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FEDERALISM, HUMAN RIGHTS, AND THE *REALPOLITIK* OF FOOTNOTE FOUR

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In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.¹

INTRODUCTION

Whatever one thinks of the Rehnquist Court's judicial philosophy, its determination to enforce the boundaries that the Constitution imposes on the jurisdiction of Congress, the federal courts, and the states, respectively, has had at least three salutary effects.

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¹ THE FEDERALIST NO. 51, at 164 (Alexander Hamilton or James Madison).

- The first is that the Court's federalism and separation of powers jurisprudence is forcing a long overdue reexamination of important, but largely unsupportable assumptions about the nature and allocation of political jurisdiction under the United States Constitution.
- The second is that concerns about "judicial activism,"² however defined, extend across the political spectrum, and are fueling the growth of a healthy political realism about

² I place the term in quotes because its meaning varies widely from person to person and from left to right on the political spectrum. Professor Mark Tushnet provides a useful typology in Mark V. Tushnet, Comment, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 147 (1987) (noting six meanings of the term "activist:" (1) when courts decide issues not actually before them, (2) when courts readily disregard precedent without first having determined that actual "problems have[] arisen in the administration of the [prior] rule," (3) decisions that "substitute[] the judgment of unelected judges for those of elected decision makers," (4) certain uses and abuses of "the jurisprudence of 'original intention,'" (5) cases in which "an activist court is an arm of an activist government," and (6) as a "praise" or "blame" word). *Id.* at 147-53. Professor Stephen F. Smith has remarked, when used in the "praise" or "blame" sense identified by Tushnet, "[t]he term serves principally as the utmost judicial put-down, a polemical, if unenlightening, way of expressing strong opposition to a judicial decision or approach to judging." Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1077 (2002) (citations omitted). For a recent sampling of articles on the topic, see, for example., John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today's World*, 25 CHI. B. REC. (October 16, 2002); Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002). See also JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 198, 210 (1985) (referring to judicial activism as courts "acting contrary to the will of the other branches of government" and thereby "taking power from th[ose] other branches"); Glendon Schubert, *A Functional Interpretation*, in *THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT* 17 (David F. Forte ed., 1972) (noting that a court "is activist when[ever] its [policies are in] conflict with those of other major decision-makers").

the nature and limitations of what Raoul Berger has called "Government by Judiciary."³

- The third is that the overtly political nature of the discussion provides a golden opportunity to examine both the nature and the extent of the political power the Court claims *for itself* under the rubric of "substantive due process."

The loaded question that serves as the title of this symposium underscores the need for such an inquiry. If the Rehnquist Court's federalism and separation of powers jurisprudence actually does pose a threat to the post-New Deal allocation of political power among Congress, the Court, the President, and the States, we cannot assume at the outset, as the editors have, that the New Deal is, or should be, the starting point for the discussion. We must look first at *the Court's* pre- and post-1936 assumptions about how power is allocated in our "compound republic."

This is a tall order. At least three generations of American lawyers and judges uncritically accept the proposition that the power equations embedded in the Court's post-1936 jurisprudence are integral components of "the very principles that have shaped our country since the New Deal."⁴ Professor Bruce Ackerman's theory that the "crisis of 1937" was part of a fundamental reallocation of political power—a "constitutional moment"—is an

³ Raoul Berger, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). See, e.g., Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001). In support of this argument, Professor Kramer stated that:

There is . . . a world of difference between having the last word and having the only word: between judicial supremacy and judicial sovereignty. We may choose to accept judicial supremacy, because we need someone to settle certain constitutional questions But it does not follow either that the Court must wield its authority over every question or that, when it does, the Court can dismiss or too quickly supplant the views of other, more democratic institutions.

Id. at 12.

⁴ Matthew B. Stein, Note, *Something Wicked This Way Comes: Constitutional Transformation and the Growing Power of the Supreme Court*, 71 FORDHAM L. REV. 579, 581 (2002) (citations omitted).

extended argument that those power equations should be viewed as part and parcel of the Constitution itself.⁵ Others make the less sweeping but equally political claim that the "crisis of 1937" was one of several "dramatic episodes of alteration in the institutional and political realities of U.S. public life."⁶ Either way, the conventional wisdom is that our national commitment to the protection of both human rights and representative democracy depends upon an uncritical acceptance of the Court's post-1936 vision of its own power.⁷

This Essay argues two propositions diametrically opposed to the conventional wisdom. The first is that our national commitment to the protection of human rights and representative democracy supports the Rehnquist Court's penchant for looking critically at *any* claim of power to make or alter substantive policy. The second is that the "new federalism" cases can only be understood in light of the Rehnquist Court's deep skepticism about the most dangerous power claim of all: that the Due Process Clause confers on the Court a prescriptive *and preemptive* authority to define the substantive content of liberty and equality.

In the pages that follow, I will argue that neither the "crisis of 1937," the controversy over the Rehnquist Court's "new federalism," nor the bare knuckle, political struggle between Senate Democrats and President Bush over control of the judicial

⁵ See BRUCE ACKERMAN, *Foundations in WE THE PEOPLE* (1991) (hereinafter ACKERMAN *Foundations*) (distinguishing periods of ordinary lawmaking from "constitutional moments" in which the political branches, acting in furtherance of a popular political mandate, effect a major reallocation in the operational distribution of power).

⁶ Thomas O. Sargentich, *The Rehnquist Court and State Sovereignty: Limitations of the New Federalism*, 12 WIDENER L.J. 459, 515 (2003). See also Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343 (2003); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990).

⁷ See, e.g., Address of Senator Hillary Rodham Clinton to the Convention of The Constitution Society, Friday, August 1, 2003 (arguing that the Court's federalism and separation of powers cases are not only "legally dubious," they also have "made a mockery of one of our most cherished constitutional rights, the right to vote." Associated Press, *Clinton: Court Rulings Don't Erase Distrust*, ST. LOUIS POST-DISPATCH, Saturday, August 2, 2003, at 23, 2003, WL 3598689.

power the United States can be understood without first carefully distinguishing the power of judicial review conferred by Article III and claimed in *Marbury v. Madison*,⁸ from the power to define the substantive concepts of "liberty" and equality claimed by the Court since the mid-19th century. The former is the power to declare which claimant to an existing authority is the proper delegate under the Constitution. The latter is a claim by the judiciary that it has the power to make or alter substantive policy *ab initio*.

Because the power of judicial review rests on the proposition "that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void,"⁹ the question for discussion here is whether anything that happened during the "crisis of 1937" supports the blank check the Court appears to have written itself in footnote four of *United States v. Carolene Products, Co.*¹⁰ and its accompanying text.

We begin the discussion by acknowledging the obvious. The defeat of Franklin Delano Roosevelt's March 9, 1937 "court reorganization plan" had significant political effects. The most important of these was a practical redistribution of political power among the branches of the federal government, and between the federal government and the states. The Rehnquist Court's federalism and separation of powers cases challenge not only the wisdom of that redistribution, but also its constitutionality. It should not be surprising that the resulting controversy has been both acrimonious and highly politicized.

Senior Judge John T. Noonan, Jr., of the United States Court of Appeals for the Ninth Circuit, charges that the Rehnquist Court is "narrowing the nation's power" by "siding with the states" against Congress.¹¹ Professor Tom Sargentich echoes that theme in this symposium with an assertion that there "is an important difference between a view of the Court as having supremacy in constitutional interpretation, which results from the need for an

⁸ 5 U.S. (1 Cranch) 137, 177 (1803).

⁹ THE FEDERALIST NO. 78, at 231 (Alexander Hamilton).

¹⁰ 304 U.S. 444, 149 n.2 (1938).

¹¹ NOONAN, JR., *supra* note 2. Judge Noonan's approach focuses on the convoluted interplay of the doctrine of sovereign immunity, the meaning of the Eleventh Amendment, and the Court's creation of "new criteria . . . to limit lawmaking by Congress." *Id.* at 4.

umpire to reconcile opposing views, and what one commentator calls the current majority's assumption of 'sovereignty' over constitutional interpretation."¹² Scholars who are more skeptical of the charge that the Rehnquist Court's federalism jurisprudence is a major change in direction pose the power question in more measured, but no less political, terms.¹³

None of this should come as a surprise. FDR sought to "reorganize" the Court because he understood that "constitutional lawsuits are the stuff of power politics in America."¹⁴ President George W. Bush understands that as well. Like FDR, he wants to use "transformative judicial appointments"¹⁵ to change the judicial power equation he inherited from prior administrations. Hoping to preserve it, Senate Democrats have mounted a filibuster.¹⁶ The system is working exactly as the Framers planned.

The burden of this Essay is to argue that the conventional wisdom about the Court's resolution of the crisis of 1937 both begs the question of the Court's jurisdiction to prescribe substantive rules governing our rights,¹⁷ and misses the point that history

¹² Thomas O. Sargentich, *supra* note 6, at 463.

¹³ See, e.g., Neal Devins, *Congress As Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001) ("If anything, as I will argue in this Essay, Congress had been (and still may be) spurring the Court into action by signaling its indifference to the constitutional fate of its handiwork."). *Id.* at 436; Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, (2001) ("Under either interpretation, then, something interesting has been taking place at the Supreme Court, and no one yet has offered a convincing explanation for it."). *Id.* at 322. Compare, e.g., Robert A. Destro, "By What Right?": *The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion"*, 29 IND. L. REV. 1 (1995).

¹⁴ ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 287 (1941).

¹⁵ The term is Bruce Ackerman's. 2 BRUCE ACKERMAN, *Transformations, in WE THE PEOPLE* 26 (1998) [hereinafter, ACKERMAN, *Transformations*]. See, e.g., Jeanne Cummings, *Bush and Conservatives: Nomination Fight Speaks Volumes—Pickering Judicial Pick Pleases the Right, but Tardy Salvage Effort May Dismay Them*, WALL ST. J., Mar. 7, 2002, at A26.

¹⁶ See, e.g., Helen Dewar, *Bush's Use of Clout Intensifies Senate Split: GOP's Boldness Riles Democrats Who Think President Uses Hill as Rubber Stamp*, WASH. POST, Mar. 2, 2003, at A4.

¹⁷ The term "begging the question" is defined as "a taking for granted of the thing to be proved." THE OXFORD ENGLISH DICTIONARY ONLINE (1989).

proves the Court unfit to be the sole repository of such a sweeping power. Part I will argue that the Founders' vision of a "compound" American republic was lost when the Supreme Court of the United States used the New Deal controversy over the limits of judicial review to accomplish one of the most far-reaching power grabs in the history of the Republic. Part II will discuss how erroneous assumptions about the prescriptive jurisdiction of the Court lead lawyers, judges, academics, and politicians to forget that the "crisis of 1937" was about neither "values"¹⁸ nor "political participation."¹⁹ It was about *power*. They therefore miss Madison's point: *No* branch of government can be trusted with preemptive power to define our rights and duties. Parts III and IV argue that the Supreme Court's post-New Deal vision of the role of the political branches in the struggle for human dignity and equal rights is too weak, and that it has done great harm to the body politic each time it has attempted to settle a difficult political and moral issue by striking what appears, at the time, to be a "balance" between otherwise irreconcilable world-views. From this perspective, the Rehnquist Court serves the cause of civil rights each time it reaffirms the "compound" nature of our republic by forcing a political solution.

The Essay concludes by making three points about the *Realpolitik* of footnote four. The first is that it should come as no surprise that politicians are sometimes either unable or unwilling to protect the liberty, security, and equal rights of each person. The Court does not do so either. Footnote four and the text it accompanies hold that the type and degree of protection owed *by the Justices themselves* to the litigants who appear before them varies in inverse proportion to the Court's perception of their social status or need.

The second is that when politicians and judges take the oath of office prescribed by Article VI, each of them undertakes the same

¹⁸ Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 302 (1995) ("[T]he *Carolene Products* Footnote is about values.") (citations omitted).

¹⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77 (1980) ("participation . . . either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached . . .").

sacred duty to the "whole person" embodied in each individual²⁰ subject to their political jurisdiction. The oath—like the Constitution they are sworn to "support and defend"—is neither selective nor abstract. Its stated goal is the equal protection of the *whole* person and citizen, not disembodied "values," abstract liberties, or factional interests.

The third point follows from the first two. Like the framers of the Fourteenth Amendment, FDR attacked the Court because he believed that it had taken sides in what he called the "unending struggle between those who would preserve this original broad understanding of the Constitution as a layman's instrument of government and those who would shrivel the Constitution into a lawyer's contract."²¹ Until the *Court* accepts the proposition that a judiciary perceived *for any reason* to be biased or otherwise "activist" contributes to the destruction of the fabric of republican self-government envisioned in *Federalist 51*, it is pointless to decry the increasingly vitriolic tenor of the rhetoric surrounding judicial decisions and nominations. "In the compound republic of America," it is the threat that "different governments will control each other" that provides the guarantee that "at the same time . . . each will be controlled by itself."

I. RECAPTURING THE VISION: POLITICAL JURISDICTION IN A "COMPOUND REPUBLIC"

Few topics have been more controversial in the history of our compound republic than the nature and extent of the federal government's power to make laws that have the purpose and effect of preempting state institutions or policies. The first such controversy occurred at the Constitutional Convention itself, where the Antifederalists sought explicit guarantees that federal power

²⁰ The language of the Fourth Amendment captures the tangible manifestations of this concept when it refers to the right of each individual "to be secure in their persons, houses, papers, and effects." U.S. CONST. amend. IV. Read as an organic whole, the Constitution provides for the protection and "security" of the person in all walks and activities of life: in trade and commerce, in the arts, in matters of religion and spiritual development, in the resolution of disputes, and in matters of local and national self-government.

²¹ *Id.* at 377, quoting Franklin D. Roosevelt, Address on Constitution Day, Sept. 17, 1937, cited *infra* note 56.

would not be utilized to preempt important state laws, institutions, and values. The Preamble to the Bill of Rights reflects those concerns. It states:

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institutions.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States²²

²² U.S. CONST. pmbll., bill of rights. The Preamble to the Bill of Rights was agreed to by the Senate on Tuesday, September 8, 1789. *Journal of the Senate* (Tuesday, Sept. 8, 1789) at 78. The image can be obtained online through the Library of Congress at: <http://www.loc.gov/exhibits/treasures/images/uc004829.jpg> (last visited July 25, 2003). The Preamble itself is reproduced online at http://www.archives.gov/exhibit_hall/charters_of_freedom/bill_of_rights/preamble.html (National Archives' Charter of Freedom Exhibit) (last visited July 5, 2003). In full, the Preamble provides as follows:

Congress of the United States begun and held at the City of New-York, on Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Id.

The text and structure of the Constitution, Bill of Rights, and Fourteenth Amendment underscore the point. The United States Reports are filled with disputes in which the ultimate question is the balance to be struck between federal and state jurisdiction to prescribe.

Controversies over the power of judicial review center on precisely the same issue. In *Marbury v. Madison*, the Court asserted the unexceptionable proposition that Congressional jurisdiction to prescribe is limited by the Constitution that creates it, and that laws exceeding those limits are a nullity.²³ Executive acts,²⁴ federal and state judicial decrees,²⁵ and state laws²⁶ are subject to the same jurisdictional restraints. So too are the decisions of the Court.²⁷

The concept that lies at the core of these disputes—jurisdiction to prescribe—provides a useful framework in which to discuss not only the Rehnquist Court's approach to federalism and separation of powers, but also its conception of the nature and scope of the power of judicial review. Defined as the power of a sovereign "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court,"²⁸ federal jurisdiction to prescribe thus includes not only the legislative powers of Congress,

²³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁴ *E.g.*, *Clinton v. Jones*, 520 U.S. 681 (1997); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²⁵ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

²⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²⁷ *See Erie*, 304 U.S. 64 (1938), *rev'g Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *See generally* Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J. LAW & RELIGION 355 (1994-95).

²⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1986).

but also any prescriptive powers claimed by the President under Article II,²⁹ or by the Court under Article III.

The literature on these topics is voluminous, and the lack of clarity in the Rehnquist Court's federalism cases exacerbates the problem.³⁰ Dissecting either body of literature is not, as Professor Roger Hartley puts it, a task "for the faint of heart."³¹ Thankfully, it is both unnecessary and premature to attempt that particular task in this Essay. Sovereign immunity, federalism, and separation of powers are structural issues derived from a far more fundamental issue: institutional competence.

Advocates of the post-New Deal allocation of power between the Congress and the Court have long accepted the proposition that the Court's "power of interpretation functions as the power to revise, restate, [and] remake the constitution."³² As long as the Court was striking the proper political balance in cases involving civil and political rights, and was willing to defer to Congress in all matters arguably within its jurisdiction, it was possible to imagine that the scope of the power claimed by the judiciary under the Due Process Clause of the Fourteenth Amendment was limited by the countervailing powers of Congress under Sections 1 and 5³³ and Articles I and IV.³⁴

Now that the Rehnquist Court has given notice that exercises of Congressional power must be defended *ab initio*,³⁵ and has rejected the argument that controversies over the reserved powers of the States are nonjusticiable,³⁶ advocates of the proposition that "the ideals of the [New Deal's] victorious activist Democracy [could also] serve as a primary foundation for constitutional rights

²⁹ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

³⁰ Compare, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990), with *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), with *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

³¹ Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 43 (2001).

³² NOONAN, *supra* note 2, at 7; see also *infra* text accompanying note 142.

³³ U.S. CONST. amend. XIV, §§ 1, 5.

³⁴ U.S. CONST. arts. I, IV.

³⁵ *United States v. Lopez*, 514 U.S. 549, 552 (1995).

³⁶ See *New York v. United States*, 505 U.S. 144, 183-88 (1992) (holding that states may challenge, on federalism grounds, the constitutionality of statutes their officials supported in Congress).

in the United States"³⁷ are justifiably fearful that the Court will, once again, put its power claims before its duty to support and defend the Constitution. Echoing the words of then-Attorney General Robert Jackson after the crisis of 1937,³⁸ Judge Noonan makes the case that "[t]he court's struggle for supremacy over all branches of government" has resumed, "and must be resisted again"³⁹ lest "the Supreme Court become[] the supreme authority in the land."⁴⁰

If one assumes the validity of the post-1937 power structure, the reasoning of its separation of powers and federalism cases does seem to lead inexorably to a conclusion that "the Constitution is what the judges say it is."⁴¹ If, by contrast, one begins with the traditional assumption that all claims to prescriptive jurisdiction must be proved, the Rehnquist Court's federalism and separation of powers jurisprudence leads to precisely the opposite conclusion.⁴² The courts have only the power the Constitution gives specifically to them, *minus* the powers allocated to others.⁴³

There is no indication in the cases that the Court has any interest in cutting back on otherwise legitimate exercises of Congressional jurisdiction to prescribe rules for the national economy or that it wants to limit the exercise of express Congressional authority to guarantee equality before the law.⁴⁴ Nor has the Court indicated any reservation about the authority of the

³⁷ Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985).

³⁸ JACKSON, *supra* note 14.

³⁹ NOONAN, *supra* note 2, at 7.

⁴⁰ NOONAN, *supra* note 2, at 7.

⁴¹ Speech by Chief Justice Charles Evans Hughes, at Elmira, New York (1907), in *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES*, at 143 (David J. Danelski & Joseph S. Tulchin eds.) (1973) (citation omitted).

