THE SUPREME COURT 1996 TERM

FOREWORD: IMPLEMENTING THE CONSTITUTION

Richard H. Fallon, Jr.

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*Richard H. Fallon, Jr.**

INTRODUCTION

Among the most important functions of the Supreme Court are to craft and apply constitutional doctrine[1] — a term that I use to embrace not only the holdings of cases, but also the analytical frameworks and tests that the Court's cases establish.[2] The need for doctrine arises partly from uncertainty about which values the Constitution encompasses and how protected values should be specified. For example, there are well-known disputes about whether the equality norm expressed in the Equal Protection Clause bars affirmative action preferences[3] and about whether the First Amendment encompasses a right to burn the flag[4] or to disseminate obscenity.[5] For the Constitution to function effectively as law, the Court must provide an authoritative resolution of disputes such as these. But the need for doctrine rests at least partly on another factor.

Even when general agreement exists that the Constitution reflects a particular value or protective purpose, questions of implementation of-

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1 *See* Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994) [hereinafter Fried, *Constitutional Doctrine*]; Charles Fried, *Types*, 14 CONST. COMMENTARY 55, 75 (1997) [hereinafter Fried, *Types*]; Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1990 (1996); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1470–71 (1995).

2 *Cf.* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1128–29 (1996) (asserting adherence to the "rationale upon which the Court based the results of its earlier decisions"); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1639 (1995) ("We interpret doctrine as being the set of rules and methods to be used to decide a particular class of cases.").

3 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

4 *See* United States v. Eichman, 496 U.S. 310, 315 (1990); Texas v. Johnson, 491 U.S. 397, 406 (1989).

5 *See* Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 890–91 (1996); Frederick Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 926 (1979).

ten remain.[6] For example, it may be a purpose of the First Amendment to protect against governmental efforts to stifle dissent,[7] or of the Commerce Clause to prevent "'economic Balkanization' and the retaliatory acts of other [s]tates that may follow."[8] But the norms reflecting purposes such as these are too vague to serve as rules of law; their effective implementation requires the crafting of doctrine by courts. The Supreme Court has responded accordingly. By no means illegitimately, it has developed a complex, increasingly code-like sprawl of two-, three-, and four-part tests,[9] each with its limited domain.

Critics have protested that the Court's multipart tests are inappropriate because they do not plausibly reflect the Constitution's true meaning.[10] But this criticism misses a crucial point. Identifying the "meaning" of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely. Or so I argue. The Court's role in implementing the Constitution through doctrine is the central focus of this Foreword.

As the Court attempts to implement the Constitution, its task is much complicated by the phenomenon of reasonable disagreement in constitutional law.[11] Many constitutional questions lack answers that

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[6] *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) [hereinafter Sager, *Underenforced Norms*] (discussing institutional considerations that sometimes lead courts to craft doctrines failing to enforce constitutional norms to their full conceptual limits); Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 961–73 (1985) (discussing strategic elements in constitutional rulemaking); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (discussing the need for courts to craft prophylactic rules to protect constitutional values).

[7] *See* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 91 (1990) (arguing that a central purpose of the First Amendment is to protect dissent and dissenters); *see also Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[8] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1599 (1997) (citation omitted) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325 (1979)).

[9] *See* Schauer, *supra* note 1, at 1455; *see also* Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 308–09 (noting the proliferation of doctrinal categories, each with "its own corpus of subrules, principles, categories, qualifications, and exceptions").

[10] For criticism of the Supreme Court's tendency to proliferate multiple part tests, see, for example, C. Edwin Baker, Turner Broadcasting*: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 115–16; Morton J. Horwitz, *The Supreme Court, 1992 Term — Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 98 (1993); and Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 182 (1985).

[11] *See generally* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35 (1996) (discussing various issues and challenges confronting courts in light of political disagreement);

can be proved correct by straightforward chains of rationally irresistible arguments.[12] As a result, reasonable citizens, lawyers, and judges differ widely about what methodology should be used to interpret the Constitution, about which substantive principles the Constitution embodies, and about how, in more practical terms, constitutional norms should be protected by doctrine. Reasonable disagreement generates at least two pervasive issues. One, which has attracted broad notice, involves the circumstances, if any, under which the Supreme Court should invalidate action by the political branches that could reasonably be viewed as constitutionally permissible, but that the Court thinks would be found constitutionally impermissible on the best view of what the Constitution requires.[13] As a doctrinal matter, the Court frequently treats reasonable disagreement as a ground for judicial deference to the political branches of government. To cite perhaps the most prominent example, the "rational basis" test familiarly employed under the Equal Protection Clause reflects an explicitly restrained judicial response to the phenomenon of reasonable disagreement.[14] But the Court does not always defer in areas of reasonable disagreement, nor — as I argue below — should it.

The other, less noted issue raised by reasonable disagreement involves the means by which Justices of the Supreme Court, who might themselves disagree about the best reading of the Constitution, might nonetheless come to reasonably stable agreement about doctrinal for-

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Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. (forthcoming May 1998) (discussing the relevance of reasonable disagreement to legal interpretation). The phenomenon of reasonable moral and political disagreement is at the heart of much of the best recent work in political theory. *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 1 (1996); JOHN RAWLS, POLITICAL LIBERALISM 54–58 (1993).

[12] To acknowledge *reasonable* disagreement is not to endorse skepticism or relativism but simply to recognize that constitutional argument, like moral discourse, "often fails to produce certainty, justified or unjustified," THOMAS NAGEL, THE LAST WORD 101 (1997), and that questions about the validity of particular claims are often bound up with broader, equally contested substantive and methodological issues. Even if, in principle, people ought to be able to come to agreement if they participated long enough in appropriately structured, noncoercive discourse, *cf.* Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 31 (1986) (discussing work that emphasizes this possibility), experience teaches that unanimity cannot be expected at the conclusion of arguments that are bounded as a practical matter by time.

[13] Questions about the appropriate nature of judicial review in cases of reasonable disagreement date to the early, formative years of American constitutional history, when at least some jurists urged that judicial invalidation should occur only in cases of plain unconstitutionality. *See* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 13–44 (1990). In perhaps the most famous essay in the history of American constitutional law, James Bradley Thayer also treats reasonable disagreement as a central phenomenon. According to Thayer, federal courts generally did not and should not hold laws unconstitutional unless "those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question." James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[14] *See infra* pp. 64–65, 88–89.

mulations.[15] In this Foreword, I argue that the practical need for the Court to speak effectively as an institution often requires the Justices to subordinate their personal views about how the Constitution would best be implemented and to accept doctrinal structures that they regard as less than optimal. As members of a collective body,[16] the Justices must reach complex judgments, sometimes premised on predicted effects, about when to compromise in order to achieve the law-settling benefits of a majority opinion, when to settle for a plurality opinion or to concur separately, and when to dissent.[17]

The institutional imperative for the Justices to engage in compromise and accommodation raises a further set of questions about the Supreme Court's obligation of constitutional fidelity. By common consensus, the Justices have a duty to be faithful to the Constitution.[18] In the literature on constitutional theory, the most commonly disputed question is how the meaning of the Constitution, to which fidelity is owed, would ideally be specified.[19] The practical and institutional

[15] Pioneering studies on this subject include SUNSTEIN, *supra* note 11; Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L REV. L. & ECON. 169 (1992) [hereinafter Kornhauser, *Path-Dependence*]; Lewis A. Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 J.L. ECON. & ORG. 441 (1992); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993) [hereinafter Kornhauser & Sager, *The One and the Many*]; and Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

[16] *See* Kornhauser & Sager, *The One and the Many*, *supra* note 15, at 3–10.

[17] *See id.* at 7 (discussing these questions); *see also* Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 248–58 (examining the elements of and motivations for dissenting opinions).

[18] *See generally* Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

[19] *See* James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1335 (1997) ("[T]he central question ... 'What is the best conception of fidelity in constitutional interpretation?,' ultimately poses the questions '*What* is the Constitution and *how* should it be interpreted?'").

In the literature on constitutional theory, some identify constitutional meaning with the "original understanding" of constitutional provisions. *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 15–17 (1987); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143–46 (1990); EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 15–36 (1994). Within the Supreme Court, Justices Scalia and Thomas frequently champion this view. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358–59 (1995) (Thomas, J., concurring in the judgment) (calling for originalist interpretation of the First Amendment); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (defending an originalist over a nonoriginalist approach to interpretation); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996) (same). Other Justices occasionally join them, though on a less regular basis. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) (joined by Rehnquist, C.J., and O'Connor & Scalia, JJ.); *McIntyre*, 514 U.S. at 371 (Scalia, J., dissenting) (joined by Rehnquist, C.J.).

Resisting the claims of a narrow "originalism," others assert that fidelity should run not to the expectations and understandings of those who wrote and ratified relevant constitutional language, but to the abstract principles, as best understood in light of correct political morality, that the Framers and ratifiers enacted or that the Constitution embodies. *See, e.g.*, RONALD DWORKIN, pressures that require compromise to achieve workable doctrine receive scant attention. In this Foreword, I argue that the fidelity owed by the Justices must be defined partly in institutional terms, not simply by an abstract ideal of constitutional truth. Sometimes, fidelity to the project of implementing the Constitution successfully requires the Justices to compromise their personal views and ideals.

Part I of this Foreword develops the thesis that a gap frequently, often necessarily, exists between the meaning of constitutional norms and the tests by which those norms are implemented. Against this background, Part II distinguishes eight different kinds of tests that the Court employs to implement the Constitution in one or more doctrinal settings. These include "balancing" tests, "effects" tests, "forbidden-content" tests, and "suspect-content" tests. Part III considers the advantages and disadvantages of these different kinds of tests; it addresses questions about how the Court decides, and should decide, which tests to employ.

Part IV examines constitutional doctrine from another perspective. Whereas Parts II and III are concerned with the *content* of Supreme Court doctrines, Part IV addresses the *role* of doctrine in constitutional adjudication within the Court itself and the *processes* by which the Court attempts to reach agreement concerning doctrinal formulations.

At the risk of oversimplification, Part IV argues that constitutional doctrine — once it is developed — sustains a crude, admittedly permeable distinction between two kinds of cases. In "ordinary" cases, the Court applies the framework established by prior decisions. In light of reasonable disagreement concerning many points that doctrine purports to settle, effective implementation of the Constitution requires respect for stare decisis, even in the Supreme Court. Nonetheless, direct appeals to constitutional norms are never, in principle, precluded. "Extraordinary" cases, which the Court believes cannot or should not be resolved without a fresh examination of underlying "first princi-

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FREEDOM'S LAW 4–5, 11–12 (1996) [hereinafter DWORKIN, FREEDOM'S LAW]. On this view, constitutional adjudication is pervasively "a matter of principle," with the Supreme Court functioning as the quintessential "forum of principle." RONALD DWORKIN, A MATTER OF PRINCIPLE, 69–71 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE]. In something approaching an effort to split the difference, a third school of fidelity theorists characterizes constitutional interpretation as "translation." *See, e.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171–73 (1993) [hereinafter Lessig, *Fidelity in Translation*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 410 (1995) [hereinafter Lessig, *Understanding Changed Readings*]; Jeanmarie K. Grubert, Note, *The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights*, 65 FORDHAM L. REV. 1819, 1825–29 (1997). According to this position, the central challenge for constitutional adjudication is to determine the "meaning" of principles endorsed by the Constitution's Framers and ratifiers in the divergent contexts in which contemporary issues arise. On this view, interpretation is a two-step process. The first step is to identify a historical meaning; the second is to carry that meaning forward into a new context. *See* Lessig, *Understanding Changed Readings*, *supra*, at 396–410.

ples,"[20] are especially revealing of the Court's evolving conception of its role and of its obligation of fidelity to the Constitution. In discussing some of the extraordinary cases decided by the Court during its 1996 Term, Part IV has two recurring themes. One involves the division within the Court about the underlying principles that constitutional doctrine ought to reflect and the difficulty of achieving agreement on workable doctrines to protect shared, sometimes compromised, formulations of those principles. The other theme concerns the significance, if any, that the Court should attach to the phenomenon of reasonable disagreement among the broader public and between courts and legislatures about constitutional norms.

Continuing to explore these themes in light of the Court's decision in last Term's "right-to-die" cases,[21] Part V discusses how the Court's function in crafting constitutional doctrine, especially in cases that the Court experiences as extraordinary, may appropriately vary over time. Among the relevant considerations is the Court's capacity to function effectively as a representative decisionmaker — to render decisions on controverted issues that will, in time, command broad assent. For a variety of reasons, Part V concludes, the current Court would generally serve best by crafting doctrine cautiously.

I. Tests and the Constitution

The indispensable function of constitutional doctrine — including the multipart tests that critics have pilloried[22] — is to implement the Constitution. Nonetheless, the relation between the meaning of the Constitution, on one hand, and the doctrinal tests crafted and applied by the Supreme Court, on the other, frequently is not and sometimes could not be one of identity.[23] First, there is the banal point that the

[20] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995) (asserting that in determining the scope of congressional regulatory power under the Commerce Clause "[w]e start with first principles"); *McIntyre*, 514 U.S. at 358–59 (Thomas, J., concurring in the judgment); Charles Fried, *The Supreme Court, 1994 Term — Foreword: Revolutions?*, 109 HARV. L. REV. 13, 16 (1995) (observing that "the pages of the United States Reports" and academic commentaries both "ring with calls to examine, or reexamine, first principles").

