Notes on a Bicentennial Constitution:
Part II, Antinomial Choices and the Role of the Supreme Court†

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Arguments respecting the role† of the United States Supreme Court in American government have flourished in recent years. They have tended to preoccupy the professional literature on constitutional law,² pressing off to one side more conventional writing addressed to the substantive treatment of particular constitutional clauses and cases. Since this is the bicentennial of the Constitution, however, professional review of the Supreme Court’s role is surely a welcome development. It helps avoid one of those “misfortunes of the law” noted by Justice Holmes in 1912, namely, the tendency “that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”³ The role of the Supreme Court has assuredly not been allowed to become an encysted or unexamined idea. To the contrary, it has provoked a great deal of thought.

Nevertheless, I have been puzzled by some of this literature, partly for reasons I have addressed elsewhere in three short articles that appeared during the past two years.⁴ This puzzlement has been due less to any

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1. Or perhaps one should say the role, or the most important role, to distinguish some conventional expectations of the role that are less subject to dispute (e.g., the Court’s role in resolving intercircuit disagreements respecting the interpretation of acts of Congress).

2. Probably not since the Great Depression has there been any equivalent outpouring of suggestions on how the Supreme Court should conduct the enterprise of judicial review, and even then the range of suggestion and criticism was markedly less polycentric than it has tended to be in recent years. To mention only a very few well-publicized book-length arguments (leaving out altogether the much larger number of law review articles), see, e.g., J. Choper, Judicial Review and the National Political Process (1980) (Court should declare federalism questions and legislative-executive conflicts non-justiciable); J. Ely, Democracy and Distrust (1988) (Court should behave modestly in constitutional adjudication, except to compel change or uphold change providing representation recognition); M. Perry, The Constitution, the Courts, and Human Rights (1982) (Court should take stronger hand in securing justice); see also R. Epstein, Takings (1985) (analysis of takings clause of fifth amendment as archimedean point of Constitution); cf. B. Segal, Economic Liberties and the Constitution (1980) (Court should resuscitate property-oriented clauses of Constitution).


particularized misgivings respecting the strong social preferences a number of colleagues reflect than to the manner in which each assumes to engage the judiciary and, more particularly, the Supreme Court in these tasks. The matter is most acute in respect to the Supreme Court and the Constitution itself.

Simply put, my naivete has been such that I could not agree that the judges should or could in good faith freely act on some of these various proposals consistent with their oath of office and their obligations of judicial review. The strain between that oath and that duty, and the urgings of some writers, seemed too great to be reconciled. They seemed to me to frame an antinomial\textsuperscript{5} rather than a compatible choice. If, underneath, the conflict was as severe as it appeared to be, resolving that conflict should virtually require an amendment to the Constitution to recast the obligation—the role—of the Supreme Court. No one has proposed such an amendment.

Within the last year, I was obliged to consider the matter again, in preparing an essay on the role of the Supreme Court for the Encyclopedia of the American Constitution. In contrast with the way one has to labor over a law review article, however, I thought of this task as an easier and altogether more welcome task. Unlike the more personalized or judgmental character of a law review article, the encyclopedia essay was meant to be merely descriptive and serviceably reportorial. It was not meant to bear any responsibility of argument, but, rather, a lighter burden of description and review: to provide a fair and informative review of the categories of responsibility associated with the Supreme Court in our national life. As such a review, it would leave the reader to consult the balance of the Encyclopedia’s numerous essays for a more particular consideration of political perspectives and of partisan debate respecting the Court’s successes and failures.

Unexpectedly, however, that simple attempt foundered or, rather, wrote itself into a dead end. For as its descriptive listings lengthened to include each role the Supreme Court has been thought to serve in our national life, the essay became an embarrassment. In a word, the enterprise kept coming apart at the seams. Some of the tasks claimed by the Court (or claimed by others for the Court) the Court might do, or others it might do, but the Court would not do all of the tasks at the same time—at least not equally well, and not without a considerable amount of fudging. To be sure, one could pretend otherwise and, up to a point, the pretense might succeed. Still, it seemed to cheat the reader not to notice the underlying problem. Things felt more straightforward only after a considerable scaling down of that essay, to make it easier to lay bare the more essential matters quickly, without fudging or glossing over the problems that the first, indiscriminate listing of roles approach had seemed to do.

\textit{A Response to Professor Van Alstyne, 78 NW. U.L. Rev. 1435 (1984).}

\textsuperscript{5} “Antinomy” is an apparent contradiction between valid principles or inferences that seem equally necessary. \textit{American Heritage Dictionary} 57 (W. Morris ed. 1971) (based on Latin word “antinomia,” which derived from Greek words “anti,” meaning “against,” and “nomos,” meaning “law”).
The basic problem with the original essay was caught by the happenstance of having listed two Supreme Court roles separately, instead of treating them indissolubly, as is customarily done. It is that same problem I want to lay bare here—the problem of indivisibly associating two fundamentally different views of the Supreme Court’s main role. This short Article will try to make the same point somewhat more graphically, by recourse to a strategic device. It then reviews some norms of judicial review.

I.

At least since the time of Plato and *The Republic*, constitutionalists generally have put forward various visions of personal and social justice, *i.e.*, of how they think a just and well-ordered nation state ought to operate: how it ought to function best for the common good.6 Within the United States itself, interpreters have come to our own Constitution with a similar intention, to describe how it ought best to work. The Supreme Court, they suggest (and the point seems obviously right), has the main role ultimately in attempting to see that the government observes basic justice. The Court’s power of judicial review, and most particularly of substantive constitutional review, is the ultimate means by which it carries out that role.

It follows quite naturally that the yardstick by which decisions of the Court are themselves best judged is the yardstick of simple justice itself. Do the Court’s decisions, particularly its decisions of constitutional law, do justice, or do they yield to things—or presume to do things—that seem to be fundamentally unfair? This standard tends to be the common standard by which the Court’s decisions are frequently judged. It is assuredly the most common standard that the Court is urged to follow.