⁴² See, e.g., Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001) ("For several years now, the Supreme Court has disquieted observers and commentators by reasserting the presence of constitutional limitations on national power resulting from the federal structure of the American political system."). *Id.* at 477.

⁴³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

⁴⁴ See, e.g., *Nevada Dept. of Human Resources v. Hibbs*, 123 S.Ct. 1972 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

United States to bring enforcement actions for money damages against the States.⁴⁵ The Justices of the Rehnquist Court who most often vote with the majority have made it clear, however, that they have serious questions concerning the constitutionality of the power the Court reserved for *itself* after the crisis of 1937.⁴⁶

While it "would be impossible and perhaps undesirable" for the Court "to return to the assumptions of pre-1937 doctrine"⁴⁷ concerning the powers of Congress and the States, it would be perfectly consistent with the *post*-1937 political settlement for the Court to reexamine the nature and extent of its *own* claims to prescriptive jurisdiction⁴⁸ under Article III and the Due Process

⁴⁵ U.S. CONST. art. III, § 2 (conferring jurisdiction over suits against the states in specified cases). *West Virginia v. United States*, 479 U.S. 305, 312 n.4 (1987) ("States retain no sovereign immunity as against the Federal Government."). *Accord* *Bd. of Trustees v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (noting that the Court's holding had no impact on the ability of the United States to enforce the ADA in suits for money damages); *Alden v. Maine*, 527 U.S. 706, 755-56 (1999) (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934), and observing that a "suit which is commenced and prosecuted against a State in the name of the United States . . . differs in kind from the suit of an individual"); *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) (noting that "[t]he Federal Government can bring suit in federal court against a State" as a method of "ensuring the States' compliance with federal law"). *United States v. Miss. Dept. of Pub. Safety*, 321 F.3d 495 (5th Cir. 2003).

⁴⁶ *See, e.g., Kansas v. Crane*, 534 U.S. 407, 415 (2002) (Scalia & Thomas, JJ., dissenting) (specifically taking aim at the Court's "substantive due process" rationale); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (dissenting opinions of Rehnquist, C.J., and of Scalia, Thomas, & Kennedy, JJ.); *Hill v. Colorado*, 530 U.S. 703 (2000) (Scalia, Kennedy & Thomas, JJ., dissenting). *Accord*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (Rehnquist, C.J.; Scalia, O'Connor, and Thomas, JJ., dissenting). *Cf. City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 123 S. Ct. 1389, 1397 (2003) (Scalia & Thomas, JJ., concurring) (criticizing the substantive due process arguments made by the respondents).

⁴⁷ Antonin Scalia, *Economic Affairs as Human Affairs*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 33-34 (J.A. Dorn ed., 1987).

⁴⁸ *See supra* text accompanying note 29. Section 401 of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES distinguishes three categories of political jurisdiction:

- (a) *jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;*

Clauses of the Fifth and Fourteenth Amendments.⁴⁹ Judge Noonan is therefore correct when he urges that the analytical focus of this debate over the jurisprudence of the Rehnquist Court should center "on the institution rather than the individuals within it."⁵⁰ We must consider not only *what* the Court is doing, but also "*by what right*" it claims the authority to do so.⁵¹ The Court's inability to answer that question is what led FDR to propose his court reorganization plan in the first place.

A. A "Constitutional Equilibrium"

This analysis begins with a simple question: *To whom does the Constitution entrust the power to define and protect the rights and liberties of the People?* *Federalist 51* explains that the Framers had such an abiding respect for both individuals *and* the communities in which they exercise the powers of self-government that they were unwilling to lodge that power in a single location.

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

(b) *jurisdiction to adjudicate, i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;

(c) *jurisdiction to enforce, i.e.*, to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 28.

⁴⁹ See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 264 n.37 (1970); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

⁵⁰ NOONAN, *supra*, note 2, at 8.

⁵¹ LOUIS LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975).

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.⁵²

Though neither "federalism" nor "separation of powers" is mentioned in the text of the Constitution,⁵³ they are the result of a functional distribution of political power that creates one nation, and divides the power to govern it (political jurisdiction) between and among the several States and the federal government. The federal government and the states share an equal, but limited, dignity and sovereignty not because of their inherent characteristics as governments, or because they inherited those qualities from the British Crown, but because the power they exercise within their respective spheres of political jurisdiction is delegated by the ultimate sovereign: the "People of the United States." The result is a dynamic political system that permits shifting factions and coalitions to challenge accretions of power that threaten individual rights and local self-government, or stand in the way of needed legal and cultural change.⁵⁴

⁵² THE FEDERALIST 51, *supra* note 1.

⁵³ *Compare, e.g.*, ALA. CODE § 43 (1975 & Supp. 2002), stating:

In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

with ILL. COMP. STAT. ANN. art. 2 § 1 (West 2003) ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."); Mich. CONST. art. III, § 2 ("The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."). *Id.*

⁵⁴ Madison, who, as "Publius," wrote eloquently of the merits of both separation of powers and federalism in *The Federalist*, did not embrace either concept at the Constitutional Convention. He wrote, and strongly supported, the "Virginia Plan," which called for proportional representation in both houses of

Like FDR and others before them,⁵⁵ the Rehnquist Court's critics are complaining that the majority is reading the Constitution in a manner at odds with the way it is written.⁵⁶ This, however, is neither a new phenomenon nor a new complaint. The Court has

Congress, a Congressional negative on state laws (which would have had the impact of reducing the States to the status of counties), and judicial participation with the Executive in a Council of Revision. Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q 215, 226 (1979). Even after the Convention he remained a nationalist, who strongly believed only the Congress of an extended republic would embrace a sufficient multitude of diverse factional interests to assure the formation of "disinterested majorities, strongly disposed to seek the general good of the society." *Id.* at 232. In his view, a wide-open and robust political "marketplace of ideas" and factions was itself an essential structural protection for individual liberties.

The Antifederalists, by contrast, just as emphatically did not want a "national" government. Mirroring their distrust of the proposed federal government was their faith in representatives known to and trusted by their local communities. To them, the victory in the American Revolution meant not so much the big chance to become a wealthy world power, but rather the opportunity to achieve a genuinely republican polity, far from the greed, lust for power, and tyranny that had generally characterized human society. It meant "retaining as much as possible the vitality of local government where rulers and ruled could see, know and understand each other." R. KETCHAM, *Antifederalist Political Thought*, in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 17 (Ralph Ketcham ed., 1986). Oliver Ellsworth's report on the compromise is well known: "the government contemplated by the Convention was to have a mixed character—'partly federal and partly national.'" *Id.*

For an extended discussion of these topics see Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J. LAW & RELIGION 355, 395-397 (1995).

⁵⁵ See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint* 77 N.Y.U. L. REV. 962 (2002) (discussing political opposition to unpopular judges and decisions).

⁵⁶ In an address on the occasion of the 150th anniversary of the Constitution, FDR complained that "nearly every attempt to meet those demands for social and economic betterment has been jeopardized or actually forbidden by those who have sought to *read* into the Constitution language which the framers refused to *write* into the Constitution." FDR's Address on Constitution Day, (Sept. 17, 1937) (emphasis added), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938-1950) at 366, available at Franklin D. Roosevelt Library and Museum, <http://www.fdrlibrary.marist.edu/tmirhsee.html> (last visited July 5, 2003).

been using the Due Process Clause as a license to rewrite the Constitution since *Dred Scott v. Sandford*.⁵⁷

The charges of judicial activism by critics of the Rehnquist Court have nothing to do with the Constitution as an organic whole, or with the specifics of key provisions like the Bill of Rights and the Fourteenth Amendment. At issue in this controversy is the Court's apparent rejection of a series of assumptions about the allocation of political power and the role of the judiciary embodied in the post-1937 jurisprudence of the United States Supreme Court.

All parties to the current debate agree that the original Constitution gave the United States the power to regulate matters relating to the national economy, national citizenship and immigration, foreign affairs, operational federalism, and defense.⁵⁸ All will also readily agree that all powers not delegated to the federal government were reserved to the States and the People, respectively.⁵⁹ There is also widespread agreement that the Civil War Amendments, particularly the Fourteenth, gave Congress the power to ensure that the States themselves would respect the liberty and equality guaranteed by the Constitution, federal statutes, and their own laws.

The differences among the contending factions in the "New Federalism" debate arise at the "margins" of political jurisdiction; that is, at the point where there may be "concurrent authority, or in which its distribution is uncertain."⁶⁰ It is within this boundary area, aptly described by the late Justice Robert Jackson in *Youngstown Sheet & Tube v. Sawyer* as a "zone of twilight," where the competing claims of political jurisdiction made by the federal

⁵⁷ 60 U.S. (19 How.) 393 (1856). Professor David Currie has written that *Dred Scott* "was at least very possibly the first application of substantive due process in the Supreme Court, and in a sense, the original precedent for *Lochner v. New York* and *Roe v. Wade*." David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-64*, 1983 DUKE L.J. 695, 735-36, and nn.255-64.

⁵⁸ U.S. CONST. art. IV.

⁵⁹ U.S. CONST. amend. X.

⁶⁰ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The boundary at issue in *Youngstown Sheet & Tube* was the area of competence "in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.*

government, its branches, and the States, respectively, must be worked out in practice.⁶¹ The debate over the Rehnquist Court's "New Federalism" takes place within this "zone of twilight," and its intensity reflects the shared commitment of each participant in the debate "to guard one part of the society against the injustice of the other part."⁶²

Make no mistake: there are boundaries. Within them, the distribution of power is both "certain" and, with limited exceptions,⁶³ exclusive. The *politics* of both separation of powers and federalism—including this debate—occur at the margins, where legitimate claims can be made by rival claimants to power. The result is a "zone of twilight" that is, in practice, a dynamic political arena crowded with factions whose interests drive them to exploit the "inertia, indifference or quiescence [that] may sometimes, at least as a practical matter, enable, if not invite, measures on independent . . . responsibility."⁶⁴

The strictures of the Gun-Free School Zones Act,⁶⁵ the ability to prosecute rapists under the Violence Against Women Act,⁶⁶ the Religious Freedom Restoration Act,⁶⁷ and the push to recognize private rights of action for damages against States as a means of enforcing salutary laws like the Age Discrimination in Employment Act,⁶⁸ the Americans with Disabilities Act,⁶⁹ and the Family and Medical Leave Act⁷⁰ were efforts to test—and to set—jurisdictional boundaries. Each of these statutes represents an attempt by Congress to expand the scope of federal regulatory power into an area where the text and structure of the Constitution create uncertainties concerning the location of the jurisdictional

⁶¹ *Id.*

⁶² *Id.*

⁶³ Compare, e.g., U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause) with, e.g., U.S. CONST. amend. XXI, § 2 (reserving to the States control over interstate shipment of intoxicating liquors).

⁶⁴ *Youngstown*, 343 U.S. 637 (Jackson, J., concurring).

⁶⁵ Gun-Free School Zones Act, 18 U.S.C. § 922(q) (2000).

⁶⁶ Violence Against Women Act of 1994, 42 U.S.C. § 13981(b) (2000) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender.").

⁶⁷ 42 U.S.C. § 2000bb (2000).

⁶⁸ 29 U.S.C. §§ 621-34 (2000).

⁶⁹ 42 U.S.C. §§ 12101-12213 (2000).

⁷⁰ 29 U.S.C. § 2612 (2003).

boundary. It should, therefore, be neither surprising nor alarming that every assertion of prescriptive power in an area of "uncertainty" will be resisted. That is the inevitable result of what Justice Jackson called "the equilibrium established by our constitutional system."⁷¹

Before 1936, the power equation had tipped decisively in the direction of the judicial branch, which used the power of judicial review to thwart otherwise legitimate exercise of legislative authority. Roosevelt's attack on the Court was an attempt to restore the equilibrium the Founders envisioned between Congress and the Court. It succeeded. Viewed structurally, the decisions in *United States v. Lopez*,⁷² *United States v. Morrison*,⁷³ *Kimel v. Florida Board of Regents*⁷⁴, and *Nevada v. Hibbs*⁷⁵ can also be read as attempts to restore equilibrium in the ongoing political struggle to ensure the health, safety, and equal protection of the American people.

Perspective counts for quite a lot in a political struggle. To academics and judges, cases like *Lopez*, *Kimel*, *Morrison*, and *Hibbs* are about the allocation of power in the federal system. To the factions that pressed for the adoption of these statutes, they are symbolic affirmations that their work remains incomplete. For the individuals involved, they are searing experiences that will leave scars for a lifetime.⁷⁶

⁷¹ *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

⁷² 514 U.S. 549 (1995).

⁷³ 529 U.S. 598 (2000).

⁷⁴ 528 U.S. 62 (2000).

⁷⁵ 123 S.Ct. 1972 (2003).

⁷⁶ To young Alonzo Lopez, the constitutionality of the Gun Free School Zones Act was not a mere symbol. If Congress had the authority to criminalize his conduct, he could be prosecuted twice for the same act: once by the federal government, and once by the State of Texas. *See, e.g., Susan R. Klein, Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002). For college freshman, Christy Brzonkala, and her alleged rapist, football player Antonio Morrison, the constitutionality of the Violence Against Women Act was no academic matter. Both she and Mr. Morrison learned the hard way that every "claim to a power at once so conclusive and preclusive must be scrutinized with caution," *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring), and that the significant personal and political stake each had in the

Each of these cases should be a stark reminder of the wisdom of Jackson's observation that "[i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."⁷⁷ They also remind us that premature attempts to fix the boundaries in a way that upsets the equilibrium between and among the branches and between the federal government and the States have significant consequences for us all.

B. Transcending the Politics of the New Deal

Post-New Deal discussions of the allocation of political jurisdiction assume that the Constitution assigns primary responsibility for defining and protecting our rights as individuals to the "Judicial Department" of the federal government.⁷⁸ Two related subsidiary propositions flow from this assumption. One is that the obligation of the judicial department to render judgment in cases of alleged abuse or usurpation of power is (or should be) inversely proportional to the political power the litigant can command in the public arena.⁷⁹ The other is that the allocation of power between the federal government and the states is qualitatively different for constitutional purposes than, for example, the relationship between the legislative and judicial branches.⁸⁰

These assumptions are so thoroughly rooted in the fabric of contemporary constitutional law that they function as the unconscious starting point for most academic discussions of

outcome does not seem to account for much when "what is at stake is the equilibrium established by our constitutional system." *Id.*

⁷⁷ *Id.* at 637 (Jackson, J., concurring).

⁷⁸ In *Planned Parenthood v. Casey*, 505 U.S. 833, 866, 873 (1992), the plurality opinion observed that we are to accept the Court's conceptions of our liberties whenever the "principled character [of a given ruling] is sufficiently plausible to be accepted by the Nation," even if the text of the Constitution says otherwise. *See, e.g., Maryland v. Craig*, 497 U.S. 836 (1990).

⁷⁹ *See, e.g., John Hart Ely, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 9, 16 (1978) (role of courts should be limited to protection of the politically powerless).

⁸⁰ *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding broad grant of jurisdiction to bankruptcy courts was unconstitutional).

separation of powers and federalism.⁸¹ Because each is rooted in either the New Deal's partisan vision of the political order, or in the Court's institutional reaction to it, it is also assumed that any rigorous attempt to "unpack" the post-New Deal allocation of political jurisdiction between Congress and the Court rests upon an equally partisan conception of the political order. The "question presented" in this symposium is a case-in-point: *Is the Supreme Court Undoing the New Deal?*

1. What Does the "New Deal" Have to do with the Allocation of Political Jurisdiction Under the Amended Constitution?

If the text and structure of the Constitution is the starting point for analysis, the short answer to this question is "nothing." The Constitution is a framework for the allocation of power and the organization of government. The *operational* allocation of political jurisdiction between and among the branches and between the federal government and the States—described by Justice Robert Jackson as the "actual test of power"—is likely to depend most heavily on the nature of the subject matter and "on the imperatives of events and contemporary imponderables rather than on abstract theories of law."⁸²

The confrontation between Franklin Delano Roosevelt (FDR) and the Supreme Court after the 1936 election can be viewed as a "constitutional moment" of the sort described by Professor Bruce Ackerman,⁸³ or simply one of several "dramatic episodes of alteration in the institutional and political realities of U.S. public life."⁸⁴ No matter how it is viewed, however, it stands as one of the

⁸¹ See, e.g., Knowles, *supra* note 6. ("Because the Supreme Court had not yet decided *Marbury v. Madison* and asserted its prerogative as interpreter of the Constitution, victory at the polls—the Jeffersonian Republicans' overwhelming triumph in the 1800 elections—supplied all of the authority Jefferson needed to negotiate and ratify the Louisiana treaty."). *Id.* at 411.

⁸² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

⁸³ See ACKERMAN *Foundations*, *supra* n.5 (distinguishing periods of ordinary lawmaking from "constitutional moments" in which the political branches, acting in furtherance of a popular political mandate, effect a major reallocation in the operational distribution of power).

⁸⁴ Thomas O. Sargentich, *supra* note 6, at 515. See also Knowles, *supra* note 6; Pope, *supra* note 6.

most pristine examples of how "the imperatives of events and contemporary imponderables" provide strong incentives for the branches of the federal government and the States to use the structural allocation of power embedded in the constitutional framework as launching pads for dramatic steps designed to further their respective policy agendas.

There are many such cases. Some are dramatic, like the Constitutional Convention, the adoption of the Bill of Rights, the Louisiana Purchase, the Court's assertions of power in *Marbury v. Madison* and *McCulloch v. Maryland*, the adoption of the Eleventh Amendment, *Dred Scott v. Sandford* and the Civil War, and the adoption of the Fourteenth Amendment. Others are more "transitional," such as the growth and development of the theory and practice of substantive due process during the period between 1879 and 1989.⁸⁵ What each has in common with the others is that it represents a point in political time where branches of the federal government or the States marked out the boundaries of their respective political jurisdiction.⁸⁶

The New Deal was no exception. At bottom, it was, *and remains*, a political philosophy that embodies a preference for a "national" government that will defend and foster the interests of its constituent factions. Marking the boundaries of federal power was one of the most important items on the agenda of the FDR's political coalition. After winning the landslide election of 1936, the New Deal coalition consolidated its hold on federal power by creating federal programs; it strengthened the hand of the President by creating independent agencies and giving them the power to

⁸⁵ See, e.g., *In re Jacobs*, 98 N.Y. 98 (1885). See generally Janet S. Lindgren, *Beyond Cases: Reconsidering Judicial Review*, 1983 WIS. L. REV. 583 (1983); Kyle T. Murray, Note, *Looking for Lochner in All the Wrong Places: The Iowa Supreme Court and Substantive Due Process Review*, 84 IOWA L. REV. 1141 (1999).

⁸⁶ The same phenomenon occurs at the state level. Recent cases include legislative/judicial wrangling over school finance reforms and levels, see, for example, *DeRolph v. State*, 780 N.E. 2d 529 (2002) (summarizing the controversy), and popular rejection of judicial attempts to extend the status of "marriage" to same-sex unions. See generally William C. Duncan, *Whither Marriage in the Law?* 15 REGENT U. L. REV. 119 (2002-03); Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. REV. 1657 (2002).

legislate; and it successfully used the threat of Court-packing to defend its legacy against judicial attack. Because the Court "subdued the rebellion against their constitutional dogma by joining it,"⁸⁷ the preference for national governance embedded in New Deal political philosophy became so inextricably intertwined in the fabric of the Court's post-1937 jurisprudence that it can rightly be viewed as one of the most important parts of the political legacy of FDR's New Deal coalition.

