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Constitutionalizing Chevron: Filling up on Interpretive Equality

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CONSTITUTIONALIZING *CHEVRON*: FILLING UP ON INTERPRETIVE EQUALITY

Abstract: This Note proposes a new approach to constitutional interpretation, arguing that application of the *Chevron* doctrine to constitutional interpretation is a logical outgrowth of Supreme Court decisions and could harmonize some tensions in the Court's current doctrines. This proposal would give Congress an explicit role in interpreting the Constitution, while the Court retains its role as supreme interpreter. Additionally, this Note suggests how this method can be used to critique current Court decisions while putting aside the agenda of individual commentators.

INTRODUCTION

As Alexis de Tocqueville noted in *Democracy in America*, "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one."[1] This observation has stood the test of time, as the federal judiciary has been deeply enmeshed in the major political issues facing the nation.[2] Sitting at the apex of this system, the Supreme Court of the United States occupies a unique position. Combining the power of judicial review[3] with its status as the court of last resort in the United States,[4] the Court's decisions on constitutional issues effectively bind an entire nation for the indefinite future in a manner largely insulated from changing political tides.[5] Although not immutable, these decisions are rarely altered through the adop-

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[1] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1838).

[2] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 712 (1999) (holding Congress could not use its Commerce Clause power to abrogate state sovereign immunity); Romer v. Evans, 517 U.S. 620, 623 (1996) (invalidating amendment to Colorado constitution); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–400 (1937) (upholding maximum hour and minimum wage laws during Depression); Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 452 (1857) (striking down Missouri Compromise).

[3] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

[4] *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("[W]e are not final because we are infallible, but we are infallible only because we are final.").

[5] The Court is insulated to the extent its members are appointed for life. *See* U.S. CONST. art. III, § 1. At the same time, political forces shape the composition of the Court because the appointments are made by the President of the United States with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2.

tion of constitutional amendments or the explicit overruling of prior decisions.[6]

The Supreme Court (as well as the rest of the federal judiciary) draws on a deep well of philosophical considerations, supplemented with the tradition of *stare decisis,* to guide its decisions in concrete factual situations.[7] Against this backdrop of reasoned opinion stands the raw reality that five votes, regardless of motivation, can dictate the course of constitutional development or discard the decisions of the past.[8] These institutional characteristics, combined with the Court's unique visibility, make the Court a focus of constitutional theorists.[9] Given the Court's own statements about its proper role—contrasting the judicial function against a presumptively illegitimate political role—there has been an understandable and important focus on formulating standards to evaluate judicial decisions.[10]

Over the years, a distinguished group of theorists have added their voices to this dialogue over the proper method(s) for interpreting the Constitution.[11] Many of these interpretive theories depend upon a broader theory of the Constitution, which creates a unified constitutional/interpretive theory.[12] One hallmark of traditional constitutional theory has been an emphasis on deriving a particular, "cor-

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[6] For instance, the Court handed down eighty decisions in 1996 alone. *See* EDWARD LAZARUS, CLOSED CHAMBERS 30 (1999). Against this number, extended over two centuries, stand the seventeen Constitutional amendments passed since the initial adoption of the Bill of Rights. *See* U.S. CONST. amend. XI–XXVII. Further supporting this institutional view of slow change is the realization that a Court can be characterized as "activist" after overruling six precedents in a recent year. *See* Robert H. Bork et al., *Symposium: Do We Have a Conservative Supreme Court?*, 1994 PUB. INT. L. REP. 125, 132 (1994).

[7] *Compare* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., opinion), *with id.* at 398 (Iredell, J., opinion) (debate between Justices Chase and Iredell on proper role of natural law in Supreme Court adjudication).

[8] *See* LAZARUS, *supra* note 6, at 277 ("[Justice] Brennan was famous for holding up one of his hands, wiggling his fingers and reminding colleagues of the all-important rule of five.").

[9] For examples, see generally, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); ROBERT H. BORK, TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); RONALD DWORKIN, LAW'S EMPIRE (1986); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985).

[10] *Compare* City of Boerne v. Flores, 521 U.S. 507, 527–28 (1997) (rejecting interpretive role for Congress) *with id.* at 536 (recognizing judicial role as different than congressional political role).

[11] *See supra* note 9 for a small sample of authors.

[12] *See, e.g.*, MODERN CONSTITUTIONAL THEORY: A READER 1–196 (John H. Garvey & T. Alexander Aleinikoff eds., 3d ed. 1994) (providing overview of significant interpretive and constitutional theories).

rect" interpretive methodology,[13] thus leading to a host of competing methodologies with widely divergent results; results which often appear tied to the political movements of the day.[14] This interrelationship between methodology and results drives much of the current theorizing in the constitutional field.[15] Scholars attempt to justify the Court's "good" opinions, while finding ways to delegitimize or lessen the impact of the Court's "bad" decisions, all with an eye towards influencing the future.[16] Despite all this effort no single theorist or theory has achieved a consensus among academics or been adopted by a majority of the Supreme Court.[17] Recently, however, constitutional theorists have begun looking beyond these unitary theories and have explored pluralist visions of the Constitution.[18]

Pluralist theorists accept as a given the range of disagreement between advocates of the competing unitary theories.[19] They also accept that this variety in constitutional theory translates into a plurality of methods for interpreting the Constitution.[20] Rather than picking one method over another, these theorists explore the interrelationship between these methods.[21] This exploration is both descriptive, focusing on judicial action, and normative, focusing on the justifications for certain methodological choices.[22] Granted that there

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[13] *See, e.g.*, DWORKIN, *supra* note 9, at 239–40 (implying that Hercules, the ideal judge, reaches "the answers I now think best.").

[14] *See generally* SCOTT ARMSTRONG & BOB WOODWARD, BRETHREN: INSIDE THE SUPREME COURT (1981); LAZARUS, *supra* note 6.

[15] *See generally* DWORKIN, *supra* note 9; BORK, *supra* note 9.

[16] *See, e.g.*, Michael C. Dorf, *The Supreme Court 1997 Term: Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998); Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Unsaid*, 110 HARV. L. REV. 4, 62–77 (1996); *see also* PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION 178 (1991) ("The efforts of many thinkers ... typically consist in trying to impose a meta-rule to resolve the indeterminacy ... along lines of which the critic approves."); ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION, at xiii (1987) (observing that methodology debates are really about substance); BORK, *supra* note 9, at 202 (critiquing Professor Tribe for continually finding new methodologies to defend *Roe v. Wade*).

[17] *See* Stephen M. Griffin, *Symposium on Philip Bobbitt's Constitutional Interpretation: Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1757–62 (1994).

[18] *See, e.g.*, BOBBITT, *supra* note 16, at 8–10; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192 (1987); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 18–19 (1990).

[19] *See, e.g.*, BOBBITT, *supra* note 16, at xiii (evaluating interpretive disagreements between ideologues).

[20] *See, e.g.*, Griffin, *supra* note 17, at 1762–63 (summarizing three lines of pluralistic thought).

[21] *See id.* at 1763–65 (listing recognized sources of value and summarizing how Post, Fallon and Bobbitt address the relationships between these sources).

[22] *See id.* at 1768 (explaining descriptive and normative elements in pluralistic theory).

is wide pluralism in the United States, with its attendant disagreement over policy as well as what qualifies as legitimate constitutional or interpretive theory, it becomes ever more important to find a way to delineate the proper role of the Court. Ideally, the contours of such a theory should be divorced from any single policy outlook, and yet lead to concrete results.

This Note will explore the ramifications of pluralism as it applies to the Supreme Court's power to interpret the Constitution through judicial review of federal statutes. Part I will explore current theoretical and methodological approaches to constitutional interpretation while examining some of the central cases surrounding the practice of judicial review.[23] In light of the Court's holding in *Chevron USA, Inc. v. Natural Resources Defense Council,* which dealt with the Court's power of statutory interpretation, the time has come to adopt a method of interpretation that accords Congress an important role in interpreting the often ambiguous phrases of the Constitution.[24] Part II will set forth the basic rationale for that new constitutional interpretive methodology.[25] This proposed methodology avoids unfettered judicial or congressional interpretive supremacy by establishing a paradigm of principled interpretive equality between the branches.[26] It offers Congress an explicit role in interpreting the Constitution, while still reserving the ultimate interpretive role for the Supreme Court. Part III applies the methodology to two prominent Supreme Court cases, *Roe v. Wade*[27] and *City of Boerne v. Flores.*[28] Finally, Part IV will examine some of the reasons supporting the proposed methodology and some possible counter-arguments against such a proposal.[29] This Note will argue that not only would such a system fit comfortably within the Court's precedents, but it should also improve the state of the law and the decision-making process on the Supreme Court. Even if the concrete proposals within this Note are rejected, this methodology may still serve as a positive framework for constitutional discus-

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[23] *See infra* notes 30–112 and accompanying text.

[24] *See* 467 U.S. 837, 866 (1984). There is almost universal accord that at least some, if not all, of the Constitution consists of ambiguity. *See, e.g.*, AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS, at xxi (1998); CHEMERINSKY, *supra* note 16, at 135.

[25] *See infra* notes 113–153 and accompanying text.

[26] *Cf. Chevron*, 467 U.S. at 864–65 (discussing proper role of judges, distinct from "judges' personal policy preferences").

[27] 410 U.S. at 113.

[28] 521 U.S. at 507. *See infra* notes 154–220 and accompanying text.

[29] *See infra* notes 221–308 and accompanying text.

sion, thereby improving the dialogue outside the courts concerning the document that governs all our lives.

I. JUDICIAL REVIEW: DECIDING WHAT THE CONSTITUTION MEANS

One of the hallmarks of American constitutional analysis is the conceptual divide between the wisdom of a statute and its constitutionality.[30] This feature has been described as a distinction between first-order justifications, which refer to a statute's wisdom, and second-order justifications, which refer to a statute's constitutionality.[31] Because the Constitution refers to itself as "the supreme Law,"[32] at first glance it would appear that its supremacy should remove any need to invoke first-order questions in any discussion of constitutional interpretive methodology.[33] This is complicated, however, by the near-universal acknowledgment of ambiguity in the Constitution's textual provisions.[34]

Regardless of where interpretive power is lodged,[35] in order to arrive at concrete decisions, interpretive tools must be used to divine meaning out of the Constitution's ambiguities.[36] In the context of statutory interpretation, a variety of tools, called "canons of construction," have been developed to address these problems.[37] A similar situation exists with regard to constitutional interpretation, but there is considerable disagreement in the Court and among commentators over which tools are proper and how they should be used.[38]

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[30] *See, e.g.*, Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729, 732 (1992).

[31] *See id.* at 732–33.

[32] U.S. CONST. art. VI, § 2.

[33] Because the Constitution is "supreme" its "law" would appear to transcend our concepts of "good" and "bad." Although an argument might be made that the Preamble reincorporates these distinctions, it suffices for present purposes to note that, at face value, the Supremacy Clause *appears* to foreclose any appeal to extraneous value judgments. *Cf.* U.S. CONST. pmbl.

[34] *See supra* note 24.

[35] For present purposes, only Congress and the Supreme Court will be considered. Congress has not directly asserted interpretive power over the entire Constitution. *See* PAUL R. DIMOND, THE SUPREME COURT & JUDICIAL CHOICE: THE ROLE OF PROVISIONAL REVIEW IN A DEMOCRACY 103 n.1 (1989).