To be sure, “justice” is an elusive and contestable idea, and it is neither assumed nor alleged that judges have a monopoly on knowing justice. Rather, it is an aspiration and a guiding dictate. And it is the insulation the judges are given from aspects of the crasser political process, such as lobbying, vote-trading, and immediate self-interest, that gives them the special obligation in checking injustice—at least in the fundamental or constitutional sense. So the Court should feel bound to intervene on constitutional grounds—to see that an injustice has not been done, especially when the legislation the judges review has earmarks of political suspiciousness.7 Indeed, however, it is presumably appropriate for them to consider the matter of justice equally in every case, not just for suspicious cases as just defined. Accordingly, the satisfactoriness of a court’s decisions

6. So, in *The Republic*, Socrates suggests that the perplexity of what is justice for a single person is a great perplexity indeed, but perhaps it can be discovered by examining the same question in reference to a larger community first, within which individual justice can be deduced. (“If it please you, then, let us first look for its quality [the quality of justice] in states, and then only examine it also in the individual, looking for the likeness of the greater in the form of the less.”). From this premise, the balance of the dialogue proceeds to lay out a complete description of a just system of government and law. *Plato: Collected Dialogues* 615 (E. Hamilton & H. Cairns eds. 1966).

7. That is, considerations such as how the legislation got enacted, who favored it, and whom did it disfavor—variations on footnote 4 of United States v. Carolee Prods. Co., 304 U.S. 144, 152 n.4 (1938).
should be tested by their conformity or nonconformity to the standard of ultimate justice, and perhaps by that standard exclusively. Most especially should that be so in respect to the highest court, the Supreme Court, in its exercise of constitutional review. The alternative, one may suggest, is a savage flight to moral nihilism, an abandonment of the judicial role.

This is, to be sure, an oversimplified account of what a number of commentators have suggested on how one measures the success of courts in living up to the judicial role and thus what that main role is. There are substantial variations, subtle and otherwise, including alternative ways of putting the same thing, as well as sharply conflicting views on what justice does or does not require. But, underneath, many are bound together by this common understanding of the main role of the Supreme Court, however differently they sometimes reason about the outcome or the acceptability of a particular constitutional case.

For instance, an alternative way of saying about the same thing is found in discourses on the Supreme Court that tend to divide its decisions into three kinds, according to what one may correspondingly judge of the excellence of the Court's work and, presumably, the extent to which it capably or incapably performs its role. The three kinds of constitutional decisions one might identify are legitimating, braking, and catalytic decisions, each being descriptive of what each represents in reporting the fulfillmen: of the Supreme Court's main role in seeing justice done.

Accordingly, the first kind of decision, a legitimating decision, does just what it implies; it is a judicial decision that confers legitimacy upon an act of government. By sustaining an act against constitutional objection, the Court attests to the act's fundamental integrity and is itself correspondingly to be judged for having done so. The Court, in brief, provides the ultimate imprimatur of judicial approval. By sustaining an act against constitutional objection, the Court warrants that nothing in the act is fundamentally amiss. Vouching for the legitimacy of acts of Congress is a part of the Court's main role.

In just the same way, a braking decision arrests ill-advised legislative or executive action; it is a decision either interpreting an act against the government's desire or a decision holding the act unconstitutional. It is used to force the government to reconsider what the Court has determined to have been much too precipitate or fundamentally unfair for the government to have tried to do. And, in keeping with this analytic framework, a catalytic decision is one that is constitutionally stimulative. It is a decision compelling government action not previously forthcoming from departments that may be politically bogged down and unreasonably sluggish in failing to act. A catalytic decision is judicial action requiring the government to act affirmatively to see that social and personal justice is done.

By sorting through the Court's legitimating, braking, and catalytic decisions, one may also assess the extent to which the Court has, or has not, lived up to its own best potential, in fulfillment of its singular and most appropriate institutional role. If it has, then presumably it is to be
commended. If it has not, then it is to be faulted and urged to change, to bring the Court back to its real assigned task of seeing that basic justice is done under the Constitution of the United States.

Probably this alternative description is also oversimplified, even as was the first one. It will do, however, for my purposes and it can be tested for our purposes at once—by asking you to submit guilelessly to the following quiz respecting what the Supreme Court should do. The object of this quiz is straightforward; it is to see to what extent one agrees or disagrees with each statement respecting what the Supreme Court should do. The differences among these statements simply reflect variations on several kinds of issues as they tend to be raised by different kinds of constitutional disputes. Each also furnishes its own stipulation or proposed example of social justice, which allows one to signal one's view as to what the Supreme Court ought to do. By checking particular statements and by leaving others blank, one will indicate one's own tendency to say what the role of the Supreme Court should be.

In my view, a Supreme Court whose judges properly exercise the responsibility of their office will:

1. sustain such acts of Congress as are plainly conducive to the general welfare of the people of the United States.

2. sustain such acts of Congress as are duly enacted under representative auspices of what constitutes the general welfare, even if those acts do not seem wise or necessarily well advised [to the Court] as a matter of social choice.

3. invalidate such acts of Congress as are unfair or exploitative, at least when the evidence is clear and convincing that such acts were not the consequence of considered and representative reflection.

4. observe the same role in respect to the President and the states as described in 3 supra in respect to Congress.

5. invalidate such legislation whether national, state, or local, as reflects an underappreciation of those whom it adversely affects, at least when those whom it disadvantages appear to lack an effective participating voice or presence in the electorate or the legislature.

6. sustain such legislation, whether national, state, or local, as increases the participating opportunities of historically excluded or disadvantaged groups of people for equal dignity and respect.

7. invalidate such legislation as reflects a mere political intolerance of difference in matters of intimate personal choice among consenting adults who threaten no harm to others.

8. protect competitive opportunities, a free market, and private

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8. For example, if the Court has legitimated a thoroughly discreditable act.
rights of contract against offensive acts of government inconsistent with personal economic freedom._____

9. invalidate such acts of Congress as unduly interfere with the autonomy of each state to prefer standards of conduct and values different from those of its neighbor._____

10. all of the above_____

11. not necessarily any of the above, but, rather, [here substitute your different or additional description of the Supreme Court's proper role insofar as it is not represented in the above list]._____

II.