Since it comes as no surprise that a majority of the members of the Rehnquist Court do not share the political philosophy of the New Deal, and President Roosevelt died in 1945, the question is not whether the Supreme Court is "undoing the New Deal," but rather why anyone should care. If we are to give that important question the attention it deserves, then we must ask another question: *What does the legacy of the New Deal have to do with the powers of the United States Supreme Court?*

2. The New Deal and the "Checking Functions" of Federalism & Separation of Powers

In order to explore the impact of the New Deal on the Supreme Court's understanding of its own power, we must first consider the *means* by which President Roosevelt sought to shield the New Deal's policies from judicial attack. His political agenda required that Congress take control of the national economy, that it enact programs to end the Great Depression, that the President be given the authority to regulate key sectors of the economy, and that Congress use its regulatory and fiscal powers to address significant social problems. FDR knew that federal powers, including his own, were limited; that powerful political and economic factions were arrayed against him, and that the Supreme Court's due process jurisprudence made litigation a viable means for his opponents to continue the political battle for control of the economy.

Given its political context, the "Court-Packing Plan" was both a brilliant political maneuver and a legislative disaster.⁸⁸ Article III

⁸⁷ JACKSON, *supra* note 14, at vi.

⁸⁸ The political context in which the Court-packing plan arose is recounted in many books and articles. Professor Stephen O. Kline's 1999 article provides an excellent overview. Stephen O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L.

creates "one supreme Court,"⁸⁹ but vests control of its size and composition in the political branches.⁹⁰ When Roosevelt proposed that the size of the Court be increased, he attempted to utilize those powers in the way the Framers intended: as a political tool for "checking" the power of the Judicial Branch. It was as stark a warning as has ever been delivered to—and received by—the Court. The message delivered was clear: the Court's power "to say what the law is" is limited by the very structural devices we are debating in this symposium: separation of powers and federalism.

Though FDR lost the Court-packing battle, he won the war with the Court over the power of the federal government to regulate the national economy. Fifty-eight years would elapse between the Court's acknowledgement that the Constitution confers the power and duty of regulating the national economy on

REV. 863 (1999). Professor Kline reports that, during 1936, "more than 100 separate proposals were introduced to alter the balance of power between the Court and the political branches." *Id.* at 901. These included proposals to change the size of the Court, to increase the number of votes required to hold legislation unconstitutional, and to institute better retirement plans for aged Justices. *Id.* at 901-02. There were proposals to amend the Constitution as well. *See also* G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867 (1997).

⁸⁹ U.S. CONST. art. III, § 1.

⁹⁰ The Constitution assumes that the Supreme Court of the United States will have a Chief Justice, U.S. CONST. art. I, § 3, cl. 6 ("When the President of the United States is tried [after impeachment], the Chief Justice shall preside."), and an unspecified number of Associate Justices, U.S. CONST. art. II, § 2, cl. 2 (conferring upon the President the power to "nominate, and by and with the Advice and Consent of the Senate . . . appoint . . . Judges of the supreme [sic] Court").

President Roosevelt's Message to Congress containing his "Recommendation to Reorganize the Judicial Branch of the Federal Government" observed that:

In almost every decade since 1789 changes have been made by the Congress whereby the numbers of judges and the duties of judges in the Federal courts have been altered in one way or another. The Supreme Court was established with 6 members in 1789; it was reduced to 5 in 1801; it was increased to 7 in 1807; it was increased to 9 in 1837; it was increased to 10 in 1863; it was reduced to 7 in 1866; it was increased to 9 in 1869.

H.R. Doc. No. 75-142, at 2 (1937).

Congress,⁹¹ and its refusal to accept the Commerce and Necessary and Proper Clauses as the jurisdictional basis for the Gun-Free School Zones Act.⁹²

The title of the symposium assumes, wrongly in my view, that the Rehnquist Court has taken aim at the New Deal *itself*, rather the arguments of those who would extend the Court's post-1937 deference to the powers of Congress to the limits of its logic.⁹³ A more balanced approach, in my view, is to view the Court's use of the concept of due process to hamper otherwise-legitimate legislative policy making, Roosevelt's response in the Court-packing plan, its rejection by key members of Congress, the Court's 1937 about face, and the Rehnquist Court's refusal to defer to a Congressional attempt to federalize possession of guns in school zones as a case study of how Madison's observations in

⁹¹ See *Va. Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937) (upholding the Railway Labor Act of 1934):

Even though Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process, it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause. . . . And the Fifth Amendment, like the Fourteenth . . . is not a guarantee of untrammelled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable.

Id. at 558 (citations omitted). *Accord*, *Wright v. Vinton Branch*, 300 U.S. 440 (1937) (upholding revisions to the Frazier-Lemke Farm Bankruptcy Act), *rev'g*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *West Coast Hotel Co v. Parrish*, 300 U.S. 379 (1937) (rejecting a Fourteenth Amendment Due Process Clause attack on the Washington State minimum wage law for women and minors). See 1913 Wash. Laws ch. 174, p. 603.

⁹² Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2)(A) (2000), held unconstitutional in *United States v. Lopez*, 514 U.S. 549 (1995) (prohibiting "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone").

⁹³ See *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). In *McCarter*, Justice Holmes stated:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Id. at 355.

Federalist 10 and *51* apply in the extended, "real-time" environment of constitutional politics.

"A double security arises to the rights of the people," wrote Madison, when contending political factions coalesce into a critical mass willing to confront accretions of power viewed as inimical to the common good.⁹⁴ Unlike the dissenters in *Seminole Tribe*⁹⁵ and *Alden*,⁹⁶ Roosevelt understood the practical and political limits of asserting federal power over the States *as States*.⁹⁷ His most important legacy, Social Security, included an explicit exemption for what are now hugely successful state public employee retirement systems.⁹⁸ When Florida and Maine asserted their immunity against private suits in *Seminole Tribe*, *Kimel*, and *Alden*, respectively, they illustrated the ways in which the structure of the Constitution makes it possible for the "different governments [to] control each other,"⁹⁹ and when Congress refused to vote on Roosevelt's Court-packing plan, it illustrated the ways in which a robust understanding of separation of powers ensures

⁹⁴ THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

⁹⁵ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

⁹⁶ *Alden v. Maine*, 527 U.S. 706 (1999).

⁹⁷ Cf. James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 558-59 (1994) Professor Pfander argues that the Original Jurisdiction Clause "overrode states' sovereign immunity under the law of nations when [the Framers] included state-party 'cases' in an effort to assure the existence of an original federal docket for federal question claims against the states." *Id.* at 653. In his view, the Original Jurisdiction Clause was "at the center of the framers' plan to secure the effective enforcement of federal law against the states," and that Congress should consider its implications, along with the limitations imposed by the Eleventh Amendment, when it considers the means at its disposal for "the enforcement of federal law against the states in their sovereign or collective capacity." *Id.* at 558-59.

⁹⁸ INTERNAL REVENUE CODE 26 U.S.C. §§ 3121, 7701 (2003). See generally Pamela Yip, *Teachers Find Social Security Law Loophole*, KNIGHT-RIDDER TRIB. BUS. NEWS: DALLAS MORNING NEWS PERSONAL FINANCE COLUMN (June 10, 2002).

⁹⁹ THE FEDERALIST 51, *supra*, note 1 at 164. See generally William E. Thro, *Immunity or Intellectual Property: The Constitutionality of Forcing the States to Choose*, 173 WEST'S EDU. L. REP. 17 (2003).

that "at the same time [,] . . . each [government] will be controlled by itself."¹⁰⁰

I. JUDICIAL "ACTIVISM": FEDERALISM, SEPARATION OF POWERS & THE REHNQUIST COURT

A. *The Meaning of "Judicial Activism"*

Charges that the Rehnquist Court has become a bastion of "conservative activism" are a relatively recent political phenomenon.¹⁰¹ In order to understand them fully, it will be necessary briefly to unpack the meaning of the term "judicial activism."

¹⁰⁰ THE FEDERALIST 51, *supra*, note 1 at 164. Roosevelt also learned, first-hand, the political risks of an attack on the power of judicial review. Professors Prakash and Yoo have suggested that, in their zeal to attack the Court's federalism decisions, some academic commentators also attack the power of judicial review. See Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1465 (2001). Prakash and Yoo suggest that Professor Larry Kramer's rejection of judicial review of federalism is based on the idea that "the Constitution requires no judicial review at all." *Id.* Professor Kramer's words appear to support their view: "Given their understanding of judicial review, no one in the Founding generation would have imagined that courts could or should play a prominent role in defining the limits of federal power. And no one did." *Id.* Professor Kramer's view is at odds with the Court's record in the field of individual rights. Viewed structurally, its individual rights decisions unquestionably "defin[e] the limits of federal power." *Id.* The Incorporation Doctrine was an enormous expansion of federal power, see Destro, *supra* note 13; and the Court's holdings concerning the application of the Bill of Rights in federal question cases impose express *limits* on its exercise. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

¹⁰¹ A search of Westlaw reveals that until 1991, criticism of the Rehnquist Court for "judicial activism" was practically nonexistent. The first reference that I could find in that database was a warning that "[n]ew Justices in the Rehnquist mold could help comprise an activist Court seeking to further conservative political values." Gene R. Nichol, Jr., *Constitutional Perils—Real and Otherwise*, 1984 DUKE L.J. 1002, 1011-12 (1984) (footnote omitted) (reviewing NORMAN DORSEN, *OUR ENDANGERED RIGHTS—THE ACLU REPORT ON CIVIL LIBERTIES TODAY* (1984)). See also William H. Erickson & William D. Neighbors, *Pronouncements of the United States Supreme Court Relating to the Criminal Law Field: 1983-1984*, 103 F.R.D. 187 (1984) (noting "that the present court, though more conservative, continues the activist role of its predecessor"). *Id.* at 191.

To a judicial conservative, such as Justice Antonin Scalia, "our Constitution . . . is a practical and pragmatic charter of government—a framework for the allocation of power, not a 'living' document, the meaning of which changes over time."¹⁰² In this view, the role of the judge or Justice is to determine the locus of the power allocation based on the Constitution *as written*. Judicial "activism" is therefore *any* judicial act—whether deferential or assertive—that does not find support in the text and structure of the Constitution, when read in light of the history that led to the adoption of the specific text in question.

To judicial liberals, such as Earl Warren or William Brennan, the question of judicial activism cannot be separated from the role the Constitution assigns to the judiciary. In their view, "the issue on judicial review was not reasonableness but rightness. If the law was contrary to their own conception of what the Constitution demanded, it did not matter that a reasonable legislator might reach

¹⁰² ANTONIN SCALIA, A MATTER OF INTERPRETATION 134 (1997). The text from which this quotation was excerpted reads as follows:

The American people have been converted to believe in The Living Constitution, a 'morphing' document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.

Id. at 47. See also Alice Koskela, *Scalia Shows Textualists Have a Sense of Humor*, 43 ADVOCATE 31 (2000):

They call themselves believers in the 'living Constitution,' Scalia said of his philosophical foes. 'Now isn't that great packaging? Where does that leave me? Oh, Scalia, he wants to defend the dead Constitution.' Scalia, who said he prefers the term 'enduring Constitution,' to describe the document he holds sacred, insisted that his interpretation is the only one that makes sense. 'I am applying principles as they were adopted—I give words the meaning they had . . . when they were adopted,' he said."

Id. at 31.

the opposite conclusion."¹⁰³ Judicial activism is therefore any act or omission by the judiciary that is inconsistent with a right result in the case before them.¹⁰⁴ Professor Bernard Schwartz has observed.

The crucial question in constitutional cases, according to Justice Frankfurter, the leading post-Holmes advocate of judicial restraint, was: '[W]ho is to judge' . . . 'Is it the Court or Congress? Indeed, more accurately, must not the Court put on the sackcloth and ashes of deferring humility in order to determine whether the judgment that Congress exercise[s] . . . is so outside the limits of a supportable judgment by those who have the primary duty of judgment as to constitute that disregard of reason which we call an arbitrary judgment[?]',¹⁰⁵

To Chief Justice Warren and his supporters, Frankfurter posed the wrong questions. Their view was well expressed by Justice Black, replying to a letter asking whether the Court should defer to congressional judgment on constitutional issues.

The question just does not make sense to me. This is because if the Court must 'defer' to the legislative judgment about whether a statute is constitutional, then the Court must yield its responsibility to another body that does not possess that responsibility I think it is the business and the supreme responsibility of the Court to hold a law unconstitutional if it believes that the law is unconstitutional, without 'deference' to anybody or any institution I

¹⁰³ Bernard Schwartz, "*Brennan vs. Rehnquist*"—*Mirror Images in Constitutional Construction*, 19 OKLA. CITY U. L. REV. 213, 217 (1994).

¹⁰⁴ See, e.g., *Bush v. Gore*, 531 U.S. 98, 138-39, 142-143 (2000) (Ginsburg, Stevens, Breyer, & Souter, JJ., dissenting); *id.*, at 143-44 (Ginsburg & Stevens, JJ., dissenting); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (Part I of opinion of O'Connor, J., concurring in the judgment, and of Blackmun, Brennan, & Marshall, JJ., dissenting).

¹⁰⁵ Schwartz, *supra* note 104, at 216 (citations omitted).

believe it is the duty of the Court to show 'deference' to the Constitution only.¹⁰⁶

If viewed as a question of "deference" alone, both sides are correct. When the Constitution gives Congress jurisdiction to prescribe rules to govern a particular geographic or subject-matter area and does not otherwise limit its discretion, Justice Frankfurter has the better part of the argument. The courts *must* defer when the act under scrutiny is within the political jurisdiction of the entity whose power is questioned. To do otherwise is to unconstitutionally invade the powers granted or reserved to Congress, the President, or the States. To the extent that the issue is one of power derived from or reserved by the Constitution, Justice Black is also correct. "Deferring humility" is unconstitutional if a fair reading of the Constitution leads to a conclusion that a State or any branch of the federal government has exceeded the scope of its authority.

The only way to make sense of the muddle is to undertake an analysis of the power allocations made by the Constitution. In this case, "deference" is not an issue. The power claimant either has political jurisdiction, or it does not. The "rightness" of a given result is equally irrelevant at this stage. It becomes relevant if, and only if, the entity making the rule has the jurisdiction to prescribe the "right" rule *in the first instance*.

B. The Function of the "Standard of Review"

1. The Judicial Role

Since "we must never forget that it is a *constitution* we are expounding,"¹⁰⁷ this section begins with Alexander Hamilton's observation that "the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."¹⁰⁸ This intermediate role, according to Hamilton, was to be governed by a clear understanding on the part of the judges that

¹⁰⁶ Schwartz, *supra* note 104, at 216 (citations omitted).

¹⁰⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

¹⁰⁸ THE FEDERALIST NO. 78, at 231 (Alexander Hamilton).

"[a] constitution is, in fact, and must be regarded by [them], as a fundamental law."¹⁰⁹

Federalist 51 explains that the first principle of power allocation in our "compound republic" is that "the power surrendered by the people is first divided between two distinct governments:" federal and state.¹¹⁰ The baseline of federal jurisdiction to prescribe was established in 1787 and adjusted periodically thereafter by the Bill of Rights and subsequent amendments. State jurisdiction to prescribe was reserved simultaneously, and has been adjusted over time by the same sequence of amendments.

The power of judicial review arose under, and is limited by, the same acts of formal ratification. The "portion [of jurisdiction to prescribe] allotted to [the federal government was] subdivided among distinct and separate departments."¹¹¹ Jurisdiction to prescribe rules of conduct was reserved to the political branches;¹¹² divided to ensure oversight,¹¹³ and subjected to specific limitations in a number of cases where factional self-interest would likely produce outcomes inconsistent with national, regional, or individual interests.¹¹⁴ So understood, the Court's claim that "[i]t is emphatically the province and duty of the judicial department to say what the law is"¹¹⁵ does not "by any means suppose a superiority of the judicial to the legislative power."¹¹⁶ As a structural device, judicial review "only supposes that the power of the people is superior to both[,]"¹¹⁷ and ensures that a forum is available for the resolution of cases and controversies arising under

¹⁰⁹ *Id.*

¹¹⁰ THE FEDERALIST 51, *supra* note 1, at 164.

¹¹¹ *Id.*

¹¹² *See, e.g.*, U.S. CONST. art. I, § 1; art. II, § 2, cl. 2.

¹¹³ *See, e.g.*, U.S. CONST. art. I, §§ 1, 7, 8, 9, cls. 2-7; art. II, § 3; art. III, § 1.

¹¹⁴ *See, e.g.*, U.S. CONST. art. I, § 6, cls. 1-2 (Speech & Debate & Incompatibility Clauses); art. I, § 7, cl. 9 (Appropriations Clause); art. I, §§ 9-10; art. II, § 2 (Treaty Clause); art. III, § 2.

¹¹⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹¹⁶ Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1189 (2002).

¹¹⁷ *Id.* at 1189. The Preamble to the U.S. CONSTITUTION, the Supremacy Clause, and the amendatory powers contained in Article V, are among the express affirmations of the sovereignty of the people.

the Constitution, laws or treaties of the United States, or involving issues or parties whose character,¹¹⁸ stature,¹¹⁹ or status¹²⁰ makes a state forum either inappropriate or potentially biased.

The Article III power to resolve cases and controversies thus assumes that the judicial branch will develop a methodology to guide constitutional interpretation (standards of review),¹²¹ the power to enunciate its understanding of a particular phrase or clause of the Constitution (interpretation of constitutional norms),¹²² and jurisdiction to determine which branch or government has prescriptive power over a given subject or territory (political jurisdiction),¹²³ It does not, however, include the power to prescribe the rule of decision *in the first instance*.

Hamilton's words are instructive on this point: judges "ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."¹²⁴ To the extent that the Court has done so, its holdings must be treated, for all practical purposes, as "infallible"¹²⁵ statements of constitutional law until they are

¹¹⁸ See, e.g., U.S. CONST. art. III, § 2, cl. 1 ("Cases of admiralty and maritime Jurisdiction" and "between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects").

¹¹⁹ See, e.g., U.S. CONST. art. III, § 2, cl. 2 ("Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party").

¹²⁰ U.S. CONST. art. III, § 2, cl. 1 ("Controversies to which the United States shall be a Party" and "Controversies between two or more States").

¹²¹ THE FEDERALIST 78, *supra* note 109 ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . .").

¹²² *Id.* ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.")

¹²³ *Id.* ("[Nature and reason] teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.").

¹²⁴ *Id.*

¹²⁵ The late Justice Robert Jackson coined the now famous phrase: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (opinion concurring in result). The use of such imagery to describe the Court's work leads to quite a few

modified or overruled.¹²⁶ Where its jurisdiction is in doubt, however, the compound nature of the republic makes it inevitable that Congress, the President, the States, dissenting Justices, and individuals are *entitled* to use whatever structural devices the Constitution makes available to them to challenge overbroad assertions of judicial authority.¹²⁷

FDR's court reorganization plan was such a device. So too were Congress's decision to eliminate the 1802 Term in response to the show-cause order issued in *Marbury v. Madison*,¹²⁸ and the

misunderstandings concerning the nature of power in the federal system, and how, if at all, it is shared among all those who participate in its governance, including "the People."

