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Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law

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JUDICIAL DEFERENCE AND INTERPRETIVE COORDINACY IN STATE AND FEDERAL CONSTITUTIONAL LAW

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Will nobody defend judicial supremacy anymore?[1]

"[A] permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of the Constitution."[2]

INTRODUCTION

Judicial supremacy is alive and well in the U.S. Supreme Court. The concept that the Supreme Court is the ultimate, and in some cases exclusive, interpreter of the Constitution flourished in the 1990s.[3] Correspondingly, across a broad range of legal doctrine, federal judicial deference to the constitutional interpretation of other branches of government declined markedly. In 1999, this trend accelerated. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[4] announced on the final day of the Court's 1998 Term, provides particularly compelling evidence of diminished judicial deference. Provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments specifically confer enforcement powers on Congress.[5] Accordingly, these enforcement clauses long have constituted an area of substantial judicial deference to the constitutional judgments of Congress. *Florida Prepaid*, however, announced a new and limiting construction of Congress's enforcement powers.[6]

Florida Prepaid serves simply as the latest and most visible manifestation of the new judicial supremacy. A series of Supreme Court cases over the past ten years has traced a similar pattern in subjects including the scope of the federal commerce power, the implied limits that federalism places on the exercise of federal authority, the political question doctrine, and the appropriate level of judicial deference to administrative agencies. *New York Times* reporter Linda Greenhouse's characterization of the Supreme Court's last Term actually captures a

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1 Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 385 (1994).

2 Miller v. Johnson, 515 U.S. 900, 922-23 (1995) (quoting Cooper v. Aaron, 358 U.S. 1, 18 (1958)).

3 *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (refusing to defer to Congress's determination of the need to legislate to protect rights under the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (refusing to defer to Congress's interpretation of interstate commerce); New York v. United States, 505 U.S. 144 (1992) (refusing to defer to Congress's determination of the need to impose regulatory obligations on states). These cases are discussed *infra* Part II.

4 119 S. Ct. 2199 (1999).

5 *See* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

6 For a discussion of *Florida Prepaid*, see *infra* notes 96-106 and accompanying text.

much broader trend in recent federal jurisprudence: "The Supreme Court rules."[7]

Two significant court of appeals decisions from 1999 demonstrate that this decline in deference is radiating into the lower courts as well. In *American Trucking Ass'ns v. EPA*,[8] the Court of Appeals for the District of Columbia reinvigorated judicial scrutiny of congressional delegation of administrative authority. This decision may herald a revival of the nondelegation doctrine, which has lain dormant for half a century. Another marker of diminished deference, despite its ultimate holding, is the decision of the U.S. Court of Appeals for the Fourth Circuit in *United States v. Dickerson*.[9] In *Dickerson*, the court held that Congress had effectively overruled *Miranda v. Arizona*[10] by enacting 18 U.S.C. § 3501.[11] The holding is surprising, but the reasoning even more so. Rather than deferring to the constitutional judgments of Congress, the court reached its decision by expressing disdain for the interpretive powers of both Congress and the President.[12] In rejecting deference to Congress, the President, and the Supreme Court's holding in *Miranda*, the case is literally unprecedented.

Even as judicial supremacy gains ascendancy in the courts, its star is on the decline in the legal academy. The theory that Congress and the President have the ability, indeed the obligation, to engage in constitutional interpretation independent of the Judiciary has achieved a status of accepted dogma. Dissenters remain,[13] but the focus of the debate has turned to the scope, not the existence, of the independent role of the Executive and the Legislature in interpreting the Constitution. The implications of the coordinacy theory for the question of judicial deference, however, have not been fully appreciated. One commentator has accurately described the question of the Judiciary's deference to the constitutional interpretation of the other two branches of government as "perhaps *the* central question" of constitutional adjudication.[14] Coordinacy has important and unexplored ramifications for this central question.

The relationship between coordinacy and judicial deference is complex. Acknowledging the constitutional competence of other branches of government does not necessarily entail judicial deference

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7 Linda Greenhouse, *Supreme Court: The Justices Decide Who's in Charge*, N.Y. TIMES, June 27, 1999, § 4, at 1.

8 175 F.3d 1027 (D.C. Cir. 1999).

9 166 F.3d 667 (4th Cir.), *cert. granted*, 120 S. Ct. 578 (1999).

10 384 U.S. 436 (1966).

11 *See Dickerson*, 166 F.3d at 687.

12 For a discussion of *Dickerson*, see *infra* Part II.E.

13 *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending judicial supremacy).

14 Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 156 (1999).

to their constitutional conclusions. Indeed, coordinacy is in tension with notions of absolute judicial deference to Congress or the President. Coordinacy does not substitute legislative supremacy or executive supremacy for judicial supremacy. Recognizing the interpretive role of the Legislature and the Executive, however, does undermine the strong position of judicial supremacy exhibited in recent federal court opinions. Judicial supremacy affords a simple, pervasive, and consistently negative answer to the question of deference to other branches. Recent Supreme Court cases limiting congressional power illustrate the implications of this theory. Coordinacy requires a revised approach.

This Article offers a new framework for addressing the issue of deference that incorporates the insights of the coordinacy/supremacy debate. This approach draws on the insights of the academic rejection of judicial supremacy, but also seeks to expand the range of discussion to include state courts. Current theories of coordinacy and deference in constitutional interpretation focus solely on the federal Constitution. Consideration of state court interpretation of state constitutions offers an important additional dimension. Unlike federal courts, state courts generally do defer to the constitutional judgments of other branches of government. The state experience thus stands in marked contrast to the federal experience and offers a valuable alternative perspective. The goal of this Article is to construct an account of deference to guide the practice of both state and federal courts.

Through an analysis of state and federal judicial decisions across a broad range of doctrinal areas, this Article argues that current standards of judicial review reflect basic commitments to certain postulates of political philosophy. State court deference corresponds to the concept of a state government of plenary power; federal courts resist deference based on a concept of the limited power of the national government. Having identified the theory of deference that underlies contemporary practice, this Article offers a critique of that approach and of the current case law that embodies it. I criticize the foundationalist premises of the theory, arguing that they present an oversimplified and monologic understanding of our constitutional traditions. State and federal constitutions cannot be reduced to a single dominant political principle, because American constitutional practice has been more complex and polyphonic. The foundationalist theory and the judicial decisions that it gnides ignore this story of constitutional diversity. As a result, state and federal courts adopt insufficiently nuanced approaches to the question of deference. In brief, in a variety of areas, federal courts defer too little and state courts defer too much. The resulting constitutional practice is impoverished and not

sufficiently attuned to the positive role of government in realizing constitutional values.

In place of this foundationalist theory, this Article offers a more pragmatic and contextual approach to the question of deference. Both the principle of interpretive coordinacy and the realities of the modern state demand an appreciation of the crucial role of legislatures in promoting constitutional principles. As the New Deal illustrated, legislative inaction may prove more pernicious than legislative action.[15] A pragmatic theory recognizes the mandate for legislative action and calibrates the appropriate level of deference to the need for legislative participation in the realization of constitutional norms. State and federal constitutional provisions may manifest faith in legislatures, fear of legislative action, or fear of legislative inaction. These different kinds of constitutional concerns require different degrees of judicial deference. Rather than relying on ossified postulates of enumerated federal power or plenary state power, this Article develops a principle of deference that responds to the varying constitutional responsibilities of legislatures in the modern state.[16]

Part I examines the dominance of coordinacy over judicial supremacy in debates about constitutional interpretation and explores the relevance of coordinacy to theories of judicial deference. Part II describes the proclamations of judicial supremacy and the rejection of deference characteristic of current federal court practice. By reviewing the decline of deference in several doctrinal areas, this Part demonstrates how the emphasis on limiting the powers of the national government drives the resistance to judicial deference. Part III explores how the contrasting principle of plenary state governmental power leads state courts to maintain a deferential standard of judicial review. Part IV analyzes alternative accounts of judicial deference based on text, institutional competence, and democratic deliberation and contends that they cannot offer satisfactory approaches to determining the appropriate standard for judicial review. Part V explores the underlying premises of the foundationalist account of deference and explains how the theory misrepresents the diversity of our constitutional traditions. Building on principles of interpretive coordinacy, I then develop a new, pragmatic approach to deference that facilitates

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15 *See, e.g.*, Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2130 (1999); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 501-04 (1987) [hereinafter Sunstein, *Constitutionalism*]; Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 683 (1985) [hereinafter Sunstein, *Agency Inaction*].

16 This Article focuses primarily on the interaction of courts and legislatures, but the basic principles it develops also apply to the relationship between courts and the executive branch.

the crucial role of legislatures in realizing constitutional values in the modern state.

I
SUPREMACY, COORDINACY, AND DEFERENCE

This Part sketches the key concepts that underlie this Article's exploration of recent trends in judicial decision making. I outline the concepts of judicial supremacy, coordinacy, and deference and discuss the relationship among the three.

A. Supreme Court Proclamations of Supremacy

The theory of judicial supremacy posits the U.S. Supreme Court as the single, authoritative interpreter of the U.S. Constitution.[17] According to this view, the Constitution means only what the Supreme Court says it does. Other branches of government and the citizenry at large may have opinions about constitutional meaning, but the Court has a privileged role in constitutional interpretation. Supreme Court rulings thus define the content of the Constitution. No difference exists between the Constitution and constitutional law as developed by the Supreme Court. Judicial precedents are every bit as binding and authoritative as the text of the Constitution itself.

The Supreme Court's most famous use of the rhetoric of judicial supremacy was in *Cooper v. Aaron*.[18] In *Cooper*, the Governor of Arkansas defied the desegregation orders of the federal courts. Governor Faubus sought to justify his stance by asserting the right of the state to interpret the Constitution independently of the Supreme Court. In response to Governor Faubus's challenge, the Court proclaimed:

> Article VI 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 the notable case of *Marbury v. Madison* that "It 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, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law

17 *See* Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 367-68 (1997) (discussing characteristics of judicial supremacy).

18 358 U.S. 1 (1958).

> of the land, and Art. VI of the Constitution makes it of binding effect on the States . . . .[19]

The Court has repeated claims to supremacy in a variety of cases following *Cooper*.[20] Recently, in *Planned Parenthood v. Casey*,[21] the Court again spoke in the accents of judicial supremacy.[22] The theory places the Supreme Court at the apex of a pyramid that encompasses all other government officials. Consequently, Supreme Court rulings bind other branches of government just as they bind lower courts.

B. Coordinacy v. Supremacy

While the rhetoric of judicial supremacy appears in judicial opinions, much academic commentary rejects the concept, emphasizing the independent role of the President and of Congress in interpreting the Constitution.[23] Indeed, one of the chief advocates of a robust role for executive interpretation of the Constitution has expressed some dismay at the absence of scholarly sparring partners, inquiring, "Will nobody defend judicial supremacy anymore?"[24] In the place of judicial supremacy, these commentators insist on coordinate roles for the President and Congress in constitutional interpretation.

The coordinacy theory rests on the premise that within our constitutional system, each branch has an independent obligation to interpret the Constitution. This independent obligation derives from the constitutional system of separation of powers.[25] The oath to "support this Constitution,"[26] an oath constitutionally mandated not only for judges but also for all state and federal legislators and executive officials, evidences this independent obligation.[27] Under the coor-

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19 *Id.* at 18 (citations omitted).

20 *See, e.g.*, United States v. Nixon, 418 U.S. 683, 703-05 (1974); Powell v. McCormack, 395 U.S. 486, 549 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962).

21 505 U.S. 833 (1992).

22 *See id.* at 868; *see also* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 347 (1994) (describing *Casey* as treating judicial supremacy "as a defining characteristic of the American people and their ideals").

23 *See* Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-1990); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). Even commentators who question some of the more extreme implications drawn from the concept of coordinate interpretation do not dispute the basic notion that the executive and legislative branches have an independent role in interpreting the Constitution. *See* Eisgruber, *supra* note 22; Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373-74 (1994).

24 Paulsen, *supra* note 1, at 385.

25 *See* Paulsen, *supra* note 23, at 241-57.

26 U.S. CONST. art. VI, cl. 3.

27 *See id.* ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this

dinacy theory, a distinction exists between the Constitution and the judicial construction of the Constitution. The Judiciary is not the exclusive oracle of constitutional meaning. Other branches may interpret the Constitution independently of the Judiciary.

Many questions of theoretical interest turn on the distinction between supremacy and coordinacy. What should we think of a President who says the following: "I believe that this legislation represents good policy, and the Supreme Court has indicated that it believes the legislation is constitutional. However, though I wish I agreed with the Court in this conclusion, I do not. I find that the law is unconstitutional, and therefore I must veto it or pardon anyone who violates it." Is this President a constitutional hero or constitutional fool?[28] In certain instances, as when executive decisions are not subject to judicial review, the issue of independent interpretive authority may have practical significance.[29] However, because so many relevant executive decisions are either wholly discretionary, such as the veto and pardon,[30] or eventually subject to judicial review, the coordinacy/supremacy debate will generally not have a dispositive effect on matters of public policy.[31] Assuming that, *pace* Governor Faubus, the Executive must comply with judicial judgments in cases to which it is a party,[32] the distinction between a mere judicial opinion and a binding judicial determination is merely a matter of time. Even if the Court's view of the Constitution is not theoretically supreme, its interpretation will even-

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Constitution . . . ."); Paulsen, *supra* note 23, at 257-62. The Constitution further dictates that the President take an oath to "preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 8.

28 *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 245 (1976) (discussing the obligation of the Executive to veto unconstitutional legislation, even if courts would uphold the enactment).

29 *See* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 115-16 (I993).

30 We now generally accept the fact that the President may veto legislation or exercise the pardon power to further policy preferences, not just to prevent unconstitutional usurpation. *See* Easterbrook, *supra* note 23, at 909. The Framers, by contrast, created the veto mainly as a means of negating unconstitutional legislation. *See id.* at 907-08; Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 9 (1995).

31 *Cf.* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., 1969) ("There is hardly a political question in the United States which does not sooner or later turn into a judicial one.").

32 Professor Paulsen is one of the few to assert that the President can ignore a judgment issued in a particular case. *See* Paulsen, *supra* note 23, at 221-22. However, even he acknowledges that such defiance should be extremely rare. *See id.* at 332-42 (discussing principles of executive deference, accommodation, and restraint); *see also* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1325 (1996) ("[A]lthough we do not have supreme confidence in our answer, we conclude that the best understanding of the role of judgments in the constitutional scheme is that the President and Congress can refuse to enforce a judgment only in extreme circumstances . . . .").

tually become embodied in a judicial judgment that will bind other branches of government.[33] Thus, when Attorney General Edwin Meese dared to criticize judicial supremacy,[34] he provoked public outcry and academic debate,[35] but no constitutional crisis.[36]

C. Judicial Deference to Constitutional Interpretation by Other Branches

The question whether other branches must follow judicial interpretations of the Constitution that are not embodied in binding judgments thus raises fascinating theoretical issues of occasional practical import. By contrast, the degree of deference that the Judiciary owes to the interpretations of other branches of government is a matter of tremendous significance across a broad range of legal doctrine.[37] The question really concerns the scope of judicial review. In examining the validity of particular governmental actions, should the courts exercise wholly independent judgment, or should they offer some level of deference to the constitutional judgments of other branches? The answer to this question defines the role of the Judiciary in addressing pressing public issues. The answer reflects the difference between *Lochner v. New York*[38] and *West Coast*

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33 *See* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 71-72 (1993).

34 *See* Lawson & Moore, *supra* note 32, at 1268; Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987) (reprinting Attorney General Meese's speech).

35 *See* Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977 (1987).

36 Perhaps the greatest controversy that assertions of the Executive's power to make independent constitutional interpretations generated concerned the Reagan Administration's refusal to enforce certain provisions of the Competition in Contracting Act. *See* Paulsen, *supra* note 23, at 268-72; *cf.* Murray Waas & Jeffrey Toobin, *Meese's Power Grab: The Constitutional Crisis No One Noticed*, NEW REPUBLIC, May 19, 1986, at 15 ("[U]ntil Ronald Reagan, no president has ever asserted the right to ignore a law he thinks is unconstitutional, let alone the right to defy a court ruling that a law is constitutional just because he happens to disagree.").

37 *See* Hartnett, *supra* note 14, at 156.

38 198 U.S. 45 (1905) (invalidating state statute setting maximum labor hours for bakery and confectionery establishment employees). Although the Court in *Lochner* sometimes employed the language of reasonableness, it showed no interest in deferring to the Legislature's assessment of social reality:

> We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.

Id. at 58.