[36] *See, e.g.*, BOBBITT, *supra* note 16, at x–xi.

[37] Some examples include canons stating that in construction, absurdity should be avoided, and that usually the natural meaning is used rather than any technical meaning in construing a word. A rather exhaustive list of canons can be found in CHESTER JAMES ANTIEU, CONSTITUTIONAL CONSTRUCTION. at ix–xi (1982).

[38] *See* Griffin, *supra* note 17, at 1755–57.

In order to justify one ordering system over another, commentators often employ meta-theories of political legitimacy or general legal theory.[39] They then apply these combined constitutional/interpretive theories to cases, arguing for the "correct" outcome.[40] These grander theories can be roughly broken down into process-based or rights-based theories.[41] Process-based theories focus less on particular results and more on the process of arriving at those results.[42] Rights-based theories, on the other hand, can be characterized by their adherence to a particular substantive vision of the Constitution and its protections.[43] Even a purportedly process-based theory such as John Hart Ely's representation-reinforcing role of the Court has been subject to criticism over the substantive choices and commitments it requires.[44] Not only does the disagreement between proponents of the various theories appear intractable, there is often an underlying sense that much of this theorizing is, to some extent, results-driven.[45] As a matter of persuasiveness, this "preaching to the choir" element of such theorizing appears unlikely to change the minds of opponents and has been criticized as a danger to scholarly values.[46] These shortcomings in unitary theories have led to recent explorations into pluralistic theories of constitutional interpretation, which accept as a given the diversity of viewpoints and interpretive tools that the legal community currently possesses.[47]

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[39] *See, e.g.*, David Lyons, *Substance, Process and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745, 760 (1987); Alan Hunt, *Law's Empire or Legal Imperialism*, in READING DWORKIN CRITICALLY 9, 29 (Alan Hunt ed., 1992) (discussing attempt to ground legal theory *within* theory of interpretation); Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 664–65 (1999) (discussing Easterbrook and theories of political legitimacy as precursor to formalism).

[40] *See, e.g.*, DWORKIN, *supra* note 9, at 379–92 (Hercules applying law to Supreme Court cases).

[41] *See* GARVEY & ALEINIKOFF, *supra* note 12, at 2.

[42] *See id.*

[43] *See id.*

[44] *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Theories*, 89 YALE L.J. 1063, 1065–77 (1980); *see also* GARVEY & ALEINIKOFF, *supra* note 12, at 2.

[45] *See* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts are No Different from Legislatures*, 77 VA. L. REV. 833, 853–54 (1991) (criticizing doctrinaire trend in academic analysis).

[46] *See* Griffin, *supra* note 17, at 1767.

[47] *See* BOBBITT, *supra* note 16, at 28–30.

A. *Pluralism: A Brief Sketch of the Multiplicity of Legitimacy*

Professors Bobbitt, Post and Fallon have all put forward pluralistic theories of interpretation.[48] While Fallon assumes this pluralism,[49] Bobbitt traces the source to the common law with its use of multiple tools,[50] and Post looks to the different theories stemming from different conceptions of constitutional authority represented by the process-centered and rights-centered theories mentioned previously.[51] What each of these theories shares is an acceptance of diverse interpretive tools, each with a claim to legitimacy.[52] At least on a descriptive level, this appears to be the most accurate picture of the Supreme Court, where multiple interpretive methods are used and where there has been no ranking of the methods.[53] All of these authors agree that using this variety of methods will inevitably lead to situations where conflicting answers can be justified.[54] For Bobbitt, this situation allows for the exercise of conscience in decision-making,[55] while Post describes it as the exercise of legal judgment.[56] Fallon, on the other hand, proposes a hierarchy of methods,[57] evoking Rawls' lexical hierarchy in *A Theory of Justice*.[58] These pluralistic theories place the Supreme Court's explication of its own interpretive powers in an important context, particularly when dealing with congressional enactments and their relation to the Constitution.

B. *The Supreme Court's View of Its Interpretive Powers*

The Supreme Court has maintained the power to declare acts of Congress unconstitutional since *Marbury v. Madison*, decided in 1803.[59] The rationale for the decision was based on the Court's insti-

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[48] *See generally id.*; Fallon, *supra* note 18; Post, *supra* note 18.

[49] *See* Fallon, *supra* note 18, at 1189–90.

[50] *See* BOBBITT, *supra* note 16, at 5.

[51] *See* Post, *supra* note 18, at 19–26.

[52] *See* Griffin, *supra* note 17, at 1763–64.

[53] *See id.* at 1757.

[54] *See id.* at 1764–66 (summarizing views of Fallon, Bobbitt and Post regarding the possibility of conflicting answers).

[55] *See* BOBBITT, *supra* note 16, at 168.

[56] *See* Post, *supra* note 18, at 35.

[57] *See* Fallon, *supra* note 18, at 1193–94.

[58] *Compare* Fallon, *supra* note 18, at 1193–94, *with* JOHN RAWLS, A THEORY OF JUSTICE 42–43 (1971) (describing lexical ordering as placing principles in serial order, where the first must be satisfied before moving on to the second, third and so forth).

[59] 5 U.S. (1 Cranch) 173, 179 (1803).

tutional capacity to interpret the language of the Constitution.[60] At the same time, the Supreme Court has never explicitly acknowledged a similar wide-ranging power in Congress to interpret the Constitution.[61] It has, however, recognized a doctrine of "political questions" whereby the Court declares certain issues non-justiciable due to the Constitution's commitment of interpretive power solely to another branch.[62]

Marbury stands as the first instance in which the Supreme Court refused to enforce a federal statute on the basis of the statute's unconstitutionality.[63] Chief Justice Marshall's opinion for the Court based the inability of the Court to effect a writ of mandamus for Marbury on several arguments. First, he relied on the fact that the United States Constitution is written.[64] As a corollary to this, Marshall invoked the role of the judiciary to say what the law is—relying on historical judicial practices when interpreting a statute or facing conflicting statutes.[65] Once the power of the judiciary to look to the Constitution and interpret it was affirmed, Marshall also pointed to the oath that judges must take as support for review.[66] Finally, he pointed to the Constitution's own statement that it is the supreme law of the land as support for holding void a law repugnant to the Constitution.[67] Thus, the judicial veto over congressional legislation was born.

This veto power went unexercised by the Supreme Court for almost sixty years before being invoked in the case of *Dred Scott v. Sanford* in 1857.[68] Between 1865 and 1986, the Supreme Court declared another 108 acts of Congress unconstitutional.[69] It was within the context of a challenge to the Court's invalidation of state action, however, that the Court first explicitly asserted that it had the ultimate power to interpret the Constitution.[70] In the 1958 decision, *Cooper v. Aaron,* a unanimous Court held that a local school district could not

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[60] *See id.* at 175–76.

[61] *See* DIMOND, *supra* note 35, at 103 n.1.

[62] *See, e.g.*, Nixon v. United States, 506 U.S. 224, 226–28 (1993); Baker v. Carr, 369 U.S. 186, 209–37 (1962).

[63] *See* ALPHEUS THOMAS MASON & DONALD GRIER STEPHENSON, JR., AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES 32–33 (9th ed. 1990).

[64] *See Marbury*, 5 U.S. (1 Cranch) at 173–79.

[65] *See id.* at 177.

[66] *See id.* at 180.

[67] *See id.*

[68] *See* 60 U.S. (19 How.) 393, 452 (1856); *see also* MASON & STEPHENSON, *supra* note 63, at 35 tbl. 2.1.

[69] *See* MASON & STEPHENSON, *supra* note 63, at 35 tbl. 2.1.

[70] *See infra* note 71–74 and accompanying text.

postpone its desegregation plan after the state's governor created a situation so flammable that the President federalized the National Guard to preserve order.[71] One of the governor's and the state legislature's stated rationales for their actions opposing the Court's original desegregation decision in *Brown v. Board of Education*,[72] was their belief that the decision was unconstitutional.[73] In response to this direct challenge to the Court and to public order, the Court underscored its constitutional superiority over state actors by referring to *Marbury* as declaring the "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[74] Thus, although the Court conceded that the school district's officials were making good faith efforts to comply with the order, the district could not use the actions of other state actors to justify further delay in the enforcement of the desegregation order.

This doctrine of supreme interpretive power was occasionally softened by the Court's invocation of a "political questions" doctrine, whereby the Court pronounced certain issues not amenable to judicial resolution.[75] The Court explored the intersection of these two doctrines in the 1962 decision, *Baker v. Carr*, where the Court held the Tennessee legislature's failure to reapportion voter districts abridged the right to vote.[76] The Court rejected an argument that the judiciary could not consider the case under the "political question" doctrine.[77] This self-imposed doctrine claims to resolve adequately an issue or that the issue has been textually committed to another branch of government.[78] Under either line of reasoning, the effect of the political question doctrine is to leave certain areas untouched by the Court's jurisprudence, and to look instead to other politically accountable branches for redress.[79] The Court explored the prior political question precedents and concluded that the current case did not fit into any of these earlier situations.[80] In so doing, the Court reiterated its

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[71] *See* 358 U.S. 1, 4–11 (1958).

[72] 347 U.S. 483 (1954).

[73] *See Cooper*, 358 U.S. at 4.

[74] *Id.* at 18.

[75] *See infra* note 76–90 and accompanying text.

[76] *See* 369 U.S. 186, 237 (1962).

[77] *See id.* at 209–37.

[78] *See id.* at 210–11.

[79] *See, e.g., id.* at 223–25 (detailing judicial refusal to enter into political question cases); Luther v. Borden, 48 U.S. (7 How.) 1, 46 (1849) (holding question of which government of Rhode Island was legitimate government was a political question for Congress, not amenable to judicial resolution).

[80] *See* 369 U.S. at 209–37.

status as the ultimate interpreter of the Constitution, but also relied to some extent on the fact that this case involved a state, rather than a co-equal branch of the federal government.[81]

Left unanswered was the question how these "ultimate interpreter" and "political question" doctrines would interact with congressional action. In the 1969 case of *Powell v. McCormack*, the Court applied the "ultimate interpreter" formulation to congressional action in concluding that the exclusion of an elected representative from Congress was unconstitutional.[82] The Court rejected a congressional assertion that its action was unreviewable as an exercise of congressional power to determine, under Article I, § 5 of the Constitution, whether elected members met the qualifications necessary to serve in Congress.[83] Although both sides presented interpretations of the underlying language and although the proposed congressional interpretation might have met the Court's political question test, the Court found the excluded member's argument conclusive.[84] In its eight to one decision, the Court held that the representative was unconstitutionally excluded from his seat in the 90th Congress—the single dissent preferring to rest on mootness grounds rather than the majority's rationale.[85]

In 1993, the Court again dealt with the "political question" doctrine when faced with another challenge to congressional action, this time in the impeachment arena.[86] In *Nixon v. United States*, a federal district judge attempted to challenge the legality of his impeachment by Congress.[87] The judge argued that the Senate failed to "try" him under the Impeachment Clause of the Constitution.[88] The Court held that the case was a non-justiciable political question because the interpretation of the word "try" was committed "solely" to the Senate by the Constitution.[89] By invoking the "political question" doctrine and its attendant concerns with affording the other branches of government due respect, the majority essentially declared the impeachment process outside the jurisdiction of the Court.[90]

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[81] *See id.* at 211, 226.
[82] *See* 395 U.S. 486, 489, 521 (1969).
[83] *See id.* at 548.
[84] *See id.* at 519–548.
[85] *See id.* at 550; *see also id.* at 559 (Stewart, J., dissenting).
[86] *See infra* notes 87–90 and accompanying text.
[87] *See* 506 U.S. 224, 226–28 (1993).
[88] *See id.*
[89] *See id.*
[90] *See id.* at 228–29.