¹²⁶ For an extended, and illuminating discussion of the rule of *stare decisis*, see *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See also Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949).

¹²⁷ See generally Louis A. Fisher, *The Curious Belief in Judicial Supremacy*, 25 SUFFOLK U. L. REV. 85 (1991).

¹²⁸ Professor Susan Low Bloch reports that:

[William Marbury, Dennis Ramsay, William Harper, and Robert Townsend Hooe] filed their suit [against Secretary of State James Madison] during the December 1801 Term, and the Court issued a rule calling upon Madison to show cause at the Court's next term as to why a mandamus should not issue. 5 U.S. (1 Cranch) at 137. That next term was scheduled for June 1802, but in April 1802, Congress modified the Court's schedule, providing that the Court was to meet only once a year, with that session scheduled for the first Monday of February. Act of April 29, 1802, An Act to Amend the Judicial System of the United States, 7th Cong., Sess. I, ch. 31, § 1, 1 Stat. 156-67. Since this Act was passed in April, 1802, Congress was in effect abolishing the June and December 1802 sittings (which had been established by the Judiciary Act of 1801, 6th Cong., Sess. II, ch. 4, § 1) and thereby effectively recessing the Court for fourteen months. [George Lee Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-15*, in II HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 141 (1981)]. Congress's decision to abolish the 1802 terms was apparently motivated by a desire to delay the Court's consideration of both Marbury's petition and the repeal of the Judiciary Act of 1801[.] See [QUARRELS THAT HAVE SHAPED THE CONSTITUTION 13-14 (John A. Garraty ed., 1987.)]

Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 13 WTR EXPERIENCE 24 n.6 (2003).

many proposals over the years to limit the jurisdiction of the federal courts¹²⁹ or to limit their ability to function through the use of the appropriations process. The Rehnquist Court's emerging jurisprudence of federalism and separation of powers also utilizes a structural device to challenge assertions of judicial authority that its majority deems to be overbroad: the power of judicial review itself.

2. The Standard of Review as a Guide for Judicial Fact Finding

The role of an Article III judge who must rule on a constitutional case or controversy is to decide whether the government has violated the constitutional norms applicable to the case presented.¹³⁰ The function of a standard of review is to define the quality and quantity of evidence that will lead the judge (or Justice) to a finding concerning the relevant constitutional fact or facts. If the factual inquiry produces a finding that the constitutional norms at issue have been violated, the challenged action is unconstitutional; if not, the Court defers to the authority authorized to act. The result is a set of constitutional norms that are consistently interpreted *and applied*.¹³¹

¹²⁹ P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 357 (2d ed. 1973). *See, e.g.*, H.R. 2028 and S. 1297.IS (Protect the Pledge Act of 2003), 108th Cong., 1st Sess. (2003) (proposals to withdraw the jurisdiction of the federal courts "to hear or determine any claim that the recitation of the Pledge of Allegiance to the Flag ('I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.') violates the first article of amendment to the Constitution of the United States."). *Id.*

¹³⁰ *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-16 n.7 (1992); Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

¹³¹ *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990). In support of this interpretation, the Supreme Court stated that:

If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.

Id. at 888-89.

Reading *Marbury v. Madison* in this way means that the Court does not have the *authority* to be "selective" or "deferen[tial]" to majoritarianism and the political process"¹³² in cases where the Constitution allocates political jurisdiction in a manner inconsistent with the challenged action. In these instances, the inquiry is "jurisdictional," not prudential.¹³³ A standard of review that does not accurately reflect the norms from which it is derived is thus always subject to modification or rejection, no matter how venerable its pedigree.¹³⁴

C. Why Liberals Need Ackerman's "Constitutional Moment"

Professor Ackerman has spent many years elaborating and refining his theory that 1937 was a "constitutional moment" that advanced the "nation-centered character of the Republican model of constitutional change"¹³⁵ effectuating a "substantive change" in the allocation of political power. His theory is that "the People [have] spoken decisively on behalf of activist national government" in and after the 1937 election, and that "the ideals of

¹³² See, e.g., DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 207-08 (1996).

¹³³ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *id.*, (Thomas, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (arguing that there is no room for a balance to be struck because the Vesting Clause of Article II and the *Ex Post Facto* Clause, art I § 9, cl. I, deprive Congress of all power over the criminal prosecution function). See also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (controlling norms hostile to the legislative action; no room to balance), and *Bd. of Educ. of the Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 732, 735-42 (1994) (Scalia and Thomas, JJ., and Rehnquist, C.J., dissenting) (controlling norms not hostile and arguably inapplicable to the legislative accommodation at issue).

¹³⁴ Compare *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a state And no clause in the Constitution purports to confer such a power upon the federal courts.") with *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). In cases where constitutional norms require a balancing process, the result of the process is an interpretation of the norm itself. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (comparing "balancing" under the Commerce Clause with, among other things, balancing under the First Amendment).

¹³⁵ ACKERMAN, *Transformations*, *supra* note 15, at 23.

the victorious activist Democracy [should] serve as a primary foundation for constitutional rights in the United States."¹³⁶

In this view, Justice Stone's majority opinion in *Carolene Products* is part of a larger political strategy that "brilliantly endeavored" to use the allocation of political jurisdiction suggested in footnote four "to turn the Old Court's recent defeat" at the hands of the New Deal "into a judicial victory."¹³⁷ Attempts by the Rehnquist Court to upset the allocation of authority assumed in footnote four places that "judicial victory" at risk.¹³⁸ Professor Ackerman is straightforward when he claims:

These New Deal opinions have operated as the functional equivalent of formal constitutional amendments, providing a solid foundation for activist intervention in national social and economic life for the past sixty years.

¹³⁶ ACKERMAN, *Foundations*, *supra* note 5.

¹³⁷ *Id.* at 714.

¹³⁸ Justice Souter's dissenting opinion in *United States v. Lopez*, 514 U.S. 549, 608 (1995) suggests that "it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago." He warns that:

Further glosses on rationality review . . . may be in the offing. Although this case turns on commercial character, the Court gestures toward two other considerations that it might sometime entertain in applying rational basis scrutiny (apart from a statutory obligation to supply independent proof of a jurisdictional element): does the congressional statute deal with subjects of traditional state regulation, and does the statute contain explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce? Once again, any appeal these considerations may have depends on ignoring the painful lesson learned in 1937, for neither of the Court's suggestions would square with rational basis scrutiny.

Id. at 608-09. See also Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?*, 55 ARK. L. REV. 795 (2003). Professor Rotunda states that:

A great deal of the academic and political criticism that has accompanied the recent federalism decisions of the Supreme Court express the fear that . . . these opinions undercut federal power in a very serious and substantial way, thus preventing the Federal Government from enacting needed legislation that would be beyond the capacity of the individual states to regulate

Id.

I do not claim that his New Deal jurisprudence is an unchangeable element of our Constitution—but then again, neither is most of the formal text. I do claim that any future transformation of New Deal principles should require a higher lawmaking process comparable to the one led by President Roosevelt in the 1930s.¹³⁹

This is an interesting and important argument, but it is fatally flawed. Ackerman cannot argue that "[t]he Founding, Reconstruction, and the New Deal were all acts of *constituent* authority,"¹⁴⁰ without also conceding that he is, at bottom, an advocate of judicial supremacy. Unless "the Constitution is what the judges say it is,"¹⁴¹ Congress and the President did not *need* an act of *constituent* authority to repudiate the "laissez-faire vision expressed by *Lochner* and *Hammer*."¹⁴² Subject to the structural devices of separation of powers and federalism, Article I gives Congress and the President plenary jurisdiction to prescribe the rules that shall govern the national economy.

An act of *constituent* (or constitutional) authority is necessary to justify the post-1937 case law if, and only if, the "constitutional moment" of 1937 was an affirmation by the People that the Due Process Clauses of the Fifth and Fourteenth Amendments confer preemptive jurisdiction to prescribe the substantive content of individual rights *on the Court*. At bottom, Ackerman's claim is that "normal politics" is an insufficient basis for reconsideration of the Court's holdings in cases where the Court has acted under the Due Process Clause to limit the scope of federal or state jurisdiction to prescribe.¹⁴³ More, he argues, is required: a demonstration, to the

¹³⁹ ACKERMAN, *Transformations*, *supra* note 15, at 26.

¹⁴⁰ *Id.* at 11 (emphasis added).

¹⁴¹ Chief Justice Charles Evans Hughes, Speech at Elmira, New York (1907), *supra* note 41.

¹⁴² See ACKERMAN, *Transformations*, *supra* note 15 at 377.

¹⁴³ *Id.* at 381 ("If, after sober second thought, the Court concedes that a mobilized majority of Americans is demanding fundamental change, it may begin to retreat from judicially entrenched constitutional principles, giving the President and Congress an opportunity to consolidate their reformed constitutional vision by replacing retiring justices with transformative appointments."). *Cf.* *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Katzenbach v. Morgan*, 384 U.S. 641, 666 (1966) (Harlan, J., with whom Stewart, J., joins, dissenting).

Court's (or Ackerman's) satisfaction that the political branches have "earn[ed] authority from the People to repudiate" the Court's holdings.¹⁴⁴

This, of course, is precisely the proposition that FDR rejected when he condemned the "unending struggle between those who would preserve this original broad understanding of the Constitution as a layman's instrument of government and those who would shrivel the Constitution into a lawyer's contract."¹⁴⁵ Ackerman, however, is determined to prove that the Court's post-1937 reliance on the Due Process Clause has the same constitutional pedigree as the Fourteenth Amendment itself.

If [lawyers] hope to do better, constitutionalists must return to the sources and discover that they tell a very different story. They reveal both Reconstruction Republicans and New Deal Democrats refusing to follow the path for constitutional amendment set out by their predecessors. Like the Federalists before them, these reformers self-consciously validated their initiatives through a series of unconventional institutional appeals to the People Though the rising constitutional movement did not respect established norms for revision, it did not seek to destroy the entire matrix of preexisting institutions. Instead, it constructed new higher lawmaking processes out of older institutions, using them as platforms for an unconventional argument that our repeated institutional and electoral victories have provided us with *a mandate from the People* adequate to authorize new constitutional law.¹⁴⁶

There is only one problem with Ackerman's theory that the New Deal is an example of a form of "higher lawmaking" functionally equivalent to that which is authorized by Article V; it does not square with the facts. Even if we assume that the political processes that resulted in the adoption of the Fourteenth Amendment validate a reading of Article V that "makes its procedures sufficient, but not necessary, for the enactment of a

¹⁴⁴ See ACKERMAN, *Transformations*, *supra* note 15 at 376.

¹⁴⁵ *Id.* at 377, quoting Franklin D. Roosevelt, Address on Constitution Day, Sept. 17, 1937, cited *infra* note 56.

¹⁴⁶ *Id.* at 10-12.

valid amendment,"¹⁴⁷ the only thing that the Court-packing controversy shows is that the Court responds to political discipline.

Although FDR challenged the Court's claim that the Due Process Clause empowers it alone to speak for the Nation, the Court "renounced no power and [was] subjected to no new limitation,"¹⁴⁸ either before or after 1937. If anything, the scope of its claim that the Due Process Clause grants the judiciary preemptive jurisdiction to prescribe substantive rules has *increased* since 1937.

Since neither the text nor structure of the amended Constitution support such a sweeping claim of judicial authority under the Due Process Clause, "normal politics" cannot validate it. The fact that the Fourteenth Amendment was an attempt to recapture, *from the Court itself*, powers it had taken from Congress and the States makes the Due Process Clause a uniquely implausible foundation for a claim of a judicially-centered prescriptive jurisdiction over human rights. All that remains to validate the power claim is Ackerman's theory. As we shall see in Parts III and IV, the claim that the nation's approbation of the political program of the New Deal also validates the Court's post-1937 jurisprudence is wishful thinking, at best.

D. The Conservative Critique of the Rehnquist Court

Conservative critics of the Rehnquist Court's separation of powers and federalism decisions have no desire to validate the Court's power claims. Their concerns are more tightly focused on specific areas of law, such as religious liberty, or the character of the states as distinct political communities having the right of self-

¹⁴⁷ *Id.* at 15. I do not accept this proposition. It is one thing to argue the nation is bound by the rules enunciated by the Court when the political branches have come to accept the Court's holdings on a specific subject, even if they are wrong. It is quite another to argue that erroneous holdings by the Supreme Court acquire a constitutional pedigree. See *supra* notes 67-77 and accompanying text. I express no opinion in this Essay concerning Professor Amar's proposition that "the People" themselves can amend the Constitution through the use of procedures other than those enumerated in Article V. See generally Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994).

¹⁴⁸ JACKSON, *supra* note 14, at vi.

government within the scope of their reserved powers.¹⁴⁹ The political aftermath of the Court's decision in *Employment Division v. Smith*¹⁵⁰ provides a case in point.

In *Smith*, the Court held that "the First Amendment has not been offended" if generally applicable and otherwise valid legislation has the incidental, or unintended, effect of "prohibiting the exercise of religion."¹⁵¹ Advocates for religious liberty from across the political spectrum were outraged that the Court had so constricted the ability of judges to intervene on behalf of religious minorities. They formed an extraordinary political coalition, the explicit goal of which was to neutralize or overturn the decision through political action in Congress and in the States, as well as through litigation in state courts.

Conservatives had taken seriously the Court's statement in *Smith* that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well,"¹⁵² and understood it to mean that the Court would defer to whatever balance of interests Congress struck between religious liberty and state sovereignty. In *Smith*'s citation to state laws accommodating minority religious claims, they also saw a signal that laws explicitly designed to protect religious freedom would not be subject to attack under the Establishment Clause. Assuming leadership positions in the coalition, they petitioned Congress and the State legislatures. The Religious Freedom Restoration Act [RFRA]¹⁵³ was the most important of several federal laws¹⁵⁴ passed in response to *Smith*.¹⁵⁵

¹⁴⁹ U.S. CONST. art. IV, § 4 (Guaranty Clause). See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

¹⁵⁰ 494 U.S. 872 (1990).

¹⁵¹ *Id.* at 878. The Court reaffirmed this holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

¹⁵² *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

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

¹⁵⁴ Congress also put teeth into AIRFA in the American Indian Religious Freedom Act Amendments of 1994, Pub. L. 103-344, *codified at* 42 U.S.C. § 1996a (2000). AIRFA now operates as both a legislative accommodation for individuals, and a preemptive limit on State power to regulate the religious practices of Native Americans.

¹⁵⁵ Numerous state policies seeking to supplant *Employment Division v. Smith* were adopted as well, either by statute or judicial decision. See generally STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A*

Though some, including this writer, accurately predicted that the Court would invalidate RFRA on separation of powers and federalism grounds,¹⁵⁶ most supporters of RFRA were surprised when the Court held, in *City of Boerne v. Flores*,¹⁵⁷ that it was unconstitutional. In the words of Judge John Noonan: "The big break came with *Boerne*."¹⁵⁸

The rationale the Court employed in *Boerne* made the political reaction worse. Supporters of RFRA had relied upon *Ex parte Virginia*¹⁵⁹ and *Katzenbach v. Morgan*,¹⁶⁰ in which the majority opinions held explicitly that Section Five of the Fourteenth Amendment "grant[s] to Congress [the] same broad powers expressed in the Necessary and Proper Clause."¹⁶¹ They therefore assumed that the Court would accept a statutory direction from Congress to apply a standard of review—the *Sherbert-Yoder* balancing test—it had expressly rejected in *Smith*. Its holding in *Boerne*—that the power to "enforce" depends upon "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"¹⁶²—left the impression that the Court, in a fit of pique over a legislative rejection of its decision in *Smith*, was determined to put Congress in its place.¹⁶³ Echoing the sentiments of those worried about the demise of the post-New Deal role of the Court, some took its holding as a breach of trust.¹⁶⁴

CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 126 (1995). See also Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1535 (2000) (proposing "a system that justifies the circumstances under which any of the [branches of government] might merit the last word in interpretation of the Bill of Rights").

¹⁵⁶ See Testimony of Robert A. Destro Before the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee, United States House of Representatives, "The Religious Freedom Restoration Act," Washington, D.C., May 14, 1992 at 305, noted in Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1099 & n.422 (1993).

¹⁵⁷ 521 U.S. 507 (1997).

¹⁵⁸ NOONAN, *supra* note 2, at 15.

¹⁵⁹ 100 U.S. 339, 345-46 (1879).

¹⁶⁰ 384 U.S. 641 (1966).

¹⁶¹ *Id.* at 650 n.9.

¹⁶² *Boerne*, 521 U.S. at 508 (1997).

¹⁶³ See *id.* (invalidating the Religious Freedom Restoration Act).

¹⁶⁴ See NOONAN, *supra* note 2, at 31 ("Those who relied on such pledges by the Supreme Court did not consider sufficiently that the court could change

The decisions in *Smith* and *Boerne* illustrate, perhaps better than most, the inherent tension between the Court's adjudicative role in cases and controversies raising civil rights issues, and the prescriptive role in matters of civil rights it assumed after 1937.¹⁶⁵ By the time the Court decided *Smith*, the Court's opinions had become so closely identified with the substantive scope of the Religion Clause¹⁶⁶ that the National Council of Churches' Counselor on Religious Liberty, the late Dr. Dean Kelley, was moved to assert in testimony before the House Judiciary Committee that the practical impact of *Smith* was a judicial "repeal" of the Free Exercise Clause itself.¹⁶⁷

Supporters of the New Deal vision of federal judicial power and those who (like this writer) take solace in the fact that both the Bill of Rights and the Fourteenth Amendment expressly reserve the power of the states and Congress to protect civil and human rights readily agreed that the states should take up the slack after the demise of RFRA, but the agreement stops there. Those who fear that the Court is systematically dismantling its post-1936

its mind."). Chapter 1, entitled "The Battle of Boerne," recounts some of the history and much of the reasoning, and disappointment, of RFRA supporters.

¹⁶⁵ *Palko v. Connecticut*, 302 U.S. 319 (1937). In *Palko*, the Court held that the "fundamental" portions of the Bill of Rights also bind the States. *Id.* at 325. This approach, called "selective incorporation," uses the Due Process Clause of the Fourteenth Amendment to make parts of the Bill of Rights applicable to the States as well as the federal government. The prescriptive claim is that because Article III gives the Court the power to interpret the Constitution, and because Section 1 of the Fourteenth Amendment binds the States, the Court has the power to import "substantive" content into the Due Process Clause. The Court "selectively" determines which liberties contained in the Bill of Rights are "fundamental," and the rights the Court declares fundamental binds the States. What is not "fundamental" binds only the federal government.

¹⁶⁶ There is considerable debate over the proper nomenclature to be assigned to the religion-specific provisions of the First Amendment. Some, including perhaps a majority of the Court, view these provisions as analytically distinct clauses. Others view them as integral parts of a single clause.

¹⁶⁷ *Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 27 (1990) (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches). In Dr. Kelley's view, the majority's rejection of the compelling state interest standard of review in cases involving religious practice burdened by laws of general applicability repeals the Free Exercise Clause of the First Amendment. *Id.*

vision of its role in the system fear that "conservative judicial activism" may include reconsideration of the "constitutional moment" when the Hughes Court struck a strategic political bargain with the progressive wing of the Democratic Party. Since there is widespread agreement that the Hughes Court's "constitutional moment" had the effect of reallocating political jurisdiction, any move by the Rehnquist Court to reopen questions long thought settled by politicians and the academy would not simply betray the bargain. By suggesting that the text and structure of the Constitution impose just as many limits on the power of the Judicial Branch "to say what the law is" as they do on the respective powers of Congress, the President, and the States, it would do so in the worst possible way.

