

**DO AS WE SAY AND NOT (NECESSARILY) AS WE DO:
THE CONSTITUTION, FEDERALISM, AND THE SUPREME
COURT'S EXERCISE OF JUDICIAL POWER**

JOHN TUSKEY*

INTRODUCTION

All who have taken a basic constitutional law course know (or should know) that the Constitution safeguards liberty in large part by dividing governmental power.¹ The Constitution divides power both horizontally—between the three branches (legislative, executive, and judicial) of the federal government—and vertically—between the federal government and the states.² The division of power between the federal government and the states is commonly known as the principle of federalism.³ Interestingly, the word “federalism” appears nowhere in the Constitution’s text; the Constitution contains no “federalism clause.” Yet, the structural principle embodied by the word “federalism”—the division of power between the federal government and the states—does exist within the document.

No one seriously disputes that the Constitution contains the structural principle of federalism.⁴ This lack of dispute, however, still leaves open questions about what exactly federalism is, what the proper federal-state boundary should be, and whether, to what extent, and by whom that boundary can be enforced. Where and how is federalism embodied in the Constitution? Is the boundary between federal and state power really enforceable? How is that boundary to be enforced? What are the respective roles of the courts and the political system in policing that

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* Assistant Professor, Regent University School of Law. I thank members of the Regent faculty for helpful comments made at a faculty symposium. I especially thank my colleague Lynne Marie Kohm for her encouragement and helpful comments. I also thank Jaret Teague, Dawn Manley, and Carly Gammill for their research and editing assistance.

¹ See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 261 (1985).

² See *THE FEDERALIST* NO. 51, at 267–72 (James Madison) (George W. Carey & James McClellan eds., 2001).

³ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 1.1, at 3 (1997).

⁴ See Robert Justin Lipkin, *Federalism as Balance*, 79 *TUL. L. REV.* 93, 163 (2004).

boundary?⁵ Is the boundary judicially enforceable? To what extent? Is it appropriate for federal courts (in particular, the Supreme Court) self-consciously to play the role of “jurisdictional policeman”⁶ between the federal and state governments?

As to the first question—where and how federalism is embodied in the Constitution—the Constitution accomplishes the division of power between the federal and state governments by empowering the federal government to exercise only those powers delegated to it in the Constitution. The Constitution establishes the federal government’s three branches and sets forth the powers each branch may exercise.⁷ Implicit in this is the idea that the federal government may exercise only those powers the Constitution sets forth (or those powers fairly implied from the powers set forth).⁸ All other governmental power rests with the states or the people. The Tenth Amendment makes explicit what constitutional structure implies: “The 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.”⁹

It follows that Congress violates federalism limits when it acts outside its constitutionally delegated powers.¹⁰ If Congress enacts a statute that is within its power to enact, even if that statute somehow restricts state action, Congress has not violated the principle of federalism. However, if that statute is not within Congress’s power to enact, Congress has violated the principle of federalism by restricting state action without constitutional

⁵ See generally the majority and dissenting opinions in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), for different perspectives of Supreme Court Justices on this issue.

⁶ Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1377 (1998) (arguing that the role of “jurisdictional policeman” is not only an appropriate role for the Supreme Court to play, but is indeed textually mandated as the appropriate role for the Court).

⁷ See U.S. CONST. art. I–III. The Constitution also, in Article I, Section Nine, expressly prohibits the legislative branch from doing certain things.

⁸ With respect to implied powers, see the seminal case *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 316 (1819), which held that the Constitution grants implicit powers to carry out appropriate acts, as long as the end is legitimately within the scope of the enumerated powers.

⁹ U.S. CONST. amend. X.

¹⁰ See Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 695 (2005).

authority or by usurping a power that belongs to the states or people under the Constitution.¹¹

In a series of decisions issued over roughly the past one and one-half decades, a majority of the Supreme Court (which I will call the “federalism five”)¹² has clearly indicated its belief that federalism boundaries are, to a great extent, judicially enforceable and that it is entirely appropriate for the Court to play jurisdictional policeman in disputes regarding federalism boundaries.¹³ The federalism five have not been reticent about telling Congress what it may do with respect to the states and what private activity Congress must leave to state regulation.¹⁴ Thus, despite the fact that neither the Eleventh¹⁵ nor the Tenth Amendment¹⁶ mentions sovereign immunity,¹⁷ the federalism five have found that both represent a principle of state sovereign immunity, which generally prohibits Congress from creating causes of action in state or federal court that are directly enforceable against states, without the states’ consent.¹⁸ The federalism five also have held that the Tenth Amendment prohibits Congress from directing state legislatures to enact congressionally-mandated legislation¹⁹ and directing state executive officers to enforce federal law.²⁰

¹¹ See *New York v. United States*, 505 U.S. 144, 188 (1992).

¹² Before Justice O’Connor’s retirement and Chief Justice Rehnquist’s death, the federalism five on the Court consisted of Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas. While other Justices occasionally joined these five in federalism cases, the five named Justices have been the most consistent in embracing the role of jurisdictional policemen. See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decision*, 69 U. CHI. L. REV. 429, 429–30 (2002).

¹³ See *id.*

¹⁴ See *id.* at 431.

¹⁵ The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

¹⁶ See *supra* text accompanying note 9.

¹⁷ See U.S. CONST. amend. X, XI. The Eleventh Amendment on its face merely withdraws federal jurisdiction over a certain class of cases against states. See U.S. CONST. amend. XI. It does not say that states are immune from suits in federal court without their consent. The Amendment nowhere mentions that a state’s consent is relevant to the exercise of judicial power. The Tenth Amendment only makes explicit what is implicit in the constitutional structure. See *United States v. Darby*, 312 U.S. 100, 123–24 (1941).

¹⁸ *Alden v. Maine*, 527 U.S. 706, 712, 730 (1999).

¹⁹ See *New York v. United States*, 505 U.S. 144, 188 (1992).

²⁰ See *Printz v. United States*, 521 U.S. 898, 935 (1997).

Additionally, the federalism five found federal statutes unconstitutional because these statutes exceeded Congress's power to "regulate Commerce . . . among the several States."²¹ And finally, in *City of Boerne v. Flores*²² (a case this Article will discuss in detail), the Court invoked federalism as a reason for limiting Congress's power to enforce the Fourteenth Amendment.²³

Each case in which the Supreme Court has policed federal-state jurisdictional boundaries involved the exercise of the Court's power of judicial review—the Court's power to refuse to give legal force to an action of one of the other branches of the federal government or of a state (e.g., by refusing to apply a statute) because that action is inconsistent with the Constitution.²⁴ Like the word "federalism," the power of judicial review does not appear explicitly in the Constitution. Yet, it is now

²¹ U.S. CONST. art. I, § 8, cl. 3; *accord* *United States v. Morrison*, 529 U.S. 598, 619 (2000); *United States v. Lopez*, 514 U.S. 549, 551 (1995). *Lopez* and *Morrison* may very well have more bark than bite, as evidenced by the Court's recent decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). In *Raich*, the Court majority (which included Justices Scalia, who wrote a separate concurrence, and Kennedy) held that Congress's power under the Commerce Clause was broad enough to allow Congress to prohibit individuals from growing marijuana for private medicinal use, which was authorized by state law. *Id.* at 2198, 2201.

²² 521 U.S. 507 (1997).

²³ *Id.* at 536; *see also Morrison*, 529 U.S. at 619. In *City of Boerne*, Justice Stevens joined four members of the federalism five—Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Thomas—in the majority. 521 U.S. at 509. Justice O'Connor wrote the main dissenting opinion. *Id.* at 544 (O'Connor, J., dissenting). However, the majority and dissenting opinions agreed about the conception of judicial power that formed the basis for the decision in *City of Boerne*, which I contend also formed the basis for the Court's earlier decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See infra* Part II.

²⁴ I am using the term "judicial review" to refer generally to the power of federal courts (and in particular, the Supreme Court) to review the actions of other governmental actors, federal or state, for conformity with the Constitution. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 241 (1994). Judicial review can be used in a more precise sense to refer to the power of federal courts to determine if statutes passed by Congress conform to the Constitution. *See id.* This is the context that the classic justifications for judicial review in THE FEDERALIST NO. 78 (Alexander Hamilton) and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), address. My thesis is that the same general principles underlying judicial review apply in either context, as do the same limits on the power.

commonly accepted that this power is implied in the Constitution and exists in federal courts.²⁵

Federal courts, like Congress and the executive branch, exist only because the Constitution created them.²⁶ Therefore, like Congress and the executive branch, federal courts are part of the federal government. This may seem too obvious to bother stating, but it underscores an important point: judicial review by federal courts is as much an exercise of federal governmental power as Congress enacting a statute or the executive branch executing federal law. Because federal courts may exercise the power of judicial review over state action as well as federal action,²⁷ that exercise of federal power can directly affect federal-state relations. Thus, in a case involving allegedly unconstitutional state action, when the Supreme Court exceeds the limits of its power of judicial review to invalidate the action, the Court has transgressed federalism bounds just as Congress does when it passes a statute affecting the states that exceeds the limits of congressional power. In this sense, every exercise of judicial review of state action creates a federalism case.

Oftentimes, the Court (including the Justices in the federalism five) seems to have missed this point. While paying fealty to federalism in opinions telling Congress what it cannot do with respect to the states, members of the federalism five have all, to a greater or lesser extent, appeared less concerned about how the Court's review of state action inappropriately restricts legitimate state prerogatives. The federalism five have been telling Congress not to order the states around, but while doing so the Justices in that majority have remained committed to judicially-

²⁵ See, e.g., Paulsen, *supra* note 24, at 241. This common acceptance of the power of judicial review has not always been the case. CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 90 (rev. ed. 1994). My own view is that the power of judicial review, *properly understood*, is implied in the Constitution. In other words, I believe that *Marbury* correctly decided that the power of judicial review exists in federal courts. However, this power is not a *carte blanche* given to federal courts to declare government action "unconstitutional" where the Constitution itself does not fairly require that result. See *infra* Part I. Nor is it a justification for treating Supreme Court opinions that are themselves inconsistent with or not fairly grounded in the Constitution as the supreme law of the land that trumps inconsistent federal or state statutes or actions. See *infra* Part I.

²⁶ See U.S. CONST. art. III.

²⁷ See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (holding that the Supreme Court's appellate jurisdiction included jurisdiction to review cases from state courts).

created doctrines that allow the Court to order states around in the supposed name of the Constitution.

I say “supposed” because these doctrines are not found in the constitutional text (or, at least, the Court has not bothered to explain how these doctrines are found in the constitutional text). In reality, these doctrines allow the Court to second-guess state action on what can only be described fairly as policy grounds, rather than on legal grounds. The worst offenders among the federalism five in this respect are Justices O’Connor and Kennedy. It is no surprise that the best example of members of the federalism five actively promoting such doctrines is Justice O’Connor’s and Justice Kennedy’s participation in jointly authoring the lead opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁸ In *Casey*, the Court upheld what the joint authors termed the “central holding” in *Roe v. Wade*²⁹ that the Constitution’s Due Process Clauses³⁰ protect a woman’s right to have an abortion.³¹ To reach this conclusion, Justices Kennedy and O’Connor combined a definition of due process liberty that, if taken seriously, would call into question any government action restricting individual conduct, with a conception of stare decisis that exalts the Court’s constitutional decisions over the Constitution on which those decisions are ostensibly based.³²

Casey was an abuse of the power of judicial review. Inferring the power of judicial review from a Constitution that nowhere expressly grants the power is ultimately justified because the Constitution, being superior to other forms of law in our system, necessarily displaces any law or action that conflicts with it. Early courts saw no justification for displacing legislative or executive action unless the Constitution required that result.³³ The Constitution established the apparatus for self-government through representatives.³⁴ The people, through their representatives, ought to be left to govern themselves unless the Constitution requires otherwise. Judicial review historically involved determining whether government action violated a *rule* stated or fairly implied by the Constitution.³⁵

²⁸ 505 U.S. 833 (1992).

²⁹ 410 U.S. 113 (1973).

³⁰ U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”); *id.* amend. XIV, § 1.

³¹ *Casey*, 505 U.S. at 879 (plurality opinion).

³² See *infra* text accompanying notes 268–76.

³³ See Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 678 (2001–2002).

³⁴ See U.S. CONST. art. I, § 2.

³⁵ See WOLFE, *supra* note 25, at 41–43.

Judicial review did not involve determining whether government action ought to be invalidated because the government's interest was not sufficient to justify the action. Stated differently, constitutional provisions were not treated as mere generalities that invited specification by the Court based on what the Justices thought best, all things considered. The Supreme Court early on eschewed the power to second-guess political agents on questions of degree, which the Court correctly viewed as political and not legal questions.³⁶

The Court's substantive due process jurisprudence, which includes *Casey*,³⁷ runs afoul of both of these principles. Substantive due process jurisprudence allows the Court to find rights nowhere mentioned in the Constitution and then to determine if state action restricting those rights may stand after balancing the state's interest in undertaking that action against the perceived importance of those rights.³⁸ However, substantive due process is not the only doctrine that runs afoul of the historical understanding of the power of judicial review. Here are some brief examples.

First, in its dormant Commerce Clause doctrine, the Court has inferred from the power granted to *Congress* to regulate interstate commerce,³⁹ a *judicial* power to review and hold unconstitutional state laws that affect interstate commerce.⁴⁰ This doctrine allows the Court to invalidate state

³⁶ See *infra* Part I.B.4.

³⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992) (plurality opinion).

³⁸ See, e.g., *id.* at 876–77 (stating that an abortion regulation is unconstitutional if it imposes an “*undue burden*” on the right to abort a fetus (emphasis added)).

³⁹ U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.”).

⁴⁰ See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The original justification for the doctrine was that the Constitution made Congress's power to regulate interstate commerce exclusive. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824). It followed that any direct state regulation of interstate commerce violated the Constitution because the Constitution deprived states of any power to regulate in that area. See, e.g., *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251–52 (1829); *Gibbons*, 22 U.S. at 197–200. The Court has long since abandoned this rationale, thereby leaving itself with no logical textual basis for its dormant Commerce Clause jurisprudence. See *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., dissenting). The Court itself has admitted that the bounds of the dormant Commerce Clause “appear nowhere in the words of the Commerce Clause, but [rather] have emerged gradually in the decisions of this Court.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); see also Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the* (continued)

regulations that incidentally affect, but do not discriminate against, interstate commerce, if the Court finds that the regulation's burden on interstate commerce outweighs the state's interest in regulation.⁴¹

A second example is the exclusionary rule created by the Court to enforce the Fourth Amendment.⁴² More than once, the Court has stated (once in an opinion authored by Justice Thomas) that the Fourth Amendment does not require the exclusion of evidence obtained from an illegal search or seizure, and that exclusion does not remedy the illegality.⁴³ Rather, the exclusionary rule is, in Justice Thomas's words, "a judicially created means of deterring illegal searches and seizures" that is "prudential rather than constitutionally mandated."⁴⁴ The Court continues to apply the exclusionary rule against states at criminal trials.⁴⁵ To determine whether to apply the rule at other proceedings (e.g., parole revocation proceedings)⁴⁶ the Court balances the rule's "costs"—principally, the exclusion of probative evidence—against the benefit to be gained—chiefly, deterring future illegal searches and seizures—in applying the rule at that particular type of proceeding.⁴⁷ If the Court's own stated premises are correct, then the Court has taken upon itself a power to impose on the states a rule not required by the Constitution, based on the Court's assessment of the value of imposing that rule in a particular class of cases.

