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Precautionary Constitutionalism

In the regulation of financial, environmental, health, and safety risks, "precautionary principles" state, in their most stringent form, that new instruments, technologies, and policies should be rejected unless and until they can be shown to be safe.[1] Examples include requirements that new drugs pass stringent tests of safety before they are licensed for sale; requirements that nuclear power plants pass stringent tests of design safety before coming into operation; and the Bush administration's "one percent" doctrine, which held that even a miniscule risk of terrorism warranted precautionary countermeasures.[2] Such principles come in many shapes and sizes, and with varying degrees of strength, but the common theme is to place the burden of uncertainty on proponents of potentially unsafe technologies and policies. Critics of precautionary principles urge that the status quo itself carries risks, either on the very same margins that concern the advocates of such principles or else on different margins; more generally, the costs of such principles may outweigh the benefits.

Although this debate is a relatively new one in the theory of regulation, it is a venerable one in constitutional law debates about second-order

1 *See, e.g.*, Peter L. deFur, *The Precautionary Principle: Application to Polices Regarding Endocrine-Disrupting Chemicals*, *in* PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT: IMPLEMENTING THE PRECAUTIONARY PRINCIPLE 337, 345–46 (Carolyn Raffensperger & Joel Tickner eds., 1999) ("As described in the Wingspread Statement on the Precautionary Principle, the applicant or proponent of an activity or process or chemical needs to demonstrate to the satisfaction of the public and the regulatory community that the environment and public health will be safe."). For an overview of the massive literature on precautionary principles in various regulatory domains, see IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: PERSPECTIVES AND PROSPECTS (Elizabeth Fisher et al. eds., 2006).

2 *See* RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 (2006) ("If there's a 1% chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response." (quoting former Vice President Richard Cheney)).

political risks, or so I will claim. At the wholesale level, many theorists defend a master principle according to which constitutions should be designed to take precautions against political risks arising from the design of institutions and the allocation of power among officials. At the retail level, many constitutional rules and structures have been justified as precautions against the risk of abuse of power by incumbent officials or other constitutional actors, the risk of tyrannous majorities, or other political pathologies. Although later chapters will critique precautionary justifications for constitutional rules, the aim of this one is to reconstruct such arguments in charitable terms, in order to put them in their best possible light.

PRECAUTIONARY PRINCIPLES AND POLITICAL RISKS

In the domain of risk regulation, precautionary principles come in many different forms. One count shows no less than nineteen versions of "the precautionary principle"[3] – or nineteen different precautionary principles, related only by a vague family resemblance. As we will see, constitutional precautionary principles are equally heterogeneous. The principal dimensions of variation include the following:

Scope. To what political risks does the principle apply? The leading ones I will discuss are "abuse of power" or self-dealing by officials, "tyranny" in the sense of legislative[4] or executive dictatorship,[5] majoritarian oppression,[6] minoritarian oppression, the death of federalism or the abolition of the states,[7] and various forms of biased policymaking by agencies and biased judging. All these have the second-order character that is the hallmark of political risks; they arise from particular allocations of decision-making power across officials and institutions.

Weight. How strong is the principle within its scope? What sort of showing or what sort of reasons suffice to defeat it?

3 Jonathan B. Wiener, *Precaution in a Multirisk World*, *in* Human and Ecological Risk Assessment: Theory and Practice 1509, 1513 (Dennis J. Paustenbach ed., 2002) (citing Per Sandin, *Dimensions of the Precautionary Principle*, 5 Hum. Ecol. Risk Assess. 889 (1999)).

4 *See* The Federalist No. 47, at 300–08 (James Madison) (Clinton Rossiter ed., 1961).

5 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650–53 (1952).

6 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

7 *See* Brutus XV, *in* 2 The Complete Anti-Federalist 437, 437–42 (Herbert J. Storing ed., 1981).

Timing. When does the constitutional rule intervene to ward off an uncertain threat? How far in the future must or may the threat arise?

Justification. Why should there be ex ante precautions at all, as opposed to ex post remedies?

Overall, in both regulatory and constitutional domains, it is best to envision a continuum of precautionary principles, varying both in their stringency and in the timing of their application.[8] "On these sliding-scale dimensions, regulation is more 'precautionary' when it intervenes earlier and/or more stringently to prevent uncertain future adverse consequences."[9] In the weakest form, precautionary principles may be cast as mere considerations, tiebreakers, or easily rebuttable presumptions, but we will see that constitutional actors have often argued for much stronger versions of precautionary measures against political risks.

The inherent messiness of the subject creates a dilemma about what to include. Constitutional arguments offered by framers and other constitutional actors may appear precautionary, in some broad sense, but those actors are not decision theorists or game theorists and they rarely specify the precautionary principle that underlies the argument, or whether the constitutional rules at issue might instead be justifiable on nonprecautionary grounds. I have opted to lump before splitting. Rather than narrowing the focus at the outset, I will begin by canvassing a broad range of seemingly precautionary or quasi-precautionary arguments.

For ease of exposition, I will arrange the examples along two axes. First, precautionary arguments may be addressed to constitutional designers or else to interpreters of an established constitution. Second, such arguments may be pitched at wholesale, as master principles, or at retail, as justifications for particular constitutional rules and structures. Collating these two distinctions yields four cases, which I will take up in turn. With these in hand, I will distinguish constitutional precautionary principles from some near relations.

WHOLESALE PRINCIPLES OF CONSTITUTIONAL DESIGN

In his *Life of George Washington*, John Marshall described a precautionary mindset widespread among Antifederalists of the founding era: "*That power might be abused, was, to persons of this opinion, a conclusive argument against its being bestowed*; and they seemed firmly persuaded that

8 Wiener, *supra* note, at 1514.

9 *Id.*

the cradle of the constitution would be the grave of republican liberty."[10] Robert Yates, writing as the Antifederalist pamphleteer Brutus, went so far as to offer "an axiom in politic[s]," to the effect that "the people should never authorize their rulers to do any thing, which if done, would operate to their injury"[11] – a principle that, like the maximin criterion, seemingly took no account of the probability of the harm occurring, as opposed to the consequences of its occurrence. Brutus in effect offered a precautionary master principle of constitutional design aiming to preclude even the possibility that constitutional power would be abused.