Hotel Co. v. Parrish,[39] between *Plessy v. Ferguson*[40] and *Loving v. Virginia*.[41]

A strong view of judicial supremacy implies an absence of judicial deference. If constitutional interpretation is the special preserve of the Judiciary, and the constitutional role of the Court is privileged and unique, then the Court has no reason to afford special significance to the constitutional judgments of Congress or the President. Accordingly, the courts would err in deferring to the views of other branches. Such deference would amount to abdication of the constitutional responsibility to declare the meaning of the Constitution.

The coordinacy argument, by contrast, provides for the possibility of judicial deference. Coordinacy recognizes that Congress and the President also have an obligation to interpret the Constitution. Congressional or presidential interpretation of the Constitution thus does not represent impudence or attempted usurpation, but rather the discharge of a constitutionally imposed duty. Judicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different from one it would otherwise reach. Indeed, deference only has meaning if the court addressing the matter independently would reach a conclusion different from that of the Executive or the Legislature.[42] In this sense, deference implies difference.[43] Coordinacy, though, can tolerate disa-

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39 300 U.S. 379 (1937) (upholding state minimum wage law for women). The Court noted:

> [T]imes without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

Id. at 398 (quoting Nebbia v. New York, 291 U.S. 502, 537-38 (1934) (internal quotation marks omitted)).

40 163 U.S. 537 (1896) (upholding state law mandating racial segregation in railroad cars), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954). The Court approached the issue in *Plessy* as follows: "So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature." *Id.* at 550.

41 388 U.S. 1 (1967) (finding unconstitutional the state legislation banning interracial marriage). The Court stated: "[W]e do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose." *Id.* at 8.

42 *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983) (discussing deference as involving a displacement of the interpretation that a court otherwise would have reached).

43 Jacques Derrida's meditations on the interplay between difference and deference led him to create the term "*différance*," JACQUES DERRIDA, *Différance*, *in* MARGINS OF PHILOSOPHY 3 (Alan Bass trans., 1982), which has been rendered as "difference-differing-deferring," *see* JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 97 (1982).

greement. Judicial supremacy responds to the perceived need for a single authoritative interpretation, and therefore a single authoritative interpreter.[44] Within this framework, deference constitutes dissonance, a distraction from the single, proper voice. Coordinacy recognizes a plurality of authorized voices and views deference as an acceptable, even desirable accommodation to this constitutional polyphony.[45] Many matters end up in court, but the fact of judicial review does not entail ignoring preceding constitutional judgments by other branches of government.

Coordinacy does not, however, mandate complete judicial deference. The recognition of an independent interpretive role for Congress and the President does not imply judicial dependence on nonjudicial constitutional interpretations. On the contrary, the case for independent executive and legislative interpretation builds on the case for independent judicial interpretation.[46] Coordinacy merely recognizes the voices of Congress and the President; it does not silence the Judiciary. The theory does not replace judicial supremacy with legislative or executive supremacy. The Court's decision in *Marbury v. Madison*[47] furnishes strong support for the idea that courts are not constitutionally bound to follow the constitutional interpretations of other branches of government. Both in holding a section of the Judiciary Act unconstitutional and in showing a willingness to review the legality of executive action (if jurisdiction were constitutionally permitted),[48] the Court in *Marbury* created an independent role for the Judiciary in deciding constitutional questions. Academic supporters of coordinacy agree that *Marbury* gives the Judiciary an independent voice; they simply wish to extend the gift of *Marbury* to other branches.[49]

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44 Larry Alexander and Frederick Schauer provide an extended argument for judicial supremacy based on the need for an "authoritative interpreter[ ]" of the Constitution. Alexander & Schauer, *supra* note 13, at 1359.

45 Polyphony may also result from an interplay between state and federal interpretive voices. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

46 *See* Easterbrook, *supra* note 23, at 919-20 (noting Chief Justice Marshall's rejection of judicial deference in *Marbury* and characterizing his approach to judicial review as premised on the theory of "[e]very man for himself" (internal quotation marks omitted)).

47 5 U.S. (1 Cranch) 137 (1803).

48 *See id.* at 173-80.

49 For example, Professor Paulsen states:

> I emphatically reject the view, which sometimes travels under the name of deference, that an interpreter (typically, a judge) should reach a conclusion different from the one produced by her best legal analysis, or should refrain from reaching any conclusion at all, because of the views of another. While an interpreter may be persuaded or influenced in the exercise of her *own* judgment by the views and reasoning of another, any theory that accords decision-altering weight to the views of another, contrary to the interpreter's settled conviction as to the proper interpretation of the provision

Coordinacy provides a strong case against what might be called legal deference, the view that the courts are legally bound to accept the constitutional judgments of others.[50] Coordinacy, however, can accept the more pragmatic notion that, in certain instances, courts can better serve the constitutional design by crediting the determinations of other branches.[51] The coordinacy thesis is quite compatible with a judicial deference that accommodates the views of other branches, while not amounting to an abdication of judicial review.[52] *Marbury* does not contradict the principle that, in some instances, a court exercising its independent judgment should nevertheless give great weight to the constitutional judgments of other governmental actors.[53] *Marbury* establishes the principle of judicial review, but does not demarcate the scope of its exercise.[54] Contrary to the implications of some recent Supreme Court pronouncements,[55] *Marbury* in no way rejects deferential review.

> at issue, is fundamentally illegitimate. I am thus deeply skeptical of doctrines of pseudo-deference such as the political question doctrine and stare decisis.

Paulsen, *supra* note 23, at 336 n.413; *see also* Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV 81, 108 (1993) (questioning the propriety of "automatically deferring" to constitutional views of other branches of government).

50 Lawson & Moore, *supra* note 32, at 1271.

51 *See id.* at 1274-79. Lawson and Moore employ the term "epistemological deference" to describe the practice of accepting the judgments of others because, all things considered, these judgments likely provide the best guides in the search for truth. *Id.* at 1271. I avoid this term because I am not convinced that constitutional interpretation is best conceived as an epistemological process of seeking the single correct meaning.

52 *See* Paulsen, *supra* note 23, at 332 ("In a system of coordinate interpretive power, each branch should be guided in the exercise of its independent interpretation by a principle of deference to the considered views of the other branches, and by a responsibility of reasonable accommodation of its independent views to those of the others." (emphasis omitted)); *see also* Hartnett, *supra* note 14, at 154-58 (defending the importance of deference by the Judiciary and other branches); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 187 (1997) ("[W]hen Congress has addressed and resolved a constitutional question, the Court should not overturn that interpretation without a powerful justification.").

53 *See* Eisgruber, *supra* note 22, at 349-51; Lawson & Moore, *supra* note 32, at 1274 ("[T]o say that federal courts have the power, or duty, to interpret the Constitution is not necessarily to say that they have the power to interpret it *independently* of the views of other governmental actors."). Similarly, Professor Monaghan notes:

> [T]he judicial duty "to say what the law is" is analytically empty. The judicial duty to decide demands nothing with respect to the *scope* of judicial review; it is, therefore, entirely consistent with such propositions as, "the Constitution means what Congress says it means, so long as the congressional determination is a reasonable one.

Monaghan, *supra* note 42, at 9.

54 *Cf.* William Wade Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 595 (1985) (noting that *Marbury* did not decide the question whether the binding effect of judicial rulings extends beyond the litigants in a particular case).

55 For example, the Court has characterized the implications of *Marbury* as follows:

Indeed, not only is *Marbury* consistent in principle with a deferential standard of review, but much evidence also supports the proposition that early exercises of judicial review by state and federal courts were extremely deferential in character. In his influential essay, *The Origin and Scope of the American Doctrine of Constitutional Law*, James Bradley Thayer found long-standing and consistent support for the concept that courts invalidate legislative acts only when their unconstitutionality is established with great certainty.[56] Though the matter is not entirely clear,[57] many recent commentators agree that early notions of judicial review embodied a "clear-error" rule, such that courts would not strike down legislation if its constitutionality were merely subject to doubt.[58]

Thayer's argument for deference had an important influence on Justices Holmes, Brandeis, and Frankfurter.[59] Although the federal courts have rejected his proposed clear-error standard as the general benchmark for determining the constitutionality of federal legisla-

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> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit Congressional power.

City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (citation omitted).

56 *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140-44 (1893). Thayer also cited Thomas Cooley's leading constitutional law treatise to buttress this claim. *See id.* at 142 n.1 (citing Cooley treatise); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 182-86 (Leonard W. Levy ed., De Capo Press 1972) (1868) (discussing judicial deference to legislative decisions on constitutional questions).

57 *See* Lawson & Moore, *supra* note 32, at 1277 ("It is true that many, if not most, descriptions of the power of judicial review during the founding era used the language of Thayerian deference, but those statements are not decisive . . . ."); G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 74-76 (1993) (questioning the accuracy of Thayer's historical account).

58 *See, e.g.*, WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 222-27 (1995); ROBERT LOWRY CLINTON, *Marbury v. Madison* and Judicial Review 20-30 (1989); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 36-37, 63-65 (1990); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 545 (1997). Snowiss argues that the "doubtful case" rule arose from a notion of the Constitution as fundamental law, wholly different from ordinary law. Judicial deference reflected the idea that the Judiciary had no power to interpret this fundamental law. *See* SNOWISS, *supra*, at 190. In Snowiss's view, Chief Justice John Marshall undercut the justification for deference by adopting a new conception of the Constitution as merely "supreme ordinary law," which the courts could interpret as they did other species of law. *Id.* at 3-4, 121-23.

59 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 35 (2d ed. 1986); PAUL W. KAHN, LEGITIMACY AND HISTORY 84 (1992); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 86-88 (1994); Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 8 (1993); Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 71 (1978).

tion,[60] the Supreme Court until recently applied a very deferential standard of review in particular areas, approving the "reasonable," not merely the "correct," judgment of other branches.[61] In these specific doctrinal realms, the Court did not simply substitute its view for that of other governmental branches.

The current Court, however, has substantially narrowed the terrain of deference and now proclaims judicial supremacy across a broad range of doctrine. In the state courts, by contrast, Thayer's concept of deference remains influential. The clear-error standard provides the test for judicial review in many states. These varying approaches to deference, I will argue, correspond to the courts' understandings of the fundamental postulates of political power in their different systems. The federal courts' broad declaration of supremacy derives from a desire to prevent erosion of the concept of a national government of limited and enumerated powers.[62] To defer, the federal courts insist, would undermine the principle of limited government. The state courts' deferential attitude in turn accords with the theory of the plenary power of state governments. The exercise of state legislative power is presumed legitimate, requiring no special justification. State courts understand the concept of plenary power as a mandate to defer to legislative judgments. The next two Parts demonstrate the contemporary patterns of deference and their connection to important premises of political theory.

II
ENUMERATED POWERS AND THE DECLINE OF DEFERENCE IN FEDERAL COURTS

In the wake of the New Deal, the U.S. Supreme Court applied relatively lenient standards when enforcing limits on the scope of federal powers. In this area, the Court manifested great deference to the judgments of other branches of government. Recently, however, the Court has shown less inclination to defer across a wide realm of legal doctrine.

A. Enforcement Provisions of the Reconstruction Amendments

Especially since the 1960s, the U.S. Supreme Court has adopted a deferential standard when reviewing the scope of congressional power

60 *See* SNOWISS, *supra* note 58, at 190; Monaghan, *supra* note 42, at 14; Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 332 (1993). As will be discussed below, Thayer's rule has received a warmer reception in the state courts. *See infra* Part III.

61 *See infra* Part III.

62 *See* H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 892-93 (1999) (suggesting that the Court may bave adopted a more active role in order to check expansion of national power).

under the enforcement provisions of the Reconstruction Amendments. Section 5 of the Fourteenth Amendment and the similarly worded sections of the Thirteenth and Fifteenth Amendments seem to recognize a role for Congress in interpreting the Constitution: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[63] The text does not expressly confer on Congress a right to interpret the provisions of the Fourteenth Amendment, because enforcement is not literally equivalent to interpretation. Nevertheless, enforcement does entail some level of interpretation. At the very least, the language contemplates a role for Congress in realizing the values embodied in the Amendment. The text clearly rules out the notion that it is up to the courts alone to enforce this part of the Constitution. Though not unambiguous, the congressional debates concerning the drafting of the Fourteenth Amendment confirm that many of those involved in framing the Amendment did not wish to give the courts sole responsibility for safeguarding the principles established therein.[64]

Indeed, Supreme Court precedents support the idea that Congress has a special role in interpreting the rights that the Fourteenth Amendment protects. In several cases, the Court has adopted a deferential posture, allowing Congress considerable leeway in protecting a variety of interests related to the Reconstruction Amendments. In *Katzenbach v. Morgan*,[65] for example, the Court reviewed a section of the Voting Rights Act of 1965 that effectively prohibited New York from applying its literacy requirements to people who had attended school in Puerto Rico.[66] In a prior case, the Court had found that literacy requirements for voting did not violate the Constitution.[67] *Morgan* raised the question whether Congress's enforcement powers nevertheless allowed it to void New York's literacy requirement. In sustaining the Voting Rights Act, the Court indicated that it would give great deference to congressional judgments in the enforcement area: "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[68] Further, the Court made clear that it would not second-guess congressional determinations as to how best to en-

63 U.S. CONST. amend. XIV, § 5; *see also id.* amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

64 *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 122 (1988); McConnell, *supra* note 52, at 181-83.

65 384 U.S. 641 (1966).

66 *See id.* at 643-45.

67 *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959).

68 *Morgan*, 384 U.S. at 651.

force the Fourteenth Amendment, including congressional views of the appropriate weight to be given to state interests:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement.... It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[69]

In subsequent cases, the Court reaffirmed this broad deference to congressional judgments. In *City of Rome v. United States*,[70] for instance, the Court addressed the issue of whether the Fifteenth Amendment authorized Congress to prohibit voting practices based solely on their discriminatory effects.[71] In a case decided the same day as *City of Rome*, the Court ruled that only discriminatory purpose, not mere discriminatory effects, could give rise to a violation of the Fifteenth Amendment.[72] Nevertheless, in *City of Rome*, the Court upheld the challenged legislation as within the scope of Congress's enforcement power, asserting that Congress "could rationally have concluded" that the outlawed practices created a risk of unconstitutional conduct.[73]

Scholars debated whether cases such as *Morgan* acknowledged that Congress possessed a substantive power to determine the meaning of the Constitution without regard to judicial interpretation.[74] Some found in *Morgan* simply a recognition of congressional expertise in fashioning remedies to redress or prevent conduct that created a risk of violating judicially established constitutional standards.[75] The cases made clear, however, that under any theory, the Court would afford great deference to congressional judgments regarding poten-

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69 *Id.* at 653.

70 446 U.S. 156 (1980).

71 *See id.* at 173-75.

72 *See* City of Mobile v. Bolden, 446 U.S. 55 (1980).

73 City of Rome v. United States, 446 U.S. at 177.

74 *See, e.g.*, Robert A. Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Stephen L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975).

75 *See, e.g.*, Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 103-07 (1965).

tial threats to constitutional rights and the appropriate means for addressing these concerns.[76]

Recently, in *City of Boerne v. Flores*[77] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[78] the Supreme Court cast grave doubt on the theory that section 5 confers on Congress a special power to implement the Fourteenth Amendment. The Court effectively disclaimed any deference to congressional construction of the Amendment and indeed deployed rhetoric indicating outright hostility to the notion of Congress's exercising an independent role in construing the Constitution. *Florida Prepaid* presented the decisive break with the tradition of deference, but the earlier broad affirmation of judicial supremacy in *Boerne* established the Court's new skeptical perspective for judicial review of congressional invocation of section 5 power.[79]

Boerne presented an unusual situation in which Congress attempted to use its section 5 authority to overrule a recent Supreme Court case and reinstitute the prior judicial standard. The case concerned the constitutionality of the Religious Freedom Restoration Act (RFRA).[80] Congress enacted the RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*,[81] which narrowed the First Amendment's Free Exercise Clause protections for individuals seeking exemptions from generally applicable laws.[82] The RFRA sought to restore the previous test, which prohibited the state and federal governments from impairing an individual's religious practice, unless a compelling governmental interest justified the infringement.[83] In enacting the RFRA, Congress relied on its authority to enforce the First Amendment, as incorporated through the Due Process Clause of the Fourteenth Amendment.[84] *Boerne* raised the question whether reimposing the compelling-interest test came within Congress's enforcement powers.[85]

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76 *See also* Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding congressional ban on literacy tests for voting); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (upholding statute banning private racial discrimination in the sale of property) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.").

77 521 U.S. 507 (1997).

78 119 S. Ct. 2199 (1999).

79 *See* City of Boerne v. Flores, 521 U.S. at 536.

80 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

81 494 U.S. 872 (1990).

82 *See* City of Boerne v. Flores, 521 U.S. at 512-14.

83 *See* 42 U.S.C. § 2000bb(b).