In the sections that follow, I develop the argument that the Court's post-1936 jurisprudence about the reach of congressional power makes it very unlikely that the Court is on the verge of waging a pre-1936-style campaign to limit the otherwise legitimate exercise of federal and state legislative jurisdiction. The more interesting question is whether it has begun to reconsider the scope of its *own* post-1936 claims that Article III empowers it to prescribe substantive rules of conduct that cannot be revised or changed without either a formal constitutional amendment or a judicial change of heart.

It troubles advocates of a more limited judicial power to prescribe under the Due Process Clause to watch the Court struggle to develop a coherent rationale for cutting back on the scope of *congressional* power, even while reaffirming or extending the scope of its *own* power claims.¹⁶⁸ In this regard, I agree with Judge Noonan. Should the Court be attempting to aggrandize its own power at the expense of Congress or of the States, the situation would be serious indeed.

Based on my own review of the Court's jurisprudence, I draw the slightly more optimistic conclusion that the situation is "hopeless, but not serious." Judge Noonan is correct to observe that "[t]he big break came with *Boerne*,"¹⁶⁹ but I respectfully disagree

¹⁶⁸ See, e.g., *State Farm Mutual Auto. Ins. Co. v. Campbell*, 2003 WL 1791206 (U.S., April 7, 2003); *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992).

¹⁶⁹ NOONAN, *supra* note 2, at 15.

that the Court's rejection of RFRA was the constitutional travesty he suggests it to be. *Boerne* says next to nothing about the power of Congress to write laws designed to protect religious liberty or anything else, but speaks volumes about the propensity of judges to substitute their own views for those of the legislature without first examining the reasons for its actions. This, of course, is precisely what got the Court in trouble with FDR.

Viewed from the vantage point provided by the concept of political jurisdiction, it is possible that the Rehnquist Court is taking the first tentative steps in the direction FDR suggested when he asked where judges get the power to "read into the Constitution language which the Framers refused to write into the Constitution."¹⁷⁰ Read together as an Essay on the nature of the judicial task, the opinions in *Smith* and *Boerne* opinion come very close to suggesting that the answer to FDR's question is that they have no such power.

Both opinions reject a standard of review that permits "*judges* [to] weigh the social importance of all laws against the centrality of all religious beliefs."¹⁷¹ In *Smith*, the Court concluded that the *Sherbert-Yoder* formulation was bad constitutional law because it permits *judges* to engage in a balancing process unfettered by any standard other than their own commitment to religious liberty and their impressions concerning the bona fide arguments of the complaining party. When Congress responded by writing the *Sherbert-Yoder* standard of review into RFRA, the Court used the dispute in *Boerne* to remind Congress that its power under Section 5 of the Fourteenth Amendment does not confer unfettered lawmaking discretion on Congress either.

Though it will likely prove impossible to apply in practice, the purpose of *Boerne's* holding regarding the need for "congruence and proportionality" in Congressional attempts to remedy violations of the Fourteenth Amendment is clear. Both federalism

¹⁷⁰ Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938-1950) 366 (Samuel Rosenman ed., 1937), quoted in ACKERMAN, *Transformations*, supra note 15, at 379. This address is also available online at the Franklin D. Roosevelt Library and Museum, at <http://www.fdrlibrary.marist.edu/tmirhsee> (last visited July 5, 2003).

¹⁷¹ *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (emphasis added).

and separation of powers are compromised when either Congress or the Court adopts an overbroad standard for the exercise of judicial discretion.

III. TO WHOM HAVE THE PEOPLE DELEGATED THE PRIMARY POWER OF PROTECTING INDIVIDUAL RIGHTS: CONGRESS, THE FEDERAL COURTS, OR THE STATES?

It is now time to take a hard look at the Court's post-1936 role in the system, and to ask whether its pre-1936 power claims differ in any great degree from those made after 1936. It should come as no surprise that they do not.

There is no better way to illustrate the inherent difficulty with the Court's post-1936 jurisprudence of federalism and separation of powers than to focus on the area of law in which it is said to have its greatest "comparative competence and 'expertise,'" individual rights.¹⁷² The usual approach to such an endeavor is substantive. A substantive approach will feature either an examination of specific substantive rules announced by the Court in important areas such as the First Amendment;¹⁷³ or trace the legal, political, and philosophical developments that led to the Court's post-1936 preference for individual rights.¹⁷⁴ The approach taken here, by contrast, will be jurisdictional, and will utilize the structural devices of federalism and separation of powers to examine the "paradigm shift" of 1937.

¹⁷² WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 15 (1980) (citing HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 82 (2d ed. 1973)); MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 29-30 (1966); Clifton McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 360-61 (1966).

¹⁷³ See, e.g., *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (holding that children who were Jehovah's Witnesses could be compelled to salute the flag), *rev'd* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁷⁴ See, e.g., Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1461 (1991) (noting the ways in which disdain for economic due process and a preference for individual rights characterized the views of the "Great Dissenters" of the Taft Court—Justices Holmes and Brandeis); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

In order to set the stage for the discussion, it will be necessary to examine *United States v. Carolene Products Co.*¹⁷⁵ This case lies at the root of the seemingly endless political and academic debates over which persons and groups should be singled out for special judicial or legislative protection. Under the logic of *Carolene Products*, the Court claims the power to determine not only *whose* interests shall be protected in judicial proceedings, but also the prescriptive jurisdiction to determine, as an initial matter, *what* interests Congress has the power to protect from State interference.¹⁷⁶

These are questions of profound importance in a representative democracy,¹⁷⁷ but most discussions tend to focus on

¹⁷⁵ 304 U.S. 144 (1938).

¹⁷⁶ In *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court held that those portions of the Bill of Rights protecting "fundamental rights" apply to the states via the Due Process Clause of the Fourteenth Amendment. "Selective incorporation" assumes that the Due Process Clause of the Fourteenth Amendment authorizes the Court to make parts of the Bill of Rights applicable to the states. The claim is that because Article III gives the Court the power to interpret the Constitution, and because Section 1 of the Fourteenth Amendment binds the states, the Court has the power to import substantive content into the Due Process Clause. The Court "selectively" determines which liberties contained in the Bill of Rights are "fundamental." What the Court declares fundamental binds the states. What is not fundamental binds only the federal government. *Id.* See also, *supra* note 167 and accompanying text. *Palko* thus raises at least two significant questions: (1) Where does the Court get the authority to prioritize the rights enumerated in the Bill of Rights? and (2) Which of the rights characterized as "fundamental" takes priority when they may conflict?

The Court's opinion in *Palko* does not answer these questions, but it implicitly adopts the view that there is "an implied hierarchy of constitutional values." Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 479 (1991). Otherwise, the Court would necessarily characterize *all* rights in the Bill of Rights as fundamental. See generally LOUIS FISHER, *Separation of Powers & Federalism*, in 1 AMERICAN CONSTITUTIONAL LAW: CONSTITUTIONAL STRUCTURES 422-23 (4th ed. 2001). The Incorporation Doctrine also raises two important "structural" questions: (1) Federalism—the extent to which the federal government, including the Court, may regulate state action and (2) Separation of powers—which federal branch has the power to decide whether a right is "fundamental enough" to restrict state action.

¹⁷⁷ William Van Alstyne has noted that "'it is difficult to imagine a more consequential subject' than the relationship of the Fourteenth Amendment to the Bill of Rights." William W. Van Alstyne, *Foreword* to MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF

the details of when and under what circumstances certain litigants, rights, or individuals should get special attention from the courts. Though these are important questions, the initial one is jurisdictional: *On what grounds does the Court exercise prescriptive authority in the first instance?*¹⁷⁸

Were the answer to this question found in, or easily implied from, the text, structure, or history of the Constitution, the task would be an easy one. Instead, we are facing one of the most enduring questions in constitutional law: "the problem of [political] legitimacy raised whenever nine elderly lawyers invalidate [or uphold] the legislative decision of a majority of our elected representatives."¹⁷⁹

Given the importance of the question, one might expect that there might be an extended discussion of the issue in at least one opinion. There is not. All we have is the following statement by Justice William Brennan in a footnote to the majority opinion in *Oregon v. Mitchell*:

[T]he statements of Bingham and Howard . . . indicate that the framers of the [Fourteenth] Amendment were not always clear whether they understood it merely as a grant of power to Congress or whether they thought, in addition, that it would confer power upon the courts, which the courts would use to achieve equality of rights. Since §5 is clear in its grant of power to Congress and we have consistently held that the Amendment grants power to the courts, this issue is of academic interest only.¹⁸⁰

From a jurisdictional perspective, this is a very interesting statement. Because the Court's power to decide cases or controversies is defined by Article III, it needs no additional power

RIGHTS, at ix (1986). Others have echoed this sentiment. See, e.g., Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1198-1203 (1992) (discussing the relationship between the general prohibitions of Article I, Section 9, and the specific prohibitions of Article I, Section 10 (binding the states), and the First Amendment (binding Congress alone)).

¹⁷⁸ I discuss these questions at length in two articles. Destro, *supra* note 13; Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J. L. & RELIGION 355 (1995).

¹⁷⁹ Ackerman, *supra* note 37, at 715.

¹⁸⁰ 400 U.S. 112, 264 n.37 (1970).

to declare "what the law is" under the Fourteenth, or any other, amendment. Justice Brennan must therefore be referring to *another* type of power that the framers of the Fourteenth Amendment intended to "confer . . . upon the courts"—prescriptive jurisdiction. Without jurisdiction to prescribe, it would not be possible, in Justice Brennan's words, for "the courts [to] use [section one] to achieve equality of rights."

Like any other claim of political jurisdiction, the nature and scope of the Court's assertion that the Fourteenth Amendment grants it preemptive, prescriptive jurisdiction over both Congress *and* the States must be justified on the basis of a fair reading of the text, structure, and history of the Constitution and its amendments. Like the late Chief Justice Earl Warren, we must assume, for analytical purposes at least, that "the fact that the Court rules in a case . . . that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is."¹⁸¹

A. The Realpolitik of Footnote Four

Footnote four of *United States v. Carolene Products Co.* has been variously described as "The Most Celebrated Footnote in Constitutional Law"¹⁸² and "the core of the constitutional case for judicial review."¹⁸³ Those are significant appellations. In order to understand how a few paragraphs of dicta appearing as a footnote in a case that deals with Congressional authority to regulate the sale of "filled milk"¹⁸⁴ have acquired such cosmic status, we must consider the practical politics, or *Realpolitik*,¹⁸⁵ of footnote four.

¹⁸¹ Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962). This point is discussed at length in Louis Fisher, Ph.D., *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1994).

¹⁸² WILLIAM B. LOCKHART ET AL., *THE AMERICAN CONSTITUTION* 17 (5th ed. 1996).

¹⁸³ Ackerman, *supra* note 37, at 745 ("*Carolene* remains at the core of the constitutional case for judicial review.").

¹⁸⁴ Relying on the House and Senate Agriculture Committee reports supporting the passage of the "Filled Milk Act," the Court described "filled milk" as "milk compounds made of condensed milk from which the butter fat has been extracted and an equivalent amount of vegetable oil, usually coconut oil, substituted. These compounds resemble milk in taste and appearance and are distributed in packages resembling those in which pure condensed milk is distributed." *United States v. Carolene Products, Co.*, 304 U.S. 444, 149 n.2

The use of national political power to resolve social and economic problems was the political centerpiece of the New Deal. In the first "Fireside Chat" of his second term, FDR described the three branches in "the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed."¹⁸⁶ Drawing a distinction between

(1938). See also Geoffrey Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

¹⁸⁵ The term "Realpolitik" is derived from the German [*real* = actual + *Politik* = politics], and is understood to mean "politics based on practical and material factors rather than on theoretical or ethical objectives." MERRIAM-WEBSTER'S UNABRIDGED ONLINE at <http://www.meriamwebster.com> (2003) (last visited June 10, 2003).

¹⁸⁶ The text of the Fireside Chat "On the Reorganization of the Judiciary" given on Tuesday, March 9, 1937 is available as part of the online collection of the Franklin Delano Roosevelt Presidential Library and Museum *available at* <http://www.fdrlibrary.marist.edu/030937.html> (last visited June 10, 2003). It is also available in print in 6 Franklin D. Roosevelt, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 1937, THE CONSTITUTION PREVAILS* 123-25 (1941). The excerpts in the text are taken from the paragraphs quoted below.

I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses. It is the American people themselves who are in the driver's seat. It is the American people who want the furrow ploughed. It is the American people themselves who expect the third horse to pull in unison with the other two.

....

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures in complete disregard of this original limitation. In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body. When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the

"the proper use of its judicial functions" and an "improper" claim of power to "set itself up as a third house of the Congress—a super-legislature . . . [by] reading into the Constitution words and implications which are not there, and which were never intended to be there," he argued that "[t]he Courts . . . have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions."¹⁸⁷

His plea was a simple one. Quoting Justice Bushrod Washington in *Ogden v. Saunders*,¹⁸⁸ FDR argued that "[i]t is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity until its violation of the Constitution is proved beyond all reasonable doubt."¹⁸⁹ In his view, proper respect for the separation of powers should have required the Court, "the third horse[,] to pull in unison with the other two."¹⁹⁰

Until Roosevelt's announcement that he was sending to Congress a "Recommendation to Reorganize the Judicial Branch of the Federal Government,"¹⁹¹ it had been thought that the only way to bring the Court to heel was to amend the Constitution.¹⁹² The Court-packing plan was so simple, and such a direct attack on the Court itself, that it sent shockwaves through the American political establishment.

Then-Attorney General Robert Jackson described the plan as an "exemplary and disciplinary" political attack.¹⁹³ The Court understood it as such, and appears to have interpreted it as an attack on the power of judicial review itself.¹⁹⁴ So, apparently, did

Court has been assuming the power to pass on the wisdom of these Acts of the Congress—and to approve or disapprove the public policy written into these laws.

Id.

¹⁸⁷ *Id.*

¹⁸⁸ 25 U.S. (12 Wheat.) 213 (1827).

¹⁸⁹ *Id.* at 270.

¹⁹⁰ Roosevelt, "On the Reorganization of the Judiciary" *supra* note 91.

¹⁹¹ *See supra*, note 91.

¹⁹² Several proposals had been introduced to that end. *See Kline, supra* note 89.

¹⁹³ JACKSON, *supra* note 14, at vii. He made this observation *before* he was appointed to the Court.

¹⁹⁴ *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401-07 (1937) (Sutherland, Van Devanter, McReynolds & Butler, JJ., dissenting).

its allies.¹⁹⁵ What interests us here, however, is its *institutional* reaction to Roosevelt's attack.

There are various interpretations of the famous "switch in time that saved nine."¹⁹⁶ Among them is Jackson's observation that the Court "subdued the rebellion against their constitutional dogma by joining it,"¹⁹⁷ and Bruce Ackerman's more fulsome description of *Carolene Products* as the Court's acceptance of "a revolutionary transformation of traditional doctrine" that was to be accomplished through a combination of "transformative judicial appointments" and "transformative judicial opinions."¹⁹⁸

Since no one knows for certain what prompted Justice Owen Robert's change of heart, there is very little to support the proposition that *Carolene Products* was a "rebellion" against anything. There is even less to support the claim that the Court intended "a revolutionary transformation of traditional doctrine." All we have is the Court's opinions—and they indicate a clear intent to reaffirm its position that substantive due process is a legitimate tool for controlling the exercise of legislative discretion.

There is widespread agreement that the Court's decisions in *West Coast Hotel Company v. Parrish*¹⁹⁹ and *National Labor Relations Board v. Jones & Laughlin Steel*²⁰⁰ are the transition points in the "crisis of 1937," after which the Court ceased to challenge New Deal social and economic legislation.²⁰¹ The question that concerns us here is: *What changed?*

According to Robert Jackson, the Justices "subdued the rebellion against their constitutional dogma by joining it."²⁰² In one sense, that is true. There is no question that the Court "subdued the

¹⁹⁵ JACKSON, *supra* note 14, at vii.

¹⁹⁶ The quip is attributed to Joseph Alsop. Roger K. Newman, *Hugo Black: A Biography* 214 (1994).

¹⁹⁷ JACKSON, *supra* note 14, at vi. *Accord* Ackerman, *supra* note 37, at 714-15.

¹⁹⁸ ACKERMAN, *Transformations*, *supra* note 15, at 25-26.

¹⁹⁹ 300 U.S. 379 (1937), *aff'g* *Parrish v. West Coast Hotel Co.*, 55 P.2d 1083 (1936).

²⁰⁰ 301 U.S. 1 (1937).

²⁰¹ *See generally* HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994); THOMAS FLEMING, *THE NEW DEALER'S WAR: FRANKLIN D. ROOSEVELT AND THE WAR WITHIN WORLD WAR II* 59-62 (2001).

²⁰² JACKSON, *supra* note 14, at 25-26.

rebellion" by ceding the field of social and economic legislation to Congress, but it is also true that the Hughes Court never gave FDR what he really wanted: a clear statement that the Court eschewed "the power to pass on the wisdom of . . . Acts of the Congress and to approve or disapprove the public policy written into these laws."²⁰³

In a brilliant two-step maneuver, the Court did precisely the opposite. It simultaneously *reaffirmed* its claim of power to review the "substance" of legislation for consistency with a vision of "fundamental rights" rooted in principles reflected in, but existing largely outside, the constitutional text,²⁰⁴ and "*withdrew*" its claim of authority to subject Congressional economic regulations to "substantive" review under the Due Process Clause. In short, it "redefined" due process. From *West Coast Hotel* onward, a commercial or economic "regulation which is reasonable in

²⁰³ 6 Franklin D. Roosevelt, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 1937: THE CONSTITUTION PREVAILS 125 (1941), quoted in Kline, *supra* note 89, at 924.

²⁰⁴ See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996) ("[I]t is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by 'we the people,' that best explains, and best justifies, American constitutional law today."). *Id.* at 879; Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161 (1988). In support of this interpretation, Professor Sunstein argues that:

From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history. The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses therefore operate along different tracks.

Id. at 1163-64 (footnote omitted).

relation to its subject and is adopted in the interests of the community *is due process*."²⁰⁵

In order to see the reaffirmation of judicial power in the *Carolene Products* formulation of the standard of review, it is necessary to compare the *Carolene* holding concerning the scope of review in cases involving the exercise of legislative authority over commercial and economic issues with the standard of review it would apply in cases involving civil rights.

The text accompanying footnote four contains the standard of review to be applied to "regulatory legislation affecting ordinary commercial transactions." It reads:

Even in the absence of [legislative findings and history], the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.²⁰⁶

After *West Coast Hotel*, "due process" in cases involving "regulatory legislation affecting ordinary commercial transactions" is the *legislative* process unless there is a clear indication that the decision made was "of such a character" that casts doubt on the existence of *any* process of rational decisionmaking.

²⁰⁵ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (emphasis added). In *Parrish*, the Court stated that:

[T]he due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the *Adkins* Case governed Congress[,] . . . speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

Id.

