

FUNCTIONAL DEPARTMENTALISM AND NONJUDICIAL INTERPRETATION: WHO DETERMINES CONSTITUTIONAL MEANING?

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I

INTRODUCTION

One of the vibrant constitutional debates at the turn of the twenty-first century concerns enduring questions about the appropriate role of nonjudicial entities—especially Congress and the President—in the development of constitutional meaning.¹ The Supreme Court, of course, asserted its own authority to act on its interpretations of the Constitution two hundred years ago in *Marbury v. Madison*.² Although academic debate over judicial review continues, the Court's authority to review the constitutionality of acts of Congress and the President today is integral to our constitutional system.

Judicial review, though, is distinct from judicial supremacy. As growing numbers of commentators note, the *Marbury* Court claimed relatively limited interpretive authority for the courts: to interpret and apply the Constitution only in the course of resolving justiciable cases and controversies. The Court did not purport to resolve whether and when fidelity to the Constitution requires Congress and the President to adhere to the Court's interpretations as they exercise their own constitutional powers.

Congress and the President, too, are constitutionally obligated to uphold, and thus must first interpret, the Constitution. How should they approach this responsibility? Should they follow relevant Supreme Court precedent, even precedent with which they disagree, or may they take official action premised

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1. This Article focuses on the President and Congress, but notes that constitutional meaning is shaped as well by social movements, political parties, the states, scholars, and commentators, among other nonjudicial forces.

2. 5 U.S. (1 Cranch) 137 (1803).

on constitutional views at odds with those of the Court? Abortion provides one context in which to contemplate interpretive authority: What should guide a member of Congress in voting on a bill that would restrict the performance of abortions, or a President contemplating whether to sign or veto such a bill? What about a President faced with how (or even whether) to enforce constitutionally dubious abortion restrictions in a federal statute, or whether to defend the law in court against constitutional challenge? Should the political branches (that is, Congress and the President) invariably seek to conform their actions to the Court's then-current standard, whether it is the *Roe*³ strict scrutiny standard, the less protective *Casey*⁴ "undue burden" standard, or some future test? Or is it ever constitutionally appropriate for their actions to vary, for example, with whether they agree with the Court's decision in *Roe* or *Casey*?

Such questions lie at the heart of a debate sometimes characterized as a choice between "judicial supremacy," which emphasizes the need for the political branches to defer to the Court as the "ultimate interpreter of the Constitution,"⁵ and "departmentalism," which recognizes the authority of each federal branch or "department" to interpret the Constitution independently. One striking aspect of this debate is the limited relevance of ideology. Legal scholars across the ideological spectrum increasingly endorse roles for the President and Congress and processes for constitutional interpretation that are less dominated by the courts. A divide does exist, though, between those academics who write about nonjudicial interpretation and almost everyone else. Judicial supremacy is unquestionably the dominant view in United States law, politics, and society, including among lawyers, who study, teach, and practice law almost entirely from the perspective of judicial doctrine.⁶

Two major developments during the 1980s and 1990s elevated both interest in and the practical importance of nonjudicial interpretation: President Ronald Reagan's support for strong presidential interpretive independence, and the Rehnquist Court's subsequent adoption, seemingly to the contrary, of an extremely strong version of judicial supremacy. The Reagan Administration asserted broad and controversial interpretive authority, especially through Attorney General Edwin Meese III. The Department of Justice under Meese's leadership developed comprehensive and detailed constitutional positions at odds with Supreme Court precedent on a broad range of issues, including abortion, congressional power, federalism, and affirmative action.⁷ Though depart-

3. *Roe v. Wade*, 410 U.S. 113 (1973).

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

5. *United States v. Nixon*, 418 U.S. 683, 704 (1974) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)).

6. See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term: Foreword: We, the Court*, 115 HARV. L. REV. 4, 6-7 (2001) ("It seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course. I am certain that the vast majority of law professors also shares this view . . .").

7. See, e.g., OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988) [hereinafter OLP, GUIDELINES]; OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR

mentalist in theory and ambition, the Reagan Administration in practice (and under public pressure) exercised power in ways far closer to court-centered norms than to a strong departmentalist approach.

President Reagan nonetheless succeeded substantially in advancing his agenda for constitutional change, primarily through appointing judges who shared his legal views and vision for change.⁸ Most notably, a sharply divided Rehnquist Court has imposed new limits on Congress's constitutional power to legislate to protect constitutional rights.⁹ These victories for Reagan's legal agenda, though, appeared to strike a blow to departmentalism. As justification for its new limits, the Rehnquist Court has developed a strengthened version of judicial supremacy that denigrates nonjudicial interpretive authority and declares that, in certain contexts, the advancement of independent constitutional views violates the separation of powers.¹⁰ According to the Court, Congress unconstitutionally encroaches on judicial power when it seeks to "define," rather than "enforce," the guarantees of the Fourteenth Amendment through its Section 5 authority: "[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."¹¹

The Rehnquist Court's new judicial supremacy fails to adequately respect, or even acknowledge, the role of the political branches in the development of constitutional meaning, but the Court seems to be succeeding in its expansion of judicial power.¹² The public continues to welcome judicial resolution of constitutional disputes, with little regard to the particular nature of the dispute,¹³

2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988) [hereinafter OLP, CONSTITUTION IN 2000].

8. See, e.g., OLP, CONSTITUTION IN 2000, *supra* note 7, at v ("There are few factors that are more critical to determining the course of the Nation, and yet are more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.”).

9. See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act); see also Alden v. Maine, 527 U.S. 706 (1999) (expanding state sovereign immunity in state court proceedings); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (expanding state sovereign immunity in federal court proceedings).

10. See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 387-406 (2003) (comparing the Reagan Administration's agenda for constitutional change with regard to congressional power and federalism with the Rehnquist Court's subsequent doctrine).

11. *Garrett*, 531 U.S. at 365.

12. The Court's most recent decision in this line of cases likely will facilitate public acceptance. The Court continued to preserve for itself authority to define constitutional meaning, to the exclusion of Congress. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“[I]t falls to this Court, not Congress, though, to define the substance of constitutional guarantees.”). The Court exercised that authority, though, to uphold provisions of the popular Family and Medical Leave Act and to signal that federal laws that protect women and racial minorities are relatively safe from the Court's new limits on congressional power (unlike laws that seek to protect against forms of discrimination the Court has not declared entitled to heightened judicial scrutiny). Compare *Hibbs*, with cases cited *supra* note 9.

13. Cf. *Bush v. Gore*, 531 U.S. 98 (2000). In writing about *Bush v. Gore*, Professor Sanford Levinson noted the gap between public perception and the reality that “public officials occupying legislative and executive roles are, as a practical matter, far more important than are judges in giving actual meaning to the Constitution.” Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List*

while political branch disagreements with the Court are viewed with deep, albeit often well-founded, distrust. Even those increasingly on the losing end of judicial rulings—most obviously Congress and the President, as well as progressive legal advocates—remain understandably reluctant to challenge the supremacy of an independent judiciary that enjoys broad public support and that for the last half-century has played a strong and special role in the protection of political minorities and fundamental rights.

This Article joins the debate over the appropriate contours of political branch interpretive authority. It proposes a variation on existing theories, which I call “functional departmentalism”—a variation informed by past practice and the practical implications for our system of constitutional self-government. Functional departmentalism can help in understanding and guiding conscientious elected officials as they confront constitutional issues, as well as the courts and the electorate as they evaluate the political branches’ efforts. Most challenging, and of special focus, are those constitutional issues about which Congress or the President flatly disagree with the Court. This Article considers the circumstances upon which interpretive legitimacy depends¹⁴ and concludes, contrary to strong forms of both judicial supremacy and departmentalism, that determinations about interpretive authority require close attention to the particular constitutional question at issue and the context in which it arises.¹⁵

Part II begins with strong forms of judicial supremacy and departmentalism. Notwithstanding the judiciary’s special role in protecting rights, unduly strong notions of judicial supremacy actually threaten individual liberty as well as other core constitutional values: governmental accountability, democratic participation, and the quality of constitutional interpretation. Undue focus on the courts masks the substantial influence that Congress and the President exert

of Some Early Lessons, 65 LAW & CONTEMP. PROBS. 7, 16 (Summer 2002). Levinson wrote that *Bush v. Gore* “further entrenches the monarch-like status of the United States Supreme Court as ‘ultimate constitutional interpreter,’ with a monarch-like royal prerogative to ignore ordinary legal restraints when necessary to protect the public good.” *Id.* at 28. Though I would not go quite as far in describing the relative importance of political branch and judicial interpretation, Professor Levinson’s writings, including those regarding the differences between what he terms “catholic” and “protestant” visions of constitutional interpretation, have helped shape and advance the ongoing debate, including my own views. *See infra* note 23.

14. This Article builds on a discussion of presidential authority to decline to enforce constitutionally objectionable federal statutes. *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (Winter/Spring 2000).

15. In their study of Congress’s authority, pursuant to Section 5 of the Fourteenth Amendment, to participate in the development of the meaning of the Fourteenth Amendment’s substantive guarantees, Professors Robert Post and Reva Siegel, for example, carefully attend to constitutional text, structure, and history and what of value Congress brings to the interpretive enterprise. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000) [hereinafter Post & Siegel, *Federal Antidiscrimination Legislation*]; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Policentric Interpretation of the FMLA*]; Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) [hereinafter Post & Siegel, *Juricentric Restrictions*].

over constitutional meaning and change, including on issues and in contexts not subject to meaningful judicial review. Misguided criticism of legitimate, even necessary constitutional interpretation by political branches discourages openness and transparency. The political branches do not stop acting upon their constitutional views; they instead operate with increased secrecy and diminished public oversight and accountability.

Departmentalism provides an obvious alternative, but the dominant strong form—which emphasizes near-plenary authority for each branch to act on its own constitutional views—suffers from some of the same deficiencies as strong judicial supremacy. Both approaches reflect and encourage arrogance on the part of one branch of government regarding the superiority of its own interpretations relative to those of the other branches, and both denigrate the value of interbranch constitutional debate and shared responsibility for interpretation. The Rehnquist Court's excesses should not be met with idealized views of the interpretive abilities of nonjudicial actors and inadequate respect for the judiciary's role in upholding constitutional guarantees against hostile political majorities. The Court's relative extremism regarding judicial supremacy actually can be seen as a form of strong, institution-driven departmentalism. At the same time, departmentalism proves valuable in responding to judicial supremacy's shortcomings and should not be ceded to the absolutists, formalists, and ideological conservatives who in recent decades have served as its primary proponents.

Part III suggests an alternative approach that draws upon departmentalism's theoretical insights, but that in application yields results closer to traditional notions of judicial supremacy than to strong forms of departmentalism. "Functional departmentalism" would recognize only limited authority to act on independent views, the contours of which are informed by functional considerations. The shared nature of the three branches' responsibility to uphold the Constitution, as well as political branch practice and judicial doctrine, all support a highly context-dependent approach. Two principles are suggested here to guide the political branches and those who evaluate their actions, each of which in turn helps in the development of more specific guidance. First, the Constitution obligates each branch of the federal government to support the Constitution in its entirety, which includes a duty to respect and preserve the constitutional functions of the other branches. Second, members of Congress and the President are obligated to uphold and promote not their personal views of contested constitutional issues, but the best constitutional interpretations and outcomes. The determination of constitutional meaning thus is a collaborative enterprise in which each branch should recognize its own limitations and the relative strengths and functions of the other coordinate branches.

Under these principles, whether Congress or the President has the authority to act on independent views depends on factors that include the constitutional power exercised, the constitutional text or structural arrangement being interpreted, and the potential impact on constitutionally protected rights. Equally

important are the processes followed in reaching constitutional judgments. I suggest five characteristics of processes likely to encourage principled, high-quality political branch constitutional interpretation. The development of processes should not be viewed solely as discretionary policy choices to be left to the political branches, but as integral to constitutional authority and the proper subject of political attention and checks. A President's limited authority to act contrary to the views of the Court and Congress is enhanced where the President's contrary legal views result from a principled, deliberative, transparent process that appropriately respects the views and authorities of the other branches. A President's obligation for care and candor in acting upon independent views is enhanced where there is a diminished likelihood of judicial checks, as in the exercise of natural security and war powers.

Part IV examines the issue of abortion, an issue of extensive judicial involvement and a context in which the Court has offered one of its strongest articulations of judicial supremacy, claiming authority to "speak before all others" about constitutional meaning.¹⁶ At the same time, abortion has attracted innumerable nonjudicial efforts at constitutional change, typically with the goal of restricting access to legal abortion and overruling *Roe v. Wade*.¹⁷ Few issues rival abortion in illustrating the limitations of judicial supremacy and the reality that a Supreme Court declaration does not necessarily end constitutional controversy. While abortion is an extraordinary issue, its regulation provides a rich context in which to explore the appropriate political branch responses to judicial interpretations with which they disagree.

II

THEORIES OF POLITICAL BRANCH INTERPRETIVE AUTHORITY

Some academic commentators declare that we all are judicial supremacists,¹⁸ while others contend that judicial supremacy, at least as the Court envisions it, does not exist,¹⁹ and that we all are departmentalists.²⁰ Some of the apparent

16. *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992).

17. 410 U.S. 113 (1973). The political branches most often have promoted less protection for women's reproductive liberty than has been recognized by the Court, as in the recent enactment of the Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201, in the wake of the Supreme Court's invalidation of a similar Nebraska state law in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Some elected officials, though, have supported a federal Freedom of Choice Act to provide greater protection for women than is afforded by the Court's constitutional doctrine. See generally *infra* Part IV.B.

18. E.g., Kramer, *supra* note 6, at 6-7.

19. E.g., Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 848 (2002) ("[J]udicial supremacy, at least in the strong form sometimes envisioned by the Court and commentators, is unlikely to ever exist in practice. The courts are not the exclusive interpreters of the Constitution, and often are not its ultimate or most authoritative interpreters either."); see also Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1278 (2001); Levinson, *supra* note 13.