84 *See* RELIGIOUS FREEDOM RESTORATION ACT OF 1993, S. REP. No. 103-111, at 13-14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903; H.R. REP. No. 103-88, at 9 (1993).

85 *See* City of Boerne v. Flores, 521 U.S. at 529.

The Supreme Court held that Congress had exceeded the authority granted by section 5,[86] rejecting the notion that Congress might have substantive power to substitute its own interpretation of the Fourteenth Amendment for the Supreme Court's construction.[87] The Court acknowledged that, in the process of remedying constitutional violations, Congress could prohibit conduct that would not itself be unconstitutional.[88] But the Court erected standards designed to ensure that the remedial authority did not effectively give Congress the right to redefine the Constitution. The Court stated that the legislation must have "congruence" and "proportionality" to the constitutional violation.[89] Most significantly, the Court insisted that its own interpretation of the Constitution provide the proper frame of reference. Congressional remedies had to be related to the scope of constitutional rights defined by the Court. The Court made clear that it would give no deference to Congress's understanding of the constitutional commands; the interpretive authority of the Court was supreme:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[90]

Guided by this assertion of judicial supremacy, the Court concluded that the RFRA must fail, because the statute prohibited vast amounts

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86 *See id.* at 536.

87 *See id.* at 519-29.

88 *See id.* at 518.

89 *Id.* at 520.

90 *Id.* at 536; *see also* David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 34 ("[Under *Boerne*], the Constitution has a determinate meaning that only the Supreme Court can divine, and if Congress deviates from the Court's substantive understanding in any way, its actions are per se invalid."); Devins & Fisher, *supra* note 23, at 93 (citing *Boerne* as an example of the Supreme Court's invocation of "judicial supremacy"); McConnell, *supra* note 52, at 163 (describing *Boerne* as adopting a "startlingly strong view of judicial supremacy"); Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849, 849-50 (1998) (citing *Boerne* as an assertion of "judicial supremacy"); Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945, 948 (1998) (describing *Boerne* as adopting a theory of "judicial supremacy"). Indeed, the Court expressed deep antipathy to Congress's encroachment on what the Court conceived of as its constitutional prerogative. *See* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 J. CONST. L. 583, 637 (1999) (noting "Court's tone of rebuke to Congress"); *see also* Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380, 382 (1988) ("[T]o the extent that the Court does not recognize that interpretation is a shared enterprise, the meaning and limits of constitutional principles will be defined in response to a wholly irrational and irrelevant consideration, namely the Justices' anger.").

of conduct that did not violate the Court's construction of the Constitution.[91]

In asserting a strong judicial role in policing the congressional enforcement power, the Court in *Boerne* explicitly linked its review with the concept of limited government: "Under our Constitution, the Federal Government is one of enumerated powers. . . . The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited . . . .'"[92] In the Court's view, only judicial supremacy could ensure that the national government remained a government of limited powers.

Boerne sought to affirm its continuity with prior case law, which had generally deferred to congressional enforcement actions under the Reconstruction Amendments.[93] The Court claimed to recognize that Congress had "not just the right but the duty" to make constitutional judgments when enacting legislation.[94] Further, this interpretive role justified the Court in affording a "presumption of validity" to congressional enactments.[95] Because the RFRA clearly seemed designed to overrule the Supreme Court's interpretation of the Constitution and had far-reaching effects on activities that would have been constitutional under the Court's doctrine, *Boerne* did not fully test the Court's proclamations of deference. The Court plausibly could claim continued deference to congressional judgments consistent with invalidating the RFRA.

Florida Prepaid presented quite a different case. Concerned about states' interference with intellectual property rights, Congress had passed legislation subjecting states to suit in federal court for patent infringement.[96] Acting pursuant to its authority under section 5 of the Fourteenth Amendment, Congress sought to abrogate the immunity that states otherwise would enjoy in federal court.[97] The underly-

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91 *See* City of Boerne v. Flores, 521 U.S. at 532.

92 *Id.* at 516 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)) (citations omitted).

93 *See id.* at 524-29.

94 *Id.* at 535.

95 *Id.*

96 *See* Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified at 7 U.S.C. §§ 2541(a)-(b), 2570 (1994) and 35 U.S.C. §§ 271(h), 296 (1994)).

97 *See* S. REP. No. 102-280, at 7-8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3087, 3093-94. Under Supreme Court doctrine, the Eleventh Amendment generally immunizes nonconsenting states from individuals' suits in federal court for damages. *See* Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996). In abrogating the states' immunity, Congress relied on its authority under the Commerce Clause and the Patent Clause, as well as its powers under section 5 of the Fourteenth Amendment. *See* S. REP. No. 102-280, at 7-8, *reprinted in* 1992 U.S.C.C.A.N. at 3093-94. Subsequent to the enactment of the legislation, the Supreme Court narrowed Congress's ability to abrogate state immunity, suggesting that only section

ing theory of this legislation was that when states employed their sovereign immunity to shield state infringement of patents, they deprived the patent holders of property without due process of law.[98] In enacting the statute, Congress wished to prevent what it perceived to be unconstitutional efforts by states to deny a remedy for state impairment of intellectual property rights.[99]

In contrast to the situation giving rise to *Boerne*, the Court had not previously rebuffed this interpretation of the Constitution; nor in *Florida Prepaid* did the Court reject the notion that a state might violate the Constitution by using sovereign immunity to deny a remedy for its patent infringement.[100] Instead, the Court found that Congress had not adequately supported its claims.[101] The Court insisted that Congress had not shown convincingly that the practice of unremedied state patent infringement was sufficiently widespread to justify congressional action.[102] Chief Justice Rehnquist, writing for the majority, asserted that the record did not substantiate Congress's concerns:

> Here, the record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal court patent actions.
>
> Because of this lack, the provisions of the Patent Remedy Act are "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[103]

The thrust of the opinion is that Congress did not sufficiently document the widespread nature of the problem. Although Chief Justice Rehnquist also noted that the "lack of support in the legislative record is not determinative,"[104] his evaluation of that record figures centrally in the opinion. Congress did not convince the Court that the nature and extent of the constitutional violations justified remedial action.[105]

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5 of the Fourteenth Amendment authorized abrogation. *See Seminole Tribe*, 517 U.S. at 65-73 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

98 *See* S. REP. No. 102-280, at 6, 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3087, 3092, 3094; H.R. REP. No. 101-960, pt. 1, at 37-38 (1990); *see also* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2207-09 (1999) (discussing the theory behind section 5).

99 *See* S. REP. No. 102-280, at 6, 8, *reprinted in* 1992 U.S.C.C.A.N. at 3092, 3094.

100 *See Florida Prepaid*, 119 S. Ct. at 2208.

101 *See id.* at 2207-11.

102 *See id.* at 2209-11.

103 *Id.* at 2210 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)) (citation omitted).

104 *Id.*

105 *See id.*; *see also* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306 (1999) (noting the *Florida Prepaid* Court's "fairly extensive scrutiny of the legislative record").

According to the Court, much of the state action reached might have been simply illegal, rather than unconstitutional.[106]

Any notion of deference to congressional judgments is absent from the Court's decision. The Court neither disputed that the conduct that Congress targeted was unconstitutional nor provided an independent basis for assessing what proportion of the conduct reached by the statute would be merely illegal, but not unconstitutional. Rather, the Court placed the onus for establishing the necessary factual predicate on Congress and found that Congress had not met its burden. By contrast, the *Boerne* Court stated that Congress was entitled to "wide latitude" in determining the scope of remedial measures.[107] As Justice Stevens noted in his dissent in *Florida Prepaid*, "Congress' 'wide latitude' in determining remedial or preventive measures has suddenly become very narrow indeed."[108] *Boerne* at least paid lip service to the notion of "deference";[109] *Florida Prepaid* did not.

The Court's recent decision in *Kimel v. Florida Board of Regents*[110] continued this pattern of applying a strict standard in reviewing the factual underpinnings of congressional enactments. In *Kimel*, the Court held that Congress did not have authority under section 5 of the Fourteenth Amendment to apply the Age Discrimination in Employment Act (ADEA)[111] to state employers.[112] The Court reviewed the legislative record and found that it did not justify the congressional action: "Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem."[113] Such a statement represents extraordinary judicial second-guessing of a legislative determination.

The opinion in *Kimel* set a very high standard for the kind of information on which Congress could legitimately rely. The Court re-

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106 *See Florida Prepaid*, 119 S. Ct. at 2210. Citing its due process jurisprudence, the Court emphasized that state patent infringement that was unintentional, as opposed to willful, might not give rise to a constitutional violation. *See id.* at 2209-2210 (citing Daniels v. Williams, 474 U.S. 327 (1986)).

107 City of Boerne v. Flores, 521 U.S. at 520.

108 *Florida Prepaid*, 119 S. Ct. at 2217 (Stevens, J., dissenting) (quoting City of Boerne v. Flores, 521 U.S. at 520) (citation omitted).

109 *See* City of Boerne v. Flores, 521 U.S. at 536 ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966))).

110 120 S. Ct. 631 (2000).

111 39 U.S.C. § 621 (1994).

112 *See Kimel*, 120 S. Ct. at 650.

113 *Id.* at 648-49.

jected floor statements reporting constituent correspondence.[114] The Court also discounted a 1966 report by the State of California concerning age discrimination in public agencies: "Even if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time, it nevertheless would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union."[115] Perhaps information becomes outdated at some point, but the Court focused its objection not on the lapse between the 1966 report and the 1974 enactment, but on the limited geographic scope of the California report. The Court would apparently require Congress to have reports from all, or at least many, states. These stringent evidentiary requirements contradict any notion of deference to Congress's legislative judgments.

In a related area, the Court has explicitly acknowledged its declining deference to Congress. In its affirmative action jurisprudence, the Court traditionally accorded special deference to congressional judgments about the need for race-conscious remedial measures and recognized section 5 of the Fourteenth Amendment as mandating a special role for the national government in enforcing principles of racial equality.[116] The Court thus applied a less stringent standard of review to federal, as opposed to state or local, affirmative action programs.[117] In the 1995 decision of *Adarand Constructors, Inc. v. Pena*,[118] however, the Court rejected this special deference and insisted that the same standard applies to affirmative action programs at all levels of government.[119]

B. Federalism and the Scope of the Federal Commerce Power

With regard to questions of federalism and the scope of the Interstate Commerce Clause, the Court also has moved away from a deferential stance. In the 1985 case of *Garcia v. San Antonio Metropolitan*

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114 *See id.* at 649 (quoting, as an example of the weakness of evidence of public age discrimination, the following statement by Senator Bentsen: "'Letters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees,'" 118 CONG. REC. 7745 (1972)).

115 *Id.*

116 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (plurality opinion) ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.").

117 *See* Metro Broad. v. FCC, 497 U.S. 547, 565-66 (1990) (explaining that different standards of review apply to federal and state action); *J.A. Croson Co.*, 488 U.S. at 491 ("[O]ur treatment of an exercise of congressional power . . . cannot be dispositive here.").

118 515 U.S. 200 (1995).

119 *See id.* at 224 (asserting the principle of "congruence" in equal protection jurisprudence). For a discussion of the degree of judicial deference appropriate for affirmative action policies generated by the political process, see Lisa E. Chang, *Remedial Purpose and Affirmative Action: False Limits and Real Harms*, 16 YALE L. & POL'Y REV. 59, 101 (1997).

Transit Authority,[120] the Court disclaimed judicial enforcement of federalism-based restrictions on congressional power, stating that Congress itself was the proper body to implement constitutional principles of federalism.[121] The national political process, the Court asserted, would serve to protect the constitutional interests of the states.[122]

Seven years later in *New York v. United States*,[123] the Court resumed judicial enforcement of state interests.[124] The Court did not expressly overrule *Garcia*,[125] but it clearly abandoned the underlying constitutional theory that envisioned the political process, rather than judicial review, as the proper mechanism for enforcing federalism.[126] Writing for the Court in *New York v. United States*, Justice O'Connor implied a continuity with prior doctrine by citing references in the *Garcia* opinion to the constitutionally protected role of the states.[127] What she failed to note, however, was that, in each cited instance, *Garcia* explained that the body with the primary responsibility for enforcing these federalism provisions was Congress, not the courts.[128] Implicitly, but unmistakably, *New York v. United States* rejected *Garcia*'s notion of congressional, rather than judicial, enforcement of constitutional principles of federalism.[129] The Court focused simply on what it understood federalism to require. Deference to the constitutional judgments of Congress apparently did not merit contemplation.

The Court continued to use judicial review to protect the states from supposed federal intrusion in *Printz v. United States*.[130] Despite

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120 469 U.S. 528 (1985).

121 *See id.* at 556.

122 *See id.* at 550-55.

123 505 U.S. 144 (1992).

124 *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 101 (1999) (noting that "[t]he Supreme Court eventually abandoned the view that the Constitution placed only process-based limits on Congress's power with regard to the states").

125 *See* New York v. United States, 505 U.S. at 160 (including *Garcia* in a list of cases whose holdings "[t]his litigation presents no occasion to apply or revisit"). The Court purported to distinguish cases like *Garcia*, in which the challenged legislation, such as minimum wage laws, applied both to the states and to private parties. *See id.* The Court failed to explain, however, why laws singling out the states for regulation posed greater threats to federalism. *See id.* at 201-02 (White, J., dissenting); Moulton, *supra* note 62, at 871.

126 *See* Moulton, *supra* note 62, at 864 (describing recent cases, including *New York*, as "com[ing] quite close to overruling *Garcia* sub silentio").

127 *See* New York v. United States, 505 U.S. at 156, 162.

128 The Court noted:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

129 *See* Moulton, *supra* note 62, at 870-71.

130 521 U.S. 898 (1997).

protests from the dissent, the Court again ignored the *Garcia* approach of relying on the political, rather than the judicial, safeguards of federalism.[131] Far from recognizing a constitutional role for congressional interpretation, the Court's opinion reads as if it is intervening to prevent the federal bully from further oppressing its traditional victim.[132] Within the framework of the opinion, deference to the bully would be unwise and unfair.

The Court has also recently asserted a more robust role for judicial review in its Commerce Clause jurisprudence. Since the New Deal, the Court has allowed Congress great leeway in interpreting the scope of the constitutional powers to regulate interstate commerce.[133] But in *United States v. Lopez*,[134] the Court held, for the first time in fifty years,[135] that congressional legislation exceeded the powers available to Congress under the Commerce Clause.[136] The Court contended that deferring to congressional construction of the Commerce Clause would undermine the theory of enumerated powers; it noted that prior case law had broadly construed the commerce power, "giving great deference to congressional action," but that "to proceed any further . . . would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated."[137] The Court further claimed that deference to Congress would produce unchecked, unlimited governmental power.[138]

Justice Kennedy's concurrence explicitly addresses the Judiciary's role in enforcing limits on the powers of Congress.[139] Justice Kennedy noted that each branch of government has the responsibility to assess the constitutionality of its actions, and he commended Congress for, at least at times, properly undertaking that constitutional duty.[140] He also acknowledged that the Court enjoys a greater institutional advantage in defining individual liberties than in policing the bounda-

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131 *See id.* at 955-62 (Stevens, J., dissenting).

132 *See id.* at 923-25.

133 *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 150-51 (1988).

134 514 U.S. 549 (1995).

135 *See* Louis H. Pollak, *Foreword*, 94 MICH. L. REV. 533, 535 (1995).

136 *See Lopez*, 514 U.S. at 567-68.

137 *Id.* at 567 (citations omitted); *see also Printz*, 521 U.S. at 936 (Thomas, J., concurring) ("Although I join the Court's opinion in full, I write separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers.").

138 *See Lopez*, 514 U.S. at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *see also* Moulton, *supra* note 62, at 856 (describing the Court as "casting about for some check on national power").

139 *See Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

140 *See id.* at 577-78 (Kennedy, J., concurring).

ries of the commerce power.[141] Despite these reservations, however, Justice Kennedy argued that the importance of federalism justified an active judicial role.[142] In view of the political pressures tempting Congress to exceed its constitutional powers, he asserted that the Court must intervene to safeguard federalism as a critical part of the American constitutional structure.[143]

As these cases indicate, although judicial proclamations of deference to congressional fact finding persist, they provide a mere preface for the determination that Congress has forfeited any entitlement to deference because of inadequate deliberation in a particular case.[144] As in *Florida Prepaid*, the Court's position in *Lopez* amounted to a conclusion, based on the Court's independent review of the factual underpinnings of the legislation, that Congress had not properly considered the constitutionally significant interests. This position represents a substantial departure from an attitude of deference. So-called deference that depends on an independent assessment of the underlying basis for the legislation is functionally equivalent to nondeference.