²⁰⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

Footnote four, by contrast, deals with *judicial* process, and *reaffirms* the Court's prior holdings concerning the scope of its own power under the Due Process Clause. The *Carolene* Court states that:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation, [such as] restrictions upon the right to vote, restraints upon the dissemination of information, interferences with political organizations, [and] prohibition of peaceable assembly.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities[,] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.²⁰⁷

Many have remarked that the footnote sets forth its position in terms that are "tentative . . . exploratory[,] and hesitant."²⁰⁸ Given

²⁰⁷ *Id.* at 152 n.4 (citations omitted). The actual holding in *Carolene Products* is that "any rational basis" is the appropriate standard of review for Congressional action challenged under the Commerce Clause. *Id.* at 152-54.

²⁰⁸ Professor Jack Balkin observes that the *Carolene Products* footnotes all start with the following diffident phrases: "There may be narrower scope for . . ."; "It is unnecessary to consider now . . ."; and "Nor need we enquire whether . . .". J.M. Balkin, *The Footnote*, 83 N.W. U.L. REV. 275, 284 (1989), quoting *Carolene Products*, 304 U.S. at 152 n.4, *quoted in* Winter, *supra* note 210, at 1463 n.104.

the politics of the time, it did not really have much choice.²⁰⁹ But closer examination of the text of the footnote indicates that the Court made a sweeping, but subtle, political move in response to Roosevelt's plan.

The first paragraph appears to be a rather unexceptional restatement of the rule in *Marbury v. Madison*.²¹⁰ The second paragraph, however, bears closer scrutiny. It is one thing to argue that the federal government is the ultimate guarantor of the integrity of the political process, and that it has a critically important role to play in the protection of other rights, whether listed in the Bill of Rights or not. It is quite another to argue that the Court is the beneficiary of a grant of preemptive or prescriptive power "under the general prohibitions of the Fourteenth Amendment."²¹¹ In time, the Court will utilize the Due Process Clause to claim judicial supremacy—that is preemptive political jurisdiction—over issues of civil rights.

In retrospect, the Court's reaction to the Court-packing plan was better planned and executed than Roosevelt's. After *Carolene Products*, the right to review legislation concerning economic regulation, the structure and organization of the federal government, state-federal relationships, and social welfare would be ceded to the comparative competence and expertise of the political branches.²¹² In exchange, the Judicial Branch would claim primary jurisdiction (or, to borrow a phrase from Louis Lusky, the self-proclaimed author of footnote four²¹³ an "area of judicial

²⁰⁹ Opposition to the Court-packing plan "included organized bar groups, (particularly the American Bar Association), the Catholic Church and other religious entities, national farm organizations, most newspaper publishers, corporate executives, and isolationist groups that traditionally hated Roosevelt." Kline, *supra* note 89, at 917.

²¹⁰ 5 U.S. (1 Cranch) 137 (1803).

²¹¹ *Carolene Products*, 304 U.S. at 152 n.4.

²¹² See, e.g., Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

²¹³ Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942) (presenting the arguments for the need for special solicitude for the interests of minorities by the law clerk who drafted *Carolene's* footnote 4).

hegemony"²¹⁴) over individual rights, access to the political process, and (of course) control over the scope of its own power.²¹⁵

Wrapping itself in the mantle of civil and human rights turned out to be a brilliant political strategy. The Court's track record in those fields was abysmal in the mid-1930s,²¹⁶ but was perceived to be improving.²¹⁷ By deftly asserting that the power of judicial review is most appropriately exercised in those settings where "the ideals of the victorious activist Democracy [could also] serve as a primary foundation for constitutional rights in the United States," Justice Stone's majority opinion "brilliantly endeavored" to use the footnote as a part of a larger political strategy "to turn the Old Court's recent defeat [at the hands of the New Deal] into a judicial victory."²¹⁸

And he did so. At the end of the Court-packing controversy, the Court had, in the words of Robert Jackson, "renounced no power and [was] subjected to no new limitation."²¹⁹ As a direct result of the partition of political jurisdiction suggested in *Carolene Products*, the Court's power actually *increased* relative to Congress and the States, and was to serve for nearly sixty years as the "firm [political] ground . . . upon which [the Court was] to rebuild the institution of judicial review" after the crisis of 1937.²²⁰

²¹⁴ LOUIS LUSKY, *BY WHAT RIGHT: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* 109 (1975).

²¹⁵ *See* *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Mistretta v. United States*, 488 U.S. 361 (1989); *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *United States v. Nixon*, 418 U.S. 683 (1974). *See generally* Destro, *supra* note 13; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

²¹⁶ *See, e.g.*, *Buck v. Bell*, 244 U.S. 200 (1925) (involuntary sterilization of the mentally retarded); *Lochner v. New York*, 198 U.S. 45 (1905); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (rejecting an equal protection challenge to Illinois court rules denying women admission to the Bar); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

²¹⁷ *See* Kline, *supra* note 89, at 917.

²¹⁸ Ackerman, *supra* note 37, at 714.

²¹⁹ JACKSON, *supra* note 14, at vi.

²²⁰ Ackerman, *supra* note 37, at 714.

B. The Dubious Pedigree of Footnote Four

Carolene Products is "The Most Celebrated Footnote in Constitutional Law"²²¹ because it encapsulates the heart and soul of the post-New Deal understanding of the role of the Court in our political system. In the face of nearly overwhelming political opposition, the Court developed a "new constitutional paradigm [that] was a virtual mirror image of the Old Court's jurisprudence: judicial deference in areas of economic regulation and judicial protection of civil rights and liberties."²²²

So successful has been the reconstruction of the Court's image that the conventional wisdom in constitutional circles "is the fact that the *Carolene Products* Footnote is about values"²²³ and "participation . . . either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached."²²⁴ The assumption that "*Carolene* remains at the core of the constitutional case for judicial review"²²⁵ is so firm that even a civil libertarian of the stature of Bruce Ackerman must assure his audience that thoughtful, constructive criticism of the "bad political science"²²⁶ at the core of the footnote is not intended, in any way, "to deny the obvious unconstitutionality involved in excluding minorities from the nation's political life."²²⁷ Thus, academic discussions of footnote four almost always focus on either "the proud role that *Carolene* has played in the pursuit of constitutional values over the past half-century,"²²⁸ or the manner in which its rationale can be adapted "to a changing political reality."²²⁹

There are at least two problems with this picture. First, it is political and legal nonsense. Footnote four is a discussion of the standard of review. As such, it deals explicitly with the balance of power between the Court and the legislature, not values. Second,

²²¹ LOCKHART, *supra* note 184, at 17.

²²² Winter, *supra* note 176, at 1462 nn.98-99.

²²³ Linzer, *supra* note 14, at 302.

²²⁴ ELY, *supra* note 19, at 77.

²²⁵ Ackerman, *supra* note 37, at 745.

²²⁶ *Id.*

²²⁷ *Id.* at 716.

²²⁸ *Id.* at 746.

²²⁹ *Id.*

Bruce Ackerman's fear that those who question the "bad political science"²³⁰ in the footnote will be accused of anti-civil rights *animus* underscores not only the symbolic strength of the political mantle in which the Court wrapped itself in 1937, but also the inherently political nature of the "anti-civil rights" charge.

Save for those who go so far as to question the existence of the power of judicial review itself²³¹ (and I am not one of them), the outrage about the "activism" of the Rehnquist Courts seems a bit selective and the history a bit revisionist. So too is the exquisite sensitivity of those who see in the Court's post-1937 jurisprudence a constitutional warrant to experiment with our liberties. Civil rights enforcement, however, is far too important a topic, both across-the-board and on the specific question of judicial fidelity to the civil rights commands of the Constitution, for anyone interested in the debate to be subject to petty censorship. Truth be told, the Court has *never* been on the cutting edge of civil rights. In fact, it has often been on the wrong side.

The Court began its flirtation with the concept of substantive due process in *Dred Scott v. Sandford*.²³² In the face of both constitutional text and massive historical evidence to the contrary, it has assumed that the Constitution assigns the power to define the substantive content of both liberty and equality *to the judiciary*. *Carolene Products* reaffirms that proposition, and lays institutional claim that the Court is the embodiment of the Constitution and the "infallible" arbiter of its meaning.²³³

Thus, it is unsurprising that, like Robert Jackson, Bruce Ackerman acknowledges that pre-1937 judicial activism did not stop. It was simply redirected. The ideals of economic *laissez-faire* gave way to the social agenda of "victorious activist Democracy."

²³⁰ *Id.* at 714.

²³¹ See, e.g., Kramer, *supra* note 3, at 12.

²³² 60 U.S. (19 How.) 393 (1856). See David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 735-36 nn.255-64 (1983).

²³³ The late Justice Robert Jackson coined the now-famous phrase: "We are not final because we are infallible, but we are infallible because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result). The use of such imagery to describe the Court's work leads to quite a few misunderstandings concerning the nature of the Court's power in the federal system.

In this regard, a slight revision of Jackson's observation conveys the message a bit more clearly: The Court "subdued the rebellion against their constitutional dogma by joining"²³⁴ in the New Deal's vision of a "victorious activist Democracy," and by putting the engine of substantive due process to work on its behalf.

C. Judicial Review and Power Politics

We now turn to a closer examination of how *Carolene Products* logic affects our reading of the *Constitution's* allocation of prescriptive jurisdiction to define and protect human rights. In doing so, it is useful to bear in mind Justice Jackson's observation that: "Constitutional lawsuits are the stuff of power politics in America. The Court may be, and usually is, above party politics and personal politics, but the politics of power is a most important and delicate function, and adjudication of litigation is its technique."²³⁵

Four important assumptions about the relationship of judging to politics, and of politics to civil and human rights lie at the core of Bruce Ackerman's claim that "any future transformation of New Deal principles should require a higher lawmaking process comparable to the one led by President Roosevelt in the 1930's."²³⁶

The first and most important of these assumptions is one of law: that the Constitution makes the Judicial Branch supreme with respect to the definition and enforcement of constitutional rights.²³⁷ The remaining three assumptions are mixed questions of law and politics concerning the role of the Court.

If the Court has jurisdiction to prescribe, it is logical for Ackerman and others to assume: (1) the Court "proposed to make the ideals of the victorious activist Democracy [embodied in the New Deal]" serve as the "primary foundation" for individual rights; (2) lawyers, therefore, should respond by "organiz[ing] their

²³⁴ JACKSON, *supra* note 14, at vi. *Accord* Ackerman, *supra* note 32, at 714-15.

²³⁵ JACKSON, *supra* note 14, at 287-88.

²³⁶ ACKERMAN, *Transformations*, *supra* note 15, at 26.

²³⁷ The Court made this claim explicit in *Cooper v. Aaron*, 358 U.S. 1 (1958), and reaffirmed it in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The claim of interpretive supremacy is defended by Professors Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

concern for individual rights through a constitutional rhetoric" that reflects this value orientation,²³⁸ and (3) litigation is the device by which the Court adopts that rhetoric as policy. In this view, the legislative branches, Congress, and the state legislatures play but a supporting role.

Given the political character of these assumptions, it is imperative that a visage of neutrality be maintained. Although footnote four functions as a political blank check on which lawyers, led by the Court, can write at will, its academic supporters often behave like the old man behind the curtain in *The Wizard of Oz*.²³⁹ Most lawyers and academics simply assume that the Constitution supports the implicit partition of political jurisdiction embodied in footnote four. It is one of those "fundamental assumptions [that] appear so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them."²⁴⁰ Furthermore, "we the people" are to accept the Court's conceptions of our liberties whenever the "principled character [of a given ruling] is sufficiently plausible to be accepted by the Nation,"²⁴¹ even if the text of the Constitution says otherwise.²⁴² The scope of the Court's power under the Fourteenth

²³⁸ Ackerman, *supra* note 37, at 714-15.

²³⁹ In *The Wizard of Oz*, when Dorothy, Scarecrow, Tin Man, and Cowardly Lion confront the Wizard and ask that he prove his powers, they are instructed to ignore the man who appears to be running the show. They are counseled to fix their gaze instead on the image of "The Great and Powerful Oz" projected (with suitable sound and fury) on a large screen. Only after they follow his instructions to the letter do they find (much to their chagrin) that the *real* Wizard bears no resemblance to the image, and worse, that he has no idea how to get young Dorothy back to Kansas.

²⁴⁰ Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247-48 (1978).

²⁴¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion) (adopting "undue burden" standard) (hereinafter *Casey*).

²⁴² *Compare, e.g., Maryland v. Craig*, 497 U.S. 836, 844 (1990) ("We have never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial.") (majority opinion per O'Connor, J.) (emphasis added) *with id.* at 860 (Scalia, Brennan, Marshall & Stevens, JJ., dissenting) ("Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.").

Amendment is not to be litigated or questioned. It is, in the Court's own words, a matter "of academic interest only."²⁴³

Even though the political logic of footnote four is constitutionally infirm, Justice Scalia is correct to observe that it "would be impossible and perhaps undesirable to return to the assumptions of pre-1937 doctrine."²⁴⁴ The pre-1937 assumptions are problematic for the very same reason that the post-1937 decision to utilize disparate levels of scrutiny for property and personal rights are problematic. The Constitution does not support them.

If the Constitution makes no distinction between personal and property rights, why should the Court? Nothing in the Constitution makes the "discreteness" or "insularity" of a minority group relevant to the Equal Protection Clause. It simply states a rule of conduct. Why then should the type or degree of protection owed *by the Court itself* to individuals who claim the protection of the Citizenship and Equal Protection Clauses vary in accordance with the Court's perception of their social status or need?²⁴⁵ The footnote does not tell us, and the Court has never provided an answer.²⁴⁶

In order to pass constitutional muster, *each* of the propositions in footnote four that are alleged to support the *Court's* power to be "selective" must be justified by reference to the norms they are

²⁴³ *Oregon v. Mitchell* 400 U.S. 112, 264 n.37 (1970), *quoted in supra* text accompanying note 182.

²⁴⁴ Antonin Scalia, *Economic Affairs as Human Affairs* in J.A. DORN, *ECONOMIC LIBERTIES AND THE JUDICIARY*, 33-34 (1987).

²⁴⁵ *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring) ("The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal,' who were discriminated against. And the relevant resolve is that that should never happen again.").

²⁴⁶ The point made in the text goes to *the Court's* duty only, not that of the United States government. Under Article III, the Court's primary legal and ethical duty is to the litigants that appear in the "case or controversy" pending before it. *Congress* has both the remedial duty and power under Sections 1 and 5 of the Fourteenth Amendment to ensure that "equal *protection* of the laws" is not merely a slogan to be observed on official occasions, but a present reality embodied in both law and culture. The President is, of course, sworn to see that policies ensuring equal protection are "faithfully executed."

intended to enforce. If they cannot be so justified, the Court exceeds the scope of its power, and has become a law unto itself.²⁴⁷

IV. RESTATING THE POWER EQUATION: THE REHNQUIST COURT AS AN ADVOCATE OF A "ROBUST" VISION OF JUDICIAL REVIEW

In *Beyond Carolene Products*, Bruce Ackerman warned "that the weaknesses in *Carolene's* defense of minority rights [cannot] long remain a professional secret locked in the pages of the *Harvard Law Review*. Instead, *Carolene's* errors will become increasingly apparent on the surface of American political life."²⁴⁸ He could not have known just how prescient his 1985 warning would be. Justice Antonin Scalia took his seat on the Supreme Court in 1986, and his jurisprudence has paved the way for a frontal attack on the political, legal, and philosophical structure of the *Carolene Products* approach. In order to see the pattern, however, it is necessary to focus on the standard of review issues that lie at the root of *Carolene Products*.

A. A Preliminary Note on the Function of the "Standard of Review"

The role of an Article III judge who must rule on a constitutional case or controversy is to decide whether the government has violated the constitutional norms applicable to the case presented.²⁴⁹ Because the standard of review is the means by which the Court defines and enforces constitutional norms, its function is to define the quality and quantity of evidence that will lead the judge (or Justice) to a finding concerning the relevant constitutional fact or facts. If the inquiry produces a finding that the constitutional norms at issue have been violated, the challenged action is unconstitutional; if not, the Court defers to the authority

²⁴⁷ In some cases, the Court has arguably gone farther than *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), permits. It has assumed powers expressly denied. See generally Destro, *supra* note 27, at 355.

²⁴⁸ Ackerman, *supra* note 37, at 744.

²⁴⁹ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 & n.7 (1992); *Bendix Autolite Corp. v. Midwesco Enterpr., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

authorized to act. The result is a set of constitutional norms that are consistently interpreted *and applied*.²⁵⁰

Reading *Marbury v. Madison* in this way means that the Court does not have the authority to be "selective" or "deferential to majoritarianism and the political process"²⁵¹ in cases where the Constitution allocates political jurisdiction in a manner inconsistent with the challenged action. In these instances, the inquiry is "jurisdictional" not prudential.²⁵² A standard of review that does not accurately reflect the norms from which it is derived is thus always subject to modification or rejection, no matter how venerable its pedigree.²⁵³

²⁵⁰ See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990). In support of this conclusion, the *Smith* Court stated,

If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.

Id. at 888-89.

²⁵¹ See, e.g., DAVID SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA* 207-08 (1996).

²⁵² See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Id.* At 584-602 (Thomas, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting) (arguing that there is no room for a balance to be struck because the Vesting Clause of Article II and the *Ex Post Facto* Clause, art. I § 9, cl. 1, deprive Congress of all power over the criminal prosecution function). See also *Bd. of Educ. v. Grumet*, 512 U.S. 687, 732, 735-42 (1994) (Scalia & Thomas, JJ., and Rehnquist, C.J., dissenting) (controlling norms not hostile and arguably inapplicable to the legislative accommodation at issue) *and* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (Scalia, J., concurring in part and concurring in the judgment) (controlling norms hostile to the legislative action; no room to balance).

²⁵³ Compare *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a state . . . And no clause in the Constitution purports to confer such a power upon the federal courts.") with *Swift v. Tyson*, 41 U.S. (16. Pet.) 1 (1842). In cases where constitutional norms require a balancing process, the result of the process is an interpretation of the norm itself. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (comparing "balancing" under the Commerce Clause with, among other things, balancing under the First Amendment).

Footnote four, by contrast, suggests that a standard of review serves two purposes. The first—or "symbolic function"—is to provide assurance that the Court is committed to protecting constitutional rights and other important values. The other—the "prudential function"—provides a flexible mechanism that permits the Court to balance the prescriptive rules embedded in constitutional norms against specific governmental interests in the regulation of conduct. The net result is to allow the Justices to strike "sensible balances" between and among the competing values and interests they deem to be important in any given case.²⁵⁴ The constitutional norm (if it can be described as one) "floats," and is defined by a tipping point that can only be discerned from the legal, social, or political context in which the specific case at issue arises.²⁵⁵

²⁵⁴ See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring, with whom Brennan, Marshall & Blackmun, JJ. concurred in part); *Texas Monthly v. Bullock*, 489 U.S. 1, 28 (1989) (Blackmun and O'Connor, JJ., concurring in the judgment). For the Justices who joined the majority opinion in *Smith* (Justices Scalia, Kennedy, Stevens, White, and Chief Justice Rehnquist), most of the criteria relevant to striking such a balance are simply irrelevant: the degree of burden, the "centrality" of the belief, the importance of the State's interest, and one's status in the community (*i.e.* as a "minority," however defined). When the task is striking "balances" of this sort, their preference (at least in some cases) appears to be for the legislature. The dissenters, including Justices O'Connor and Souter as to this point, vehemently disagree. Part II of Justice O'Connor's opinion in *Smith*, which was joined by Justices Blackmun, Brennan and Marshall, contains an extensive discussion of the values underlying the respective clauses, and the role of both "categorical" reasoning, and "balancing" in the Court's analysis. See 494 U.S. at 901-02 (O'Connor, J., concurring).