20. E.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1465 (1997) (citing authorities for the proposition that "judicial supremacy has been rejected by a veritable all-star list of constitutional scholars"); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1533 n.20 (2000) ("De-

disparity actually reflects the use of different definitions or a focus on different groups (reflecting, in turn, the gap between the prevalent judicial endorsement and academic criticism of strong judicial supremacy).²¹ Moreover, many critics use terms other than departmentalism to describe their preferred theories, sometimes with substantially different meanings: “presidential” or “coordinate” review,²² “constitutional protestantism,”²³ “police-centric constitutionalism,”²⁴ “constitutional construction,”²⁵ “constitutional dialogue,”²⁶ and “populist constitutionalism.”²⁷ Others argue that judicial supremacy should not be used to describe the Rehnquist Court’s insistence on interpretive “sovereignty”²⁸ and “exclusivity.”²⁹

In an insightful discussion of “extrajudicial constitutional interpretation,” Professor Keith Whittington offers definitions that are instructive and typical, and that also reveal the limitations of unitary definitions: “Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances

partmentalism now appears at some level to reflect ‘the consensus view among serious scholars of the Constitution.’”) (quoting Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996)); Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 385 (1994) (“Are we really all ‘departmentalists’ now? Will nobody defend judicial supremacy anymore?”).

21. For example, Professor Michael Paulsen’s important work often is cited approvingly as a leading example of modern departmentalist theory, *see, e.g.*, LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 266 (3d ed. 2000) (citing Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994)), but virtually no one agrees with all of the implications of his strong form of departmentalism. Professor Larry Kramer defines judicial supremacy so broadly as to include all but one of its self-professed critics (namely, Michael Paulsen, who disputes the binding nature of particular Supreme Court judgments). Kramer, *supra* note 6, at 7-8. At the other end of the spectrum, Kramer argues there is “a world of difference” between judicial supremacy and the Rehnquist Court’s approach of “judicial sovereignty,” which he describes as the “difference between having the *last* word and having the *only* word.” *Id.* at 13.

22. Calabresi & Yoo, *supra* note 20, at 1463; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Lawson & Moore, *supra* note 20, at 1270.

23. SANFORD LEVINSON, CONSTITUTIONAL FAITH 44 (1988) (“A ‘protestant’ Constitution is a deinstitutionalized, or at least . . . nonhierarchical, Constitution” that entails “the community joined together in basically egalitarian discussion of the meaning (and demands) of the relevant materials.”); *see* Levinson, *supra* note 13, at 26 (“The United States, jurisprudentially, is a distinctly ‘catholic’ country in the sense that the public at large seems to accord a papal-like authority to pronouncements of the Court.”).

24. Post & Siegel, *Policentric Interpretation of the FMLA*, *supra* note 15.

25. KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999).

26. NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE (1996); LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

27. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 11 (1999) (advocating a system of “populist constitutional law” for the enforcement of the “thin” Constitution); *id.* (“We can think of the thin Constitution as its fundamental guarantees of equality, freedom of expression, and liberty.”).

28. *See* Kramer, *supra* note 6, at 13.

29. *See* Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1623 (1988).

that are not subject to judicial review.”³⁰ Departmentalism, which Whittington describes as “[t]he most significant historical and theoretical alternative to judicial supremacy,” holds that “each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties” and “is supreme within its own interpretive sphere.”³¹

Few scholars should be characterized as either departmentalists or judicial supremacists without further qualification. Very few self-described departmentalists argue that the President’s interpretive independence includes the authority to refuse to comply with judicial orders;³² relatively few (though significantly more) would argue that Presidents should routinely decline to enforce federal laws they find constitutionally objectionable. Similarly, relatively few judicial supremacists would contend that Presidents invariably must defer to Supreme Court interpretations with which they disagree—for example, in exercising the veto and pardon powers. Virtually all would agree that when the political branches advance independent views, they at least on occasion enhance the constitutional debate. Constitutional theory and public policy would benefit from attention to the details of various possible forms of judicial supremacy and departmentalism and to what they suggest about the circumstances under which it is constitutionally appropriate for the political branches to act on their independent constitutional views.

A. Judicial Supremacy and the Nature of Political Branch Interpretation

The Court’s assertion, and the public’s acceptance, of supreme judicial authority to “say what the law means”—at times to the point of seeming to equate the Court’s doctrine with the Constitution itself³³—masks the myriad ways in which the political branches actually do influence constitutional meaning. The Constitution confers on Congress and the President many powers and responsibilities that entail constitutional interpretation, often on contested issues of substantial public importance. Congress confronts constitutional issues in the course of lawmaking, executive branch oversight, judicial selection, and the confirmation of executive branch officials. Relevant presidential powers are more diverse. A President’s view of a bill’s constitutionality might influence whether he works for or against its passage and whether he signs or vetoes it. The President also is charged with enforcing laws and sometimes faces the dilemma of how and whether to enforce laws of questionable constitutionality. Under his

30. Whittington, *supra* note 19, at 784. Several commentators, Whittington among them, have noted but not explored variability among theories of judicial supremacy and departmentalism. *Id.* at 783; *see also id.* at 786 (“This Article does not attempt to specify the proper scope of extrajudicial constitutional interpretation, but rather simply responds to objections that would displace the authority of nonjudicial actors entirely.”).

31. *Id.* at 782-83.

32. Kramer, *supra* note 6, at 7 (citing Paulsen as the sole exception).

33. *See* Akhil Reed Amar, *The Supreme Court, 1999 Term: Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 45 (2000) (discussing possible dangers of privileging the Court’s doctrine over the “document”).

direction, the Department of Justice advances constitutional views as it litigates on behalf of the United States. The President nominates and, upon Senate confirmation, appoints the federal judges who declare constitutional doctrine. Last, but far from least, the President and Congress both possess awesome constitutional responsibilities regarding the use of the United States military and the preservation of constitutionally protected liberties during war and other times of emergency.

Not seriously at issue is whether Congress and the President should exercise power in conformity with the Constitution and, in the process, interpret the meaning of relevant constitutional provisions: clearly they must. They should consider, for example, the constitutionality of legislation prior to fulfilling their constitutionally prescribed roles in lawmaking. Commentators overwhelmingly condemn the occasional President or member of Congress who dismisses possible constitutional defects as irrelevant to a bill's passage and appropriately left to the courts in later litigation. The constitutional text and structure, as well as judicial precedent, strongly support the consensus that all three branches share the responsibility to uphold the Constitution.³⁴

Rather, the issue in serious dispute is whose interpretation should govern, and why, in the varied contexts in which the political branches interpret the Constitution. This Article focuses particularly on constitutional constraints on political branch actions that contradict judicial precedent or that seek to change constitutional meaning. How should the public evaluate such acts: Should they be tolerated as unavoidable (albeit undesirable) assertions of raw constitutional power, condemned as illegitimate (albeit sometimes unreviewable) usurpations of judicial power, or praised as valuable contributions to constitutional meaning? The responses most consistent with our constitutional system vary with the circumstances. For example, for a President to sign into law a bill that violates judicially declared rights raises different (and in my view, far more serious) constitutional questions than for that same President to veto a bill based on the very same constitutional views, equally at odds with those of the Court. The broad brush of the prevalent strong view of judicial supremacy, however, discourages careful attention to context and sometimes taints legitimate and valuable interpretive activity.

Past practice merits close consideration. First, the political branches do engage in principled constitutional interpretation—not in ways that mirror judicial interpretation, but in ways nonetheless deserving of the term “interpretation.” Volumes of Department of Justice legal opinions (of Attorneys General and the

34. The Court routinely explains its standards for judicial review—including the presumption of constitutionality and deferential review of most governmental actions—as a reflection of elected officials' responsibility in the first instance to ensure their compliance with the Constitution. The Rehnquist Court continues to recite these standards, even as it *sub silentio* alters them and creates new limits on congressional interpretive authority. See *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (“When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. . . . Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.”).

Office of Legal Counsel (OLC)) attest to the principled nature of many executive branch interpretations.³⁵ Often, though, the public does not have a basis for evaluating the quality of political branch interpretations or for knowing when constitutional views motivate action. The exercise of some political branch powers, such as a presidential veto or pardon, appropriately may be premised on either policy or constitutional views or a combination of the two, and the executive branch often does not publicly release its constitutional analyses (sometimes for good reason, but other times simply for lack of public expectation or demand, or to avoid political embarrassment).

Congress and the President usually adhere to the Court's precedent, but that precedent itself sometimes contemplates a measure of political branch interpretive independence. The Court does not always intend its decisions to resolve a constitutional issue for all contexts. Presidential or congressional action premised, for example, on a view of Fourteenth Amendment "equal protection" or "liberty" that is more protective of individual rights than the Court is willing to enforce does not necessarily conflict with the Court's view. Judicial doctrine instead may reflect that the political branches possess superior interpretive abilities of relevance or that insufficient justification exists for removing certain issues from democratic processes.³⁶ Some independent political branch interpretation falls within the sphere of independence contemplated by the Court, but on relatively rare occasion Congress or Presidents use the constitutional authorities outlined above to promote constitutional views flatly at odds with the Court's announced interpretations.

Even regarding issues on which the courts exercise the most exacting judicial scrutiny—most notably, the protection of minority and fundamental rights—Congress and Presidents have effected substantial constitutional change. Some influences have diminished individual rights, such as Ronald Reagan's views on congressional power and abortion, but others have enhanced rights, as in Abraham Lincoln's opposition to *Dred Scott*, Thomas Jefferson's

35. The executive branch's legal views are set forth in opinions of the Attorney General and, since 1977, of the Office of Legal Counsel of the Department of Justice. For a collection of selected Attorney General and Office of Legal Counsel opinions with valuable commentary, see H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* (1999).

36. Professor David Barron thoughtfully discusses one context in which presidential interpretive authority may vary with judicial expectations. He builds on important works of Professors H. Jefferson Powell, Lawrence Sager, Laurence Tribe, and others to argue that Presidents have greater authority to refuse to enforce a law on constitutional grounds where the courts would evaluate the constitutional issue with rules of deference that contemplate the possibility that the political branches will reach different constitutional conclusions. David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 *LAW & CONTEMP. PROBS.* 61, 66-75 (Winter/Spring 2000); see also Johnsen, *supra* note 14; H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 *U. CHI. L. REV.* 365 (1998) (book review). See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212 (1978). Even the Rehnquist Court's restrictive view of Section 5 continues to recognize Congress's authority to go beyond what the Court would find unconstitutional, as long as Congress seeks not to "define" constitutional meaning, but only to "enforce" (that is, remedy or prevent violations of) rights as defined by the Court. See *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

opposition to the Sedition Act of 1798, and Congress's enactment of civil rights legislation in the 1960s and 1970s.³⁷

On some issues, political branch influences are primary because doctrines of justiciability, judicial restraint, and deference appropriately limit judicial review. On issues of war powers and foreign affairs, for example, executive branch precedent and formal written legal analyses are far more extensive than judicial precedent, and the courts typically give strong deference to the views and practices of the political branches. Moreover, the exercise of certain powers, such as the presidential veto or pardon, are all but unreviewable. The absence of judicial review, of course, does not signify the absence of constitutional limits. Raw power does not signify authority. Even absent external constraints, the political branches must adhere to constitutional requirements. Constitutional fidelity, though, often depends on the branches' effectiveness in determining their own constitutional obligations and then exercising principled self-restraint, as well as on the branches' substantial powers to check each other and on the ultimate power of the electorate.³⁸ The effectiveness of both principled self-restraint and external political checks in turn depends heavily on the traditional values of transparency and accountability.

Practice thus establishes that the political branches at times provide a necessary source of interpretation in the absence of judicial resolution and a valuable alternative or supplemental voice when the Court has spoken. The prevailing exaggerated notion of judicial supremacy ignores and undermines those interpretive roles. Indiscriminate criticism may chill elected officials' willingness to engage in debate and struggle over constitutional meaning. Moreover, when political branch officials do act on their own constitutional views, whether by necessity or by choice, their accountability to the public is diminished by inadequate public understanding and incentives against openness. Public advocacy groups and commentators at times have exacerbated incentives against candor through misplaced attacks on public officials that target their interpretive authority rather than the substance of their views.³⁹ Moreover, members of Congress and Presidents themselves at times advance unduly strong views of judicial supremacy, and denigrate their own interpretive authority.⁴⁰ Such misleading

37. See, e.g., Johnsen, *supra* note 10; Post & Siegel, *Federal Antidiscrimination Legislation*, *supra* note 15; *infra* note 65.

38. Political branch lawyers share the popular tendency to view constitutional meaning solely in terms of Supreme Court precedent. When I served in the Office of Legal Counsel (1993-1998), executive branch "clients," themselves typically lawyers, sometimes would frame legal questions in terms of how the Court likely would rule, which necessitated explanation that the President's constitutional obligations extend beyond judicially enforceable limits. For further discussion regarding the role of the Office of Legal Counsel and of executive branch lawyers, see Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993).

39. See, e.g., *infra* note 91 and accompanying text (ethics complaint filed against Attorney General Ashcroft in connection with his expression of his views on the Second Amendment).

40. See, e.g., *infra* note 146 and accompanying text (discussing Attorney General John Ashcroft's confirmation hearing testimony regarding abortion). James Bradley Thayer, of course, famously warned against aggressive judicial review. James Bradley Thayer, *The Origin and Scope of the Ameri-*

representations and misunderstandings contribute, for example, to continued sharp controversy over such fundamental questions as whether the legal views of a President's nominees to the federal courts or to serve as the Attorney General are relevant and proper subjects of the Senate's consideration.

A desirable approach to nonjudicial interpretation should facilitate the development of standards and processes that encourage open and principled constitutional decisionmaking by the political branches on issues that involve well-developed judicial doctrine as well as those less likely to be reviewed by the courts. Whether Congress and the President exceed their interpretive authority when they act on views at odds with those of the Court should be recognized as distinct from the merits of the underlying constitutional issue. The legitimacy of interpretive activity should not be the subject of misguided attack. Most generally, interpretive theory—whether advanced by the Court, the political branches, or academics—should not reinforce the myth that a fundamental divide separates “law,” the exclusive province of the courts, and “politics,” the province of Congress and the President. It should account, though, for differences in political branch and judicial interpretive processes and competencies.⁴¹ As discussed in the next section, departmentalism helps on all counts.