Strictly speaking, I believe there was only one correct answer in the preceding short quiz and that any other answer would have been incorrect or, at the least, seriously incomplete. Specifically, one should have marked only number eleven and then briefly should have written, possibly as one's complete answer, a sentence of the following sort:

Some of the above, and possibly even all of the above (since each seems consistent with eminently reasonable ways of doing justice), but of course to no greater extent than the Constitution provides.

Alternatively, one would have added this qualification in each of the blanks one was otherwise inclined to check, to state what the Supreme Court should do. In no case, however, would one check anything on the list without adding this qualification expressly.

One may initially think this qualification will not produce much change—that the effect will be pretty much as before, when no such repetitious or pro forma qualification was attached to each positive answer one already recorded. So the whole thing may look more like a quibble than a real change; a mere boilerplate afterthought, or a formalistic addendum fastidiously tacked on as a nod to conventional proprieties of constitutional review. Indeed, it is a virtual certainty that many will think that this is entirely the case—that adding this qualification adds absolutely nothing at all.

Still, for most of us, that is probably not quite true. The nagging addition tends to draw its own attention. There is likely to be some slight change, and the change is even likely to become considerable, depending on the seriousness and earnestness of one's new intent.

The constraining addendum first exerts a light tug on one's attention; it may pull in the direction of specific case outcomes in increasing tension with what one might otherwise have decided when the test was just the looser, policy-preoccupied, unqualified proposition first set down. Allow that much to happen and so also may something more; the qualifying addendum may gradually seize hold of the looser proposition, subjecting that proposition to some degree of critical discipline altogether missing within its naked original formulation. In the end, depending upon how seriously one takes the qualification, the addendum may eventually claim
dominion over the entire ground. It will displace the whole of the statement
to which it is attached. Indeed, it will end by standing alone—attached to
nothing but itself. It will become the sole test of the main task, as it were, of
an oath-bound judge of the Supreme Court. The transformation will have
been completed. In fact, it will lead to a wholly different view of one's
enterprise and one's concept of the judicial role.

I shall take up here one easy example, namely the first statement in the
quiz, to illustrate what would happen if one proceeded likewise through the
whole of the original list. The first statement in the quiz read approximately
like this:

In my view, a Supreme Court whose judges properly exercise the
responsibility of their office will sustain such acts of Congress as
are plainly conducive to the general welfare of the people of the
United States.

But we then altered it by adding to it a (slight?) qualification, to say this:

In my view, a Supreme Court whose judges properly exercise the
responsibility of their office will sustain such acts of Congress as
are plainly conducive to the general welfare of the people of the
United States, but of course to no greater extent than the
Constitution provides.

Surely it is true that even the necessary first effect of this rephrasing is
to draw one's attention somewhat over and beyond the original question, is
it not? For the first time one begins to focus on the Constitution, on what
one thinks it provides as to the legislation in question, and not obsessively
on the effects of the legislation—on whether the legislation may or may not
be conducive to the common good. Only on the premature supposition that
the latter category is necessarily within the former would one say our
qualification added nothing, that it doesn't add anything that could actually
affect the result. But the very act of adding the qualification qua qualiﬁcation
implies the possibility of a disjunction. Indeed, it concedes some
possibility of a gap—between national legislation "plainly conducive to the
general welfare" (as one considers it to be or concedes at least that Congress
might reasonably so regard it) and what the Constitution itself may or may
not authorize Congress to do.

Indeed, once one not only adds in the qualification but resolves also to
give it full faith and credit, as it were, it must tend inexorably not just to
qualify the statement to which it is attached, but toward a far stronger effect
than that. Eventually, as one repeats it and comes gradually to take an
extended interest in it, its emerging centrality must in increasing measure
dominate each statement to which it is added. In fact, even this is too weak
a statement of its eventual consequence. Rather, the added phrase actually
will claim the whole ground. The relevance of each original statement will

decide constitutionally." (emphasis added)).

10. I believe this does tend to happen with some who serve on the Supreme Court. They
gradually take an increasing interest in these things, grow into a different job, and thus acquire
a different sense of the judicial obligation.
recede and eventually disappear; it will remain relevant only to the extent it is "reported out" again, that is, only to the extent that it can be found inside and as part of the second statement as well. Otherwise, it doesn't count at all.

The Constitution now occupies the whole ground for this judge. It asserts a preemptive claim on his or her loyalty and recasts the statement of judicial obligation in decidedly different-appearing form. And insofar as that is true, nothing more is lost from the first statement than if it were recast in this way:

In my view, a Supreme Court whose judges properly exercise the responsibility of their office will not depart from what in fact they understand the Constitution provides. It will accordingly apply such acts of Congress as it believes are provided for; it will apply none that it believes are not.

And whether such acts of Congress are or are not "conducive to the general welfare" in the Court's or in Congress' view disappears as a question except as the Constitution may make that question germane.11

The same will be so in every other instance on our list. The dominion of the original normative predicate will altogether disappear. It will count merely to the extent that it turns out to be germane to the constitutional question on its merits—it cannot count twice and may not count even once.12 It has no separate or additional force apart from such force as the Constitution may or may not already grant it, which it is the obligation of good faith judges to figure out.

III.

The principal role of the Court is rightly identified with Marbury v. Madison,13 its most famous case, and with the observations of John Marshall, its most famous Chief Justice, who correctly identified that role with a judicial responsibility to apply no act inconsistent with the Constitution. The Court is assigned a role of independent adjudicative obligation pursuant to the judges' own oaths, Marshall effectively observed, in respect to a significant, albeit limited, variety of cases, namely those described in article III of the Constitution itself. Its function is to consider in good faith such disputes as litigants have with respect to interpretations or conflicts of law that directly and materially affect them, to the extent their cases fall within the categories of cases described in article III plus such acts of Congress as may regulate the Court's jurisdiction and the criteria for more particular selection the judges are at liberty to maintain.