The most obvious predecessor, and perhaps ancestor, of this approach was David Hume's maxim that "in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest."[12] Hume's "knavery principle" is best understood not as a factual claim that all men are so motivated, but rather a claim that constitutional design will work best if all men are presumed to be so motivated. Later theorists have advanced a cluster of justifications for a presumption of that sort; for our purposes, most relevant is the idea that the knavery principle represents a kind of "precautionary exercise"[13] that is useful for constitutional designers, despite its counterfactual character.

Suppose that each office-holder who is a bad type does damage that outweighs the benefits supplied by an office-holder who is a good type. In a risk model, the designers may decide to act in a risk-averse fashion, discounting their estimate of the probability that good types will hold power by the disproportionate harm that bad types inflict.[14] Alternatively, suppose that the designers face genuine uncertainty about the proportion of knaves in the pool of potential office-holders, a question on which they simply have no epistemically justified estimate of probabilities. The designers may then do best to maximize the minimum payoff from constitutional arrangements by supposing that all office-holders will be bad types, and by

[10] 5 John Marshall, The Life of George Washington: Commander in Chief of the American Forces, during the War which Established the Independence of His Country, and First President of the United States 131 (Philadelphia, C.P. Wayne 1807) (emphasis added).

[11] Brutus VIII, *in* 2 The Complete Anti-Federalist, *supra* note, at 405, 406.

[12] David Hume, *Of the Independency of Parliament*, *in* 1 Essays and Treatises on Several Subjects 37, 37 (London, A. Millar 1764) (emphasis omitted).

[13] Geoffrey Brennan & James M. Buchanan, The Reason of Rules: Constitutional Political Economy 52 (1985).

[14] *See id.* at 54–59.

adopting rules designed above all to preclude the harms of the worst-case scenario – a type of maximin constitutionalism.

RETAIL PRINCIPLES OF CONSTITUTIONAL DESIGN

At the retail level, many rules and structures of the Constitution of 1787 were designed and chosen on explicitly precautionary grounds. At the Philadelphia convention and in the subsequent debates over ratification, both Federalists and Antifederalists often cast their arguments in precautionary terms:

> In the Virginia debates, Henry Lee correctly observed that "the opposition continually objected to possibilities with no consideration of probabilities." Madison, too, objected to the supposition that "the general legislature will do every thing mischievous they possibly can." At the same time, in the Pennsylvania debates James Wilson defended the document by claiming that "we were obliged to guard even against possibilities, as well as probabilities."[15]

This tendency to treat worst-case political possibilities as though they are certain to occur is, in effect, the maximin approach to constitutionalism.

The unitary executive. At the Convention, a main thread in the debate over a unitary executive centered on the question whether a unitary or multiple executive was a better precaution against the risk of despotism. On the one hand, Edmund Randolph "strenuously opposed a unity in the Executive magistracy. He regarded it as the foetus of monarchy."[16] On the other hand, Wilson argued that "Unity in the Executive instead of being the fetus of Monarchy would be the best safeguard against tyranny."[17] Although the two had contrasting views of the merits of the institutional question, the aim of choosing the right precautions against monarchical despotism was common to both.

Separation of powers; checks and balances. In a similar vein, Federalists and Antifederalists were united on the view that the separation of powers, and various structures of checks-and-balances, were best justified as precautions against abuse of power. In New York, Melancton Smith put the argument in starkly precautionary form by claiming that "because there

[15] Jon Elster, Securities Against Misrule: Juries, Assemblies, Elections 46–47 (2013) (internal citations omitted).

[16] 1 The Records of the Federal Convention of 1787, at 66 (Max Farrand ed., 1911).

[17] *Id.*

would eventually be corruption in Congress, '[i]t is wise to multiply checks to a greater degree than the present state of things requires.'"[18] Even if there is no present problem, in other words, the prudent constitutional designer will take precautions against a risk that is likely to materialize at some unknown future point. For Madison, in Federalist 51, the principal justification for both separation of powers and checks-and-balances was that these mechanisms would serve as "auxiliary precautions": precautions against the concentration of all powers in the hands of the legislative department that were auxiliary to elections (direct or indirect), which were an inadequate safeguard.[19]

Standing armies and military appropriations. One of the most contentious elements of the proposed constitution, and one of the most difficult points for its supporters to defend, was the explicit grant of power to Congress to "raise and support armies," subject only to the limitation that no military appropriation last longer than two years.[20] Picking up a longstanding theme of libertarian argument in English constitutionalism, Antifederalists and others worried about the risk that a standing army would become a tool of despotism, whether monarchical or oligarchic. The general argument was that "the liberties of the people are in danger from a large standing army," either because "the rulers may employ [the army] for the purposes of supporting themselves in any usurpation of power, which they may see proper to exercise," or because of the "great hazard, that any army will subvert the forms of the government, under whose authority, they are raised, and establish one, according to the pleasure of their leader."[21] In light of these hazards, Antifederalists criticized the proposed constitution on the ground that it took insufficient precautions. Their preferred alternative was a provision that barred standing armies in times of peace, perhaps with exceptions for minimal garrisons at arsenals and borders, and for raising armies when an imminent threat of foreign invasion appeared.[22]

The Bill of Rights. More generally, and more successfully, the Antifederalists articulated a theory of constitutional rights as precautions, and criticized the proposed document for its failure to include a bill of rights of the sort that many state constitutions set out. Thus, Brutus found

[18] Men of Little Faith: Selected Writings of Cecelia Kenyon 102 (Stanley Elkins, Eric McKitrick & Leo Weinstein eds., 2002).

