58–68 (2013) (arguing that recent state laws that restrict women’s access to abortions have been based on unfounded medical concerns).

174. See JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (1971) (proposing that if people do not know their situation in society or natural assets, they cannot be in a position to tailor principles to their advantage, which will lead to the principles that are agreed to being just).

175. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 76–79 (1962) (suggesting that under the veil of ignorance, individuals participating in the constitution-making process would not be able to anticipate what decisions would benefit them, so they would attempt to devise constitutional norms that benefit the average person).

176. See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399, 403–04 (2001) (explaining the purpose of the veil of ignorance to inhibit self-interested

of a norm against filibustering, campaign-finance reform, or a similar constitutional or institutional reform should ask herself whether she would support the norm if she did not know whether she was a Republican or Democrat. The veil of ignorance deprives her of knowledge of her party. Under the veil, the politician would support the norm or reform if and only if she believes that it would advance the nation as a whole.

Similarly, the judge in our example above might ask himself what the principle of federalism implies in a world in which he does not know whether he supports or opposes abortion, or indeed any of his political positions. This type of thinking encourages the judge to think about the merits and disadvantages of federalism abstracted away from specific outcomes. Indeed, this type of impartial thinking is exactly what we expect judges to do.

Both naïve and tactical flip-flopping is a sign that an agent does not apply the discipline of the veil of ignorance to her positions. The problem with merely accusing the agent of flip-flopping is that it doesn't tell us which position the agent should adopt; it is just an accusation of bad faith or naiveté. The goal should be not just to shame the agent, but to force her to announce a position on the norm based on an argument from behind the veil of ignorance.

2. *Puzzles.*—The idea of a veil of ignorance is both time-honored and appealing, but in the context at hand, it raises a series of puzzles. The first is normative. To see the problem, consider a stylized example. Suppose that a nation has two parties. Party *A* is usually in the majority, and it will be in the majority for the relevant or foreseeable future (two years? four years? eight years?). Party *B* represents the minority. Party *A* is committed to a program that would reduce both welfare and liberty; Party *B* strenuously resists that program. Let us stipulate that the veil of ignorance deprives both parties of knowledge about which party is likely to be in power. If both were placed behind the veil, they might, on plausible assumptions, choose a resolution that gives the majority a great deal of power. If so, Party *B* should be entitled to object that the veil leads to an unfortunate and possibly even catastrophic outcome, and that if it is entitled to consider both its enduring minority status and the welfare-reducing, liberty-impairing program of the majority, it would insist on its current prerogatives.

On this view, the veil of ignorance is unhelpful, because it deprives people of essential information. It is only with knowledge of the circumstances (i.e., not behind a veil) that one knows what the right course is. Or to put it another way, the veil of ignorance treats optimal constitutional design as an exercise in ideal theory, where it might be better understood as an exercise in nonideal theory. It might follow that the use of a veil of

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decision making by afflicting the decision maker with uncertainty, which will result in decisions that are equivalent to those made by an impartial decision maker).

ignorance is helpful only if we benefit from having a degree of (unrealistic?) agnosticism about the future electoral success of the parties and also about which party is correct on the merits.<sup>177</sup> Is it clear that the veil should deprive the parties of that knowledge? On imaginable assumptions, the veil could produce outcomes inferior to those that would emerge if both parties know what is in their self-interest.

The second problem is conceptual. Behind the veil, how can the parties resolve their differences? What are the particular goals that a successful resolution would promote? To narrow the inquiry, let us focus on a discrete question that might be thought to be relatively easy: whether and when the Senate should be authorized to filibuster Executive Branch nominees. To answer that question, it seems clear that the parties would have to decide how to balance the interest in allowing the President to select his own team against the interest in ensuring against incompetent or extreme officials. While these are the primary considerations, the parties might have to consider other factors, such as the value (or not) of allowing “holds” as a means of extracting Executive Branch concessions on other matters (“extraction authority”). To come to terms with the full range of considerations, the parties would have to consider, at a minimum, the following:

- whether and to what extent it is important for the President to have his own nominees in place, or whether “acting” officials can essentially do the job;
- whether and to what extent one or another adjustment to the filibuster rules would increase the likelihood that the President could have his own nominees in place;
- the seriousness of the risk that without certain uses of the filibuster, incompetent or extreme nominees would be chosen or confirmed;
- the opportunity costs that come from time spent closely examining executive nominees;
- the costs and benefits of allowing the Senate to have the extraction authority that is associated with the power to hold nominees.