In 1994, the year after *Nixon* was decided, Congress passed the Religious Freedom and Restoration Act ("RFRA") in an attempt to overrule the Supreme Court's Free Exercise Clause decision in *Employment Division v. Smith*, handed down during the Court's 1992 term.[91] In *Smith*, a 6–3 decision upheld the application of a statute depriving a member of the Native American Church unemployment benefits following his dismissal for peyote use.[92] Congress, which had previously allowed recognition of peyote use within its regulatory framework, disapproved of the decision.[93] Purportedly drawing upon its power under § 5 of the Fourteenth Amendment, Congress passed RFRA.[94] The purpose of the law was to enforce a congressional view of the protections to be found in the First Amendment, which in this case meant requiring the government to advance a compelling interest before it could regulate a religious believer's conduct.[95]

The Supreme Court invalidated this legislation in *City of Boerne v. Flores*, decided in 1997.[96] Although conceding the power of Congress to enact rules to prevent violations of the First Amendment by the states, the Court noted that, in this case, there was no "congruence between the means used and the ends to be achieved."[97] The Court found no evidence before itself or Congress indicating passage of generally applicable laws because of religious bigotry.[98] Significantly, the Court discussed the extent of congressional power to "enforce" the Fourteenth Amendment in terms of interpretive power.[99]

The Court acknowledged that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern,"[100] and that "Congress must have wide latitude in determining where it lies."[101] At the same time, the Court explicitly denied that Congress

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[91] *See* 494 U.S. 872 (1990); *see also* City of Boerne v Flores, 521 U.S. 507, 512–15 (1997) (describing Congressional motivation).

[92] *See id.* at 873–74.

[93] *See City of Boerne*, 521 U.S. at 515; Eric E. Sterling, *Drug Policy: A Smorgasbord of Conundrum Spiced by Emotions Around Children & Violence*, 31 VAL. U. L. REV. 597, 605 (1997) (citing federal regulation protecting peyote use).

[94] *See City of Boerne*, 521 U.S. at 516.

[95] *See id.* at 515–16.

[96] *See id.* at 512.

[97] *Id.* at 530; *see also id.* at 518–20.

[98] *See City of Boerne*, 521 U.S. at 530–32.

[99] *See id.* at 527–29.

[100] *Id.* at 519.

[101] *Id.* at 520.

had any substantive power under the Fourteenth Amendment.[102] According to the Court, "[i]f 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.'"[103] Thus, in striking down RFRA and rejecting this interpretive argument, the Court noted that, "[u]nder [the congressional] approach, it is difficult to conceive of a principle that would limit congressional power."[104]

In the context of statutory interpretation, however, the Court took a very different stance in *Chevron USA, Inc. v. Natural Resources Defense Council,* decided in 1984.[105] In that case the Court unanimously delineated the respective interpretive roles of executive agencies and the courts when dealing with federal statutes.[106] In reversing a lower court's interpretation of an environmental statute, the Court established a two-step test for determining when to give deference to agency interpretations.[107] First, the Court required a finding by the judiciary that the statutory language involved was ambiguous.[108] If a statute was not ambiguous, the agency would not be entitled to deference—the courts would substitute this "clear" meaning of the statute for the agency's interpretation.[109] Once a finding of ambiguity was made, however, the Court then asked whether the agency interpretation was reasonable.[110] In upholding the EPA's interpretation as reasonable, the Court focused not just on the ambiguity of the statutory language, but also on the essentially political nature of the choice between one interpretation over another interpretation when a statute could support both.[111]

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[102] *See City of Boerne,* 521 U.S. at 519.
[103] *Id.* at 529.
[104] *Id.*
[105] 467 U.S. 837, 837 (1984).
[106] *See id.* at 839.
[107] *See id.* at 842–43.
[108] *See id.* at 842.
[109] *See id.* at 842–43.
[110] *See Chevron,* 467 U.S. at 843.
[111] *See id.* at 844–45, 864–66.

II. Striking Oil: Applying *Chevron* to Constitutional Interpretation

A. *The Basic Argument*

Chevron provides the principle for regulating congressional interpretation that was missing in *Boerne*. The Court in *Boerne* read the congressional assertion of interpretive power as a direct challenge to its own authority, and as an assertion of the same legislative supremacy that Congress has with respect to the federal judiciary's interpretations of statutory provisions.[112] In this realm of statutory interpretation, Congress has a basically unreviewable power to overturn Supreme Court statutory constructions, subject only to constitutional constraints.[113] A more appropriate view of the power exercised in RFRA, however, treats congressional interpretation of the Constitution as a parallel to agency interpretation of a statute. Just as the judiciary retains an important but circumscribed role in channeling agency interpretations, so too would the Court retain an important role in channeling congressional interpretations.

The Court's own reasoning in *Chevron* leads the way to a principle that adequately restrains *both* congressional and judicial power. Additionally, the framework that follows will reconcile the "unchanging" text and law that is the Constitution, with the "evolutionary" needs and realities of American society. This principle, applying the *Chevron* framework to congressional interpretation of the Constitution, embodies the central insight of *Chevron:* "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."[114] The Court's decision hearkens back to the basic concern between permissible judgment and impermissible will as exercised by the judiciary that one finds in the writings of the Federalist Papers

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[112] *See* 521 U.S. 507, 515, 536 (1997).

[113] *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.) (1994) (overturning several Supreme Court decisions).

[114] *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984) (emphasis added).

and in Marshall's *Marbury* opinion—it is the heart of the "counter-majoritarian problem."[115]

The *Chevron* Court concluded that Congress implicitly grants agencies interpretive power whenever a statute's terms are ambiguous.[116] The role of courts, then, is to channel those interpretations to make sure that they are reasonable, thereby limiting the courts' role to ensuring that agency interpretations are consistent with the underlying statute.[117] Translated into terms of interpretive theory, the Court in effect acknowledged the pluralist conception of values within the realm of statutory interpretation by acknowledging the existence of several possible "correct" interpretations of a single statute, so long as they are "reasonable."[118]

Significantly, the Court also accepted the "legal realist" critique that, at least in those situations where legal tools do not lead to a decisive outcome, the exercise of discretion in picking one interpretation over another by a judge is truly a political choice.[119] Rather than usurp the role of the politically responsive branches in this way, the Court focused on ensuring that the agency interpretation was justifiable.[120] One important side effect of this decision is the leeway that it apparently gives agencies to shift their interpretation under a statute that may be unchanging so long as these interpretive shifts meet the "reasonableness" standard.[121] This allows agencies to respond to changing times, circumstances and needs in a way that is difficult, if not impossible, for courts to do.[122]

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[115] *See* THE FEDERALIST No. 78 (Alexander Hamilton); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) (identifying counter-majoritarian problem).

[116] *See Chevron*, 467 U.S. at 843.

[117] *See id.* at 865–66.

[118] *See id.*

[119] *See id.* at 866. The legal realist position held, in brief sketch, that on many questions the law did not provide a single answer; that it was indeterminate. In these indeterminate situations, more often than not it was subconscious biases or other processes that led to the outcome and that it was important to openly confront this problem. For the reader who does not want to read the collected works of Holmes and Brandeis or others associated with the realism movement, see Ely, *supra* note 45, at 835 n.7 ("Indeed, the very point of early realists like Holmes and Brandeis was that judges should understand what they are doing is not essentially different from legislating, *and approach their jobs with appropriate restraint.*") (emphasis added).

[120] *See id.* at 865–66.

[121] *See Chevron*, 467 U.S. at 863–65.

[122] *See generally* Dorf, *supra* note 16 (arguing common law method not flexible enough for modern pace of change.)

Just as executive agencies and the judiciary stand subordinate to a congressional enactment, so too do Congress and the judiciary stand subordinate to the Constitution.[123] Both Congress and executive agencies are empowered to bring the abstract language of a written document into a form where it may be implemented in everyday situations. It is this identical relationship to a written text that argues for recognizing an explicit congressional role in interpreting the Constitution, a role parallel to that granted agency interpretations of federal statutes found in *Chevron*.[124] The Constitution stems from "We, the People," through the mechanics of its adoption and subsequent amendments.[125] Similar to congressional legislation, its language often reflects compromise or a tacit acceptance that difficulties, which might not be worked out at the moment, can be left to another day in the face of strong need.[126] Additionally, by its very nature it is meant to adapt to changing circumstances.[127]

These features lead to the ambiguity one finds in so many of its most ringing phrases, an ambiguity shared by federal statutes.[128] Equal protection serves as a good example.[129] Does it mean formal equality of opportunity or outcome? Both? Neither? The Court gives flesh to concepts like equal protection through its interpretations, but these interpretations are the result of choices.[130] The Court acknowledges this much and more, in recognizing both the greater need to revisit its constitutional decisions and the greater likelihood of reversing its

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[123] Although this sentiment (and the ideology associated with it) can be linked to Edwin Meese, *see* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 13 (2d ed. 1996), it really is a tautology based on the Constitution's Supremacy Clause. *See* U.S. CONST. art. VI.

[124] *Compare Chevron*, 467 U.S. at 865–66 (one judicial response to ambiguity), *with* City of Boerne v. Flores, 521 U.S. 507, 527–29 (1997) (different response to ambiguity).

[125] *See* U.S. CONST. art. VII (ratification process), art. V (amendment process).

[126] *See, e.g.*, LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 350 (1988) ("The Framers had a genius for studied imprecision and calculated ambiguity. They relied on generalized terms . . . because *politics required compromise, and because compromise required ambiguity.*") (emphasis added).

[127] *See id.* at 294; *see also* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 229–30 (1988); ARTHUR SELWYN MILLER, SOCIAL CHANGE & FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION 3 (1979).

[128] *Compare* LEVY, *supra* note 126, at 350 (discussing constitutional ambiguity) *with Chevron*, 467 U.S. at 865–66 (discussing statutory ambiguity).

[129] *See* U.S. CONST. amend. XIV.

[130] *Compare* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 78 (1873) (concluding Fourteenth Amendment not intended to fundamentally alter relationship between federal government and states) *with* AMAR, *supra* note 9, at 163–71 (arguing for more expansive view of Fourteenth Amendment based upon historical materials).

constitutional precedents.[131] Unless one maintains that this evolutionary process on the Court is completely divorced from the realities of our society, the importance of understanding society's current needs should be clear.[132] Congressional representatives are institutionally better suited to understanding and adapting to these needs because of their responsiveness to the electorate.[133]

Coupled with statutory and constitutional ambiguity is the accountability shared by Congress and to a lesser extent, agencies, further suggesting the shared benefits of congressional and agency interpretive power. In the same sense that Congress oversees the agencies it creates, thus reducing the need for judicial decision as to the *best* policy among reasonable alternatives, so too do the American people watch over their elected representatives.[134] In *Marbury*, Marshall essentially accepted *Chevron*'s basic division between reasonable and unreasonable alternatives in evaluating the actions of executive officers, and the argument seems equally applicable to congressional actors, who are bound by the same oath as executives and the judiciary.[135] Additionally, Marshall put particular stress in *Marbury* on the Constitution's written nature as a justification for judicial review.[136]

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[131] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997) ("As we have often noted, '*stare decisis* is not an inexorable command,' but instead reflects a policy judgment . . . That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.") (citations omitted).