In respect to constitutional questions arising as to acts of Congress or the acts of the fifty states, "courts are concerned only with the power to enact . . . statutes, not with their [constitutional] wisdom," as Chief Justice

11. A matter one cannot know about in advance, i.e., the normative condition may, a priori, be (a) a necessary but not sufficient condition of constitutionality; (b) a sufficient condition of constitutionality; (c) not a condition of constitutionality at all.
12. See supra note 11.
13. 5 U.S. (1 Cranch) 137 (1803).
Stone correctly observed. The same is true with respect to the Constitution itself, even as Justice Roberts sharply observed in the same case:

[When] an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

The Constitution, in short, like Plato’s Republic, may have its own theory of justice—and it is that theory that is to govern insofar as it is this Constitution, and not Plato’s or Rawls’ that furnishes the supreme law of the land. So, for instance, if it is plain that one aspect of this Constitution’s theory is that power is more appropriately dispersed rather than concentrated (e.g., through the provisions horizontally for separated powers, and vertically through the enumeration of specified national powers and the italicized tenth amendment reserve of what is not enumerated to the states or the people), the task of judges is to understand and to apply it rather than to ignore or otherwise misrepresent it because some other theory of social justice (i.e., of social organization) might seem to Congress or to others to be more conducive to the common good, more efficient, or better advised. Alterations in the plan of the Constitution are reserved from the Court as well as from Congress. At most, Congress may propose such amendments additional to the twenty-six already put in place, and take its chances under the provisions of article V. In the meantime, the Constitution “as is” prescribes the boundaries, the separations, and the limits, even as Marbury v. Madison itself illustrates. In a concrete way, this is all that Justice Roberts’ dictum (quoted supra) means to say as well.

15. Id. at 62.
16. For an example of a strongly contrasting model respecting the proper organization of constitutional government, neither Platonic nor Rawlsian, and quite different from our own as well, see 1977 Kosygin, SSSR (Constitution of the Union of Soviet Socialist Republics) art. 3 (“The Soviet state is organised and functions on the principle of democratic centralism, . . .”). See also id. art. 6 (“The leading and guiding force of Soviet society and the nucleus of its political system, of all state organisations and public organisations, is the Communist Party of the Soviet Union . . . [which,] armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of the home and foreign policy of the USSR. . . .”)

Given these sorts of provisions, one would expect that if Soviet courts were possessed of a power of constitutional review, as they are not, they would still not reach “the same” conclusions in comparable cases as should our own Supreme Court in applying the very different provisions of our Constitution. They would be correct in not doing so, or at least ought not be faulted for not doing so, moreover, as our Court would not be correct were it to follow suit.

17. Amendments furnish the cambium rings (growth rings) in the Constitution. See Van Alstyne, Notes on a Bicentennial Constitution: Part I, supra note 4, at 951-58; cf. Ackerman, The Storms Lectures: Discovering the Constitution, 93 Yale L.J. 1015 (1984). Whether they are improvements is largely a matter of point of view (e.g., the eighteenth amendment and/or its repeal by the twenty-first amendment, the ill-fated ERA, and the pending state proposals to provide a measure of fiscal restraint).
18. The point is utterly uncontroversial, one would suppose. Yet, it scarcely seems even to be acknowledged, much less is it met, in some arguments respecting the role of judges and the Constitution. See, e.g., Barber, Unwritten Constitution, in 4 Encyclopedia of the American Constitution 1949-51 (1986).
To make the point plain by example one more time, it will be useful to go back to our quiz. We shall take another abstracted statement and see graphically where the complete difference in emphasis lies. Proposition number six originally appeared this way:

In my view, a Supreme Court whose judges properly exercise the responsibility of their office will sustain such legislation, whether national, state, or local, as increases the participating opportunities of historically excluded or disadvantaged groups of people for equal dignity and respect.

According to this view, the role of the Court is clear. It is to determine as best it conscientiously can whether the legislation is of the kind that fits the requirements of this sentence, and accordingly hold it valid or not.

In our first qualified reformulation, however, the test became one of two parts, rather than merely one. So the test becomes:

In my view, a Supreme Court whose judges properly exercise the responsibility of their office will sustain such legislation . . . as increases the participating opportunities of historically excluded or disadvantaged groups of people for equal dignity and respect, but of course to no greater extent than the Constitution provides.

And insofar as one understands the matter properly, the first formulation will finally drop altogether away, leaving only the following unprepossessing, untilted form:

In my view, the correct role of the Supreme Court is to sustain such legislation as may be provided for by the Constitution (for they assuredly have no warrant to hold unconstitutional such legislation as is provided for), and not otherwise.

Under this test, the original, modified Ely-Dworkin formulation counts for absolutely nothing as such because it adds literally nothing to help define the judicial task. If the Constitution provides for such legislation, it should be sustained and if the Constitution does not, then it should not. The matter is no more arcane than that.

To be sure, we have glossed over every problem of "interpretation." But I submit even now that the difference in one’s orientation is profound, rather than merely cosmetic or trivial, if one agrees with the main task of the Court as just described.

19. The proposition reflects a view put forth by John Ely, see J. ELY, supra note 2, at 135-79, mingled with a view sponsored by Ronald Dworkin, see generally R. DWORIN, TAKING RIGHTS SERIOUSLY (1977).

20. Compare Professor Hart's pleasant reassurance that "[i]t's a perfectly good Constitution if we know how to interpret it." Hart, supra note 9, at 1372. For an excellent and succinct review of the general problem, see Brest, Constitutional Interpretation, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 464 (1986).

21. It must be obvious even in the first case, for example, that the nature of things to be looked at, or "interpreted" if you will, will be utterly different as between these two questions: A. Is the X Act of Congress conducive to the general welfare of the people of the United States? A., Is the X Act of Congress provided for among the enumerated or implied powers this Constitution grants?

Unless one supposes that A is subsumed in A (and there is no reason a priori to think that it will be), one will not imagine them to be merely different statements of the same question.
Second, perhaps more importantly, it at once checks the conscious and unconscious judicial habits of double counting, false counting and simple wish fulfillment, in the phenomenon of judicial review. It cuts off and disallows the inveigling influence of normative presupposition, and it steadies the enterprise of interpretation itself. Even a summary reprise on what we have just been through may show how this is so, still again.