C. Deference to Administrative Agencies

The evolving case law also undercuts prior proclamations of broad judicial deference in other areas of law. Since the early days of the administrative state, courts have shown some deference to the legal interpretations of administrative agencies.[145] The 1984 Supreme Court case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[146] appeared to provide a particularly strong statement of the deference principle, mandating broad judicial deference to an agency's

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141 *See id.* at 579 (Kennedy, J., concurring) ("The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.").

142 *See id.* at 578 (Kennedy, J., concurring).

143 *See id.* (Kennedy, J., concurring).

144 *See id.* at 562-63; Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2207-10 (1999).

145 *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). Although *Hearst* provides the classic reference for early manifestations of judicial deference, some scholars question whether that case actually exhibits a deferential approach. *Compare* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 374-75 (1999) (describing "deferential rational basis test"), *with* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 463-64 (1993) ("On closer examination, however, the Court engages in a much more thorough and independent analysis of the law [than some scholars have suggested].").

While mandating deferential review of issues of fact, the Administrative Procedure Act arguably requires independent review of questions of law. *See* 5 U.S.C. § 706 (1994); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1085-86 (1997). Nevertheless, courts have often employed a deferential standard. *See id.* at 1086.

146 467 U.S. 837 (1984).

interpretation of statutes.[147] The Court held that if a statute is ambiguous, courts must defer to the reasonable interpretation of the agency authorized to implement that statute.[148] The evolving doctrine, however, indicates that the Court has lost confidence in such exercises of administrative power.

Recent scholarship suggests that the Supreme Court has failed to accord administrative agencies the deference that *Chevron* seemingly requires.[149] Instead, the Court assumes an active role in reviewing agency determinations.[150] Some scholars conclude that judicial deference may be a victim of the "new textualism."[151] Under the leadership of Justice Scalia, federal courts emphasize deriving meaning from the plain language of the statute.[152] *Chevron* contemplates deference to agency interpretations if the language of the statute itself is ambiguous.[153] But the plain-language focus of the new textualism reduces the instances in which the courts will find a gap that administrative construction must fill.[154] A commitment to textualism appears to en-

147 *See id.* at 842-45.

148 *See id.* at 842-43.

149 *See* Theodore L. Garrett, *Judicial Review After* Chevron*: The Courts Reassert Their Role*, NAT. RESOURCES & ENV'T, Fall 1995, at 59, 78-79; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-93 (1992) [hereinafter Merrill, *Judicial Deference*]; Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 359-63 (1994) [hereinafter Merrill, *Textualism*]; Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995); Zeppos, *supra* note 60, at 324; *see also* John F. Belcaster, *The D.C. Circuit's Use of the* Chevron *Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745, 754, 764 (1992) (finding ambivalence in the D.C. Circuit's responses to *Chevron* from 1984 to 1990). On the other hand, some studies have documented greater *Chevron* deference by lower federal courts. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1007-13, 1057; *see also* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 72-73 (1995) (contrasting courts of appeals' embrace of *Chevron* deference with the U.S. Supreme Court's frequent rejection of deference).

150 *See* Merrill, *Judicial Deference*, *supra* note 149, at 980-85; Merrill, *Textualism*, *supra* note 149, at 357-62; Pierce, *supra* note 149, at 750.

151 *See, e.g.*, Merrill, *Textualism*, *supra* note 149 (discussing the tension between textualism and *Chevron* deference).

152 *See id.* at 351-52.

153 *See Chevron*, 467 U.S. at 843.

154 *See* Merrill, *Judicial Deference*, *supra* note 149, at 990-92; Merrill, *Textualism*, *supra* note 149, at 354-63; Pierce, *supra* note 149, at 752. *But see* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 133 n.153 (1997) (questioning whether the conclusions of Merrill and Pierce rest on a representative sample of cases); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 53-59 (1998) (presenting empirical data, drawn from decisions of courts of appeals, that question the link between judges' interpretive methodologies and their proclivity to defer to administrative agencies); *cf.* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1771 (1997) (concluding that political ideology has a significant influence on administrative law decisions by the Court of Appeals for the D.C. Circuit).

tail a belief that statutes generally have a determinate meaning that one can ascertain by reading only the text of the legislation and a dictionary. Justice Scalia himself has asserted a connection between textualism and the absence of deference to administrative agencies: "One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists."[155] At the same time, in reviewing agency policy determinations, courts have continued to apply a "hard look" doctrine that involves close judicial scrutiny.[156]

The administrative deference that *Chevron* mandates can be understood as ensuring the vitality of the modern activist government. One of the original barriers to the development of the administrative state was the nondelegation doctrine, under which courts prohibited Congress from delegating lawmaking authority to other bodies, including administrative agencies.[157] As part of its validation of the New Deal, the Court desisted from enforcing the nondelegation doctrine, thus allowing Congress broad discretion to allocate legislative power.[158] One can justify deferential review on the theory that congressional delegation of lawmaking authority implies a restriction on judicial review of the exercise of that authority.[159] Deference thus ensures that Congress, not the judiciary, will have the primary role in allocating lawmaking power. Deference protects congressional decisions from the rigorous review that the nondelegation doctrine requires. Professor Jerry Mashaw forcefully puts the matter: "[T]he Court seems to have written its opinion in *Chevron* as if to drive the last nail in the sporadically reopened casket of the nondelegation doctrine."[160]

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155 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

156 The U.S. Supreme Court blessed the "hard look" doctrine in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-44 (1983). For a discussion of the application of the hard-look doctrine and its effects on the rulemaking process, see Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410-26 (1992); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 539-56 (1997); and Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 490-99 (1997).

157 *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478-88 (1989) (describing the nondelegation doctrine's central role in the battle over the development of the modern administrative state).

158 *See id.* at 483-88.

159 *See* Monaghan, *supra* note 42, at 25-28.

160 Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 834 (1991). For an extended discussion of the connection between *Chevron* and the nondelegation doctrine, see Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 271-80 (1988).

The erosion of *Chevron* deference bespeaks a retreat from this affirmation of the activist, administrative state. Robust judicial review need not be inconsistent with support for the administrative state. Judicial review of agency inaction, for example, might facilitate congressional efforts to ensure that regulations further the public interest. Contemporary doctrine, however, does not promote agency intervention.[161] The recent turn to textualism corresponds instead to a loss of faith in the concept of an activist government.[162] Skepticism about the benefits of governmental intervention gives rise to an emphasis on mechanical rules that are easily applied and perhaps not subject to strategic manipulation.[163] Professor Merrill has contrasted the present situation with earlier periods in which "courts saw themselves as playing a purposive, constructive role in managing the administrative state."[164] That attitude, he argues, is now absent.

In keeping with this desire to curb congressional power, a recent decision of the Court of Appeals for the District of Columbia Circuit, *American Trucking Ass'ns v. United States Environmental Protection Agency*,[165] indicates that judicial enforcement of the nondelegation doctrine may be reawakening after a sixty-year slumber.[166] Current developments in administrative law thus manifest increasing concern with checking federal governmental power and an accompanying growth in judicial hegemony.

D. The Political Question Doctrine

The political question doctrine represents still another category of cases in which courts traditionally have deferred to the determinations of other governmental actors. Indeed, in its strongest form, the political question doctrine constitutes an area in which courts have absolutely refused to review decisions made by other branches of gov-

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Some have found a more direct connection between deferential decisions and the substance of a case. *See* Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 474-75 (1996) ("Our tests show that the Court does not uniformly endorse judicial deference, but rather does so discriminately in the years where the doctrine yields policy outcomes more to the Court's liking."); Kerr, *supra* note 154, at 49 ("Just as the political model asserts, judges who applied *Chevron* in cases with clear political ramifications tended to reach results consistent with their political views.").

161 *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985) (restricting review of agency decisions not to undertake enforcement actions).

162 *See* Merrill, *supra* note 145, at 1044.

163 *See id.*

164 *Id.* at 1092.

165 175 F.3d 1027 (D.C. Cir. 1999).

166 For a critique of the *American Trucking* court's understanding of the appropriate judicial role in reviewing administrative action, see Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999).

ernment.[167] Driven by separation of powers concerns,[168] this strong form of the doctrine establishes an exception to judicial review, an area beyond the cognizance of courts.

As is appropriate for a doctrine that limns the borders of judicial review, the political question doctrine traces its origin to the same source as the doctrine of judicial review: *Marbury v. Madison*.[169] In expounding the doctrine of judicial review, Chief Justice Marshall acknowledged a category of cases in which governmental actors exercise discretion of a kind not reviewable by a court.[170] However, the contours of this category have never been subject to precise definition.[171] Here, as elsewhere, the text of the Constitution does not provide definitive guidance.[172]

The decline of judicial deference with regard to political questions can be traced back further than the parallel decline in the other substantive areas examined above.[173] In the 1960s, the Supreme Court issued two decisions that suggested few limits to the Court's powers of review. In *Baker v. Carr*,[174] the Supreme Court overcame its prior resistance to entering the field of state apportionment decisions and invalidated Tennessee's system of allocating legislative representation.[175] In *Powell v. McCormack*,[176] the Court reviewed and rejected the House of Representatives' decision not to seat one of its members.[177] These Supreme Court decisions signaled the decline of the doctrine,

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167 *See* David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1439-40 (1999) (distinguishing between courts' merely deferring to the decisions of other branches and courts' absolutely abjuring review of those decisions).

168 *See* Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125, 135; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 497 (1996).

169 5 U.S. (1 Cranch) 137 (1803).

170 *See id.* at 165-66 ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.").

171 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 2.8.1, at 118-19 (1997); Mulhern, *supra* note 133, at 104.

172 Professor Pushaw has explained the issue as follows:

> [T]he real issue is whether a constitutional question must be left to a political branch for a *final, non-reviewable decision*. And that determination cannot be based on the Constitution's text, which nowhere states that any particular exercise of legislative or executive power is or is not judicially reviewable. Therefore, interpretation must focus primarily not on the Constitution's language, but instead on its structure, political theory, history, and precedent.

Pushaw, *supra* note 168, at 501 (footnotes omitted).

173 *See supra* Part II.A-C.

174 369 U.S. 186 (1962).

175 *Compare id.* at 237 (finding justiciable a challenge to state apportionment system) *with* Colegrove v. Green, 328 U.S. 549, 552-56 (1946) (finding same to be non-justiciable).

176 395 U.S. 486 (1969).

177 *See id.* at 549-50.

and subsequent developments have not suggested its revival.[178] Indeed, one commentator has suggested that the doctrine "may be falling into desuetude."[179] In the 1993 case of *Nixon v. United States*,[180] the Court did find nonjusticiable the question whether certain Senate procedures fell below the standard mandated by the Constitution's command that the Senate "try"[181] impeachments.[182] But even in this case, Justice White, joined by Justice Blackmun, rejected the political question doctrine.[183] Justice Souter adopted at best a lukewarm version of the doctrine, purporting to find the question nonjusticiable, but insisting that judicial review might be appropriate if the Senate's procedures were too troubling.[184]

The contested status of the political question doctrine in the context of impeachment and the absence of its application in other realms suggest that the area protected from judicial review by the doctrine remains small. As a historical matter, the political question doctrine reached its zenith with the New Deal Court[185]—a Court that sought to allow the federal government freedom to address the needs of the emerging national economy. Certainly, the decline of the doctrine conforms to the current Court's renewed concern with imposing judicial restraints on the scope of federal power.

The area of foreign affairs presents an exception to the pattern of nondeference, but an exception that conforms to the overall theory of deference advanced in this Part. The Court rarely finds nonjusticiable political questions in foreign affairs cases.[186] The Court does, how-

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178 *See generally* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 20 (1992) (summarizing cases in which courts have refused to apply the political question doctrine).

179 *Id.* at 61; *see also* Bederman, *supra* note 167, at 1445 ("The recent decisions have all but given the political question doctrine a quiet burial.").

180 506 U.S. 224 (1993).

181 U.S. CONST. art. I, § 3, cl. 6.

182 *See Nixon*, 506 U.S. at 238.

183 *See id.* at 239-52 (White, J., concurring in the judgment).

184 Justice Souter stated:

> If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply "'a bad guy,'" judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.

Id. at 253-54 (Souter, J., concurring in the judgment) (citation omitted); *see also* Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After* Nixon, 44 DUKE L.J. 231, 248-61 (1994) (discussing different theories regarding the scope of judicial review of impeachments following *Nixon*).

185 *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 625 (1976).

186 *See* Bederman, *supra* note 167, at 1442-46.

ever, defer heavily to executive decisions in this area.[187] In foreign affairs, the review is often loose in theory, but nonexistent in fact.[188] This relatively lenient standard of review provides further evidence of the connection between deference and a theory of enumerated powers. Foreign affairs is an exceptional area in which the Court has found the power of the federal government to be plenary, rather than limited.[189] Therefore, the unusual deference in foreign affairs corresponds to this unusual theory of federal governmental power.

E. A Nondeferential Approach to Overruling *Miranda*

A recent decision of the Court of Appeals for the Fourth Circuit shows that lower courts are following the Supreme Court's disdainful approach to the constitutional interpretations of coordinate branches of government. In *United States v. Dickerson*,[190] the Fourth Circuit essentially held that Congress had overruled the Supreme Court's decision in *Miranda v. Arizona*[191] by enacting 18 U.S.C. § 3501.[192] Although this thumbnail sketch might leave the impression that the case represents an instance of judicial deference, the opinion takes pains to reject deference to the constitutional interpretation of other branches of government.[193] In its assertive approach and in its subtext of limiting federal power, *Dickerson* continues the themes discussed earlier.[194]

Commentators have posited a role for Congress in modifying prophylactic rules created by the Court.[195] For example, in the area of criminal procedure, the Supreme Court has fashioned rules designed to protect constitutional rights by reaching more broadly than the Constitution itself. The rules flowing from *Miranda* in particular set up certain procedures that must be followed for a confession to be

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187 *See* Strauss, *supra* note 29, at 126-27.

188 *See* Bederman, *supra* note 167, at 1446.

189 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936) ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."); Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 U. COLO. L. REV. 1127, 1131-32 (1999); G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1120 (1999). Professor White provides a critique of the conventional view of a sharp dichotomy between domestic and foreign realms. *See id.* at 1121-23.

190 166 F.3d 667 (4th Cir.), *cert. granted*, 120 S. Ct. 578 (1999).

191 384 U.S. 436 (1966).

192 *See Dickerson*, 166 F.3d at 687.

193 *See id.* at 672, 687-88.

194 *See supra* Part II.A-D.

195 *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 26-29 (1975) (discussing the Court's role in creating a constitutional common law of civil liberties).

admissible in state or federal court.[196] The Supreme Court, however, has refused to constitutionalize the specific requirements of *Miranda*.[197] In *Miranda*'s wake, Congress enacted legislation, 18 U.S.C. § 3501, that sought to provide an alternative, more permissive framework for determining the admissibility of confessions in federal court.[198]

Section 3501 provides a fascinating example of the potential interplay among coordinate branches of government in interpreting the Constitution. Arguably, § 3501 represents a congressional attempt to redefine the prophylactic rules necessary to protect the rights of persons subject to police interrogation. For its part, the executive branch has concluded that § 3501 is unconstitutional because it does not adequately protect the judicially defined constitutional rights of the accused.[199] Any adjudication involving § 3501 would seem to require careful consideration of the overlapping roles of the executive, legislative, and judicial branches of government in interpreting the Constitution.

Surprisingly, however, the Fourth Circuit in *Dickerson* managed to reach the issue in a manner that not only failed to recognize the role of other branches in interpreting the Constitution, but actually mocked that role. The court found that in enacting § 3501, Congress sought to modify *Miranda*.[200] Citing *Boerne*, the Fourth Circuit rejected the notion that Congress could play a role in shaping an interpretation of the Constitution.[201] Accordingly, the court concluded that § 3501 could be constitutional only if the *Miranda* rules were not constitutionally required.[202] Based on passages from various Supreme Court opinions, the Fourth Circuit held that *Miranda* did not have constitutional roots, but was instead merely a judicially fashioned rule

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196 The Court stated these now familiar procedures as follows:

> [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 479.

197 *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 305 (1985); New York v. Quarles, 467 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974).

198 *See* S. REP. No. 90-1097, at 38-51 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124-38; *see also* Eric D. Miller, Comment, *Should Courts Consider 18 USC § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1033 (1998) ("Congress made no secret of its hope that Section 3501 would undo *Miranda*.").

199 *See* United States v. Dickerson, 166 F.3d 667, 672 (4th Cir.), *cert. granted*, 120 S. Ct. 578 (1999).

200 *See id.* at 686-87.

201 *See id.* at 687-88.

202 *See id.*

of evidence subject to legislative displacement.[203] In the course of upholding § 3501, the court thus rejected a role for Congress in fashioning constitutional prophylactic rules.