A third and very recent example is the Court's application of the Eighth Amendment in death penalty cases. In these cases the Court decides whether states may, consistent with the Eighth Amendment's prohibition of "cruel and unusual punishments,"⁴⁸ impose the death penalty on different categories of offenders (e.g., minors)⁴⁹ by determining whether

Dormant Commerce Clause, and the Federalism Mantra, 71 OR. L. REV. 409, 418–19 (1992).

⁴¹ See *Pike*, 397 U.S. at 142; see also McGinley, *supra* note 40, at 415–17.

⁴² See generally *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence obtained in violation of the Fourth Amendment must be excluded from federal and state criminal proceedings).

⁴³ See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362–63 (1998); *United States v. Leon*, 468 U.S. 897, 906 (1984); *Stone v. Powell*, 428 U.S. 465, 482, 486 (1976).

⁴⁴ *Scott*, 524 U.S. at 363 (citing *Leon*, 468 U.S. at 907; *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

⁴⁵ See, e.g., *James v. Illinois*, 493 U.S. 307, 311–20 (1990).

⁴⁶ *Scott*, 524 U.S. 357.

⁴⁷ See *id.* at 364–65.

⁴⁸ U.S. CONST. amend. VIII.

⁴⁹ *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

imposing the penalty would be consistent with “evolving standards of decency that mark the progress of a maturing society.”⁵⁰ To reach this conclusion, the Court consults various sources, including international and foreign law,⁵¹ and “[i]n the end [the Court’s] own judgment [on] the acceptability of the death penalty under the Eighth Amendment.”⁵² The Court’s “own judgment,” in turn, depends on the Justices’ assessment of whether persons in the group can ever be considered sufficiently blameworthy to merit death⁵³ (or, in Justice O’Connor’s words, on the Justices’ assessment of “moral proportionality”).⁵⁴

These doctrines leave the Court free to make “constitutional” determinations without any guidance from the Constitution. To cite another example, in equal protection analysis a law based on what the Court considers a “suspect” classification—like race—must be justified by a *compelling* state interest.⁵⁵ But a classification based on a ground the Court considers merely “quasi-suspect”—like sex—need only be justified by an *important* state interest.⁵⁶ The problem is that nothing in the Constitution tells us how to distinguish a compelling state interest from an important state interest. Moreover, the Constitution does not tell us the grounds upon which to make such a distinction, or even to what kind of classifications the respective justifications apply. Likewise, the Constitution does not tell us how to weigh burdens on commerce against the value of a state’s interest in regulation, how to determine whether excluding evidence from a proceeding is “worth it” to deter future illegal searches or seizures, or how to assess the general blameworthiness of various groups of offenders. There simply is no law in the Constitution on

⁵⁰ *Id.* at 1190 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

⁵¹ *Id.* at 1198–1200.

⁵² *Id.* at 1191–92 (citations omitted).

⁵³ *See id.* at 1194–98 (comparing the relative general blameworthiness of minors to adults). Justice Kennedy authored *Roper* while Justice O’Connor dissented. *Id.* at 1183. However, as Justice Scalia noted in his separate dissent (joined by Chief Justice Rehnquist and Justice Thomas), Justice O’Connor demonstrated a willingness to overturn application of the death penalty to certain groups of offenders based upon her own assessment of “moral proportionality.” *See id.* at 1212 (O’Connor, J., dissenting); *id.* at 1222 n.8 (Scalia, J., dissenting). Justice O’Connor dissented in *Roper*, in part, because her sense of “moral proportionality” differed from the majority’s. *Id.* at 1206 (O’Connor, J., dissenting).

⁵⁴ *Id.*

⁵⁵ *See Heller v. Doe*, 509 U.S. 312, 319 (1993).

⁵⁶ *See Craig v. Boren*, 429 U.S. 190, 197 (1976).

these subjects; they are matters of policy judgment with no easily discernable “right” answer. These judgments are political choice, not law.

The Court has developed doctrines that allow it to sit, in essence, as a super-legislature, free to pass judgment on state laws and impose practices on states. The Court’s decisions are not based on guidance from the Constitution; rather, they are based on the Justices’ policy choices. The doctrines noted above take from the hands of the people and their elected representatives (who are accountable to the people) policy choices not clearly prohibited by any law, and place those choices in the hands of nine unelected, life-tenured⁵⁷ judges that the Framers deliberately insulated from direct popular accountability.⁵⁸ These doctrines, when applied to state action, profoundly affect the federal-state balance by taking these policy choices from state governments accountable to the people in those states and placing them in a branch of the federal government. When the states lose, the Justices’ policy choices are embodied in judgments enforceable against recalcitrant state actors—potentially at the end of a gun⁵⁹—by the federal executive branch.

Each doctrine depends on a conception of the power of judicial review that is inconsistent with both the historical understanding and justification of that power. As I will explain, the attitude of the majority of the Court (including members of the federalism five) toward the power of judicial review is best reflected in two important cases in which the federalism five participated: *Planned Parenthood of Southeastern Pennsylvania v. Casey* (an opinion in which, as noted earlier, Justices Kennedy and O’Connor shared authorship) and *City of Boerne v. Flores* (an opinion authored by Justice Kennedy).

⁵⁷ To be technically correct, the Constitution states that judges are to “hold their Offices during good Behaviour.” U.S. CONST. art. III, § 1. However, for a judge who does not misbehave so as to subject himself to impeachment, that tenure amounts to life-tenure. *See id.* art. I, § 3, art. III, § 1.

⁵⁸ *See id.* art. III, § 1. As I note *infra*, judicial independence is not complete. Judges are appointed and confirmed by the political branches. *Id.* art. II, § 2. Congress controls federal court jurisdiction. *Id.* art. III, §§ 1–2. Judges are subject to impeachment. *Id.* art. II, § 4. However, judges are insulated from any direct popular accountability. They do not face re-election and can be removed only by being impeached. *See id.*

⁵⁹ One dramatic example of federal enforcement at the end of a gun is President Eisenhower’s decision in 1957 to deploy the 101st Airborne Division to enforce a federal court’s order that Little Rock, Arkansas desegregate its schools. National Park Service, U.S. Department of Interior, Little Rock Central High School National Historic Site, <http://www.cr.nps.gov/nr/travel/civilrights/ak1.htm> (last visited Jan. 18, 2006).

The remainder of this Article examines in more detail how the Court views and exercises the power of judicial review, and how the Court's exercise of that power distorts the federal-state balance. The Article also explains how Justices in the federalism five all, to a greater or lesser extent, share the same view of judicial power that allows the Court to perpetuate doctrines that distort the federal-state balance.

Part I explains and defends the traditional justification of judicial review embodied in *Marbury v. Madison* and *The Federalist No. 78*. Part I also examines several corollaries that flow from the traditional understanding of and justification for judicial review that mark out the bounds of that power.

Part II contrasts the traditional understanding of judicial review with the understanding of judicial review reflected in *Casey* and *City of Boerne*. Part II examines how these cases share the same understanding of judicial review, how that understanding is at odds with the traditional understanding, and how that understanding allows the Court to distort the federal-state balance.⁶⁰

In discussing Court decisions, I am not so much concerned with whether the Court might properly have reached the same result based on different reasons as I am with the reasons the Court actually advanced to reach that result. I am more concerned with how the Court's reasoning reveals its view of judicial review and its willingness to impose restrictions on the states without an adequate constitutional basis. For example, it may be that the Fourth Amendment requires the exclusionary rule.⁶¹ Even if that is correct, the fact that the federalism five can explicitly state that the Fourth Amendment does not require the rule and that the rule does not

⁶⁰ One notable doctrine I do not discuss is the doctrine of incorporation. This doctrine allows the Court to apply the provisions of the Bill of Rights to the states. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968). Obviously, if there is no constitutional basis for incorporation, then all the Court's cases reviewing state action for the conformity to the Bill of Rights represent a power grab by the Court.

I do not discuss incorporation primarily because to do so would make this Article far longer than it needs to be to make the points I am trying to make. Moreover, much ink has already been spilled on incorporation's validity. For a quick primer on that issue, see generally the notable debates between Justices Frankfurter and Black in *Adamson v. California*, 332 U.S. 46 (1947). Therefore, for purposes of this Article, I will take incorporation as a given (or perhaps more accurately, a *fait accompli*) despite any misgivings I or anybody else may have concerning the doctrine.

⁶¹ See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369–70 (1998) (Stevens, J., dissenting); *United States v. Leon*, 468 U.S. 897, 928–30 (1984) (Brennan, J., dissenting).

remedy an illegal search or seizure,⁶² yet continue to apply the rule against states⁶³ (or determine whether to apply the rule based on balancing costs against benefits),⁶⁴ says much about what those Justices really think about federalism and their exercise of judicial review.

I. THE EXERCISE OF FEDERAL JUDICIAL POWER

A. *The Traditional Defense of Judicial Review*—Marbury v. Madison and The Federalist No. 78

The most controversial exercise of the federal judicial power (at least historically) has been the power of judicial review.⁶⁵ The Constitution does not expressly grant the power of judicial review. Indeed, the Constitution does not expressly grant to any branch of the federal government, including the courts, the power to interpret the Constitution.⁶⁶ The power of judicial review—the power of federal courts to refuse to give legal effect to the action of other government actors because those actions are inconsistent with the Constitution⁶⁷—is implied from other provisions of the Constitution.⁶⁸

With respect to judicial review of federal statutes, the classic arguments justifying this implied power are found in *Marbury v. Madison*⁶⁹ and *The Federalist No. 78*.⁷⁰ Enough has been written describing in detail the *Marbury* and *The Federalist No. 78* justifications for judicial review that little purpose would be served in another detailed explanation of those justifications.⁷¹ Therefore, I will briefly sketch out the basic argument of those two sources supporting the implication of a power of judicial review.

⁶² See *Scott*, 524 U.S. at 362–63 (majority opinion).

⁶³ See, e.g., *James v. Illinois*, 493 U.S. 307, 319–20 (1990).

⁶⁴ See, e.g., *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987).

⁶⁵ See Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case”*, 38 WAKE FOREST L. REV. 375, 375–78 (2003).

⁶⁶ Paulsen, *supra* note 24, at 241.

⁶⁷ See discussion *supra* note 24.

⁶⁸ This is hardly a novel point. See, e.g., Paulsen, *supra* note 24, at 241; William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 26–29.

⁶⁹ See 5 U.S. (1 Cranch) 137, 173–80 (1803).

⁷⁰ See THE FEDERALIST NO. 78, at 403–05 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

⁷¹ See, e.g., WOLFE, *supra* note 25, at 73–89; John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 333 (1998); Paulsen, *supra* note 24, at 241–52; Van Alstyne, *supra* note 68, at 16–38.

Marbury required the Court to decide whether it had original jurisdiction to grant a writ of mandamus ordering Secretary of State James Madison to deliver a commission of office to several plaintiffs, including Marbury, who had been appointed to serve as justices of the peace for the District of Columbia and Alexandria.⁷² The Court interpreted section 13 of the Judiciary Act of 1789 to grant the Supreme Court original jurisdiction to issue writs of mandamus to officers of the United States—such as the Secretary of State.⁷³ But according to the Court, section 13, as interpreted, purported to grant jurisdiction to the Court that was not within the judicial power of the United States set forth in Article III.⁷⁴ The Court had to decide whether to follow the statute and accept jurisdiction or follow the Constitution and dismiss for lack of jurisdiction.⁷⁵ To dismiss for lack of jurisdiction would require the Court to disregard a statute enacted by Congress.⁷⁶

The Court chose to disregard the statute and held that original jurisdiction did not exist to grant the writ of mandamus against Madison.⁷⁷ But why did the Court disregard the statute? What, in the Court's view, gave it the authority to refuse to follow a duly-enacted statute? These were not just idle questions. That courts would refuse to apply statutes they thought inconsistent with the Constitution was not a foregone conclusion; other countries with written constitutions do not allow (or historically have not allowed) the type of judicial review recognized in *Marbury*.⁷⁸

⁷² *Marbury*, 5 U.S. at 138. Van Alstyne succinctly summarizes *Marbury*'s background. See Van Alstyne, *supra* note 68, at 3–6.

⁷³ *Marbury*, 5 U.S. at 148; WOLFE, *supra* note 25, at 86 (defending *Marbury*'s interpretation of section 13). Whether the Court correctly interpreted section 13 has been disputed, and the critics may well have the better of the argument. See, e.g., Van Alstyne, *supra* note 68, at 14–15. The important point for my purposes is that the Court did interpret section 13 in a way that conflicted with the Court's interpretation of the grant of original jurisdiction in Article III. See *Marbury*, 5 U.S. at 174–76. This conflict ultimately required the Court to decide whether to follow section 13 (as interpreted) and exercise jurisdiction or follow Article III and dismiss for lack of jurisdiction. See *id.*

⁷⁴ See *Marbury*, 5 U.S. at 174–76. Again, whether the Court's interpretation of Article III is correct is not important for my purposes; it is important only that the Court did perceive a conflict between section 13 and Article III. *Id.*

⁷⁵ See *id.* at 174.

⁷⁶ See *id.*

⁷⁷ See *id.* at 176–80.

⁷⁸ Van Alstyne, *supra* note 68, at 17 & n.29 (citing France, Switzerland, and Belgium as examples).

The argument for judicial review begins by recognizing that federal courts exist to decide cases involving real disputes between litigants over alleged violation of legal rights.⁷⁹ In deciding cases, courts are required to apply law to facts to determine if legal rights exist and if so, whether they have been violated. To do this, judges must know what the law is. Because a law's meaning is not always (or even often) obvious on its face, to know what the law is often requires the judge to interpret the law. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."⁸⁰

All this is eminently logical, but it still does not lead inexorably to a power of judicial review. While true that courts must apply law, a statute passed by Congress pursuant to the procedures specified in the Constitution (passage by both Houses and presentment to and signature of the President, or override of the President's veto by two-thirds majorities in each house)⁸¹ is also, at least on its face, law. The only move that could lead to judicial review is to treat the Constitution not only as law, but as law that is superior to regular (statutory) law.

This is precisely the move that *The Federalist No. 78* and *Marbury* made. Judges are free to disregard a statute when it conflicts with the Constitution because the Constitution is superior to ordinary statutes.⁸²

⁷⁹ *Marbury* implicitly acknowledged this in recognizing (in a portion of the opinion that is most likely dicta) that two of the issues before it were whether Marbury had a legal right to his commission and whether a remedy existed for violation of those rights. See 5 U.S. at 154.

The Supreme Court even before *Marbury* had eschewed the power to issue advisory opinions. See CHEMERINSKY, *supra* note 3, § 2.4, at 50–52. Moreover, the Constitution's drafters had specifically rejected combining the executive and judicial branches to act as a Council of Revision to review acts of Congress for conformity with the Constitution. *Id.* § 2.1, at 35. This leaves the conduct of ordinary court business—that is, deciding actual cases—as the only opportunity for federal courts to interpret the law authoritatively.

⁸⁰ *Marbury*, 5 U.S. at 177.

⁸¹ U.S. CONST. art. I, § 7, cl. 2.

⁸² THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 404; see *Marbury*, 5 U.S. at 178.

A constitution is in fact, and must be, regarded by the judges as a fundamental law. . . . If there should happen to be an irreconcilable variance between [the Constitution and a statute], that which has the superior obligation and validity ought of course to be preferred; or in other words, the [C]onstitution ought to be preferred to the statute . . .

THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 404.