[21] *See* Vacco v. Quill, 117 S. Ct. 2293 (1997); Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

[22] *See supra* note 10 and accompanying text.

[23] *See* Board of Educ. v. Dowell, 498 U.S. 237, 245–46 (1991) (cautioning that the Court's concepts should not be treated as if they were part of the Constitution); South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (asserting that judges are obliged to enforce the Constitution, "not the gloss which [the Court] may have put on it" (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)) (internal quotation marks omitted)); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 767 (1988) ("From the beginning of our political and legal tradition, we have differentiated between text and its interpretation. The implicit premise has been to privilege the text over its interpreted gloss."); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1347–49 (1990) (same); James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis,*

Supreme Court may err;[24] it may, for example, reach a mistaken determination about whether a category of speech or expressive conduct, such as obscenity or flag burning, comes within "the Freedom of Speech" that the First Amendment guarantees.[25]

A second point bears more interestingly on the nature of the judicial role in implementing the Constitution and, in particular, on the Supreme Court's obligation of constitutional fidelity. Frequently, a perfect correspondence could not, even in principle, exist between the meaning of constitutional norms and the doctrinal tests by which those norms are implemented. As suggested above, some constitutional norms may be too vague to serve directly as effective rules of law.[26] In addition, in shaping constitutional tests, the Supreme Court must take account of empirical, predictive, and institutional considerations that may vary from time to time.[27]

The doctrines imposing First Amendment restrictions on state libel law furnish a well-known example of the kinds of considerations to which the Court, in framing constitutional doctrine, must respond.[28]

The Constitution, and the Supreme Court, 66 B.U. L. REV. 345, 366 (1986) (discussing the relative importance of adhering to precedent in comparison with deciding based on the Justices' independent understanding of constitutional commands); *see also* Sager, *Underenforced Norms*, *supra* note 6, at 1213 (noting the phenomenon of judicial underenforcement of constitutional norms); Strauss, *supra* note 6, at 190 (noting the prominence of prophylactic rules in constitutional law).

The question whether the relation between judicial doctrine and the Constitution is one of identity is different from the question whether judicial doctrine, once propounded, must be accepted by other branches of government as binding. For useful discussion of the extent to which judicial pronouncements bind other branches, see, for example, Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1268 (1996); Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35, 38 (1993); and Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 220 (1994).

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

25 On the distinction between "speech" and "the Freedom of Speech," see Schauer, cited above in note 5, at 900.

To cite another point of current contention, Justices Scalia and Thomas recurrently argue that the Court has erred in holding that the Commerce Clause, besides empowering Congress, imposes direct restraints on state legislative authority. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1608–14 (1997) (Scalia, J., dissenting).

26 *See supra* p. 57.

27 *See* Sager, *Underenforced Norms*, *supra* note 6, at 1217–20; Strauss, *supra* note 6, at 207–08; *cf.* Anderson v. Creighton, 483 U.S. 635, 643–44 (1987) ("[T]he precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable."); T.M. Scanlon, *Rights, Goals, and Fairness*, *in* PUBLIC AND PRIVATE MORALITY 93, 103 (Stuart Hampshire ed., 1978) (stating that claims of right are "generally backed" by a "claim about how individuals would behave or institutions would work" if the asserted right were not recognized, a value-based assertion that "this result would be unacceptable," and a "further empirical claim about how the envisaged assignment of rights" will produce a normatively preferable outcome).

28 For illuminating discussions of the doctrine-crafting challenges confronting the Court in these cases, see Melville B. Nimmer, *The Right To Speak from* Times *to* Time*: First Amendment*

In *New York Times v. Sullivan*[29] and *Gertz v. Robert Welch, Inc.*,[30] the Court held that the First Amendment forbids recovery for the defamation of public officials and other public figures unless the defendant promulgated a false, defamatory utterance "with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[31] This rule undoubtedly confers immunity on some false and defamatory statements that are worthless from a constitutional perspective.[32] As the Court recognized, however, mistakes are "inevitable in free debate,"[33] and a rule allowing all false and defamatory utterances to be actionable would have a predictable effect, albeit one of uncertain magnitude, in chilling critical commentary. The Court therefore set out to craft doctrine that would ensure "breathing space" for First Amendment freedoms.[34]

As thus conceived, the Court's task was not only to balance, in an abstract way, the First Amendment interest in promoting the free flow of critical comment against the states' interest in protecting reputations. The Court also had to make more concrete, empirical, and predictive assessments about the relative proclivity of the press to engage in self-censorship under alternative liability regimes; about the proportion of truthful and untruthful assertions that would be chilled by such regimes; about the harms that would be done by false speech and the benefits of truthful speech that would be forgone under various imaginable rules; and about the practical competence of the courts to administer particular liability standards fairly.[35]

Sullivan and *Gertz* are by no means atypical in their reliance on empirical, predictive calculations.[36] In the past Term, for example, *Clinton v. Jones*[37] invoked similarly predictive assessments in holding that the President enjoys no temporary immunity from civil suits based on his unofficial acts.[38] In rejecting President Clinton's claim that the Constitution required a stay of a suit against him until the end

Theory Applied to Libel and Misapplied to Privacy, 56 CAL. L. REV. 935, 957 (1968); and Strauss, cited above in note 6, at 198.

29 376 U.S. 254 (1964).

30 418 U.S. 323 (1974).

31 *Id.* at 327–28 (quoting *Sullivan*, 376 U.S. at 279–80).

32 *See id.* at 340.

33 *Id.*

34 *Sullivan*, 376 U.S. at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)) (internal quotation marks omitted). In *Gertz*'s alternative formulation, the aspiration was to "protect some falsehood in order to protect speech that matters." 418 U.S. at 341.

35 *See, e.g.*, Nimmer, *supra* note 28, at 948–55; Strauss, *supra* note 6, at 200 (addressing the importance of predictive assessments to First Amendment analysis).

36 *See generally* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 547–49 (1991) (arguing that judicial assumptions about background facts play a pervasive role in constitutional law).

37 117 S. Ct. 1636 (1997).

38 *See id.* at 1643–52.

of his term, the Court concluded that disruption of essential presidential functions was unlikely to occur[39] and, in any event, that the exercise of sound discretion by the trial judge would provide an adequate safeguard against this potential consequence.[40]

As *Clinton v. Jones* illustrates, the Court does not always frame constitutional doctrine to ensure that constitutional values are protected to the fullest possible extent. Just as *Sullivan* and *Gertz* "protect some falsehood in order to protect speech that matters,"[41] some constitutional tests reflect an implicit judgment that it would be too costly or unworkable in practice for courts to enforce all constitutional norms to "their full conceptual limits."[42] A relatively clear example comes from another case decided last Term, *Maryland v. Wilson*,[43] which held that the Fourth Amendment categorically permits police officers making traffic stops to order all passengers out of stopped vehicles, apparently without regard to the officers' motivations.[44] Taken to its full conceptual limit, the Fourth Amendment would arguably bar any seizure effected in the absence of a case-specific ground for suspicion; at the very least, it would forbid any seizure lacking a legitimate purpose. But the Court, taking note of likely consequences, opted for a doctrinal formulation that it thought would be "more likely to" minimize assaults on law enforcement officers than would other plausible alternatives.[45]

Lawrence Sager offers a more significant example of "underenforced" constitutional norms.[46] According to Professor Sager, the Equal Protection Clause of the Fourteenth Amendment expresses the principle that "[a] state may treat persons differently only when it is fair to do so."[47] If this is the norm, then the most familiar equal protection test, under which courts uphold classifications that are rationally related to any actual or hypothesized state interest,[48] is an instance of constitutional "underenforcement." The Court has determined that allowing judges to make independent, case-by-case assessments of the fairness of statutory classifications would invite excessive

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39 *See id.* at 1651.

40 *See id.* at 1650–51.

41 Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

42 Sager, *Underenforced Norms*, *supra* note 6, at 1221.

43 117 S. Ct. 882 (1997).

44 *See id.* at 886. The Court had held in a case decided earlier in the 1996 Term, *Ohio v. Robinette*, 117 S. Ct. 417 (1996), that when a police officer is justified by the objective circumstances in asking a driver to exit an automobile, "subjective thoughts" are irrelevant. *Id.* at 421.

45 *Wilson*, 117 S. Ct. at 885 n.2.

46 *See* Sager, *Underenforced Norms*, *supra* note 6, at 1215.

47 *Id.*

48 *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 313–14 (1993) ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" (quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980))).

litigation and generate unpredictable and conflicting results.[49] This judgment about undesirable consequences, rather than a decision about constitutional "meaning,"[50] has led the Court to develop a doctrine that prescribes broad judicial deference to legislative decisions.[51]

In emphasizing that constitutional tests frequently either overenforce or underenforce constitutional norms, I do not mean to suggest that it is always easy to draw the line between a constitutional norm and its implementing doctrine, or even that it would typically be sensible to attempt to do so.[52] Moreover, it is crucial to recognize that constitutional doctrine, once established, becomes part of the fabric of

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[49] *See* Sager, *Underenforced Norms*, *supra* note 6, at 1215–20.

[50] *See* Strauss, *supra* note 6, at 205–06. Strauss argues:

> One of the principal justifications for rational basis review is that the legislature is best able to assess the complex factual issues underlying social and economic legislation; courts, lacking the legislature's fact-finding capacities, are ill-equipped to second-guess its judgments. . . . This justification presupposes that an omniscient court — or even a court that conducted an exhaustive factual investigation in each case — would invalidate many statutes that survive rational basis review. . . . The "real" equal protection clause requires invalidation of such statutes. Rational basis review deviates from the "real" equal protection clause by upholding such statutes; the justification for doing so is that detailed factual investigation would be too costly and error-prone.

Id.

[51] There are at least two bases on which someone might deny the possibility of any constitutionally legitimate gap between the meaning of the Equal Protection Clause and the rational basis test. One possible approach would maintain that constitutional tests such as the rational basis test, if they are legitimate at all, are legitimate because they reflect either the original understanding of the meaning of the constitutional provisions that they implement or the original understanding of how those provisions would be implemented. But most originalists appear not to hold this extravagant view. *See, e.g.*, BORK, *supra* note 19, at 162–63 (arguing that the originalist methodology can yield only principles, which must then be applied). Another approach would be to equate doctrinal tests with constitutional meaning by insisting that the substantive norm or principle reflected in the Equal Protection Clause, for example, is one with significant, but not unlimited, "weight," and that constitutional adjudication must therefore weigh other principles, including separation of powers principles that call for judicial deference to legislative judgments. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 26 (1977) (noting that when principles "intersect," the "one who must resolve the conflict has to take into account the relative weight of each"). On this view, the "rational basis" test does not literally express the meaning of the Equal Protection Clause, but it does (if it is indeed the constitutionally correct test) precisely define the "concrete" rights that the Constitution creates when equal protection principles are arrayed against other principles also possessing constitutional weight. *Cf. id.* at 93 (distinguishing between "abstract" rights and the "concrete," judicially enforceable rights that emerge when the relative weight of a right in comparison with competing "political aims" is more precisely specified). The difficulty with this account is that its depiction of constitutional adjudication as a pervasive contest of rights and principles does not adequately reflect the appropriate roles of the empirical, the contingent, the predictive, and the tactical. It is not enough for courts to identify constitutional values and weigh those abstract values against each other. As the above discussion of the judicial function in *Gertz* and *Sullivan* attempts to illustrate, courts must also ask what are the main threats to constitutional values at any particular time, which rules would work more or less effectively to protect those values, and what would be the empirical effects of alternative rule structures.

[52] *See* Strauss, *supra* note 6, at 207–08 (observing that it would be "pointless" to try to distinguish between "what the real, noumenal Constitution would require if governments had different tendencies or the courts had different capacities" and the doctrine crafted in light of empirically relevant considerations).

constitutional law. For the Constitution to be implemented successfully, this fabric must be reasonably stable and coherent;[53] as I argue more fully below, doctrine therefore has a claim to adherence, even by Justices who believe it to be less than optimal. Nonetheless, a distinction exists between constitutional doctrine and the Constitution itself; the Supreme Court must sometimes frame doctrinal tests that cannot be linked directly, by ordinary interpretive means, to the meaning of the norms that those tests implement. What is more, the Court must not only take into account the practical adequacy of one or another test to protect underlying values, but must also weigh the costs, in practical and constitutional terms, of adding or subtracting increments of judicial protection. More specifically, the Court must assess the competence of courts to conduct particular kinds of inquiries;[54] the costs that particular tests are likely to engender — including judicial errors of both over- and under-protection and the burdens of litigation under narrower and broader, or more and less determinate, doctrinal formulations;[55] and the political fairness of having courts resolve different kinds of questions on more or less deferential bases in the face of reasonable disagreements among the citizenry, between judges and more politically accountable actors, and, in some cases, among the Justices themselves.[56]

The Court's obligation of fidelity to the Constitution needs to be seen in this light. When judicial competence is lacking or the costs of particular forms of judicial involvement would be great, the Court does not necessarily betray its obligation of constitutional fidelity if it fails to craft judicially enforceable rules that fully protect constitutional norms.[57] The Court can share responsibility for implementing the Constitution with other institutions. Conversely, when judicial enforcement seems practically necessary, and a bright-line prophylactic rule will work most effectively at relatively low cost, not every doctrine that "over-enforces" constitutional norms reflects a constitutional betrayal.