[19] The Federalist No. 51, at 290, 322 (James Madison) (Clinton Rossiter ed., 1961).

[20] U.S. Const. art. I, § 8, cl. 12.

[21] Brutus X, *in* 2 The Complete Anti-Federalist, *supra* note, at 413, 413.

[22] See the clause proposed in Brutus X, *id*. at 416.

it "astonishing, that this grand security to the rights of the people is not to be found in this Constitution."[23] Bills of rights were necessary, he argued, for the "security of life," the "security of liberty," and "for securing the property of the citizens."[24] The main political risk against which bills of rights were directed, on the Antifederalist theory, was agency slack – the abuse of power by "rulers" insufficiently constrained by elections or by the constitutional enumeration of governmental powers.[25] Because "rulers have the same propensities as other men … the same reasons which at first induced mankind to associate and institute government," a fear of the predatory impulses of their fellows "will operate to influence them to observe this precaution."[26]

Presidential power, military power, and emergencies. Retail-level precautionary arguments about constitutional and institutional design are by no means confined to the remote past. I will illustrate by reference to some arguments for institutional precautions against excessive presidential power or excessive military power, or both. A leading proponent of such arguments is Bruce Ackerman, who discerns, in contemporary institutional and political trends, an appreciable possibility of either a presidential or military coup in the American future – possibilities sufficiently grave that Ackerman fears (in the title of one work) "The Decline and Fall of the American Republic."[27] This is a kind of a fat-tail problem in politics; although the chance of a presidential or military coup is exceedingly remote, there is an uncertain possibility that it is higher than a normal distribution of risk would indicate, and the resulting harms to constitutionalism would be severe.

At the stage of solutions, Ackerman has little faith in the courts, primarily because they are reactive rather than precautionary; courts wait too long to intervene, if they do at all. "Since the Supreme Court won't intervene early enough to check [executive] abuses in the future, the only remaining option is to create a new institutional mechanism that will put a brake on the presidential dynamic before it can gather steam."[28] Among the precautionary mechanisms that Ackerman suggests are a "Supreme

[23] Brutus II, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note, at 372, 374.
[24] *Id.* at 374–75.
[25] *See* John Francis Mercer, *Address to the Members of the Conventions of New York and Virginia*, *in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note, at 102, 105 ("Against the *abuse* and *improper* exercise of these sacred powers, the [p]eople have a right to be secured by a sacred Declaration…").
[26] Brutus II, *supra* note, at 374.
[27] BRUCE A. ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010).
[28] *Id.* at 143.

Executive Tribunal," empowered to issue binding rulings on legal questions internal to the executive branch,[29] and a framework statute to govern emergencies, whose central feature would be a "supermajoritarian escalator" – a provision requiring approval of presidential emergency powers by successively larger supermajorities of Congress.[30] These and other mechanisms are explicitly pitched as safeguards against pathological political risks of presidential and military power. These are risks in the colloquial sense; Ackerman does not clearly specify whether the "threats" he discerns should be analyzed in a framework of risk or instead a framework of uncertainty. But the precautionary intent is clear.

WHOLESALE PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

Once a constitution is in place, actors will propose competing master principles of constitutional interpretation. Among the possible principles, some will take a precautionary form, urging that the constitution be "strictly" or "narrowly" construed to prevent political risks. In the history of American constitutionalism, precautionary master principles have taken two main forms: one based on federalism, and the other on individual rights. These two forms are by no means mutually exclusive. Where national regulatory action is at issue, a coalition between libertarians and proponents of states' rights will often form, claiming that precautions against overreaching by the national government protect individual liberty.[31]

A recent example involves the coalition of libertarians and proponents of states' rights who challenged the constitutional power of Congress to enact an individual mandate to buy health insurance. The Supreme Court upheld the individual mandate as a valid exercise of Congress' taxing powers, but issued *dicta* – judicial statements not necessary to the result in the case at hand – warning that the mandate may lie beyond Congress' powers to regulate interstate commerce. Part of the Court's commerce analysis invoked the purported risks to individual liberty of expansive congressional power to regulate commercial transactions. If the individual mandate were upheld as a commerce regulation, the Chief Justice claimed in the

[29] *Id.* at 143–52.
[30] *Id.* at 168–69.
[31] This is a prominent theme in the jurisprudence of Justice Anthony Kennedy of the U.S. Supreme Court. *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

leading opinion, "Congress could address the diet problem by ordering everyone to buy vegetables."[32] I will examine the states' rights strand and the libertarian strand separately, but in practice their proponents exploit the interaction between the two for increased rhetorical effect.

States' rights precautionary principles. The states' rights precautionary principle advocates strict construction of national powers. The early-nineteenth-century commentator St. George Tucker urged that the Constitution "is to be construed strictly, in all cases where the antecedent rights of a *state* may be drawn in question."[33] The basis of "Tucker's Rule"[34] was a mix of consent theory and precaution:

> [A]s every nation is bound to preserve itself, or, in other words, [its] independence; so no interpretation whereby [its] destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case, where it has not, in the *most express terms*, given [its] consent to such an interpretation.[35]

Here the political "hazard" is that national power will "destroy" the independence of what Tucker took to be the sovereign and independent nation-states of the American confederation; such states must be strongly presumed to take proper precautions for their own survival, and must therefore be presumed not to chance their own destruction unless their consent to assume such a risk is unmistakable. For Tucker and other early states-rights commentators, the master principle of strict or narrow construction of national powers was embodied in the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[36]

Libertarian precautionary principles. Tucker and other early proponents of states' rights had another string to their bow, however: the Ninth Amendment, rather than the Tenth Amendment. The former provides that "[t]he enumeration in the Constitution of certain rights shall not be

[32] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2588 (2012) (opinion of Roberts, C.J.).