When a statute conflicts with the Constitution, the statute must give way.⁸³ The power of judicial review, then, is really nothing more than a simple choice-of-law rule.⁸⁴

The primary objection to judicial review has historically been that it is undemocratic (or, perhaps more accurately, anti-republican) in that it allows unelected, life-tenured judges to ignore statutes passed by Congress and apply their own interpretation of the Constitution.⁸⁵ This is a serious objection. The founding generation of Americans considered self-government and popular sovereignty to be “paramount” concerns.⁸⁶ The notion of judicial review by unelected, life-tenured judges raised a real concern of judicial supremacy: “vesting [of] controlling power in an appointive aristocracy.”⁸⁷ As Michael Paulsen has noted, such a vesting would be “contrary to the whole idea of republican government. [It] would have been a knock-down argument against ratification.”⁸⁸

The Constitution bears out this concern about self-government by placing primary lawmaking power in a legislature comprised of representatives of the people and states, whose governments are themselves established and controlled by the people of those states.⁸⁹ While this lawmaking authority is subject to checks and balances (e.g., the presidential veto),⁹⁰ by placing lawmaking power in the people’s representatives, the Constitution places that power in the people’s control. Ultimately the people are sovereign.

⁸³ See *Marbury*, 5 U.S. at 178.

⁸⁴ *Marbury* makes this clear. *Id.* at 177 (“If two laws conflict with each other, the courts must decide on the operation of each.”).

⁸⁵ See Douglas, *supra* note 65, at 377.

⁸⁶ See Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 303–04 (1991) (“[T]he fundamental natural right in the Revolutionary and early republican eras was the right of a community to be governed by laws of its own choosing. Republican government was the paramount liberty.” (emphasis omitted)); Paulsen, *supra* note 24, at 245.

⁸⁷ Paulsen, *supra* note 24, at 246; see also Bradley, *supra* note 86, at 306 (“Antifederalists spent a considerable amount of time criticizing the judicial article They saw in the provisions for the federal judiciary the potential for a consolidating aristocracy.” (alteration in original) (quoting Boyd Clifton Rist, *The Jeffersonian Crisis Revived: Virginia, the Court, and the Appellate Jurisdiction Controversy* 27 (1971) (unpublished Ph.D. dissertation, University of Virginia))).

⁸⁸ Paulsen, *supra* note 24, at 246.

⁸⁹ U.S. CONST. art. I. The first sentence of Article I states: “All Legislative Powers herein granted shall be vested in a Congress of the United States.” *Id.*

⁹⁰ *Id.* art. I, § 7.

If the people are sovereign, and their sovereignty is best reflected by the acts of their own representatives, what business does a court have in refusing to apply statutes enacted by the people's representatives? The traditional response begins by agreeing that judges have no power to impose their wills over the people's will.⁹¹ Under traditional republican theory however, the Constitution is an act of the people and an expression of the people's sovereignty and will.⁹² Indeed, it is the most fundamental expression of the people's will.⁹³ Thus, when a federal court refuses to apply a statute because it is inconsistent with the Constitution, the court is interposing the more fundamental expression of the people's will as expressed in the Constitution over the less fundamental transient expression of the people's will as expressed in statutes.⁹⁴ This harmonizes judicial review with republican theory and the notion of popular sovereignty. As Hamilton noted in *The Federalist No. 78*:

Nor does this conclusion [that federal courts have the power of judicial review] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than those which are not fundamental.⁹⁵

B. Corollaries of the Traditional Theory

1. The Constitution as Written Controls

Several corollaries follow from this rationale for judicial review. First, this theory of judicial review presupposes the judge's ability to interpret and apply the Constitution—to really discover the people's fundamental will that is embodied in the Constitution. That presupposes that there is

⁹¹ See WOLFE, *supra* note 25, at 101.

⁹² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 403–04.

⁹³ *Marbury*, 5 U.S. at 176; THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 403–04.

⁹⁴ See *Marbury*, 5 U.S. at 176; THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 404.

⁹⁵ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 404.

meaning found in the Constitution. *Marbury*'s defense of judicial review collapses if that power allows judges to roam around at will and "discover" constitutional meaning that is not fairly found in the document. "Found in the document" refers to the meaning found in the actual words of the Constitution, understood in light of their historical context, context in the document, and evidence that sheds light on their meaning as understood at the time of ratification (the act that gave the Constitution legal force).

The focus here is on interpreting the Constitution as written, not on trying to discern the Framers' "intent" apart from the intent the text makes apparent, or on discerning the "principles" or "values" that underlie the text. This is not to say that the Framers' intent or the principles or values underlying the Constitution are irrelevant,⁹⁶ rather, substituting intent, principles, or values for the actual text is illicit.

Both the "intent" and "values" approaches ignore that the Framers did not ratify a set of unadorned intentions, principles, or values; they ratified the text of a specific document—the Constitution. "The various theoretical contentions of the Framers—whatever they were—were melded into or supplanted for operational purposes by the enactment."⁹⁷ The Court's decision in *Griswold v. Connecticut*⁹⁸ is a good example of substituting the "principles" or "values" thought to underlie the text for the text itself.⁹⁹ In *Griswold*, the Court found in the Constitution a general right to privacy broad enough to protect state restriction of contraceptive use by married couples.¹⁰⁰ Although the Constitution does not enumerate such a general right to privacy,¹⁰¹ the Court in *Griswold* reasoned that some concept of privacy informed several provisions of the Bill of Rights.¹⁰² From this, the

⁹⁶ These can shed some light on the text's meaning. How much light they shed (if any) depends on a variety of factors that is outside this Article's scope.

⁹⁷ Bradley, *supra* note 86, at 252.

⁹⁸ 381 U.S. 479 (1965).

⁹⁹ *See id.* at 501 (Harlan, J., concurring).

¹⁰⁰ *See id.* at 485–86 (majority opinion). The Court later extended this right to privacy to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972). In *Baird*, the Court held that a Massachusetts law prohibiting distribution of contraceptives to single persons, but not married persons, violated the Equal Protection Clause. *Id.* In reaching this conclusion, the Court noted that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free of unwarranted governmental intrusion." *Id.* at 453. The Court shortly afterward extended the right of privacy it had discovered lurking in the Constitution to include a right to abortion. *See Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

¹⁰¹ *Roe*, 410 U.S. at 152.

¹⁰² *See Griswold*, 381 U.S. at 484.

Court deduced that “privacy” was an important constitutional principle and, therefore, that the Constitution must protect a more general right to privacy rather than just the specific aspects of privacy protected by the Bill of Rights provisions.¹⁰³

The problem with the *Griswold* approach is that it fails to respect the choices made by those who drafted and ratified the Constitution. Principles or values by themselves “lack resolving power in deciding questions of detail.”¹⁰⁴ A constitution embodies many principles, and those principles are often in tension.¹⁰⁵ Moreover, principles and values can be implemented in different ways and to varying degrees.¹⁰⁶ For example, judicial independence from political influence is unquestionably an important principle informing the Constitution.¹⁰⁷ As John Harrison has noted, the way that that principle is implemented in the Constitution—by ensuring tenure and salary and making removal difficult—is not the only way to further independence.¹⁰⁸ Moreover, the Constitution does not pursue judicial independence from political influence to the hilt. While judges are shielded from direct popular accountability, the Constitution provides political actors with the power to exert a great deal of control over the courts: judges are nominated by the President (a political actor);¹⁰⁹ their nominations must be confirmed by the Senate (a body of political actors);¹¹⁰ and they are removable by impeachment by Congress (a body of political actors).¹¹¹ Congress controls the courts’ funding, and even, to a large extent, the courts’ jurisdiction.¹¹² The judiciary is subject to checks

¹⁰³ See *id.* at 484–86.

¹⁰⁴ John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 253 (1997).

¹⁰⁵ See Bradley, *supra* note 86, at 252. Similarly, the Framers’ “intent” was not undifferentiated. MCDONALD, *supra* note 1, at 224. “[I]t is meaningless to say that the Framers intended this or that the Framers intended that: their positions were diverse and, in many particulars, incompatible.” *Id.*; see also Bradley, *supra* note 86, at 252.

¹⁰⁶ Harrison, *supra* note 104, at 253.

¹⁰⁷ *Id.*; see also U.S. CONST. art. III, § 1 (establishing tenure during “good Behaviour” and salary protection for federal judges). *The Federalist No. 78* was in large part a defense of judicial independence. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 405–07.

¹⁰⁸ See Harrison, *supra* note 104, at 253.

¹⁰⁹ U.S. CONST. art. II, § 2.

¹¹⁰ *Id.*

¹¹¹ *Id.* art. I, §§ 2–3.

¹¹² See *id.* art. III, § 1 (giving Congress the power to create lower federal courts); *id.* § 2, cl. 2 (allowing Congress to regulate and make exceptions to the Supreme Court’s appellate
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and balances (which is itself a principle that undergirded the Constitution's framing), just like the other branches, and those checks and balances are not necessarily consistent with a full commitment to complete judicial independence.

A lawmaker chooses not only the principles and values the law is to pursue but also how far to pursue those principles and how to accommodate tension between principles.¹¹³ The trick in drafting a constitution (or any law, for that matter) is in determining how and to what extent to implement concretely often-conflicting principles.¹¹⁴ These decisions often reflect difficult judgments and compromises. Thus, while the Constitution provides for a significant level of judicial independence by protecting judges' salary and tenure, it still allows a political check on the judicial branch by the means mentioned above.¹¹⁵ Likewise, the Constitution's drafters may well have protected personal privacy in certain discreet situations but understood that not all activities that might be considered private necessarily merit protection from the law. The accommodation of conflicting principles is written into the Constitution itself, and the only way to discover that accommodation is to read the document. To exalt constitutional principles or values over the actual implementation of those principles and values in the document itself "dishonor[s] an essential part of the enactment," and thus usurps power that properly belongs to the lawmaker (in this case, those who ratified the Constitution).¹¹⁶

2. *Moderate Judicial Review—Deference to Other Government Actors*

In exercising its power of judicial review a court is really just applying superior law over less fundamental law; this supports what Christopher Wolfe has called "moderate judicial review."¹¹⁷ The theory of moderate judicial review posits that a court should not find a statute, or any government action, unconstitutional unless the court finds with reasonable certainty that the statute (or other action) really does violate the

jurisdiction); *id.* art. I, § 8 (giving Congress the power to pay the government's expenses); *see also Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513–14 (1868) (upholding Congress's power to remove cases from the Supreme Court's appellate jurisdiction).

¹¹³ *See* Harrison, *supra* note 104, at 253–54.

¹¹⁴ *See id.*

¹¹⁵ *See supra* text accompanying notes 109–12.

¹¹⁶ *See* *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 139 (7th Cir. 1987) (Easterbrook, J., dissenting).

¹¹⁷ WOLFE, *supra* note 25, at 101–04.

Constitution.¹¹⁸ In effect, the theory of moderate judicial review calls for courts to exercise some deference to the political branches on questions of constitutional interpretation.

This deference should not be misunderstood. It would be wrong to say that unless a statute obviously violates a constitutional provision on its face, a court may not hold the statute unconstitutional. It also would be wrong to say that if the statute is consistent with any conceivably reasonable interpretation of the Constitution, a court may not hold the statute unconstitutional.¹¹⁹ Constitutional provisions are not always that

¹¹⁸ See *id.* at 101. The seminal academic treatment of this theory is provided by James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17 (1893).

¹¹⁹ See WOLFE, *supra* note 25, at 105–06. Thus, I am not willing to go so far as Thayer seemed to go in requiring judicial deference to the political branches. Thayer stated that a federal court is not to declare federal statutes unconstitutional merely because “upon a just and true construction the law is unconstitutional.” Thayer, *supra* note 118, at 144. Rather, the court “can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question.” *Id.* The most natural reading of this statement leads to the conclusion that if a court, after legitimately interpreting a statute and a constitutional provision, finds the two inconsistent, the court may not find the statute unconstitutional unless the argument for unconstitutionality is irrational. That is, if any rational argument exists for constitutionality, the court must uphold the statute. If that is what Thayer meant, then he may have gone too far by insisting that courts apply statutes even when convinced that the statute is unconstitutional. See *id.* This seems to denigrate the Constitution’s status as fundamental law and is probably inconsistent with *Marbury*’s insistence that judges are to prefer the Constitution over conflicting statutes. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

This indeed seems to be the primary thrust of Thayer’s article. Yet, there are statements in the article that suggest Thayer may not have meant to go this far. For instance, Thayer noted that the rule he proposed recognizes that “the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.” Thayer, *supra* note 118, at 144. Furthermore, Thayer defines “reasonable doubt” as “that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this.” *Id.* at 149. This sounds much like what I have noted in the text—a court should defer if reasonable doubt remains after the court has made its best effort to come to its own conclusion. However, Thayer went on to state that “*the ultimate question [before the Court] is not the true meaning of the constitution, but whether legislation is sustainable or not.*” *Id.* at 150. This
(continued)

clear. That does not necessarily mean that a provision is truly ambiguous. Like any legal document, the Constitution must be interpreted. Some interpretations will turn out to be better than others, even if those others are still reasonable (or not unreasonable). Judges have the power to interpret the Constitution; indeed, their education, training, and experience make them (or, at least should make them) uniquely suited to the task of interpretation.¹²⁰ That is what lawyers (which is what judges typically are) are trained to do. That is their day-to-day work.¹²¹

Unfortunately, interpretation does not always yield a clear answer. Sometimes a provision is just ambiguous (and possibly was deliberately

seems to indicate that courts should defer even after being convinced the Constitution and statute actually conflict.

¹²⁰ Paulsen, *supra* note 24, at 335 (explaining the comparative advantage courts have in legal interpretation due to knowledge and experience).

¹²¹ This is not to say that judges have a monopoly on legal interpretation. The power to interpret the Constitution is every bit as much implied in the legislative and the executive power. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2720 (2003). After all, congressmen and the President, like judges, take an oath to defend and uphold the Constitution. U.S. CONST. art. II, § 1; art. VI. Neither a congressman nor a President (or his officers) can act (or at least act conscientiously, consistently with their oaths) without being concerned with constitutional meaning. See Paulsen, *supra*, at 2718–23, 2725–31 (arguing that *Marbury*'s logic implies that the executive and legislative branches have a duty to interpret the Constitution). On this point, I disagree with Professor Harrison with respect to congressmen. Harrison distinguishes between legislation that violates a specific prohibition (e.g., ex post facto laws, which Article I, Section Nine specifically prohibits) and laws that go beyond Congress's power set forth in the Constitution. Harrison, *supra* note 71, at 360. For the former, Harrison posits that the oath to support a Constitution that forbids certain laws requires congressmen to ensure that no laws they enact violate any specific prohibitions. See *id.* But for the latter, Harrison concludes that the Constitution imposes no duty to refrain from passing laws beyond congressional powers. See *id.* Thus, a congressman has no obligation to consider whether a law is within Congress's power to enact before voting to enact it.