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[53] *See* Fried, *Constitutional Doctrine*, *supra* note 1, at 1152.

[54] *Compare* Strauss, *supra* note 6, at 198–204 (defending doctrines that establish presumptions of unconstitutionality in cases in which government officials likely acted for unconstitutional purposes and in which it would tax judicial competence to conduct case-by-case inquiries into actual motives), *with id.* at 205–06 (suggesting that "rational basis" review of economic legislation is appropriate because courts lack the practical competence to conduct the fact-finding necessary to determine whether challenged classifications are fair).

[55] *See id.* at 193 & n.12.

[56] *See* Lawrence Gene Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 425–28 (1993).

[57] *Cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1784–86 (1991) (discussing judicially crafted immunity doctrines that sometimes preclude individually effective judicial remedies for constitutional rights violations).

In short, the Court must craft doctrine in light of judgments about what the Constitution means, but determinations of constitutional meaning do not always, or perhaps even typically, dictate with full precision what constitutional doctrine ought to be. Though based on the Constitution, constitutional doctrine and the Court's role in crafting it deserve independent attention.

II. VARIETIES OF DOCTRINAL TESTS

A. *A Typology*

As the Supreme Court confronts the task of shaping constitutional doctrine, many kinds of tests are available to it. Without claiming comprehensiveness, this Part identifies eight relatively common kinds of tests, all employed by the Court (either alone or in combination) in some areas of constitutional law to help define constitutional limits on governmental powers.[58]

My list is admittedly a bit of a hodgepodge. Besides being incomplete, it does not distinguish systematically between tests that trigger judicial scrutiny (such as a test singling out statutes that discriminate on the basis of race for distinctive analysis) and tests that define particular types, levels, or tiers of judicial review (such as "strict scrutiny," "mid-level scrutiny," or "rational basis" review).[59] Among my reasons for not sharply differentiating tests that trigger judicial scrutiny from tests that prescribe a level of review is that I believe this distinction to be less categorically tight than is sometimes thought. In addition, division of constitutional tests into two basic categories may minimize the options available to the Supreme Court in determining how to protect constitutional values.

1. Forbidden-Content Tests. — One paradigmatic kind of test identifies statutes, regulations, or policies as absolutely unconstitutional based on their content. An example is the rule, apparently emerging from last Term's decision in *Printz v. United States*,[60] that Congress may not compel state and local governmental officers (except judges and officials of quasi-judicial bodies) to enforce a federal regulatory

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58 For a similar but distinct typology, see Fried, *Types*, cited above in note 1, at 56. A somewhat different set of tests may be used to assess claims that the federal government has exceeded the scope of delegated powers. *Cf.* United States v. Lopez, 514 U.S. 549, 556–68 (1995) (discussing tests for identifying limits of congressional power under the Commerce Clause); South Dakota v. Dole, 483 U.S. 203, 206–08 (1987) (discussing precedents establishing limits on congressional spending power). Although I do not attempt to catalogue the kinds of tests used to determine whether the federal government has exceeded the scope of delegated powers, I occasionally use separation of powers and especially federalism cases to illustrate the tests included in my typology, because many of the tests that are used to protect individual rights are also used to define limits on delegated powers.

59 *Cf.* Fried, *Types*, *supra* note 1, at 55–56 (drawing this distinction).

60 117 S. Ct. 2365 (1997).

program.[61] A statute violating this rule is per se unconstitutional; no assessment of the government's interest in enacting the statute is necessary.[62]

2. Suspect-Content Tests. — Whereas forbidden-content tests mark some kinds of laws as per se invalid, suspect-content tests identify certain kinds of laws as presumptively, but not necessarily, unconstitutional. A prominent example is the First Amendment rule that content-based regulations of speech are presumptively forbidden and can be upheld only if necessary to serve a compelling governmental interest.[63]

3. Balancing Tests. — In paradigmatic balancing tests, the Court explicitly assesses competing considerations to determine whether a challenged statute or action is constitutionally permissible. The Court first identifies constitutional values threatened by governmental action; next it assesses the degree of their implication in a particular case; then the Court weighs the harm to protected values against the interests that the government has endeavored to promote. The Court may also consider alternative means by which the government might achieve its ends at less cost to constitutional values.

A concrete example is the test applied by the Supreme Court last Term in *Timmons v. Twin Cities Area New Party*[64] to determine the permissibility under the First and Fourteenth Amendments of Minnesota "anti-fusion" statutes that prohibit candidates from being nominated for the same elective office by more than one party.[65] Writing for the majority, Chief Justice Rehnquist concluded that the state's interest in maintaining the "integrity, fairness, and efficiency" of its ballots by preventing their use as "billboard[s] for political advertising"[66] was "sufficiently weighty"[67] to justify the prohibition against fusion

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[61] *See id.* at 2380.

[62] *See id.* at 2380–81.

[63] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47–50 (1987) (discussing the distinction between content-based and content-neutral regulations of speech); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 722–28 (1991) (same).

[64] 117 S. Ct. 1364 (1997).

[65] The Court framed its inquiry as follows:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions."

Id. at 1370 (citations omitted).

[66] *Id.* at 1373.

[67] *Id.* at 1372 (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)).

candidacies.[68] The majority also found that the state had a legitimate interest in "the stability of [its] political system[]," which it was entitled to support by "enact[ing] reasonable election regulations that [tend to] favor the traditional two-party system."[69]

4. Nonsuspect-Content Tests. — Nonsuspect-content tests call for judicial scrutiny pursuant to standards reflecting strong presumptions of constitutional validity.[70] A well-known example is the "rational basis" test applied under the Due Process and Equal Protection Clauses to legislation that neither classifies on a "suspect" basis nor implicates a "fundamental" right. A typical formulation appeared in *FCC v. Beach Communications, Inc.*[71]:

> In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines [e.g., race, national origin, religion, or alienage] nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.[72]

5. Effects Tests. — Some constitutional tests focus not on the explicit content of a statute or policy, but on its effects. Effects tests either hold statutes or policies unconstitutional or, more commonly, target them for more or less searching judicial review based on their effects on constitutional rights or values, on particular groups, or on both. Last Term's decision in *M.L.B. v. S.L.J.*[73] furnishes an example. *M.L.B.* involved a Mississippi rule conditioning the right to appeal a decree terminating parental rights on advance payment of record

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[68] *See id.* at 1375. As a preliminary matter, the Chief Justice also concluded that, although the anti-fusion rule imposed burdens on associational freedoms, those burdens were not "severe" enough to call for strict judicial scrutiny. *See id.* at 1372–73.

[69] *Id.* at 1374. In the principal dissenting opinion, Justice Stevens disagreed with each of the three "premises" on which the majority's reasoning rested:

> The Court's conclusion ... rests on three dubious premises: (1) that the statute imposes only a minor burden on the [challenging] Party's right to choose and to support the candidate of its choice; (2) that the statute significantly serves the State's asserted interests in avoiding ballot manipulation and factionalism; and (3) that, in any event, the interest in preserving the two-party system justifies the imposition of the burden at issue in this case.

Id. at 1376 (Stevens, J., dissenting).

[70] *Cf.* FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we think a political branch has acted." (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979))).

[71] 508 U.S. 307 (1993).

[72] *Id.* at 313–15 (citations omitted); *see also* Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) ("If a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.'" (quoting Romer v. Evans, 116 S. Ct. 1620, 1627 (1996))).

[73] 117 S. Ct. 555 (1997).

preparation fees.[74] After a state chancery court eliminated M.L.B.'s parental rights with respect to her two children, M.L.B. filed a timely appeal but was unable to pay the $2,352.36 cost of preparing and transmitting the record.[75] Relying heavily on precedents from the 1950s, 1960s, and early 1970s,[76] the majority opinion found application of Mississippi's fee requirement to M.L.B. to be unconstitutional in light of its combined effects in (i) disproportionately burdening the poor (ii) in seeking access to a judicial process (iii) to resist state efforts to burden a constitutionally protected interest (iv) that is associated with family life and "the upbringing of children" and that "has ranked as 'of basic importance in our society.'"[77]

6. Appropriate-Deliberation Tests. — Whereas the kinds of constitutional tests canvassed so far focus mostly on the "output" of legislative and policymaking processes, an alternative kind of test looks at "inputs"[78] — at the nature of the deliberative process from which a challenged statute or policy resulted.[79] For example, the Supreme Court has suggested that the permissibility of legislation discriminating on the basis of gender depends at least partly on whether the legislature relied on unthinking stereotypes.[80] The Court has also held that legislatures may sometimes act deliberately to create so-called major-

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[74] *See id.* at 560.

[75] *See id.*

[76] *See id.* at 560–62 (citing Mayer v. Chicago, 404 U.S. 189, 193 (1971); Boddie v. Connecticut, 401 U.S. 371, 374 (1971); Rinaldi v. Yeager, 384 U.S. 305, 309–10 (1966); and Griffin v. Illinois, 351 U.S. 12, 16 (1956)).

[77] *Id.* at 564 (quoting *Boddie*, 401 U.S. at 376).

[78] On the distinction between "input" and "output" tests, see Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 284–85 (1991), and Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problem of Hate Speech and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 19.

[79] A frequently animating idea is that the Constitution aims to establish a "deliberative democracy" and that the courts have a role in enforcing the legislature's deliberative responsibilities. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69–75 (1985) (analyzing several proposals for more searching judicial review of administrative and legislative processes); *see also* Guido Calabresi, *The Supreme Court, 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 83 (1991) (identifying a type of judicial review that "gives courts the power to send back for reconsideration any governmental action that arguably violates some fundamental right whenever that action seems either the product of undue haste on the part of the decisionmakers or the product of . . . 'hiding'").

[80] *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (noting that state justification for gender-based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); J.E.B. v. Alabama, 511 U.S. 127, 139 n.11 (1994) ("[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection clause."). *See generally* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1551–52 (1991) (tracing the Supreme Court's increasing sensitivity to gender stereotypes).

ity-minority voting districts, but may not make race the "predominant" factor in the drawing of district lines.[81]

7. *Purpose Tests.* — Another kind of constitutional test focuses on a subset of inputs into governmental decisionmaking processes. According to purpose tests, legislation or other governmental policies are invalid if developed or applied for constitutionally illegitimate reasons.[82]

The category of purpose tests is almost necessarily a loose one because of the multiple senses in which the term "purpose" is used. In perhaps the simplest and most familiar usage, purpose is roughly coextensive with motive. For example, legislation is invalid under the Equal Protection Clause if enacted "'because of,' not merely 'in spite of,' its adverse impacts upon an identifiable group."[83] Other usages reflect more complex connections between constitutional values and officials' motivations. For example, a statute will fail scrutiny under the Establishment Clause if its purpose is to promote religion.[84] According to a leading case, a state legislature offended this prohibition when it enacted a statute barring the teaching of evolution in the public schools.[85] This ascription would probably stand even if those enacting the restriction could accurately report that their motive was not to promote religion, but to stop the communication of ideas that they believed to be educationally unsuitable (because false), or to please their constituents, or to win re-election. As implemented by a purpose test, the First Amendment precludes action on otherwise permissible considerations (such as pleasing constituents or trying to win re-election) when those reasons, in a particular case, are too conceptually or practically interconnected with constitutionally forbidden grounds for official action.

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[81] *See* Abrams v. Johnson, 117 S. Ct. 1925, 1936 (1997); Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995); *see also* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997) (applying the rule that "race [may] not predominate over . . . traditional districting principles").

[82] For a recent survey of purpose tests in constitutional law, see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997). Earlier, path-breaking studies include Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95; Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 53 N.Y.U. L. REV. 36 (1977); and John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

[83] Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). *But cf.* David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956–64 (1989) (criticizing this definition of discriminatory intent on the ground that it ignores problems associated with unconscious bias, and proposing a test under which discriminatory intent should be found in any case in which the government's decision would have been different if the adverse impacts "fell on whites instead of blacks, or on men instead of women").

[84] *See, e.g.*, Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997) ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion . . . .").