This reasoning casts doubt on the applicability of *Miranda* rules in state courts. Although § 3501 applies only in federal prosecutions,[204] by insisting on the nonconstitutional status of *Miranda*, the Fourth Circuit invited states to deviate from *Miranda* as well. The court had to acknowledge that the Supreme Court clearly understood *Miranda* principles to govern in state court cases, such as *Miranda* itself. The Fourth Circuit ambiguously characterized the justification for applying *Miranda* in state cases as "an interesting academic question."[205] Given the Fourth Circuit's understanding of *Miranda* rules as not grounded in the Constitution, the question would seem to be "not of an intricacy proportioned to its interest."[206] If *Miranda* rules are essentially guidelines for federal practice, which Congress may alter, it is difficult to conceive how the rules could be obligatory on states. Authorizing the Supreme Court to prescribe rules binding state, but not federal, courts would be an odd theory of supervisory power.[207] The *Dickerson* opinion leads directly to the conclusion that no justification exists for applying *Miranda* in state court proceedings. *Dickerson* thus suggests significant limits on the scope of federal regulation of state law enforcement practice.

The *Dickerson* court reserved its harshest language for criticizing the executive branch's assertion of a role in constitutional interpretation. Since the enactment of § 3501 in 1968, no presidential administration has sought to use the provision to override *Miranda* rules.[208] The Clinton Administration specifically had taken the position that § 3501 was unconstitutional.[209] Theories of coordinate branch interpretation suggest that the Executive should make an independent judgment about the constitutionality of statutes and even that the President is duty-bound to refuse to enforce laws that the President

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203 *See id.* at 688-92. For contrary arguments regarding the constitutional status of *Miranda* rules, see, for example, Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1175-76 (1998).

204 *See* 18 U.S.C. § 3501(a) (1994).

205 *Dickerson*, 166 F.3d at 691 n.21. The court, however, noted that the answer to this question "has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution." *Id.*

206 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

207 For a discussion of the theory of the Supreme Court's supervisory authority over federal courts and the application of this theory to *Miranda*, see Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1514-15 (1984).

208 *See Dickerson*, 166 F.3d at 672.

209 *See id.*

finds unconstitutional.[210] Moreover, the U.S. Supreme Court has never addressed the constitutionality of § 3501.[211] The executive decision not to enforce § 3501 thus raised interesting issues about executive interpretation of the Constitution. The Fourth Circuit, however, summarily rejected any role for the President in constitutional interpretation. The court castigated the Justice Department's refusal to enforce the statute, accusing it of "elevating politics over law."[212] Ironically, in the course of finding that Congress had effectively overruled *Miranda*, the court couched its opinion in the rhetoric of judicial supremacy, thus denying any place for the Legislature or the Executive in constitutional interpretation.

F. Summary

Recent federal cases endorse notions of judicial supremacy and generally reject deference to other branches of government. Deference survives mainly in the rational-basis test applied to due process and equal protection challenges that do not implicate a fundamental right or a suspect classification.[213] Tracing the question of deference

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210 *See, e.g.*, Easterbrook, *supra* note 23, at 914-24; *see also* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994) (discussing circumstances in which the President may decline to enforce statutes that the President believes are unconstitutional). *But see* CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE *passim* (1998) (rejecting presidential authority to decline enforcement of statutes that the President believes are unconstitutional). In view of traditional notions of prosecutorial discretion, the arguments for presidential authority to decline enforcement of statutes on grounds of unconstitutionality may be particularly strong in the area of criminal law. *See* Miller, *supra* note 198, at 1054-58 (discussing this argument and rejecting its application in the case of § 3501).

211 *See Dickerson*, 166 F.3d at 671.

212 *Id.* at 672. A dissenting judge rejected this characterization and asserted that the court should respect the executive's decision not to rely on the statute. *See id.* at 696-97 (Michael, J., dissenting in part and concurring in part).

213 *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 58 (1997) ("[T]he 'rational basis' test familiarly employed under the Equal Protection Clause reflects an explicitly restrained judicial response to the phenomenon of reasonable disagreement."); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999) (linking rationality review to James Bradley Thayer's argument for judicial deference); *cf.* Monaghan, *supra* note 42, at 33 ("Wherever the rationality test obtains, *Marbury*'s demand of independent judicial judgment is a weak one, functionally equivalent to deference, with the judicial role confined to policing boundaries."). Conversely, Professor Komesar points out:

> In contemporary jurisprudence, most legislative determinations of equal treatment or protection of property receive no meaningful judicial consideration at all. Minimal scrutiny of that vast range of legislation referred to as "economic and social" is in reality zero scrutiny, and it cannot be realistically associated with the absence of "clear error" no matter how one defines "clear error."

Neil K. Komesar, *Slow Learning in Constitutional Analysis*, 88 NW. U. L. REV. 212, 218 (1993); *see also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 205-06 (1988) (characterizing rational-basis review as prophylactic underenforcement of constitutional provisions).

to a theory of enumerated federal powers helps to explain the continued judicial deference in these areas. In due process and equal protection cases, federal courts most often review the actions of state and local, rather than federal, governmental bodies. A commitment to a doctrine of enumerated federal powers has no application in challenges to nonfederal entities. By contrast, the areas of declining deference canvassed above[214] relate to doctrines applicable almost exclusively to federal action.[215] It is deference to federal action that has abated.

III

PLENARY POWER AND DEFERENTIAL JUDICIAL REVIEW UNDER STATE CONSTITUTIONS

State court doctrine stands in marked contrast to this recent federal trend. While Supreme Court deference to Congress has declined in many areas, state court deference to state legislatures continues to be strong. Broad generalizations are perilous, but the overall pattern appears clear.[216] In reviewing claims under a state constitu-

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214 *See supra* Part II.A-E.

215 Although the political question doctrine also may be applied to state action, most of the recent cases raising political question issues relate to federal practices. *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (involving federal impeachment proceedings); Franklin v. Massachusetts, 505 U.S. 788 (1992) (involving federal reapportionment methods); United States Dep't of Commerce v. Montana, 503 U.S. 442 (1992) (same); United States v. Munoz-Flores, 495 U.S. 385 (1990) (challenging a provision of the federal Victims of Crime Act of 1984 under the Origination Clause).

216 Indeed, while deferential review has always been the norm in state courts, the pockets of nondeferential review that did exist appear to be declining. For a time, many state courts engaged in substantive due process review of social and economic legislation, despite the demise of such review in the federal courts. *See* James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 94, 99-105 (Bradley D. McGraw ed., 1985); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1463 (1982) [hereinafter *Developments*]; Lawrence M. Friedman, *State Constitutions in Historical Perspective*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1988, at 33, 40-41; Peter J. Galie, *State Courts and Economic Rights*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1988, at 76; A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 879-91 (1976).

Economic substantive due process review persists in some states. *See* ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW CASES AND MATERIALS 291 (3d ed. 1999); Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 472-73 (1996) (finding that some state courts impose a stricter rationality standard than do the federal courts). The practice, however, has waned. *See* Susan P. Fino, *Remnants of the Past: Economic Due Process in the States*, *in* HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING 145, 156-57 (Stanley H. Friedelbaum ed., 1988).

Perceived incursions on the judicial domain provoke more assertive responses from state courts. For instance, state courts have resisted attempts to reduce their regulatory authority over lawyer discipline and rules of practice. *See* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 104 & nn.107-08 (1998). Recently, this defense of judicial authority has led state courts to invalidate tort reform measures as unacceptable limits on the remedial powers of the Judiciary. *See, e.g.*, State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062,

tion,[217] state courts frequently employ a highly deferential standard, insisting that legislation be upheld unless it is "unconstitutional beyond a reasonable doubt."[218] In this regard, James Bradley Thayer's approach[219] seems to have continuing vitality in the states. Indeed, some states, including Nebraska and North Dakota, constitutionalize deference by requiring a supermajority vote of the state supreme court to declare a law unconstitutional.[220] In Nebraska, five of seven

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1097 (Ohio 1999) (holding that Ohio tort reform statute "usurps judicial power" and thus violates Ohio's constitution); William Glaberson, *State Courts Sweeping Away Laws Curbing Suits for Injury*, N.Y. TIMES, July 16, 1999, at A1.

217 This Article addresses the practice of state court judicial review only under state constitutions. When reviewing federal questions, state courts must apply the standard of review federal law dictates. *See* Chapman v. California, 386 U.S. 18, 20-21 (1967) (holding that federal law provides the standard for review of federal constitutional errors in state courts).

218 *Ex parte* Bronner, 623 So. 2d 296, 298 (Ala. 1993); *accord* McClead v. Pima County, 849 P.2d 1378, 1382 (Ariz. Ct. App. 1992); Winslow Constr. Co. v. City & County of Denver, 960 P.2d 685, 692 (Colo. 1998); City Recycling, Inc. v. State, 725 A.2d 937, 941 (Conn. 1999); Blair v. Cayetano, 836 P.2d 1066, 1069 (Haw. 1992); *In re* C.S., 516 N.W.2d 851, 857 (Iowa 1994); Moore v. Board of Supervisors, 658 So. 2d 883, 884 (Miss. 1995); State v. Butler, 977 P.2d 1000, 1002 (Mont. 1999); City of New York v. State, 562 N.E.2d 118, 121 (N.Y. 1990); State *ex rel.* Shkurti v. Withrow, 513 N.E.2d 1332, 1338 (Ohio 1987); Seibert v. Clark, 619 A.2d 1108, 1113 (R.I. 1993); Rothschild v. Richland County Bd. of Adjustment, 420 S.E.2d 853, 856 (S.C. 1992); State v. Heinrich, 449 N.W.2d 25, 27 (S.D. 1989); Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area, 953 P.2d 1150, 1159 (Wash. 1998); Riccitelli v. Broekhuizen, 595 N.W.2d 392, 401 (Wis. 1999); Frank v. State, 965 P.2d 674, 678-79 (Wyo. 1998); *cf.* Hlava v. Nelson, 528 N.W.2d 306, 308 (Neb. 1995) ("A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality."); Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah 1993) (rejecting the unconstitutional-beyond-a-reasonable-doubt standard in favor of the principle that "[t]he act is presumed valid, and we resolve any reasonable doubts in favor of constitutionality").

219 *See supra* notes 56-61 and accompanying text.

220 The Ohio Constitution previously contained a supermajority requirement, but this provision was repealed in 1944. *See* OHIO CONST. art. IV, § 2 editor's comment (West 1999). The Ohio provision occasioned the following outburst by Chief Justice Carrington T. Marshall, in an opinion in which an insufficient majority concurred in a holding of unconstitutionality:

> When in the course of human events it becomes necessary for the majority of the Supreme Court of Ohio to differ from the judgment pronounced by the minority, and to assume the separate though inferior station to which the amendment of 1912 has consigned them, a decent respect to the opinions of the bench and bar of the state requires that they should declare the causes which impel them to the separation.

City of E. Cleveland v. Board of Educ., 148 N.E. 350, 352-53 (Ohio 1925) (Marshall, C.J., dissenting). The adoption of supermajority requirements in these states was nearly contemporaneous. Ohio adopted its requirement in 1912, North Dakota in 1919, and Nebraska in 1920. *See* Katherine B. Fite & Louis Baruch Rubinstein, *Curbing the Supreme Court–State Experiences and Federal Proposals*, 35 MICH. L. REV. 762, 774, 779, 780 (1937). For a discussion of these state supermajority requirements, see *id.* at 772-80; Carl L. Meier, *Power of the Ohio Supreme Court to Declare Laws Unconstitutional*, 5 U. CIN. L. REV. 293 (1931); and William W. Redmond, Note, *Constitutional Law–Requirement in State Constitution of More Than a Majority of Supreme Court to Invalidate Legislation*, 19 NEB. L. BULL. 32 (1940). For a discussion of the procedural problems produced by such supermajority requirements, see

state supreme court justices must concur to invalidate legislation.[221] In North Dakota, a decision holding legislation unconstitutional requires the votes of four of the five members of the supreme court.[222]

This judicial deference has manifested itself in areas such as school finance reform, in which courts have proven very hesitant to find state constitutional violations or to enforce remedies once violations have been established.[223] The deferential attitude also appears in the reluctance of state courts to interpret their constitutions independently of the federal Constitution. Many state constitutions contain individual rights provisions that mirror those in the federal Bill of Rights. State courts' power to interpret these guarantees as having meanings different from their federal analogs is well established.[224] Recently, much judicial and scholarly attention has focused on state rights provisions and their potential to provide additional protections for individuals at a time when the Warren Court-era expansion of rights guarantees appears to have passed.[225] Research indicates, however, that for the most part, state courts follow federal constitutional analysis, seldom offering additional protections under their state constitutions.[226]

Robert L. Hausser, *Limiting the Voting Power of the Supreme Court: Procedure in the States*, 5 OHIO ST. L.J. 54 (1938).

221 *See* NEB. CONST. art. V, § 2; *see also* State *ex rel.* Spire v. Beermann, 455 N.W.2d 749, 749-50 (Neb. 1990) (upholding legislation despite finding of unconstitutionality by four of seven justices).

222 *See* N.D. CONST. art. VI, § 4 (requiring concurrence of four justices to hold legislation unconstitutional); *id.* art. VI, § 2 (setting membership of supreme court at five justices); *see also* Bismarck Pub. Sch. Dist. v. State, 511 N.W.2d 247, 250 (N.D. 1994) (upholding state's school finance system despite the finding of three of five justices that the system violates the state constitution).

223 *See* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1082-85 (1991); *see also* Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by* Sheff v. O'Neill*—and a Proposed Solution*, 29 CONN. L. REV. 1115, 1138 (1997) (noting the extreme deference of state courts to legislatures in implementing remedies in school finance cases).

224 *Cf.* Michigan v. Long, 463 U.S. 1032, 1040-42 (1983) (noting that state courts may use federal precedent as mere guidance in deciding cases).

225 For example, Justice Brennan has urged increased attention to state constitutions. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 547-48 (1986). Other commentators also have championed the "new judicial federalism." *See* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Court Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984); *see also Developments*, *supra* note 216, at 1367 ("The present function of state constitutions is as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law.").

226 *See, e.g.*, BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 158-59 (1991) (finding little state court deviation from federal doctrine); Craig F. Emmert & Carol Ann

Many reasons may explain this tendency of state courts to interpret state constitutions as having the same meaning as the federal Constitution, a practice sometimes termed "lockstep interpretation." Considerations of convenience and uniformity, for example, may be involved.[227] The rejection of independent interpretation, however, also exemplifies a deferential attitude toward applying the power of judicial review. State courts hesitate to declare laws unconstitutional, and lockstep interpretation provides a haven for this deferential posture.[228] In brief, lockstep interpretation represents an extreme expression of judicial passivity. The Supremacy Clause requires that state courts apply the federal Constitution against state officials.[229] A differing interpretation of state constitutions could only put additional constraints on state governmental action. By conforming state constitutions to the federal standard, state courts afford the maximum possible deference to state actors. Lockstep interpretation eliminates the state constitution as an independent restriction on state governmental activity.[230] Rejection of independent interpretation by state courts thus embodies a deferential application of judicial review quite different from that evident in recent federal case law.

This difference in state constitutional practice further suggests a strong connection between deference and judicial views on fundamental aspects of constitutional structure. In explaining the deferential standard, courts and commentators often rely on the notion that,

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Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 42-48 (1992) (reporting the results of a survey that found substantial state court reliance on federal law); Susan P. Fino, *Judicial Federalism and Equality Guarantees in State Supreme Courts*, 17 PUBLIUS 51, 66-67 (1987) (same); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780-84 (1992) (same); Barry Latzer, *Into the '90s: More Evidence That the Revolution Has a Conservative Underbelly*, 4 EMERGING ISSUES ST. CONST. L. 17, 17 (1991) (finding that state criminal procedure is looking "more and more like . . . federal constitutional criminal law"); Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190, 193-94 (1991) (same); Michael E. Solimine & James L. Walker, *Federalism, Liberty, and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1467 (1997) ("Despite the considerable hoopla afforded a few decisions from a few states, the vast majority of state courts follow federal law when construing the liberty-protective provisions of their own constitutions . . . ."); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1114-17 (1997) (summarizing research finding limited state court reliance on state constitutions).

227 *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 424 (1998).