I see no reason why this must be so. It is more reasonable to suppose that the principle of enumerated powers, under which the federal government may exercise *only* those powers granted it, implies a broad prohibition—Congress is not to pass laws that are not authorized by its constitutional powers. Essentially, the principle of enumerated powers says to Congress, “You may enact those laws consistent with the powers granted *but no others.*” The “but no others” acts as a prohibition. If so, then a congressman has every bit as much of a duty under his constitutional oath to ensure that a law is authorized by some constitutionally granted power as he does to ensure that a law does not violate a direct prohibition. See Paulsen, *supra*, at 2720 (“Every act of Congress is an implicit act of constitutional interpretation concerning the scope of its . . . powers.”).

left that way by the document's drafters). Sometimes interpretation, rather than revealing one clear meaning, reveals a range of more or less equally plausible meanings. If the court were to go ahead and assign its own meaning to the ambiguous provision or choose what meaning it prefers from the range of more or less equally plausible meanings, the court would not be deciding what the provision means. The court would be deciding what it thinks the provision *ought* to mean. To hold a statute unconstitutional because it is inconsistent with the court's chosen meaning would not be to hold the statute inconsistent with what the Constitution says. Rather, it would be to hold the statute unconstitutional because it is inconsistent with what the court thinks the Constitution ought to say. To put this in the language of republican theory found in *The Federalist No. 78*, the court would not be substituting the fundamental will of the people for the less fundamental transient will of the people's present representatives; it would be substituting its own will for the will of the people's representatives.¹²²

Deference is not judicial abdication. Some might argue that the judicial power (and duty) is the power (and duty) to decide cases or controversies. *Marbury* stated that it is "the province and duty of the judicial department to say what the law is."¹²³ Refusal to say definitely "what the law is" is to refuse to decide, and thus to shirk the judicial duty.¹²⁴

This objection, however, would confuse refusing to assign a precise meaning to a legal provision with refusing to decide a case. The two are not the same, as can be seen by examining an analogous example. Suppose after the plaintiff and the defendant in a negligence case have presented their evidence and the attorneys have made their closing arguments, the jurors, after being properly instructed, cannot decide which

¹²² THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 405 ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

¹²³ 5 U.S. at 177.

¹²⁴ This argument has come up in informal conversations I have had with colleagues concerning the appropriate deference courts ought to show to the political branches when deciding constitutional questions. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (charging the *Garcia* majority with "abdicat[ing] its constitutional responsibility" in holding that a lack of a judicially-enforceable standard in the Constitution required leaving to the political process protection of legitimate state prerogatives from congressional overreaching).

side the evidence favors. The plaintiff has the burden of proof.¹²⁵ In that case, under the normal rules of civil litigation, the jury must return a verdict for the defendant.¹²⁶ The jury has not decided that the defendant's negligence did not cause injury to the plaintiff. But the jury has decided *the case*. The normal rules regarding burdens of proof, coupled with the jury's inability to decide which side the evidence favors, lead to a definite result: the plaintiff loses and the defendant wins. The court must enter judgment for the defendant, and that judgment is binding.¹²⁷ The plaintiff, under the normal rules of claim preclusion, would not be able to relitigate his claim against the defendant.¹²⁸

The deference for which I am arguing applies the same analysis to questions of law that is applied to questions of fact.¹²⁹ If a party's position depends upon a certain legal proposition being true (e.g., that a constitutional provision means X), and a court cannot determine that the proposition is true (applying an appropriate standard of proof for the truth of legal propositions), then the Court should enter judgment against the party relying on that legal proposition (again, in relation to the appropriate standard of proof for the truth of legal propositions). The court would still be deciding the case; one party wins and another party loses.

What about *Marbury*'s statement that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect"?¹³⁰ Does refusing to assign a specific meaning to a constitutional provision when interpretation reveals more than one plausible meaning leave that constitutional provision "without effect"? It does not. When reaching the decision that certain constitutional language is ambiguous or has a range of plausible meanings, a court is not necessarily saying that the words have no effect. Rather, the court is saying that the words could mean X or Y. The words do mean something, and they do have effect, but that effect is given in the *range* of plausible meanings rather than in one particular fixed meaning.¹³¹

¹²⁵ RESTATEMENT (SECOND) OF TORTS § 328A (1965).

¹²⁶ See generally *id.* § 328C.

¹²⁷ RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982).

¹²⁸ *Id.* §§ 19–26.

¹²⁹ Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 860 (1991–1992).

¹³⁰ 5 U.S. (1 Cranch) 137, 174 (1803).

¹³¹ Note also that *Marbury* speaks of a *presumption* that the words will not be "without effect." *Id.* This may counsel (as a rule of construction) against finding ambiguity when possible. But in the case of true ambiguity, the presumption is overcome.

As noted, *Marbury* stated that a court's power to interpret the Constitution is the power to "say what the law is."¹³² *Marbury* also stated that courts are to treat the Constitution as law.¹³³ As explained above, saying what the law is (as defined by the law's actual content) is not the same as saying what the law ought to be. If a constitutional provision has a range of more or less plausible meanings, that range is what the law (the Constitution) is. To choose one interpretation from a range of more or less plausible interpretations or to assign a meaning to a truly ambiguous provision goes beyond saying what the law is; it is saying what the law ought to be.

Does this approach leave constitutional law in an inappropriate state of flux? After all, one of the purposes (probably the primary purpose) of having a written constitution is to fix the rules under which the federal government, state governments, and the political system operate.¹³⁴ Leaving those rules without fixed, precise meanings could undermine the stability and certainty that a written constitution is supposed to provide. Some power in the courts (in particular, the Supreme Court) to pronounce an authoritative gloss on unclear constitutional provisions or to fill in any "gaps" in the Constitution could be useful in serving the goals of stability and certainty.

While such a power may be useful, it is inconsistent with the underlying premise of *Marbury* and the traditional American theory of judicial review that posits the Constitution's status as the fundamental law, which justifies courts in refusing to give legal effect to the actions of other governmental actors.¹³⁵ If constitutional meaning that limits government action is not fairly found in the text (either by express prohibition or limits on powers granted) but rather must be provided by gloss or gap-filling, the condition justifying judicial review—conflict with the Constitution—does not exist, and, under *Marbury*, judicial review is not justified.¹³⁶

¹³² *Id.* at 177 (emphasis added) ("[I]t is emphatically the province and duty of the judicial department to say what the law is.").

¹³³ *See id.*

¹³⁴ "The whole reason to have a written constitution, like a written contract, is to 'lock in' some meaning that can only be changed by proper procedures." Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court?: The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1278 (2002); *see also id.* at 1279 ("[T]he whole reason for putting a constitution in writing is to constrain the behavior of political and judicial actors.").

¹³⁵ *See supra* note 24.

¹³⁶ Akhil Amar has pointed out that "James Madison . . . seemed to think that the Constitution was ambiguous in certain aspects, but those ambiguities would be clarified—

(continued)

Recognizing that some constitutional provisions might warrant a range of equally plausible meanings does not give government actors carte blanche to do as they please, free of constitutional limits. There is no reason why constitutional limits must always be fixed-point limits. When governmental action is not consistent with any interpretation within the acceptable range of interpretation, it is inconsistent with the Constitution, and a court would be justified in refusing to give legal effect to the action. The range of acceptable interpretation sets limits on governmental action and provides guidance to government actors. Those limits and that guidance may not be as precise as those given by one definite meaning of a provision, but they do limit and provide guidance nonetheless.

This slight loss in precision is more than justified by countervailing considerations. The quest for a definitive correct meaning, even if a court has to supply that meaning, understates the value of allowing a certain amount of breathing space for the political branches and the states in carrying out their duties. Recognizing that some constitutional provisions might be subject to a range of acceptable interpretations rather than one fixed interpretation allows, within tolerable limits, flexibility from

his word was ‘liquidated’—by early precedents, both judicial and political.” Akhil Reed Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL’Y 39, 42 (1994) (quoting THE FEDERALIST NO. 37 at 183 (James Madison) (George W. Carey & James McClellan eds., 2001)). See THE FEDERALIST NO. 37 (James Madison), *supra*, at 183 (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

Assuming that this makes Madison an opponent of the principle of judicial deference set forth (an assumption I will grant but do not accept), my response is twofold. First, Madison may merely be recognizing that language that may be obscure in the abstract can become clear in the context of concrete application. Second, even if Madison was positing a power in courts to choose one particular meaning of a provision out of two or more equally plausible meanings, *The Federalist Papers*, while a useful guide to helping to interpret the Constitution, are not themselves the Constitution. The Constitution, and not *The Federalist Papers* or Madison’s (or any other Founder’s) thoughts, is controlling with regard to the scope of governmental power. The implied power of judicial review is premised on the status of the Constitution as fundamental law, so that acts inconsistent with the Constitution must give way. See *Marbury*, 5 U.S. at 176; THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 403–04. As stated in the text, if the Constitution itself reveals only a range of meanings, and government action is consistent with an interpretation in that range, or the constitutional provision really is ambiguous, it is impossible to say that the action is inconsistent with the Constitution, and the condition justifying judicial review does not exist.

generation to generation in meeting contemporary needs without having to go through the process of amending the Constitution.

This is how the popular maxim that the framers chose language “capable of growth” should be understood: that one legislative policy adopting a choice among options permitted by broad language may be constitutional at one time, and a different legislative policy adopting a different choice at a later time may nonetheless also be constitutional.¹³⁷

A court-imposed “correct” interpretation (where the constitutional language reveals only a range of more or less plausible meanings) removes this flexibility and narrows the legitimate range of options that the states and the federal political branches may consider in meeting contemporary needs.

3. *Limits on Stare Decisis*

The Supreme Court will make decisions about what the Constitution means, as the Court did in *Marbury*. As such, other questions inevitably will arise: When the Court does decide the meaning of a constitutional provision, should that decision bind even those who are not parties to the dispute? Should the decision itself be treated in the future as “law”? Should the decision bind the Court in the future even if the decision is wrong? These questions raise the issue of stare decisis. The classic defense of judicial review also points to some limits on the doctrine of stare decisis in constitutional cases. At least two respected scholars have taken the position that stare decisis in constitutional cases is itself unconstitutional (if stare decisis is defined as allowing a court to treat precedent as binding even if the precedent is wrong).¹³⁸

This result follows from *Marbury*’s premise—the Constitution is supreme law that trumps less fundamental law.¹³⁹ If, as *Marbury* tells us,

¹³⁷ Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J.L. & RELIGION 33, 60–61 (1989).

¹³⁸ Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994); Paulsen, *supra* note 121, at 2732; Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 680 (1995); *see also* Paulsen, *supra* note 137, at 82–83 (arguing that lower court judges can and should refuse to apply higher court precedent that clearly misinterprets the Constitution).

¹³⁹ Lawson, *supra* note 138, at 30; *see* 5 U.S. at 180.

the Constitution provides “a rule for the government of *courts*, as well as of the legislature,”¹⁴⁰ then it follows that “[w]hat’s sauce for the legislative or executive goose is also sauce for the judicial gander.”¹⁴¹ Judicial opinions that conflict with the Constitution must give way, just as statutes must give way when they conflict with the Constitution.¹⁴²

This argument is perfectly logical. If one accepts *Marbury*’s basic reasoning as persuasive, the argument seems conclusively to exclude a rule requiring (or even allowing) courts to follow constitutional precedent that clearly is wrong.¹⁴³ Applying a strong rule of stare decisis elevates precedent over the Constitution and is thus inconsistent with the fundamental premise underlying judicial review.

This does not mean that precedent cannot or should not play a role in constitutional adjudication. While judicial opinions interpreting the Constitution should not be law, they are at least evidence of what the law—the Constitution’s meaning—is. Thus, an opinion interpreting the Constitution is evidence of what the Constitution means. Simple humility requires that in most cases judges defer to the considered decisions of previous courts where there is no serious reason to doubt those decisions.¹⁴⁴

But such humility commands deference, not obeisance. The deference owed to a precedent should vary with the quality of that precedent’s reasoning. An opinion is not necessarily conclusive evidence, or in some cases even good evidence of what the Constitution means. The strength of a court’s opinion as evidence of what the Constitution means depends on the strength of the reasoning that supports the court’s interpretation. “Strength” in this sense is a function of the soundness of the opinion’s textual exegesis. Thus, an opinion that fairly confronts the constitutional text using the standard tools of interpretation (text, context, structure, historical evidence of original meaning, due consideration for the nature of the document as a legal document, and the use of certain language as terms of art),¹⁴⁵ and that makes a reasoned explication of the text may be

¹⁴⁰ 5 U.S. at 180.

¹⁴¹ Lawson, *supra* note 138, at 28.

¹⁴² See *Marbury*, 5 U.S. at 180.

¹⁴³ Lawson, *supra* note 138, at 27–28.

¹⁴⁴ See Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1292 (1997).

¹⁴⁵ Christopher Wolfe has explained as well as anyone the process of constitutional interpretation as a process of deriving meaning from the text rather than imposing meaning
(*continued*)

considered strong evidence of what the Constitution really means. Conversely, an opinion that pulls meaning out of thin air with little or no basis in the Constitution¹⁴⁶ is very weak (I would contend worthless) evidence of what the Constitution means. These two examples fix the ends of a spectrum; cases that do a more or less faithful job of confronting and explicating the text would fall onto that spectrum, closer to one end or the other.¹⁴⁷

Stare decisis in constitutional cases should be treated only as a presumption that precedent has correctly interpreted the Constitution. In this weaker sense of stare decisis, precedent interpreting the Constitution should control future decisions based on the precedent's strength.¹⁴⁸ The values that undergird stare decisis—efficiency, finality, stability, and settled expectations¹⁴⁹—justify following what I call strong precedent—precedent in which the court has made an honest effort to interpret and apply the Constitution, in which the court's decision is not clearly wrong, and in which new arguments do not cast doubt on the decision's soundness. In such cases, one can reasonably argue that courts should not have to reinvent the wheel and upset settled expectations by rehashing arguments already considered and reasonably rejected.

on the text. See WOLFE, *supra* note 25, at 17–89; see also CHRISTOPHER WOLFE, *HOW TO READ THE CONSTITUTION: ORIGINALISM, CONSTITUTIONAL INTERPRETATION, AND JUDICIAL POWER* 3–25 (1996).

¹⁴⁶ Exhibit number one on this point is *Roe v. Wade*, 410 U.S. 113 (1973). As John Hart Ely has written, *Roe* “is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.” John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1972–1973).

¹⁴⁷ I realize that I am simplifying the task of constitutional litigation. Adjudication entails not only discovering what the Constitution means but also adducing facts and applying the law to those facts to reach a decision. But the starting point in *constitutional* litigation, if it is truly to be constitutional litigation, is to determine what the relevant constitutional provision or provisions mean. Much of modern constitutional decisionmaking is less (if at all) concerned about the actual rules that the Constitution sets forth than with the manipulation of doctrine and precedent that often is far removed if not completely disconnected from the constitutional text. The point of the discussion here is that precedent that misconstrues or ignores the Constitution conflicts with the Constitution and, according to the logic of *Marbury*, must give way. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803).

¹⁴⁸ See Lawson, *supra* note 138, at 25 (“Courts are free to give weight, and even decisive weight, to prior decisions because of the persuasiveness of their reasoning.”).

¹⁴⁹ See *id.* at 28.

Weak precedent—a decision that is poorly reasoned or not fairly grounded in the Constitution itself—is a different story. Cases in which new and serious arguments are made concerning the original decision’s soundness, even if the original decision is what I would characterize as strong, also stand out. To follow precedent in such cases simply because it is precedent exalts the decisions themselves over the Constitution. To treat such decisions as binding is for the court to say, in effect, “We do not care what the Constitution says. We have decided, and that is that.” Treating *stare decisis* as a rule that allows courts to stubbornly stick by a clearly wrong decision or to refuse to consider new and serious arguments concerning the original decision’s soundness changes judicial review from a limited structural check on the unconstitutional actions of other government actors to an empowerment of the courts to become the ultimate lawmakers for the country. It fulfills the prophecy of Bishop Hoadley: “Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them.”¹⁵⁰ Thus, the application of *stare decisis* in such cases takes lawmaking authority out of the people’s representatives and puts it in the courts. This was the insight that Abraham Lincoln had when criticizing *Dred Scott v. Sandford*¹⁵¹ in his first inaugural address:

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.¹⁵²

The reasoning above fails if the Constitution itself tells federal courts that they may follow precedent even when precedent is wrong. It has been argued that the “judicial power” granted in Article III incorporated the pre-

¹⁵⁰ Benjamin Hoadley, Bishop of Bangor, Sermon Preached Before the King of England (Mar. 31, 1717), *quoted in* Paulsen, *supra* note 24, at 220; *see also* Thayer, *supra* note 118, at 152 n.2.