B. Strong Forms of Departmentalism

Familiar ideological labels do not describe well the divide between strong judicial supremacists and the growing numbers who endorse substantial nonjudicial interpretive roles. Ideology nonetheless is relevant to the various forms of departmentalism, as is another familiar dichotomy: formalism and functionalism. Debate over nonjudicial constitutional interpretation raises a theoretical dispute typically at the core of such contested issues of separation of powers: To what extent is the Constitution's allocation of authorities and responsibilities among the three branches—the constitutional system of “checks and balances”—best understood as strictly separating governmental powers? When the text assigns and delimits the scope of relevant powers expressly and in relative detail, the overwhelming weight of authority and opinion directs adherence to that text. Far more controversial and difficult are recurring questions about when, if ever, the Constitution demands a separation of powers that the text does not expressly assign, but that may be characterized as “executive,” “leg-

can Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893); see also Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

41. See generally H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 5 (2002) (“American constitutionalism was wracked with deep, principled (at least politically principled) disagreement from the beginning. . . . There never was an age of constitutional virtue. . .”); TRIBE, *supra* note 21, at 254-67 (discussing democratic value of multiple interpreters of the Constitution); Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in SUPREME COURT DECISIONMAKING 15, 19 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing “[t]he schizophrenia between practitioner-based and academic conceptualizations of law” and law's relation to politics); Post & Siegel, *Juricentric Restrictions*, *supra* note 15, at 3 (declaring that the Rehnquist Court's “decisions, exemplified by *Garrett*, are fundamentally indifferent to the subtle but fundamental interconnections between the constitutional dimensions of our political life and the democratic dimensions of our constitutional culture”).

islative,” or “judicial.” To what extent should constitutional theory emphasize the separate and distinctive authorities of the branches and try to divine from the constitutional text and structure relatively stark divisions of authority (an approach commonly associated with “formalism”), rather than consider also the connections among the branches and the practical consequences and realities of how they govern (“functionalism”)?⁴²

Departmentalism’s support for political branch interpretive independence is rooted in the separate and coordinate status of the three branches, or “departments.”⁴³ Presidents and members of Congress, as well as federal judges, are constitutionally obligated, including by oath, to uphold the Constitution. The Constitution, for example, requires the President to swear or affirm to “preserve, protect and defend the Constitution”⁴⁴ and to “take Care that the Laws be faithfully executed.”⁴⁵ Emphasis on the independent status of the branches, and the perceived need to maintain rigid lines and rules, leads many self-described departmentalists to positions of absolute or near-absolute interpretive autonomy for each branch in the exercise of its responsibilities. Strong departmentalists argue that no one branch’s constitutional interpretations control or require deference from the others. With regard, for example, to every governmental action involving a federal statute—passage by Congress, signature or veto by the President, enforcement by the President, review by the Court, and presidential pardon—each branch possesses the authority, even duty, to be guided by its own best view of the constitutionality of the statute.⁴⁶

Departmentalism, both in academic literature and in motivating governmental action, has come to be associated with a strong and formalistic interpretive approach, especially in the service of ideologically conservative substantive positions. The presidential administrations of Ronald Reagan and George H.W.

42. Supreme Court doctrine provides examples of both, which has led to charges that the Court is unpredictable. For one attempt to reconcile the Court’s separation of powers doctrine, see Office of Legal Counsel, *The Constitutional Separation of Powers Between the President and Congress* (May 7, 1996) [hereinafter 1996 Dellinger Memorandum], reprinted in 63 LAW & CONTEMP. PROBS. 514 (Winter/Spring 2000) (memorandum by Assistant Attorney General Walter Dellinger to the general counsels of the federal government).

43. Professor Akhil Amar conveys this concept of coordinate status by reference to the constitutional “architecture”:

[T]he general architecture of these three articles would seem to imply a basic coequality among the three departments. . . . Had the document been designed to privilege the Supreme Court over all other entities—to affirm not merely judicial review but judicial supremacy—surely it should have highlighted such an important point prominently and explicitly. . . . [A]lthough the Constitution makes the Supreme Court supreme over inferior courts within its own branch, it nowhere explicitly raises the Court above coordinate legislative and executive departments.

Akhil Reed Amar, *Architecture*, 77 IND. L.J. 671, 692-93 (2002).

44. U.S. CONST. art. II, § 1, cl. 8; see also *id.* art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

45. *Id.* art. II, § 3.

46. See Johnsen, *supra* note 14, at 14-22 (discussing departmentalist approaches to presidential nonenforcement of constitutionally objectionable statutes).

Bush, for example, both endorsed strong forms of departmentalism,⁴⁷ though far less in practice than in theory; Attorney General Meese most famously and controversially argued that the President possesses substantial authority to promote his own constitutional interpretations.⁴⁸ Some ideologically conservative members of Congress and their lawyers have claimed similar congressional authority to legislate based on interpretations at odds with the Court's precedent.⁴⁹

Departmentalists emphasize that the *Marbury* Court asserted the power of judicial review, not judicial supremacy.⁵⁰ Judicial power to interpret the Constitution in the context of resolving a justiciable case or controversy does not preclude strong departmentalism, with political branch interpretive authority similar to that of the courts and each branch acting on its own views in furtherance of its own constitutional authorities.⁵¹ Under this view, the power to interpret the Constitution is not specially that of the judiciary, but neither must the courts defer to the constitutional views of the political branches when they exercise judicial power.

Seemingly at the other extreme lies the Rehnquist Court's strong version of judicial supremacy. The Court has asserted that the authority ultimately to

47. See *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. Off. Legal Counsel 18, 32 (1992) (memorandum from Acting Assistant Attorney General Timothy E. Flanigan) (concluding that the President may refuse to enforce acts of Congress that the President views as unconstitutional). *But see* 1996 Dellinger Memorandum, *supra* note 42; The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) (memorandum from Attorney General Benjamin R. Civiletti) [hereinafter 1980 Civiletti Memorandum]; *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199 (1994) (memorandum from Assistant Attorney General Walter Dellinger) [hereinafter 1994 Dellinger Memorandum].

48. In a much-discussed speech, then-Attorney General Meese stated that "constitutional decisions need not be seen as the last words in constitutional construction." Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987). Rather, "[e]ach of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions." *Id.* at 985-86. Meese cited for support Abraham Lincoln's opposition to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Meese, *supra*, at 984-85. He clearly, though, advocated authority far beyond cases as extreme as *Dred Scott*, as evidenced by a series of official Department of Justice reports that systematically set forth autonomous views on a broad range of legal issues and strategies to implement those views. See, e.g., OLP, GUIDELINES, *supra* note 7; OLP, CONSTITUTION IN 2000, *supra* note 7; see also Johnsen, *supra* note 10, at 389-99 (discussing these and other Reagan/Meese Department of Justice reports).

49. Professor John Yoo has written of his work as general counsel to the U.S. Senate Judiciary Committee: "Congress is an equal coordinate branch and is entitled to interpret the Constitution in the course of fulfilling its own constitutional duty of legislating." John C. Yoo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROBS. 1, 5 (Spring 1998).

50. Professor Kramer has noted that "conventional wisdom" now holds that *Marbury* "ventur[ed] only that it was proper for the Court to interpret the Constitution without in any way suggesting that its interpretations were superior to those of the other branches." Kramer, *supra* note 6, at 5-6; see also Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-88 (1975) ("*Marbury v. Madison* was not premised on any special, let alone exclusive, constitutional function of the Court, but simply on its duty to decide the case before it in conformance with the superior law of the Constitution.").

51. Professor Paulsen strikingly adapted *Marbury*'s most famous line: "'It is emphatically the province and duty' of the executive department, no less than the judiciary, 'to say what the law is.'" Paulsen, *supra* note 21, at 221 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also Lawson & Moore, *supra* note 20, at 1268 (paraphrasing *Marbury* to the same effect).

define constitutional meaning is that of the Court, and not Congress, and has offered self-aggrandizing assertions about its power as “ultimate expositor,” with citations to *Marbury* that actually provide no direct support.⁵² The Court’s analysis, while quite thin and specific to Congress’s Section 5 authority, suggests a more general view that when the Court speaks to a particular constitutional question, the political branches should adhere to that determination.

On close scrutiny, the Rehnquist Court’s reasoning actually shares much with strong forms of departmentalism and might be best conceptualized, not as occupying the other extreme, but as an institution-driven form of strong departmentalism. The Court in *Boerne*, when it first announced its new version of judicial supremacy,⁵³ described constitutional interpretation at some points as a departmentalist would: as the duty of each branch, in the exercise of its powers. “The power to interpret the Constitution *in a case or controversy* remains in the Judiciary.”⁵⁴ So, too, Congress: “When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”⁵⁵ The Court continued that when the political branches act contrary to a constitutional interpretation the Court has adopted, “it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*.”⁵⁶ These portions of the Court’s decision could be read, not as seeking to constrain Congress’s interpretive authority, but only as declaring that the Court will not defer to Congress’s view if presented with it. Strong departmentalists would not take issue with the Court’s authority to disagree with Congress’s constitutional views, but only with

52. See *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (“[E]ver since *Marbury*, this Court has remained the ultimate expositor of the constitutional text.”); see also *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees.”); *id.* (“The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (“[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.”).

53. The Court on several earlier occasions used similarly extreme language to describe the supremacy of its views, but commentators convincingly have explained those statements as driven by extraordinary facts. See, e.g., *TRIBE*, *supra* note 21, at 267 (“Properly understood, both *Cooper* and *Marbury v. Madison* are consistent with *Katzenbach v. Morgan*.”) (discussing *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution.”)); *id.* at 254-67; Akhil Reed Amar, *Nixon’s Shadow*, 83 *MINN. L. REV.* 1405, 1411 (1999) (“Fear of defiance also helps explain the opinion’s overblown rhetoric proclaiming the Court the ‘ultimate interpreter of the Constitution’ (language not found in *Marbury*, and never appearing in U.S. Reports before the 1960s.)” (discussing *United States v. Nixon*, 418 U.S. 683, 704 (1974) (“ultimate interpreter of the Constitution”) (quoting *Baker v. Carr*, 369 U.S. 186 (1962))).

54. *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (emphasis added).

55. *Id.* at 535. “This has been clear from the early days of the Republic” and is the basis for affording acts of Congress a presumption of constitutionality. *Id.* But cf. *id.* at 545 (O’Connor, J., concurring) (“[W]hen it enacts legislation in furtherance of its delegated powers, Congress must make its judgments consistent with this Court’s exposition of the Constitution . . .”).

56. *Boerne*, 521 U.S. at 536.

the Court's less measured claims that Congress encroaches on judicial power when it legislates premised on views at odds with the Court's precedent.⁵⁷

The Court's subsequent opinions emphasize the more sweeping judicial supremacist statements from *Boerne*, rather than its departmentalist-like analysis, but the Court's reasoning continues to exhibit similarities with strong versions of departmentalism.⁵⁸ Both approaches focus in significant part on locating the interpretive authority at issue in one of the branches and maintaining clear lines to separate them. The Court not surprisingly settles on itself as interpreter, while strong departmentalists locate authority in whichever of the three branches is exercising constitutional power. Under the approaches at both extremes, interpretive arrogance, rather than respect and deference, is a hallmark of the interpretive process: both the Rehnquist Court and the Reagan Administration at times have exhibited undue arrogance about their own relative interpretive abilities.⁵⁹ Neither strong judicial supremacists nor strong departmentalists approach constitutional interpretation as a collaborative enterprise, with each branch encouraged to recognize its own institutional limitations and to respect the superior competencies of the others.

III

TOWARD A MODEL OF FUNCTIONAL DEPARTMENTALISM

The three branches' coordinate status, though central to their interpretive authority, alone is inadequate to sustain a strong form of departmentalism. Presidents and members of Congress undoubtedly must interpret, apply, and uphold the Constitution as supreme law, and the Constitution is more than what the Supreme Court says it means. More, though, is required to establish that elected officials should act on their own interpretations rather than defer to those of the Court or each other, at least to some degree and in some contexts. More consistent with the constitutional structure, as well as with past practice, is an approach to departmentalism that also reflects certain functional considerations, an approach I therefore call "functional departmentalism." The term may seem an oxymoron to some departmentalists. Professor Paulsen, for example, derides as "analytically incoherent" the "mushy middle that constitutes the prevailing consensus" under which Presidents possess only limited interpretive autonomy.⁶⁰ To the contrary, those who typically adhere to formalistic

57. See, e.g., Yoo, *supra* note 49, at 5-6 ("Although Congress may not force the judiciary to follow its theory of constitutional law, *City of Boerne* cannot compel Congress to adopt the Court's positions, nor can it necessarily prohibit Congress from using the other powers at its disposal to achieve the ends it believes to be constitutional.").

58. See cases cited *supra* note 52.

59. Some criticism of the Reagan Administration's assertion of interpretive authority has been excessive or misplaced and would have been better aimed at the substance of the positions the Reagan Administration advanced than at their basic legitimacy. At times, though, the tone of Reagan Administration reports setting forth independent constitutional interpretations exhibit undue interpretive arrogance and lack of respect for both the Court and Congress. See *supra* note 7.

60. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 83 (1993) ("The premises of executive branch interpre-

modes of interpretation should recognize the special value of a functional approach to determining constitutional meaning and the possibility that appropriate functional considerations would lead to outcomes that vary with context.

The obligation to interpret the Constitution, and thereby to influence constitutional meaning, is a constitutional responsibility that each branch should fulfill mindful of the other branches of government. It is a power and duty shared by all three branches, and its shared nature suggests that it ought not be fulfilled by each branch acting independently within its sphere of authority, without regard for effect. Thus, the issue is not best framed in terms that typically divide formalists and functionalists—that is, whether one branch of government is exercising the wrong kind of power.