In the abstract, it is not simple to provide a disciplined answer to these questions. On certain (plausible) assumptions, the Senate should essentially allow the President to pick his team, and no kind of minority veto is justified. Political safeguards constrain the President’s choices, and if a nominee is genuinely incompetent or extreme, the Senate as a whole will not confirm him. If so, there is no need to retain the ability to filibuster. On other (plausible) assumptions, the filibuster is an important safeguard, and the nation benefits from it. If political safeguards are otherwise imperfect, the filibuster is a check against bad choices. Perhaps it is true that behind the

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177. *See id.* at 402 (explaining that sometimes the information concealed by the veil of ignorance may be valuable to the extent it outweighs benefits that may be obtained from neutrality in decision making).

veil, senators could agree that, all things considered, the filibuster should be used exceedingly rarely in these cases. That judgment seems at least as reasonable as any other. But it would reflect something like an informed hunch about costs and benefits.

The third problem involves motivation and feasibility. Why, exactly, would senators want to adopt a veil of ignorance?<sup>178</sup> And exactly when, with what kinds of discount rates for the future? In a specific year—say, this one—the veil might not seem appealing to legislators who are concerned above all with their own electoral prospects or who are focused above all on the short-term consequences (avoiding disastrous consequences in the next two years). If so, perhaps senators could agree that they will adopt a specific resolution of an institutional question but only in a certain year—say, three years hence. The advantage of this approach is that it would abstract from current controversies, and no senator could know whether he would be helped or hurt. A settlement by a future date would create the functional equivalent of a veil of ignorance.

But senators who are now in the majority might well be ambivalent about that approach. It would not do anything to resolve their current problem, and if they anticipate being in the minority in the future, it might be profoundly unappealing. And what incentive would the current minority have to resolve the disagreement at that time? If members of the minority believe that they will continue to be in the minority, they would not be drawn to the idea of a settlement. Perhaps they would like the idea if they anticipate being in the majority, but if so, the current majority may well anticipate being in the future minority, in which case the question of feasibility returns.

In some respects, an immediate solution might seem more appealing. At least from the standpoint of the majority, such a solution would eliminate the existing problem and would be attractive for that reason. Of course, the majority will be aware that any solution might end up harming it if it loses its majority status. But that very awareness creates a kind of veil of ignorance, whose effectiveness and reality turn on how much the majority discounts the future.

In some cases, the parties will resolve a disagreement about a norm by engaging in a deal. Bipartisan deals of this kind (or deals between branches) are familiar from disputes about the budgetary process, the sharing of Executive Branch information with Congress, and even filibustering.<sup>179</sup>

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178. See *id.* at 428–30 (describing how veil rules in the Constitution control the legislature by reducing the institutional “energy” of the legislature, assuming that self-interest is the “principal spur to action”).

179. See, e.g., Helen Fessenden, *The Limits of Intelligence Reform*, FOREIGN AFF., Nov.–Dec. 2005, <https://www.foreignaffairs.com/articles/united-states/2005-11-01/limits-intelligence-reform> [<https://perma.cc/8U9P-GAZY>] (detailing the deal struck by Congress and the Executive Branch that resulted in intelligence-reform legislation in 2004); Ashley Parker & Jonathan Weisman, *Congressional Leaders Reach Deal on Spending*, N.Y. TIMES (Dec. 9, 2014), <http://www.nytimes>

What is the difference between deals and the veil of ignorance? Deals take place when the two parties believe that resolution of the dispute about the norm serves both parties' interests (or the interests of party leaders or majorities in each party). Thus, the deals may not necessarily advance the public interest (though they may). A deal to limit campaign finance may, for example, benefit incumbent members of both parties while harming challengers of both parties. By contrast, the veil of ignorance encourages agents to take a more public-spirited approach. It might also be seen as a device for helping agents to see the perspective of their opponents.