¹⁵¹ 60 U.S. (19 How.) 393 (1856).

¹⁵² Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 101-10, at 139 (1989).

existing practice of following precedent that interprets texts.¹⁵³ If there is no good reason to think that the Constitution altered the historically accepted practice of following precedent, then it is reasonable to conclude that judicial power includes the power to treat precedent interpreting the Constitution (even when wrong) as legally binding.¹⁵⁴ In that case, the Court would simply be doing what the Constitution tells (and thus empowers) it to do.

There are good reasons not to read Article III's grant of judicial power in this way, at least with respect to precedent interpreting the Constitution. To say that Article III allows federal courts to follow precedent is to say that Article III allows federal courts to treat precedent as a source of law. But that is no reason that courts should follow precedent inconsistent with the Constitution any more than courts should follow statutes inconsistent with the Constitution. As Gary Lawson notes, "[T]he grant of . . . judicial power [obviously] includes the power . . . to treat . . . statutes as sources of law."¹⁵⁵ Yet, as *Marbury* makes clear, that power is qualified by the proviso, implicit in the implied power of judicial review, not to apply statutes that are inconsistent with the Constitution.¹⁵⁶ In effect, the Constitution tells federal courts, "Follow statutes unless they are inconsistent with the Constitution."¹⁵⁷ This is so because the Constitution is superior law to statutes.¹⁵⁸

Likewise, the grant of judicial power may well allow federal courts to rule consistently with previous constitutional decisions—that is, to treat those decisions as a source of "law." But there is no more reason to conclude that the grant of judicial power implies that courts may follow decisions that are inconsistent with the Constitution than there is to conclude that the grant of judicial power implies that courts are to follow statutes inconsistent with the Constitution.¹⁵⁹ In either case, the conclusion

¹⁵³ See Amar, *supra* note 136, at 41; Charles Fried, *Reply to Lawson*, 17 HARV. J.L. & PUB. POL'Y 35, 35 (1994); see also Lawson, *supra* note 138, at 29 (noting this objection to his case against stare decisis).

¹⁵⁴ Lawson expressly acknowledged this possibility. See Lawson, *supra* note 138, at 29.

¹⁵⁵ *Id.* at 30 (internal quotation marks omitted).

¹⁵⁶ *Id.*

¹⁵⁷ See *id.* at 26; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

¹⁵⁸ *Marbury*, 5 U.S. at 180; Lawson, *supra* note 138, at 26.

¹⁵⁹ Lawson, *supra* note 138, at 27–28.

would be inconsistent with the premise that the Constitution is the supreme law in our system.¹⁶⁰

Nothing in the Constitution expressly tells federal courts to treat precedent as binding law. In fact, Article VI points in the opposite direction by specifying that the “Constitution, . . . Laws of the United States which shall be made in Pursuance thereof, and all Treaties . . . made under the Authority of the United States [are] the supreme Law of the Land.”¹⁶¹ The notable omission from this list of sources of supreme law is judicial decisions. If statutes (the natural reading of “Laws of the United States”), which *are* included among the sources of supreme law, must give way when inconsistent with the Constitution, why should judicial decisions, which are *not* listed among the sources of supreme law, not likewise give way when inconsistent with the Constitution?

4. *Questions of Degree*

Finally, it would seem to follow from the theory of moderate judicial review that unless the Constitution specifically directs courts to answer questions of degree, those questions would not fall within the types of questions appropriate for judicial review. After all, the Constitution does not give any guidance with respect to such questions. For example, using common modern terminology, the Constitution does not tell a court how to differentiate between essential, compelling, or merely important government interests. Nothing in the Constitution tells us whether a court’s assessment of the importance of the interest supporting a law is better or worse than the legislature’s.

Consistent with this reasoning, the seminal case of *McCulloch v. Maryland*¹⁶² made clear what the Marshall Court’s position was regarding questions of degree: they are not suitable for judicial review.¹⁶³ In *McCulloch*, the Supreme Court faced two issues: First, did Congress have the power to charter the Second Bank of the United States?¹⁶⁴ Second, if Congress did have the power to charter the Bank, could Maryland tax a branch of the Bank located in that state?¹⁶⁵ The Court held that Congress did have the power to charter the Bank.¹⁶⁶ Although chartering banks or

¹⁶⁰ See *Marbury*, 5 U.S. at 180.

¹⁶¹ U.S. CONST. art. VI, cl. 2.

¹⁶² 17 U.S. (4 Wheat.) 316 (1819).

¹⁶³ *Id.* at 430.

¹⁶⁴ *Id.* at 401.

¹⁶⁵ *Id.* at 425.

¹⁶⁶ *Id.*

corporations is not expressly mentioned among Congress's constitutional powers, the Court held that chartering a bank was a necessary and proper means¹⁶⁷ of carrying into effect other delegated powers, such as the power to raise revenue.¹⁶⁸

The Court then held that Maryland did not have the power to tax the Bank.¹⁶⁹ It reasoned that the power to tax the Bank would be the power to destroy the Bank.¹⁷⁰ To permit a state to destroy an entity created by Congress under its delegated powers—that is, to allow a state the power to defeat federal law—would be inconsistent with the principle of Article VI that federal law is supreme over state law.¹⁷¹

Both issues before the Court in *McCulloch* presented the Court with opportunities to make decisions based on questions of degree. Both times, the Court adamantly refused to do so.¹⁷²

In holding that Congress had the power to charter the Bank, the Court interpreted the Necessary and Proper Clause¹⁷³ so as not to require absolute necessity (that is, that execution of an enumerated power would be impossible without using the means Congress chose).¹⁷⁴ Instead, the Court held that necessity “has not a fixed character peculiar to itself. It admits of all degrees of comparison.”¹⁷⁵ Thus,

the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.¹⁷⁶

¹⁶⁷ See U.S. CONST. art. I, § 8, cl. 18 (providing that Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” the powers granted by the Constitution to the United States government).

¹⁶⁸ See *McCulloch*, 17 U.S. at 407–09.

¹⁶⁹ *Id.* at 436.

¹⁷⁰ *Id.* at 431.

¹⁷¹ See *id.* at 426–27.

¹⁷² See *id.* at 423, 430.

¹⁷³ U.S. CONST. art. I, § 8, cl. 18.

¹⁷⁴ See *McCulloch*, 17 U.S. at 387.

¹⁷⁵ *Id.* at 414; accord *id.* at 418 (noting that “necessary” can be defined as “needful,” “requisite,” “essential,” and “conducive to”).

¹⁷⁶ *Id.* at 421.

The Court found the Bank's "necessity" (in this more flexible sense of necessity) to be apparent.¹⁷⁷ "But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, *the degree of its necessity, as has been very justly observed, is to be discussed in another place.*"¹⁷⁸ The Court then went on to emphatically reject any power to second-guess Congress's judgment as to degree of necessity:

[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, *to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretension to such a power.*¹⁷⁹

The Court just as emphatically eschewed any competence to decide questions of degree in rejecting Maryland's power to tax the Bank.¹⁸⁰ Its primary reason for holding that Maryland did not possess this power was that a power to destroy a federally created entity, which the Court saw in a power to tax, was inconsistent with the supremacy of federal law.¹⁸¹ One response is that taxes do not necessarily destroy those taxed.¹⁸² Excessive taxes may destroy, but reasonable taxes do not.¹⁸³ Thus, only taxes that reached an unreasonable, destructive level would be inconsistent with Congress's superior power to charter and preserve the Bank.¹⁸⁴

The Court preferred instead the simple clear-cut rule: states do not have the power to tax the Bank at all.¹⁸⁵ One important reason for that was

¹⁷⁷ *See id.* at 423.

¹⁷⁸ *Id.* (emphasis added). That other place was Congress. *Id.* at 325.

Necessary powers must here intend such powers as are *suitable* and *fitted* to the object; such as are *best* and *most useful* in relation to the end proposed. . . . It is not for this Court to decide whether a *bank* or *such a bank* as this, be the *best* possible means to aid these purposes of government. Such topics must be left to that discussion which belongs to them in the two houses of Congress.

Id. at 324–25.

¹⁷⁹ *Id.* at 423 (emphasis added).

¹⁸⁰ *Id.* at 430.

¹⁸¹ *Id.* at 431–32.

¹⁸² *Id.* at 431.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *Id.* at 436.

that the bright-line rule would not confront the Court with “the perplexing inquiry, *so unfit for the judicial department, [of] what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.*”¹⁸⁶

The Court in *McCulloch* could not have been any clearer in rejecting the notion that the power of judicial review gave federal courts the power to routinely decide questions of degree: “[T]he degree of its necessity . . . is to be discussed in another place,” i.e., Congress;¹⁸⁷ “to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power;”¹⁸⁸ “what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power” was a “perplexing inquiry, so unfit for the judicial department.”¹⁸⁹

McCulloch’s refusal to consider questions of degree makes perfect sense in the context of the theory of judicial review explicated in *Marbury* and *The Federalist No. 78*. Under this theory, the only factor that justifies refusing to apply a duly enacted statute (or to give effect to any other government action) is the statute’s or action’s inconsistency with the Constitution.¹⁹⁰ But if the answer to the question, “Does this action conflict with the Constitution?” cannot be found in the Constitution itself, there is no basis for saying the statute or action is inconsistent with the Constitution. To use *McCulloch* as an example, while the Constitution says that exercise of an implied power must be “necessary,” where necessity can be a matter of degree, the Constitution provides no guidance for determining how necessary the exercise of that power is to accomplishing the enumerated end.¹⁹¹ Likewise, while the Constitution may fairly imply that a state does not possess powers that can be used to destroy the efficacy of valid federal law,¹⁹² the Constitution does not indicate where to draw the line between exercises of the asserted state power that are not destructive and exercises that are destructive. *McCulloch* also counsels against interpreting constitutional provisions in a way that would direct courts to consider and decide questions of degree.¹⁹³

¹⁸⁶ *Id.* at 430 (emphasis added).

¹⁸⁷ *Id.* at 423.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 430.

¹⁹⁰ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 403.

¹⁹¹ See *McCulloch*, 17 U.S. at 423.

¹⁹² See U.S. CONST. art. VI.

¹⁹³ See *McCulloch*, 17 U.S. at 430.

If such questions were thought to be “unfit for the judicial department,”¹⁹⁴ it is reasonable to presume that an interpretation of a constitutional provision that directs courts to answer questions of degree by balancing competing factors is probably incorrect (unless that direction is abundantly clear).¹⁹⁵

5. *Summing Up*

Marbury's justification of judicial review was based on the fundamental premise that the Constitution itself is the supreme law of the United States. This fundamental premise provided justification for courts to refuse to apply statutes duly enacted by legislatures (the people's representatives), or to otherwise refuse to give legal effect to government actions in the name of the Constitution. This fundamental premise reconciled judicial review with the principles of republicanism and popular sovereignty that underlie our constitutional system.¹⁹⁶

Several corollaries follow from this basic justification for judicial review. First, because the Constitution is law, the justification for setting aside statutes or other acts of government actors must fairly be found in the Constitution itself. This requires courts to interpret the actual document as opposed to relying on broad general principles without determining how the document itself actually implements those principles.

Second, courts need to exercise some deference to other government actors. If constitutional interpretation reveals ambiguity or a range of more or less equally plausible meanings, it is not for the court to supply meaning or to choose from among the more or less equally plausible meanings. To do so would allow a court to set aside government action, not because of what the Constitution (law) requires but because of what the court thinks the Constitution ought to require. Supplying meaning in this way makes courts lawmakers rather than law interpreters.

Third, because the Constitution is law, limits need to be set on stare decisis in constitutional cases. To stubbornly follow a decision that is not fairly grounded in the Constitution or to refuse to consider serious arguments regarding a previous decision's correctness exalts the decision

¹⁹⁴ *Id.*

¹⁹⁵ This is one reason why I believe the Court was correct in overruling the free exercise conduct-exemption scheme of *Sherbert v. Verner*, 374 U.S. 398 (1963), in *Employment Division v. Smith*, 494 U.S. 872, (1990). I discuss *Smith* in more detail in Part II.

¹⁹⁶ See Larry D. Kramer, *Putting Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 237 (2000).

over the Constitution. In effect, that makes the decision rather than the Constitution the law.

Finally, as made clear in *McCulloch*, questions of degree are not generally appropriate questions for judicial review. The Constitution provides no answers to those questions. Because the answer cannot be found in the Constitution, there is no basis for saying that the answer of the government actor whose action is being challenged is inconsistent with the Constitution. Again, inconsistency with the Constitution, because the Constitution is the supreme law, provides the only justification for setting aside government action.

II. THE MODERN COURT'S VIEW OF JUDICIAL POWER

In contrast to the "*Marbury* theory of judicial review" stands the exercise of judicial review by the modern Supreme Court. The modern Court's exercise of that power differs in all important respects from the *Marbury* theory set forth in Part I. The Court's current conception of judicial review is marked by three primary characteristics. First, the Court tends to read certain constitutional provisions as "majestic generalities"¹⁹⁷ stating broad values rather than rules or legal principles. For example, the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹⁹⁸ Rather than searching for the historically understood meaning of "the freedom of speech, or of the press" to determine what may not be abridged, the Supreme Court's First Amendment jurisprudence generally posits the more broad proposition that free speech is good and ought to be protected as much as possible, consistent with the needs of society.¹⁹⁹

This leads to the second characteristic: balancing of interests. The broad values the Court finds in the Constitution must have limits. For example, while free speech is generally a good thing, the Court has recognized that some restrictions on speech are necessary in an orderly society.²⁰⁰ Since the Constitution does not itself state those limits with any

¹⁹⁷ *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) ("[T]he task of translating the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence.").

¹⁹⁸ U.S. CONST. amend. I.

¹⁹⁹ See WOLFE, *supra* note 25, at 192–95 (explaining this development in modern First Amendment jurisprudence).

²⁰⁰ See, e.g., *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49–51 (1961).

specificity, the Court has seen it as its role to specify those limits.²⁰¹ It has generally done so by balancing the constitutional “value” (e.g., free speech) against the governmental or societal interest justifying a limit on that value. Sometimes, the Court will balance these interests case-by-case;²⁰² other times, the Court will balance these interests to generate a rule that will govern future cases.²⁰³

Third, the modern Court effectively regards its own decisions as the supreme law, even where serious doubt exists as to the correctness of those decisions. To the Court, the Constitution means what the Court says it means; disagreement is not tolerated (unless one can persuade five members of the Court to reject the Court’s earlier holding).