[85] *See* Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

Once it is agreed which purposes are forbidden,[86] the question is whether, but for the influence of some illegitimate consideration in motivating one or more relevant decisionmakers, the government would likely have enacted a challenged statute or taken other contested steps.[87] Answering this question may present formidable evidentiary problems.[88] In at least some cases, questions about how a legislature would have acted under counterfactual conditions may pose conceptual puzzles as well.[89] In addition, the requisite inquiries may be embarrassing for a court to make, because they involve questions about the constitutional good faith of governmental officials.[90] Apparently for reasons such as these, some commentators[91] and Justices[92] have protested that courts should eschew inquiries into subjective purposes. Nonetheless, inquiries into purpose are familiar in constitutional law,[93]

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[86] For a discussion of some complexities involved in determining which reasons for action are constitutionally forbidden under which circumstances, see Jesse H. Choper, *Religion and Race Under the Constitution: Some Similarities and Differences*, 79 CORNELL L. REV. 491, 493–500, 502–08 (1994).

[87] *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 431, 439 (1996) ("The critical inquiry is whether the government would have imposed the restriction in the absence of impermissible factors . . . .").

[88] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . . ."); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute . . . , discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."); United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."). Indeed, as I argue below, these problems may partly explain why the doctrine frequently employs what I characterize as "surrogates" for inquiries into governmental purposes, by putting a heavy burden of justification on *kinds* of statutes that are generally likely to reflect forbidden motives.

[89] *Cf.* Strauss, *supra* note 83, at 971–75 (arguing that the application of purpose tests sometimes depends on counterfactual inquiries that approach "incoheren[ce]").

[90] *See, e.g.*, Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164–65 (1978); Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1285 (1986) ("[T]he Justices no doubt feel some disinclination to accuse state officials of improper purpose . . . .").

[91] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 213–21 (2d ed. 1986) (opposing inquiries into subjective motives of legislators); Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 516 (1990) (citing problems with inquiries into legislative motives to identify Establishment Clause violations).

[92] *See, e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 558 (Scalia, J., concurring) (refusing to join part of the Court's opinion because it departed from a "general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*"); *Edwards*, 482 U.S. at 636–40 (Scalia, J., dissenting) (calling for abandonment of the "purpose prong" of the *Lemon* test for Establishment Clause violations); *O'Brien*, 391 U.S. at 383 ("[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

[93] *See* Bhagwat, *supra* note 82, at 323 ("[T]he process of attributing purposes to the actions of lawmaking bodies is implicit in the legal method.").

as they are in the moral assessment of human conduct. In many if not most cases, the relevant questions seem entirely straightforward.[94]

8. Aim Tests. — Aim tests hold statutes or policies invalid, or identify them as subject to more or less searching judicial scrutiny, on the ground that they are directed primarily at, even though they do not refer directly to (in the sense reflected in suspect-content tests), conduct that implicates constitutionally protected interests. The principal champion of aim tests is Justice Scalia. In his concurring opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[95] for example, Justice Scalia joined a majority of the Court in invalidating a municipal ordinance that forbade a number of specific practices, involving the ritual slaughter of animals, that were predominantly engaged in by a minority religion.[96] Unlike the majority, Justice Scalia did not think that judicial inquiry should focus on the subjective purposes of lawmakers.[97] Nor did he think that the law should be subjected to heightened review based simply on its effect on minority religions.[98] In Justice Scalia's view, the vice of the challenged ordinance lay precisely in the fact that despite its even-handed form, and regardless of the subjective purposes of those who enacted it, it was targeted, as an objective matter, principally at religiously motivated practices.[99]

[94] *See id.* (observing that accepted methods for identifying legislative purpose yield "a reasonably consistent account in most cases"). Whatever other difficulties may be raised by inquiries into whether governmental officials acted for forbidden purposes, such inquiries do not pose the same distinctively conceptual problems as the inquiries into legislative "intent" sometimes undertaken for purposes of statutory or constitutional interpretation. *See, e.g.*, DWORKIN, A MATTER OF PRINCIPLE, *supra* note 19, at 38–57 (discussing problems in identifying and cumulating relevant mental states of a multimember body); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (1997) (discussing problems in the use of legislative history to discern legislative intent). There is, for example, no need to discern what individual legislators thought that the legislation meant, or how they thought it would be applied to various fact situations.

[95] 508 U.S. 520 (1993).

[96] *See id.* at 558 (Scalia, J., concurring).

[97] *See id.*

[98] Justice Scalia has argued consistently that government does not violate, or even implicate, the Free Exercise Clause when it passes statutes of general applicability that have the incidental effect of burdening religious practice. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)) (internal quotation marks omitted)).

[99] *See Church of the Lukumi Babalu Aye*, 508 U.S. at 558 (Scalia, J., concurring). The notion of a statute's having an objective aim, that is different from both the subjective purposes of those who enacted it and at least partially distinct from its effects, is not wholly free from mystery. It seems to involve a "personification" of the law, *cf.* RONALD DWORKIN, LAW'S EMPIRE 167–75 (1986) (discussing "personification" as a step in interpretation), and an imputation to the law as thus personified of an aim, based on the law's preponderant effect. Although Justice Scalia apparently believes that identification of statutory aims or "object[s]" avoids the hazards associated with inquiries into lawmakers' "subjective" motivations or purposes, *see Church of the Lukumi Babalu Aye*, 508 U.S. at 558 (Scalia, J., concurring), it might be questioned whether aim tests differ from purpose tests in much besides the kinds of evidence by which they permit purpose to be

B. *Combinations and Permutations*

The eight kinds of constitutional tests that I have distinguished are not always, or perhaps even typically, stark alternatives to each other. On the contrary, many constitutional doctrines consist of a mix of the kinds of tests that I have separately identified.[100] Consider, for example, the First Amendment test prescribed by *United States v. O'Brien*,[101] under which a content-neutral restriction on expressive conduct may be upheld only "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[102] Scrutiny under the *O'Brien* formula is triggered by an effects test; a statute's effect in burdening conduct undertaken for expressive purposes launches judicial scrutiny under the First Amendment. The *O'Brien* test presupposes a negative result to a suspect-content test: the challenged statute must not discriminate against speech on the basis of content, or strict scrutiny would apply. *O'Brien* also calls for what might roughly be called a "balancing" assessment[103] of whether the challenged statute advances an "important" governmental interest and whether "the incidental restriction" on First Amendment freedoms is no greater than necessary.[104] In addition, the query whether the government might have achieved its end with less of an adverse impact on protected interests may serve as a surrogate for inquiry into governmental purposes. If the government might have achieved its goal without trenching on constitutional values, but chose

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proved. Whereas purpose tests admit many kinds of evidence bearing on decisionmakers' states of mind, aim tests, as employed by Justice Scalia, focus entirely on statutory language and on the language's preponderant impact on conduct that is religiously motivated or otherwise constitutionally protected. *See id.* at 557–58 (rejecting any inquiry into legislative motives, but endorsing a test invalidating "laws which, though neutral in their terms, through their design ... target the practices of a particular religion for discriminatory treatment"); *cf.* Rogers v. Lodge, 458 U.S. 613, 630–31 (1982) (Powell, J., dissenting) (arguing that in light of the costs of considering broader evidence of legislative motivation in voting discrimination cases, the Court should generally avoid inquiries into "the *subjective* thought processes of local officials" and require proof of discriminatory intent by "objective" factors).

[100] *See* Fried, *Types*, *supra* note 1, at 68–71.

[101] 391 U.S. 367 (1968).

[102] *Id.* at 377.

[103] Here and elsewhere, I use the "balancing" rubric to encompass "mid-level" tests calling for courts to determine whether statutes advance "important" or "substantial" government interests and whether their classificatory schemes are "substantially" related to the promotion of those interests. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) (characterizing intermediate scrutiny as an "overtly balancing mode"); *see also* Bhagwat, *supra* note 82, at 305 (classifying *O'Brien*'s intermediate scrutiny as a balancing test).

[104] *O'Brien*, 391 U.S. at 377.

to trench on those values anyway, there is often reason to suspect that the decision to do so was purposeful, not innocent.[105]

The tests that I have distinguished can function as complements to each other even when they are not explicitly conjoined: a governmental action may be held invalid if it fails any of a number of tests. For example, a statute forbidding "potentially pregnant persons" to engage in certain hazardous activities would trigger inquiry under a suspect-content test: is the statute facially discriminatory against women?[106] Even if that question were answered in the negative, the statute would invite scrutiny under a purpose test: was the legislation passed for the forbidden purpose of harming women?[107] An appropriate-deliberation test might also apply: did the legislature act on the basis of stereotyped assumptions about women?[108]

Alternatively, a statute or policy may be upheld unless it fails more than one test. For example, political gerrymanders will apparently survive judicial scrutiny unless they have both the purpose and the effect of systematically degrading the votes of one political party.[109]

Despite the possibility of combinations and permutations, distinguishing among eight relatively pure kinds of constitutional tests remains useful. Among other things, the different tests protect constitutional values in quite different ways. Viewing them as distinguishable invites questions about which tests should be preferred under which circumstances, about the different tests' relative advantages and disadvantages, and about whether some kinds of tests should be abandoned altogether. Examination of the Supreme Court's tendency to prefer particular kinds of tests may also provide a valuable measure of how the Court conceives its functions and capacities at any particular time.

III. THE RELATIVE PROMINENCE OF DIFFERENT KINDS OF TESTS

The eight kinds of constitutional tests that I have distinguished have larger and smaller areas of formal applicability and, what is at least sometimes different, they have larger and smaller domains of practically controlling significance. To attempt to chart the precise,

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[105] *See* Fried, *Types*, *supra* note 1, at 63.

[106] *Compare* Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) (holding that an insurance scheme's exclusion of coverage for disabilities associated with pregnancy did not discriminate on the basis of gender, but instead drew a nonsuspect distinction between "pregnant women and non-pregnant persons"), *with* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644, 651 (1974) (invalidating mandatory leave policies for pregnant teachers because the policies rested on an "irrebuttable presumption" of the teachers' unfitness and thus violated the Due Process Clause).

[107] *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (ruling that a statute should be invalidated if enacted "'because of,' not merely 'in spite of,' its adverse impact upon an identifiable group").

[108] *See* sources cited *supra* note 80 and accompanying text.

[109] *See* Davis v. Bandemer, 478 U.S. 109, 138–39 (1986).

comparative significance of the different tests would be a heroic agenda, and I make no pretense of doing so. I do, however, wish to establish four general points about the role of different kinds of tests in constitutional law. First, although some commentators characterize the current era of constitutional law as an "age of balancing,"[110] balancing tests have relatively less influence within constitutional doctrine than is often thought. Second, forbidden-content, effects, appropriate deliberation, and aim tests play relatively small roles in contemporary doctrine. Third, suspect- and nonsuspect-content tests dominate large, important areas of constitutional law. Fourth, contemporary constitutional doctrine reflects a larger concern with the legitimacy of governmental purposes than is often appreciated. Many doctrines prescribe invalidation of actions taken for forbidden reasons; other tests function as surrogates for direct inquiries into governmental purposes.

The best explanation for the relative prominence of the different kinds of tests relies heavily on the phenomenon of reasonable disagreement. All things being equal, the current Court disfavors balancing tests on the ground that, given reasonable disagreement, they are insufficiently law-like.[111] Worries about reasonable disagreement similarly underlie the Court's disfavoring of effects and appropriate-deliberation tests.[112] Both tend to promote judicial review that the Court regards as too subjective and intrusive in areas marked by reasonable disagreement both among judges and between courts and legislatures. By contrast, the prominence of suspect- and nonsuspect-content tests is at least partly explained by their relative determinacy; the classification of legislation as either "suspect" or "nonsuspect" is nearly always outcome-dispositive.[113] But another impetus associated with reasonable disagreement is also at work. In the face of reasonable disagreement among the citizenry and between courts and legislatures, the two-tiered framework produced by the conjunction of suspect- and nonsuspect-content tests manifests a judicial aspiration to trust institutions of political democracy except in circumstances in which the democratic process is manifestly untrustworthy. Problems of reasonable disagreement also help explain the increasingly prominent role of purpose tests in modern constitutional doctrine: even when the Justices can agree on little else, they may be able to agree that certain governmental purposes are impermissible and that political insti-

[110] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987).

[111] *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2383 (1997) (arguing that balancing tests are inappropriate devices to enforce federalism and separation of powers principles); Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2047 (1997) (O'Connor, J., concurring in part and concurring in the judgment) (criticizing the "principal opinion," which was joined in relevant part by only two Justices, for employing a "vague balancing test").

[112] *See infra* pp. 84–87.

[113] *See* Sullivan, *supra* note 103, at 296.

tutions lose all claim to judicial deference when they act for forbidden reasons.

A. *Balancing Tests in Constitutional Law*

In recent years, critics have lamented what they perceive as the dominant, even pervasive role of balancing tests in constitutional law.[114] This descriptive claim is only partly correct. To assess the significance of balancing in constitutional law, it is necessary to distinguish two types of balancing.[115] One is an aspect of the process by which the Court crafts doctrine in the first instance. The other kind of balancing is itself a doctrinal test, used to resolve individual cases.