[132] As Oliver Wendell Holmes observed: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 192 (Suzy Platt ed., 1989).

[133] *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955):

> [The] law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. . . . For protection against abuses by legislatures the people must resort to the polls, not to the courts"

Id. (internal quotation omitted).

[134] *See generally* AMAR & HIRSCH, *supra* note 24 (arguing for overruling by plebiscite); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing that demise of judicial review would not be problematic because of democratic participation). *Cf. Chevron*, 467 U.S. at 864 (focusing on agency responsiveness, even though agency members are not elected).

[135] *Cf. Marbury*, 5 U.S. (1 Cranch) at 170 ("The providence of the court is, solely, to decide on the rights of individuals, not to inquire how the executive or executive officers, perform duties in which they have a discretion.").

[136] *See id.* at 176–77.

Insofar as the Supreme Court has consistently invoked the tools of statutory construction to ascertain the meaning of ambiguous phrases in the Constitution, the very foundations of judicial review argue strongly for congruent application of basic statutory interpretive principles to the Constitution as well.[137] Accepting this and thereby allowing Congress to explicitly interpret the Constitution does not necessarily lead to legislative supremacy, however. The *Chevron* Court acknowledged an important, but circumscribed role in determining what the law ultimately is—ensuring that debatable agency interpretations are implemented only where the statute is ambiguous and ensuring that these interpretations are themselves reasonable.[138] Accepting such a role with regard to constitutional interpretation would thus also leave the Court's role as ultimate interpreter intact. The question remains, then, how might such a process work?

B. *Constitutional Interpretive Equality in Action*

Applying the *Chevron* framework to congressional interpretations of the Constitution, the basic approach of the Court in most instances would be identical with current practice. It is an inescapable reality of the judicial system that courts must make decisions in concrete cases.[139] Assuming no explicit guidance from Congress, individual judges would continue to make what they feel is the best decision under the circumstances.[140] In this sense, constitutional practice would parallel that used whenever the Court approaches the application of a statute in a given case. The primary differences between this proposed methodology and current practice involves what happens when Congress addresses the constitutional interpretive question before the Court considers a challenge to a particular statute, and what Congress may do once the Court strikes down a statute in the absence of a congressional interpretation.

In the same way that agencies may adopt binding statutory interpretations under *Chevron*, Congress could adopt a constitutional interpretation and give it the effect of law, either as part of an enacted statute or standing alone, before the Court has evaluated the statute's constitutionality. These interpretations would need to explicitly state

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[137] *Cf. id.* at 173–76 (invoking tools of statutory construction); Griffin, *supra* note 17, at 1763–64 (discussing interpretive tools).

[138] *See Chevron*, 467 U.S. at 843.

[139] *See, e.g.*, KARL LLEWYELLN, BRAMBLE BUSH 40 (1960).

[140] *See* Griffin, *supra* note 17, at 1765 (describing current need to exercise legal judgment).

how Congress is construing the Constitution's demands, so that the Court may adequately determine the compatibility of such interpretations with the Constitution. These interpretations would be binding on the courts, and thus would have to meet Article I standards, including the President's veto power, in order to achieve this effect.[141] This requirement would also prevent Congress from opportunistically passing legislation based on varying interpretations of the same clause at the same time. Whatever flexibility the Constitution contains, its singular text should have the same meaning for all at any one time.[142] When confronted with a question of constitutional interpretation involving one of these areas, the Court would evaluate the proposed construction under a slightly modified *Chevron* doctrine.

First, the Court would ask if the Constitution is clear on the point at issue.[143] At this point, the inquiry should center on employing the traditional tools of legal analysis. If all of these tools point in the same direction, the answer is clear.[144] In essence, unanimity is the test at this point. Any proposed interpretation that conflicted with a unanimous answer would thus be rejected summarily. Why? The process-based answer is that when the presumably diverse members of the Court, employing whatever iteration of the various methodologies available to them all come to the same answer, there is strong reason to believe that the Court's exercise was one of "judgment," not of impermissible "will."[145]

If there are differences in the answers reached by the members of the Court, however, the Court would then move on to the next question: is the interpretation reasonable?[146] How the Court approaches this question will depend upon the procedural posture of the case. If the case is one of first impression for the Court, it will have to answer this question with reference to the opinions of its members and the other tools available to it. Assume, for instance, that Congress passes a statute that includes a section saying the prohibition of unreasonable searches and seizures has a "good faith" exception contained within it. The Court would then ask whether that constructions was reasonable *before* passing on the constitutionality of the effective ele-

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[141] *Cf.* Bowsher v. Synar, 478 U.S. 714, 726–27 (1986).

[142] *See Marbury*, 5 U.S. (1 Cranch) at 177 (unchanging text).

[143] *Cf. Chevron*, 467 U.S. at 865–66 (analogous principle).

[144] *See* Griffin, *supra* note 17, at 1764–65 (arguing, implicitly, that when multiple methods do not conflict, legal answer is clear).

[145] *Cf.* FEDERALIST No. 78 (Alexander Hamilton).

[146] *Cf. Chevron*, 467 U.S. at 865–66 (asking same question in statutory context).

ments of the statute. Just as easily, Congress could interpret a right to education to fall within the Fourteenth Amendment's protections in passing a law mandating equal educational opportunities in a state. Again, the approach would be the same. Thus one can see the political neutrality of the approach—without working through the analysis it is unclear what the answer in any individual case would be, but the process itself would be straightforward.

If, however, the case is brought in front of the Court in response to congressional re-enactment of a statute previously rejected as unconstitutional—assuming Congress has also passed a law detailing how it construed the relevant constitutional phrases—the Court would have the benefit of the majority, dissenting and concurring opinions as further guideposts in determining reasonability.[147] The Court even has a built-in baseline for determining unreasonableness as a matter of law beyond purely intellectual arguments. As mentioned earlier, unanimous decisions, prior to the Court's recognition of the reasonableness standard in this proposal, should foreclose congressional reconsideration because they represent a decision that the meaning of some phrase was sufficiently clear. Likewise, unanimous decisions under the first arm of the modified *Chevron* test would do the same. Again, the convergence of views provides unique reassurance that a decision is well-grounded or "clear" in the parlance of *Chevron*. Under either scenario, whether the Court addresses a case of first impression or revisits a previous decision, the result is the same. Congress is granted discretion but only within Court-imposed constraints. Thus, the Court would still maintain its role as the ultimate interpreter of the Constitution.

The ability to revisit Supreme Court interpretations rests upon the reasoning employed in *Chevron*. Explicit in the Court's *Chevron* decision is the recognition that interpretations under a statute may need to shift in order to adjust to changing times.[148] Implicitly, the decision thus grants to agencies the power to adopt constructions that depart from prior judicial constructions, so long as the departure is

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[147] One can easily imagine Congress reversing a 5–4 decision this way—by tacking on an adoption of the dissenters' rationale to a statute (or as a stand-alone bill). It seems difficult to imagine how the members of the Court would be able to characterize their dissenting colleagues as "unreasonable," particularly if there is agreement among the dissenters (rather than a splintering of views).

[148] *See* 467 U.S. at 863–64.

reasonably within the meaning of the statute.[149] In applying the *Chevron* rationale to congressional interpretive power, the same considerations hold. If Congress could adopt a different interpretation than the Court before the Court rules on a case and have it upheld by the Court, there is no principled reason why Congress could not do the same after a judicial decision.[150] It is this exercise of the interpretive power that would require the Court to revisit the issue of a statute's constitutionality.

Significantly, this procedure would not require any alteration of the "Rule of Five," in the sense that five Justices could *still* declare that a statute failed both prongs of the *Chevron* test. This result would simply be more unlikely, however, if one accepts the background assumptions of ambiguity in the constitutional text and intellectual honesty on the Court. The truth of the former poses no problem for the proposed method because it would be dealt with under the first stage of the adapted *Chevron* test. As for the latter, it would appear much harder for a Court whose legitimacy rests on the reasoned justification of its opinions to hide behind its "non-political" role when the interpretive question is posed in terms of reasonableness. Where reasonable arguments for both positions exist, the Court in *Chevron* acknowledged that judicial choice is more appropriately viewed as the exercise of political choice by the unelected, rather than the explication of law.[151]

The proposed method thus should test where the rubber meets the road—can members of the Court put aside their own personal predilections to answer the second question honestly? Undoubtedly the answer is yes, but such an important question should be openly confronted rather than exist as a mere academic hypothetical. Finally, it would allow a principled method of determining when the Court extends beyond "judgment" into "will" by examining the logical consistency of the Court in a given area—where a result is inconsistent with the Court's stated rationale, the odds are good that politics is driving the decision.

Before examining some of the most salient arguments for and against this proposed method, it will be helpful to see how this proposal works when applied to actual cases. For these purposes, *Roe v.*

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[149] *See id.* at 843 n.11 (recognizing agency interpretation not necessarily what judiciary would decide as matter of first impression).

[150] *Cf. id.* at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[151] *See id.* at 865–66.

Wade and *City of Boerne* are ideal: they represent contentious issues where disagreement appears endemic. These cases will not only allow an exploration of the descriptive and normative components of the methodology, but it is hoped that these examples also will show how the methodology may facilitate dialogue by distinguishing between reasonable and "best" interpretations, as well as inconsistent application of any particular interpretation.[152]

III. Applying the Method to *Roe v. Wade* and *City of Boerne*

Roe v. Wade represents one of the most divisive issues in our society today. Abortion cases have been an important backdrop to our political discourse. They dictate Supreme Court appointments, provoke mass political movements and present a recurring sight on the Court's docket.[153] *Roe* also has resulted in congressional challenges to the Supreme Court's authority.[154] For present purposes, *Roe* is useful because it puts in stark contrast the differing relationship between state and congressional interpretations under this proposal, while showing how the proposal might work. *Roe* also exhibits how the proposed methodology, with its implicit requirement of logical consistency by the Court, allows one to detect when the Court oversteps its judicial bounds and suggest curative steps—all while remaining agnostic between the combatants in the abortion debate.[155] *City of Boerne,* on the other hand, represents a crystallized moment of conflict between the legislative and judicial branches.[156] Application of the proposed methodology to *City of Boerne* can reconcile it with the strongest precedent against it, and provide insight into how the proposed methodology would work in practice.

Roe v. Wade, decided in 1973, held unconstitutional a state statute criminalizing abortions.[157] In that case, a Texas woman challenged the law as a violation of her due process rights.[158] The Court concluded that a fetus was not a constitutional "person" under the Fourteenth

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[152] *See infra* notes 153–217 and accompanying text.

[153] *See* Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 995 (1992) (Scalia, J., dissenting); John G. Ferreira, Note, 10 Hofstra L. Rev. 1269 (1982).

[154] *See* Ferreira, *supra* note 153, at 1270–71 (describing Human Life Bill attempting to overturn *Roe*).

[155] *See infra* notes 182–196 and accompanying text.