Nevertheless, some strong departmentalists argue not only that the coordinate status of the departments dictates interpretive independence for each, but also that the best possible constitutional outcomes would result from the constitutional clashes and vibrant disagreement likely to result from the absence of deference.⁶¹ The Rehnquist Court also makes a functional claim to support its role as supreme interpreter: If Congress were permitted to “interpret” and not just “enforce” the Constitution,⁶² it in effect could amend the Constitution by a simple legislative majority and “no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’”⁶³ Extensive commentary on the quality of political branch interpretation undermines the Court’s assertion, at least in this extreme form,⁶⁴ but these, at least, are the types of functional considerations that should inform the parameters of interpretive authority.

Departmentalism should not be ceded to formalists and absolutists. Its focus on the textual and structural underpinnings for nonjudicial interpretive authority is both theoretically sound and of practical help in countering the prevailing excessive focus on the courts. The constitutional structure supports significant interpretive roles for Congress and the President, without mandating rigid lines between the branches or interpretive arrogance. Moreover, at least some forms of departmentalism are consistent with interpretive independence premised on the strong claims of the President and members of Congress as elected representatives to speak for the evolving constitutional values and views of the American people. When considered in context, the compelling historical examples some cite to support strong forms of departmentalism—most notably,

tive autonomy and of judicial supremacy are, in principle, irreconcilable. Either the executive branch possesses the prerogative of autonomous legal interpretation within the sphere of its powers or it is subordinate to the judiciary; the two propositions cannot peacefully coexist.”).

61. See, e.g., Paulsen, *supra* note 21, at 329-30.

62. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

63. *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also *id.* (“Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.”).

64. See, e.g., Whittington, *supra* note 19, at 779 (refuting, along lines similar to other commentators, the defense of judicial supremacy offered by Professors Alexander and Schauer in Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997)).

the actions and views of Thomas Jefferson, Andrew Jackson, and Abraham Lincoln—instead constitute less rigid and extreme forms of departmentalism.⁶⁵

The precise label—one person’s functional departmentalism may be another’s qualified judicial supremacy—matters far less than the identification of constitutionally appropriate principles, standards, and processes to govern political branch interpretation. Two desirable attributes of interpretive theory help guide my consideration of such issues here. First, Professor Christopher Schroeder has cautioned well against theories that set unattainable expectations for political branch decisionmaking: “Political theory aimed at articulating ideals that we should try to implement in our actual practice must necessarily persuade in theory and in practice.”⁶⁶ While there is value as well in more sweeping critiques,⁶⁷ this Article focuses on the relatively attainable. Second, in this symposium issue, Professor Barry Friedman reminds those who theorize about current constitutional events to exercise “historical humility” and test theory “in the crucible of very different circumstances.”⁶⁸ Humility and consistency are essential in the development of standards and processes to guide elected officials—Republicans and Democrats, conservatives, moderates, and progressives alike—as they interpret the Constitution, and the Supreme Court as it reviews those interpretations.⁶⁹

65. Some brief highlights: Thomas Jefferson explained his pardon of those convicted under the Sedition Act of 1798: “[N]othing in the Constitution has given [judges] . . . a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them.” Letter to Abigail Adams (Sept. 11, 1804), in 8 THE WRITINGS OF THOMAS JEFFERSON 311 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1897). President Andrew Jackson explained his veto of a bill to extend the charter of the Bank of the United States as premised on his view that the bill was unconstitutional, despite Supreme Court precedent to the contrary: “The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.” Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 582 (James D. Richardson ed., 1900). Among Abraham Lincoln’s statements in opposition to the Court’s decision in *Dred Scott*: “[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” First Inaugural Address (Mar. 4, 1861), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 9 (James D. Richardson ed., 1900).

66. Christopher H. Schroeder, *Deliberative Democracy’s Attempt to Turn Politics Into Law*, 65 LAW & CONTEMP. PROBS. 95, 118 (Summer 2002) (citing Thomas Nagel, *What Makes A Political Theory Utopian?*, 56 SOC. RES. 903, 903-04 (1989)).

67. See, e.g., TUSHNET, *supra* note 27.

68. Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS 149, 170 (Spring 2004) (“When we devise theories of constitutional theory . . . we ought properly to interrogate them by asking whether they are theories we would be willing to live with under different political configurations.”); see also TUSHNET, *supra* note 27, at 172 (“Our conclusion must consider *all* issues, not just the ones where the Court happens to be coming out on our side And it must not idealize the Court by saying that the good decisions—the ones we like—occur when the Court gets the Constitution right, and the bad ones occur when we happen to have the wrong justices.”).

69. For example, the diametrically opposed views of federal elected officials regarding abortion, ranging from the legitimacy of *Roe v. Wade* to legislative bans on “partial-birth abortions” to who should sit on the Supreme Court, illustrate the importance of humility and consistency as we theorize about the exercise of governmental authority.

The authority of Congress and the President to act on their own views of the Constitution should be viewed as constrained by the following two constitutional imperatives: (1) each branch must respect the constitutional functions and powers of all three branches of the federal government (which this Article will refer to as “interbranch respect for constitutional functions”); and (2) each branch is obligated to uphold and promote, not simply its own constitutional views, but principled and high-quality constitutional interpretations and interpretive processes (“interpretive quality”).⁷⁰ These principles in turn facilitate the development of more specific factors to guide and with which to evaluate the political branches.

The principles of interbranch respect and interpretive quality should be relatively noncontroversial and consensus-building among the scholars, government officials, and commentators of various ideologies who advocate a less court-centered constitutional culture. Nonetheless, ideology is relevant to their application, as are judgments on difficult-to-assess empirical questions. Views differ, for example, about what of value Congress and the President bring to the process of constitutional interpretation, which turns in part on what one believes are the appropriate methods and sources of constitutional interpretation. Those who believe that the Constitution is “dead” will find relatively little value in listening to the people speak through their elected representatives about the meaning of equal protection and liberty. They instead rely on other sources of interpretive legitimacy, such as that claimed by adherents to originalism. Beliefs vary, too, about the value of clear rules susceptible to consistent application, relative to more flexible standards likely to provide stronger, more particularized protection of rights.⁷¹ Even the choice of language can give rise to vehement disputes: should we speak of political branch influences on the “creation,” “development,” “discovery,” or “declaration” of constitutional law?⁷² One’s view of the constitutionally appropriate interpretive roles of the political branches ultimately will depend in part on choices among competing substantive values.⁷³

70. I suggested versions of these two principles, and six factors that flowed from these principles, in a previous assessment of how Presidents best fulfill their constitutional duty when confronted with the enforcement of statutes they believe unconstitutional. Johnsen, *supra* note 14, at 29-43.

71. See Kathleen M. Sullivan, *The Supreme Court, 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

72. See, e.g., *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (citations omitted) (“The very framing of the issue that we purport to decide today . . . presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. . . . To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it . . .”).

73. Professor Erwin Chemerinsky recognized that the selection of “a model for judicial review” “must be based upon substantive values, upon a political theory that examines how our government should be structured and identifies which values are so important that they must be shielded from majority rule.” Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1210 (1984).

A. Interbranch Respect for Constitutional Functions

The President must “preserve, protect and defend,”⁷⁴ and Congress must “support,”⁷⁵ the Constitution in its entirety, including its allocation of powers elsewhere. Any exercise of interpretive independence therefore must respect the constitutional separation of powers and the core functions of the other branches of government. Whether, for example, the President may take official action premised on constitutional views at odds with those of the Court or Congress depends on whether doing so would unconstitutionally infringe upon the Court’s judicial power or Congress’s legislative power. Again, while this articulation of principle finds support in political branch practice and judicial precedent and should spark little disagreement, controversy lies in its application.

The Court has held, for example, that Congress encroaches on judicial power when it enacts legislation premised on a substantive view of the guarantees of the Fourteenth Amendment that conflicts with the Court’s precedent. Significantly, the Court has described the problem in separation of powers terms and not simply as a disagreement with Congress on the merits of how to interpret the Fourteenth Amendment.⁷⁶ One omission in the analysis is striking: the Court ignored the general separation of powers principle that it employed in several previous cases. When assessing the Independent Counsel Act, for example, the Court rejected reliance on a formalistic search for the appropriate label for the type of power at issue—executive, legislative, or judicial—and instead asked whether the law allowed the President “to perform his constitutionally assigned duties.”⁷⁷ This approach of the seven Justices in the majority in *Morrison v. Olson* (in an opinion authored by Rehnquist) differs significantly from strong versions of both judicial supremacy and departmentalism.

Although *Morrison* has been sharply criticized, application of the general separation of powers principle that it articulates makes eminent sense in evaluating the contours of the shared responsibility of constitutional interpretation.⁷⁸ The determination of constitutional meaning clearly is not exclusively judicial in nature, but the constitutional structure should be viewed as imposing limits, consistent with *Morrison’s* approach, when the exercise of interpretive independence by one branch would prevent another branch “from accomplishing its

74. U.S. CONST. art. II, § 1, cl. 8.

75. *Id.* art. VI, cl. 3.

76. See cases cited *supra* note 52; Post & Siegel, *Policentric Interpretation of the FMLA*, *supra* note 15, at 1945 (“[The Rehnquist Court] has discovered an entirely new reason to renew judicial hostility to Section 5 authority: separation of powers.”).

77. *Morrison v. Olson*, 487 U.S. 654, 696 (1988); *accord* *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (“[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.”).

78. An alternate separation of powers theory could be fashioned to require more of each of the branches in the actual facilitation of the responsibilities of the other branches. While I do not here endorse such an approach, the accommodation principle the political branches use to govern congressional requests for executive branch material would provide a good model for exploration. Barron, *supra* note 36, at 101.

constitutionally assigned functions.”⁷⁹ Here especially, the debate over nonjudicial interpretation would benefit from close study of the past practices of the political branches. Congress and Presidents usually simply adhere to the Court’s views, and even where they instead have developed independent constitutional views, they do not consistently act on those views. Most striking, whether the political branches actually exercise power premised on independent constitutional views typically depends also on their own policy preferences and, further, on the particular constitutional power they are exercising and its relationship to the powers of the other branches. Functional departmentalism better explains this variability than do strong forms of either judicial supremacy or departmentalism.

Recent variations in presidential positions regarding constitutional issues of congressional power provide an illustration. Differences resulted in part from changes in the presidency, with the Reagan and George H.W. Bush Administrations promoting diminished congressional power, and the Clinton Administration defending then broad and deferential judicial views on congressional power. The Reagan Administration in particular developed detailed alternative visions that included substantial new limits on three of Congress’s principal legislative authorities: Section 5 authority, the commerce power, and the spending power.⁸⁰ On closer scrutiny, though, changes in who held office provide only a partial explanation. President George H.W. Bush’s positions varied also with his policy preferences. Bush, for example, raised congressional power concerns in opposition to the Freedom of Choice Act, which he also opposed on policy grounds.⁸¹ He did not object, though, to the Americans with Disabilities Act, which was vulnerable to similar criticism, but which he strongly favored as a matter of policy and enthusiastically signed into law; that law later became the subject of the *Garrett* decision, in which the Rehnquist Court substantially limited congressional power in ways the Reagan and Bush Administrations elsewhere had advocated.⁸² President George W. Bush has continued President Clinton’s defense of congressional power in the courts, even while his judicial appointments make the courts more hostile to his administration’s legal arguments and mirror those of Presidents Reagan and George H.W. Bush.⁸³

79. *Nixon*, 433 U.S. at 443.

80. See OLP, GUIDELINES, *supra* note 7; OLP, CONSTITUTION IN 2000, *supra* note 7.

81. *Hearing of the Comm. on Labor and Human Res. on S. 25 to Protect the Reproductive Rights of Women by Providing that a State May Not Restrict the Right of a Woman to Choose to Terminate a Pregnancy*, 102nd Cong. 8-24 (1992) (statement of John C. Harrison, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice).

82. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). After leaving office, President George H.W. Bush filed an *amicus curiae* brief in the Supreme Court in support of the law’s constitutionality. See Statement of Former President George H.W. Bush as Amicus Curiae in Support of Respondents, *Garrett*, 531 U.S. 356 (2001) (No. 99-1240).

83. See, e.g., Brief for the United States, *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368); Brief for the United States, *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (No. 01-46).

In addition to legal ideology, policy views, and partisan concerns, Presidents' constitutional positions reflect the varied institutional interests and responsibilities of the three branches. As a general matter, Presidents consider themselves free to veto legislation or grant pardons based on their own constitutional views, even if those views are in direct conflict with the Court's precedent.⁸⁴ Presidents also often have appointed Supreme Court Justices based on their legal views for the purpose of promoting constitutional change.⁸⁵ Yet only in extremely rare instances have Presidents claimed authority to decline to enforce a constitutionally objectionable statute,⁸⁶ and their Departments of Justice typically defend acts of Congress that in their view are unconstitutional, as long as a reasonable argument can be made in support of the law.⁸⁷ Presidents also invariably have complied with Supreme Court orders they believed premised on incorrect constitutional interpretations, though on rare occasion they reportedly have considered noncompliance.⁸⁸ These presidential practices reflect respect for the Court and Congress and are consistent with the general separation of powers.

Interpretive independence is least appropriate, and typically should be considered unconstitutional, as the basis for a presidential refusal to comply with the clear dictates of a court order or a federal statute. For the President to refuse to comply with a direct order from the Supreme Court, at least absent the most extraordinary of circumstances, would gravely impair the core power of the Court to decide cases or controversies and would seriously undermine the Court's very legitimacy.⁸⁹ More contested is presidential authority to decline to enforce a constitutionally objectionable statute. Contrary to a strong view of judicial supremacy, presidential respect for judicial power should not be viewed as the principal constraint on presidential nonenforcement. Indeed, Presidents sometimes decline to enforce laws premised on an application of relevant judicial doctrine and in the service of implementing the Court's interpretations, which poses no threat to either judicial supremacy or judicial power. The more relevant constraint is Congress's legislative power: for a President routinely to

84. See *supra* note 65 (quoting Andrew Jackson's veto message regarding the Bank of the United States and Thomas Jefferson's explanation of his pardon of those convicted under the Sedition Act of 1798).