228 I develop this argument in detail elsewhere. *See id.* at 419-28.

229 The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

230 *See* Schapiro, *supra* note 227, at 421-22.

in contrast to the national government of enumerated powers, state governments enjoy plenary authority.[231] The underlying assumption is that state governments may undertake any action that is not specifically prohibited; they need not look to their constitutions for authorization.[232]

The connection between the theory of plenary powers and the deferential standard of judicial review is long-standing. In the 1884 case of *Alexander v. People*,[233] for example, the Colorado Supreme Court explained that it would strike down legislation only if no doubt existed as to its unconstitutionality.[234] As support for this principle, the court quoted Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, who asserted in an 1834 opinion that courts "never declare a statute void, unless the nullity and invalidity of the act are placed in their judgment beyond reasonable doubt."[235] The Colorado court explicitly linked that deferential standard to the plenary power of the state legislature: "There would be greater force in the arguments employed to demonstrate the invalidity of the laws . . . if the state constitution, like the national constitution, was a grant of enumerated powers."[236]

More recently, Justice Tobriner of the California Supreme Court affirmed this theoretical distinction between the state and national legislatures: "Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature."[237] From the legislature's plenary authority, Justice Tobriner derived the principle that the court should adopt a deferential attitude in the exercise of judicial review, resolving any doubts in favor of upholding the legislature's action.[238] The Rhode Island Supreme Court expressed similar sentiments in *City of Pawtucket v. Sundlun*:[239]

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231 *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 6-9 (1998); W. F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 137 (1919).

232 *See* WILLIAMS, *supra* note 216, at 793-94.

233 2 P. 894 (Colo. 1884).

234 *See id.* at 896.

235 *Id.* (quoting Case of Wellington, 33 Mass. (16 Pick.) 87, 95 (1834)) (internal quotation marks omitted).

236 *Id.*

237 Pacific Legal Found. v. Brown, 624 P.2d 1215, 1221 (Cal. 1981) (en banc) (quoting Methodist Hosp. v. Saylor, 488 P.2d 161, 164 (Cal. 1971)) (internal quotation marks omitted).

238 *See id.*; *see also* WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE 31 (1993) (noting the relationship between a broad grant of legislative authority and a deferential standard of judicial review); Michael J. Besso, *Connecticut Legislative Power in the First Century of State Constitutional Government*, 15 QUINNIPIAC L. REV. 1, 49 (1995) (same).

239 662 A.2d 40 (R.I. 1995).

> Because of the broad plenary power of the General Assembly, this court's evaluation of legislative enactments has been extremely deferential . . . . Specifically, this court will not invalidate a legislative enactment unless the party challenging the enactment can prove *beyond a reasonable doubt* to this court that the statute in question is repugnant to a provision in the constitution.[240]

Just as the decline of deference in federal courts reflects increased concern with limiting the power of the federal government, the continuation of deferential review in the states evinces an ongoing commitment to a theory of plenary state governmental power.

IV
ALTERNATIVE THEORIES OF JUDICIAL DEFERENCE

Having reviewed the varying deferential practices of state and federal courts and their connections to the concepts of enumerated and plenary powers, I now examine three alternative theories of deference. In constructing frameworks to guide the exercise of judicial review, scholars have advanced theories based on textualism, institutional competence, and democratic deliberation. This Part reviews these theories and examines their shortcomings.

Two criteria are essential for judging theories of deference. First, the theory must be determinate. It must provide useful guidance in deciding the appropriate level of deference to employ in a particular situation. The application of the principle may be contestable, but at least the relevant factors must be clear. Second, a theory of deference must be consistent with the particular constitution in issue. Deference involves the allocation of decision-making authority among different branches of government. Such a fundamental issue of division of power must accord with underlying constitutional principles.

In this Part, I contend that models of deference based on textualism and institutional competence are generally indeterminate. Without greater attention to underlying normative principles, neither of these approaches can provide an adequate account of deference. The principle of promoting deliberation fares somewhat better than the others. Its focus on deliberative values provides more determinate guidance. However, this model also can give rise to conflicting views

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240 *Id.* at 44-45 (citation omitted). In a similar vein, in *Board of Education v. City of St. Louis*, 879 S.W.2d 530, 532-33 (Mo. 1994), the Missouri Supreme Court stated:

> Unlike the Congress of the United States, which has only that power delegated by the United States Constitution, the legislative power of Missouri's General Assembly . . . is plenary, unless, of course, it is limited by some other provision of the constitution. Any constitutional limitation, therefore, must be strictly construed in favor of the power of the General Assembly.

Id. (citations omitted).

of deference. The singular focus on democratic deliberation, to the exclusion of other constitutional values, presents further problems. In particular, the majoritarian features of the model conflict with constitutionalism's basic commitment to protecting certain individual rights from the effects of the normal democratic processes.[241]

A. Textualism

One approach to determining the appropriate level of deference is to refer to the document that the court is attempting to construe. Following this framework, the court should look to the constitution itself, or the statute in the administrative context, for guidance.[242] Then the court should simply follow the instructions supplied therein, adopting the standard of review set forth in the constitution or statute. Grounded in the authoritative document, this approach has strong claims to interpretive legitimacy. The court applies the entire constitution or statute, including the portions detailing the standard of review. The text may present questions, but if it fails to provide a definitive answer, it may at least establish the deference owed to various answerers.

Unfortunately, the documents being construed often lack accompanying interpretive guides. The U.S. Constitution, for example, includes no clear textual authorization for judicial review, much less a general standard for its exercise. Only in rare instances does the Constitution speak to the proper allocation of reviewing authority.[243] The Constitution grants Congress the power to regulate interstate commerce.[244] But the Constitution does not specify whether congressional exercise of that power is unreviewable, subject to deferential review, or subject to nondeferential review.[245] The text of the Constitution thus does not indicate whether the standard of review adopted by the Supreme Court in *United States v. Lopez*[246] was too firm, too soft, or just right. Further, the text of the Constitution does *not* detail any limits placed by federalism on congressional regulatory power. As the

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241 *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (discussing the tension between elective judiciaries and constitutional democracy).

242 *See, e.g.*, Paulsen, *supra* note 23, at 288-92 (discussing textual arguments for deference in particular areas).

243 One example is the Reexamination Clause of the Seventh Amendment: "[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII; *cf.* Paulsen, *supra* note 23, at 288-92 (discussing textual exceptions to the general principle of coordinate interpretation).

244 *See* U.S. CONST. art. I, § 8, cl. 3.

245 *See* Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 404-06 (1986).

246 514 U.S. 549 (1995).

Court itself acknowledged, the restrictions on the commandeering of states' functions, identified in *New York v. United States*[247] and *Printz v. United States*,[248] do not derive from any specific constitutional language.[249] The Tenth Amendment may serve as a monument to federalism, but its language establishes no determinate restraints on national power.[250] The text of the Constitution fails to settle the interpretive contest between *Garcia v. San Antonio Metropolitan Transit Authority*[251] and *Printz*, between relying on the political safeguards of federalism and insisting on robust judicial protection of federalism.

With regard to the enforcement clauses of the Reconstruction Amendments, the text suggests some role for Congress in implementing those constitutional guarantees. As discussed above, however, the conferral of the power "to enforce, by appropriate legislation" neither grants a specific interpretive role to Congress, nor establishes a standard for the judicial review of congressional action. The text simply does not provide a particular allocation of authority for determining the scope of federal power.

In the administrative context, Congress does occasionally specify the standard for judicial review of agency action. The *Chevron* doctrine, however, applies only when the statute does not contain an explicit allocation of interpretive authority.[252] Deference rests heavily on the notion of a delegation of interpretive authority to the administrative agency and an *implied* restriction on the scope of judicial review.[253] Similarly, the text of the Constitution plays a role in one aspect of the political question doctrine. The U.S. Supreme Court has

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247 505 U.S. 144, 161, 188 (1992).

248 521 U.S. 898, 935 (1997).

249 *See id.* at 905 ("[T]here is no constitutional text speaking to this precise question . . . ."); Moulton, *supra* note 62, at 872 (noting the absence of a textual basis for the Court's rule against "commandeering" state governments).

250 *See* New York v. United States, 505 U.S. at 156-57 ("The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology."). In deriving principles of state sovereign immunity from the Eleventh Amendment, the Court has demonstrated a similar ability to reach beyond the confines of the Constitution's text. *See* Alden v. Maine, 119 S. Ct. 2240, 2253-60 (1999) (rejecting arguments based on the text of the Eleventh Amendment); Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says . . . .'" (quoting Blatchford v. Native Village, 501 U.S. 775, 779 (1991))).

251 469 U.S. 528 (1985).

252 *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

253 *See* Merrill, *Judicial Deference*, *supra* note 149, at 995 ("Courts reconcile their duty to 'say what the law is' with the practice of deferring to agency interpretations of law by *positing* that Congress, in conferring authority on an agency to administer a statute, has *implicitly* directed courts to defer to the agency's legal views." (emphasis added)); Monaghan, *supra* note 42, at 25-28.

found nonjusticiable, political questions in cases that involve "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[254] As the recent case of *Nixon v. United States*[255] illustrates, though, textual commitment constitutes only one strand of the doctrine.[256]

Some state constitutions do expressly authorize judicial review,[257] but they do not explicitly establish the applicable standard. Further, the few textual signals that do exist have not been particularly influential. A potential interpretive guide present in some state constitutions, for example, is an admonition that the rights granted therein are independent of those established in the federal Constitution.[258] This provision might stand as textual authority to interpret the state constitution without reference to the federal Constitution, thus rejecting the deferential posture implicit in lockstep interpretation. However, these provisions do not appear to deter state courts from following federal doctrine and thus adopting a restrained mode of judicial review under the state constitution.

The Rhode Island Constitution, for instance, asserts the following: "The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States."[259] But Rhode Island courts generally follow the federal lead and have thus developed a rule restricting departures from federal doctrine.[260] In short, while some state constitutions do offer a modicum of textual interpretive guidance, this language provides little assistance in specifying the mode of judicial review that state courts actually apply. As in the other areas reviewed above, interpretive questions vastly outstrip any textual answers.

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254 Baker v. Carr, 369 U.S. 186, 217 (1962).

255 506 U.S. 224 (1993).

256 *See id.* at 236 (relying in part, but only in part, on the textual commitment argument in rejecting Judge Nixon's plea for judicial review of the procedures employed by the Senate during his impeachment trial).

257 *See, e.g.*, GA. CONST. art. 1, § 2, ¶ 5 ("Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."); N.Y. CONST. art. 6, § 3(b)(2) (conferring jurisdiction on the New York Court of Appeals to review judgments declaring that a state or federal statute violates the state or federal constitutions); VA. CONST. art. VI, § 1 (conferring jurisdiction on the Virginia Supreme Court in cases raising state or federal constitutional questions); *see also* Schapiro, *supra* note 227, at 429 (discussing textual support for judicial review under state constitutions).

258 *See, e.g.*, R.I. CONST. art I, § 24.

259 *Id.*

260 *See* State v. Benoit, 417 A.2d 895, 899 (R.I. 1980) (stating that departures from federal doctrine "should be made guardedly"), *overruled on other grounds by* State v. Werner, 615 A.2d 1010 (R.I. 1992); *see also In re* Advisory Opinion to the Governor (Appointed Counsel), 666 A.2d 813, 816-18 (R.I. 1995) (conforming the right-to-counsel provision of the Rhode Island Constitution to federal Sixth Amendment jurisprndence); *Werner*, 615 A.2d at 1013-14 (conforming the unreasonable search-and-seizure provision of the Rhode Island Constitution to federal Fourth Amendment jurisprudence).

B. Institutional Competence

Another approach to the deference issue focuses on the comparative expertise of the various branches of government. Under this theory, a court should defer when another branch enjoys a relative advantage in interpretation.[261] Deriving the appropriate metric for this assessment, however, presents insuperable difficulties. Judgments as to relative competence must depend more on underlying normative commitments than on any readily definable institutional characteristics.

On one level, the institutional competence theory suggests no judicial deference to other branches. After all, the Judiciary is especially well suited to decide legal questions. Judicial expertise in legal interpretation provided one of the early arguments for judicial review under the U.S. Constitution. In *Marbury v. Madison*, Chief Justice Marshall asserted that the Constitution was a species of law and that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[262] Along similar lines, Alexander Hamilton argued that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[263] This judicial expertise indicates that judges are especially skilled at constitutional interpretation and should not yield to the interpretation of others.[264]

Scholars have also pointed to the courts' structural independence as a comparative advantage in constitutional interpretation. Life tenure may make federal judges less subject to political pressures that might interfere with their constitutional judgment.[265] Additionally, the adjudicative process itself may facilitate a fully considered resolution of constitutional disputes.[266] While generally favoring nondeferential review, the institutional expertise approach does suggest deference when constitutional decisions turn largely on factual ques-

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261 *See, e.g.*, Lawson & Moore, *supra* note 32, at 1300 ("A judge . . . has an obligation to defer to the constitutional views of other actors if, but only if, those other actors are more likely than the judge to discover the correct answer."); Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 147 (1993) (asserting that preference for a particular standard of review "depends at least partly on whether and to what extent one believes that, in general, our judges and Justices have a better capacity for sound political-moral judgment than, in general, do our legislators").

262 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

263 THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Willmore Kendall & George W. Carey eds., 1966).

264 *Cf.* Paulsen, *supra* note 23, at 335 ("Law interpretation is what courts do for a living. They are supposed to be good at it.").

265 *See* Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 148 (1993); Strauss, *supra* note 29, at 132; Richard A. Posner, *Appeal and Consent*, NEW REPUBLIC, Aug. 16, 1999, at 36, 38 (book review) (discussing institutional advantages of the Judiciary).

266 *See* Rosenfeld, *supra* note 265, at 148.

tions. Because Congress has the institutional capacity to assess the complex factors underlying whether an activity has a substantial effect on interstate commerce, for example, the Court should defer to congressional conclusions as to the scope of the commerce power.[267]

A version of the institutional competence approach underlies the political-safeguards-of-federalism argument recognized in *Garcia v. San Antonio Metropolitan Transit Authority*.[268] Because the states are represented in Congress, this argument holds, Congress is in a very good position to acknowledge and to weigh appropriately the state interests that may be infringed by particular legislation.[269] Accordingly, the courts should not second-guess, but rather should defer to, congressional determinations in matters of federalism. As a descriptive matter, it is now quite clear that the Court does not trust Congress to make these decisions. For the Court, federalism is too important to leave for someone else to defend.[270]

In the administrative realm, the notion of relative administrative expertise in gathering facts underlay early theories of deference.[271] The doctrine of administrative deference, however, applies not only to agencies' fact-finding, but also to their legal interpretations.[272] Moreover, the *Chevron* doctrine moves away from focusing on administrative expertise,[273] instead tying deference to the clarity of the statute, not the comparative advantage of the agency. *Chevron* apparently requires judicial deference if, but only if, the statute does not clearly resolve the question at issue.[274] The difficulties in assessing the relative expertise of agencies and courts provided part of the impetus to substitute the *Chevron* standard for a multifactor approach to deference.[275]

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267 Similarly, legislative expertise in making means-end assessments and balancing costs and benefits would suggest minimal judicial scrutiny under the Equal Protection and Due Process Clauses for Congress's economic and social policies.

268 469 U.S. 528, 556 (1985).

269 *See id.*

270 *See* United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."). It is probably true that some supporters of the political safeguards argument do not put a particularly high value on federalism. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 253 (1980) ("That personal liberty is neither dependent on nor enhanced by federalism has been substantiated by experience in other countries as well.").

271 *See* Merrill, *Judicial Deference*, *supra* note 149, at 994.

272 *See id.* at 994-95.

273 *See id.*; Monaghan, *supra* note 42, at 25-26.

274 *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

275 *See* Merrill, *Judicial Deference*, *supra* note 149, at 994-95.

A more general problem with the institutional competence theory is the difficulty of evaluating relevant institutional capabilities. Is the Court or Congress better equipped to decide whether conduct substantially affects interstate commerce? On the one hand, Congress can draw on a broad array of social scientific evidence; Congress can commission studies and hold hearings. Unlike the Court, Congress is not limited by the presentation of the parties to a particular controversy. All these features suggest that the Court should defer to congressional determinations. On the other hand, when it comes to the scope of congressional power, perhaps Congress is too biased to make proper judgments. Perhaps national politicians, tempted by special interest dollars, are too willing to aggrandize their own authority.[276] Maybe the institutional position of the more insulated court system affords it a better perspective on the question. Sorting out these contrary considerations requires a weighing of the relative risks and benefits of national power and federalism. General principles of institutional competence provide only limited assistance.

In other areas as well, the scale used to measure competence depends on an assessment of the substantive interests involved and the gravity of the risks associated with various kinds of miscalculations. Part V argues that comparative institutional analysis should play a key role in determining the appropriate level of judicial deference to constitutional interpretations by other government branches. This analysis, though, must reflect the substantive goals to be achieved in a particular situation, not merely generalizations about the relative strengths of the various branches of government.[277]

C. Promoting Democratic Deliberation

The goal of promoting democratic deliberation provides another perspective on the deference question. James Bradley Thayer himself relied principally on this ground when he advanced his influential theory of judicial deference. Some contemporary scholars have embraced this approach, and related strains can be found in recent Supreme Court opinions.