[156] *See* City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[157] *See* 410 U.S. 113, 165 (1973).

[158] *See id.* at 129.

Amendment.[159] The Court's opinion also located a pregnant woman's right to terminate the pregnancy within the context of the Court's previous "right to privacy" cases.[160] The majority further concluded that although the fetus was not a "person" under the Fourteenth Amendment, the state did have an important interest in protecting the "potential life" as well as the mother's health.[161]

In analyzing the relationship between privacy rights and the state's rights to protect the mother and the fetus, the Court established a trimester framework for evaluating abortion regulations.[162] During the first trimester, based on statistics indicating that abortion was safer than carrying a pregnancy to term, the Court rejected regulation of abortion.[163] As the pregnancy entered the second trimester, however, the Court determined that the state could regulate abortion, but only so long as the regulations were intended to protect the pregnant woman's health.[164] Finally, according to the Court, the state's interest in protecting potential life would outweigh the woman's privacy interest in the third trimester, so long as there was an exception for situations where the woman's life and health were in jeopardy.[165]

In recognizing a right to abortion, *Roe* invalidated the abortion laws of states across the country and ignited a firestorm of criticism and protest.[166] By the early 1980s, opponents of the decision had gathered enough political clout to make overturning *Roe* a national issue.[167] During this period, certain members of Congress argued that rather than passing a constitutional amendment to reverse *Roe*, Congress might accomplish the same end through enactment of a statute.[168] While the proposed "Human Life" legislation—which would have defined a "person" as beginning at conception—never passed, this strategy of congressional interpretation of the Constitution would reappear in the debate over the Religious Freedom Restoration Act ("RFRA").[169]

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[159] *See id.* at 156–58.
[160] *See id.* at 153.
[161] *See id.* at 162–63.
[162] *See Roe*, 410 U.S. at 163–64.
[163] *See id.* at 164.
[164] *See id.*
[165] *See id.*
[166] *See* Ferreira, *supra* note 153, at 1269 (summarizing reactions to *Roe*).
[167] *See id.*
[168] *See id.*
[169] 42 U.S.C. § 2000bb et seq. (1994).

For purposes of exploring the proposed methodology, *Roe*'s central importance lies in its direct analysis of the text of the Constitution: the Court's interpretation of the word "person" under the Fourteenth Amendment.[170] It is important to note that this construction replaced a state interpretation of the key constitutional terms. Under the proposed methodology, this is only proper because the Constitution should depend upon interpretation by federal actors, not states[171]—congressional interpretation would thus not shift this important balance.[172] One must thus turn to the word "person" in the Fourteenth Amendment.

It seems clear that the word cannot be applied before conception, for before then there is not a genetically distinct individual thing upon which to attach concepts of personhood.[173] Additionally, the Fourteenth Amendment defines citizens based upon birth, setting that as the latest point at which a fetus could be considered a "person."[174] Between conception and birth there are, at least, three other points that appear to reasonably demarcate the line between "person" and "non-person": the initiation of heartbeat,[175] the beginning of brainwave activity[176] and viability.[177] Faced with these potential choices

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[170] *See* 410 U.S. at 158.

[171] As Oliver Wendell Holmes observed, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295–96 (Harold J. Laski ed., 1952).

[172] This is analogous to the comity reflected in Supreme Court deference to state court constructions of state law and constitutions. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). This is reinforced by the multiplicity of potential state interpretations of a single text. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816).

[173] The justification for this point is fairly straightforward. The egg and sperm cells are live cells. *See* Michael J. Flower, *Coming into Being: The Prenatal Development of Humans in* ABORTION, MEDICINE AND THE LAW 437, 438–42 (J. Douglas Butler & David F. Walbert eds., 1992) (noting that it may be difficult to pin down the exact point during the fertilization process that those cells unite to become a "person").

[174] *See* U.S. CONST. amend. XIV.

[175] This point seems reasonable because the cessation of the heart is one criteria for determining death. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7180 (West 1970 & Supp. 2001).

[176] This is based on another criteria for determining death. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7181 (West 1970 & Supp. 2001).

[177] The Court in *Roe* seemed implicitly to recognize this point in its trimester framework. *See Roe*, 410 U.S. 164–65. The rationale is clear enough: if the child *could* survive on its own, its individuality and humanity could be considered realized, thus allowing recognition as a "person." *See also* Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 846 (1992) (recognizing viability as point justifying regulation). *But see also* Flower, *supra* note 171, at 441 fig. 2 (recognizing other important transition points).

in *Roe,* the Court had to choose. Birth is among these rational choices and the Court cannot be faulted for choosing that particular point. In this sense, *Roe* was not erroneous as a matter of legal interpretation.

One consequence of the proposed methodology, however, is the opportunity it offers for Congress to alter that line. Because the key term, "person," is in the Fourteenth Amendment, whatever definition is given to it must apply nationally. Congress could adopt a different line, moving the line to viability or some other, earlier point.[178] If this were done, the differing application of laws regulating the intentional taking of a life depending upon birth would appear vulnerable to an equal protection challenge.[179] Should Congress pass a law construing "person" in such a fashion, under this proposal Supreme Court acceptance appears almost certain.[180] Clearly, such a position might lead to restrictions on the right to abortion, but a single switched vote on the Court would leave the country in the same position.[181]

At the same time, because the proposed methodology shifts the normative focus away from policy concerns, one can examine the logical consistency of opinions to discover a strong indication of improper political concerns. This process is value-independent in the sense that it depends not on the commentator's policy commitments, but rather on the interpretive and value judgments already made by the Court. A brief sketch shows how one might criticize the Court's current approach based on its own reading of the Fourteenth Amendment in *Roe,* but reaching a result at the other end of the political spectrum from the potentially "conservative" positions described above that congressional interpretation would make available.[182] With *Roe,* the Court's interpretation of "person" has ram-

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[178] Although there is an argument that the Court in *Roe* did precisely that in its recognition of the state ability to ban most abortions post-viability. *See* 410 U.S. at 164–65.

[179] *See id.* at 157 n.54 (recognizing equal protection dilemma).

[180] One might imagine states that define personhood more broadly than Congress (or the Court). Assuming for the moment that this extended definition would not immediately violate the Constitution, there may be other ramifications that will be explored soon within the context of the Supreme Court's current understanding of "person." *See infra* notes 182–196 and accompanying text.

[181] *See Casey,* 505 U.S. at 944 (Rehnquist, C.J., dissenting).

[182] The contention here is that by attempting to remove the more outright political considerations from the judicial process, the Justices are left with choosing among the various constructions. They may surely consider what the ramifications of choosing one over another are in settling upon one construction. What should be singled out, however, is the attempt to water down, based on policy rather than legal justifications, the construction they have adopted to avoid unpleasant results, rather than accepting the ramifications of the construction they have adopted or outright switching to another option.

ifications that cast serious doubt on part of the Court's trimester rationale and the continued invocation of the "undue burden" test enunciated in *Planned Parenthood v. Casey*.[183]

Applying this principle of analytic consistency to try and ferret out when politics, divorced from reasonable interpretations of the constitutional text, is at work, two problems with *Roe* stand out. First, the legal classification of the fetus, left open by *Roe*, is troubling. At first glance it would appear that the lack of personhood leaves the fetus as property.[184] The Supreme Court has never so held, however, and appears to treat the fetus as a *sui generis* category.[185] If the Court has actually carved out a unique legal category, one would hope for a rationale and maybe an explanation of what a fetus *is* legally, as opposed to what it is not.[186] The Court has not, however, seen fit to provide either despite almost thirty years of abortion litigation.

The second, more problematic, aspect of *Roe* is related to the legal status of the fetus, but focuses on a woman's relationship to her body, a fetus and the law. Assume every mother has a clear liberty interest, if not also a property interest,[187] in her own body.[188] Because the fetus is not legally a person, nor even alive,[189] it would appear that any regulation of abortion not aimed at protecting the health of the

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[183] *See Casey*, 505 U.S. at 877 (replacing *Roe* trimester framework with requirement that abortion regulations not constitute an "undue burden" on woman's right to abortion).

[184] *Cf.* BLACK'S LAW DICTIONARY 1216, 1479 (6th ed. 1991) (property as "that which belongs to one," things "as property . . . contradistinguished from 'persons'").

[185] *Cf.* Witty v. American General Capital Distributors, Inc., 727 S.W.2d 503, 506 (Tex. 1987) (holding fetus neither "person" nor "property"); Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 4 DEPAUL J. OF HEALTH CARE L. 703, 785 (1999) (arguing that the fetus occupies a unique status, but comparable to "stewardship" of animals).

[186] *See* William E. Buelow III, Comment, *To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 TEMPLE L. REV. 963, 965 (1998) (arguing present status is "absolutely inconsistent"). The conundrum posed by the current, unexplained role of the fetus is adequately summed up in one Texas court's observation: "Strangely, Texas law denies the mother and father of a viable human fetus capable of living outside the womb at the time of the negligent tort, the redress of a statutory wrongful death suit or survival claim for loss of the viable fetus, while at the same time Texas law classifies unborn animals as "goods," so humans who own pregnant animals will have redress for the negligently inflicted death of their unborn animals." Parvin v. Dean, 7 S.W.3d 264, 275–76 (Tex. App. Ct. 1999).

[187] It is at least unclear if bodily parts are legally-cognizable property, *see* Moore v. Regents, 793 P. 2d 479, 488–89 (Cal. 1990) (finding patient's cells not property *after* removal from body), but the fetus is arguably distinct from the mother, *see* Flower, *supra* note 173.

[188] *See Casey*, 505 U.S. at 915 (Stevens, J., concurring and dissenting) ("One aspect of this liberty is a right to bodily integrity, a right to control one's person.").

[189] This directly follows from the *Roe* Court's observation that the state's interest is in "*potential* life" as opposed to existent life. *See* 410 U.S. at 162–63.

mother results in the usage of the woman's body for the benefit of the state.[190] This is an infringement of her liberty interest—and therefore requires due process[191]—and, arguably, a taking of her property.[192] The state cannot properly invoke a protection rationale because, legally, there is no one to protect.[193]

The effect of such an understanding would be, at a minimum, to greatly restrict the availability of such regulations,[194] or even to require the state to subsidize, during pregnancy, the children that its policies are requiring to be born.[195] A strong argument thus exists that every woman that carries a child to term should—if the Court were to accept these implications of its opinions—have a claim against the state once her pregnancy reaches the point at which the state steps in to prevent abortion.[196] Conceding the brief nature of the treatment of the above argument, it does reveal a great structural weakness in *Roe* and its progeny—where did the Court find the link between potential fetal life and a state's compelling interest? Even accepting this link, why must a state pay for a constitutional taking when a plane flies over someone's home but not when a woman is forced to carry a child to term?[197] This failure of the *Roe* Court to reach the conclusions that appear to follow from its legitimately chosen inter-

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[190] *Cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'").

[191] *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."). This due process requirement is applicable against Congress and also against the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1.

[192] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). This requirement is not only applicable to the states, it can be invoked for interim damages for a "temporary taking." *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) ("It is axiomatic that the Fifth Amendment's just compensation provision is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.") (internal quotations omitted).

[193] Again, under *Roe* and its progeny, there is no life, only "potential life." *See Roe*, 410 U.S. at 162–63.