1. Balancing in the Shaping of Doctrinal Tests. — Supreme Court judgments about which kind of test to apply frequently depend on the sort of multipart assessment that the metaphor of "balancing" reflects. Such an assessment becomes necessary whenever, after the identification of a constitutional norm or value, a further question remains about how that norm or value is best implemented in light of contingent empirical conditions, institutional competencies and pathologies, and predictive judgments about the effects of alternative tests.

Maryland v. Wilson,[116] discussed above, illustrates the point. In *Wilson*, which involved the circumstances in which police can require passengers to exit a vehicle during a routine traffic stop, all agreed that the relevant constitutional principle forbade unreasonable searches and seizures.[117] The question was whether to implement this principle with a per se rule or a balancing test. To resolve this question, the Court needed to make a number of assumptions about likely consequences and, having done so, to reach a multifactored assessment concerning the kind of test that was most appropriate. In *Wilson*, the Court selected a bright-line rule permitting requests for passengers to get out of a vehicle;[118] in many other contexts under the Fourth Amendment, the Court has opted for case-by-case, totality-of-the-

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[114] *See, e.g.*, Aleinikoff, *supra* note 110, at 943–44 (analyzing the "serious problems in the mechanics of balancing," which as "a form of constitutional reasoning . . . has become widespread, if not dominant, over the last four decades"); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 4 (1987) (arguing that balancing "is an unacceptable foundation for the constitutional function of judicial review"); Robin West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 47–48 (1990) ("Like the Warren and Burger Courts, when faced with a constitutional challenge to state action, the Rehnquist Court has balanced the asserted right and the severity of its infringement against the seriousness or importance of the state interest." (footnote omitted)).

[115] *Cf.* Nimmer, *supra* note 28, at 942–43 (distinguishing between "definitional" balancing, which aims at determining "which forms of speech are to be regarded as 'speech' within the meaning of the first amendment," and "ad hoc" balancing "for the purpose of determining which litigant deserves to prevail in a particular case").

[116] 117 S. Ct. 882 (1997).

[117] *See id.* at 884–85; *id.* at 886–87 (Stevens, J., dissenting).

[118] *See Wilson*, 117 S. Ct. at 886.

circumstances assessments.[119] But the Fourth Amendment does not make the choice between these two approaches, nor does the process of constitutional interpretation furnish any algorithm to determine the conclusion. No member of the Court, not even the Justices most drawn to "originalism,"[120] suggested otherwise. "Balancing" competing considerations, the Court determined — and there is no irony in this — that the reasonableness of ordering passengers to exit stopped vehicles should be determined pursuant to a per se rule, not a case-by-case balancing process.[121]

The kind of multifactor inquiry represented by balancing also comes into play when the Court determines that a suspect-content test is preferable to a forbidden-content test;[122] that equal protection values should be protected by different kinds of tests in different doctrinal settings; and that inquiries into a decisionmaker's purposes or the quality of legislative deliberation are too costly and disruptive a means of protecting constitutional values in some contexts, but not in others.[123]

2. *Balancing Within Constitutional Doctrine as Shaped by the Supreme Court.* — Balancing, in the sense in which I have more generally used the term, also has a formal role in a significant number of doctrinal tests. Some tests, such as the one applied in *Timmons v. Twin Cities Area New Party*,[124] explicitly frame the judicial inquiry as requiring balancing.[125] To cite just one more example, the test of *Mathews v. Eldridge*,[126] which determines the requirements of procedural due process in diverse settings,[127] is a balancing test of especially broad import. I have also treated tests calling for mid-level scrutiny, in which a court asks whether a statute is substantially related to an important state interest, as balancing tests.[128] In addition, virtually any constitutional test with a closeness-of-fit requirement[129] invites a court

119 *See, e.g.*, Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).

120 *See supra* note 19.

121 *See Wilson*, 117 S. Ct. at 886.

122 *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116, 124 (1991) (applying a suspect-content rule over Justice Kennedy's protest that the Court should hold all content-based classifications per se invalid under the First Amendment).

123 *See infra* note 260.

124 117 S. Ct. 1364 (1997).

125 *See, e.g.*, *id.* at 1370.

126 424 U.S. 319 (1976).

127 *See id.* at 334–35.

128 *See supra* note 103.

129 Closeness-of-fit or "tailoring requirement[s] ask[] ... whether there is a different method of achieving the government's goals that places fewer restrictions" on constitutionally protected rights or interests. Williams, *supra* note 63, at 641. Many constitutional tests call for judicial scrutiny of whether statutes or policies are reasonably fitted to the ends that they aim to promote. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (ruling that classifications that discriminate on the basis of gender are unconstitutional unless they are "substantially related to achievement of [important governmental] objectives"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (stating

to determine whether, all things considered, a statute should be struck down on the ground that there are other adequately effective means by which the government might achieve its end.

Any claim for the pervasive influence of judicial balancing could not, however, rest solely on tests such as these. That claim depends on a broader characterization of balancing — one that encompasses suspect-content and nonsuspect-content tests.[130] There is, undoubtedly, a sense in which these tests could count as balancing tests. Both require courts to assess whether a statute ought to be upheld, in light of the governmental interests that it serves, despite its impact on constitutionally protected values. Nonetheless, more illumination is lost than gained by failing to distinguish relatively even-handed balancing tests, on one hand, from suspect- and nonsuspect-content tests, on the other. Even if something approaching the form of balancing is observed, it is commonplace that suspect-content tests that are "'strict' in theory" will routinely prove "fatal in fact."[131] Conversely, judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp.[132]

3. Criticism and Practice. — The limited number of doctrinal tests that the Court has construed to call for serious, nondeferential balancing reflects anxieties about the balancing enterprise. A prominent criticism challenges the coherence of balancing methodologies, which prescribe that constitutional outcomes should be determined by a weighing of competing interests.[133] According to this critique, the fac-

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that "incidental restriction[s]" on First Amendment freedoms fail judicial scrutiny unless the burden they impose "is no greater than is essential to the furtherance of" an important governmental interest); Fried, *Types*, *supra* note 1, at 55 (noting the frequency with which constitutional doctrines call for inquiry into whether "the connection between [governmental] goals and the means of their attainment" is sufficiently "tight — 'narrowly tailored' is a term frequently used").

130 The Supreme Court has sometimes characterized suspect-content tests as balancing tests. *See, e.g.*, City of Boerne v. Flores, 117 S. Ct. 2157, 2160–61 (1997) (characterizing the compelling government interest test once applied to statutes that substantially burden religious practices as a balancing test); *see also* Aleinikoff, *supra* note 110, at 946 (asserting that compelling state interest tests "exemplify" a "form" of balancing).

131 Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (protesting that strict scrutiny of federal affirmative action should not necessarily be fatal in fact).

132 *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 314–15 (1993) (characterizing rational basis review as "a paradigm of judicial restraint," under which "a classification . . . bear[s] a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it'" (citation omitted) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)))); *see also* Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) (noting that statutes subject to a rational basis test are "entitled to a 'strong presumption of validity'" (quoting Heller v. Doe, 509 U.S. 312, 319 (1993))).

133 *See* Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (noting that "the scale analogy is not really appropriate, since the interests on both sides are incommensurate"); Aleinikoff, *supra* note 110, at 972–96 (discussing the lack of

tors that are supposed to be "weighed" against each other are frequently incommensurable;[134] it makes no more sense to ask whether a right is outweighed by a governmental interest than to inquire whether a rock is heavier than a line is long.[135]

This strong criticism is quite mistaken if "balancing" is conceived, as it should be, as a metaphor for (rather than a literal description of) decision processes that call for consideration of the relative significance of a diverse array of potentially relevant factors.[136] Understood in this way, the term "balancing" does not signify that decisionmaking necessarily proceeds by reducing all relevant considerations to a single metric, assigning them quantitative values, and then weighing them against one another with the precision of a scale.[137] If this misleading picture is rejected and "balancing" is viewed as a metaphor for multifactor decisionmaking, the "incommensurability" objection becomes either too strong or too weak.[138] It is too strong to be credited at all — because too inconsistent with the deepest assumptions of practical reasoning — if it suggests that, when different kinds of considerations bear on a decision, there can be "no basis in our knowledge of value" to say that one decision is rationally preferable to another.[139] In contrast, if the claim allows that rational "comparability" is possible (even if "commensurability," in the sense of measurement according to a single metric, is not), then it is too weak to show that balancing in the metaphorical sense should be abandoned as an approach to legal or other practical decisionmaking. Indeed, as I have argued above, it is hard to imagine how a multifactor decision process (which "balancing" is intended to signify) possibly could be replaced in the deliberations through which the Supreme Court frames doctrinal tests to implement recognized constitutional values.

It is a separate question, however, whether multifactor balancing tests are likely to produce an excessive number of reasonable dis-

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an objective, external "scale of values" upon which to weigh the competing interests); Laurent Frantz, *Is the First Amendment Law? — A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 748 (1963) (asserting that balancing calls for judges to "measur[e] the unmeasurable ... [and] compare the incomparable").

134 For lucid introductions to leading positions in philosophical and legal debates about commensurability, see Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 786–803 (1994), and Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 795–812 (1994).

135 *See Bendix Autolite*, 486 U.S. at 897 (Scalia, J., concurring in the judgment).

136 *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 346 n.13 (1993); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1249 (1983).

137 *See* SHIFFRIN, *supra* note 7, at 133–34.

138 *Cf.* Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 815–17 (1994) (distinguishing "strong" and "weak" incommensurability).

139 *Id.* at 816; *cf.* NAGEL, *supra* note 12, at 101–25 (arguing that skeptical and relativist ethical claims must be rejected if incompatible with other claims, including first-order ethical claims, that are better supported by reason and experience).

agreements at the stage of application. Critics, supported by historical experience, have suggested that reasonable disagreement will frequently occur when the doctrinal tests formulated by the Supreme Court call for nondeferential balancing.[140] And reasonable disagreement is troubling in at least two ways.

First, reasonable disagreement raises issues about fair allocations of political power: by what right does a court substitute its judgment for the reasonable view of politically accountable institutions concerning a disputable issue? I revisit questions involving the pertinence of reasonable disagreement, without purporting to answer them definitively, below.[141] For now, suffice it to say that anxiety about comparative judicial expertise rather clearly provides at least part of the explanation for the extremely deferential "rational basis" review applied to most challenges to legislation under the Due Process and Equal Protection Clauses.

Second, the possibility of reasonable disagreement about the correct outcome of balancing tests frequently means that balancing doctrines will create uncertainty. Legislatures will be unsure of the limits of their authority; citizens will not know their rights; the burdens of litigation will increase. In light of considerations such as these, Justice Scalia has argued that the "rule of law" requires a "law of rules," not open-ended standards or balancing tests.[142] Taken in its strongest form, this claim is surely exaggerated. The common law, for example, is not a law of rules in Justice Scalia's sense, but may nonetheless satisfy the functional desiderata of the rule of law.[143] Nevertheless, concerns about notice and predictability cannot be dismissed cavalierly; measured against these concerns, doctrines that call for serious, case-by-case judicial balancing are frequently less than optimal,[144] especially when reasonable disagreement must be anticipated.

4. Balancing Tests, Reasonable Disagreement, and the Role of the Supreme Court. — The preferability of relatively determinate doctrinal formulations as compared with more open-ended balancing formulations — of rules versus standards — is an important and recurring issue[145] about which I have little to say that has not been said by others. I would, however, make one discrete point: anyone's view about this

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140 *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989) (discussing the lack of predictability that results from balancing).

141 *See infra* Part V.

142 Scalia, *supra* note 140, at 1187.

143 *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7–9 (1997) (discussing rule-of-law desiderata).

144 *See id.* at 9.

145 *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–68 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976); Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56–69 (1992).

issue is likely to depend at least partly on her assessment of the range of reasonable disagreement about how a standard or balancing test is appropriately applied. The broader the range of reasonable disagreement, the less determinacy and predictability will be achieved, and the stronger the argument becomes (other things equal) for a more rule-like test.[146] But rules, which aspire to determine multiple outcomes in advance, are typically harder to formulate than standards or balancing tests.[147] Moreover, because more determinate doctrines attempt to resolve more questions in advance than do less determinate doctrines, it may sometimes prove more difficult for a multimember Court to come to agreement about the appropriate rule — which is to say, about the appropriate resolution of a number of future cases — than about how the balance of considerations tips in a particular case.[148]

The upshot is this: even if the Court believed in principle that more determinate constitutional tests are, all things equal, preferable to balancing tests, it might find that no majority of the Justices could reach agreement on any particular relatively determinate test that a majority thought adequately protective of constitutional values.[149] For example, among those Justices united in their view of the correct result in the case before them, some might favor a suspect-content rule, while others might believe that such a rule would unacceptably overenforce constitutional values in a range of other cases. By contrast, the Court might find that it could reach agreement on the appropriate outcome on the facts, and that it could further agree that this outcome would be correct under a balancing test. If so, even if most or indeed all of the

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[146] One important consideration is that rules, which determine more outcomes in advance, tend to increase the authority of the rule-maker — a role played at least in part by the Supreme Court — relative to the officials, including lower court judges, who are charged with making case-by-case decisions. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 158–62 (1991). Because rules are almost always either underinclusive or overinclusive as measured by their background justifications, an ideal decisionmaker would be able to make better decisions by referring directly to those background justifications than by deciding according to rule. *See id.* at 100–02. No decisionmaker is ideal, however, and a preference for more determinate tests over balancing tests at least partly reflects the view that lower courts and other law-applying officials will be prone to make more errors if given the relative decisional freedom afforded by balancing tests than if charged with applying more determinate rules laid down by the Supreme Court. *Cf. id.* at 158–62 (characterizing rules as devices for the allocation of power).