85. See, e.g., OLP, CONSTITUTION IN 2000, *supra* note 7.

86. See, e.g., 1980 Civiletti Memorandum, *supra* note 47; 1994 Dellinger Memorandum, *supra* note 47.

87. See, e.g., Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001).

88. See, e.g., PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 20 (4th ed. Supp. 2004) (citing evidence that President Franklin D. Roosevelt would have executed suspected Nazi saboteurs regardless of the Court's decision in *Ex Parte Quirin*, 317 U.S. 1 (1942)).

89. Most proponents of strong departmentalism concede that the constitutional structure contemplates presidential adherence to court orders. See, e.g., Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1433 (1999) ("The Framers were right to legally bind the President to execute court judgments absent a clear mistake just as they were right to in other respects give all three branches . . . the co-equal power to enforce and interpret the Constitution."); see also Lawson & Moore, *supra* note 20, at 1314-27.

refuse to comply with any law he believes is unconstitutional would be inconsistent with the constitutionally prescribed process for lawmaking, which affords Congress final say on what becomes law. While Presidents may use the power of the veto to block unconstitutional bills, Congress possesses the ultimate power to override that veto and may do so premised on a disagreement with the President over the bill's constitutionality.⁹⁰

With these exceptions of court orders and enforcement of statutes, the exercise of presidential power premised on independent constitutional views typically does not impair judicial or legislative power. Nor, contrary to the Rehnquist Court's suggestions, does Congress unconstitutionally undermine judicial power when it legislates based on a constitutional view that differs from judicial precedent. Whether such acts of interpretive independence are constitutionally appropriate should depend on other factors, especially what will best uphold the Constitution and promote interpretive quality. A constitutionally based veto, for example, accompanied by an explanation of the President's views, promotes interbranch dialogue about constitutional meaning in a manner transparent to the public and consistent with the Constitution's allocation of lawmaking powers, without imposing new legal requirements on private citizens premised on a contested constitutional view. Far more difficult is whether Congress should pass and the President should sign legislation that is premised on a constitutional view inconsistent with the Court's announced views to the detriment of individual rights.

Given that the executive branch's constitutional views depend in part on the specific authority being exercised, the executive branch occasionally may, in the exercise of different constitutional responsibilities, adopt conflicting positions on the same issue under the same President. The Department of Justice, for example, routinely raises constitutional concerns about pending legislation in an effort to convince Congress to correct defects prior to passage. Sometimes those views are cited against the Department when it takes the contrary position in defense of the constitutionality of a federal law. Attorney General John Ashcroft became the target of an ethics complaint when he sent a letter to the National Rifle Association expressing views on the proper interpretation of the Second Amendment that allegedly conflicted with positions the Department of Justice was taking in litigation.⁹¹

Does an Attorney General (or President) act unethically or unconstitutionally by endorsing a constitutional position that conflicts with arguments his Department of Justice has offered a court in defense of an act of Congress? The answer must be no. Conflicting constitutional interpretations offered under the same President may be entirely appropriate when in pursuit of different responsibilities. Nor should the Department of Justice, for example, shade constitu-

90. See Johnsen, *supra* note 14 (discussing limited circumstances in which presidential nonenforcement may be constitutionally appropriate).

91. The complaint was filed by the Brady Center and Common Cause. The Bush Administration subsequently changed its position in litigation.

tional concerns about pending legislation because Congress might pass the law without making recommended changes and the Department's views might be cited against it in court. To conclude otherwise would threaten the quality of lawmaking and constitutional decisionmaking as well as governmental openness and accountability.

President Bush acts appropriately by having his Department of Justice continue the executive branch tradition of defending Congress before the courts (though he is not constitutionally compelled to do so) even if he, like President Reagan, personally supports a more limited view of congressional power. That his lawyers assert a position in court does not limit his authority, or the authority of his Attorney General, to espouse a conflicting position elsewhere. President Bush, in fact, has nominated and appointed judges who have endorsed exceedingly narrow views of congressional power at odds with those his administration's lawyers have advanced in court. President Bush possesses the authority to nominate judges based on their legal views, and the Senate just as surely is entrusted with the responsibility to consider those same views in the exercise of its advise-and-consent role.

B. Interpretive Quality

Congress and the President are constitutionally obligated to "uphold" the Constitution, which is distinct from their interpretations of the Constitution (just as the Constitution is distinct from judicial doctrine). The political branches should exercise interpretive independence only to the extent that it effectively promotes the Constitution as best interpreted, and not simply their own constitutional views. This distinction is consequential, though enormous difficulties and contention surround the evaluation of interpretive quality. On the one hand, the recognition that elected officials acting autonomously will not invariably reach the best constitutional interpretations suggests that context matters and that some degree of deference in some circumstances may be constitutionally indicated. All three branches should respect the considered constitutional views of the others in light of their "comparative institutional competenc[ies]."⁹² On the other hand, recognition that in many circumstances the courts will provide little or no meaningful review or guidance, and in other circumstances actually will anticipate a substantial political branch role, highlights that the question is not if, but when and how, the political branches should exercise interpretive independence.

Behind the public's acceptance of the Court's occasional self-aggrandizing statements of strong judicial supremacy, and even its resolution of a presidential election, lies distrust of political branch constitutional interpretation as unprincipled and improperly motivated by politics.⁹³ The Court has alluded to essen-

92. Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994).

93. See generally Schroeder, *supra* note 66 (discussing the public's views on politics and elected officials and citing relevant poll results).

tially that same fear through its references to “shifting legislative majorities” that would deprive the Constitution of its status as “superior paramount law, unchangeable by ordinary means.”⁹⁴ Commentators’ assessments of the branches’ comparative interpretive competencies vary widely, in part based on legal ideology and methodology preferences.⁹⁵

My own view is that the public’s (and the Court’s) fears are well founded, but not well addressed by the prevalent law/politics dichotomy that assigns law to the courts. Experience belies a sharp distinction: political branch influences on constitutional meaning are extensive and unavoidable, and the involvement of what sometimes is described as “high” politics has proven essential to the preservation of our constitutional structure and the promotion of our constitutional ideals.⁹⁶ Although the political branches clearly are capable of principled and valuable interpretation, the courts should continue to play a special, though not exclusive, interpretive role, particularly with regard to the protection of constitutional rights.⁹⁷ For reasons that underlie judicial doctrine, the courts should not ordinarily or easily permit the political branches to afford less protection to minority or fundamental rights than the courts deem warranted, but the same justifications for searching judicial review do not apply when the political branches choose to afford rights heightened protection.⁹⁸ More generally,

94. *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

95. Professor Mark Tushnet has warned that both formalists and functionalists tend toward idealization of preferred interpreters:

The formalists appeal to the idealization of constitutional law as real law, in which specialists in law attend carefully to the words and architecture of the Constitution.

.....

The functionalists, though, have their own difficulties. In their favor, they appeal to another dimension of our legal culture, the realistic assessment of politics as it actually is. Yet they offer an idealized version of the real world of politics, because they cannot work enough about that world into judicial opinions.

Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 604-05 (1992).

96. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001). For an extraordinarily rich historical analysis of constitutional law as “an historically extended tradition of argument, a means (indeed, a central means) by which this political society has debated an ever-shifting set of political issues,” see POWELL, *supra* note 41, at 6; see also Kramer, *supra* note 6; Post & Siegel, *Federal Antidiscrimination Legislation*, *supra* note 15; Post & Siegel, *Juricentric Restrictions*, *supra* note 15; Post & Siegel, *Policentric Interpretation of the FMLA*, *supra* note 15.

97. My own experience at the Department of Justice, working with many exceptional lawyers and under the leadership of Attorney General Janet Reno and Assistant Attorney General Walter Dellinger, established to my satisfaction that the quality of executive branch interpretation can rival that of the Supreme Court. At the same time, I believe that the quality of executive branch interpretation, across issues and across administrations, may be less consistently optimal than that of the Court. The Court’s doctrine at times may suffer from institutional biases, as evidenced by the Rehnquist Court’s strong declarations of judicial supremacy. Of greater concern, though, especially absent the stabilizing influence of significant deference to the Court: “A tendency to augment presidential power and allow policy and political considerations to influence constitutional interpretation—or, at a minimum, whether to raise genuine constitutional objections in support of policy goals—inheres in the institution of the presidency.” Johnsen, *supra* note 14, at 41.

98. Extensive academic commentary, as well as judicial precedent—too extensive to more than briefly note here—explore why and to what extent the judiciary should seek to guarantee at least a

while the courts alone do not determine constitutional meaning, when they do squarely address an issue, a practice of some measure of deference to that doctrine promotes principled political branch interpretations. At a minimum, whenever Congress or the President exercises authority premised on constitutional views at odds with the Court, the processes of political branch decision-making should ensure careful consideration of that doctrine and a detailed public explanation of the basis for disagreement.

Regardless of which branch engages in constitutional interpretation, law must not be reduced simply to politics, even as we struggle to define what distinguishes law from politics. Professor Sanford Levinson has put it well: “[W]hoever claims the mantle of constitutional interpreter must present a plausible notion of how (or whether) proffered interpretations differ from unmediated political preference.”⁹⁹ Professor Levinson also has correctly urged attention to the processes that govern constitutional decisionmaking by the political branches.¹⁰⁰ The Rehnquist Court is wrong to expect Congress to act like a lower court, but the political branches should adhere to processes that encourage principled interpretation and should defer to the Court, and also to each other, to the extent deference promotes interpretive quality. The development of appropriate processes is best viewed not as merely a policy choice to be left to the discretion of each official, but as integral to the constitutional authority of Congress and the President to take official action premised on independent interpretations. Among the characteristics especially desirable in the processes that guide the President are deliberativeness, transparency, humility, variability, and attainability.

1. Deliberativeness

Professor Harold Koh and other former attorneys from the Office of Legal Counsel have noted the importance of processes that promote principled deliberation as OLC fulfills its responsibilities as legal advisor to the executive

floor of protection for various constitutional rights against the infringement of political majorities. Much commentary focuses on the merits of the “one-way ratchet” approach of *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966), under which Congress would be free to exercise its Section 5 authority to afford more, but not less, extensive protection of rights than that provided by the courts. I generally agree with those who support enhanced congressional authority to provide stronger protections, though I recognize in some instances this will be complicated by the presence of competing claims to constitutional protection, as in the cases of abortion (potential fetal life) and affirmative action (nonbeneficiaries). See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 826 (1999) (“[T]he most sensible reading of the Fourteenth Amendment would involve both courts and Congress in the task of protecting truly fundamental rights against states, with states generally held to whichever standard was stricter—more protective of fundamental freedoms—in any given instance.”).

99. Levinson, *supra* note 13, at 16.

100. See, e.g., Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 379 (1994); see also PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (4th ed. 2000); LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (3rd ed. 2001); Brest, *supra* note 50; Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986); Johnsen, *supra* note 14, at 25-29.

branch on behalf of the Attorney General.¹⁰¹ While variations across administrations may be substantial, OLC often has followed a tradition of deliberativeness that transcends politics, fostered by “informal procedural norms designed specifically to protect its legal judgments from the winds of political pressure and expediency that buffet its executive branch clients.”¹⁰² Such norms should be encouraged and regularized. During the Clinton Administration, for example, OLC followed a “two-deputy review” process, which meant that its legal advice, ordinarily binding on the executive branch, had been subjected to the scrutiny of at least three OLC attorneys, two of whom were senior supervising attorneys. One aspect of the deliberative process worthy of special attention is the issue: deliberation by whom? Notably, the historical examples of interpretive independence most often cited by departmentalists involve the personal views of Presidents and members of Congress, including Thomas Jefferson, Andrew Jackson, and Abraham Lincoln.¹⁰³ The exercise of some presidential powers, such as the veto and the pardon powers, require personal action and thus an element of personal deliberation. Presidential authority to act on interpretations at odds with Supreme Court precedent, I would suggest, is enhanced when the President personally makes the final decision, rather than officials acting on his delegated authority.¹⁰⁴

2. Transparency

The public release of OLC legal opinions generally promotes principled and high-quality legal analysis and also makes possible public accountability, which is of independent constitutional value. Strong reasons for not releasing some material range from national security concerns to the chilling effect on those who seek advice on policy initiatives that may be abandoned based on legal advice. Further, the details of what should be released are debatable. Yet such legitimate differences do not explain the dramatic differences in practices among administrations regarding the public release of OLC opinions and other legal analyses. This variation may be due in part simply to inattention, lack of external demands, and the relatively low priority assigned by some administrations to openness in government. Public disclosure is especially warranted when the executive branch takes official action premised on independent constitutional views, rather than application of judicial precedent. In such cases, absent exceedingly strong countervailing factors, such as a threat to national security, the executive branch should release a detailed explanation to the public. Moreover, Congress and the public should exert pressure for such explanations

101. Harold Hongju Koh, *Protecting the Office of Legal Counsel From Itself*, 15 CARDOZO L. REV. 513, 514 (1993). See generally Symposium, *supra* note 38.

102. Koh, *supra* note 101, at 514.

103. See *supra* note 65.

104. Presidential advisors obviously do not always agree, even when a President strongly sets the broad parameters of an independent legal agenda, as Ronald Reagan surely did. See, e.g., CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991); DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* (1992).

in appropriate circumstances. Candor also is of great value regarding the general standards and processes that govern executive branch interpretation in a given administration.¹⁰⁵ Especially when Presidents seek to promote their constitutional views and actively participate in the development of constitutional meaning, as President Reagan did, the other branches of government and the public should know of their general approach and of any official actions they take premised on independent views.