[33] St. George Tucker, *View of the Constitution of the United States*, *in* 1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 140, 151 (St. George Tucker ed., Lawbook Exch. 1996) (1803).

[34] Kurt T. Lash, *"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 Wm. & Mary L. Rev. 1343 (2006).

[35] Tucker, *supra* note, at 423.

[36] U.S. Const. amend. X.

construed to deny or disparage others retained by the people,"[37] and has been portrayed as a master principle of constitutional interpretation – an interpretive presumption in favor of "individual liberty."[38] On this view, individuals are conceived to have natural liberty rights, and constitutional courts must review governmental action under a presumption of liberty, itself taken to be embodied in the written constitution.

In both early and recent formulations, this presumption of liberty is often cast in explicitly precautionary terms. For Tucker, the point of the Ninth Amendment was "to guard the people against constructive usurpations and encroachments on their rights," and the combination of the two amendments entailed that "the powers delegated to the federal government are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question."[39] More recently, a prominent constitutional libertarian writing in the Tuckerian tradition grounds judicial review of the constitutionality of governmental measures on the need to protect natural liberty from "legislative or executive abuses."[40]

Judicial review. As the last argument shows, judicial review of statutes for constitutionality has itself been justified as a precautionary principle, in the sense that it provides a beneficial safeguard against an uncertain propensity to rights-violations by legislative and executive actors. On this justification, even if courts are not systematically better than legislatures or other actors at identifying the correct scope of constitutional rights (according to some theory or other), it is beneficial to add another veto-point to the lawmaking system. Doing so has the marginal precautionary effect of reducing one type of error, the underprotection of rights.[41] Admittedly, judicial review might itself create another type of error by overprotecting rights, but proponents of this view offer a judgment that the former type of error is more harmful than the latter, so that "it [is] better to err on the side

37 U.S. Const. amend. IX.
38 Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 242 (2004).
39 Tucker, *supra* note, at 154.
40 Barnett, *supra* note, at 267.
41 *See* Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 Cornell L. Rev. 1529, 1577–78 (2000) ("the more institutions that possess a veto over government action, the more costly that action will become and the more likely the action will be struck down"); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 Harv. L. Rev. 1693, 1695 (2008) ("legislatures and courts should *both* be enlisted in protecting fundamental rights [and] both should have veto powers over legislation that might reasonably be thought to violate such rights").

of too much rather than too little protection of rights,"[42] which is essentially a precautionary claim.

RETAIL PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

Although precautionary principles of constitutional interpretation are sometimes stated in general terms, they are other times stated so as to have a limited domain, applying to particular classes of problems or controversies, to particular clauses of the written constitution, or to particular governmental powers.

State taxing power. *McCulloch v. Maryland*,[43] Chief Justice Marshall's great opinion on structural constitutionalism, is famous for its expansive construction of the national government's enumerated powers, in direct opposition to the states' rights precautionary principle advocated by Tucker. Indeed Marshall himself announced a precautionary principle that narrowly construed state power to tax federal instrumentalities. Flipping on its head Tucker's concern that an expansive construction of national power would "hazard" the "destruction" of the independent sovereign states, Marshall argued that an expansive construction of state taxing power risked the same denouement for federal instrumentalities, because "the power to tax involves the power to destroy."[44] Unless the federal government possessed the power to immunize its chartered instrumentalities from state taxation, the consequences might be dire:

> If we apply the principle for which the State of Maryland contends, to the constitution, generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.[45]

Like Brutus, only with the opposite political valence, Marshall slips with lightning speed from the premise that a political risk is "capable" of occurring to the conclusion that it *must* be guarded against.[46] In the words Marshall had used to mock the Antifederalists, "that power might

[42] Fallon, *supra* note, at 1708.
[43] 17 U.S. 316 (1819).
[44] *Id*. at 431.
[45] *Id*. at 416.
[46] *Id*. at 432.

be abused, was, to persons of this opinion, a conclusive argument against its being bestowed."[47]

Federal spending power. As historians of constitutional federalism have shown, Tuckerian principles enjoyed a revival during and after the 1830s.[48] The tradition of precautionary states'-rights argument continued strongly for another century, although of course with varied fortunes. The final crisis of the old order in the 1930s witnessed a vigorous assertion of precautionary narrow construction of national powers. Perhaps the clearest example is *United States v. Butler*,[49] the 1936 decision in which the Court invalidated the New Deal's scheme, in the Agricultural Adjustment Act, for granting subsidies to farmers who would agree to curtail production. The issue was whether Congress might use spending to indirectly accomplish an aim that, under the contemporary law, Congress lacked the constitutional power to accomplish through direct legislation. The Court announced a precautionary principle against such uses of the federal spending power, one explicitly justified as a safeguard against political abuse:

> If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states. … If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. … [T]he general welfare of the United States … might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead.[50]

Presidential power and counterterrorism. Earlier, we saw a set of institutional-design proposals by Bruce Ackerman, intended as precautions against the risk or uncertain possibility of a presidential or military coup, or of executive abuses more generally. Ackerman is pessimistic about the capacity of courts to do anything to constrain executive power. Other theorists, however, urge courts to accept (or to make explicit that they have already been practicing) a set of judicial doctrines that will safeguard against the risks of executive abuses of civil liberties in the war on terror.