This Section will examine two cases—*City of Boerne v. Flores*²⁰⁴ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁰⁵—that demonstrate the Supreme Court’s view of judicial review as practical judicial supremacy. At first blush, it might seem that *City of Boerne* and *Casey* have little, if anything, in common. *City of Boerne* rejected an attempt by Congress to exercise its power under Section Five of the Fourteenth Amendment²⁰⁶ by requiring courts to determine, through a balancing process, whether neutral state laws that incidentally burden religiously-motivated conduct are sufficiently justified to be imposed on a religious adherent.²⁰⁷ The majority in *City of Boerne* invoked federalism as

²⁰¹ Sanford Levinson (a supporter of judicial balancing tests) neatly summarized this position: “You cannot say that ‘no’ [law] means ‘no’ [law]. . . . There have to be some times when you can abridge speech At that point, it does seem to me that we do have to invent something dangerously close to ‘necessary and proper’ or compelling interest.” Sanford Levinson, *Tiers of Scrutiny—From Strict Through Rational Bases—And the Future of Interests: Commentary on Fiss and Linde*, 55 ALB. L. Rev. 745, 749 (1992).

²⁰² Thus, the so-called “levels of scrutiny” in First Amendment cases, the best example of which is found in the Court’s forum analysis cases. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

²⁰³ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964) (holding, based upon a balancing of the value of robust political speech against the government interest in protecting the reputation of government officials, that a state may award damages for defamation of a public official only on a showing of actual malice, i.e., knowledge or reckless disregard of falsity).

²⁰⁴ 521 U.S. 507 (1997).

²⁰⁵ 505 U.S. 833 (1992).

²⁰⁶ U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

²⁰⁷ *City of Boerne*, 521 U.S. at 533–36.

a reason for so limiting Congress's power.²⁰⁸ *Casey*, on the other hand, upheld the decision in *Roe v. Wade*²⁰⁹ that the Constitution protected a woman's right to choose to have an abortion.²¹⁰ *Roe*, based on nothing in the Constitution itself, effectively declared the then-existing abortion laws of all states to be invalid and removed the fundamental policy question of fetal protection from state political processes.²¹¹

City of Boerne seems to protect state interests from congressional overreaching and leaves the question of protecting religious adherents to state political processes. *Roe* and *Casey*, on the other hand, are obviously anti-republican and anti-federalist decisions. However, deeper analysis shows that *Casey* and *City of Boerne* are connected by a conception of judicial power that ultimately shifts power from political actors to courts and that can be used to defeat legitimate state prerogatives without constitutional warrant (as demonstrated in *Casey* itself).

City of Boerne involved the constitutionality of the Religious Freedom Restoration Act (RFRA).²¹² Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*.²¹³ In *Smith*, the Court held that a neutral, generally applicable law that burdens a person's religious practice does not violate the Free Exercise Clause.²¹⁴ Previous Supreme Court cases arguably would have required balancing the burden placed on the person's religious practice against the governmental interest supporting the burden on that practice.²¹⁵ If the law substantially burdened the person's religious practice, the burden would violate the Free Exercise Clause unless the government could prove that the law was narrowly tailored to serve a compelling governmental interest.²¹⁶ Without a governmental showing of a compelling interest, a religious adherent was

²⁰⁸ See *id.* at 521 (noting concerns that the original draft of the Fourteenth Amendment would give Congress excessive power over the states).

²⁰⁹ 410 U.S. 113 (1973).

²¹⁰ *Casey*, 505 U.S. at 846 (plurality opinion).

²¹¹ See *Roe*, 410 U.S. at 164.

²¹² 42 U.S.C. § 2000bb (2000).

²¹³ 494 U.S. 872 (1990).

²¹⁴ *Id.* at 878–82, 890; see also U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

²¹⁵ See *Smith*, 494 U.S. at 882–85.

²¹⁶ See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); see also *Smith*, 494 U.S. at 898–99 (O'Connor, J., concurring).

entitled to an exemption from legal penalty for religiously-motivated conduct that violated a generally applicable law.²¹⁷

Smith did away with the “conduct exemption”²¹⁸ and the compelling interest test.²¹⁹ Congress responded by passing RFRA, which prohibited local, state, or federal governments from “substantially burden[ing]” religious practice, even by neutral, generally applicable laws, unless the government could prove that the burden was the “least restrictive means” of furthering a “compelling [state] interest.”²²⁰ In effect, RFRA attempted to reinstitute the pre-*Smith* regime for free exercise cases.²²¹

The Court in *City of Boerne* held that RFRA, as applied to state and local governments,²²² was unconstitutional because it exceeded Congress’s power under Section Five of the Fourteenth Amendment.²²³ Section Five expressly authorizes Congress “to enforce, by appropriate legislation, the provisions [of the Fourteenth Amendment].”²²⁴ RFRA could have been within Congress’s Section Five power under two possible theories. First, if the Free Exercise Clause requires exemptions from generally-applicable laws for religiously-motivated conduct, then RFRA (on the Court’s own premise that the First Amendment applies to the states by way of the

²¹⁷ In practice, this burden, although appearing heavy, proved relatively easy for the government to meet, at least in the Supreme Court. *See Smith*, 494 U.S. at 883 (noting that the Court had “always found the [*Sherbert*] test satisfied”). Indeed, Justice O’Connor, who vehemently opposed jettisoning the compelling state interest test, agreed with the majority in *Smith* that Oregon had not violated the Free Exercise Clause. *Id.* at 891 (O’Connor, J., concurring). Gerard Bradley noted that “[i]n a random survey of 100 pre-*Smith* cases (1979–1989), the plaintiffs’ ledger was approximately . . . 7 wins, 93 losses.” Bradley, *supra* note 86, at 247 n.14.

²¹⁸ I borrow the term “conduct exemption” from Gerard Bradley, who wrote: “I submit the following definition of religious liberty for our generation: the government may not make or enforce any law that ‘substantially burdens’ religiously motivated conduct unless it is a narrowly tailored means of achieving a compelling state interest. Let us call this the ‘conduct exemption.’” *Bradley, supra* note 86, at 247.

²¹⁹ *See Smith*, 494 U.S. at 884–85.

²²⁰ 42 U.S.C. §§ 2000bb(a)(3), 2000bb-1(b)(2); *see also* Jay Alan Sekulow & John Tuskey, *City of Boerne v. Flores: The Justices Know Best*, NEXUS, Fall 1997, at 51, 52. Much of the discussion on *City of Boerne* in this section draws from and elaborates on points made in that article.

²²¹ *See* § 2000bb(b).

²²² The decision did not address RFRA’s application to federal action burdening religious practice. *See City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

²²³ *Id.* at 512.

²²⁴ U.S. CONST. amend. XIV, § 5.

Fourteenth Amendment) would squarely be within Congress's Section Five power.²²⁵ Second, RFRA, despite subjecting even neutral laws to the compelling interest test, may have been thought to be a reasonable ("appropriate") means of preventing state action that penalizes conduct on the basis of religion.²²⁶ Because Section Five had been understood to authorize such preventive laws,²²⁷ RFRA might have been within Congress's Section Five power even though it reached conduct that did not violate the Free Exercise Clause.²²⁸

In holding RFRA unconstitutional, the majority in *City of Boerne* rejected both of these theories.²²⁹ First, the majority refused to uphold RFRA as an appropriate preventive measure because it lacked "proportionality or congruence between the means adopted and the legitimate end to be achieved."²³⁰ As the majority saw things, RFRA

²²⁵ This position is suggested in Justice O'Connor's dissent. *See City of Boerne*, 521 U.S. at 549–64 (O'Connor, J., dissenting). This position assumes, of course, that the Fourteenth Amendment really does make the Free Exercise Clause applicable to the states. I will make that assumption because there is no question that is (and will continue to be) the Court's position. *See id.* at 519 (majority opinion) ("Congress can enact legislation under [Section Five] enforcing the . . . free exercise of religion. . . . Congress'[s] power to enforce the Free Exercise Clause follows from our holding . . . that the 'fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment.'" (citation omitted)). On the Court's own premise then, RFRA should have been within Congress's Section Five power if the Free Exercise Clause requires conduct exemptions.

²²⁶ *Id.* at 529–30.

²²⁷ *Id.* at 522–25.

²²⁸ *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (holding that Congress could suspend literacy tests under its power to enforce the Fifteenth Amendment right to vote, even though literacy tests are not themselves unconstitutional, because Congress could reasonably find that suspending literacy tests was a reasonable means of ensuring the right to vote); *see also City of Boerne*, 521 U.S. at 530 (noting that "preventive rules are sometimes appropriate remedial measures" and therefore could be within Section Five power); *id.* at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress'[s] enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . .").

²²⁹ *Sekulow & Tuskey*, *supra* note 220, at 54.

²³⁰ *City of Boerne*, 521 U.S. at 533. In a dissenting opinion in *Tennessee v. Lane*, 541 U.S. 509 (2004), Justice Scalia rejected *City of Boerne*'s "congruence and proportionality" test. *See id.* at 556–59 (Scalia, J., dissenting). Instead, Justice Scalia concluded that Section Five, in granting Congress the power to enforce the Fourteenth Amendment, gives Congress no power to impose preventive provisions on the states that require more than the Fourteenth Amendment itself requires or that do not facilitate enforcement (by, for
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applied the compelling interest test to numerous state laws that would be constitutional under the rule announced in *Smith*.²³¹ While “[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional,”²³² the majority found that the record before Congress did not support the conclusion that states were using neutral, generally applicable laws as a cover for religious discrimination.²³³ Second, although its opinion did not say so explicitly, the majority implicitly rejected the theory that RFRA required only what the Free Exercise Clause itself required.²³⁴ There would have been no reason to analyze whether RFRA was within Section Five power as a preventive measure if RFRA and the Free Exercise Clause both required the compelling interest test for neutral laws.

Underlying the majority’s decision in *City of Boerne* was the conclusion that *Smith* was correct—“that the Free Exercise Clause does not prohibit states from enforcing neutral, generally applicable laws against people whose religious practice [is burdened by the law].”²³⁵ The majority thus saw RFRA as an attempt by Congress to change the Free Exercise Clause’s meaning.²³⁶ That, according to the Court, was forbidden: “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.”²³⁷

No one can object to this principle. Indeed, this principle echoes one of the reasons that *Marbury* offered in defense of judicial review: to allow Congress to act beyond its power unchecked would be to allow Congress to rewrite the Constitution without going through the formal amendment process in Article V.²³⁸ Nobody would disagree that “Congress could not

example, requiring states to report Fourteenth Amendment violations). *See id.* at 558–59. For further discussion of Justice Scalia’s dissenting opinion in *Lane*, see Nelson Lund, *Fig Leaf Federalism and Tenth Amendment Exceptionalism* 8–11 (The Berkeley Elec. Press, Working Paper No. 25, 2005), <http://law.bepress.com/gmulwps/gmule/art25>.

²³¹ *City of Boerne*, 521 U.S. at 534 (majority opinion).

²³² *Id.* at 532.

²³³ *See id.* at 530–31.

²³⁴ *See* Sekulow & Tuskey, *supra* note 220, at 54.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *City of Boerne*, 521 U.S. at 519.

²³⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to

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use its Section [Five] power to require states to prohibit duck hunting by finding that ducks are ‘persons’ and therefore entitled to equal protection of the laws. Ducks simply are not persons.”²³⁹ Nobody could plausibly read the Fourteenth Amendment and think that it protected waterfowl. Congress in that case would not be enforcing a constitutional provision that protects “persons”; Congress would be writing a new constitutional provision that protects ducks.

The problem in *City of Boerne*, however, is that the majority equated “alter[ing] the meaning of the Free Exercise Clause”²⁴⁰ with *disagreeing with the Court’s interpretation* of the Clause and embodying that disagreement in a statute.²⁴¹ This equation cannot be correct if the touchstone for determining constitutional meaning is the Constitution itself. A statute embodying a constitutional interpretation different than the Court’s interpretation of the provision only “alter[s] the [provision’s] meaning” if the Court is correct about the provision’s meaning. If Congress is right and the Court is wrong in its interpretation, Congress is not changing the provision’s meaning. In fact, if the Court is wrong, and the Court’s decision is considered binding on the states and other branches of the federal government, which the majority of Justices considers the Court’s decisions to be, the *Court* would be changing the provision’s meaning. Moreover, if interpretation yields several more or less equally plausible meanings or a range of meanings the provision might bear, the Court cannot fairly say that Congress has changed the provision’s meaning simply because Congress has chosen an interpretation within that range, but different than the interpretation the Court has chosen.

The *City of Boerne* majority did not qualify its assertion about “changing the Constitution’s meaning” as I have above. Nor, as I will show shortly, did the majority attempt to show why Congress was wrong. Thus, for the *City of Boerne* majority, simply disagreeing with the Court’s interpretation of the Free Exercise Clause was the same thing as changing the Clause’s meaning. The majority equated the Constitution’s meaning with its own interpretation. If that is so, the Constitution, in the Court’s

alter it. If the former . . . be true, then a legislative act contrary to the Constitution is not law.”); *see also City of Boerne*, 521 U.S. at 529 (“If Congress could define its own powers by altering the Fourteenth Amendment’s meaning . . . the Constitution . . . would be . . . ‘alterable when the legislature should please to alter it.’” (quoting *Marbury*, 5 U.S. at 177)).

²³⁹ Sekulow & Tuskey, *supra* note 220, at 54.

²⁴⁰ *City of Boerne*, 521 U.S. at 519.

²⁴¹ Sekulow & Tuskey, *supra* note 220, at 54.

view, “means what the Court says it means—no more or no less.”²⁴² Justice O’Connor, in her dissent, neatly summed up the Court’s position: “Congress lacks the ability independently to define or expand the scope of constitutional rights [W]hen it enacts legislation in furtherance of its delegated powers, *Congress must make its judgments consistent with this Court’s exposition of the Constitution*”²⁴³ This is so, apparently, no matter how reasonable Congress’s interpretation is or how unreasonable the Court’s is (unless, of course, the Court decides to overrule its previous opinion).

Justice O’Connor did not dissent in *City of Boerne* because she disagreed with the majority’s view of judicial power. In fact, she—and the three Justices who joined her dissent—agreed with the majority on that point.²⁴⁴ Rather, Justice O’Connor dissented because she disagreed with the majority about *Smith*.²⁴⁵ She thought *Smith* was wrongly decided and ought to have been overruled and that the *Sherbert* compelling state interest test was the appropriate free exercise standard.²⁴⁶

To support her conclusion, Justice O’Connor offered a detailed historical analysis in an attempt to show that the Free Exercise Clause, as originally understood at the time of its ratification, provided for the kind of conduct exemption she championed.²⁴⁷ If Justice O’Connor’s analysis was correct, then Congress, assuming that the Court’s premise that the Fourteenth Amendment makes the Free Exercise Clause applicable to the states is correct, would have had the power under Section Five of the Fourteenth Amendment to pass RFRA. The majority did not respond to Justice O’Connor’s analysis. The majority did not analyze the meaning of the Free Exercise Clause in light of its text and the historical context in which it was proposed, drafted, and ratified. The majority did not defend *Smith* on these grounds.²⁴⁸ According to its opinion, all that mattered to the majority was that RFRA and *Smith* were at odds.²⁴⁹ Because Congress

²⁴² *Id.* at 55.

²⁴³ *City of Boerne*, 521 U.S. at 545 (O’Connor, J., dissenting) (emphasis added).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 546.

²⁴⁶ *Id.* at 544–45.

²⁴⁷ *See id.* at 548–64.

²⁴⁸ *Id.* at 512–14 (majority opinion).