3. Humility

I would add to Professor Friedman's call for historical humility that, just as academic theory must withstand "the crucible of very different circumstances,"¹⁰⁶ Presidents and members of Congress should strive for humility regarding their own relative interpretive abilities: humility in the ultimate service of constitutional fidelity. The ideal should reflect a willingness to live by the rules they establish even as power shifts to the other political party, as well as: a respect for the superior interpretive abilities and expertise of other branches, recognition of one's own negative tendencies that might interfere with principled interpretation (such as tendencies toward self-aggrandizement and self-protection), confidence in the assertion of principled views, and resistance to encroachments on interpretive authority. Humility, too, should guide the Court's determinations of what deference it should afford principled, candid political branch interpretations.¹⁰⁷ When confronted with the assertion of an independent view by Congress or the President, the Court typically should examine both the substantive merits of the position and the actual processes employed to reach that interpretation. This approach would be superior to the Rehnquist Court's rote and often-hollow claims of adherence to the presumption that federal legislation is constitutional—a presumption that itself is premised on the often inaccurate assumption that Congress passes and the President signs legislation only after a determination of its constitutionality.¹⁰⁸

105. See, e.g., sources cited *supra* notes 42 & 47.

106. Friedman, *supra* note 68, at 170.

107. Then-professor, now federal judge, Michael McConnell similarly called for "judicial humility:" [A]n essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions, especially when they conflict with the decisions of others who have, no less than judges, sworn an oath to uphold and defend the Constitution.

Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1292 (1997). One difficulty in application, of course, is disagreement over what humility entails. See William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, Georgetown University (Oct. 21, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 14 (Federalist Soc'y ed., 1986) ("[I]n truth [originalism] is little more than arrogance cloaked as humility.").

108. The Court's 1819 decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), provides one example of the Court favorably referencing deliberate and principled political branch interpretations:

The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was

4. Variability

Presidential and congressional interpretive practice has varied significantly—appropriately so—with the views of the officeholder. Most Presidents have afforded relatively strong deference to the Court’s constitutional views, as well as to Congress’s views as evidenced by its enactment of legislation. During the Clinton Administration, for example, OLC issued the following general guidance to executive branch agency general counsels:

[T]he constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court’s decisions interpreting the Constitution cannot simply be *equated* with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution.¹⁰⁹

At the other extreme lies President Reagan’s at least theoretical support for broad executive independence and his administration’s alternative constitutional vision and critique of numerous Supreme Court decisions as either “consistent” or “inconsistent” with that vision.¹¹⁰ Effecting sweeping constitutional change is only one of numerous possible presidential priorities, and nothing in the Constitution requires Presidents to place high on their lists resource-intensive development of comprehensive constitutional views to compete with those of the Supreme Court.¹¹¹ Variability across administrations does come at a potentially significant cost: significant imbalance might result from a pattern of Presidents of one political party (or ideology) consistently ranking constitutional change a higher priority than Presidents of the other party. The principal check, though, must be the American public, as it is generally on Presidents’ choices regarding priorities. Presidents and members of Congress ordinarily do not violate their constitutional oaths by choosing to adhere to judicial prece-

opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law.

Id. at 401-02. For discussions of the roles of all three branches in consideration of the constitutionality of a national bank and excerpts from relevant documents, see, e.g., BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 100, at 7-60; Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General’s First Constitutional Law Opinions*, 44 DUKE L.J. 110 (1994).

109. 1996 Dellinger Memorandum, *supra* note 42, at 517. While the Clinton Administration was considerably more deferential to the constitutional views of the Court than, for example, the Reagan Administration, it did, on occasion, disagree with the Court. See, e.g., *id.* at 558 n.116 (“The rationale of [Wiener v. United States, 357 U.S. 349 (1958)] . . . seems questionable.”); *id.* at 560 (“[W]e believe that the executive branch should resist any further application of the *Wiener* rationale. . . .”).

110. See OLP, GUIDELINES, *supra* note 7.

111. By contrast, Professor Paulsen’s reading of the Take Care clause unrealistically would “demand[] *full legal review* of all matters that come before [the President] to be ‘faithfully executed’; that is, executive review of the legal correctness of other branches’ actions.” Paulsen, *The Most Dangerous Branch*, *supra* note 51, at 261-62. For thoughtful discussions of the importance of balancing the costs of political branch deliberation against benefits, see Garrett & Vermeule, *supra* note 19; Schroeder, *supra* note 66.

dent. When they do diverge from precedent, though, they should exercise their interpretive independence to best promote the Constitution through principled, high-quality, transparent constitutional decisionmaking.

5. Attainability

Finally, do the preceding four characteristics suggest an attainable system? While relatively few would argue with the goals of improved deliberation, accountability, and humility, some strong incentives run in the opposite direction. All three branches of government possess incentives at times to minimize and malign congressional and presidential participation in shaping constitutional meaning. Witness the debate over the appropriate role of prospective judges' legal views in judicial selection and the charges of "politicization" of the process, as well as the testimony of executive branch nominees seeking to reassure the Senate that their personal constitutional views are irrelevant. In the end, these characteristics do provide realistic goals and, at minimum, helpful ideals to which we should aspire and attempt to hold our government officials. For the executive branch, in particular, the structures and practices for principled constitutional interpretation already are in place, with the greatest need for improvement in the area of transparency. Essential to success is public oversight. The Constitution itself provides incentives for the branches to regulate each other.¹¹² Congress regularly demands detailed constitutional views of the executive branch¹¹³ and less frequently, information about the processes by which constitutional interpretations were reached. More interbranch constitutional debate and demands of these sorts would improve political branch interpretation, as would increased awareness and attention by academics, the press, interest groups, and the public.

IV

FUNCTIONAL DEPARTMENTALISM APPLIED: ABORTION AND CONGRESSIONAL POWER

Some of the most extensive analyses of political branch influences on constitutional meaning focus on the issue of abortion. Important separate works by Professors Neal Devins and Barry Friedman in particular examine abortion as illustrative of the dialogic nature of constitutional interpretation, with constitutional meaning shaped by the interaction of judicial rulings and the political and

112. See generally TUSHNET, *supra* note 27, at 95-128 (discussing the "incentive-compatible Constitution," that is, the ways in which the Constitution is self-enforcing absent judicial review). See also THE FEDERALIST NO. 51 (James Madison) ("Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.").

113. Congress requires the Attorney General to notify Congress if the Department of Justice has determined that a law is unconstitutional and therefore refuses to enforce or defend it in litigation. See Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 21, 93 Stat. 1040, 1049-50 (1979); see also Johnsen, *supra* note 14, at 52-54 (discussing ways in which the processes of executive branch constitutional interpretations might be improved).

social responses to those rulings.¹¹⁴ Elected officials and advocacy groups clearly have not left the constitutional status of abortion to the courts since the Supreme Court purported to settle the matter in 1973. Presidents and many members of Congress are among those who have made extraordinary efforts to overrule and narrow the reach of *Roe v. Wade*.¹¹⁵ Notwithstanding the Court's declaration in its 1992 *Casey* decision of its authority to "speak before all others" about constitutional meaning,¹¹⁶ the issue of abortion illustrates the power of nonjudicial influences. Since *Casey*, the Rehnquist Court has rejected the value of multiple interpreters with greater clarity and vehemence, even as elected officials continue to challenge the Court's abortion rulings. Most striking is Congress's enactment of the Partial Birth Abortion Ban Act of 2003 (PBABA),¹¹⁷ which made it a federal crime to perform certain types of abortions that were labeled "partial-birth abortions," despite the Court's 2000 ruling in *Stenberg v. Carhart*¹¹⁸ invalidating a similar criminal ban.

This concluding Part considers federal activity regarding abortion. Secondly, it addresses Congress's Section 5 authority, a potential source of congressional power to regulate abortion and, since *Casey*, the context in which the Rehnquist Court most strongly has proclaimed interpretive supremacy. The extraordinary activity counter to *Roe*, and to reproductive liberty generally, has been within political branch authority. With the notable exception of the PBABA, Congress and Presidents have challenged the Court primarily in two contexts: through the appointment of federal judges, and through the expression of views either to the Court or to the public. Neither context directly restricts abortion in ways counter to the Court's doctrine. In both, the arguments for interpretive independence are particularly strong, but that is true for the courts as well: the courts should not defer to governmental determinations and actions less protective of reproductive liberty than the courts believe constitutionally required.

114. DEVINS, *supra* note 26, at 5 ("*Roe* ignited a constructive constitutional dialogue . . ."); Friedman, *supra* note 26, at 583 ("[C]ourts interpret the Constitution, but they also facilitate and mold a societywide constitutional dialogue."); see also BRUCE A. ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 397-403 (1998); MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS (1996); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990). I consider here only federal political branch influences and recommend the sources cited in this footnote for discussions of the many nonjudicial influences on abortion, including the critical roles played by social movements and state governments.

115. 410 U.S. 113 (1973).

116. *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992).

117. Pub. L. No. 108-105, 117 Stat. 1201. I do not evaluate here the far more extensive state governmental action in opposition to the Court's abortion decisions.

118. 530 U.S. 914. Professor Devins has stressed that abortion activity quieted following *Casey*, which he interpreted as evidence that nonjudicial interpreters respected the Court's rulings on abortion. DEVINS, *supra* note 26, at 8-9. Devins certainly is correct that those who oppose abortion tailor their actions to what likely will succeed in the Court, but his assessment of the dialogue is more positive than my own. A chief problem with the restrictions that the Court has upheld as a result of the interactions Devins describes—restrictions such as parental consent requirements and prohibitions on the use of public funds and public hospitals—is that they disproportionately harm the least politically powerful women, poor women and young women. The disparate impact of a complete overruling of *Roe* would be even greater.

One preliminary point: Under a functional departmentalist approach, the appropriate exercise of interpretive independence depends on context. Any generalization across issues should thus proceed with care. Particular care is warranted regarding abortion, which is a rich and often-discussed example precisely because it is an extraordinary legal, political, social, and moral issue that, in substantial ways, is not representative of how the political branches typically go about constitutional interpretation. The unusual public attentiveness to abortion—through the press, interest groups, and political parties—elevates the accountability of elected officials. Congress's Section 5 authority poses far greater challenges for those who disagree with the Rehnquist Court's rulings. Another obvious distinguishing characteristic of both abortion and congressional power, at least under the Rehnquist Court, is that the Court closely scrutinizes many arguably unconstitutional actions of the political branches and provides detailed constitutional views. Interpretive theory also must address the need for principled constitutional decisionmaking with regard to issues and contexts in which the political branches will not have the option of simply applying well-developed judicial doctrine, including issues of war powers and foreign affairs.

A. Political Branch Influences

Members of Congress and especially Presidents have at least considered the use of nearly the full range of their relevant constitutional powers to restrict abortion: the development of alternative constitutional theories and interpretations, the promotion of those views both through public debate and in litigation, the selection (and rejection) of federal judges based in significant part on their views on the constitutional status of reproductive liberty, congressional passage and presidential veto of legislation, executive branch regulations and policies, and even constitutional amendments.¹¹⁹ Political branch action regarding abortion has not proceeded solely in policy terms or on the basis of asserted superiority in relevant fact-finding, but has directly challenged the Court on the level of constitutional meaning. President Ronald Reagan stands out among opponents of *Roe*, and abortion was a central issue in his administration's more general attack on the Court and its promotion of presidential interpretive independence.¹²⁰

119. See DEVINS, *supra* note 26, at 299 ("Each and every feature of the abortion dispute is dominated by elected government action.").

120. Charles Fried has written of his time as Solicitor General during the Reagan Administration: "The Reagan administration made *Roe v. Wade* the symbol of everything that had gone wrong in law, particularly in constitutional law." FRIED, *supra* note 104, at 72; see also KMIEC, *supra* note 104, at 72-89 (discussing the Reagan Administration's abortion policies, in a section entitled "Abortion: The Licit Murder of Family Members"); OLP, GUIDELINES, *supra* note 7, at 8 ("The so-called 'right of privacy' cases provide examples of judicial creation of rights not reasonably found in the Constitution."); *id.* at 82-83 (declaring the following, among many other Court decisions, "inconsistent" with the Reagan Administration's constitutional views: *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating state law that criminalized the performance of abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state statute that criminalized the use of birth control devices); and *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating state statute that forced sterilization of certain "habitual" criminals)).

The Court's 1992 decision in *Planned Parenthood v. Casey*¹²¹ is best known as the case in which the political branches failed in their attempt to change constitutional meaning. In an interview published in 2000, former Attorney General Meese cited the Court's failure to overrule *Roe* as the greatest failure of the Reagan legal agenda.¹²² Less generally appreciated (though widely recognized among academics and advocates), *Casey* also represented a substantial partial victory for Presidents Reagan and Bush and an example of successful presidential efforts to change constitutional meaning: the Court substantially reduced the level of protection afforded women in their choices regarding abortion. For all of its eloquence about the rule of law and the importance of reproductive choice, as well as its practical import in retaining a floor of constitutional protection, the Court expressly overruled in part its two most recent abortion cases—*City of Akron v. Akron Center for Reproductive Health, Inc.*¹²³ and *Thornburgh v. American College of Obstetricians and Gynecologists*¹²⁴—by upholding a state-mandated waiting period indistinguishable from those it had invalidated in *Akron* and *Thornburgh*. Most significantly, *Casey* replaced the fundamental right/strict judicial scrutiny standard, which essentially foreclosed government restrictions prior to the point of fetal viability, with a new, less protective “undue burden” standard that allows some pre-viability restrictions.

Notably, it was President Reagan's Solicitor General, Rex Lee, who first urged the Court to adopt the undue burden standard, in a brief filed in *Akron*.¹²⁵ The Court declined, and six Justices (down from seven in *Roe*) continued to apply strict scrutiny and recognize as fundamental the liberty to make abortion decisions free from governmental interference. Justice O'Connor endorsed the undue burden standard in dissent,¹²⁶ and a decade and four Reagan and Bush appointments later, the joint opinion of Justices O'Connor, Kennedy, and Souter in *Casey* adopted the undue burden standard.¹²⁷ In the interim, the Reagan and Bush Administrations had filed five *amicus curiae* briefs urging the Court to go further and expressly overrule *Roe*.¹²⁸ In the Court's 2000 *Stenberg* decision, Justice Kennedy split with Justices O'Connor and Souter on how to apply the undue burden standard, and the Court invalidated a Nebraska “partial birth abortion” ban by a vote of five to four.¹²⁹ Presidential and congress-

121. 505 U.S. 833 (1992).