²⁵⁵ See, e.g., *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 343-44 (2002) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." (citation omitted) "In failing to undertake this inquiry, the Court ignores much of the impact of respondent's conduct on petitioners."). *Id.* at 344 n.1 (Rehnquist, C.J., and Scalia, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the result) ("objective observer" test). There are, to be sure, constitutional norms that draw their specific meaning from context, see, for example, U.S. CONST. amend. IV ("unreasonable searches and seizures"), *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); U.S. CONST. amend. VI ("speedy and public trial"), but most do not. *E.g.*, U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole

The difference between the two approaches is significant. When the inquiry is “jurisdictional” that is, where the norm is clear, there is no room for a judge or Justice bound by oath to support and defend the Constitution *as written* to strike a “balance”—sensible or otherwise—that is inconsistent with either the fair meaning of the norm, or the jurisdictional balance it strikes.²⁵⁶ Where the meaning of the relevant norms is subject to interpretation, or the balance between them unclear, the factual inquiry required by the relevant standard of review will *explicitly* include factual, legal, and political considerations.²⁵⁷

In cases where the standard of review operates as either a symbol of the Court's commitment to principle, or as a guide for the “prudential” balancing of competing interests, the *operational* content of the constitutional norm depends upon the weight the Court assigns to the individual and state interests involved,²⁵⁸ and may not be fixed for many years.²⁵⁹

Power to try all Impeachments.”); U.S. CONST. art. II § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”); U.S. CONST. art. III § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”).

²⁵⁶ See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (“In an appropriate case, I believe that we must further reconsider our ‘substantial effects’ test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.”).

²⁵⁷ See, e.g., *Grutter v. Bollinger*, 123 S.Ct. 2325, 2350-2365 (Thomas & Scalia, JJ., dissenting) (examining in detail each of the reasons alleged to support the University of Michigan’s affirmative action policy); *Klehr v. A.O. Smith Corporation*, 521 U.S. 179, 200 (1997) (Scalia & Thomas, JJ., concurring) (“Both the allurements and the vices of the ‘mix-and-match’ approach to statutes-of-limitations borrowing (the possibility of which the Court today entertains) is that it provides broad scope for judicial lawmaking. . . . It is, in other words, no wonder that the Court finds the question it has posed for itself today ‘subtle and difficult;’ judicial policy-wonking is endlessly demanding, and constructing a statute of limitations is much more complicated than adopting one.”).

²⁵⁸ See *infra* text accompanying notes 268-323.

²⁵⁹ See, e.g., *Grutter v. Bollinger*, 123 S.Ct. 2325, 2346 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

B. To Whom Has the Power Been Delegated?

1. The Fourteenth Amendment & Jurisdiction to Prescribe Rules
Governing Civil & Human Rights

In a detailed and thought-provoking article on the incorporation of the Bill of Rights, Akhil Reed Amar observed that:

because of the peculiar logistics of incorporation, the Fourteenth Amendment itself often seems to drop out of the analysis. We *appear* to be applying the Bill of Rights directly; the Civil War Amendment is mentioned only in passing or not at all. Like people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.²⁶⁰

The same holds true for modern commentators who assume that the political culture of the late 1930's is, or should be, the starting point for our understanding of both separation of powers and federalism. They view the Constitution through a *Carolene Products* "lens," but do not realize how powerfully it has refracted what they see.²⁶¹

If the Constitution, rather than footnote four,²⁶² is the starting point for analysis, the inquiry might eventually turn to "ideals," "values," and "political participation," but the first item on the agenda would be the power allocation made by the Fourteenth Amendment.²⁶³

²⁶⁰ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136-37 (1991).

²⁶¹ Professors David A. Schultz and Christopher E. Smith correctly chastise those who urge "that a political, policy, or outcome model can adequately explain a justice's opinions." SCHULTZ & SMITH, *supra* note 133, at xxi. *See also* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1990).

²⁶² *See* Linzer, *supra* note 18.

²⁶³ *Accord* Ely, *supra* note 80 at 86 ("Whatever may have been the case before [the Civil War], the Fourteenth Amendment quite plainly imposes a judicially enforceable duty of virtual representation of the sort I have been describing.").

That amendment was needed because the Reconstruction Congress feared that a hostile Supreme Court would strike down the Civil Rights Act of 1866. Congress and the States wanted the power to protect the rights of their citizens *by legislation*. The Court had taken that power away from them in *Dred Scott*.²⁶⁴ The Citizenship and Privileges and Immunities Clauses reclaimed that power from the Court and gave it back to the federal government and the states, respectively.

The Court would therefore have been the *last* branch of government to which the framers of the Fourteenth Amendment—Bingham, Howard, and Sumner in particular—would have entrusted the power to serve as final arbiter of the content of its citizenship, liberty, and equality guarantees.²⁶⁵ This is why the power of the Court under the Fourteenth Amendment is not, as Justice Brennan held, an "issue of academic interest only;"²⁶⁶ it is one of immense political and constitutional significance.

2. Human Rights and the Post-1937 Court

The Court did not come to its political and institutional senses in 1937. It neither confessed error, nor made a bold statement that judicial intervention on behalf of minorities and others is clearly appropriate in all cases where federal or state law provides a basis for such intervention. It did what comes naturally to any institution

²⁶⁴ 60 U.S. (19 How.) 393 (1856). In *Dred Scott v. Sandford*, the Court interpreted Article IV in a manner that negated the federalism it embodies. By reading the scope of congressional power over the territories narrowly, the Court gutted both the Missouri Compromise and the power of Congress under Article IV, Section 3 to adopt "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. By permitting the Missouri Supreme Court to refuse to give effect to the law of Illinois governing the personal status and contractual capacity of those who resided in Illinois or entered into contractual relationships to be performed there, *Jarrot v. Jarrot*, 7 Ill. (2 Gilm.) 1 (1845), the Court negated the cooperative federalism implicit in the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1; *Dred Scott*, 60 U.S. (19 How.) at 555-58 (McLean, J., dissenting). The gutting of Article IV made it impossible for either Congress or the free states to protect the privileges and immunities of individuals living within their respective jurisdictions.

²⁶⁵ See Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 SUFFOLK L. REV. 85 (1991).

²⁶⁶ *Oregon v. Mitchell*, 400 U.S. 112, 264 n.37 (1970).

that realizes its independence and institutional integrity are at risk. It proposed a "deal." Legislative programs consistent, in the Court's view, with either "the enlightened sentiment of mankind,"²⁶⁷ or the views of "the thoughtful part of the Nation"²⁶⁸ on economics or social policy would not be scrutinized too closely, but state laws inconsistent with views of the Court's supporters during the crisis of 1937 would be subjected to strict scrutiny. The apparent hope was that if the Court remained progressive in its outlook, Congress would leave it alone.²⁶⁹ Until *Employment Division v. Smith*, it did.

And how have "minorities" (however defined) fared during the nearly fifty-five years that elapsed between the Court's claim that it had a special concern for minorities in *Carolene Products* and its ostensible retraction of this concern in *Smith*?

a) *Race Discrimination: Has Plessy Been Overruled?*

We might begin by asking why the phrase "*Plessy* is overruled" does not appear in any of the Court's opinions, either before or after 1937. Though the Court has *asserted* that it "repudiated" and "overruled"²⁷⁰ *Plessy v. Ferguson*²⁷¹ in *Brown v.*

²⁶⁷ In the *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890), Justice Joseph Bradley wrote that "[t]he State has a perfect right to prohibit . . . all . . . open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced." *Id.* at 50.

²⁶⁸ *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992).

²⁶⁹ Both *Harris v. McRae* and *Bowers v. Hardwick* are often cited as examples of the Court's failure to take a principled stand in defense of minority rights. Viewed as a question of "raw political power," however, the holdings in both of these cases may reflect precisely the same calculus that undergirds *Carolene Products*: a political judgment that political discretion is sometimes the better part of valor. In *McRae*, 218 members of the House—a majority of the whole—signed an *amicus* brief arguing that the Court had no power to order the Congress to appropriate money from the Treasury, and that they would take a dim view of judicial orders which flew in the face of their reading of Article I Section 9, Clause 7. See Brief of Rep. Jim Wright, *et al.*, and Certain Other Members of the Congress of the United States as *Amici Curiae*, *Harris v. McRae*, 448 U.S. 297 (1980) (No 79-1268). A similar calculus may well have affected the Court's judgment in *Bowers*. Cf. The Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996).

²⁷⁰ See *Planned Parenthood v. Casey*, 505 U.S. 833, (1992); *Milliken v. Bradley*, 418 U.S. 717, 767 (1974) (noting that *Brown* overruled *Plessy*);

Board of Education,²⁷² its words bespeak a more "nuanced" approach.

The Court began its discussion in *Brown I* by acknowledging that it had, in the years immediately following the adoption of the Fourteenth Amendment, construed Section One as:

contain[ing] . . . a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.²⁷³

Had it stopped at this point and simply reaffirmed *Strauder v. West Virginia*, the outcome would have been the same—the demise of separate-but-equal. The constitutional principle derived from the Equal Protection Clause and elaborated by the Court, however, would have been very different—and crystal clear: no race discrimination. Once again, the Court's words are instructive:

In approaching this problem [of school segregation], we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. *Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.* . . . We conclude that in the field of

Gomperts v. Chase, 404 U.S. 1237, 1240 (1971) (opinion of Douglas, J., sitting as Circuit Justice denying a motion for preliminary injunction pending the filing of a Petition for Certiorari) (noting that "*Plessy v. Ferguson* has not yet been overruled on its mandate that separate facilities be equal").

²⁷¹ 163 U.S. 537 (1896).

²⁷² 347 U.S. 483, 492-93 (1954) (quoting *In re Slaughter-House Cases*, 1873 (16 Wall.) 36, 67-72 (1872); *Strauder v. West Virginia*, 1880, 100 U.S. 303, 307-308 (1879) (known as *Brown I*)).

²⁷³ *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880), *quoted in* *Brown v. Bd. of Educ.*, 347 U.S. at 690 n.5.

public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.²⁷⁴

How interesting. The Court cannot determine if racial segregation "deprives these plaintiffs of the equal protection of the laws" until it first considers the importance of "public education is in the light of its full development and its present place in American life throughout the Nation."²⁷⁵ Why not?

There are two answers. First, the holding makes sense only if the Court's rationale is understood as a Due Process analysis that strikes a "sensible balance" between the seemingly intractable demand of the Equal Protection Clause and a political reality shaped by the "social fact" that racial prejudice is deeply engrained in the culture, the political fact that desegregating the public schools would be both difficult and dangerous, and the moral and educational needs of children enrolled in public schools. Second, the Court does not appear to consider *itself* bound by the Equal Protection Clause. If the Equal Protection Clause is a rule of conduct that binds both the Court *and* the states, the obligation of the Court was clear. It was obligated to hold that the states must immediately provide equal *protection* of the laws, regardless of race. Period.

The Court, however, has never so held. Even though no one can define the term "race," and its meaning varies over time,²⁷⁶ the Court continues to believe that racial discrimination is a legitimate tool for accomplishing social goals.²⁷⁷ Notwithstanding the stigmatizing effect of race discrimination on all who are touched by it,²⁷⁸ the Court has repeatedly reaffirmed every aspect of

²⁷⁴ *Brown I*, 347 U.S. at 492-93, 495 (emphasis added).

²⁷⁵ *Id.* at 492-93.

²⁷⁶ See, e.g., *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 633 n.1 (1990) (Kennedy & Scalia, JJ., dissenting); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610-12 (1987).

²⁷⁷ See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted* 123 S. Ct. 617 (2002), *aff'd*, 123 S. Ct. 2325 (2003).

²⁷⁸ See *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

Plessy—including its "central holding"—except its paean to the virtues of segregated schools.

The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.²⁷⁹

We can now see clearly why all those inner-city public schools never got desegregated, and why so many court-ordered desegregation plans did not have the impact their judicial designers intended. Even after the Court's recent decision in *Zelman v. Simmons-Harris*,²⁸⁰ children in most inner-city schools have neither a velvet cushion on which to sit, nor a way out of their substandard schools.²⁸¹ Without a good education, neither do they have much of a "choice" concerning what the Court calls in another context "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."²⁸² Many are lucky if they even have a desk!²⁸³

²⁷⁹ *Plessy v. Ferguson*, 193 U.S. 537, 544 (1896).

²⁸⁰ 536 U.S. 639 (2002).

²⁸¹ See Daniel J. Monti, *A SEMBLANCE OF JUSTICE* (1985) (noting the "heretical" possibility that "[p]erhaps . . . fights [over desegregation] merely purchased the illusion of change, while providing a medium through which the legitimacy of old boundaries and institutions could be reaffirmed by virtue of having been tested so severely").

²⁸² *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

²⁸³ See *Religion News Service, O'Connor School Plan Gets Merrill Lynch Backing*, *ORLANDO SENTINEL*, Sept. 14, 1996, at D6 (noting that thousands of

We might also ask why, as recently as 1992, the Court (with Justice Scalia dissenting) felt it appropriate to caution that we should not view the decision to overrule *Plessy* "merely as the victor[y] of one doctrinal school over another," but rather as the response of "the thoughtful part of the Nation" (as embodied, apparently, in the Justices themselves) "to facts as they had not been seen by the Court before."²⁸⁴ What self-serving nonsense! Section one of the Fourteenth and Fifteenth Amendments make it clear that government-imposed or sanctioned racial subordination has always been inconsistent with the concept of equal citizenship.

The Court knew the "facts of life" facing Black Americans when it decided *Dred Scott*. It knew them when it reaffirmed *Scott*'s "central holding" in *Plessy*. It also knew them when it reaffirmed *Plessy*'s "central holding" in *Brown*. For whatever reason, the Court has *never* been inclined to accept either the principle of equal citizenship embodied in the text of the Fourteenth and Fifteenth Amendments, or the power of Congress to forbid race discrimination *as such*.²⁸⁵ To their credit, "the People" of the States appear to disagree.²⁸⁶

b) Religious Discrimination

Because many, if not most, thoughtful commentators on contemporary constitutional issues assume the validity of the power equation implicit in Justice Stone's famous *Carolene Products* footnote, they find it difficult to imagine that the Rehnquist Court's more balanced vision of judicial review could be robust enough to assure protection of civil liberties, equality before the law, and access to the political process. They respect its influence, but are openly hostile to its approach.

New York City public school students were without desks this year); George Will, *Secret of School Success*, WASH. POST, Sept. 15, 1996, final ed., at C7 (putting the number at 91,000 students).

²⁸⁴ *Casey*, 505 U.S. at 864.

²⁸⁵ In *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978), a plurality of the Court held that "[i]n view of the clear legislative intent," an explicit prohibition of discrimination on the basis of race means that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.*

²⁸⁶ See, e.g., CAL. CONST. art 1, § 31.

No area of law bears better witness to this problem than the Court's jurisprudence of the Religion Clause. Read together, *Sherbert v. Verner*,²⁸⁷ *Employment Division v. Smith*,²⁸⁸ *City of Boerne v. Flores*,²⁸⁹ and *Zelman v. Simmons-Harris*²⁹⁰ demonstrate how *Carolene*-style reasoning creates a conceptual muddle that can take generations to untangle.

In *Sherbert v. Verner*, the Court was asked to decide whether South Carolina could validly deny unemployment compensation to a Seventh Day Adventist when its law contained an explicit exemption for Sunday observers.²⁹¹ The Fourteenth Amendment unquestionably supplied the rule of decision, but the Court had to make a choice of the governing norm: Due Process, or Equal Protection?

It should come as no surprise that it chose Due Process.²⁹² An equal protection rationale does not leave much room for judicial discretion, and a holding that religion-based discrimination raises serious constitutional questions would have required reconsideration of the officially-sanctioned discrimination that lay at the heart of the "school aid" branch of its emerging jurisprudence of the Establishment Clause.²⁹³ A Due Process rationale, by contrast, leaves the judiciary in complete control of which religious interests, practices, and groups will be protected.

In one of its early polygamy cases, the *Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*,²⁹⁴ the Court had held that the Free Exercise Clause should be understood to permit "the State . . . to prohibit . . . all . . . open offenses against

²⁸⁷ 374 U.S. 398 (1963).

²⁸⁸ 494 U.S. 872 (1990).

²⁸⁹ 521 U.S. 507 (1997).

²⁹⁰ 536 U.S. 639 (2002).

²⁹¹ *Sherbert*, 374 U.S. 398.

²⁹² *Id.*

²⁹³ Compare *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (majority opinion) with *id.*, 330 U.S. at 23 (Jackson, Rutledge, Frankfurter & Burton, JJ., dissenting) ("Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values."). Cf. *Davey v. Locke*, 299 F.3d 748, 756 (9th Cir. 2002) ("[O]nce [the government] opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion.").

²⁹⁴ 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."²⁹⁵ A "compelling state interest" standard of review²⁹⁶ embodies precisely the same standard: "the enlightened sentiment of mankind."²⁹⁷ The result? A free exercise standard of review that was, at once, internally inconsistent, discriminatory as applied,²⁹⁸ and inconsistent with the jurisprudence of the Equal Protection Clause.²⁹⁹

The problematic nature of using *Carolene*-style rules to construct the free exercise standard of review was also apparent in *Smith*. Oregon's law prohibiting peyote use was not "directed at particular religious . . . or racial minorities" (an "intent" standard), but it did have the effect of imposing a substantial burden on religious exercise. The individuals involved, Alfred Smith and Galen Black, could be characterized as members of "discrete and insular minority" groups. Both had engaged in the practice of Native American religious beliefs and one was a Native American.³⁰⁰ It could also have been argued that federal judicial intervention was necessary because Oregon's normal political and judicial processes were neither sympathetic to the nature of the challenged activity (peyote use), nor to the identity of the affected group (adherents of Native American religions).

Professor (now Judge) Michael McConnell has written that the conventional wisdom among lawyers immediately prior to *Employment Division v. Smith* was that the Supreme Court had spoken with respect to the Free Exercise Clause. The balance of

²⁹⁵ *Late Corp. of the Church of Jesus Christ of Latter Day Saints*, 136 U.S. 1, 50 (1890).

²⁹⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁹⁷ *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion). The plurality's discussion of the reasons why *West Coast Hotel Co. v. Parrish* and *Brown v. Board of Education* should be overruled stated that, "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and *the thoughtful part of the Nation* could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Casey*, 505 U.S. at 864 (emphasis added).

²⁹⁸ *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 622, 625 (9th Cir. 1988) (Noonan, J., dissenting).

²⁹⁹ *Washington v. Davis*, 426 U.S. 229 (1976).