47 Marshall, *supra* note, at 240–41.
48 Lash, *supra* note, at 1382–89.
49 297 U.S. 1 (1936).
50 *Id*. at 75–78.

Cass Sunstein, Samuel Issacharoff, and Richard Pildes all suggest that courts should require a clear statutory statement of legislative authorization for executive action in emergencies.[51] On this view, although it is too much to expect robust substantive review from courts during times of national crisis, courts can at least install democratic checks on executive overreaching through clear-statement rules. The motivation for this requirement is explicitly precautionary. The idea is that clear-statement rules will hedge against the chance that hot emotions that produce widespread public fear, and cold cognitive mechanisms like the availability heuristic, will combine to produce excessive regulatory responses to low-probability risks of terrorist activity.[52] The precautions, then, are precautions against pathological decision making by the executive branch – a distinctively political risk.

Recess appointments. In 2013, the federal court of appeals for the District of Columbia circuit – widely thought to be the nation's second most prominent court – decided an important case about presidential power to make "recess appointments," or appointments that are made while the Senate is not in session, and thus bypass the usual process of Senate consent. The relevant clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[53] One of the main issues in the case – *Noel Canning v. NLRB*,[54] conventionally known as *Canning* – was whether that clause allows the president to make "intrasession" recess appointments, when the Senate takes a recess *during* a given session of Congress, or instead allows only "intersession" recess appointments, when the Senate takes a recess *between* sessions of Congress. The court held that the latter, narrower interpretation was correct; it said that intrasession recess appointments are prohibited. (There was also another holding, not relevant here.)

The court's initial arguments for this conclusion drew on the text and original understanding of the constitutional clause. "[T]he Recess," according to the court, could only mean, and at the time of the Constitution's ratification did mean, an intersession recess. Despite that textualist and originalist beginning, however, the heart of the court's opinion was a long,

[51] *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 Theoretical Inq. L. 1 (2004); Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47.

[52] *See* Sunstein, *supra* note, at 74–75.

[53] U.S. Const. art. II, sec. 2, cl. 3.

[54] 705 F.3d 490 (D.C. Cir. 2013), cert. granted, U.S. (June 24, 2013).

impassioned treatment of the functional effects and broad purposes of the constitutional structure. And the nub of the court's reasoning was precautionary. Intrasession recesses must be excluded from the scope of the recess appointment power as a precaution against the risk of presidential aggrandizement, or even presidential despotism. In the court's words:

> To adopt the [government's] proffered intrasession interpretation of "the Recess" would wholly defeat the purpose of the Framers in the careful separation of powers structure reflected in the [appointments provisions of the Constitution]. As the Supreme Court observed ... "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism."[55]

Recess appointments are hardly the stuff of which tyranny is made, because of their inherently limited duration, expiring at the end of the next congressional session. So one might see all this talk of aggrandizement and despotism as a rhetorical flourish in support of the textual arguments. Yet the opposite is closer to the truth. The court was quite candid that the point of its textual arguments was to establish a firm rule as a precaution against presidential aggrandizement:

> We must reject ... vague alternative[s] in favor of the clarity of the intersession interpretation. As the Supreme Court has observed, when interpreting "major features" of the Constitution's separation of powers, we must "establish high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." ... Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers.[56]

Canning is best understood to adopt a rigid and narrow interpretation of the recess appointment power, excluding all intrasession recess appointments, as a precaution against the risk of presidential despotism. The judges were haunted by a slippery-slope risk – the risk that, unless a clear line were drawn, the president would end up with "free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction."[57] Analytically, there is no necessary connection between

55 705 F.3d at 503 (internal citation omitted).
56 705 F.3d at 504 (internal citation omitted).
57 705 F.3d at 504.

precautionary arguments and slippery-slope arguments, as I explain later, but the two rest on similar anxieties and often appear together.

Canning is not, of course, a final decision from the Supreme Court. As of now, the Court will hear the case in the Fall of 2013, and might well decide to overturn the decision below or, at a minimum, to modify its holding or rationale. Yet the point of discussing *Canning* is not to cite it for its binding legal authority; even if it is eventually overturned, the decision still aptly illustrates the precautionary approach to interpretation of particular constitutional provisions. As I will show later, there are other equally plausible, but less precautionary, interpretations of the recess appointment power. The *Canning* decision rests on contestable choices about the risks of presidential aggrandizement, and about the proper judicial response to those risks.

Free speech. On the "rights" side of the conventional structure-rights divide, precautionary arguments are if anything even more common. Vincent Blasi's influential account of free speech urges judges to devise free speech doctrine by taking a "pathological perspective," in which constitutional rules are geared to preventing the worst-case scenario – abuses targeted at the speech of political minorities, dissenters, or opponents of the regime.[58] Blasi's argument calls for a type of constitutional risk aversion, or, if one prefers to think in terms of uncertainty, a type of constitutional maximin.

Here there is a stock contrast between two cases that both address subversive political speech; one illustrates an expected-risk approach, the other a precautionary approach. In a case involving subversive advocacy by Communist organizations, *Dennis v. United States* held that courts should evaluate the risk that advocacy of overthrow of the government will lead to very severe harms, even if in the remote future, under a test formulated by Learned Hand: "In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[59] Some passages in the Court's opinion might be interpreted, in isolation, as advocating a precautionary approach to the risk of subversive violence; free speech and the doctrinal requirement of a "clear and present danger" cannot, the Court said, mean that "before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is

58 Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

59 341 U.S. 494, 510 (1951) (quoting United States v. Dennis, 183 F.2d. 201, 212 (2d Cir. 1950) (Hand, J.)).

awaited."[60] Reading the opinion as a whole, however, its centerpiece was Hand's analysis, which considers all relevant risks and thus implies optimal rather than maximal precautions.

In contrast to this straightforward expected-harm calculus, *Brandenburg v. Ohio* held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[61] The latter holding attempts to build a doctrinal barrier against politically motivated restrictions on speech and other worst-case political pathologies, and thus exemplifies Blasi's precautionary approach. Similar justifications have been offered for other free-speech principles and doctrines, such as the strong presumption against "prior restraints" that regulate speech before it actually occurs – a precautionary principle against government regulation that might "chill" protected expression.[62]

"Takings" and property rights. The Takings Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use without just compensation."[63] Among the many controversies that attend this provision, the sharpest one in recent years has involved the requirement that takings (the exercise of "eminent domain" by the government) must be for "public use." That requirement is independent of, and cumulative with, the requirement that the government pay "just compensation" for takings that are otherwise permissible.