122. Edwin Meese III, *Dialogue: Reagan's Legal Revolutionary*, 3 GREEN BAG 2D 193, 199 (2000).

123. 462 U.S. 416 (1983).

124. 476 U.S. 747 (1986).

125. Brief for the United States as Amicus Curiae in Support of Petitioners, *Akron* (No. 81-746) [hereinafter United States *Akron* Brief].

126. *Akron*, 462 U.S. at 463 (O'Connor, J., dissenting).

127. *Casey*, 505 U.S. at 833.

128. *Id.* at 844 (noting that “the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*”). Rex Lee's successor, Charles Fried, has written of his belief that if in the 1986 *Thornburgh* case he had wanted to argue for anything less than an express overruling of *Roe*, as Lee had by proposing the undue burden standard in *Akron*, “I would simply [have been] overruled.” FRIED, *supra* note 104, at 34. Fried's appointment as Solicitor General may have depended on his willingness to urge the Court to overrule *Roe*. *Id.* at 34-35.

129. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

sional efforts to overrule *Roe* continue. Despite *Stenberg*, Congress passed and President George W. Bush signed into law the PBABA,¹³⁰ and President Bush has pledged to appoint “conservative” Justices like Justices Thomas and Scalia, who, along with Chief Justice Rehnquist, consistently have voted to expressly overrule *Roe*.¹³¹

In affirming what it described as “*Roe*’s essential holding,”¹³² the joint opinion in *Casey* offered one of its strongest statements of judicial supremacy:

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of *the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals*.¹³³

In an extraordinarily open discussion about its motivations, the joint opinion in *Casey* justified its adherence to what it described as a “watershed” precedent¹³⁴ in part on the need to protect the Court’s legitimacy and appear principled in the public’s eye: “The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures”¹³⁵ Overruling *Roe* instead would have drawn attention in a politically explosive context to the role legal views on abortion had played in Reagan and Bush’s appointments to the Court.

The irony in the joint opinion’s explanation for its decision—the need to avoid the appearance that it was responding to public pressure—is obvious. Moreover, there is no question that opposition to *Roe* by Presidents Reagan and Bush—and the appointment of Justices who shared that opposition—resulted in the Court’s decision in *Casey* to replace strict scrutiny/fundamental rights analysis with the far less protective undue burden standard. The opinion studiously downplayed the significance of this change and did not expressly apply the principles of *stare decisis*, so fully discussed and carefully applied with regard to *Roe*, to the two cases and the standard of review that the Court essentially overruled.

130. Pub. L. No. 108-105, 117 Stat. 1201 (2003).

131. Neil A. Lewis & David Johnston, *Bush Would Sever Law Group’s Role in Screening Judges*, N.Y. TIMES, Mar. 17, 2001, at A1. Just days after the November 2002 election gave Republicans control of both houses of Congress (in addition to the presidency), prospective Senate majority leader Trent Lott promised a federal law criminalizing so-called partial birth abortions. Dana Milbank, *Lott’s Promise to Bring Up Abortion Worries Bush Aides*, WASH. POST, Nov. 12, 2002, at A23; see also Editorial, *The War Against Women*, N.Y. TIMES, Jan. 12, 2003, at A14 (“The lengthening string of anti-choice executive orders, regulations, legal briefs, legislative maneuvers and key appointments emanating from [President George W. Bush’s] administration suggests that undermining the reproductive freedom essential to women’s health, privacy and equality is a major preoccupation of his administration—second only, perhaps, to the war on terrorism.”).

132. *Casey*, 505 U.S. at 846.

133. *Id.* at 868 (emphasis added).

134. *Id.* at 867 (“[O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure”).

135. *Id.* at 865.

The Court followed its strong assertion of interpretive supremacy in *Casey*—there, as the grounds for maintaining some protection for reproductive liberty—with decisions in *Boerne*,¹³⁶ *Kimel*,¹³⁷ and *Garrett*¹³⁸ placing limits on Congress’s Section 5 power to protect individual rights. The Court was right in *Casey* to uphold *Roe* based upon *stare decisis*, but its broad assertions of judicial supremacy were unnecessary to that holding: the decision of a Justice to uphold a landmark decision like *Roe* despite personal disagreement can be an act of judicial humility, a recognition that an issue of this importance and contention regarding an individual right should not vary with the individuals who happen to sit on the Court at the time, some of whom were appointed in part because of their views on this very issue.¹³⁹

The Court’s approach in *Casey* was a strong assertion of judicial supremacy in the service of preserving some core of a “watershed” decision that protected an embattled, politically divisive individual right from legislative infringement. *Casey* by no means mandated the Court’s later decisions invalidating congressional attempts to *enhance* federal rights protection (specifically for religious liberty and against age and disability discrimination).¹⁴⁰ Nor did it require the Court’s failure to recognize in those cases that Congress is capable of contributing to principled constitutional interpretation. These later decisions, more clearly even than *Casey*, represent presidential success in transforming constitutional meaning. They, too, resulted directly from a Reagan-initiated campaign, this time to diminish Congress’s power and enhance “states’ rights,” including through the development of constitutional theories and the appointment of Justices who would adopt those theories.¹⁴¹

Efforts by Congress to legislate concerning abortion—whether to restrict or protect lawful abortion—thus confront not only the undue burden test, but also the Court’s view that congressional efforts to define constitutional meaning contrary to the Court’s interpretations violate the separation of powers. The Court’s insistence that it is illegitimate for Congress to attempt to define the scope of the Fourteenth Amendment’s guarantees strengthens existing incentives for Congress to base abortion legislation instead on its commerce power and to thus disguise both the purpose and effect of laws that regulate abortion, as it subsequently did with the PBABA.

Despite the wide-ranging activity hostile to *Roe*, the specific ways in which the political branches have asserted independent views fare well under a func-

136. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

137. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

138. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

139. See ACKERMAN, *supra* note 114, at 399 (stating that if the Court had overruled *Roe* and subsequent “pro-*Roe* nominees made it to the Court . . . the result would have been a decade of jurisprudential crisis as a new 5-to-4 majority overruled *Casey*’s 5-to-4 overruling of *Roe*—leading perhaps to an effort by the next President to reverse the reversal”).

140. See *supra* notes 136-138.

141. At the same time that Meese cited abortion as the “most disappointing loss” on the Reagan legal agenda, he cited the Rehnquist Court’s congressional power and federalism decisions as among the Reagan Administration’s greatest successes in moving the law. Meese, *supra* note 122, at 199.

tional departmentalist approach. With regard to the first suggested principle of interbranch respect for constitutional functions, Presidents notably have not acted on independent views in the exercise of the two presidential powers that would raise serious separation of powers issues: a presidential refusal to comply with a judicial order or a duly enacted federal statute. With the exception of the PBABA, the powers Presidents and Congress actually have exercised to oppose the Court—primarily voicing opposition to *Roe* and appointing judges based on their legal views—did not prevent another branch of government “from accomplishing its constitutionally assigned functions.”¹⁴² To be clear, Presidents and Congress have restricted abortion in ways other than advocacy and judicial appointments, and some of those actions were at least arguably constitutionally objectionable.¹⁴³ But whatever one’s view of the constitutional merits of the substance of political branch opposition to *Roe*, almost all past manifestations have been consistent with the Constitution’s allocation of federal authority.

Almost all past assertions of independent views also seem constitutionally authorized when evaluated with regard to my second suggested principle: the promotion of the Constitution through interpretive quality. Again, the federal ban on partial birth abortions constitutes the notable exception. Because abortion is an issue of exceptional public and political interest, elected officials typically feel compelled to formulate their own positions—constitutional as well as religious and moral—rather than simply declare that it is an issue for the Court to decide. That same public attention and pressure, facilitated by the press, interest groups, and political parties, helps ensure that elected officials and candidates for public office announce detailed views on abortion and settle on those views personally, thereby promoting deliberativeness and transparency. Humility, in my view, counsels particularly strong deference to the Court in the protection of rights and counsels against judicial deference to the political branches. When, though, elected officials are candid with the public about their constitutional views on abortion, they do not act beyond their interpretive authority when they advocate those views before the courts and the public or appoint Justices in part based on those views. The proper response of the courts, and of the Senate with regard to judicial nominees (and generally of the three branches with regard to each other), is to continue to safeguard and uphold rights consistent with their own interpretations of the Constitution.

The one aspect of interpretive quality in which the political branches (and the Court) have not fared particularly well is public transparency and candor regarding the processes of constitutional interpretation, both generally and also with specific regard to abortion. The American public cannot help but know of

142. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

143. I would cite the imposition of funding restrictions and what is commonly described as the abortion counseling Title X “gag rule,” though on both the Court ultimately agreed with the President and Congress and upheld the restrictions. See *Rust v. Sullivan*, 500 U.S. 173 (1991); *Harris v. McRae*, 448 U.S. 297 (1980). See generally DEVINS, *supra* note 26, at 78-120.

the continued political assaults on the supremacy of the courts regarding abortion. And yet, even here, officials in all three branches of the government at times obfuscate and deny the roles played by Congress and the President in shaping constitutional meaning. Judicial appointments provide the clearest example. Accusations that the Senate's consideration of nominees' legal views improperly politicizes the law are made in the face of presidential pledges to remake the Court along the lines of its most ideologically conservative members and claims that "philosophy" but not "ideology" should matter.¹⁴⁴ That Justices appointed by Presidents Reagan and George H.W. Bush authored the *Casey* joint opinion is cited as evidence of both judicial independence and the need for more careful ideological screening of nominees in the future. The Rehnquist Court's opinions that denigrate nonjudicial constitutional interpretation and diminish congressional power also threaten to add to public misunderstanding about constitutional change and to exacerbate existing incentives for the political branches to disclaim responsibility for constitutional interpretation.

Positions taken by John Ashcroft on the PBABA illustrate the range of interpretive authority government officials may claim—from strong departmentalism to strong judicial supremacy, even on a single issue—and expose some of the pressures to deny existing interpretive authority. Then-Senator John Ashcroft urged the Senate to override President Clinton's veto of a ban on so-called "partial birth abortions." Ashcroft not only strongly disagreed with the Court's abortion decisions, but he advocated a strong view of congressional interpretive independence and authority to legislate based on views at odds with Supreme Court precedent. He testified about his belief, contrary to *Roe*, that the Fourteenth Amendment protects the right to life of the fetus, and that Congress's Section 5 authority therefore supported enactment of the federal ban: "[A]llowing this life-taking procedure to continue would be inconsistent with our obligation under Section 5 of the Fourteenth Amendment to protect life."¹⁴⁵

Yet as the President's nominee to serve as Attorney General, Ashcroft sought to minimize the extent of his prospective interpretive authority. During his Senate confirmation hearing, Ashcroft sought to reassure the committee that, as Attorney General, he would not be in a position to act on his own constitutional views. In response to questions about how he would advise President Bush on the PBABA, Ashcroft testified that he would be bound by the Court's abortion decisions, which he described as "settled law," thereby implying that he might recommend President Bush veto the law.¹⁴⁶ Not only did President Bush sign the federal abortion ban, but Ashcroft's Department of Justice had

144. See, e.g., *The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (2001); 149 CONG. REC. S14528 (2003) (thirty-nine hour filibuster regarding judicial selection).

145. 144 CONG. REC. S10491 (1998). Ashcroft further stated, "I expect those defending the President's veto will say that opponents of partial birth abortion are really against all abortions. Well, Mr. President, I cannot speak for other Senators, but on that charge, I plead guilty." *Id.*

146. *Confirmation Hearing on the Nomination of John Ashcroft to be Attorney General of the United States, Hearing before the Senate Judiciary Comm.*, 107th Cong. 207 (2001).

earlier filed a brief in support of the constitutionality of a similar state law.¹⁴⁷ Ashcroft's positions, one strongly departmentalist and the other strongly judicially supremacist, are not necessarily entirely contradictory, for he spoke first as a Senator and then as a prospective Attorney General. Nor was he the first nominee to seek to reassure a potentially hostile Senate by minimizing his prospective authority. But it is striking that Senators did not do more to challenge Ashcroft, which might reflect the lack of a shared understanding of the interpretive authority and power of Presidents and their advisors, notwithstanding our nation's recent experience with the Reagan/Meese campaign to remake constitutional law. On issues of constitutional interpretation, the politically accountable branches are inadequately so.

B. Legislation Premised on Political Branch Disagreement with the Court

The enactment of the PBABA presents the issue of political branch interpretive independence in an especially complicated and contentious context. Congress passed, and President Bush signed into law, restrictions on abortion difficult to distinguish from those the current Court had held unconstitutional just three years earlier.¹⁴⁸ No intervening change in the Court's composition or doctrine suggests that the Court will decide the issue differently.¹⁴⁹ It is instructive to think about the PBABA in connection with the Freedom of Choice Act (FOCA), federal legislation introduced, but never enacted, that would have expanded protection for reproductive liberty.¹⁵⁰ The FOCA is similar in this respect to some rights-protective statutory provisions the Rehnquist Court has found beyond Congress's Section 5 authority.¹⁵¹ The FOCA first was introduced in 1989,¹⁵² when it seemed likely that the Court would go further than it thus far has to diminish judicial protection for reproductive liberty. Indeed, the Court's

147. Brief for the United States of America as Amicus Curiae Supporting Reversal, *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003) (No. 01-4124).

148. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

149. Congress purports to avoid this outcome by making a series of factual findings that it declares are superior to those found by the courts in *Stenberg*. See generally Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?* 109 YALE L.J. 1535 (2000).

150. See, e.g., S. 25, 103rd Cong. (1993); S. 1912, 101st Cong. (1989).

151. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act).