[147] *See generally* Kaplow, *supra* note 145, at 621–22 (discussing considerations bearing on whether a rule or standard is preferable).

[148] *See* SUNSTEIN, *supra* note 11, at 38–41.

[149] A majority of the Justices might be able to agree to the use of a relatively determinate test, such as a purpose test, without believing that the agreed test — without supplementation by any other test — protects constitutional values fully adequately. *Cf. infra* notes 262–269 and accompanying text (discussing the "overlapping consensus" that frequently supports purpose tests). In such a case, the Justices who agreed in principle on the need for further protection might nonetheless be unable to agree on the *kind* of relatively determinate test that ought to be employed as a supplement.

Justices began with a presumption in favor of rules, they might find themselves settling for balancing tests as a matter of second-best.[150]

Within recent judicial history, the Burger Court's reputation as a "balancing" court[151] may have arisen largely from its Justices' general willingness to accept balancing tests on this basis. Both divided and "rootlessly activist,"[152] the Burger Court was often willing to unite on results, and on loose methodologies, when broader and deeper agreement was impossible. More recently, Justice Scalia, in particular, has crusaded for renunciation of this relatively ad hoc approach,[153] but with less success than once seemed within his grasp. Although the Rehnquist Court generally prefers rules to balancing,[154] it has not abandoned balancing doctrines altogether.[155]

B. *Less Influential Tests*

1. Forbidden-Content Tests. — Forbidden-content tests are by no means insignificant in constitutional law, but their scope is less than might be expected in central, contested areas. Most of the doctrinally prominent tests under the First Amendment and the Equal Protection Clause, for example, are suspect-content rather than forbidden-content tests. A statute that regulates speech based on content, or that discriminates facially on the basis of race, is not per se unconstitutional (as it would be if a forbidden-content test applied), but is only presumptively so; the statute may be upheld if necessary to serve a compelling governmental interest.[156]

The reasons for the relatively small role played by forbidden-content tests are not hard to discern. It is virtually impossible, in practice, to generate a set of forbidden-content tests that would cover the entire universe of constitutional law (and not require supplementation by other kinds of tests); provide adequate protection for constitutional

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150 For further discussion of the situations in which the Court might agree to balancing tests as a matter of second-best, see note 275 below.

151 *See* Aleinikoff, *supra* note 110, at 964–65 (noting that balancing "has come of age" in recent decades and that, as of the mid-1980s, "[e]very sitting Justice of the Supreme Court ha[d] relied on balancing").

152 *See* Vincent Blasi, *The Rootless Activism of the Burger Court*, *in* THE BURGER COURT 198, 210–17 (Vincent Blasi ed., 1983).

153 *See* Morrison v. Olson, 487 U.S. 654, 711–12 (1988) (Scalia, J., dissenting); Scalia, *supra* note 140, at 1187; *see also* Sullivan, *supra* note 103, at 301 ("Justice Scalia has made the eradication of balancing a prominent part of his intellectual agenda on the Court.").

154 *See* cases cited *supra* note 111 and accompanying text. *See generally* Sullivan, *supra* note 145, at 69–123 (discussing the Justices' relative preferences for rules and standards).

155 *See, e.g.*, Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1370 (1997) ("When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden . . . ." (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)))).

156 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995); Shaw v. Reno, 509 U.S. 630, 642 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

values; and manage not to encroach too far on the practically necessary powers of government.[157] For reasons of prudence, the Court hesitates to say that government may never, no matter how great the perceived emergency, enact suspect legislation.[158]

2. *Effects Tests.* — Modern constitutional doctrine places relatively little reliance on effects tests — at least when the term refers to tests that trigger heightened judicial scrutiny of statutes that have an adverse impact on minority groups or on constitutionally protected interests in cases in which suspect-content rules do not apply. The central equal protection case is *Washington v. Davis*,[159] which held that statutes and regulations do not trigger strict judicial scrutiny merely because they impose disproportionate burdens on racial or other minorities.[160] More generally, the Court has held that statutes that reach a broad range of prohibitable conduct are subject only to deferential review even if they have the "incidental" effect of burdening constitutional rights.[161] If a statute does not specifically target protected speech or conduct, no effects test generally applies[162] — even though,

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157 In addition to permitting responses to different kinds of emergencies, constitutional doctrine must leave the government some leeway to determine how to balance competing, constitutionally grounded values. *See* Fallon, *supra* note 136, at 362; *see also* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 50–57 (1995) (arguing that strong national authority is needed to protect rights and interests against the states).

158 A case decided last Term, *Lynce v. Mathis*, 117 S. Ct. 891 (1997), is illustrative. In holding that legislation retroactively canceling a released prisoner's good-time credits and compelling his return to jail violated the Ex Post Facto Clause, the Court emphasized that the crucial ex post facto inquiry involved what the legislation had in fact done, and it expressly rejected as constitutionally irrelevant a defense based on the purpose for which the state had *initially* adopted a good-time credit scheme. *See id.* at 896–97. Pointedly, however, the Court stopped short of saying that a state's purpose for *withdrawing* good-time credits could never overcome the presumptive constitutional invalidity of a statute retroactively withdrawing good-time credits. That question was not presented, and the Court presumably did not wish to foreclose its options. *See id.* at 898.

159 426 U.S. 229 (1976).

160 *See id.* at 239–41; *see also* City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion) (holding that discriminatory intent is also necessary to establish a violation of the Fifteenth Amendment guarantee of equal voting rights).

161 *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 885, 890 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988))); Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (upholding a generally applicable military regulation that prohibited a soldier from wearing a yarmulke while on duty). *See generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1199–1232 (1996) (discussing the relevance of "incidental burdens" under various doctrines).

162 *See, e.g.*, *Smith*, 494 U.S. at 882 (holding that the incidental effect of a generally applicable law in burdening religious practice will not trigger strict scrutiny under the Free Exercise Clause); Arcara v. Cloud Books, Inc., 478 U.S. 697, 706–07 (1986) (holding that a closure remedy enforced against a bookstore for unlawful conduct did not trigger First Amendment scrutiny); *Davis*, 426 U.S. at 239–40 (holding that a statute's disproportionally adverse impact on racial minorities will not trigger heightened judicial scrutiny under the Equal Protection Clause).

from the perspective of someone claiming a constitutional right, the government's innocent purpose may matter little.[163]

Effects tests have not vanished entirely from the scene. To take perhaps the most prominent example, restrictions on conduct become subject to First Amendment scrutiny under the test of *United States v. O'Brien*[164] when they burden expressive action. In addition, the Court has still not formally overruled the much maligned test for Establishment Clause violations introduced by *Lemon v. Kurtzman*,[165] which holds statutes invalid if they have the primary effect of either promoting or inhibiting religion.[166] Significantly, however, the current status of the *Lemon* test is in doubt,[167] and there has even been some uncertainty in recent decisions involving the kind of burden on expressive activity that is necessary to trigger First Amendment scrutiny under *O'Brien*.[168]

The reason for the Court's chariness concerning effects tests seems clear: the Justices believe that for courts to invalidate every governmental act that incidentally burdens constitutional rights or disproportionately disadvantages minorities would infringe too far on powers

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163 *See* Dorf, *supra* note 161, at 1177.

164 391 U.S. 367 (1968). For a brief discussion of the *O'Brien* test, see notes 101–105 above, and accompanying text.

165 403 U.S. 602 (1971).

166 *See id.* at 612 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

167 In *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), a majority of the Court, albeit without a majority opinion, appeared to apply a different test under which the crucial question was whether the government could reasonably be perceived as having endorsed religion. *See id.* at 784 (Souter, J., concurring in part and concurring in the judgment); *id.* at 773–83 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 799–800 (Stevens, J., dissenting); *id.* at 817–18 (Ginsburg, J., dissenting) (emphasizing the failure of the government to make clear that it did not endorse a religious display in a public forum); *see also* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 370 (concluding that in *Pinette* "[f]ive Justices considered endorsement *in some form* to be critical"). *But cf.* Agostini v. Felton, 117 S. Ct. 1997, 2008–09 (1997) (affirming the continuing relevance under the Establishment Clause of inquiries such as those called for by the "purpose," "effect," and "entanglement" prongs of the *Lemon* test).

168 The Supreme Court's practice in cases under the Free Speech Clause presents at least a surface inconsistency: the approach in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), holding that the application of a generally applicable statute with a tendency to burden speech should not be subject to *any* First Amendment scrutiny, *see id.* at 704–07, appears discordant with *United States v. O'Brien*, 391 U.S. 367 (1968), which held that in cases involving elements of "speech" and "nonspeech," "incidental limitations on First Amendment freedoms" should be subjected to First Amendment scrutiny under a distinctive, three-part test, *id.* at 376–77. *See* David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 222–32 (1997) (describing a "conflict" among the approaches of recent First Amendment cases). The most plausible rationalization of the cases suggests that *O'Brien*'s elevated scrutiny will typically be triggered only when the conduct that is incidentally restricted *itself* has an expressive element, and there is therefore a "danger" that "a speech-suppressive administrative motive" was at work. Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENTARY 401, 415–20 (1995).

that must, as a matter of good sense, be vested in government.[169] And for courts to engage in open-ended balancing of all acts that incidentally affect constitutionally protected interests would invite too many inquiries that are too little determined by legal rules.[170] In a world of reasonable disagreement, the Court believes, the judicial role must be cabined to protect reasonable choices by politically accountable decisionmakers against too many costly and unpredictable assessments by courts.

3. Appropriate-Deliberation Tests. — Apparently for similar reasons, the Court only rarely employs appropriate-deliberation tests. Despite claims of republican revivalists that the Constitution aims to create a deliberative democracy[171] in which the legislature defaults on its obligations if it fails to give careful, sympathetic consideration to all groups' interests and all reasonable points of view, the quality of governmental deliberation — or indeed its absence — is generally held irrelevant under most constitutional provisions, including the Due Process, Equal Protection, and Takings Clauses.[172]

This generalization does not lack exceptions. As noted above, the government may apparently differentiate based on gender only if its deliberation is thoughtful, not corrupted by stereotypes.[173] In another set of exceptional cases, current doctrine sometimes calls for inquiry into the quality of governmental deliberations when government takes race into account for inclusionary reasons. Under Justice Powell's still controlling opinion in *Regents of the University of California v. Bakke*,[174] educational institutions may consider race in making indi-

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169 The Court made its concerns clear in the leading case of *Washington v. Davis*, 426 U.S. 229 (1976):

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248.

170 *See, e.g.*, Dorf, *supra* note 161, at 1178 ("The doctrinal distinction between direct and incidental burdens rests partly on a floodgates concern."); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 784 (1985) ("To be concerned significantly, in a constitutional sense, with incidental effects is to be committed to judicial scrutiny of an enormous range of government decisions.").

171 *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1505–07 (1988); Michelman, *supra* note 12, at 17–19; Sunstein, *supra* note 79, at 30–31.

172 *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action ... [i]t is ... 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision ....'" (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1710–27 (1984).

173 *See* sources cited *supra* note 80 and accompanying text.

174 438 U.S. 265 (1978). In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2580 (1996), the court of appeals held that use of race as a factor in law school admissions for the purpose of achieving diversity was per se proscribed. *See id.* at 946, 948. According to the

vidualized judgments about applicants' capacities to contribute to "diversity" in their student bodies.[175] But while race can count as a "plus,"[176] it apparently must not count too heavily. The Court has taken a similar approach to the question whether legislatures can deliberately create so-called "majority-minority" voting districts, in which traditional minority groups constitute more than half of the electorate. According to the Court's recent decisions, legislators may treat race as a relevant factor but generally not as the "predominant" consideration in drawing district lines.[177]

When the doctrinal norm is conjoined with its exceptions, the pattern seems clear. The Court generally eschews inquiry into the quality of governmental deliberations, but it makes exceptions in some cases in which governmental decisionmaking involves reliance, ostensibly for benign purposes, on considerations that the Court regards as suspect or quasi-suspect. Clearly ambivalent about whether "preferential" treatment based on race and gender should be permitted at all, the Court has crafted doctrine aimed at ensuring that these factors will be considered only in ways that the Court finds permissible. Possibly because of the social salience of race and gender, the Court thinks it crucial that norms disfavoring, if not prohibiting, race- and gender-based decisionmaking should not go significantly underenforced, and it appears willing to bear the costs of especially difficult and sensitive inquiries to minimize underenforcement.[178]

4. Aim Tests. — As of now, aim tests are not widely used in constitutional law, though Justice Scalia has urged their employment in several contexts as what might be viewed as surrogates for purpose tests.[179] In supporting an aim test for free exercise violations, in pref-

two-judge majority, "Justice Powell's view in *Bakke*" that race could permissibly be treated as a "plus" in the search for diversity was "not binding precedent," because it "was joined by no other Justice." *Id.* at 944. In fact, however, Justice Powell's reasoning was crucial to the *judgment* of the Court that not all use of race in the admissions process was forbidden. In addition, a majority of the Court did join in Part V-C of Justice Powell's opinion, in which the permissibility of some consideration of race in admissions processes was expressly contemplated. *See Bakke*, 438 U.S. at 320; *id.* at 272.