One may casually have supposed that the Constitution itself probably does (or surely ought to—for the sake of social justice—and therefore must?) authorize Congress to enact any legislation plainly conducive to the general welfare of the people of the United States. But in the setting of the re-centered question, the supposition or the wish cannot pass without explanation. Indeed, as such, it cannot pass at all. We have already taken a major step. Being prepared to admit that the Constitution may not authorize Congress as we expected (and as we wanted), how then does one expect next to proceed? How, otherwise, ultimately, than by this? That as one advances into the question—namely, what does the Constitution authorize?—one will proceed as in any other case one is asked to research and determine, and, having done so, one will speak truthfully in respect to what one finds. Fulfilling that obligation, in turn, is not at all strained. One fulfills it by saying what one has actually concluded after making one's conscientious review—of what the Constitution provides by way of legislative power in Congress, however, and not about whether a particular act may or may not be a good thing.

In the case we have supposed, the question is thus what is it that persuades one that the Constitution does in fact authorize Congress to enact any law that is merely conducive to the common good, no matter what the subject? But I mean to leave the matter there, rather than to argue for a certain conclusion or provide a certain example. As a serious judge suddenly given a special responsibility to apply the Constitution faithfully “as is,” leaving such alterations as may seem advisable to the cambium rings of amendments pursuant to article V, answer the question to your own satisfaction. There is just this one constraint: in the end, do not lie about the real conclusion you reach, having worked through the subject as best you know how. Approach the matter this way, and, of course, you may still be mistaken, even in the narrow sense of subsequently coming to believe you misapprehended some matter or left out a critical insight of some kind. Even so, you will at worst merely be mistaken; you will not have misperceived the task.

By now, it is obvious where this sort of discussion must lead were we to repeat it according to the entirety of the original list, which mercifully we will not. It is not a discussion about scholastic or judicial cleverness. Neither is it yet another set of trite observations about getting behind the ambiguity

Rather, on their face they do not address the same question at all. If \( A_i \) is the sole question for the Court, moreover, \( A \) has no distinct standing as a question at all; it counts only insofar as it is already built into \( A_i \), which is possible but would have to be affirmatively proved, whether as a necessary or sufficient condition of satisfying \( A_i \), the real question before the Court.

22. See the example just provided, supra note 21.

23. Always for the sake of merely expediting “social justice,” of course, and never selfishly, for ourselves.
or malleable quality of words, that is, how words can be invested with an array of different interpretations (of course they can) whether in a constitution, a poem, or some other text. For the question is not what can one make words do as an interpreter,24 much less what can one get by with or make seemingly convincing to others given the will and the zeal to lay one's politically motivated gloss.25 It is, rather, fundamentally a question of attitude respecting one's judicial obligation or role, and how that attitude is translated through the body of one's work.

To be sure, one who thinks that the first obligation of a judge is merely not to lie in administering the Constitution (which is indeed what I am arguing) may be dismissed as a crank, the point seems so far removed from anything others now contest. Still, if one seriously and unaffectionedly agrees with the proposition that the first obligation of a judge is indeed "not to lie," in the sense meant here, I suggest it carries a highly useful set of serious implications alongside. For assuming what one would want to assume, namely, that mendacity as such26 has not played any large role in judicial behavior—although I think there is evidence that it sometimes has—at least its close relatives appear to have had a much freer run of the house. Those relatives or cousins of knowing misrepresentation reflect a substantial capacity for easy self-persuasion of what the Constitution does and does not provide, consciously or unconsciously dominated by personal jurisprudential agendas only instrumentally connected with the Constitution itself.27

Without purporting to provide more than categories of examples, I shall try briefly to identify some telltale signs. Along the way, we shall also look at some standards of constitutional review.28

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24. Or as a noninterpreter (cf. the genre of constitutional exegesis called "noninterpretivism," one of the great oxymorons of our age).
25. Cf. Abrams v. United States, 250 U.S. 166, 630 (1919) (Holmes, J., dissenting) ("If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.").
26. The sting of mendacity arises from one's disrespect that comes from reading an extended se of a particular judge's opinions, gloomily compelling the conclusion that the judge will apply the Constitution quite strictly when its preferences are the same as the judge's own, but who will then patronizingly dismiss as mere unenlightened historicism the exact same kinds of observations offered against the same judge's preferred conclusions in other cases. For other kinds of telltale signs, see generally infra text accompanying notes 29-44.
27. The problems next referred to need to be tracked within the work of a particular judge in respect to what that judge does and declares in accounting for his or her decisions, rather than to consistency as such in respect to the Court as a whole. That judges, like the rest of us, may in good faith disagree on the appropriate weight or relevance or persuasiveness of particular text, history, precedent, allocation of burden, orientation to constitutional interpretation (vis-a-vis statutory interpretation), etc., is not at issue here in any way, as I trust the ensuing discussion takes care to acknowledge. Cf. Easterbrook, Ways of Criticizing the Court, 93 Harv. L. Rev. 802, 832 (1982) (concluding that justices inevitably make decisions inconsistent with those of other justices, and that while we may ask each justice to develop a consistent, principled jurisprudence, we cannot ask same of Court as whole).
IV.

I think it is probably quite sound, and not just an attempt to preordain a preferred result, that the general rule of constitutional construction begins with a strong presumption of generous construction, even as Marshall and Holmes both proposed, and for the reasons both gave. But insofar as that is the right place to begin, then presumably it is the right place always, regardless of the clause at issue and not merely in respect to such clauses as a judge may like, that is, after hearing what clause is being invoked, and after determining which sort of construction—narrow or broad—may be serviceable to a certain result.