152. See S. 1912, 101st Cong. (1989). Even before *Roe v. Wade*, members of Congress considered federal statutory protection for abortion. In 1970 Senator Bob Packwood introduced the National Abortion Act, which would have legalized abortion nationwide (and preempted inconsistent state laws) by setting a national standard strikingly similar to the standard the Court adopted three years later. 117 CONG. REC. 13,155-56 (1971). The National Abortion Act would have authorized physicians to perform abortions prior to twenty weeks of pregnancy, a point chosen to "make absolutely certain that there would be no abortion of a viable fetus," and after that point when the physician determined that to continue the pregnancy would likely endanger the health or life of the woman. *Id.* Senator Packwood indicated initial concern about Congress's authority to bind the states in this manner, but ultimately concluded Congress had the authority to protect the fundamental right to privacy, "one of our most precious and basic constitutional guarantees." 116 CONG. REC. 12,672 (1970).

1989 decision in *Webster v. Reproductive Health Services*¹⁵³ suggested that the Court was at most one judicial appointment away from overruling *Roe* and allowing states to criminalize abortion.¹⁵⁴ The FOCA originally was drafted to preserve *Roe*'s "strict scrutiny" level of protection, and then was redrafted after *Casey* to take account of the Court's new "undue burden" test. The ultimate aim, though, remained unchanged: to preserve as a statutory matter the level of constitutional protection the Court afforded abortion beginning with *Roe*¹⁵⁵ through its 1986 decision in *Thornburgh v. American College of Obstetricians and Gynecologists*.¹⁵⁶ Thus, both versions sought to invalidate state laws that the Court would uphold as constitutional.

My aim here is not to assess comprehensively the constitutionality of the PBABA and the FOCA. Even under the Rehnquist Court's new limits, the Court likely would (and should) find that Congress possesses the affirmative authority to enact both pieces of legislation pursuant to the commerce clause. Rather, I consider here only the counter-factual question: If Section 5 were Congress's only arguable basis for legislative authority, would Congress exceed that authority—and, as suggested by the Rehnquist Court, violate the constitutional separation of powers—by enacting legislation premised on a view of constitutional meaning that conflicts with the Court's precedent? This question, of course, would not exhaust assessment of the law's constitutionality. Even if Congress does not encroach on judicial power by enacting a law premised on independent constitutional views, the law might unconstitutionally infringe on protected constitutional rights (as in the case of the PBABA) or constitutional structures (such as federalism).

For example, Congress drafted the FOCA as an exercise of both its commerce power and its Section 5 authority, and President George H.W. Bush opposed it on federalism and other grounds.¹⁵⁷ If enacted, would the FOCA encroach on judicial power by redefining liberty to invalidate state restrictions the Court has upheld, or should its constitutionality depend instead on a direct assessment of possible federalism objections? Professors Robert Post and Reva Siegel emphasize the importance of this distinction in their analysis of Congress's Section 5 authority to enact the Family and Medical Leave Act.¹⁵⁸ Post and Siegel argue convincingly that the Court's "enforcement model" of Section 5, with its new congruence and proportionality test, "is not healthy doctrine" because it hides the Court's true federalism concerns behind a faulty conception of separation of powers.¹⁵⁹ The Court, by "hijacking doctrinal formulations

153. 492 U.S. 490 (1989).

154. See *TRIBE*, *supra* note 114, at 172-92 (describing events leading up to the introduction of the Freedom of Choice Act of 1989).

155. 410 U.S. 113 (1973).

156. 476 U.S. 747 (1986). See generally Comm. on Labor & Human Res., *The Freedom of Choice Act of 1993*, S. REP. NO. 103-42 (1993).

157. See *supra* note 81 and accompanying text.

158. Post & Siegel, *Policentric Interpretation of the FMLA*, *supra* note 15.

159. *Id.* at 2050.

designed for completely different purposes,” avoids speaking candidly to the true constitutional issues.¹⁶⁰ The Court thereby enhances its own power at Congress’s expense, while diminishing the possibility of public understanding and accountability.

Under the first of the two functional departmentalist principles—interbranch respect for constitutional functions—neither the PBABA nor the FOCA would prevent the Court “from accomplishing its constitutionally assigned functions,”¹⁶¹ either as each statute was drafted or even if they had been more expressly premised on a repudiation of the Court’s constitutional views. The Court would remain free to invalidate the laws to the extent that they conflict with what the Court believes to be the best interpretation of the Constitution. The second principle presents serious difficulty for the PBABA: What do Congress and the President contribute to constitutional interpretive quality through the enactment of this law? Not much, it seems to me. The only claim the law makes regarding its constitutionality is its factual finding, contrary to that of the courts, that the prohibited procedures never are medically indicated and, in fact, threaten women’s health. Absent a sincere belief in this controversial and extreme position, President Bush and members of Congress would have difficulty identifying a constitutional justification for their knowing infringement on a constitutional right recently declared by the Court; their support for the law otherwise would seem politically driven and manipulative rather than constitutionally principled, deliberative, and transparent.

The constitutional analysis is complicated, though, by the Court’s role in discouraging constitutional dialogue and candor in lawmaking through its declarations of strong judicial supremacy, as the enactment history of the PBABA illustrates. John Yoo has written about advice he gave as general counsel to the Senate Judiciary Committee, prior to the Court’s 2000 *Stenberg* decision,¹⁶² regarding the relative advantages of two possible approaches to a proposal by “opponents of abortion (including Chairman Hatch)” to criminalize the performance of so-called “partial birth abortions.”¹⁶³ The Department of Justice had advised Congress of the Office of Legal Counsel’s determination that the bill was unconstitutional (consistent with the Supreme Court’s subsequent holding in *Stenberg*).¹⁶⁴ Yoo advised (again, prior to *Stenberg*) that the Senate had two justifications for nevertheless enacting the legislation. First, Congress could assert a strong departmentalist approach to Congress’s right to interpret the Constitution as it believed best: Congress simply could disagree, for example, with the Court’s declared view that women’s health was paramount, and decide it preferred the reasoning of the Court’s dissenters.¹⁶⁵ The availability of a sec-

160. *Id.* at 2050-51.

161. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

162. 530 U.S. 914 (2000).

163. Yoo, *supra* note 49, at 7.

164. *See id.* at 8-9.

165. *Id.* (“Congress could reach its own interpretations of the Constitution and could decide, if it wished, to enforce it rather than the doctrines of the Supreme Court.”).

ond possible approach, though, made unnecessary “[s]uch an aggressive use of Congress’s authority to interpret the Constitution.”¹⁶⁶ Congress instead could fashion the bill as within the Court’s relevant precedent by either adding a health exception or finding evidence that one was not necessary.¹⁶⁷ Yoo advised that the second approach was politically preferable because poll results demonstrated that most Americans did not want the Court to overrule *Roe*, but would support a ban on procedures described as “partial birth abortions.”¹⁶⁸ The PBABA’s text and legislative history follow Yoo’s advice and take an additional step: Extensive factual findings comprise most of the bill’s text, declaring not only that the banned procedures are medically unnecessary, but that they actually endanger women’s health and lives.

With the PBABA, Congress purported not to challenge the Court’s views on constitutional meaning—which would have been a losing strategy in the Court after *Garrett*¹⁶⁹—and instead described its disagreement as merely a factual one, regarding which Congress claimed to possess superior fact-finding ability. The Court’s adoption of the undue burden standard creates possibilities for legislative (and lower court) fact-finding that reaches conclusions that differ from those of the Court with regard to similar restrictions. Solicitor General Rex Lee described the standard, in advocating for it in the 1983 *Akron* case, as “appropriately deferential” to legislatures’ “superior fact-finding capabilities:”

Because the legislature has superior fact-finding capabilities, is directly responsible to the public for its resolution of the policy issues it treats, and has greater flexibility than the courts to fine-tune and redirect its efforts if a particular solution is ill-founded or unwise, the courts should test the constitutionality of legislation impacting upon the abortion choice by an appropriately deferential standard.¹⁷⁰

Both the PBABA and the FOCA were drafted to avoid a direct confrontation with the Court over constitutional meaning and also to comply with the theory, which the Rehnquist Court continues to endorse, albeit in a more limited form, that Congress possesses some authority to reach certain kinds of constitutional conclusions that differ from those the Court has reached. The FOCA was re-drafted after *Casey* to follow the undue burden standard and to include congressional findings, contrary to the Court’s factual determination in *Casey*, that, for example, mandatory waiting periods do constitute an undue burden in practice.¹⁷¹ After *Hibbs*, and given the heightened scrutiny the Court continues to

166. *Id.* at 9.

167. Congress therefore could “interject its own interpretation without challenging the whole structure of abortion rights.” *Id.* Yoo premised his advice also on his interpretation of the bill’s vague definition of the banned procedure as limited to post-viability abortions, when the Court has held the government’s interest in the potential life of the fetus is greatest. The Committee Reports make clear a contrary intent, to ban as well pre-viability abortions. See, e.g., H.R. Rep. No. 104-267, at 9 (1995).

168. Yoo, *supra* note 49, at 9.

169. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

170. United States *Akron* Brief, *supra* note 125, at 5.

171. While the aim of the Reagan Administration was to allow greater limits on abortion, the undue burden standard allows Congress and lower courts also to invalidate restrictions similar to those that the Supreme Court has upheld. In addition to the FOCA, see *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 132 F. Supp. 2d 1150 (S.D. Ind. 2001), *rev’d*, 305 F.3d 684 (7th Cir. 2002).

apply to abortion restrictions, the FOCA should satisfy the Rehnquist Court's requirement of a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹⁷² A similar argument is not available for the PBABA, which the Court likely will, and should, invalidate, upon close scrutiny of the law's factual findings.

What if Congress had proceeded instead on a more aggressive departmentalist theory (such as that noted, but not recommended, by Yoo) and had drafted and enacted the PBABA—or the FOCA—expressly premised on an understanding of the Fourteenth Amendment's guarantee of liberty that directly conflicted with the Court's precedent? Should that change affect the constitutional analysis? Assume that the PBABA, in addition to its findings regarding the lack of need for a health exception and lack of burden, contained a statement of purpose along the lines of then-Senator Ashcroft's testimony, that Congress was acting to enforce the right to life of the fetus under the Fourteenth Amendment. Or what if Congress had expressed a different, less expansive conception of women's reproductive liberty than the Court? Or assume that Congress enacted the FOCA, with all of its findings regarding why waiting periods and other restrictions constitute undue burdens, but also with a statement that Congress believed that *Casey* was wrongly decided and that the Court should not have replaced *Roe*'s strict scrutiny standard with the *Casey* undue burden standard.

Such statements of congressional views directly rejecting the Court's declared view of constitutional meaning alone could not be said, even by the Rehnquist Court, to usurp judicial power. But the Court's Section 5 doctrine suggests that the inclusion of such statements increases the likelihood that the Court would invalidate the law as an unconstitutional attempt to "alter" constitutional meaning as declared by the Court.¹⁷³ The very purpose behind the Court's development of the congruence and proportionality test was to ferret out congressional efforts at autonomous constitutional interpretation, under the guise of enforcement.¹⁷⁴ If Congress asserts that it is, in fact, legislating based on a different view of constitutional meaning, the Rehnquist Court might conclude it has all the information it needs to declare a separation of powers violation.

The Court should not count as a strike against a law's constitutionality efforts by Congress and the President to contribute meaningfully to constitutional debate through express disagreement with the Court. Instead, the Court's constitutional assessment typically should focus on the merits of the law's effects on constitutional rights and other constitutional structures and interests.¹⁷⁵ Judicial

172. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), *discussed in* *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 722 (2003).

173. *Boerne*, 521 U.S. at 519.

174. *Id.*

175. That is not to say that expressions of political branch disagreement with the Court's constitutional interpretations should never be relevant to judicial review. Sincere and convincing factual findings by Congress regarding what constitutes undue burdens on the choice of abortion, for example,

review should reflect the judiciary's special role in protecting individual constitutional rights from majority infringement. Conversely, when the political branches choose to provide enhanced protection to individual rights, even when premised on their independent views of constitutional meaning, the courts should afford their judgments far greater deference. Regardless, though, of one's views on such contested issues, judicial doctrine and interpretive theory should recognize the great value in encouraging candor in government action by all three branches.

V

CONCLUSION

A review of political branch influences on the constitutional status of abortion underscores the need for humility and consistency in theorizing about interpretive authority. Most presidential and congressional efforts have aimed to restrict or criminalize abortion, and the Supreme Court has served as the primary protector of reproductive liberty. A functional departmentalist approach that recognizes as legitimate substantial political branch interpretive independence therefore may seem to favor opponents of *Roe*. A broader view beyond abortion, though, strongly suggests that efforts at increasing the quality, accountability, and legitimacy in the public's eye of political branch interpretation would better safeguard individual liberty and equality, as well as the fundamental features of the constitutional structure, than would dependence on one branch (namely, the Court) that has not consistently been at the forefront of the protection of individual rights. All three branches of the federal government play critical roles in rights protection that should be acknowledged and understood. Regarding abortion, supporters of *Roe* came to appreciate the risks of sole reliance on the Court as the seven Justice majority in *Roe* dwindled to a bare five-to-four majority in the 1986 *Thornburgh* decision, and subsequent appointments signaled the strong possibility the Court would overrule *Roe*. On many vital issues—war powers, national security, foreign affairs, terrorism, and the protection of individual rights in all of these contexts—the courts at best provide limited checks on the political branches' determinations about what the Constitution requires. Improvements in the processes of political branch constitutional decisionmaking are imperative. Equally important, the courts should not denigrate the authority of Congress and the President to voice and, when appropriate, act upon their constitutional views, but instead should focus on the merits of the constitutional issues presented. Public discourse similarly should debate competing substantive visions of our Constitution.¹⁷⁶

generally should be more persuasive to the Court than a simple declaration that Congress believes the undue burden standard is an inappropriate constitutional standard.

176. See generally Balkin & Levinson, *supra* note 96.