²⁴⁹ Justice Scalia, *Smith*’s author, did respond to Justice O’Connor’s dissent. *See id.* at 537–44 (Scalia, J., concurring). Justice Stevens joined Justice Scalia’s concurring opinion. For what it is worth, I think Justice Scalia had the better of the argument. *See infra* text accompanying notes 262–64.

had passed a statute that embodied a constitutional interpretation that differed from the Court's, the majority concluded Congress was changing the Constitution's meaning, thus making the statute unconstitutional, without troubling to explain why Congress was wrong and the Court was (or at least five Justices were) right.²⁵⁰

One could respond to this lack of an explanation by saying that there was no need for the Court in *City of Boerne* to explain its interpretation of the Free Exercise Clause. *City of Boerne* relied on *Smith*. *Smith*'s reasons for reading the Free Exercise Clause as it did were *City of Boerne*'s reasons. Therefore, one might conclude that it is incorrect to charge the *City of Boerne* majority with failing to explain textually why its interpretation of the Free Exercise Clause was correct.

True, the *City of Boerne* majority implicitly adopted *Smith*'s reasoning.²⁵¹ This does not respond to my concern. *Smith* did not really analyze the Free Exercise Clause's text. *Smith*'s entire analysis of the Clause's text with respect to whether the Clause provided for conduct exemptions is as follows:

[Respondents] assert . . . that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). *As a textual matter, we do not think the words must be given that meaning.* It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. *It is a permissible reading of the text,* in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.²⁵²

²⁵⁰ See *City of Boerne*, 521 U.S. at 534–36 (majority opinion).

²⁵¹ *Id.* at 514.

²⁵² *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (emphasis added).

Note the highlighted language: the *Smith* majority did not conclude that the text itself necessarily excluded a conduct exemption. Instead, the most the *Smith* majority was willing to say was that “we do not think the words must be given that [(i.e., the conduct exemption)] meaning” and that the Court’s no-conduct exemption reading was “a permissible reading of the text.”²⁵³ The opinion did not analyze the text further or explore the historical context surrounding the First Amendment’s framing or ratification.²⁵⁴ Instead, the *Smith* majority noted that its reading of the Free Exercise Clause was consistent with the bulk of Supreme Court precedent on the question,²⁵⁵ distinguished away any cases that stated (often quite clearly) the opposite of the Court’s conclusion,²⁵⁶ and noted the dangers of courts applying a compelling interest test to determine whether religious believers should be exempted from generally applicable laws.²⁵⁷

In short, there is nothing in either the *Smith* or the *City of Boerne* majority opinions that responds to the historical argument in Justice O’Connor’s *City of Boerne* dissent. That does not mean that such a response could not be made or that Justice O’Connor’s conclusion was correct—as noted, Justice Scalia did respond to Justice O’Connor’s dissent.²⁵⁸ Academics have defended *Smith* (or at least *Smith*’s result) as a historically correct (or at least very close to historically correct) reading of the Free Exercise Clause.²⁵⁹ I find those defenses to demonstrate that

²⁵³ *Id.*

²⁵⁴ Gerard Bradley, while strongly defending the result in *Smith*, noted that the *Smith* majority made no historical argument to support its reading of the Free Exercise Clause. Bradley, *supra* note 86, at 261 (“[W]ithout identifying it as such, and *without historical argument*, the Court came close to expressing the meaning apprehended by the ratifiers” (emphasis added)).

²⁵⁵ *Smith*, 494 U.S. at 878–80.

²⁵⁶ *See id.* at 895–903 (O’Connor, J., concurring) (discussing the majority’s treatment of precedent); *see also* Bradley, *supra* note 86, at 247–48 (“[T]he majority opinion unreasonably understated the solidity and scope of precedents since *Sherbert*.”).

²⁵⁷ *See Smith*, 494 U.S. at 885–89.

²⁵⁸ *City of Boerne*, 521 U.S. at 537–44 (Scalia, J., concurring). Justice Scalia made two particularly telling points in response to Justice O’Connor’s analysis. First, he noted Justice O’Connor’s failure to cite any early cases that recognized the conduct exemption and compelling interest test, despite the existence of cases that refused to recognize any conduct exemption. *See id.* at 542–43. Second, he noted that Justice O’Connor supported the proposition that the Free Exercise Clause requires judicially-created exemptions from neutral laws by pointing to examples of legislatively-created exemptions. *Id.* at 541–42.

²⁵⁹ *See, e.g.*, Bradley, *supra* note 86, at 261; Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 948
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Smith reached the correct conclusion: the Free Exercise Clause does not require exemption from generally applicable laws for religiously-motivated objectors. Indeed, I find the historical arguments persuasive enough to agree with *City of Boerne*'s ultimate conclusion that Section Five of the Fourteenth Amendment does not give Congress the power to generally impose the compelling interest, conduct exemption scheme on the states. To do so would impose legislatively on the states a "constitutional" limitation on state action that cannot fairly be found in the Constitution.

Moreover, while *Smith* offered little textual and no historical analysis to support its reading of the Free Exercise Clause, and while its treatment of post-*Sherbert* precedent is questionable, *Smith* did raise strong reasons why courts should not read the Free Exercise Clause to require judicially-enforceable religious conduct exemptions if the text does not require that result. The conduct exemption (like all balancing tests) represents a significant jurisdictional shift from legislatures to courts.²⁶⁰ The exemption gives courts the task of weighing the importance of the government's interest in enforcing its generally applicable laws "against the . . . significance of religious practice."²⁶¹ That balancing will often, if not inevitably, require courts to evaluate the "centrality" of the objector's religious practice.²⁶² Neither of these tasks are well-suited to the judiciary. There is nothing in the Constitution or any other legal source to guide judges in deciding how "compelling" a government's interest is or how "significant" or "central" religious practice is to a believer. The Court in *Smith* was surely correct when it stated that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."²⁶³ Those are theological, not legal, questions. Judges are lawyers, not theologians.

(1992). *But see* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1511–12 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1116–17 (1990). Justice O'Connor seems to have based her *City of Boerne* dissent in large part on Professor McConnell's work, and Professors Bradley and Hamburger wrote in response to Professor McConnell.

²⁶⁰ Bradley, *supra* note 86, at 256 (providing that the conduct exemption "is, on the whole, a gigantic balancing test whose practical effect is to transfer power in bulk to the judiciary. The purpose of the judicial calculations is . . . to avoid one kind of wrong answer: *any* answer given finally (i.e. without judicial review) by legislators.").

²⁶¹ *Smith*, 494 U.S. at 889 n.5.

²⁶² *Id.* at 887 & n.4.

²⁶³ *Id.* at 887 (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)).

Smith, to me at least, makes a persuasive prudential case against the conduct exemption. The majority in *City of Boerne*, therefore, was most likely correct in holding that Section Five did not empower Congress to impose the conduct exemption scheme on states, thereby leaving state actors the task of determining when to exempt religious objectors from generally applicable laws.

One could easily see *City of Boerne*, then, as a triumph for federalism and legitimate state prerogatives.²⁶⁴ However, reasoning is as important as result, and while *City of Boerne's* result arguably relieved states of a limit on their legitimate lawmaking power that is not fairly found in the Constitution, *City of Boerne's* reasoning reveals a conception of judicial power that can be turned on states to restrict legitimate state prerogatives without legitimate constitutional basis. When faced with Justice O'Connor's thorough historical analysis of the original understanding of the Free Exercise Clause, an analysis, which, if correct, would have required the Court to uphold RFRA, three of the five Justices in the majority saw no need to respond to it. Rather, those Justices were content to rest their decision on the ground that the Court had decided the issue in *Smith*, and Congress had no right to come to its own contrary conclusions, regardless of how well Congress had textually and historically grounded its conclusion.²⁶⁵ If the majority (or at least the three majority Justices who did not join Justice Scalia's concurring opinion) had thought it necessary (or at least important) to demonstrate that its reading of the Free Exercise Clause was superior to Congress's, one would expect the majority to have responded to Justice O'Connor's dissent, or at least to have dropped a footnote saying, "We agree with Justice Scalia's analysis." The majority did neither.²⁶⁶

²⁶⁴ Professor Calabresi, for example, categorizes *City of Boerne* along with cases such as *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *United States v. Lopez*, 514 U.S. 549 (1995), as cases demonstrating the commitment of a Court majority to "constitutional federalism." Calabresi, *supra* note 6, at 1379.

²⁶⁵ Sekulow & Tuskey, *supra* note 220, at 55.

²⁶⁶ One could interject at this point that in rejecting the conduct exemption on the grounds it did (i.e., that weighing the burden on a religious adherent against the state's interest in imposing that interest is not a task suited to the judiciary), see *Smith*, 494 U.S. at 890, the Court in *Smith* was merely doing what *McCulloch* did in refusing to examine the degree of necessity of the Second Bank of the United States or the level of destructiveness of the Maryland tax on the Bank. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423, 425-37 (1803). Thus, if what *McCulloch* did was consistent with the power of judicial review, so was what *Smith* did, and, therefore, in adopting *Smith's* reasons, the *City of*
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In this respect, *City of Boerne* illustrates a conception of judicial power in constitutional cases that is at odds with *Marbury*'s conception of that power. This modern conception views the Court as the ultimate interpreter of the Constitution, such that its decisions are "the supreme Law of the Land,"²⁶⁷ on par with the Constitution itself. "Interpretation," as the Court

Boerne Court was not really resting its decision on the bare assertion that Congress has no right to disagree with the Court.

I do not think this is correct for two reasons. First, *Smith* did not completely reject questions of degree in Free Exercise analysis. Under *Smith*, a law burdening the exercise of religion that is not neutral and generally applicable (i.e., a law that targets religious exercise) only presumptively violates the Free Exercise Clause. See *Smith*, 494 U.S. at 879, 888. The Court may still find no Free Exercise violation if the Court finds that the law is the least restrictive means of advancing a compelling government interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (providing that a nonneutral law burdening religiously-motivated conduct must be justified by a compelling state interest). So even after *Smith*, federal courts are still in the business of evaluating questions of degree in Free Exercise cases.

More important, this still does not fully meet the substance of Justice O'Connor's dissent, which was that the Free Exercise Clause, as originally understood, *required* the Court to engage in the conduct exemption, compelling interest analysis. *City of Boerne v. Flores*, 521 U.S. 507, 564 (O'Connor, J., dissenting). In other words, she read the Free Exercise Clause as a directive to courts to evaluate questions of degree. *Smith*'s analysis provides a partial response to her position: it is unlikely that the Free Exercise Clause would direct the Court to evaluate questions of degree because such questions are not well-suited to the judicial branch (although, again, even after *Smith* the Court's Free Exercise jurisprudence includes the compelling interest test). But neither *Smith* nor the majority opinion in *City of Boerne* responded to Justice O'Connor's historical evidence of the Free Exercise Clause's original understanding. *Sekulow & Tuskey, supra* note 220, at 55. Moreover, nothing in *City of Boerne* suggests that the majority thought it was necessary (or even important) to respond to that historical evidence. *Id.* Therefore, the point made in the text still stands.

²⁶⁷ See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). If I am correct in equating *City of Boerne* with *Cooper*, the context of *Cooper*'s "supreme law of the land" quote is revealing of the view of judicial power of most of the modern Justices:

Article IV of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in [*Marbury*] that "[i]t is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution It follows that the interpretation of the Fourteenth

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views that task, does not necessarily involve any thorough analysis of constitutional text in light of its context in the document or its historical context.

The joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁶⁸ further demonstrates this modern conception of judicial power in a context in which it was used to limit legitimate state prerogatives. *Casey* required the Court to decide whether to overrule its decision in *Roe v. Wade*²⁶⁹ that the Constitution protects a woman's right to decide whether to have an abortion.²⁷⁰ The rule announced in *Roe* invalidated the abortion laws in all states.²⁷¹ In their joint opinion, Justices O'Connor, Kennedy, and Souter, while not coming to the conclusion that *Roe* reached a correct result, decided that *Roe* (or at least what the joint opinion termed *Roe*'s "central holding") ought not be overruled.²⁷² The joint authors based their conclusion on an expansive concept "of individual liberty . . . combined with the force of *stare decisis*."²⁷³

While my primary focus is on what the joint opinion's *stare decisis* analysis reveals about the authors' view of judicial power, I will first briefly discuss the joint opinion's definition of liberty to show how that view of judicial power can affect state prerogatives.²⁷⁴ The authors stated that "choices central to personal dignity and autonomy[] are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."²⁷⁵ This is known as the infamous *Casey* "mystery passage." On its face, the mystery passage purports to protect "personal and intimate choices" (actions) based on a

Amendment enunciated by this Court . . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States

Id. (citation omitted).

²⁶⁸ 505 U.S. 833 (1992).

²⁶⁹ 410 U.S. 113 (1973).

²⁷⁰ *Casey*, 505 U.S. at 844 (plurality opinion).

²⁷¹ *Roe*, 410 U.S. at 164.

²⁷² *Casey*, 505 U.S. at 860.

²⁷³ *Id.* at 853.

²⁷⁴ I discuss in greater depth *Casey*'s notion of liberty and its implications in another forthcoming article. John Tuskey, *What's a Lower Court to Do? Limiting Lawrence v. Texas and the Right to Sexual Autonomy*, 21 *TOURO L. REV.* (forthcoming Spring 2006).

²⁷⁵ *Casey*, 505 U.S. at 851.

person's self-defined "concept of existence, of meaning, of the universe, and of the mystery of human life." Taken at face value, this broad notion of liberty could well be, to quote Justice Scalia, "the passage that ate the rule of law."²⁷⁶

A right to make "personal and intimate choices" based on one's self-defined "concept of existence . . . and of the mystery of human life" certainly would seem to include a right to commit suicide and to have someone else's assistance in committing suicide. That is precisely what an en banc panel of the Ninth Circuit held in *Compassion in Dying v. Washington*.²⁷⁷ Yet, the Supreme Court (in an opinion joined by Justices Kennedy and O'Connor) overruled the Ninth Circuit and held that the Due Process Clause does not protect a right to commit suicide.²⁷⁸ In rejecting the Ninth Circuit's reliance on *Casey*'s mystery passage, the Court stated that the mystery passage merely described those personal activities the Court previously had held the Due Process Clause protects, and that *Casey* "did not suggest" that the Clause protects "all important, intimate, and personal decisions."²⁷⁹

Glucksberg appeared to have disposed of the mystery passage as a general definition of due process liberty. In *Lawrence v. Texas*, which was authored by Justice Kennedy, however, a majority of the Court revived the mystery passage and relied on the passage in large part to hold that a Texas statute prohibiting homosexual sodomy violated the Due Process Clause.²⁸⁰ It is difficult (if not impossible) to reconcile *Lawrence*'s treatment of the mystery passage with *Glucksberg*'s, given that homosexual sodomy is one activity that the Court, in *Bowers v. Hardwick*,²⁸¹ had held was not protected by the Due Process Clause.²⁸² But it is never too late for the Court to change its mind, and the *Lawrence* Court overruled *Bowers*.²⁸³

If due process liberty really is the right to act in personal and intimate matters consistently with one's own concept of existence, then why is sodomy included within that liberty but not suicide? Perhaps the Justices in the *Lawrence* majority believe the decision whether to continue living is not as intimate and personal as the decision to engage in sodomy. But how

²⁷⁶ *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

²⁷⁷ 79 F.3d 790, 813–14 (9th Cir. 1996), *rev'd*, 521 U.S. 702 (1997).

²⁷⁸ *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

²⁷⁹ *Id.* at 726–28.

²⁸⁰ *Lawrence*, 539 U.S. at 574, 578 (quoting *Casey*, 505 U.S. at 851).

²⁸¹ 478 U.S. 186 (1986).

²⁸² *Id.* at 196.