Note we are here talking of rebuttable presumptions; we are in all instances prepared to concede to such exceptions as, by uniform standards, can in fact be made out. So there is no blind will that will rule out being

29. See Missouri v. Holland, 252 U.S. 416, 432-35 (1920) (Holmes, J.); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-407 (1819) (Marshall, J.). The Holmes and Brandeis dissents in Olmstead v. United States, 277 U.S. 438 (1928), may furnish an excellent example of such a presumption. See id. at 469-70 (Holmes, J., dissenting) (noting that "Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."); id. at 477-79 (Brandeis, J., dissenting) (rejecting majority position that fourth amendment operates only where physical trespass is a feature of the "search"). A different example by Marshall is in his treatment of art. I, § 10, in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629-50 (1819) (holding that corporate charter is contract protected by contracts clause). The presumption is neutral insofar as it applies uniformly, not selectively (e.g., insofar as it applies equally to the second amendment and the commerce clause).

30. For instance, in dissenting in Carrington v. Rush, 380 U.S. 89, 97 (1965), Justice Harlan did not begin by denying a rebuttable presumption of generous construction to the equal protection clause of the fourteenth amendment. Rather, alerted first by the inclusion in the same amendment of a separate provision (§ 2) applicable to some forms of voting abridgment, and driven from there to try to sort out the extent, if any, to which that separate section and its associated legislative history might bear upon the equal protection clause and its own relevance to voting and apportionment, Harlan concluded essentially that the presumption of generous construction and applicability of § 1 had been altogether rebutted. He decided his vote accordingly, even though it broke with previous precedents already well established under the equal protection clause. See Nixon v. Condon, 286 U.S. 73, 88-89 (1932) (applying equal protection clause to strike down political party's rule allowing only whites to participate in primary elections); Nixon v. Herndon, 273 U.S. 556, 540-41 (1927) (holding that state statute banning blacks from participating in primary elections violated equal protection clause). In reviewing the same materials, I was not convinced that the materials were sufficient to carry the burden required, to create an entire subject matter exception to the equal protection clause. But it is unimportant for present purposes, as I certainly do not believe that Justice Harlan was applying some double standard, i.e., a different standard in Carrington than he conscientiously attempted to apply to other cases. See Van Alstyne, The Fourteenth Amendment, The "Right" to Vote, and The Understanding of the Thirty-Ninth Congress, 1965 Scr. Cr. Rev. 33. Indeed, I believe Justice Harlan was a great judge in the very sense meant to be supported in this article—a judge who took the Constitution seriously in virtually every feature of his work.

As a different example, the Court's decision in United States v. Brown, 381 U.S. 437 (1965), turns substantially on a rebuttable (and unrebutted?) presumption of generous construction of the attainted clause in art. I, § 9—which Justice Frankfurter declared was generally a sound approach but nonetheless believed was not sustainable as to the attainted clause in particular. See United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring). For a similar view of article III, see Justice Frankfurter's opinion in National Mut. Ins. Co. v. Tidewater Transfer Co. 337 U.S. 582, 647 (1949) ("Precisely because 'it is a constitution we are expounding'...we ought not take liberties with it."). Again, whether or not one agrees with Frankfurter on this particular item, his opinion met a high standard of responsibility.
shown that the presumption can be, and has been, rebutted. Rather, there is simply an initial disposition that itself seems correct, defensible, and proper in respect to constitutional clauses, and thus the more appropriate one with which to begin.

But if, as we say, this seems to be the right place to begin for the commerce clause (as an example), it seems equally to be the right place to begin for other clauses too—such as the first amendment, the second amendment, the clause respecting the impairment of obligations of contracts, the takings clause of the fifth amendment, or the eleventh amendment. Most certainly it would be equally the right place to begin with respect to other affirmative powers also vested in Congress, such as the exceptions clause in article III; on its face, that clause is no more restricted in its scope than is the power of Congress to regulate commerce among the several states.

Yet, in reading the various opinions of particular judges and of jurisprudential interpreters of the Constitution, one finds very little consistency in the norm of generous construction; it appears principally as an ad hoc rhetorical device. Persons temperamentally given to use it to defer to Congress in respect to congressionally enumerated powers in article I, for instance, seem very disinclined to do so when the express congressional power under examination is obviously less welcome, such as the congressional powers enumerated in article III. Judges showing the strongest presumption of generous construction respecting the first amendment tend not to come to parts of other amendments (e.g., the second amendment, the takings clause of the fifth amendment) in the same way; they tend similarly to find very little scope for the contracts impairment clause, article I, section 10.

Unless one assumes these judges and others who proceed in like fashion are unaware of the inconstancy with which the norm of generous construction is invoked (an assumption one ought not lightly entertain), the explanation must reside elsewhere. It may, and does, reside in their selective taste and distaste for different features of the Constitution. It resides in a manipulative attitude toward the judicial role.

Similar in effect to the principle of generous construction is the notion that each express clause also may exert a slight penumbral effect, an effect widening the amplitude or the neighborhood of the application of the express clause. It is not my point to be critical of this metaphor. To the contrary, like the rule of generous construction respecting constitutional


32. In his recent monograph that rebukes the New Right for seeking an unduly cramped set of constructions for some amendments (e.g., the fourteenth amendment), Stephan Macedo nonetheless takes care to note: "In a sense, the conservatives do have a point, for both the new 'activist' jurisprudence and the old are flawed. In both cases, the choice of values to be protected is partial." S. MACEDEO, THE NEW RIGHT V. THE CONSTITUTION 47 (1986). For a federal judge's concession of the general point, see generally Graven, Paean to Pragmatism, 50 N.C.L. Rev. 977 (1972). For a recent and exceptionally conscientious review of the mislaid protections of economic liberty under the fourteenth amendment, see generally F. STRONG, Substantive Due Process of Law: A Dichotomy of Sense and Nonsense (1986).
clauses, the notion of penumbral effects may be both useful and fair. As a matter of interpretive orientation, its use need not be strained. Equivalently, others have suggested that the appropriate approach in the first instance is to grant the nonhousekeeping clauses in the Constitution the benefit of the doubt, so to speak, by assuming that constitutional clauses generally embrace connotations rather than mere denotations, or concepts rather than conceptions.