Following Alexander Bickel, much recent scholarship focuses on judicial review as a countermajoritarian institution that is a potential

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276 *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 790-99 (1995) (criticizing the idea that Congress, rather than the Judiciary, can be the primary guardian of federalism); William T. Mayton, *"The Fate of Lesser Voices": Calhoun v. Wechsler on Federalism*, 32 WAKE FOREST L. REV. 1083, 1106-16 (1997) (same).

277 In advancing his own model of comparative institutional analysis, Neil Komesar provides an insightful critique of the flaws in several other theories of constitutional adjudication that rely on assumptions of comparative institutional competence. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 196-270 (1994).

threat to democratic rule.[278] Although Thayer, too, warned of the dangers that judicial review presents, his critique of judicial review rested on quite different bases. Thayer did not emphasize countermajoritarian fears of an unelected Judiciary imposing its will on the populace.[279] Instead, Thayer premised his thoughts on the limited nature of judicial power. Congress, Thayer asserted, inevitably made constitutional decisions, not all of which would be judicially reviewable.[280] For this reason, the Legislature, rather than the courts, functioned as the chief protector of the people against unconstitutional laws. By denying judges a roving commission to root out unconstitutional acts—the kind of power that would have been embodied in a Council of Revision—the Framers denied courts the capacity to function as the primary protector of the Constitution.[281] The people must rely on the constitutional judgments of the Legislature.[282] The question for Thayer was, given the limited scope of judicial power, how could the Judiciary exercise its authority so as best to promote a sense of constitutional responsibility outside of the courts.[283]

Aggressive judicial review, Thayer argued, saps the vitality from constitutional debate in the Legislature.[284] Nondeferential judicial review leads to a kind of democratic debilitation, in which the Legislature and the people lose the ability to engage in informed discourse about constitutional norms.[285] Thayer labored under no illusions about the actual course of legislative deliberations. He referred to "persons . . . who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless,

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278 Bickel's concise elaboration of the countermajoritarian problem is oft-quoted, and deservedly so:

> The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.

BICKEL, *supra* note 59, at 16-17. Because of this countermajoritarian problem, Bickel characterized judicial review as a "deviant institution in the American democracy." *Id.* at 18.

279 *See* KAHN, *supra* note 59, at 85; Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 848-49 (1997) (analyzing Thayer's theory of restraint and distinguishing it from arguments based on the "Countermajoritarian Difficulty").

280 *See* Thayer, *supra* note 56, at 136-38.

281 *See id.* at 136-37 & n.1.

282 *See id.* at 135-36.

283 *See id.* at 155-56.

284 *See id.*

285 *See id.*; *see also* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 299-300 (1995) (discussing Thayer's critique of nondeferential judicial review).

reckless, incompetent."[286] Thayer advocated a deferential standard not out of respect for a supposedly enlightened legislature, but to help strengthen a potentially careless one. Deferential judicial review served an educative function, helping the Legislature and the people to develop a sense of constitutional responsibility.[287] Following Thayer, some contemporary scholars have shown sympathy for the theory that aggressive judicial review may impair democratic deliberation about important constitutional values.[288]

Because this approach to deference rests on a normative preference for deliberative democracy, this framework has greater resolving power than theories based on text or institutional competence. The purposive perspective provides greater guidance in analyzing particular applications of deference. The difficulty in actually correlating deference and democratic deliberation, however, results in a certain amount of indeterminacy in application. What if Thayer's hypothesis that deferential judicial review promotes democratic deliberation proves incorrect? Further, whatever the relationship between deference and the democratic process, why does this normative concern trump all other constitutional considerations? Constitutions embody many values, and a myopic focus on only one, no matter how important that value may be, interferes with the realization of other constitutional concerns.

Some evidence does exist to help evaluate Thayer's hypothesized relationship between deferential review and democratic deliberation,

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286 Thayer, *supra* note 56, at 149.

287 Thayer explained the point as follows:

> [T]he exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. . . .
>
> The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

JAMES BRADLEY THAYER, JOHN MARSHALL (1901), *reprinted in* JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 3, 85-86 (Philip B. Kurland ed., 1967); *see* KAHN, *supra* note 59, at 85; Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 894 (1995) (book review) (contrasting the views of Thayer with those of later "progressive legal thinkers"); *see also* Adler, *supra* note 279, at 848 (describing the "pedagogic" understanding of Thayer's argument for restraint).

288 *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 290-318 (1994); Steven D. Smith, *Moral Realism, Pluralistic Community, and the Judicial Imposition of Principle: A Comment on Perry*, 88 NW. U. L. REV. 183, 192 (1993); Tushnet, *supra* note 285, at 299-301; *cf.* Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 39-40 (1993) (noting affinity between Thayer's theory and the central themes of the recent revival of civic republican thought). *See generally* TUSHNET, *supra* note 124 (arguing that less vigorous judicial review will not necessarily lead to an impairment of constitutional rights).

but the evidence is not favorable to Thayer. State legislatures have operated for a long time without the burden of aggressive judicial review under state constitutions. No evidence indicates that state legislators have grown especially sensitive to constitutional concerns.[289] Congress appears to have devoted more consistent attention to constitutional matters than have state legislatures. Indeed, it is the revived interest of the state judiciary in enforcing provisions of state constitutions that has provoked responses from their legislatures.[290] Michael Perry has argued cogently that "our experience with the Supreme Court in the modern period suggests that judicial review, rather than deadening, can stir the polity's sense of moral responsibility."[291] The state experience supports Perry's assertion.[292]

Indeed, contrary to Thayer's view that deference encourages legislatures to act responsibly, one could understand the Supreme Court's recent turn against deference as an attempt to promote democratic deliberation about constitutional values. In the Commerce Clause and federalism areas, the Court has professed a need to protect the democratic process, though at a different level of government from that addressed by Thayer. The Court has asserted that vigorous enforcement of limits on federal authority serves to empower the democratic process in the states. The Court claims that Congress, in overstepping its constitutional boundaries, has interfered with the ability of the states to maintain well-functioning democratic polities. In *Lopez*, for example, Justice Kennedy emphasized that the federal Gun-Free School Zones Act interfered with the ability of the states to

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289 *Cf.* Hershkoff, *supra* note 213, at 1176-79 (questioning whether, in the context of constitutional rights to welfare, state legislatures enjoy greater institutional competence than state courts).

290 *See* Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y REV. 175, 205-06 (1998) (discussing how courts can influence legislative action in the context of state constitutional litigation over school financing).

291 MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 19 (1982).

292 As discussed above, Thayer's fear of judicial review reflects a concern for impairing responsible legislative deliberation, rather than a countermajoritarian objection. It is interesting to note, though, that state constitutional law presents an odd haven for a judicial deference grounded in democratic principles. The factors that produce the countermajoritarian dilemma for federal judicial review, such as unelected life-tenured judges and a constitution that proves difficult to amend, generally do not apply in the context of state judicial review. Most state judges are elected or subject to periodic retention elections. *See* 31 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 133-35 (1996) (describing methods for the selection and retention of state judges). *See generally* Polly J. Price, *Selection of State Court Judges*, *in* STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 9, 9-38 (Roger Clegg & James D. Miller eds., 1996) (analyzing different methods of judicial selection). State constitutions are easily, and frequently, amended. *See* 31 COUNCIL OF STATE GOV'TS, *supra*, at 5-9. If deference reflects countermajoritarian concerns, the practices of state and federal courts are exactly reversed. State courts are both more democratically responsive and more deferential than federal courts.

craft their own solutions to the problem of guns in schools.[293] More directly, in its federalism cases, the Court has argued that by commandeering state functions, the federal government distorts the democratic process. The Court asserts that in forcing states to regulate according to a federal plan, Congress blurs lines of accountability, making it impossible for citizens to determine the proper democratic outlet for their grievances.[294] For democracy to function, under the Court's reasoning, decision makers must take responsibility for their actions; aggrieved citizens must know whether to direct their petitions to Albany or to Washington.

The aspersions cast on the legislative process by recent judicial decisions also might suggest a desire to promote appropriate deliberation. Both *Lopez* and *Florida Prepaid* avow respect for congressional judgments, but simultaneously assert that the flawed nature of the particular processes giving rise to the challenged statutes negates any presumption of deference.[295] One could argue that these decisions demarcate a kind of neo-Thayerian project. According to this view, the Court encourages democratic debate by invalidating laws that result from an absence of deliberation. The issue is not recognizing comparative competence, but promoting constitutional responsibility. The Court selectively strikes down laws to encourage Congress to take its deliberations seriously. In this hypothesis, judicial review plays a pedagogic role, but this educational theory differs from Thayer's. The current Court promotes constitutional responsibility not by removing the safety net of judicial review, as Thayer would have it. Instead, the Court intervenes and disciplines Congress more directly in order to force maintenance of high deliberative standards.[296] Ironically, the foregoing account, which this Article labels "neo-Thayerian," ends by turning Thayer on his head. To promote constitutional responsibility, the Court adopts a mode of judicial review that is decidedly more robust and less deferential.[297]

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293 *See* United States v. Lopez, 514 U.S. 549, 581-83 (1995) (Kennedy, J., concurring).

294 *See* New York v. United States, 505 U.S. 144, 168-69 (1992). *See generally* Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 974 (1997) (discussing the democratic accountability argument in *New York v. United States*).

295 *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2207-11 (1999); *Lopez*, 514 U.S. at 562-63.

296 In the area of statutory construction, Jane Schacter has identified modern judicial efforts to employ interpretive methodologies so as to prod Congress to fulfill its responsibilities. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 636-46 (1995) (discussing the "disciplinarian" approach to statutory construction).

297 Whether Thayer himself would find that the challenged actions of Congress pass or fail a deferential test presents a different question. The evidence is conflicting. In *City of Boerne v. Flores*, for example, the Court cited with approval the restrictive reading of congressional enforcement power pronounced by the *Civil Rights Cases* in 1883. *See* City of

It is by no means clear that the Court's jurisprudence stems from concern for promoting democratic deliberation. Part II argues that the nondeferential approach actually reflects a substantive commitment to limiting federal power. The possibility of understanding the cases as deliberation-enhancing, however, illustrates the potential indeterminacy of basing a theory of deference on the goal of encouraging deliberative democracy.

A unitary focus on legislative deliberation also may interfere with the realization of other constitutional values. In this regard, the range of Thayer's deferential review presents substantial difficulty. Thayer was most concerned that robust judicial review limited the ability of Congress to address pressing social, economic, and perhaps racial questions.[298] He wrote before judicial battles had occurred over free speech,[299] legislative apportionment, and other matters central to the proper functioning of the democratic process.[300] Bickel, among others, noted that Thayer's approach does not adequately address issues relating to individual rights.[301] The refusal of state courts to engage in independent interpretation of the individual rights provisions of state constitutions and their resistance to enforcing remedies in areas such as school finance illustrate the unfortunate consequences of a uniformly deferential posture.[302]

Constitutions embody other values in addition to democratic deliberation, and a theory of judicial review attuned only to this concern overlooks important constitutional principles. In particular, constitu-

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Boerne v. Flores, 521 U.S. 507, 524-25, 532 (1997) (citing The Civil Rights Cases, 109 U.S. 3 (1883)). Thayer, by contrast, singled out the *Civil Rights Cases* for attack. *See* James Bradley Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, NATION, Apr. 10, 1884, at 314; *see also* Hook, *supra* note 59, at 6 ("The American event most immediately related in Thayer's 'idea' was the Supreme Court's decision in the *Civil Rights Cases* . . . ."). Deference, however, does not mean abdication. Bickel, for example, has argued that in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court adopted a greater degree of deference than Thayer could tolerate. *See* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 102 ("*Katzenbach v. Morgan* constitutes restraint, if not abdication, beyond the wildest dreams of . . . James Bradley Thayer, and in fact beyond anything he intended to recommend.").

298 *See* PERRY, *supra* note 291, at 175 n.58 (noting that Thayer wrote in the context of disputes about scope of federal power, rather than disputes about human rights); Hook, *supra* note 59, at 6 (noting the importance to Thayer of the Supreme Court's decision in the *Civil Rights Cases*, which limited Congress's ability to enact civil rights legislation, and suggesting the possibility that Thayer's "judicial deference preference was prompted by a desire to preserve federal law protections for southern blacks").

299 *See* Mendelson, *supra* note 59, at 77.

300 Some of Thayer's followers found judicial deference inappropriate in these areas. *See id.* Other heirs of Thayer, such as Justice Frankfurter, often retained a deferential posture in these areas as well. *See id.* at 83; *cf.* Purcell, *supra* note 287, at 894 (arguing that the "progressives" that followed Thayer urged deference to other branches based on technical expertise, not democratic accountability).

301 *See* BICKEL, *supra* note 59, at 39; Zeppos, *supra* note 60, at 301.

302 *See supra* notes 223-26 and accompanying text.

tions generally entail a commitment to protect certain values from current democratic processes.[303] From this perspective, the difference between the constitutional and administrative context becomes particularly siguificant. Some courts and commentators have argued that judicial deference to administrative agencies is best understood as recoguizing the superior democratic pedigree of the administrative decision.[304] Whatever validity this argument for deference has in the administrative context, the theory does not easily translate into the realm of judicial review under constitutions. This approach iguores important nonmajoritarian features of constitutionalism.

Judicial enforcement of federalism as a way of empowering local democracy runs into additional problems. A fundamental question remains: Why should the Court view the promotion of local democracy as justification for setting aside the democratic output of the national Legislature? The answer to this question must lie in a substantive theory of federalism, not in any simple theory of majoritarianism. Similar difficulties burden a framework that requires judicial deference only when the Legislature has deliberated to the courts' satisfaction. Why do the courts have authority to police the legislative process in this fashion?

This approach, moreover, entails a strong inertial bias. The Legislature can act only if it adheres to certain deliberative norms. On the other hand, lack of deliberation giving rise to inaction will generally be unreviewable. By placing hurdles in the path of legislative action, the Court increases the likelihood that no legislation will take effect. To the extent the constitution mandates legislative action,[305] the Court interferes with the ability of the Legislature to discharge its responsibility. In the end, then, this approach to deference involves a

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303 *See* Croley, *supra* note 241, at 699.

304 Writing for the majority in *Chevron*, Justice Stevens asserted:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984); *see also* Michael Herz, *Deferenee Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. 187, 188-89 (1992); Merrill, *Judicial Deference*, *supra* note 149, at 978 ("In addition to its novel framework, *Chevron* also broke new ground by invoking democratic theory as a basis for requiring deference to executive interpretations."); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 97 (1994).

305 The concept that constitutions may mandate legislative action is discussed *infra* Part V.

strong bias against legislative action. This bias returns us to a theory of enumerated powers. Only a substantive commitment to limiting governmental power can justify placing these burdens on legislative activity. The next Part seeks to construct a theory of deference that attends to substantive concerns without falling prey to the flaws of the foundationalist approach currently manifested in state and federal practice.

V
A Substantive Theory of Judicial Deference

Theories based on text, institutional competence, and democracy all have attractive features. A cogent theory of judicial deference possesses elements of each. But none of the theories individually gives sufficient guidance on the question of judicial deference. These inadequacies help explain why courts rely instead on fundamental distinctions between limited and plenary powers in determining whether to defer to other branches. Deference questions require normative assessments of the relative risks of various sources of power, and basic principles of constitutional theory can provide the necessary value judgments. The premise of the enumerated powers theory is that the authority of government is limited. Thus, the government may exercise only those powers specifically granted, and nondeferential judicial review helps to keep governmental power in check. The plenary theory, on the other hand, posits a government with general powers limited only in specific instances. Thus, deferential judicial review reflects the broad constitutional grant of authority. In each case, the judiciary defers to other branches in accordance with the level of discretion that the constitution confers on them.

This Part argues that, while the current focus on enumerated versus plenary power may provide determinate guidance on issues of judicial deference, this foundationalist model oversimplifies our constitutional traditions and produces flawed judicial rulings. This Part then constructs a more contextual, substantive theory that ties deference to normative theories of governmental authority, without reifying concepts such as enumerated or plenary power.[306] This contextual theory provides guidance in assessing deference questions while remaining consistent with underlying constitutional principles.

A. The False Dualism of Foundationalist Theories

Grounding the standard for judicial review in larger postulates of constitutional theory has some appeal. This approach recognizes the

306 *See generally, e.g.*, Peter Gabel, *Reification in Legal Reasoning*, 3 Res. L. & Soc'y 25 (1980) (discussing reification).

importance of the deference question and seeks an overarching framework that situates judicial review firmly within our constitutional tradition. Such a foundationalist account, however, inevitably reifies and distorts the underlying constitutional principles. Neither the federal nor the state constitutional traditions can be reduced to a single political theory. The traditions have always contained many voices, and these voices have changed over time.