3. *A Procedure.*—While we recognize these problems with the veil construct, it nonetheless seems to us a useful method for thinking about flip-flops. To be more specific, we propose a two-step procedure for identifying and evaluating flip-flops.

In step one, we decide whether a purported flip-flop—an apparent inconsistency in the positions about institutional values taken by an agent—is a real one. In some cases, the inconsistency is only apparent, not real: the agent can identify some additional institutional value, fact, or factor that explains the apparent inconsistency. In other cases, the flip-flop is genuine—it is naïve or tactical. The existence of a naïve or tactical flip-flop—or multiple flip-flops by numerous agents in some policy domain—is of importance because it shows that a constitutional or institutional norm is unsettled.

In step two, we demand that the agent provide a justification for her institutional position. Typically, the agent will provide the justification from behind the veil—that is, by appealing to public values rather than to the agent's self-interest. By applying the veil, we transform a debate mired in political advantage taking into a debate about constitutional and institutional values that transcend party affiliation. If a consensus emerges about the optimality of a rule, then this is a strong argument in favor of that rule.

We do not contend that this two-step process will always work. For the reasons we have sketched, merits bias and short-term incentives might prevent members of Congress from taking the relevant questions seriously. For analogous reasons, judges themselves might encounter some difficulty in using the veil. But if unjustified flip-flops are to be avoided, the process provides the best imaginable safeguard, with the exception of more formal enforcement mechanisms to which we now turn.

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.com/2014/12/10/us/politics/congressional-leaders-reach-deal-on-spending.html [http://perma.cc/RVL4-S3L5] (describing the December 2014 spending package to fund most of the federal government for the rest of fiscal year 2015, which included “more leeway for banks and other financial services companies under the Dodd-Frank Wall Street regulatory law,” which was sought by Republicans, while making some concessions to Democrats by not fighting, for example, rules on nutritional content of school lunches and the President's new immigration policy).

*D. How Are Institutional Norms Enforced?*

Institutional flip-flops occur when people invoke institutional values in order to support ideological or policy outcomes, changing their positions on institutions whenever doing so supports immediate goals. Such flip-flopping is troublesome because it suggests that the institutional rules do not matter. But if they do not, the gains from optimal institutional design are lost, and indeed, in the extreme one may wonder how political organization can be possible. Thus, we turn in this subpart to the question of how institutional flip-flopping can in fact be constrained (putting the veil of ignorance to one side). In doing so, we collect and summarize some earlier observations and survey some alternative theories as well.

*1. Legal Enforcement.*—We begin with, but will immediately dismiss, one possible theory, which is that courts and other legal institutions should constrain flip-flopping. The problem with this theory is that it is question begging. In the domain that interests us the problem is precisely that people must cooperate in the absence of legal enforcement. If senators avoid flip-flopping on the filibuster rules, it is not because the threat of judicial enforcement. Indeed, judicial enforcement is in effect endogenous to the problem that we study. When people object to court packing and other forms of political control of the judiciary but then turn around and engage in just this activity when in power, courts themselves cannot constrain them—the degree of independence of the courts will itself be the outcome of the flip-flopping or absence of it.

*2. Reputation.*—A more fertile theory is that agents avoid flip-flopping (or excessive flip-flopping) because flip-flopping may damage their reputations or credibility. The mechanism is easy to understand. If Senator *X* criticizes the filibuster when in the majority and lauds it when in the minority, people may stop believing anything that Senator *X* says. And if people do not believe Senator *X*, then she will have trouble persuading them to support her proposals in the future. This mechanism is powerful enough that when confronted with these contradictions, Senator *X* will always respond by trying to distinguish the two settings. The plausibility of the distinctions that she draws will help determine her credibility in the future.