Each of these suggestions is tentatively useful, as each also illuminates an ungrudging judicial orientation of generous constitutional construction, albeit in a somewhat distinctive way. Again, however, if this is so, then it presumably ought to be so generally rather than selectively. But the practice does not conform to the rule. To the contrary, judges most given to this method of selectively expansive constitutionalism seem knowingly unwilling to adhere to it in any general way.

33. Indeed, the suggestion of “penumbras” may be but an alternative description of the rule of generous construction.

34. Here, too, one can trace the figure of speech to Justice Holmes. See Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) (“The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other.”); cf. the revival and application of the term by Justice Douglas in Griswold v. Connecticut, 381 U.S. 479, 483 (1965), discussed infra note 37.

35. See Freund, Storms Over The Supreme Court, 69 A.B.A. J. 1474, 1478 (1983). The general notion is to determine whether a clause enacts a clear principle, as it were, rather than a congenial set of ad hoc examples alone. If one is satisfied in a serious way that the former was indeed the case, then even a careless “nonexample” (an example of what may at the time not have been thought to fit) might be affected nonetheless. Consider James Madison’s own telling example, reviewed in Van Alstyne, Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on Lynch v. Donnelly, 1984 Duke L.J. 770, 776 (payment of congressional chaplains not consistent with first amendment, though first Congress may not have appreciated this point).

Of course, one needs to take great care in proceeding in this fashion, otherwise one ends up falsifying the scope of a clause by degrees. So, for instance, if the number of examples of things declared to be unaffected by a proposed clause was large, and all of the examples thus given were themselves characterized by several strong elements in common, they may furnish reason to reconsider the principle one tentatively (mis)identified to the clause. There are, after all, “principles” and “principles”—some rather small and restricted, some a great deal larger; determining which was enacted is as much one’s judicial obligation as anything else. (This point, too, though obvious, is frequently ignored. The preferred tendency is, rather, to press a clause one likes relentlessly outward—to do “justice” of course.)


37. For example, in Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Douglas insisted that the Court moves much more surefootedly (i.e., less subjectively) in holding state statutes interfering with intimate decisions by married couples to a strong demand for justification under the fourteenth amendment’s due process clause, though the Court cannot properly require as much in its review of state laws limiting the field of private contracts involving neither force nor fraud. See id. at 485-86. His explanation of the different intensities of judicial review in the two kinds of cases was of the kind just reviewed, i.e., that certain express clauses, while not themselves explicit in protecting rights of marital intimacy, do cast penumbras of privacy rights, whereas there is no equivalent basis for a like policing of state laws and commercial contract. See id. at 481-82 (distinguishing Lochner v. New York, 198 U.S. 45 (1905)). Yet, one is bound to note the rationale within Griswold itself fits Lochner identically insofar as the Griswold rationale was drawn on the basis of penumbras of express clauses (the first, third, and fourth amendments). Article I, § 10 (concerning state laws impairing the obligations of contracts) is indubitably an express clause; by mere parity of reasoning, it would presumably have a penumbra of its own.
On the other hand, it may well be the case that a rebuttable presumption of generic construction is not in fact always sustainable to one's satisfaction. For example, despite the unqualified language of the exceptions clause in article III, and the rebuttable presumption of generic construction one initially assigns respecting the power the clause grants to Congress, the evidence of limited intended proper use may be such that one finds the presumption of generic construction unwarranted and, in the end, overthrown. So one becomes seriously persuaded that the clause cannot sustain certain uses after all, especially in light of how other clauses in the same document may bear on the question in some germane way. If so, then the Court should decide accordingly. It is incumbent on the Court so to declare—but it must likewise be prepared equally to be as readily convinced by equivalent evidence elsewhere as was allegedly convincing here. Thus, if there is equivalently impressive evidence of limited intended proper uses of the commerce power, for example, and evidence of such legitimate constrained uses reflected in some cautionary way even by mere

Whether one thinks Griswold correct or thinks Lochner is not correct does not matter. What matters, rather, is that the two cases may not be distinguished on the ground Justice Douglas himself proposed. Moreover, virtually everyone agrees (myself included) that Justice William O. Douglas was unquestionably a very smart judge. It is thus not plausible that he was unaware of this problem. What may one conclude other than that both he and the Court on which he served were somewhat unwilling to live by a common standard of judicial review?

Again, there is nothing at all intentionally partisan in these observations; they are wholly unconfined to the Warren Court's particular ideological drift. For comparison, one may take a matching example on the seemingly conservative side. Thus, Justice Rehnquist put forth an extremely powerful set of arguments drawn from presuppositions (although not the narrow wording) of the tenth and eleventh amendments, both in Nevada v. Hall, 440 U.S. 410 (1979), and in National League of Cities v. Usery, 426 U.S. 833 (1976). If the foundations of his approach in these cases had been used in behalf of other causes and outcomes ideological democrats also had happened to favor, I do not think Justice Rehnquist would have been savaged in the law reviews nearly so much as he was. His methodology in applying the tenth and eleventh amendments in those cases is not disapproved by others as a methodology applied, for example, to the first or the fourth amendment, or to the thirteenth or the fourteenth amendments. Admitting all this as I do, it is nonetheless depressing to find the approach taken by Justice Rehnquist to the tenth and eleventh amendments entirely laid aside in his jurisprudence of other clauses and other cases that come before the Court, e.g., the first and fourth amendments with respect to which he held the least generous views of any member of the Burger Court. For a recent review of some first amendment cases, see Denvir, Justice Brennan, Justice Rehnquist, and Free Speech, 80 NW. U.L. REV. 285, 293-99 (1985).

38. See supra note 30.

39. As Justice Holmes usefully observed about such matters:

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.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908); see also generally C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

In the example just given, one must notice (and account for) other portions of article III and parts of article VI, just as a minimum, in coming to terms with the exceptions clause of article III. The exceptions clause does not exist in a vacuum. Several other clauses may bear on the same problem—clauses possibly establishing "neighborhoods" of their own that at some juncture may constrain the field of congressional exception to the Supreme Court's appellate jurisdiction. That they may do so—or may not do so—cannot be dismissed or assumed in advance. See generally Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 695 (1984); Hart, supra note 9.
“penumbras” cast by other clauses (e.g., the tenth amendment), an equivalent set of Supreme Court decisions should be in order. But very few activist judges actually follow this particular path either. They not merely act “inconsistently” from area to area of constitutional adjudication; they do so to the point one cannot believe they are really moved by the reasons they give. I regret to say that I think they occasionally just lie.