²⁸³ 539 U.S. at 578.

does one reach that conclusion from the constitutional text? “Intimate and personal” may be just a code word for sexual and (loosely speaking) sexually-related matters. Again, how does one tease this special privilege for sex and sexually-related matters out of the constitutional text? The answer is that the constitutional text does not tell us what decisions are intimate and personal enough to merit protection from state regulation. These are value and policy judgments; there is no reason to think that federal courts are more competent or better situated to make these judgments than the elected representatives of the people in the states. In the end, the mystery passage definition of liberty is a means for judicial second-guessing, based on policy and value judgments rather than on the constitutional text, of any state regulation that arguably restricts intimate and personal matters.²⁸⁴

I now turn to *Casey*’s treatment of stare decisis. The joint opinion discussed four factors in deciding that stare decisis required affirming *Roe*’s “central holding.” First, the joint authors concluded that *Roe* had not been proven “unworkable.”²⁸⁵ Although *Roe* required (and *Casey* would still require) courts to assess state laws affecting access to abortion, the Court found that “the required determinations fall within the judicial competence.”²⁸⁶ Next, the joint authors concluded that persons (particularly women) had relied on *Roe*—or, more precisely, had relied on the availability of legal abortions, which may not have existed absent *Roe*—in ordering their lives, and in particular, their reproductive decisions.²⁸⁷ Third, the joint authors concluded that nothing in the Court’s

²⁸⁴ This was the primary vice of the Court’s much-maligned decision in *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny. Contrary to popular myth, *Lochner* did not lead to wholesale invalidation of state economic regulations. See GERALD GUNTHER, CONSTITUTIONAL LAW 445 (12th ed. 1991). In fact, “most challenged laws withstood attack.” *Id.* *Lochner*-style due process, however, did significantly intrude on legitimate state prerogatives precisely by subjecting state economic regulations to federal judicial second-guessing on economic grounds. *Lochner*, in effect, established the federal courts as the ultimate arbiters of the economic wisdom of state economic regulations.

²⁸⁵ *Casey*, 505 U.S. at 855.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 856. The Court noted

that for 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. The ability of women to participate equally in the economic and social life

(continued)

constitutional jurisprudence since *Roe* weakened *Roe*'s doctrinal underpinnings.²⁸⁸ These three considerations led the Court to conclude that “[w]ithin the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.”²⁸⁹

That the joint authors found *Roe*'s “central holding” to be workable reveals much about how the joint authors conceived the judicial function. The opinion replaced *Roe*'s rigid trimester system,²⁹⁰ which led to fairly predictable results (most abortion regulations before viability were unconstitutional),²⁹¹ with an “undue burden” test that allowed state regulation before viability so long as that regulation did not impose an “undue burden” (defined as a “substantial obstacle”) on the woman's ultimate right to choose to have an abortion.²⁹² Put aside the joint authors' failure to usefully define that standard,²⁹³ and note simply the standard's label: “*undue* burden.” Clearly, the undue burden standard requires courts to evaluate the degree of burden on a woman's decision to have an abortion. Courts must decide where to draw the line between due and undue burdens. Nothing in the Constitution exists to allow anyone to evaluate or to explain why the Court's conclusion about the burden is correct and the state legislature's is not. The joint authors thought that “the required determinations fall within the judicial competence,”²⁹⁴ but the question whether a particular abortion regulation is “undue”—whether it

of the Nation has been facilitated by their ability to control their reproductive lives.

Id.

²⁸⁸ *Id.* at 857–59.

²⁸⁹ *Id.* at 861.

²⁹⁰ *Roe* held that during the first trimester of pregnancy, states could neither prohibit nor regulate abortion. *Roe v. Wade*, 410 U.S. 113, 164 (1973). From the end of the first trimester until viability, states could regulate abortion to protect maternal health but could not prohibit abortion. *Id.* After viability, the state could prohibit abortion except where necessary to preserve maternal life or health. *Id.* at 164–65. However, in *Doe v. Bolton*, *Roe*'s companion case, the Court defined maternal health so broadly as to make the state's power to prohibit abortion after viability illusory. *See Doe v. Bolton*, 410 U.S. 179, 191–92 (1973).

²⁹¹ *Casey*, 505 U.S. at 985 (Scalia, J., dissenting).

²⁹² *Id.* at 876–78 (plurality opinion).

²⁹³ *See id.* at 985–93 (Scalia, J., dissenting).

²⁹⁴ *Id.* at 855 (plurality opinion).

restricts a woman's right to choose abortion *too much*—is exactly the kind of question that Chief Justice Marshall in *McCulloch* emphatically denied was within the judicial competence.²⁹⁵

The joint authors' insistence that *Roe*'s doctrinal underpinnings had not been weakened is also revealing. The Court's reference point for this determination was not the Constitution itself but the Supreme Court's substantive due process decisions on which *Roe* had relied.²⁹⁶ Neither *Casey*, *Roe*, nor any of the other decisions the joint opinion cited ever explained why the constitutional *text* required protecting a right to abortion from state regulation.²⁹⁷ The Court has never explained why the text of the Due Process Clause, which looks to be directed at *procedure*, supports its substantive due process jurisprudence.²⁹⁸ It is true, as the joint authors noted, that the Court did not repudiate the substantive due process cases on which *Roe* relied.²⁹⁹ Given that no convincing textual explanation for the enterprise of substantive due process appeared in any of those cases, and that the joint authors in *Casey* supplied no such explanation, relying on those cases is hardly sufficient to explain why the *Constitution* required affirming the right to an abortion. Once again, the Court's decisions rather than the Constitution itself are the only touchstones for the Court's "constitutional" decisionmaking.

The fourth reason the joint opinion offered for not overruling *Roe* reinforces this conclusion and neatly ties *Casey* together with *City of Boerne*. According to the joint authors, "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated

²⁹⁵ See *supra* Part I.B.

²⁹⁶ See *Casey*, 505 U.S. at 858–59.

²⁹⁷ In fact, *Roe* did not even bother to pin down which particular constitutional provision protected the right to privacy, and hence the right to abortion. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . as we *feel* it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether . . . to terminate her pregnancy." (emphasis added)).

²⁹⁸ See generally John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997) (supporting the conclusion that the Supreme Court has never provided a textual justification for the substantive due process doctrine). A review by my research assistant of all Supreme Court substantive due process cases decided after Professor Harrison's article confirmed that his conclusion still stands.

²⁹⁹ See *Casey*, 505 U.S. at 857–59.

to the rule of law.”³⁰⁰ This was so, according to the joint authors, because “[t]he Court’s power lies . . . in its legitimacy.”³⁰¹ That legitimacy is not only the product of the substance of the Court’s work (the correctness of the Court’s decisions and the convincingness of the rationales the Court gives for its decisions), but also of the public’s perception of the Court.³⁰² In other words, “the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”³⁰³

The joint authors found two circumstances in which overruling previous decisions would subvert the Court’s legitimacy. Tellingly, both are based on perception rather than on substance (i.e., whether the previous decision made a convincing argument that it got the answer right). The first circumstance is frequent overruling.³⁰⁴ “There is . . . a point beyond which frequent overruling would overtax the country’s belief in the Court’s good faith” because telling the people too many times that previous Courts had been wrong would lead people to view the Court’s decisions as result-oriented rather than principled.³⁰⁵

The joint authors found this first circumstance to be hypothetical³⁰⁶ but found a second circumstance on point:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . . its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.³⁰⁷

As to the first circumstance, it may well be that overruling precedent too frequently could lead to a public perception that Court decisions are result-driven rather than principled. Then again, it may not be. The

³⁰⁰ *Id.* at 865.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 866.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 866–67.

conclusion seems plausible, but the joint authors cited no empirical data to support their claim. It is difficult to see how to discern precisely (or even imprecisely) the “point beyond which frequent overruling would overtax the country’s belief in the Court’s good faith.”³⁰⁸ While judges are trained to analyze and apply legal principles (and thus to determine whether a prior decision was legally incorrect and should be overruled), judges have no special expertise in gauging public perception to determine if overruling has become too “frequent” (assuming that correcting incorrect constitutional decisions can ever be too frequent if the Constitution rather than the decision is truly the law). It is not a good idea to base constitutional decisions on the Justices’ intuitions.

The second circumstance posited by the joint authors is especially revealing. The underlying assumption is that it is the Court’s proper role to “resolve . . . intensely divisive controvers[ies]”³⁰⁹ and to “call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”³¹⁰ It may well be a by-product of the Court’s power to decide constitutional cases that some of those decisions help to resolve a national controversy. For example, one could argue (though it is not certain) that in *McCulloch* the Court’s decision that Congress had the power to charter the Second Bank of the United States, and that states had no power to tax the Bank,³¹¹ helped settle the controversy over the Bank’s existence. Note the difference, however, between *McCulloch* and the joint opinion in *Casey*. In *McCulloch*, the Court’s decision was deferential to Congress; the Court refused to second-guess Congress’s assessment of the Bank’s necessity without compelling guidance from the Constitution.³¹² *McCulloch* did not remove the debate over the Bank’s existence from the political process—even if it was within Congress’s power to charter the Bank, opponents could still argue that Congress ought not exercise that power.³¹³

The joint opinion in *Casey* saw it as the Court’s proper role not only to resolve constitutional controversy but to resolve political controversy as

³⁰⁸ *Id.* at 866.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 867.

³¹¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

³¹² See *supra* notes 172–79 and accompanying text.

³¹³ Even proponents of taxing the Bank were not locked out. The primary purpose of taxing the Bank was to make it impossible for the Bank to do business. See *McCulloch*, 17 U.S. at 427. Taxing proponents would merely have their efforts to shut the Bank down shifted to Congress. See *id.* at 435.

well. The “common mandate” that the joint authors insisted *Roe* called abortion opponents to accept was an invitation to total capitulation; *Roe* removed (or attempted to remove) from political discourse the question of whether women should have the right to abort their fetuses.³¹⁴ For abortion opponents, *Roe*’s “common mandate” is essentially a directive to sit down and shut up.

The joint authors were not so naïve as to think that *Roe* could or did end the national controversy over abortion.³¹⁵ Their argument for refusing to overrule was premised on the continued existence of that controversy, as the opinion went on to assess the weight that that controversy should bear in the decision to overrule *Roe*.³¹⁶ For the joint authors, the refusal to accept *Roe*’s “common mandate” showed a lack of commitment to the rule of law. This is apparent in the statement that “[a]n extra price will be paid by those who themselves disapprove of the decision’s results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law.”³¹⁷ Implied here is that those who do not “struggle to accept” the Court’s decision do not respect the rule of law. The Court must “remain steadfast”—not overrule its previous controversial decision—so as not to make those who are “tested by following” that decision undergo the test in vain and thereby have their respect for “the rule of law” undermined.³¹⁸

What precisely constitutes “the rule of law” in the joint authors’ view? Given that their solicitude was directed at those who “disapprove of the decision’s results when viewed *outside of constitutional terms*,”³¹⁹ one might infer that the “rule of law” they are referring to is the Constitution. But this inference disregards the joint authors’ repeated refusal to state that *Roe* correctly decided the primary constitutional question it considered—whether the Constitution protects a right to an abortion.³²⁰ To the joint

³¹⁴ See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1819 (1985).

³¹⁵ Indeed, as Justice Scalia noted, it is far more likely that *Roe*, rather than resolve any controversy over abortion, “did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve.” *Casey*, 505 U.S. at 995 (Scalia, J., dissenting).

³¹⁶ See *id.* at 867–68 (plurality opinion).

³¹⁷ *Id.*

³¹⁸ *Id.* at 868.

³¹⁹ *Id.* at 867–68 (emphasis added).

³²⁰ *Id.* at 853 (“[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with
(continued)

authors, *Roe* may have been right on that point; it may have been wrong. However, whether the decision was right or wrong, it must be followed. Those who refuse to accept *Roe*'s central holding (even if it was wrong) lack respect for the rule of law. The rule of law the joint authors refer to cannot be the Constitution (since they cannot tell us if *Roe* correctly interpreted the Constitution); instead, the rule of law must be the decision in *Roe*. The decision, right or wrong, is the law. It binds both the Court and the nation, at least until the Court says otherwise.³²¹

This principle—that Supreme Court constitutional decisions are the law on par with the Constitution and must be followed regardless of whether they accurately interpret (or even attempt to interpret) the Constitution, unless the Court says otherwise—was the same principle that ultimately led the Court to reject RFRA in *City of Boerne*.³²² *City of Boerne*, which could reasonably be seen as a triumph for state prerogatives against federal overreaching, is premised on the same conception of judicial power as *Casey*, which upheld the Court's invalidation of the prerogatives of the people in their respective states to decide to treat human

the force of *stare decisis*.”); *id.* at 861 (“Within the bounds of normal *stare decisis* analysis . . . the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have.”); *id.* at 869 (“A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, *if error there was*, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.” (emphasis added)); *id.* at 871 (“[T]he immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.”); *id.* at 953 (Rehnquist, C.J., dissenting) (“The joint opinion . . . cannot bring itself to say that *Roe* was correct as an original matter.”).

³²¹ That *Lawrence v. Texas*, 539 U.S. 558 (2003), overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), does not undercut this conclusion. See *supra* notes 284–87 and accompanying text. The majority in *Lawrence* did not explain why the Due Process Clause's text prohibits states from prohibiting homosexual sodomy. *Lawrence* based its decision on *Casey*'s expansive definition of liberty, *Lawrence*, 539 U.S. at 571, which the joint authors in *Casey* never supported textually, along with its conclusion that *Bowers* was inconsistent with other Supreme Court decisions and the “emerging awareness” of the past five decades that people's private consensual sexual conduct should be free from criminal regulation. See *id.* at 571–72. In short, *Lawrence* overruled *Bowers* not because *Bowers* was inconsistent with the Constitution as written, but because *Bowers* was inconsistent with nontextually-supported decisions and the majority's view of the wisdom of criminalizing private consensual sodomy. As in *Casey*, the relevant “law” the majority relied on was not what the Constitution said but what the Justices thought the Constitution ought to say.

³²² 521 U.S. 507, 536 (1997).

fetuses as human beings and to protect them like all other human beings from being intentionally killed.³²³ *Casey* and *City of Boerne* are very similar when it comes to the question of judicial power. Both stand for the proposition that the Supreme Court's word is law. Taken together they show that a majority, if not all, of the Justices share this view. While the majority in *City of Boerne* applied this conception of judicial power in defense of state prerogatives, the joint authors in *Casey* demonstrated how this proposition could be used to defeat legitimate state prerogatives.

CONCLUSION

The present view of judicial review held by the majority of Justices (including the federalism five), as demonstrated in *City of Boerne* and *Casey*, is at odds with the historically understood scope of that power. Moreover, as *Casey* demonstrates, that view of judicial review allows the Court to invalidate state action that the Constitution does not prohibit and thus upsets the federal-state balance established by the Constitution.

If the Court continues to decide like it did in *Casey*, transparency requires the Justices to do one of two things. The Justices should explain why doctrines like substantive due process and applications of those doctrines are fairly based in the Constitution's text. This may involve finding the textual justification for those doctrines in other constitutional provisions. If the Justices cannot do that, the Court should posit and defend a theory of judicial review that justifies invalidating state action that the constitutional text does not prohibit. The Justices owe it to the American people to honestly admit that in many cases they are applying "law" other than the Constitution to invalidate state action; such transparency will help the people properly evaluate whether they want the Court to exercise that power and what to do about it if they do not.

³²³ *Casey*, 505 U.S. at 846 (plurality opinion).