[194] *Cf. Roe*, 410 U.S. at 162–165 (striking down most pre-viability regulations because state interest insufficient).

[195] *Cf. First Lutheran*, 482 U.S. at 318–19 (requiring interim damages for a temporary taking by state).

[196] *Cf. id.* at 314–16 (recognizing reasons for interim compensation).

[197] *See* United States v. Causby, 328 U.S. 256, 266–68 (1946) (possible Fifth Amendment taking when planes constantly fly over house); Thornburg v. Port of Portland, 376 P.2d 100, 103 (Or. 1962) (nuisance easement constitutes taking even though planes do not fly directly overhead).

pretation, or even to discuss them, thus serves as a strong indication that the Court is crossing the line into illegitimate political choice rather than principled constitutional interpretation.[198]

The proposed methodology thus allows abortion foes the opportunity to take their case that abortion constitutes the murder of human beings to the people.[199] If they are correct in their contention, the issue takes on a different hue than if it is solely about reproductive freedom.[200] Recognition of the fetus as a "person" creates some serious conflicts between laws dealing with abortion, the intentional killing of "persons" and the Equal Protection Clause.[201] This does not make the case, rather it only recognizes that these activists have powerful, emotive arguments that the Supreme Court has not adequately confronted.[202]

At the same time, the proposed methodology also may be used to criticize the Court's attempts to reach a political compromise on the issue by denying women some of the very rights that *Roe* purported to protect. By recognizing the due process and takings concerns left aside in *Roe*, even though they appear incompatible with its holding, it makes it possible to identify where *Roe* went wrong with its own internal logic.[203] Forcing the Court to confront these issues could bring the sexual equity issues inherent in the abortion debate to the forefront. If we deem the fetus is a "thing" and not a person, acknowledging that

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[198] If we object to the possible commodification of the birth process, there is at least one response available, even if untried—the Court should state precisely what the legal status of the fetus is—if not a "person," then it should state why it is not "property." Moreover, it should explain how a constitutional right (a woman's privacy right) can ever be outweighed by a statutory/political right (the state's interest in protecting the "potential life").

[199] *See, e.g.*, LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 7 (1992) (stating only political campaign available to advocates was to transform the federal judiciary).

[200] *See Roe*, 410 U.S. at 156 ("If this suggestion of personhood is established, the appellant's case, *of course*, collapses . . . .") (emphasis added).

[201] *See id.*; *see also id.* at 157 n.54 (recognizing possible equal protection problems with lesser punishments for abortions than other criminal offenses).

[202] Nor does this realization necessarily detract from possible objections based on equal protection grounds (if women were solely targeted by any implementation of the view) or grapple with arguments that some level of disparate treatment between the born and unborn may be rational and/or constitutional. Rather, it should help people of goodwill move forward in understanding and resolving this thorny issue.

[203] Again, the Court might be able to clarify its position by explaining precisely what the legal status of a fetus is. If the Court is going to make this a *sui generis* category, neither person nor property, the Court should at least lay out a reasoned justification for the choice. *See supra* note 184–186 and accompanying text; *see also Casey*, 505 U.S. at 846 (recognizing state's interest in protecting fetus, but no mention of fetal "interests" or fetal legal *status*).

society's abortion laws may be taking from women control over their bodies and property without paying the price or following proper procedures—if any procedure could ever be "proper"—could significantly alter or clarify the current terms of the debate.

What an acceptable price might be should be a matter of open debate and exploration, rather than a relic of stereotypes or unspoken assumptions. Either choice would move our national dialogue on the issue and its related strands forward, rather than locking it into its current, stagnant form.[204] Seen in this dual fashion—as setting the range of discourse and also allowing normative evaluation of Supreme Court decisions without endorsing any particular outcome—the proposed methodology could serve to unify our constitutional discourse while also enriching it. Additionally, it shows how the methodology can allow meaningful dialogue between disagreeing viewpoints by focusing on reasonability and the consistency of an interpretation and its application. Once we define the sphere of reasonable interpretations, the pros and cons of both can be outlined and then the discussion becomes more appropriately political, rather than legal.

Just as the proposed method may have wide ramifications for *Roe*, so too does it have significant import for *City of Boerne*.[205] In 1990, in *Employment Divison v. Smith*, the Supreme Court held that a state's denial of unemployment benefits to a worker fired for the illegal use of peyote did not violate the Free Exercise Clause of the First Amendment.[206] Despite the centrality of peyote use to the worker's religion, because the law was neutrally applied to members and non-members of the Native American Church alike it was held consistent with the First Amendment.[207] The Supreme Court reasoned that a neutral law did not constitutionally require a balancing test where the asserted state interest has to be compelling before a law could be applied to religious followers.[208]

Drawing upon its power under the Fourteenth Amendment to enforce the protections found in the Bill of Rights, Congress passed legislation aimed at mandating the balancing test rejected by the Court in *Smith*.[209] The Supreme Court invalidated this legislation in

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[204] *See* TRIBE, ABORTION, *supra* note 199, at 7 (recognizing impasse between various interests in the abortion debate).

[205] 521 U.S. at 507.

[206] 494 U.S. at 890.

[207] *See City of Boerne*, 521 U.S. at 512–13.

[208] *See id.*

[209] *See id.* at 515–16.

City of Boerne.[210] Although conceding that Congress had some power to enact prophylactic rules under the Fourteenth Amendment, the Court held that there must be a showing that such rules were needed.[211] In this case, Congress had not established any need for the rule, thus putting it beyond congressional power.[212]

The invalidation of the RFRA appears to have largely circumscribed, if not altogether extinguished, the power of Congress to offer greater protection of rights than the Court itself recognizes.[213] Applying the proposed methodology, *Boerne* is nonetheless a "correct" interpretation of the Fourteenth Amendment in the sense that its reliance on precedent and policy plausibly ties into the text of the Fourteenth Amendment.[214] This interpretation is only one of several plausible interpretations, however, as a cogent argument can be made that the very purpose of the Fourteenth Amendment was to grant wide power to Congress to enforce its vision of the Bill of Rights protections against the states.[215] Using the proposed methodology Congress could reasonably adopt the more expansive view of the Amendment and overrule the decision.

Significantly, the Court did not address the broad second-order question of constitutional interpretation, regarding whether or not Congress has constitutional interpretive power. Rather, it rejected such power only as it applies to the Fourteenth Amendment under the Court's own reading of the Amendment.[216] Implicit in the opinion, however, is the Court's apparent hostility towards such arguments of a more expansive congressional role.[217] The very purpose of the proposed method, however, is to lay out the arguments, based primarily on precedent as well as policy, that might convince the Court otherwise, thereby opening the way for a reconsideration of this decision.[218] Moreover, if Congress were to claim the broad interpretive

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[210] *See id.* at 536.

[211] *See id.* at 530–35.

[212] *See City of Boerne*, 521 U.S. at 536.

[213] *See id.* at 529 (describing dangers of congressional substantive interpretation of the Constitution's provisions).

[214] *See id.* at 520–29.

[215] *See* AMAR, *supra* note 9, at 163–74.

[216] *See City of Boerne*, 521 U.S. at 529.

[217] *See id.* at 529.

[218] One hint that such an approach might be worthwhile lies in Justice Scalia's recent book. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 136 (1997). Justice Scalia implies that, if the Constitution is more ambiguous by virtue of its aspirational qualities than he apparently believes it is, judicial review may be inappropriate. *See id.* This proposed

power outlined above, that combined with the 5–4 decision in *Boerne* as to the meaning of the Fourteenth Amendment would require the Court reach a different conclusion under the proposed methodology. These applications of the proposed methodology pave the way for an assessment of the strengths and some of the strongest potential criticisms of the method.

IV. Reasons For and Against the Proposed Method

If one were to analyze judicial decisions in an economic fashion, one might focus on the error cost associated with these decisions.[219] Theoretically, one would inquire into the likelihood that a court would be wrong and the effect of these errors.[220] One difficulty in doing so, however, is reducing the consequences of legal error to a single measure, which would allow comparison between individual decisions and interpretive theories in an attempt to rationally minimize error costs.[221] Assuming such a metrical approach to error costs is difficult—if not impossible—to do,[222] it is still possible to get a rough idea of the ramifications if the criticisms of *Roe* and *Boerne* mentioned earlier are correct, whatever their ideological stripe.[223] Judicial review, as it is currently practiced, can lead to tragic mistakes on a massive, national level and can stunt our level of political discourse.[224] In contrast, it is enough to briefly touch on some key benefits of the proposed method, as revealed in the *Roe* and *Boerne* examples.

The first benefit of the approach is the flexibility it restores to our constitutional system.[225] While the Constitution is unchanging, it is meant to survive in changing times.[226] As Cass Sunstein and Michael

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method attempts to reconcile ambiguity with judicial review rather than deny an important role for either.

[219] *See* Sunstein, *supra* note 16, at 18. ("Error costs are the costs of mistaken judgments as they effect the social and legal system as a whole.").

[220] *See id.*

[221] *See id.* at 19.

[222] *See id.*

[223] *See supra* notes 153-218 and accompanying text.

[224] These ideas are broached in the attacks on maintaining only minimal judicial review found in some of the works by Akhil Reed Amar, Alan Hirsch and Mark Tushnet. *See generally* Amar & Hirsch, *supra* note 24; Tushnet, *supra* note 134.

[225] *See, e.g.*, Tushnet, *supra* note 134, at 177–82 (defending a more flexible constitutional vision).

[226] *See supra* note 127 and accompanying text. Further support lies in the realization that Chief Justice Marshall's words about the "constitution we are expounding" in *McCulloch v. Maryland*, 107 U.S. (4 Wheat.) 316, 407 (1816), were raised to support allowing con-

Dorf have recently noted, the pace of change and the needs of the country simply outstrip the ability of the courts, and particularly the Supreme Court, to respond adequately.[227] Both rely on the increased pace of change in support of these arguments,[228] but an even greater argument for flexibility rests in the Court's own history.[229]

The need for flexibility can be seen in the case of *Dred Scott v. Sanford*, where the Court declared a federal statute unconstitutional for only the second time in its history.[230] Beyond deciding the case at hand, the Court reached out to try and solve a national issue by declaring unconstitutional the Missouri Compromise of 1850, which moderated the sectional tensions over slavery.[231] Instead of accomplishing its intended result, the Court hastened, and perhaps made inevitable the bloodiest conflict in United States history.[232] Assuming that one agrees the decision was, or at the very least, could have been wrong, the Supreme Court only grades out at 50% over the course of the first sixty years of judicial review.[233] Again and again, the results of judicial "mistakes" have dramatic impacts upon the United States.[234]

Beyond these mistakes, the Court's history of politically-influenced decisions argues against a static and non-political view of its role.[235] In the 1937 cases of *NLRB v. Jones & Laughlin Steel Co.* and *West Coast Hotel v. Parrish*, the Supreme Court significantly reversed course in its Commerce Clause jurisprudence following the Presi-

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gressional discretion. *See* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 41 (1986).

[227] *See* Sunstein, *supra* note 16, at 100; Dorf, *supra* note 16, at 8.

[228] *See* Sunstein, *supra* note 16, at 18 (using Internet as example of rapid change); Dorf, *supra* note 16, at 8.

[229] *See infra* notes 230–244 and accompanying text.

[230] *See* 60 U.S. (19 How.) 393, 452 (1856).