Moreover, some so-called rules of judicial review seem vulnerable to this same criticism because they have little, if any, ground in their own right at all. They are unlike the general rule of generous construction, the presumptions of connotation-over-denotation, concept-over-conception, or the supposition of penumbral coverage. Rather, the “rule” itself tends to be one of virtual judicial abdication, albeit selectively applied. Indeed, some such rules have the unintended irony of suggesting that a legislative act may well be constitutionally defective in fact (i.e., might well be so determined if the Court were to press the issue);41 nonetheless the Court adopts a rule relieving the party relying on the statute of any need to show that the indispensable constitutional requirements have been met.42

A different sort of example is furnished by the “rule” that the Court should largely defer to Congress’ view of its own powers vis-a-vis those

40. Justice Holmes may well have had just such a tenth amendment (implied) constraint in mind, for instance, in cautioning that “[c]ommerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce.” Northern Sec. Co. v. United States, 195 U.S. 197, 402 (1904) (Holmes, J., dissenting). Consider also his observations on legislative pretext by Congress, see id. at 411 (Holmes, J., dissenting). For a recent general review, see C. Lorfel, Government from Reflection and Choice 70-115 (1986). Note, in passing, that the power vested in Congress is the power “to regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8. It is not a power “to regulate whatever affects commerce among the several states.”

41. See R. Rotunda, J. Nowak & J. Young, 2 Treatise on Constitutional Law § 15-4 (1986) (heavy presumption of validity of state economic restrictions reviewed); see also F. Strong, supra note 32, at 240 (“The Court must be informed as to legislative objective if its . . . exercise of constitutional review is to be factual rather than fictional.”); Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 43-46 (1972) (proposing less deferential test that would place greater burden on states to explain contributions of means to asserted ends).

42. Typically, the standards that the state must meet (in the kinds of cases mentioned supra note 41) are not at all exacting to begin with. For example, the declared latitude of not inappropriate objectives on the basis of which private economic liberty may be even severely curtailed by state legislatures is quite broad. Unless judicial review is to be an empty formality, the burden to meet those standards should be fairly discharged by the state or by those claiming the advantage of its actions; if they cannot be met, so much the worse for what the state presumed to do. As it is, the practical effect of judicial abdication is to advertise the nullification of the putative constitutional restrictions, allowing legislative bodies an effective prerogative of enacting naked preferences. See Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1695-98 (1984) (modern rationality review of legislation illustrates weak commitment to prohibition of naked preferences and allows raw political power to justify exercise of authority); see also Epstein, Forward to S. Macedo, The New Right v. The Constitution at xi-xii (1986) (“[J]udges cannot indulge the easy presumption that legislation is constitutional . . . . Instead, in each case there has to be a neutral inquiry into how the provisions of a statute square with the language and structure of the Constitution. The invalidation of legislation is not some extraordinary event in the life of a constitutional democracy; it is part of the original design.”).
reserved to the states. The rule is itself a simple falsification of the judicial role. It gains nothing by its commonplace reiteration—its operative effect is merely to set the fox (Congress) to guard the chickenhouse (federalism)—and it is explainable most simply by a tilted predisposition to uphold congressionaludging by means of partial abdication of the judicial role.

But it is time to sum up lest by proceeding on in this way we lose sight of the lesser point with which we began. That point, beyond providing familiar illustrations of clause bias and of judicial fiddling with standards of judicial review, was to resettle one's own view of judicial integrity and the proper role of the Supreme Court. The duty of judicial integrity, I have argued very simply, is to give the Constitution full faith and credit as supreme law, in keeping with one's oath as a judge.

Accordingly, one will not cull clauses preferentially, nor will one make up reasons for resigned or overreaching standards of judicial review. One will not anticipate amendments from either frustration or moral passion. One will not so whether to take from the Constitution such features one dislikes, or to embroider it with features one might wish were there, but

43. The ultimate version (total abdication of federalism review and legislative-executive conflicts by declaring all such questions nonjusticiable) is proposed in J. Cooper, supra note 2.
45. Three similes compete within the rhetoric of our Constitution as a "living" constitution, a celebratory but somewhat facile turn of phrase. Each envisions a different role for the Supreme Court. The first treats the Constitution virtually as unamendable scripture; thus it must be forcibly reinterpreted from time to time, kept alive largely by judicial art. The second is even bolder. Constitutional text is hardly significant in this view; like Proteus, it is capable of assuming nearly any shape, which is what judges should indeed undertake to do, guided by the best notions of the public good.

But I think the better comparison of the living Constitution is with neither of these; the Constitution is neither much like the Dead Sea scrolls nor like Proteus. Each comparison assumes entirely too much, albeit in different ways. A more neutral and compelling figure, so far as one wants one, is found on the northern California coast. It is there that one finds the great northern redwoods, possibly the greatest living things on earth. Some are as tall as 300 feet, solid, unmistakable, and unforgettable. Some are 3,000 years old. They are not at all like Proteus. Neither are they like the dry rustle of the Dead Sea scrolls.
46. Roper: "So now you'd give the Devil benefit of law?"
   More: "Yes. What would you do? Cut a great road through the law to get after the Devil?"
   Roper: "I'd cut down every law in England to do that!"
   More: (Roused and excited) "Oh?" (Advances on Roper) "And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat?"
knows perfectly well are not. One will not come to the Constitution as a challenge for manipulation; one will come to it as an obligation and as a trust.47

47. For two other essays on the main thesis of this article, see Van Alstyne, The Idea of the Constitution as Hard Law, 37 J. LEGAL EDUC. 174 (1987); Van Alstyne, Notes on a Bicentennial Constitution: Part I, supra note 4.