175 *See Bakke*, 438 U.S. at 317.

176 *See id.*

177 *See* Abrams v. Johnson, 117 S. Ct. 1925, 1936 (1997) (noting that "if race is the predominant motive in creating districts, strict scrutiny applies, and the districting plan must be narrowly tailored to serve a compelling governmental interest" (citation omitted)); Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (noting that the state "may not separate its citizens into different voting districts on the basis of race"); *see also* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997) (applying the rule that "race [may] not predominate over . . . traditional districting principles"). For valuable commentary, see Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1201–04 (1996), and Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2506 (1997).

178 On the costs, see *Abrams*, 117 S. Ct. at 1949–51 (1997) (Breyer, J., dissenting).

179 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) (arguing that objective statutory aim, not subjective purpose or incidental effects, should be the focus of inquiry when a minority

erence to a direct inquiry into governmental purposes, Justice Scalia has argued that purpose inquiries are unseemly and judicially unmanageable.[180] Other Justices, however, have generally disagreed and — as discussed more fully below — have tended to prefer purpose tests,[181] which provide relatively more protection to constitutional rights, over aim tests, which provide relatively less protection.[182]

C. *Suspect- and Nonsuspect-Content Tests*

Suspect-content tests, especially when deployed in tandem with nonsuspect-content tests, are hugely influential in implementing the Equal Protection and Due Process Clauses. In these vast doctrinal areas, statutes and policies that classify on suspect bases or infringe on fundamental rights are strongly presumptively unconstitutional; they can be upheld only if necessary to serve a compelling governmental interest.[183] By contrast, statutes and policies outside the suspect category enjoy a robust presumption of constitutionality under traditional rational basis review.[184] Suspect-content tests also play a large role under the First Amendment. Outside a few delimited categories,[185] regulations based on the content of speech are subject to the most exacting judicial scrutiny.[186]

John Ely offers the most plausible explanation for the prominence of suspect-content tests in Equal Protection and First Amendment law — and, relatedly, for the highly deferential review accorded under the Equal Protection and Due Process Clauses to nonsuspect statutes,

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religious group claims that a statute that is neutral on its face violates free exercise rights); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576–79 (1991) (Scalia, J., concurring in the judgment) (maintaining that statutes that mostly regulate conduct, not pure speech, should escape judicial scrutiny under the *O'Brien* test unless they are aimed at, rather than merely have an incidental effect on or a subjective purpose of suppressing, expressive conduct).

180 *See Church of the Lukumi Babalu Aye*, 508 U.S. at 558–59 (Scalia, J., concurring in part and concurring in the judgment).

181 Interestingly, even Justice Scalia has accepted that purpose tests are a judicially manageable means of enforcing the Equal Protection Clause. *See, e.g.*, M.L.B. v. S.L.J., 117 S. Ct. 555, 575 (1996) (Thomas, J., dissenting) (joined by Scalia, J.) (arguing that establishing a violation of the Equal Protection Clause requires proof of discriminatory motive).

182 On the relation between aim and purpose tests, see note 99 above.

183 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

184 *See, e.g.*, Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) ("If a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.'" (quoting Romer v. Evans, 116 S. Ct. 1620, 1627 (1996))); FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (stating that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" on a case-by-case basis).

185 The number of such categories may be larger than is often appreciated. *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 21–28.

186 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

regulations, and policies.[187] Ely's explanation links concerns about reasonable disagreement in constitutional law with claims about when such disagreements should be resolved by democratic processes.

Crudely summarized, Ely's theory holds that courts, in interpreting the Constitution's more open-ended provisions, should generally defer to the judgments of politically accountable decisionmakers.[188] Reasonable people will disagree about whether, for example, legislation benefiting some groups and harming others is fair or unfair; no reliable method exists for resolving the moral disputes;[189] and, in such circumstances, the basic commitment of the Constitution is to permit decision by democratic majorities and their elected representatives.[190] Given the Constitution's central commitment to political democracy, the crucial role of the courts is not to second-guess the substantive decisions of the political branches, but to ensure the integrity of the democratic process.[191] In performing this function, courts should strictly scrutinize statutes of the kinds most likely to trigger suspect-content tests under current doctrine.[192] Somewhat more particularly, courts should strictly scrutinize statutes that discriminate against "discrete and insular"[193] minorities, since statutes of this kind are likely to reflect prejudices that render the democratic process untrustworthy.[194] Under Ely's "representation-reinforcing" approach, courts should also apply strict scrutiny to statutes that restrict the flow of speech and ideas on which political democracy depends or that otherwise clog the channels of political change.[195]

In suggesting that Professor Ely's theory helps to explain the central role of suspect- and nonsuspect-content tests under the Due Process and Equal Protection Clauses and of suspect-content tests under the First Amendment, I do not claim that the Court has accepted his prescriptions on a global basis; many important constitutional doctrines are impossible to reconcile with Ely's theory.[196] I mean only to

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[187] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 75–77, 105–79 (1980).

[188] *See id.* at 101–04, 183.

[189] *See id.* at 54 ("[O]ur society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives.").

[190] *See id.* at 88–104.

[191] *See id.* at 102–03 ("The approach to constitutional adjudication recommended here is akin to what might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs — rather than dictate substantive results it intervenes only when the 'market,' in our case the political market, is systemically malfunctioning." (footnote omitted)).

[192] *See id.* at 105–79.

[193] *Id.* at 148 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

[194] *See id.* at 145–70.

[195] *See id.* at 87–88, 105–34.

[196] These include the doctrines that subject some forms of legislation to searching judicial scrutiny on "substantive due process" grounds, *see, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992), that subject affirmative action programs benefiting minority groups to strict judicial scrutiny, *see, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), and that provide

note some important convergences between Supreme Court practice and Ely's commended approach. First, the Court manifestly worries about lower courts substituting their judgment for that of politically accountable institutions in areas of reasonable disagreement. This is especially true in the broad, politically contestable domain of economic regulation that is subject to challenge under the Due Process and Equal Protection Clauses. Second, nonsuspect-content tests reflect a deferential judicial stance based largely on this worry. Third, prominent suspect-content tests are plausibly viewed as aimed at correcting process deficiencies that would render the decisions of political bodies singularly unworthy of judicial deference.

D. *Purpose Tests (and Their Plausible Surrogates) in Constitutional Law*

Doctrinal tests in constitutional law reflect broader concerns with the legitimacy of governmental purposes than is usually appreciated.[197] A number of constitutional doctrines call for direct inquiries into governmental purposes. Other doctrines employ tests that can be viewed as surrogates for purpose tests:[198] they avoid direct inquiry into the government's purposes, but nonetheless adopt presumptions of unconstitutionality or assign burdens of proof that can reasonably be understood as reflecting suspicion that when the government regulates on certain suspect bases, or when legislation has certain troubling effects, the government in fact has an illicit purpose. When purpose tests and their surrogates play a central role in constitutional doctrine, at least part of the explanation frequently lies in phenomena arising from reasonable disagreement about what the Constitution means or how it ought to be applied.

1. Explicit Inquiries into Forbidden Purposes. — Little more than a quarter century ago, the Supreme Court could claim with some plausibility that the government's actual purposes in enacting legislation were constitutionally irrelevant.[199] Today, numerous constitutional

heightened scrutiny of all gender-based classifications, regardless of whether they disadvantage men or women, *see, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982). *See generally* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833 (1991) (acknowledging that judicial practice has diverged from the theory set out in *Democracy and Distrust*).

[197] *But cf.* Bhagwat, *supra* note 82, at 301 (identifying a "trend within the Court's jurisprudence toward an increased focus" on governmental "ends" and "purposes"); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994) (arguing that "much of constitutional law" involves a process by which "courts evaluate the different kinds of reasons that are off limits to government in different arenas").

[198] For a discussion of why these tests can be viewed as "surrogates" rather than alternatives, see pp. 94–95 below.

[199] *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224–26 (1971) (refusing to consider the motivation behind a city's closing of racially integrated swimming pools); United States v. O'Brien, 391 U.S. 367, 383 (1968) (finding that "[i]nquiries into congressional motives or purposes are a hazard-

doctrines explicitly inquire whether the government has acted for forbidden reasons. With no pretense of exhaustiveness, a few examples should make the point.[200]

The Equal Protection Clause. In the leading case of *Washington v. Davis*,[201] the Supreme Court expressly rejected arguments in favor of effects and balancing tests and made discriminatory purpose the touchstone of equal protection inquiries involving statutes that do not facially discriminate against racial or other protected minorities.[202] When the government's motives are discriminatory, a facially neutral statute is invalid.[203] But if the government has no discriminatory purpose,[204] a statute will be upheld despite a racially disparate impact, as long as the statute is not arbitrary or irrational.[205]

Governmental purpose is also crucial in equal protection challenges to statutes that discriminate against classes not ordinarily protected by heightened judicial scrutiny. The Supreme Court has held that a bare desire to harm an unpopular group is not a constitutionally legitimate interest.[206] On this basis, the Court has invalidated legislation intended to harm hippies,[207] the mentally retarded,[208] and homosexuals.[209]

The Free Speech Clause. It is axiomatic under the First Amendment that the government may not prohibit speech or expressive ac-

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ous matter"); *cf. Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) (concluding that the Court is not "at liberty" to inquire into the legislature's motives for repealing the Court's appellate jurisdiction in habeas corpus cases).

200 For a partly overlapping list of doctrines aimed at barring legislation likely animated by the "naked preferences" of one group to achieve some goal at the expense of another group, see Sunstein, cited above in note 172, at 1704–27.

201 426 U.S. 229 (1976).

202 *See id.* at 238–48. *But see* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1107, 1135–36 (1989) (arguing that, contrary to what the Court has said in *Washington v. Davis* and other cases, equal protection doctrine actually involves a covert balancing of competing constitutional and governmental interests).

203 *See Davis*, 426 U.S. at 238–43.

204 The Court has elaborated on the nature of the discriminatory intent that is forbidden. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (defining discriminatory purpose in terms of actions taken "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (suggesting that proof of a discriminatory purpose "would not necessarily have required invalidation of the challenged decision," but would have shifted the burden to establish "that the same decision would have resulted even had the impermissible purpose not been considered").

205 *See Davis*, 426 U.S. at 242–45; *see also* City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (holding that discriminatory intent is also necessary to establish a violation of the Fifteenth Amendment guarantee of equal voting rights).

206 *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973), *cited in* Romer v. Evans, 116 S. Ct. 1620, 1628 (1996).

207 *See Moreno*, 413 U.S. at 534–35.

208 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

209 *See Romer*, 116 S. Ct. at 1627–28.

tivity because it disagrees with particular ideas.[210] If government's purpose is censorial, the relatively relaxed standards that would otherwise test the permissibility of "time, place, and manner" regulations and of restrictions on expressive conduct do not apply.[211]

The Establishment Clause. In *Lemon v. Kurtzman*,[212] decided in 1971, the Supreme Court summarized settled doctrine as deeming legislation invalid under the Establishment Clause if, among other things, it was enacted for the purpose of promoting or inhibiting religious exercise.[213] The *Lemon* test has drawn sharp attack in recent years,[214] but has never been rejected by a Supreme Court majority opinion.[215] Even if *Lemon* were replaced, however, inquiries concerning governmental purposes would almost surely survive, although in slightly altered form. It continues to be relatively uncontroversial that a statute passed for the purpose of deterring religious practice should be held unconstitutional[216] — under the Free Exercise Clause,[217] if not the Establishment Clause.[218] Moreover, the "endorsement" test that has been

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210 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

211 *R.A.V.*, 505 U.S. at 386.

212 403 U.S. 602 (1971).

213 *See id.* at 612–13. The Court has subsequently pointed to forbidden governmental purposes as grounds for holding that a public school cannot mandate that biology classes teach creationism as an alternative theory to evolution. *See* Edwards v. Aguillard, 482 U.S. 578, 594 (1987). A forbidden purpose has also led to the invalidation of a statute prescribing that the school day should begin with a moment of silence for meditation or private prayer. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

214 *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (characterizing the *Lemon* test as a "formulaic abstraction[] . . . which has received well-earned criticism from many Members of this Court"); Bowen v. Kendrick, 487 U.S. 589, 615–16 (1988) (noting that the "entanglement" prong of the *Lemon* test "has been much criticized over the years"); *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting) ("The three-part [*Lemon*] test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.").