*3. Repeated Interaction.*—A related theory is that agents avoid excessive flip-flopping so as to maintain cooperative relationships with other agents.<sup>180</sup> Suppose, for example, that senators do not know whether they will be in the

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180. For an example of this style of argument, see Matthew C. Stephenson, “*When the Devil Turns. . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 70–72 (2003), which argues that a governing party’s willingness to allow judicial independence increases as the party places more weight on future payouts.

majority or in the minority after the next election. All senators believe that they gain more through retention of the filibuster (protecting their interests in the minority) than they lose (allowing them to prevail more often when in the majority). The next majority may then retain the filibuster, expecting that if it does not, the other party will retaliate by refusing to recognize the filibuster when it reaches power. This theory will be even more powerful for institutions like the Supreme Court, where a small number of people must interact with each other over a long period of time and risk losing cooperative gains if they flip-flop.

The reputation and repeated-interaction mechanisms are subject to well-known limits. They tend to work best in small groups, when people expect to interact with each other well into an indefinite future and when the gains from violating norms are not too high. When the gains from exercising power in violation of a norm are high enough, agents might choose to violate the norm despite the reputational damage and the loss of future opportunities to cooperate. For example, senators may not be willing to incur the reputational cost from violating an antifilibuster norm for Supreme Court appointments in normal cases; but if a particular appointment will change the ideological majority of the court, they might believe that the damage to their party may be greater than reputational costs from violating the norm. Partisan cooperation—and the norms that sustain it—seems in general to be most likely to break down just prior to elections, when elected officials might violate norms because the alternative is to lose power, in which case reputation does them no good.

Accordingly, flip-flopping is least likely in smaller institutions (courts and the Senate rather than the House) and institutions whose members enjoy long or indefinite terms (federal courts and some state courts). It is more likely close to the end of terms than at the start of terms and when shocks (wars, economic crises) radically increase the payoffs from violating settled norms. And, as we have noted, flip-flopping will be more common when norms are ambiguous than when they are clear, because reputational costs and retaliation are easiest when a violation is clear.

*4. Internalization.*—Agents may avoid flip-flopping out of a simple sense of self-respect. We admire people who abide by principle (“statesmen”) and disparage those who do not (“hacks”). It would not be surprising if these public values were internalized by some or many people. Internalization may not be subject to the small-group limits of the reputation and repeated-interaction mechanisms. However, it may also be the case that unprincipled people are drawn into the political arena (a selection effect) or

that even principled people find it difficult to resist immediate pressure and may rationalize their flip-flops to themselves (cognitive-dissonance reduction).

5. *Public Opinion*.—Public opinion may constrain the ability of agents to flip-flop. If the public cares about institutional rules, then it will disapprove of those who try to manipulate them. But does the public have institutional values? One study suggests that public approval of the Supreme Court depends on whether the public approves of particular outcomes, not on the jurisprudential quality of the opinions.<sup>181</sup> This seems hardly surprising. Still, politicians try to avoid the “flip-flopper” label, suggesting that the prospect of public disapproval plays at least some role in constraining flip-flopping.

6. *Foreign Involvement*.—Political agents may try to constrain flip-flopping by seeking enforcement from foreign countries. A well-known theory posits that when eastern European countries made the transition to democracy in the 1990s, the initial wave of liberal leaders worried that reactionary elements would initially agree to liberal constitutional reforms but then flip-flop when those elements finally came to power.<sup>182</sup> To forestall such flip-flopping, these countries entered human rights treaties hoping that the threat of foreign involvement would deter the reactionaries.<sup>183</sup> Another example is the use that some former British colonies make of the Privy Council to settle internal disputes.<sup>184</sup>

Foreign involvement as an enforcement mechanism must itself be subject to limits, given that the foreign countries that are empowered to intervene may themselves refuse to obey the rules. For this reason, most countries are not enthusiastic about yielding sovereignty to foreign countries or international organizations.<sup>185</sup>

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181. See Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RES. Q. 206, 211 (2012) (discussing study results that suggest that the rationales underlying Supreme Court opinions affect the Court’s public legitimacy to a lesser degree than case outcomes).

182. Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT’L REL. 157, 166–67 (1995).

183. *Id.* at 167.

184. See *Role of the JCPC*, JUD. COMMITTEE PRIVY COUNCIL, <https://www.jcpc.uk/about/role-of-the-jcpc.html#Commonwealth> [<https://perma.cc/FT9P-558Y>] (identifying Commonwealth states that allow appeals to the Judicial Committee of the British Privy Council).

185. ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 9, 87 (2013).

### Conclusion

It is tempting to dismiss politicians, judges, and commentators as hypocrites who constantly shift positions on institutional norms so as to advance their electoral, political, or ideological interests. The temptation should be resisted. In most cases, there is a consensus about institutional rules which anchor debate and allow government to function. But when the rules are ambiguous, flip-flops do arise. Unfortunately, ambiguity and hence flip-flopping are present in many important settings. We have seen that real or apparent flip-flopping can be found in recurring debates over the authority of the President and the Supreme Court.

In our view, many flip-flops are a product of motivated reasoning and, in particular, merits bias. Often the merits seem clear and, if so, one's judgments about institutional issues may be decisively influenced by one's judgments about the merits. We have identified highly suggestive evidence of merits bias; we suspect that the phenomenon accounts for a large number of flip-flops. But it is also true that institutional arguments are often opportunistic and hence tactical. Because politicians are not usually punished for making purely tactical arguments, and because they have strong incentives either to oppose or support the incumbent president, a degree of institutional flip-flopping is inevitable. Within courts, the constraints of multimember tribunals and the occasional difficulty of achieving a five-person consensus on a single opinion also ensure a significant amount of flip-flopping.

Some of the most interesting flip-flops are a product of learning. In principle, it is not simple to distinguish between motivated reasoning and Bayesian updating. When people change their evaluations of a powerful Presidency or judiciary, the two may be simultaneously involved. But there is no question that when some people flip, it is because of a period of disappointment with a particular allocation of institutional authority. Sometimes, of course, the relevant learning is not pertinent to the question at hand and hence does not justify the flip-flop. But to the extent that an assessment of consequences legitimately bears on judgments about the allocation of authority, flip-flops may turn out to be honorable.

In theory, there is a right answer to the question of what institutional arrangements should be—whether, for example, it advances the public interest if the Senate can filibuster presidential nominees. In practice, however, the answer is often obscure, and agents are not always well-motivated to implement that answer even if they can identify it. A fundamental problem arises because an agent's short-term substantive or electoral interests may be inconsistent with reform of suboptimal institutional arrangements. These problems give rise to both naïve and tactical flip-flops.

The veil of ignorance offers a useful way of disciplining argument about flip-flops. When agents cannot show that an apparent flip-flop is only apparent, they are vulnerable to charges that they are naïve or acting in bad

faith. In some cases, these charges will carry some sting and help change behavior. More important, when flip-flopping over a particular issue is pervasive, we have an important signal that a constitutional or institutional norm is unsettled.<sup>186</sup>

In that case, the veil of ignorance provides a useful device for forging consensus on what norm should be recognized. With the help of the veil, one can propose institutional norms that promote resolution of unproductive disagreements and that are also fair because they give no advantage to those on different sides of a partisan or policy divide. In this way, the long-term (and common) interest in a well-functioning government that provides benefits to all or most can be seen to outweigh the short-term advantage of insisting on institutional norms that advance immediate political objectives. In light of short-term incentives and merits bias itself, we have identified significant obstacles to achieving the necessary consensus, but history demonstrates that those obstacles can sometimes be overcome.

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186. For more information on periods of constitutional uncertainty, see Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 708–16 (2009); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 993–1010 (2008).