On a narrow construal, the public use requirement means that takings may only be used to transfer property from private to public hands, as when private land is converted into public parkland or is given to common carriers open to general public use, such as railroads.[64] The Supreme Court has, however, emphatically rejected that narrow reading. In the 2005 *Kelo* decision,[65] the Court upheld the taking of private residential property as part of a city's economic redevelopment plan, under which the property would be transferred to private commercial entities. "For public use," according to the Court, means "for a public purpose," and legislatures

60 *Id*. at 509.
61 395 U.S. 444, 447 (1969).
62 See Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 Colum. L. Rev. 494, 516–17 (2008).
63 U.S. Const. amend. V, cl. 5.
64 Kelo v. City of New London, 545 U.S. 469, 479–80 (2005).
65 *Id*.

should receive a large dollop of judicial deference in determining what counts as a public purpose.[66]

The dissenters, and a legion of critics, argued for a bright-line rule that economic development can never count as public use. The main argument for that rule was precautionary. Suggesting that "the specter of condemnation hangs over all property" as a result of the Court's decision, Justice O'Connor argued that excluding economic development from the category of public use was necessary to "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power – particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."[67] Here the relevant risk is a public-choice concern that legislatures influenced by private commercial interests will exercise the takings power in ways that benefit those interests while harming overall welfare, in part by making all property rights uncertain, while offering pretextual justifications about economic development. As O'Connor put it, "[t]he beneficiaries [of the Court's holding] are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."[68] O'Connor's argument failed at the Court, but after *Kelo* a number of state legislatures enacted statutes barring takings for purpose of economic development.[69] For present purposes, all that matters is that the critics of *Kelo* stand squarely in the tradition of precautionary constitutionalism.

Due process and an impartial tribunal. The constitutional law of due process requires a neutral adjudicator where protected interests are at stake. Among the various threats to neutrality – corruption, bias, or ideology, protean words all – which should be policed by due process? The structure of the problem is that it is difficult to prove, in particular cases, whether the various decision-making distortions operated and affected the outcome; consequently, the way in which the default rules or burdens of proof are set will often prove dispositive. Thus the Supreme Court, and the lower courts, have developed a series of rules that are explicitly geared to prevent risks of decisional distortions that are difficult to observe directly. One series of cases develops a precautionary principle

[66] *Id*. at 480.
[67] *Id*. at 496 (O'Connor, J., dissenting).
[68] *Id*. at 505.
[69] *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. L. Rev. 2100, 2138–43 (2009) (collecting state statutes).

against adjudication by officials with a personal pecuniary stake in the case at hand.[70] Such an interest need not be direct, and its biasing effect need not be proved in particular cases; it suffices, as the Court once put it, that there is a "possible personal interest."[71] Both later and in Chapter 4, I will take up the underlying ideal of impartial decision making at greater length; suffice it to say that one strand in due process law is precautionary.

Reasonable doubt rule. In criminal trials, one relevant risk is conviction of the innocent. Because there is rarely an independent benchmark of guilt or innocence apart from the trial itself, that risk is inherently difficult to gauge. The reasonable doubt rule can then be understood as a precautionary principle that seeks to erect safeguards against the possibility of convicting the innocent.[72] In Blackstone's formulation, the rule's premise is that it is better for ten guilty men to go free than for one innocent to be convicted.[73] More generally, the reasonable doubt precautionary principle says that in criminal trials the ratio of false negatives (acquittals of the guilty) to false positives (convictions of the innocent) should be N to 1, where N has been specified by various courts and commentators as ranging not only up to 10, but also as high as 100 or even more.[74] This approach might or might not be consistent with an expected-utility calculus, but is not usually justified in such terms. For instance, classical arguments for the reasonable doubt rule do not typically consider the countervailing risk that the guilty who are set free will go on to commit crimes against innocent third parties[75] – a point I take up later. Rather, the basic intuition behind the reasonable doubt rule

70 *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.").

71 Gibson v. Berryhill, 411 U.S. 564, 579 (1973) ("those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes").

72 See Peter Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399; Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. Rev. 171 (2012).

73 3 William Blackstone, Commentaries 352 (1769).

74 *See* Alexander Volokh, *Guilty Men*, 146 U. Pa. L. Rev. 173, 178 (1997) (for example, Maimonides "interpreted the commandment of *Exodus* as implying a value of $n = 1000$ for the purpose of an execution").

75 *See* Larry Laudan, *The Elementary Epistemic Arithmetic of the Law*, 5 Episteme 282–294 (2008).

is vaguely precautionary: the burden of risk or uncertainty should be resolved in favor of protecting the innocent.

Prophylactic rules. Finally, precautionary arguments also underpin many so-called prophylactic rules of constitutional doctrine. The stock example is *Miranda v. Arizona*,[76] which, in effect, requires police to inform suspects of their constitutional rights as a precondition for using the suspects' voluntary statements as evidence. In the stock justification,[77] *Miranda* warnings were said not to be required by the Constitution itself: the constitutional requirement is just that waivers of rights be "knowing and voluntary," all things considered. Instead, *Miranda* warnings are a judicially created adjunct doctrine that overprotects constitutional interests, in part because of the difficulties of case-by-case determination of whether a suspect's waiver of rights was indeed voluntary. In other words, one might protect suspects through ex post remedies, involving case-specific determinations of whether police have abused their position of power; but judges think that approach inadequately protective, and thus have created auxiliary ex ante precautions in the form of *Miranda* warnings. More recently, the Supreme Court confused matters by overturning a federal statute that purported to overturn *Miranda*, and the Court suggested that *Miranda* has some sort of constitutional status; yet it did not quite say that *Miranda* warnings are directly required by the Constitution.[78] Whatever the details here, the conceptual point is clear enough.