[231] *See* Sunstein, *supra* note 16, at 49.

[232] *See id.*

[233] For a characterization of the decision as a mistake, see Sunstein, *supra* note 16, at 49. In order to arrive at the 50% figure, compare *Marbury*, 5 U.S. (1 Cranch) at 180 (assuming correct) with *Dred Scott*, 60 U.S. (19 How.) at 452 (assuming incorrect).

[234] If the over one million dead and wounded do not stand as sufficient indictment of the dangers attached to judicial inflexibility, one need only look to the Great Depression for another poignant example. *See* 4 THE NEW ENCYCLOPAEDIA BRITANNICA 681 (1983) (Civil War casualties). It is almost a truism that the active exercise of the judicial veto of federal statutes during the early Depression was erroneous. *See, e.g.*, CASS SUNSTEIN, THE PARTIAL CONSTITUTION 45 (1993). In 1937, when the Court began sustaining similar statutes and overruling prior decisions, the Court effectively admitted as much. *See id.* The previously invalidated programs may well have worked. At the very least, they deserve the benefit of the doubt. How many families that might have been helped had to suffer because of a constitutional mistake?

[235] *See, e.g., infra* notes 236–239 and accompanying text.

dent's court-packing plan.[236] The "switch in time that saved nine" is an episode that underscores the interaction between flexibility and political choice that already exists on the Court.[237] Not only did the Court take a new interpretive path; it appeared to do so in direct response to political pressure.[238] One need not be a complete cynic to observe that the history of the Court's economic decisions at this time might be more adequately explained by observation of presidential appointments during the period rather than a focus on the legal justifications advanced.[239] This politically adaptive behavior by the Court underscores another benefit of the proposed method.

By its very nature, Congress is more capable of responding to changing conditions than the judiciary because of its ties to the American electorate and independent fact-gathering abilities.[240] Although this is no guarantee that congressional policies will be "good," the process of election should minimize policies that are too "bad."[241] Moreover, it is unclear that the Court is any more "good" than Congress. Defenders of current Court practice might point to the Court's decision in *Bolling v. Sharpe*, invalidating educational segregation in the District of Columbia, as an example of saving Congress from its own impulses.[242] The revealing contrarian story focuses on the history of conflict between a civil-rights enforcing Congress and the judiciary that marked the early post-Amendment years, including the Court's attempts to restrict and defang the Fourteenth Amendment.[243] It is at

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[236] *See NLRB*, 301 U.S. 1, 49 (1937); *West Coast Hotel*, 300 U.S. 379, 398–400 (1937); *see also* United States v. Darby, 312 U.S. 100, 115–16 (1941) (overruling key economic due process case).

[237] *See* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 620 (1994).

[238] *See id.* at 621–23.

[239] *See id.*

[240] *Cf.* TUSHNET, *supra* note 134, at 65–71 (examining objections to congressional constitutional interpretation and concluding that "skeptical rejection of populist constitutional law . . . is powerfully antidemocratic.").

[241] *See, e.g.*, AMAR & HIRSCH, *supra* note 24, at 28 (defending constitutional plebiscites against mistakes because of flexibility to repeal).

[242] 347 U.S. 497, 500 (1954).

[243] Consider the following cases: *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), which restricted Congressional power to enforce civil rights to state action, while *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872), effectively eliminated the reach of the Fourteenth Amendment's Privileges and Immunities Clause. One of the earliest Dormant Commerce Clause cases, *Hall v. Decuir*, 95 U.S. 485, 487–88 (1877), struck down a state desegregation law for common carriers within the state, while the Supreme Court upheld a nearly identical law mandating segregation in *Louisville, N.O. & T. Ry. Co. v. Mississippi*, 133 U.S. 587, 594 (1890) (Harlan, J., dissenting) ("The Mississippi statute, in its application to passengers on railroad trains employed in interstate commerce, requires . . . sepa-

best unclear that judicially-crafted doctrines, whether the Warren Court's expansion of civil rights or the ninety years of judicially-sanctioned Jim Crow laws, are an improvement over the vagaries of Congress.[244]

Facilitating flexibility is thus an attempt to minimize the effect of judicial error and ensure that political decisions are indeed made by politically responsive branches, while leaving the judiciary with a limited, but important, role.[245] Additionally, although the potential increase in change may impact reliance interests,[246] this effect is counterbalanced in many ways by the prospective nature of legislation compared to the retroactive application when the Court overrules its precedents;[247] it supplies people with greater notice of the Constitution's meaning as enforceable law. This clarifying effect for the public will be particularly pronounced if Congress begins to add interpretive sections to legislation before the Court even addresses a statute.

Tied to these democratic concerns with flexibility is the relative ease with which change could then be effected under the proposed methodology, as opposed to the difficulty inherent in requiring the people to go through the amendment process every time the Court makes a mistake.[248] The disconnect between the Court and the people makes the Court more difficult for the American public to monitor than Congress,[249] and the difficulty of the amendment process stands as a significant hurdle to political organization for all except the most

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ration of races, while those trains are within that state. I am unable to perceive how [*Hall v. Decuir*] is a regulation of interstate commerce, and [this] is not.").

[244] *Compare* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (expanding Fourteenth Amendment protections), *with supra* note 243 and accompanying text (Supreme Court arguably reducing Fourteenth Amendment protections).

[245] In this same vein, see Sunstein, *supra* note 16, at 18; Dorf, *supra* note 16, at 51; *see generally also* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing for limited Supreme Court role).

[246] *See* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (explaining significance of reliance interests to *stare decisis* considerations dealing with prior constitutional decisions).

[247] *See* SCALIA, *supra* note 218, at 10–11.

[248] *See* AMAR & HIRSCH, *supra* note 24, at 5.

[249] Regardless of the empirical ability of citizens to track their congressional members or Court decisions, Court members are substantially removed from the political process. This follows from the insulation granted by the Constitution to the judiciary with life tenure. *See* U.S. CONST. art. III. *But see also* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 185 (1999) (noting public lack of knowledge of and affect toward Supreme Court).

popular propositions.[250] Once one acknowledges the ambiguity in many of the Constitution's provisions, requiring an amendment to fix each interpretation seems to be a requirement disproportionate to the offense.[251] After all, judicial decisions are below the Constitution, not equivalent to it.[252] This concern is particularly valid if one accepts the argument that the amendment process can be short-circuited by the Court's asserted power to then interpret that constitutional provision.[253]

Beyond these concerns with flexibility lie other democratic considerations. Congressional interpretation, under the proposed method, would put the words of the Constitution squarely on the table of the American electorate.[254] The reinjection of the Constitution into our political discourse would thus serve to reinvigorate politics in such areas as abortion and religious freedom.[255] In so doing, congressional interpretation will raise the stakes surrounding elections and the oversight of Congress, thus encouraging greater participation.[256] Additionally, congressional interpretation ties the Constitution to the very audience at whom its written form was directed, the American public.[257] At the same time, the limitations on congressional interpretation serve to minimize the chances that an impassioned majority will tread on the Constitution unchecked.[258]

Additionally, the proposed method is compatible with current practice. Given the Court's comfort level with incremental change, this can be seen as simply another step in the unfolding explication of judicial review, statutory interpretation and the political question doc-

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[250] *See* U.S. CONST. art. V (amendment process requirements); *see also* AMAR & HIRSCH, *supra* note 24, at 5 (making reference to agency problems in enacting amendments).

[251] *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 59 (1949).

[252] *See* Fisher & Devins, *supra* note 123, at 13 (describing Meese view). This observation is being used in the most basic sense, to simply restate the Supremacy Clause of the Constitution in a different form.

[253] *See* TRIBE, CONSTITUTIONAL CHOICES, *supra* note 9, at 23–24; *see also Civil Rights Cases*, 109 U.S. at 11 (placing restrictive interpretation on terms of Fourteenth Amendment).

[254] For other works adopting a similar perspective, see generally AMAR & HIRSCH, *supra* note 24; TUSHNET, *supra* note 134.

[255] *See generally* AMAR & HIRSCH, *supra* note 24.

[256] *Cf.* TUSHNET, *supra* note 134, at 174 (stressing important values in spreading constitutional responsibility throughout population).

[257] *Cf.* James Madison, *Speech to the House Explaining His Proposed Amendments with Notes for the Amendments Speech in* THE RIGHTS RETAINED BY THE PEOPLE 51, 58 (Randy E. Barnett ed., 1989) (aimed at general public).

[258] *See id.* at 60–61 (role of justice tribunals in preventing constitutional violations).

trine.[259] It is a step anticipated by *Chevron* and requires no revolutionary alterations in the working of the Court or its precedents.[260] Moreover, this method fits well with current practices in recognizing an important role for congressional interpretation, but avoiding a grant of interpretive power equivalent to Congress's ability to completely rewrite statutes.[261]

Not only is the proposal compatible with current practice, but it would also allow the Court to clarify some problematic doctrines. By shifting some of the onus for interpretive change onto Congress, this method could justify a stronger form of *stare decisis*.[262] Conversely, its acknowledgment of the policy grounds underlying many Supreme Court decisions and the power of Congress to correct "mistaken" policies may justify a more activist Court less beholden to *stare decisis*.[263] Although the method is agnostic between a strong or weak version of *stare decisis*, it gives a clear rationale for either choice.[264] The major limitation on the above observation is the immovable weight given unanimous opinions.[265] This caveat creates a principled justification for the application of *stare decisis* to unanimous decisions—without regard to the decision's substance—while leaving room for prudential arguments about *stare decisis* in other contexts.

The proposed method would also eliminate the need for a separate "political question" doctrine.[266] Despite the Court's efforts to rationalize the "political question" doctrine, it still has a certain *ad hoc* air to it.[267] Not only is it unclear when it applies, but it appears to cover too much.[268] As the concurring Justices pointed out in *Nixon*, the doctrine's complete exemption of issues from judicial oversight seems excessive.[269] For instance, one rightly may ask whether it would make sense in a case like *Powell* to come to a different conclusion because Congress had, by majority vote, concluded that Powell was six-

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[259] *See* Dorf, *supra* note 16, at 7–8 (noting that Supreme Court uses common law, common law is incremental).

[260] *See supra* notes 112–138 and accompanying text.

[261] *See supra* notes 112–138 and accompanying text.

[262] *See supra* notes 240–254 and accompanying text.

[263] *See supra* notes 240–254 and accompanying text.

[264] *See supra* notes 240–254 and accompanying text.

[265] *See supra* notes 142–45 and accompanying text.

[266] *See supra* notes 75–90 and accompanying text.

[267] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 209–37 (1961).

[268] *See, e.g.*, Nixon v. United States, 506 U.S. 224, 239 (1993) (White, J., concurring); *id.* at 253–54 (Souter, J., concurring); TRIBE, CONSTITUTIONAL CHOICES, *supra* note 9, at 22–28.