1. *Plenary Power and Affirmative Obligations in State Constitutions*

In emphasizing the plenary power of state legislatures, for example, state courts overlook the ways in which state constitutions channel legislative power. In particular, state courts have ignored the implications of the individual rights provisions of state constitutions. These guarantees, which manifest a distrust of unbridled legislative discretion, also define the character of the constitution. In addition, state constitutions often establish affirmative obligations that the government must discharge, such as providing educational systems[307] or guaranteeing public welfare.[308] As pointed out by commentators, including Professor Hershkoff, by adopting deferential standards of review, state courts ignore the ways in which state constitutions actually mandate governmental action.[309] In instances in which the state constitution affirms positive rights, Hershkoff argues for a consequential approach to judicial review. Under this approach, a court would ensure that the legislature is proceeding toward the constitutionally required goal, but would defer as to the means employed in so doing.[310]

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307 All state constitutions contain provisions dealing with public education. *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343-48 (1992) (listing education provisions in state constitutions); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991). The Wisconsin Constitution, for example, states: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable." WIS. CONST. art. X, § 3. The New York Constitution declares: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, § 1.

308 *See, e.g.*, N.Y. CONST. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."); Hershkoff, *supra* note 213, at 1135 ("[M]ore than a dozen state constitutions provide explicit protections for the poor.").

309 *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1060-61, 1075-89 (1993); Hershkoff, *supra* note 213; Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1409, 1412 (1999); *cf.* Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974: How Did They Fare*, 58 LA. L. REV. 389, 410 (1998) (describing interpretative problems arising from provisions of state constitutions that contain mandates that are not self-enforcing).

310 *See* Hershkoff, *supra* note 213, at 1184-86; *see also* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983) (noting limitations to the theory of the plenary power of state legislatures).

Hershkoff's framework succeeds in crafting a theory of deference that is sensitive to substantive concerns, while avoiding the false dichotomy of plenary versus enumerated powers. Provisions that mandate legislative action do not fit comfortably into either model. Such measures simultaneously grant powers to the legislature and cabin the exercise of legislative discretion. They manifest a kind of distrust for the legislature, but in marked contrast to the theory of enumerated powers, this distrust reflects fears of legislative *inaction*. The challenge for courts is to formulate a level of deference that corresponds to the complexities of constitutions that embody neither generalized fear of governmental power nor generalized trust of governmental authority. A more nuanced and contextualized framework that reflects the multiple theories of governmental power present in the particular constitution is required. Professor Hershkoff's approach represents one response to these complexities in the state context. The next section expands the critique of false dichotomy into the realm of federal constitutional law.

2. *Enumerated and Coordinate Powers in an Activist State*

Affirmative obligations break down the distinction between plenary and enumerated powers and suggest the flaws in theories of judicial deference that draw exclusively from one of these polar positions. The U.S. Constitution is often viewed as a document concerned with limitations on government, rather than with positive obligations.[311] Certainly, much in the Constitution does focus on restricting governmental power. An emphasis on limited power has allowed the federal courts to develop a robust jurisprudence of rights.[312] Unlike the state courts, federal courts have employed strong, nondeferential approaches in safeguarding individual liberties.

The Constitution, however, does more than curtail governmental authority. It sometimes speaks in a language that empowers the federal government. The Fourteenth Amendment, for example, contemplates an active federal role in protecting individual rights; the courts may have a significant part in enforcing federal rights, but the Amendment speaks to Congress as well.[313] Section 5 of the Fourteenth

311 *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-97 (1989) (emphasizing a negative, rather than an affirmative, understanding of constitutional obligations).

312 Philip Bobbitt, in particular, has emphasized the power of constitutional arguments based on the overall premise of limited governmental authority. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 20 (1991) ("The fundamental American constitutional ethos is the idea of limited government, the presumption of which holds that all residual authority remains in the private sphere.").

313 *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 175 n.* (1998) ("[M]any congressional architects of Reconstruction envisioned not only judicial

Amendment highlights the congressional obligation.[314] As Justice O'Connor's plurality opinion asserted in *City of Richmond v. J.A. Croson Co.*, "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."[315] Indeed, section 5 is a specific manifestation of the theory of constitutional coordinacy.

Coordinacy rejects the view that the Constitution is only what the Court says it is. The theory affirms that the Constitution speaks to Congress directly, not merely through the mediating interpretations of the courts. A corollary is that when the Constitution issues a command, it is incumbent upon Congress as well as the Court to obey. When the Fourteenth Amendment proclaims that a state shall not "deprive any person of life, liberty, or property, without due process of law,"[316] it imposes a duty on both the federal Legislature and the federal Judiciary. As the coordinacy theory emphasizes, members of Congress, as well as judges, take an oath "to support this Constitution."[317] This coordinate constitutional role gives Congress not just privileges of interpretation, but duties of enforcement. Thus, Congress, as well as the courts, must ensure that a state does not infringe liberty or property without due process.

Like the affirmative commands of state constitutions, the Fourteenth Amendment demonstrates that the paradigm of enumerated powers does not fully capture the position of Congress. A theory of *non*deference based on the postulate of enumerated power does not correspond to constitutional reality because the Fourteenth Amendment reflects a fear of inaction by the federal government. The theory of constitutional coordinacy thus reminds us that in the federal and state constitutional contexts, a singular, reductionist conception of the Constitution does not sufficiently attend to the multiple strands of our constitutional tradition.

The Fourteenth Amendment presents an easy case, but what about Congress's more general commerce power? The Constitution established a national government of enumerated powers.[318] Yet, it also granted that government certain broad powers.[319] In this area, as

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enforcement of section 1 [of the Fourteenth Amendment] but also–and perhaps more centrally–congressional enforcement.").

314 *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

315 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (plurality opinion).

316 U.S. CONST. amend. XIV, § 1.

317 U.S. CONST. art. VI, § 3.

318 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers.").

319 Writing for the Court in *McCulloch*, Chief Justice Marshall stated:

> [T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it

in many others, the Constitution contains many conflicting principles.[320] It is not monolithic. Nor is the Constitution static. Rather, the constitutional tradition has evolved over time. As Bruce Ackerman in particular argues, the experiences of Reconstruction and the New Deal have transformed the Constitution in fundamental ways.[321]

The New Deal Court's rejection of *Lochner* reflected in part a new conception of the relationship between tyranny and governmental power. The dislocations of the emerging national economy and the trauma of the Great Depression demonstrated a need for government intervention to address abuses of private power.[322] These events showed that tyranny might result from governmental inaction.[323] The Commerce Clause jurisprudence developed in the wake of the New Deal recognized the national government's obligation to intervene in a broad range of social and economic issues.[324] A foundational commitment to the doctrine of enumerated powers entails a belief that government action, rather than inaction, constitutes the greatest

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> 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. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421.

320 *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 24-25 (1991) (warning against a "hyper-integrationist" reading of the Constitution).

321 *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 47-50, 119-22 (1991).

322 *Cf.* Sunstein, *Agency Inaction*, *supra* note 15, at 683 ("The rise of the modern regulatory state results in large part from an understanding that government 'inaction' is itself a decision and may have serious adverse consequences for affected citizens.").

323 *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 12 & n.21, 29 (1956) (referring to James Madison's implied conception of tyranny as "every severe deprivation of natural rights" and describing tyranny inflicted by private individuals); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2284 (1990) ("Government can harm by its inaction and its inadequate action, as well as its direct action."); Griffin, *supra* note 15, at 2130 ("[A]t the base of these New Deal electoral mandates lay a public belief that the national government should be held accountable not only when it acts, but when it fails to act . . . ."); Sunstein, *Constitutionalism*, *supra* note 15, at 501-04 (describing the New Deal critique of government inaction); *cf.* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 902-19 (1987) (examining the question whether certain "Lochner-like premises" should be rejected).

324 One can view the Court's dormant Commerce Clause jurisprudence as reflecting a belief that the Commerce Clause is not solely a grant of discretion to Congress, but instead embodies a substantive constitutional commitment to a national commercial market. Congress has broad discretion as to the kind of regulations to adopt, but if Congress fails to act, the courts will take the lead in striking down state legislation that interferes with the free flow of interstate commerce. The dormant Commerce Clause cases set a default level of national intervention to protect interstate commerce in the event of congressional inaction. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-1, at 1027 (3d ed. 2000) ("The thrust of the Supreme Court's work in federal-state relations has been to locate the inertia of government . . . on the side of the centralizing impulses of nationhood and union.").

threat to the polity. The Great Depression, however, undermined that construction of the doctrine of enumerated powers.

The Supreme Court, moreover, is not simply a receptor of constitutional tradition. Rather, the Court participates in defining the character of the polity. The Constitution began a process that included various political structures, such as judicial review, and thus shaped the evolving republic. In the current Court's perspective, limited government requires nondeferential judicial review. However, it is just as true that nondeferential judicial review produces limited government. The kind of government we have is a product of the kind of review applied by the Judiciary. In this sense, the standard of judicial review is constitutive. By adopting a more deferential standard for the review of congressional power after 1937, the Court recognized and helped to create the modern activist state.

B. Toward a Contextual Theory of Deference

Standards of review reflect a recognition of the problem of error.[325] When a reviewer offers a different assessment, the reviewer is not necessarily correct.[326] Deferential standards of review acknowledge the possibility of error. For God, all review is de novo.[327] For us, different standards correspond to fears about the consequences of different kinds of mistakes. A theory of enumerated powers betrays distrust of government, and nondeferential review responds to that perspective: better to err on the side of preventing questionable governmental action. A concept of plenary power, on the other hand, manifests greater trust in governmental power, and deference is the appropriate reaction: better to err on the side of permitting governmental action. Grounding a theory of deference in a constitutional calculus of the relative dangers of potential errors makes sense. The attempt to justify a standard of review solely by reference to fundamental principles of enumerated or plenary powers, however, overlooks the complexity of our constitutional traditions. In this area,

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325 By using the term "error," I do not mean to imply an epistemic search for the one true interpretation. Error may reflect instead a pragmatic assessment of the results of a ruling, given the benefit of hindsight.

326 *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result) ("We are not final because we are infallible, but we are infallible only because we are final.").

327 I refer here to the consequences of omniscience, not to divine qualities of mercy. If the focus is instead on judging human actions, it would probably be true that all review in Hell is de novo. *Cf.* GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977) ("In Hell there will be nothing but law, and due process will be meticulously observed.").

"first principles"[328] do not offer much guidance.[329] Instead, we need a more contextualized and pragmatic assessment of the place of judicial review.

In some areas, constitutions demonstrate great fear of governmental power. Bills of rights reflect such anxieties. For example, when state courts engage in lockstep interpretation of state bill-of-rights provisions, thus denying the provisions independent operative significance, they ignore important constitutional elements. First principles of plenary power do not reflect the various strands in state constitutions.

In other domains, constitutions recognize the problem of government inaction. Welfare and education provisions of state constitutions and the Fourteenth Amendment represent such calls to governmental action. I have also argned that our constitutional tradition gives the modern Commerce Clause a similarly affirmative caste.[330] In such realms, governmental inaction threatens constitutional values and deserves more rigorous judicial scrutiny.[331] Contrary to the recent judicial opinions, deferential review of the manner in which Congress discharges these constitutional commands does not belie a foundational commitment to limited national power. Instead, it recognizes important activist strands in the Constitution that we have. In cases such as *Lopez* and *Florida Prepaid,* Congress sought to discharge its affirmative obligations to regulate interstate commerce and to protect constitutional rights. The legislation involved therein did not infringe on any protected liberties. Accordingly, the Court should have deferred to congressional judgments about the proper way to achieve these goals. When the Court looks anew at congressional power to enact civil rights legislation, it should return to an appropriately deferential stance.

Some issues present more difficult problems. The new federalism jurisprudence of cases such as *New York v. United States* and *Printz* raises complex interpretive issues. Some approaches to the deference question are clearly inadequate. The constitutional text provides little guidance,[332] and arguments about comparative competence and promoting democracy are indeterminate.[333] As this Part has demon-

328 United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

329 *See* David P. Currie, *Positive and Negative Constitutional Rights,* 53 U. CHI. L. REV. 864, 887 (1986) ("[I]t would be dangerous to read too much, even at the theoretical level, into the generally valid principle that ours . . . is a Constitution of negative rather than positive liberties. At the practical level the distinction may be of even less significance.").

330 *See supra* notes 318-24 and accompanying text.

331 The Supreme Court, of course, has intervened quite vigorously to enforce the Commerce Clause, *see supra* note 324, as well as the Fourteenth Amendment.

332 *See supra* text accompanying notes 245-56.

333 *See supra* Part IV.B-C.

strated, blanket references to a theory of enumerated federal power are misleading.

The question then becomes how the risk of unduly restricting congressional authority compares to the risk of violating constitutional principles of federalism.[334] To answer this question, one must resort to contested principles of American constitutionalism. Unlike cases that implicate the scope of the Commerce Clause, section 5 of the Fourteenth Amendment, affirmative duties to support education or welfare, or protections of fundamental individual rights, the Constitution itself provides little direct guidance as to where the primary fear of error lies. For the reasons stated by the dissents in those cases, this Article contends that the "commandeering" of state government functions effected in *New York v. United States* and *Printz* does not present a serious threat to principles of federalism. By contrast, the need for national coordination to address screening of gun buyers and interstate disposal of low-level radioactive waste argues for a strong congressional role. The Supreme Court believed otherwise.

What each case requires is an assessment of the character of the constitutional command and the consequences of various kinds of errors. In particular instances, these determinations may be subject to dispute. This debate about constitutional purposes is salutary and much more desirable than rote reference to concepts of enumerated or plenary powers.

The contextual approach that this Article advocates builds on the salutary features of other theories of deference. Like the enumerated/plenary power framework that this Part criticizes, the contextual approach grounds a theory of deference in the constitutional conferral or restriction on governmental power. This normative framework provides a focus for evaluating the comparative interpretive advantage of the different branches of government. Rather than basing standards of review on abstract assessments of institutional competence, the contextual approach looks to the constitution itself for guidance in allocating decision-making authority. In determining the appropriate standard for judicial review, the approach relies on the constitution's judgments as to the relative risks of governmental action and inaction. These constitutional judgments determine the appropriate level of judicial deference.

Unlike the enumerated/plenary power framework, the contextual approach resists ascribing a single theory of governmental power to a particular constitution. The contextual approach insists that constitutions contain many different elements, reflecting different fears

334 I do not mean to concede the validity of the federalism argument advanced in *New York v. United States* and *Printz*. In performing the risk assessment underlying the deference question, however, I assume that the risks identified by the Court are legitimate.

and aspirations, and that these elements may shift over time. The insistence on evaluating each separate constitutional provision does render the contextual approach less determinate than a framework relying on the enumerated/plenary dichotomy. Indeed, any approach will be less determinate than the "always-defer" or "never-defer" principles that that dichotomy generates. As apparent from the discussion of the Tenth Amendment cases, the particular outcome of an inquiry into constitutional powers and limits may be open to dispute. In other instances, the result may be more clear cut. Unless one indulges in pernicious oversimplifications, a greater level of precision may not be possible with regard to these kinds of constitutional issues. The most one should expect is a theory that plausibly identifies the relevant values. The contextual approach, I believe, satisfies that standard.

CONCLUSION

Recent federal court decisions manifest a marked decline in the deference afforded constitutional judgments of other branches of government. These rulings, with their rhetoric of judicial supremacy, stand in contrast both to the academic support for theories of coordinate interpretation and to the deferential review practiced in state courts. Coordinacy allows for a theory of judicial deference, while the historical practice of federal courts and the current practice of state courts illustrate the possibility of such deferential review.

Although the standard of judicial review likely reflects many influences, the pattern of deference in the federal and state courts corresponds to judicial understandings of the fundamental postulates of state and federal constitutions. Federal courts link nondeferential review to concepts of a federal government of enumerated and limited powers, while state courts tie their deference to a notion of plenary state governmental power. Standards of review properly reflect constitutional commitments and the relative dangers of different kinds of interpretive errors. Reducing state or federal constitutions to singular notions of enumerated or plenary powers, however, iguores the complexity and plasticity of constitutional traditions. The resulting theories of deference are rigid and untextured, leading federal courts to thwart congressional efforts to realize constitutional values and enabling state courts to allow state legislatures to abdicate their constitutional responsibilities. A more pragmatic, contextual theory better attends to the specific character of particular constitutional provisions and calibrates deference accordingly. This theory allows sufficient leeway to legislatures to carry out their constitutional duties, while ensuring that their inaction does not undermine important constitutional principles.