CONSTITUTIONAL PRECAUTIONARY PRINCIPLES AND NEAR RELATIONS

Given the multidimensional variation of constitutional precautionary principles, it is important to compare and contrast them with several near relations – conceptual structures or modalities of constitutional argument that in some way or another attempt to regulate the risks of politics by building some form of bias or skew into constitutional rules. No sharp distinctions are possible, but I will try to indicate some rough lines of

[76] 384 U.S. 436 (1966).

[77] *See, e.g.*, Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. Cin. L. Rev. 1, 4–5 (2001) ("the Court had justified its decision to do so on the ground that the *Miranda* rule was merely 'prophylactic' rather than an interpretation of the Fifth Amendment itself").

[78] See *Dickerson v. United States*, 530 U.S. 428 (2000). For a close analysis, see Caminker, *supra* note 77.

demarcation that draw a blurry boundary around the category of constitutional precautions.

Constitutional clear statement principles. In several areas of constitutional law and doctrine, actors have argued for clear statement principles for interpreting the Constitution. In the setting of separation of powers, Madison stated in the First Congress that the legislative and executive powers "must [be] suppose[d] … intended to be kept separate in all cases in which they are not blended."[79] Chief Justice Taft endorsed a similar principle in *Myers v. United States*.[80] And, as we have seen, Tucker's rule of strict construction of national powers amounts to a clear statement rule that presumes against national power unless it has been expressly granted. These clear statement principles of constitutional interpretation are different from constitutionally inspired clear-statement principles for interpreting statutes; an example of the latter is the proposed requirement of clear legislative authorization for presidential emergency measures, as previously mentioned.[81]

Clear statements principles for interpreting the Constitution may or may not count as precautionary principles, depending on how they are justified. Such principles might be justified as a precaution against political risks, but then again they might be justified on other grounds. Thus Tucker's Rule – ultimately founded on the "hazard" that national power will be used to "destroy" the putative independent sovereignty of the States – is explicitly precautionary. The Madison-Taft principle, by contrast, is not clearly precautionary. Although Madison did suggest that a conflation of powers would "abolish at once that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good,"[82] the main thrust of the argument was simply that a clear statement rule of separation of powers was the best interpretive inference from the structure of the new Constitution.

Slippery-slope arguments. Constitutional clear statement principles may or may not be precautionary; in turn, constitutional precautionary principles may or may not rest on slippery-slope arguments. The

79 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 380 (Philadelphia, J.B. Lippincott & Co. 1881) (1836).

80 272 U.S. 52 (1926).

81 For more general treatments of clear-statement rules in statutory interpretation, see John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399 (2010); and William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

82 *Myers*, 272 U.S. at 160.

argument in *United States v. Butler* – allowing federal spending for the purpose of circumventing limits on federal regulatory power would license a sequence of events ending in the abolition of state independence – takes a slippery-slope form.[83] By contrast, the Antifederalist concern over standing armies did not necessarily have a slippery-slope element. Rather, standing armies were seen as a standing risk that could or would eventually produce a tyrannical *coup d'état*, but that risk could be understood as a constant hazard rather than as the end-state of a predictable slide down a slippery slope.

The difference is that the *Butler* argument has the dynamic or intertemporal element that is a hallmark of slippery-slope arguments.[84] In this dynamic, a precedent at Time 1, perhaps unobjectionable in itself, triggers one or more causal mechanisms[85] that make it more likely that a more expansive precedent will be set at Time 2, and so on, until the bottom of the slippery slope is reached. Each step in the sequence increases the probability that the next step will occur, and it is this feature that makes the slope slippery. By contrast, the underlying risk model might have no inherently dynamic features at all. The actor might fear that the distribution of risks has a fat tail, such that extreme undesirable outcomes are surprisingly possible at any given time. The actor might then argue for taking precautions in light of the high variance of this distribution. Yet draws from a distribution of that sort might be entirely independent of one another, so that whether the risk does or does not materialize at Time 1 has no effect on whether it materializes at Time 2, and there is no slippery slope in the picture. I conclude that, although precautionary arguments might be and sometimes are predicated on slippery-slope risks, they need not be; slippery slopes are not a necessary feature of precautionary arguments, but merely one of several possible justifications for taking precautions.

PRECAUTIONARY CONSTITUTIONALISM: THEMES AND CONCERNS

The assemblage of precautionary principles, structures and doctrines is heterogeneous. The arguments come from different actors in very different historical eras and situations. Moreover, as I have emphasized, there

83 297 U.S. 1 (1936).
84 Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361, 381–382 (1985).
85 Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1029 (2003).

is a continuum or spectrum of precautionary stances, from the extreme of maximin constitutionalism to weaker rebuttable presumptions or tie-breaking rules. Nonetheless, it is possible to identify some common themes and concerns that underpin precautionary constitutionalism, and that will help us to reconstruct it in the best possible light before we turn to critiques in the next chapter.

If power can be abused, it will be. As John Marshall pointed out, distrust of the motivations of officials is a major theme of precautionary constitutionalism. Underpinning many of the arguments we have seen is an implicit account of what officials maximize: power and the enjoyment of the fruits of power. On this account, grants of discretion to governmental officials will inevitably be abused, as officials use their discretion to pursue self-regarding aims or to further the welfare, not of the citizenry as a whole, but of interest groups and narrow political coalitions. Shklar's liberalism of fear "regards abuses of public power in all regimes with equal trepidation" and "worries about the excesses of official agents at every level of government."[86] Precautionary constitutionalism shares this central concern and translates it into the language and institutional structures of the law.