[269] *See Nixon*, 506 U.S. at 239 (White, J., concurring).

teen years old in order to circumvent review?[270] Instead of completely insulating certain constitutional areas from judicial review in order to avoid making policy, the proposed method would afford the Court a means of addressing political issues without eliminating the power of the elected branches to make political decisions.[271] As a description of what the Court is actually doing in these cases, the proposed method has a close fit.[272]

Finally, as a matter of judicial policy, the proposed method is superior to current practice. A truism of the legal profession is that judges depend upon a factual context in order to render decisions.[273] A corollary to this is the susceptibility of important policies to rising or falling based on the context within which they are presented to the judiciary as demonstrated by activist legal organizations that strive to create the proper "test cases" that may distort the working of statutes.[274] Rather than hold policy hostage to these fact patterns, the proposed method will help judges decide the initial case without an overriding concern for the policy implications. It will then allow a true dialogue between the judiciary and the rest of the federal government about the consequences of adopting one view or another.[275] To the extent that political issues are further withdrawn from the exclusive province of the judiciary, it should increase the collegiality of the profession and hopefully increase the uniformity of decisions, while minimizing the role of party affiliation and nomination in predicting judicial outcomes.[276] The continuing battle over *Roe* and judicial nominations stands as a relatively good example of this party-related proxy effect that the proposal seeks to avoid.[277]

Up to this point, the argument has focused on the positive aspects of the proposal. Clearly, however, a challenge to the status quo must anticipate the inevitable lines of criticism. Perhaps the most

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[270] *Cf. id.* at 239 (White, J., concurring) (noting Senate position that any arbitrary procedure or even no procedure was protected by the word "try" in Impeachment Clause.)

[271] *See supra* notes 139–152 and accompanying text.

[272] *Cf. Baker*, 369 U.S. at 209–37.

[273] *See* LLEWELLYN, *supra* note 139, at 41–44.

[274] One can get a feel for the power of facts by reading Justice Blackmun's dissent in *Deshaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 213 (Blackmun, J., dissenting) (where Justice Blackmun states "Poor Joshua!").

[275] *Cf.* PERETTI, *supra* note 247, at 59 (referring to constitutional dialogue). *But see* Dorf, *supra* note 16, at 39–40 (arguing no real dialogues in current method).

[276] *See generally* STEPHEN CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994).

[277] *See id.* at 80–81, 154 (mentioning predictability of judicial appointees and its problematic role), 71–72 (role of ideology), 83 (specific instance with *Roe*).

emotionally powerful objections to the proposed method center on the possibility that Congress may, periodically or consistently, be less protective of rights than the Supreme Court.[278] But is that really a problem? First, we have the comfort of realizing that by restricting interpretations to "reasonable" ones, the methodology should prevent the grossest excesses that can be imagined.[279] For instance, by the very nature of its 9–0 result, *Brown v. Board of Education* survives all challenges to its authority, thus leaving that important decision untouched.[280] Second, such an objection assumes that there is no "zero-sum" relationship between the various rights that are protected by the Constitution.[281] Such a "zero-sum" relationship exists where enhancing protection of one constitutional right translates into lower protection for another constitutional right.[282]

It should be noted that the expansion of many rights may have come at the expense of other rights. In fact, there is a plausible theory that protection of certain economic rights by the pre-New Deal Court effectively reduced the rights of others in the country.[283] A similar argument that protection of one form of rights harms another is currently directed towards the Court's current jurisprudence regarding campaign finance.[284] In recognizing individual spending as a form of "speech," the argument goes, the Court is allowing the "voice" of weaker economic players to be drowned out.[285] Conversely, a similar argument has been made that property rights have not received enough protection since the developments of the New Deal.[286] While there may be no easy solutions, or perhaps the Court has even happened upon the single best solution, it is at least unclear whether or

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[278] *See* TUSHNET, *supra* note 134, at 55–56 (discussing similar concerns).

[279] For a discussion of precedential value in a similar vein, if a different perspective, see generally Rebecca Hanner White, *The Stare Decisis Exception to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723 (1992).

[280] *See* 347 U.S. 483, 495 (1954).

[281] *See* Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1231 (1978).

[282] *See, e.g.*, SUNSTEIN, *supra* note 234, at 57–62 (analyzing Court's economic cases during Depression).

[283] *See id.*

[284] *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 639–41 (1982).

[285] *See id.* at 640.

[286] *See* Richard Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 37–39 (1989).

not society or the Court has struck the right balance between these various competing claims.[287]

Furthermore, there remains the very real possibility that the Court will itself reverse its course.[288] Also, as the world changes around us, the optimal balance might change.[289] It seems difficult to reconcile these realities and Marshall's language in *McCulloch v. Maryland* about the "constitution we are expounding" with such a static or teleological view of the Constitution's dictates.[290] Additionally, there remains the American people to consider. Any belief that constitutional "mistakes" will be left in place must maintain that the electorate are either unable to provide enough oversight over Congress to recognize its mistakes as such, or are simply wrong about a particular issue.[291] The first is a questionable empirical claim that threatens the very justifications of democracy, and the second seems incompatible with our ideals.[292] One wonders whether such critics would classify themselves as "wrong" if the Court were to change its position on any issue in which they firmly believe.[293]

In sum, the objection based on the risk of congressional errors should apply equally to the Court and fits uncomfortably within our democratic traditions and beliefs. Moreover, the proposed methodology could co-exist with this sort of view—so long as one finds the realm of "clear" rights under the methodology equivalent to the rights that should be protected under an "enlightened" Supreme Court view. For those claims of right and right-infringement that are most contentious, one has difficulty imagining any other *a priori* way of determining which claims are correct. Thus, the congressional mistake argument loses much of its appeal in a democratic nation and does not, standing alone, invalidate the proposed methodology.

Leaving aside the possible results that the proposed method might reach, one might also argue the proposed methodology is foreclosed by precedent. This Note has striven to show the proposed method's compatibility with all of the Supreme Court's most impor-

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[287] *See* Sunstein, *supra* note 16, at 30 (advocating minimalism where constitutionally relevant moral uncertainty).

[288] *See, e.g.*, *Casey*, 505 U.S. at 944, 966 (Rehnquist, C.J., dissenting) (four justices would overturn *Roe*).

[289] *See* Dorf, *supra* note 16, at 51.

[290] 17 U.S. (4 Wheat.) 316, 407 (1819).

[291] *Cf.* TUSHNET, *supra* note 134, at 70–71.

[292] *See id.*

[293] *See, e.g.*, Schauer, *supra* note 30, at 737–38 (justifying advising someone else to follow an interpretive strategy one personally would not follow).

tant cases, from *Marbury* through *Powell* to *Nixon,* and with the possible exception of *Boerne.*[294] The other potential historical stumbling block one might imagine is the Eleventh Amendment. One view of the Eleventh Amendment, which was enacted to overturn an early Supreme Court decision, is that its passage provides implicit support for the need to use the amendment process to alter judicial decisions.[295] The conclusion is reached precisely because constitutional amendment rather than statutory amendment was the course Congress took the first time it disagreed with a Supreme Court decision.[296] In response, two observations undermine the Eleventh Amendment's support for such a proposition. The first is the fact that, based upon its subject matter, the decision that provoked the Eleventh Amendment could have easily been overturned by statute.[297] Additionally, the political context of the time lends credence to the view that the Eleventh Amendment was reported by the Federalists as a political device to preempt criticism by and support for pro-French elements of the Democratic-Republican opposition.[298] When combined, these two observations undercut the historical, as opposed to rhetorical, precedent of the Eleventh Amendment in arguing against the proposed method.

Another objection might center on the proposed method's effect on *stare decisis.* As argued earlier, however, the proposed method is ambivalent about judicial *stare decisis* and congressional flexibility is actually a benefit rather than a problem.[299] *Stare decisis* for its own sake brings to mind Oliver Wendell Holmes' famous quote, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[300] Such *stare decisis*-based objections beg the question in evaluating the proposed method, unless these concerns are tied to specific results. In such cases, they should be dealt with in terms of challenging the results the proposed method might reach, not *stare decisis.*

Finally, perhaps the most serious objection to the proposed method is that it could be unworkable. Changing the interpretation of a constitutional clause has ramifications beyond any particular stat-

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[294] *See supra* notes 59–104 and accompanying text.

[295] *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 COLUM. L. REV. 1889, 1895 (1983).

[296] LEVY, *supra* note 126, at 59; EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING & ABORTION 153 (1989).

[297] *See* Gibbons, *supra* note 295, at 1934–36.

[298] *See id.* at 1926–36.

[299] *See supra* notes 230–265 and accompanying text.

[300] *See* PLATT, *supra* note 132, at 126.

ute. One can imagine laws that are valid under one interpretation and invalid under another.[301] It is also possible to imagine interpretations of one clause conflicting with interpretations of another.[302] A realistic solution to the first problem would be to consider the adoption of an interpretation by Congress to be an implicit repeal of all incompatible legislation.[303] That way, one can avoid congressional adoption of conflicting interpretations to save single pieces of legislation.[304] Additionally, this "cascading" effect will likely reduce (perhaps after a bad experience or two) the desire of Congress to make changes without due regard for the consequences.[305] In the same way, the Court could invalidate an interpretation that clashed with another clause, requiring Congress to re-enact the legislation until it adequately meshed the two clauses. Such an approach would have the benefits of increasing awareness of the Constitution as a constitutive whole, rather than individual clauses, by all governmental actors.[306] Through the prism of Congress this effect should even reach to the people themselves.[307] The very scale of change would thus act as a channeling agent reducing the likelihood of constant change, but still allowing it whenever circumstances or need made such a change desirable.[308]

Conclusion

Rather than viewing congressional interpretation in the unbounded light suggested by congressional power to overturn judicial statutory constructions, the Court should look to applying the *Chevron* reconciliation of agency and judicial interpretive interests to the constitutional realm. This Note has explored the ramifications such an approach would have. Adopting the proposed method would not only be consistent with precedent, but would also reinvigorate our political

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[301] *Compare City of Boerne*, 521 U.S. at 512 (striking down RFRA), *with supra* notes 216–219 and accompanying text (arguing RFRA can be constitutional).

[302] *See* David L. Gregory & Charles J. Russo, *Let Us Pray (But Not "Them"!): The Troubled Jurisprudence of Religious Liberty*, 65 St. John's L. Rev. 273, 289 n.58. (1991).

[303] Such an approach might clear the books of currently unconstitutional law, effecting a form of desuetude. *See, e.g.*, Dorf, *supra* note 16, at 69–70 (arguing judges should strike down outdated laws and allow legislatures to reenact).

[304] *See supra* notes 141–142 and accompanying text.

[305] *Cf.* Tushnet, *supra* note 134, at 57–65 (discussing effect of judicial overhang on Congress).

[306] *See* Amar & Hirsch, *supra* note 24, at xviii–xxi (arguing for benefits of rejecting clause-bound approach to interpreting Constitution); Amar, *supra* note 9, at xi–xiv (same).

[307] *See* Tushnet, *supra* note 134, at 177–94.

[308] *See generally* Bruce Ackerman, We the People: Foundations (1991); *see also* Tushnet, *supra* note 134, at 67.

spheres—making the Constitution truly a document of the people, not just of judges. Such a turn should have positive ramifications for the Supreme Court, for Congress, for our jurisprudence and for our political lives. Even the mere possibility of provoking a true dialogue between Congress and the courts would be a significant benefit. Additionally, the ability of the model to assimilate the diversity of viewpoints that exist within our society should enhance its attractiveness to the sides in the various conflicts that find their way into the court system—thus making the proposal a practical, as well as theoretical possibility. All these considerations argue for the need to seriously expand the sources and understanding of constitutional interpretation, and push for a flexible framework such as the one advanced in this Note.

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