³⁰⁰ *See Employment Div. v. Smith*, 494 U.S. 872 (1990).

power between legislatures and courts over such matters was viewed a matter of settled law, "and most academic commentators were content to work out the implications of the doctrine rather than to challenge it at its roots."³⁰¹ *Smith*, however, did more than "challenge [the doctrine] at its roots;" it ripped it out "root and branch." *Carolene Products* logic would have predicted the incremental application of the higher *Sherbert* standard of review, however, the majority in *Smith* lowered it. Whereas *Carolene* would mandate consideration of the importance of the right or the impact of the prohibition on minority religions, the majority opinion by Justice Scalia explicitly holds that neither the First *nor* the Fourteenth Amendment requires consideration of either factor.

The Court's role in "those situations where representative government cannot be trusted"³⁰² to accommodate the interests of religious minorities was also reconsidered. *Carolene* logic would support judicial intervention on behalf of *some* "discrete and insular" religious minorities, but not on behalf of individual religious freedom across-the-board.³⁰³ The post-*Carolene* logic of *Smith* scraps the entire edifice because the majority of the Rehnquist Court holds that *the Court* cannot be trusted either. The majority opinion in *Smith* states:

Justice O'Connor contends that the 'parade of horrors' in the text only 'demonstrates . . . that courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests.' [citation to concurring opinion omitted]. But the cases we cite have struck 'sensible balances' only because they have all applied the general laws, despite the claims for religious exemption. In any event, Justice O'Connor mistakes the purpose of our parade: it is not to suggest that

³⁰¹ Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990), *quoted in* SCHULTZ & SMITH, *supra* note 133. *But see* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991).

³⁰² ELY, *supra* note 19, at 183.

³⁰³ *See* Bd. of Educ. v. Grumet, 512 U.S. 687 (1994); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18, 18 n.18 (opinion of Brennan, Marshall & Stevens, JJ.) (limiting legislative accommodations to relief of "demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause" that do not "impose substantial burdens on nonbeneficiaries"); *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 481 U.S. 1036 (1987).

courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice (to use Justice Blackmun's terminology) or the 'constitutiona[l] significan[ce]' of the 'burden on the specific plaintiffs' (to use Justice O'Connor's terminology) suffices to permit us to confer an exemption. It is a parade of horrors because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.³⁰⁴

By holding that "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process,"³⁰⁵ *Smith* explicitly rejects the very premise upon which the *Carolene Products* footnote is based: an implicit claim of judicial supremacy over civil and human rights policy. Small wonder that the decision in *Smith* was viewed as the functional equivalent of a "repeal" of the Free Exercise Clause itself!³⁰⁶

*Zelman v. Simmons-Harris*³⁰⁷ rounds out the picture. Filed as an Establishment Clause challenge to an Ohio voucher program designed to remedy the lingering effects of Cleveland's history of racially segregated public schools,³⁰⁸ the case required the Court to answer another tough question: Which norm takes priority? There were only two possible answers: the Equal Protection Clause or the Court's "due process" interpretation of the incorporated Establishment Clause.

³⁰⁴ *Employment Div. v. Smith*, 494 U.S. 872, 889 n.5 (1990).

³⁰⁵ *Id.* at 890.

³⁰⁶ In the view of the late Dr. Dean Kelley, the majority's rejection of the "compelling state interest" standard of review in cases involving religious practice burdened by laws of general applicability "repeals" the Free Exercise Clause of the First Amendment. See Dean M. Kelley, *The Judicial Repeal of the Free Exercise of Religion in Testimony on the Religious Freedom Restoration Act of 1990 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d session, (1990) (statement of Dean M. Kelley, Council of Churches of Christ in the USA).

³⁰⁷ 536 U.S. 639 (2002).

³⁰⁸ See *Reed v. Rhodes*, 179 F.3d 453 (6th Cir. 1999).

In Establishment Clause cases, the Court had long practiced what Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit once called "a form of affirmative action" in favor of some, but not all, religious dissenters.³⁰⁹ By the time *Zelman* reached the Court in 2001, it had utilized *Carolene*-style logic to create a body of law that gave preference to "the validity of rules designed to protect the non-religious, even when such rules, in practice, burdened religion and the religious"³¹⁰ by discriminating against those who sought to participate on an equal basis in publicly funded education programs. Adding the race factor stretched that logic to its breaking point.³¹¹ There was simply no way to accommodate both sets of interests.

In *Zelman*, the Court again resolves the impasse by reference to an equal protection standard: "neutral educational assistance programs that . . . offer aid directly to a broad class of individual recipients defined without regard to religion" are permissible.³¹² Gone is the case-by-case *judicial* parsing of the content or perspective of the challenged program or materials,³¹³ thus harmonizing the result with the rules governing cases arising under the Speech and Press Clause.³¹⁴ Gone too is the explicit, and constitutionally forbidden,³¹⁵ *judicial* assumption that professional

³⁰⁹ Guido Calabresi, *The Supreme Court: 1990 Term Foreword: Antidiscrimination and Constitutional Accountability (What The Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 101 n.63 (1991) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987); *Sch. Dist. v. Ball*, 473 U.S. 373, 397-98 (1985)). He noted that "[s]uch rules could be viewed as examples of the dominant majority accepting burdens on itself for the benefit of outcasts." *Id.*

³¹⁰ Calabresi, *supra* note 311, at 101 n.63.

³¹¹ See *Simmons-Harris v. Goff*, 711 N.E. 2d 203, 214 (2000) ("[T]he Cleveland City School District is in a crisis related to the supervision order.").

³¹² *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

³¹³ See, e.g., *Wolman v. Walter*, 433 U.S. 229, 255 (1977) (standardized tests); *Meek v. Pittenger*, 421 U.S. 349, 369-72 (1975) (no public funding for staff and materials for "auxiliary services" like guidance counseling and speech and hearing services); *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

³¹⁴ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 859-60 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995).

³¹⁵ U.S. CONST. art. VI, cl. 3 (1787) (No Religious Test Clause).

educators employed in religious schools will violate the public trust imposed on the use of public funds for non-religious purposes.³¹⁶

c) Discrimination on the Basis of Sex

The same abysmal pattern holds true for sex discrimination. *Bradwell v. State*³¹⁷ holds that states are not required to provide equal privileges and immunities for men and women because "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."³¹⁸ It has taken years, at least one constitutional amendment,³¹⁹ numerous acts of Congress,³²⁰ and the appointment of two women to the Court to get the Court to grapple seriously with how acknowledged physical differences can be accommodated in a constitutional order that requires equal protection of the laws. We are still waiting for a clear answer.³²¹

C. The Need for "Robust" Standards of Review in a Post-Carolene Products Jurisprudence of Individual Rights

1. The Federal Courts and Jurisdiction to Prescribe

To many, the Rehnquist Court's jurisprudence is a heretical rejection of the conventional wisdom concerning two important issues: (1) the origin and nature of the rights protected by the Constitution and (2) the vision of judicial review enshrined in the

³¹⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 606-607 (1971).

³¹⁷ 83 U.S. 130 (1873).

³¹⁸ *Id.* at 141.

³¹⁹ U.S. CONST. amend. XIX.

³²⁰ See generally LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* (4th ed. 2001) at 917-62 (discussing the central role of legislation in realizing the promise of equal protection of the laws for women).

³²¹ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981). Space does not permit an extensive discussion of the confusing standards of review applicable in sex discrimination cases, but the point is clear: The Court has yet to figure out *what* the law of the Equal Protection Clause requires when laws take sex-based differences into account.

Court's post-1937 precedents.³²² The trend lines in the Court's recent federalism and separation of powers cases are profoundly unsettling to those who view the Court as the primary champion of the rights of those whose interests are burdened by the democratic process.

The discomfort so clearly in evidence in the literature underscores the point of the Rehnquist Court's cases. The primary role of the Court is to decide cases and controversies arising under the Constitution and laws of the United States *as written*, not to "make the ideals of the victorious activist Democracy [of the New Deal] serve as a primary foundation for constitutional rights in the United States."³²³ The only way for the Court to ensure that the rights of individuals are protected from the power of the majority faction in *every* case where the Constitution provides a limit on that power is to adopt standards of review that are both clear *and* consistently applied.

In order to operate as a guarantee, a constitutional norm must first be identified, and then a standard of review appropriate to enforce it must be enunciated. The focus in each case would then be upon the manner in which the norm constrains government for the benefit of individuals and local communities rather than the *Realpolitik* of judicial power politics.

And thus, we return to the point made at the outset: that the judicial power of the United States to "make" law is limited structurally by the powers granted to Congress or reserved to the States and the People. Where neither the Constitution itself, nor an otherwise valid act of Congress supplies the substantive rule of decision, the bare grant of jurisdiction to resolve a controversy [jurisdiction to adjudicate] does not carry with it the power to supply the substantive rule that governs its outcome [jurisdiction to

³²² *United States v. Edwards*, 13 F.3d 291, 294 n.4 (9th Cir. 1993), *judgment vacated*, 115 S. Ct. 1819 (1995). In *United States v. Edwards*, the Ninth Circuit described as "baffling if not heretical" the Fifth Circuit's interpretation of the Court's deferential post-1937 Commerce Clause jurisprudence. See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

³²³ Ackerman, *supra* note 37, at 714-15.

prescribe].³²⁴ Simply stated, federal courts do not have the power either to *create or to modify* substantive law.³²⁵

2. FDR's Vision of the "Constitutional Moment:" The Function of Judicial Review in a "Compound Republic"

The Constitution—not the New Deal—is the appropriate starting point for an analysis of the so-called "New Federalism." The Court's role in structural controversies is clear: Article III requires that it decide where the political boundaries are, subject, of course, to "prudential" constraints that should guide its judgment in what Justice Robert Jackson called "the zone of twilight"³²⁶ between and among the branches, and between the federal government and the States.³²⁷

Ackerman and other advocates of an activist vision of judicial supremacy designed to foster the political agenda of the what was then the progressive wing of the Democratic Party have argued that the States' ability to defend their powers in the national political process makes it inappropriate for the judiciary to exercise the power of judicial review over the distribution of political jurisdiction in disputes between Congress and the States.³²⁸

³²⁴ See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), *rev'g*, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

³²⁵ Discussion of the concept of "federal common law" is beyond the scope of this paper. It should be sufficient to note that, to the extent that it is accurate to describe what is known as "federal common law" as "common law" as that term is commonly understood, its validity rests on powers clearly enumerated in, or necessarily implied from, the Constitution itself.

³²⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *supra* notes 72-76 and accompanying text.

³²⁷ This is an area of competence "in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring). Enforcement of the "fixed" boundaries of that "zone of twilight" has significant consequences. Justice Jackson noted that "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 637-38 (Jackson, J., concurring). This is, of course, precisely what is happening in the so-called "new federalism" cases.

³²⁸ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000). See generally Choper, *supra* note 214.

Advocates of a robust application of Madison's vision of a "compound republic" should argue precisely the opposite proposition: that searching judicial review of all power claims based on the Constitution is an integral *part* of the national and state political processes that serve as the ultimate arbiters of our rights.

Although the Court must be "above the fray" in the sense that its decisions must provide a faithful rendition of "what the law is" in the case before them, its *role* in the process is defined by the "case or controversy" requirement of Article III: that is to frame, as clearly as possible, the parameters of the policy question presented. Some of the current members of the Rehnquist Court believe that "[t]he root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court."³²⁹ The *real* "root of American governmental power," however, is "the People," whose political power has been divided in a compound republic, and who exercise it by voting in the States and territories in which they live.

By claiming jurisdiction to prescribe under the Due Process Clause in cases where reasonable minds can differ concerning both the proper constitutional outcome and the Court's power to resolve the controversy in the first instance, the Court invades the legitimate powers of the political branches and the States and turns the Fourteenth Amendment on its head. Each time it "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution"³³⁰ under circumstances where the document leaves the decision to the political branches, the Court loses legitimacy and turns the confirmation process into a political battleground.

Worse, the Court's insistence that it is authorized to make policy under the rubric of Due Process has allowed members of Congress, Senators, the President, and state politicians to avoid political responsibility. Making tough decisions and filling in the political details in numerous areas of law, including civil rights policy, is the essence of lawmaking. Each time the federal courts are ready and willing to relieve politicians of the responsibility of

³²⁹ *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

³³⁰ *Id.* at 867.

lawmaking, the right of "the People" to a republican form of national and state government is diminished.

It was inevitable that once the private sector was firmly under federal control, private parties would seek to use the broad language of statutes designed to regulate the economy to reconstruct the policies and priorities of local self-government. It was also inevitable that New Deal-style expansion of the size and scope of state and local government would cause problems in areas like labor and employment, trade regulation, and intellectual property. The Court's *proper* role in these cases, however, has not changed since the adoption of Article III in 1787; it is "to say what the law is" without regard to the outcome of the political processes by which we choose our leaders and representatives.

Nor has the constitutionally defined role of the federal government changed since the adoption of the Fourteenth Amendment. When Congress clearly has jurisdiction to prescribe the rule of decision, as it does in cases otherwise within the scope of the Commerce Clause or Section 5 of the Fourteenth Amendment, the "compound" nature of the republic embodied in Articles I, III, IV, and the Eleventh and Fourteenth Amendments *require* that Court decline the Congressional invitation to legislate on its behalf. Only Congress has both the power to bind the States *and* the obligation to preserve the republican character of state government.³³¹

This is why the Court's sovereign immunity cases strike precisely the right balance. They neither "narrow the Nation's power," nor deprive the affected individuals of a remedy to which they are otherwise entitled. After *Seminole Tribe*³³² and *Alden v. Maine*,³³³ the United States is free to take enforcement action on their behalf if the President determines that it is in the public interest to do so.³³⁴ Congress is free to write laws that explicitly bind the States to federal standards of conduct, or to create special

³³¹ Cf. U.S. CONST. art. IV § 4; amend. X. A discussion of the ways in which the most significant aspects of the Incorporation Doctrine can—and should—survive under such an approach is beyond the scope of this Essay.

³³² 517 U.S. 44 (1996).

³³³ 527 U.S. 706 (1999).

³³⁴ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (enforcement of Equal Protection Clause against state university).

copyright and trademark rules. The States are also free to bind themselves, either by adopting parallel legislation and instructing their courts to harmonize policy, or by waiving their sovereign immunity in state or federal court.

Each of these options is a political act of the highest order. Like the Court-packing plan, each available option entails political risk. Some might even provoke a political firestorm of the magnitude that attended FDR's 1937 "court reorganization plan." We should be pleased that they do, and outraged when the courts cut the process short. Political risk is an integral part of the system of political accountability designed by the Framers. As Madison put it in *Federalist 51*: "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."³³⁵

And thus we arrive at the point where the Rehnquist Court's approach to the standard of review stands in stark contrast to the *Carolene Products* approach favored by the legal academy. The Rehnquist Court's approach is "to say what the law is" and let the political chips fall where they may. In all cases in which the Constitution does not provide the rule of decision, it resolves what FDR called the "unending struggle between those who would preserve this original broad understanding of the Constitution as a layman's instrument of government and those who would shrivel the Constitution into a lawyer's contract"³³⁶ in favor of the voters and their elected representatives. We cease to be "a nation under lawyers."³³⁷

The *Carolene Products* approach, by contrast, is rooted in the *Realpolitik* of post-New Deal factional power politics. In this vision, the Court is part of Roosevelt's "three-horse team," and takes its political cues from the views of "the thoughtful part of the Nation," who obligingly lobby the Court through impassioned pleas in academic journals, editorial pages, and *amicus* briefs that sometimes deprive the litigants of their power to confront and

³³⁵ THE FEDERALIST NO. 51 (James Madison).

³³⁶ Franklin D. Roosevelt, Address on Constitution Day, *supra* note 56.

³³⁷ See generally MARY ANN GLENDON, A NATION UNDER LAWYERS (1994).

cross-examine the witnesses against them.³³⁸ The "record" in a *Carolene Products* case thus includes not only the facts of the case or controversy *sub judice*, but also information concerning its political character, the tenor of the times, and the relative political position of the parties. Notwithstanding the command of the Equal Protection Clause, the Court is free to play political favorites.

I wish to be clear. The preferential option for the poor and politically powerless embodied in *Carolene Products* is not the job of the courts alone. It belongs to us all.³³⁹ And lest we get carried away by the post-New Deal rhetoric about the Court's preference for the rights of individuals, we should instead take a hard look at its record. The names are familiar, but the characterization of the cases may not be. The interests of Messrs. Olson³⁴⁰ and Mistretta³⁴¹ got lost in the realities of the *Realpolitik* of separation of powers. Individual rights were also at stake in cases involving race relations (*Grutter v. Bollinger*, *Virginia v. Black*), corporate speech and association (*Austin v. Michigan Chamber of Commerce*, *Boy Scouts v. Dale*), the Commerce Clause (*Bendix v. Midwest Autolite*, *United States v. Morrison*), takings (*Lucas v. South Carolina Coastal Council*, *Nollan v. California Coastal Commission*), and the Establishment Clause (*Zelman v. Simmons-Harris*, *Davey v. Locke*). In each of these areas, the logic of *Carolene Products* counsels that the Court is the institution of government best qualified to strike "sensible balances" between individual and social needs. Courageous Presidents like Thomas Jefferson, Abraham Lincoln, and FDR knew better. So should we.

CONCLUSION

The Introduction to this Essay noted that the task ahead was to argue that the conventional wisdom about the Court's resolution of the crisis of 1937 both begs the question of the Court's jurisdiction to prescribe substantive rules governing our rights and misses the point that history proves the Court unfit to be the sole repository of

³³⁸ Oral Argument for *Grutter v. Bollinger*, 2003 WL 1728613 (April 1, 2003).

³³⁹ See generally Robert A. Destro, *Equality, Social Welfare and Equal Protection*, 9 HARV. J.L. & PUB. POL'Y 51 (1986).

³⁴⁰ *Morrison v. Olson*, 487 U.S. 654 (1988).

³⁴¹ *Mistretta v. United States*, 488 U.S. 361 (1989).

such power. When the *Realpolitik* of footnote four is taken into account, the evasion is understandable. Lawyers, judges, academics, and politicians like to argue that the "crisis of 1937" was about "values" and "political participation," and hope that other citizens will not notice that its real cause was an abuse of *power* by the legal profession itself.

Like other factions who are convinced of their ability to legislate for the common good, advocates for judicial supremacy miss or reject Madison's point in *Federalist 10* and *51*: No faction or branch of government can be trusted with preemptive power to define our rights and duties. The Court's abysmal record in the field of civil and human rights bears stark witness to its propensity to strike "sensible balances" when the law requires a clear decision.

It is for this reason that all of us—especially minorities—have a better chance of solving our problems under the Rehnquist Court's developing "post-*Carolene Products*" jurisprudence than we have had under the regime bequeathed by Chief Justice Stone. Under the Rehnquist Court's jurisprudence, legislatures would control the purse and write the laws; the courts would be open to all without discrimination; politicians and their parties would be on notice that civil rights issues cannot be avoided by turning them over to the courts.

The most important change, however, would be in the attitude of a Court itself bound by the same rules that apply to everyone else. Had they followed that laudable prescription in *Plessy*, they could not have written that "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, *and a voluntary consent of individuals*."³⁴² They might simply have applied the Fourteenth Amendment as the Reconstruction Congress wrote it.

³⁴² *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (emphasis added). For a discussion of why *Plessy* survives despite the Court's ruling in *Brown v. Board of Education*, see *supra* text accompanying notes 272-87.