If institutions can expand their power, they will do so. Transposing this account of motivations from the individual to the collective level, precautionary constitutionalists implicitly portray structured groups of officials – political institutions – as power-maximizers. The further assumption is that institutions maximize power through empire-building[87] – by expanding their jurisdiction or the scope of their discretion to encompass an ever-greater terrain. Where this comes at the expense of other institutions, the assumption is one of aggrandizement.

If a risk materializes, it may be too late to do anything about it. A hallmark of precautionary constitutionalism is the concern that unless safeguards are installed before the fact, abuses will be irremediable. In the extreme case – a transition to dictatorship, perhaps through a presidential or military coup – legal and political institutions may be swept away or else left in place as a sham. Even in lesser cases, official abuses or remorseless institutional aggrandizement may create a new status quo that law and politics will find it excessively costly to alter. Plutarch

[86] Judith N. Shklar, *The Liberalism of Fear*, *in* Political Thought and Political Thinkers 3, 9–10 (Stanley Hoffmann ed., 1998).

[87] Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 Harv. L. Rev. 915, 916 (2005).

captures this aspect of precautionary constitutionalism in his account of measures taken by the Roman consul Publicola, after the overthrow of the Tarquin kings:

> He enacted a law by which any one who sought to make himself tyrant might be slain without trial, and the slayer should be free from blood-guiltiness if he produced proofs of the crime. For although it is impossible for one who attempts so great a task to escape all notice, it is not impossible for him to do so long enough to make himself too powerful to be brought to trial, which trial his very crime precludes. He therefore gave any one who was able to do so the privilege of anticipating the culprit's trial.[88]

Consider fat-tail risks in politics. In finance, climate change, and other policy areas, important recent work has focused on "fat-tail risks" – risks that are exceedingly unlikely to materialize, but more likely than in a normal distribution, and that are exceedingly damaging if they do materialize.[89] Under certain types of probability distributions ("fat tail distributions"), such risks will have an important role in the decision-making calculus; here the crucial mistake is to assume that the relevant risk is normally distributed, such that exceedingly damaging outcomes are effectively impossible.

In politics and law, by analogy, we might understand precautionary constitutionalists and maximin constitutionalists as alert to the possibility of fat-tail distributions of political outcomes. The risk that a constitutional democracy might suddenly slide into dictatorship, for example, is exceedingly remote, but such an event might also be exceedingly harmful to constitutional values if it did occur. Moreover – and this is what the fat tail means – the risk of an extreme catastrophic harm might be significantly higher than the rulemaker appreciates, if the rulemaker wrongly assumes that the risk is normally distributed. On this view, although it is easy to scoff at alarmist fears about dictatorship and other miniscule probabilities, it would actually be a serious mistake to exclude such possibilities from consideration by focusing, myopically, on their low probability of occurrence while ignoring the possibility of fat-tail risks, with enormous potential for harm. A sensible rulemaker will take into account the possibility that political risks are not normally distributed.

88 1 Plutarch, Plutarch's Lives 533 (Bernadotte Perrin trans., 1914).

89 For accessible introductions to the issues, see Martin L. Weitzman, *Fat-Tailed Uncertainty in the Economics of Catastrophic Climate Change*, 5 Rev. Envtl. Econ. & Pol'y 275–92 (2011); Nassim Nicholas Taleb, The Black Swan: The Impact of the Highly Improbable (2d ed. 2010).

Safeguards should be redundant and robust. To the precautionary constitutionalist, safeguards against abuses should display two properties: redundancy and robustness. Although these terms are given several somewhat different definitions in the literature on mechanism design, for present purposes simple definitions will do. Redundancy means that no single safeguard should bear all the weight; rather, there should exist a series of filters that, taken as a system, will catch all attempts at abuse of official power before they materialize. Robustness means that the system of successive filters cannot easily be undermined or subverted by the very officials or institutions constrained by the system. For legal rules, robustness is ensured in part by clarity; clear and specific delineations of power will alert citizens and other institutions if some one institution is exceeding the bounds of its authority.

Limit the downside. Perhaps the simplest intuition behind precautionary constitutionalism is that it is best if rulemakers attempt to limit the downside risks of politics, eschewing ambitious attempts to maximize the possible upside gains of politics.[90] This kind of systematic attitude of constitutional risk-aversion has seemed attractive to many political theorists. As I mentioned in the Introduction, for example, Karl Popper's political theory emphasizes that a liberal society should "[w]ork for the elimination of concrete evils rather than for the realization of abstract goods."[91] Popper here captures an important strand in liberal theory, which sees the state as a standing danger to individual freedom, and which attempts to circumscribe the state's powers so as to "minimize the danger that these powers will be misused."[92] Concretely, Popper proposes, the master "principle of a democratic policy" should be to "create, develop and protect political institutions for the avoidance of tyranny."[93]

In later chapters I will argue at length that a systematically precautionary approach to constitutionalism is misguided. Yet it is important to appreciate that precautionary constitutionalism does not rest on any simple mistake or transparent fallacy. Its highly distrustful account of official and institutional motivations is widespread and time-honored; its emphasis

[90] *Cf*. David Wiens, *Prescribing Institutions Without Ideal Theory*, 20 J. POL. PHIL. 45, 46 (2012) (arguing for an "institutional failure analysis approach," which "takes its primary design task to be obviating or averting social failures").

[91] KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 485 (2d ed. 2002).

[92] *Id*. at 472.

[93] Karl Popper, *The Paradoxes of Sovereignty*, *in* POPPER SELECTIONS 324 (David Miller ed., 1985).

on prevention, rather than remediation, of constitutional abuses resonates with the paramount place of constitutional rules in the legal system; and it offers a plausible account of the benefits of robustness and redundancy in the design of constitutional safeguards. The arguments against precautionary constitutionalism face an uphill struggle. Let us now turn to those arguments to see whether they succeed.