215 *See generally supra* note 167 (discussing tests applied in recent Establishment Clause cases).

216 *See* Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).

217 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (citation omitted)). *But cf. id.* at 558 (Scalia, J., concurring in part and concurring in the judgment) (rejecting an inquiry into lawmakers' subjective purposes and calling instead for an examination of the statute's "object").

218 Professor Tribe maintains that purpose either does not or should not matter to Establishment Clause inquiries. *See* Tribe, *supra* note 78, at 28–32. In his view, the crucial question is whether government action has the "effect" of promoting, inhibiting, or endorsing religion. Governmental action that was taken for the purpose of achieving one of these effects, but failed to do

favored by some Justices in recent years as a measure of Establishment Clause violations[219] retains a place for inquiries into governmental purposes.[220]

The Free Exercise Clause. A strong majority of the Supreme Court has held that legislation enacted for the purpose of burdening or discouraging religious practice violates the Free Exercise Clause.[221]

The Dormant Commerce Clause. Settled doctrine under the dormant commerce clause forbids the states to impose taxes or establish

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so, would not violate the Constitution; it would have the character of a "failed attempt." *Id.* at 28–29. Tribe is right that in the absence of some effect, no judicially actionable constitutional violation would occur. He uses the example of a school board that prescribes the teaching of trigonometry because it hopes that exposure to triangles will promote belief in the Holy Trinity. *See id.* at 29. It does not follow, however, that the legal pertinence of "effects" can always be assessed independently of the government's purposes in achieving those effects. The effect of making Christmas Day a holiday may be the same regardless of whether the government's purpose in doing so is to promote Christianity or to provide a winter holiday on which friends and families can gather for either secular or religious celebrations. But both the nature and the constitutionality of the government's act depend on the government's purpose. Within this framework, the requirement that there must be some effect for there to be a constitutional violation is like a "standing" rule; in the absence of any effect on constitutional values, no one would be hurt, and no one would have "standing" to invoke the judicial power to seek a remedy. But when there is enough of an effect to ground standing, purpose may play a crucial role in determining whether a constitutional violation can be established on the merits.

219 *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773–78 (1995) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 784 (Souter, J., concurring in part and concurring in the judgment); *id.* at 799–800 (Stevens, J., dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) (Blackmun, J.) (adopting the endorsement test in the plurality opinion); *id.* at 624–25 (O'Connor, J., concurring in part and concurring in the judgment); *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring) (proposing the endorsement test for the first time); *see also* Greenawalt, *supra* note 167, at 370 (concluding that, in the various opinions in *Pinette*, "[f]ive Justices considered endorsement *in some form* to be critical").

For discussion of the "endorsement test" and, in particular, the reliance on a conception of a "neutral" or "reasonable" observer, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1293 (2d ed. 1988); Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 82–83 (1990); Joel S. Jacobs, *Endorsement as "Adoptive Action:" A Suggested Definition of, and an Argument for, Justice O'Connor's Establishment Clause Test*, 22 HASTINGS CONST. L.Q. 29, 38–42 (1994); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 516 (1992); and Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 291–95 (1987).

220 *See County of Allegheny*, 492 U.S. at 592 ("In recent years, we have paid particularly close attention [in Establishment Clause cases] to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."); *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring in the judgment) ("The relevant issue is whether an objective observer, acquainted with the text, *legislative history*, and implementation of the statute, would perceive [the governmental act] as a state endorsement of [religion]." (emphasis added)); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (stating that to determine "whether Pawtucket has endorsed Christianity ... we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed").

221 *See Church of the Lukumi Babalu Aye*, 508 U.S. at 532–33.

other trade barriers that purposefully discriminate against interstate commerce.[222] Taxes and other regulations do not survive judicial scrutiny simply because they are nondiscriminatory on their faces. If the purpose of a facially nondiscriminatory regulation is to protect in-state economic interests against competition from out-of-staters, the regulation is invalid.[223]

Substantive Due Process. Under the Supreme Court's decisions in *Roe v. Wade*[224] and *Planned Parenthood v. Casey*,[225] the constitutionality of some abortion regulations may depend on the government's purpose.[226] For example, the government may enact "incidental" regulations designed to ensure that a woman has made an informed decision about whether to have an abortion,[227] but (at least on one reading of *Casey*) a state may not legislate for the purpose of stopping a woman who has made an informed decision from implementing her choice to abort a nonviable fetus.[228]

2. *Tests Plausibly Viewed as Surrogates for Forbidden-Purpose Tests.* — On the surface, forbidden-content, suspect-content, and effects tests appear to be alternatives to purpose-focused inquiries. On closer examination, however, many content-based and effects-based tests can reasonably be viewed as surrogates for purpose tests. As an initial matter, the notion that other kinds of tests could be surrogates for purpose tests may seem mysterious. This formulation may suggest that purpose tests enjoy a kind of primacy, and it may therefore seem incompatible with my earlier insistence that the tests employed in constitutional law typically all stand on the same footing, as available but seldom necessary mechanisms for implementing the Constitution.[229] The explanation for treating other kinds of tests as sometime surrogates for purpose tests rests on the premise that within the project of implementing the Constitution, in which courts frequently rely on other branches of government to respect constitutional norms that are

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222 *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1597 (1997); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984).

223 *See* Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 256 (asserting that under current doctrine, "the Commerce Clause serves a function much like the Equal Protection Clause — that of disapproving certain reasons for government action"); *cf.* Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 352 (1977) (considering evidence that a facially neutral statute was enacted for a discriminatory motive).

224 410 U.S. 113 (1973).

225 505 U.S. 833 (1992).

226 *Cf.* Mazurek v. Armstrong, 117 S. Ct. 1865, 1867 (1997) (assuming arguendo that legislation motivated by a purpose of interfering with abortion rights would be unconstitutional but finding that the record did not establish such a purpose).

227 *See Casey*, 505 U.S. at 872.

228 *See id.* at 877; Bhagwat, *supra* note 82, at 329. An alternative reading of *Casey* would treat the "undue burden" standard as establishing an "effects" test and as precluding the further protection that would be given by a "purpose" test.

229 *See supra* Part I.

judicially underenforced, actions taken for unconstitutional purposes typically constitute especially egregious breaches of constitutional trust — seldom mitigated by considerations of reasonable disagreement, for example. If the underlying constitutional norms are not relatively fully protected by other kinds of tests, there may be an especially urgent interest in ensuring judicial protection against violations of this kind. Although purpose tests obviously offer the most straightforward protection against unconstitutionally motivated action, it sometimes may be difficult to prove in particular cases that the government acted for a forbidden reason.[230] Moreover, because such a determination may be insulting, courts may hesitate to reach this conclusion on a case-by-case basis.[231] In light of history and familiar psychology, however, some types of actions — as identified either by their contents or their effects — can be seen in the aggregate as likely to reflect forbidden purposes.[232] When this is so, a sensible doctrinal response is to elevate the applicable level of scrutiny.[233]

Suspect classifications under the Equal Protection Clause. Under the Equal Protection Clause, statutes that discriminate on the basis of race and other suspect and semi-suspect classifications trigger heightened judicial scrutiny.[234] Among the considerations supporting this rule is that statutes drawing distinctions on suspect bases are often likely to reflect forbidden purposes.[235]

Though formally framed in suspect-content terms, the Supreme Court's affirmative action jurisprudence manifests a clear preoccupation with what the Court takes to be constitutionally forbidden purposes.[236] Two relevant themes run through the cases. First, although governmental bodies have a compelling interest in remedying their own past discrimination, the purpose of race-based redistribution for

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[230] *See* Fried, *Types*, *supra* note 1, at 60–63; Kagan, *supra* note 87, at 438–39.

[231] *See* Regan, *supra* note 90, at 1285.

[232] *See* Fried, *Types*, *supra* note 1, at 61, 63; Kagan, *supra* note 87, at 451.

[233] *See* Fried, *Types*, *supra* note 1, at 62; Kagan, *supra* note 87, at 451.

[234] *See* United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (applying intermediate scrutiny for gender-based classification); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny for race-based classification).

[235] *See* ELY, *supra* note 187, at 145–48; John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1156 (1978); Fried, *Types*, *supra* note 1, at 62–63.

It is not my claim that the *only* reason to object to statutes facially discriminating on the basis of race is that they are likely to reflect forbidden purposes. Statutes explicitly discriminating against racial and other suspect minorities may also be objectionable because they express a message that certain groups occupy a status inferior to others, or because discrimination against minorities in the distribution of certain benefits or burdens offends the core historical meaning of the Equal Protection Clause, or because discriminatory statutes and policies are likely to reflect prejudice.

[236] *See* Bhagwat, *supra* note 82, at 314–15; David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 25–26 (1996).

its own sake is an impermissible one.[237] Second, an important reason for subjecting affirmative action programs to strict scrutiny is to "smoke out" impermissible, covertly redistributive (rather than remedial) motives.[238]

The Free Speech Clause. "Content neutrality" has emerged as the central concept in modern free speech doctrine.[239] The Court applies a balancing test to statutes that regulate speech in a content-neutral way — for example, by prohibiting all picketing, regardless of content, within 100 feet of an elementary school.[240] By contrast, statutes that regulate speech on the basis of content are presumed unconstitutional.[241] As a result, it may sometimes be permissible under the First Amendment for the government to enact a relatively broad ban, such as a prohibition against all picketing close to elementary schools, but not to enact a narrower regulation that would actually permit more speech, such as a prohibition against all picketing except labor picketing.[242] As Elena Kagan argues, the most convincing explanation for this apparent anomaly involves a presumption about governmental purposes: when the government regulates speech on the basis of content, there is reason to suspect that it has acted for the forbidden purpose of shielding citizens from ideas that the government finds objectionable.[243]

Another First Amendment doctrine reflecting concern about impermissible purposes demands relative determinacy in schemes for licensing the use of public fora.[244] For example, a town can prohibit parading without a permit, but only if the standards for awarding

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[237] *See Adarand Constructors*, 515 U.S. at 235–36; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–499 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

[238] *J.A. Croson Co.*, 488 U.S. at 493; *see Adarand Constructors*, 515 U.S. at 226; Strauss, *supra* note 236, at 26.

[239] For probing discussions of the concept of content neutrality, see, for example, Kagan, cited above in note 87, at 456–72; Stone, cited above in note 63, at 48–52; and Williams, cited above in note 63, at 722–28.

[240] *See, e.g.*, Grayned v. Rockford, 408 U.S. 104, 115 (1972) (upholding a content-neutral prohibition against disruptive picketing outside a school).

[241] The leading case is *Police Department v. Mosley*, 408 U.S. 92 (1972), which invalidated an ordinance banning all picketing except labor picketing within 150 feet of a school building during school hours. *See id.* at 94. For commentary, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975).

[242] *See Mosley*, 408 U.S. at 94; *cf.* Kagan, *supra* note 87, at 445 (noting similar seeming anomalies); Stone, *supra* note 63, at 54 (same).

[243] *See* Kagan, *supra* note 87, at 451; *see also* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1997 SUP. CT. REV. 123, 127 (noting a view of First Amendment cases under which "the form of a regulation — content-specific or content-neutral — matters mostly as evidence of its purpose, but purpose is the predominant consideration").

[244] *See, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 769–70 (1988); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969); Kagan, *supra* note 87, at 457.

permits leave little room for discretion.[245] Otherwise, licensing officials might favor some speakers and disfavor others on forbidden bases.[246]

Distinction of direct and incidental burdens. The Supreme Court has sometimes treated burdens as "incidental," and thus as not triggering heightened judicial review, even when they directly impede the exercise of a fundamental right.[247] Examples include statutes that mandate waiting periods before a woman can have an abortion[248] and those that compel people to undergo blood tests before they marry.[249] When courts find that such statutes impose only "incidental" burdens on fundamental rights, the explanation cannot be that the statutes are not targeted directly at constitutionally protected conduct. Instead, the doctrine deems burdens such as these to be "incidental" when they do not make the ultimate exercise of a right too difficult and, equally crucially, when the Court views their purposes as legitimate.[250] For example, the Court would almost surely not regard a blood test requirement as incompatible with the values supporting the right to marry.[251] More controversially, it does not see the purpose of encouraging women to deliberate before having an abortion as inconsistent in principle with the abortion right.[252]

Incidental burdens under the dormant commerce clause. As a formal matter, the Supreme Court applies a balancing test to statutes that do not facially or intentionally discriminate against interstate commerce.[253] As a practical matter, however, the judicial inquiry generally lacks bite unless a state regulatory statute disproportionately affects out-of-staters or the flow of goods in interstate commerce.[254] In cases

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[245] *See* Cox v. New Hampshire, 312 U.S. 569, 575 (1941). For criticism, see C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 993–94 (1984).

[246] *See* Saia v. New York, 334 U.S. 558, 562 (1948); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867 (1991).

[247] *See* Planned Parenthood v. Casey, 505 U.S. 833, 887 (1992) (plurality opinion); Dorf, *supra* note 161, at 1219–29.

[248] *See Casey*, 505 U.S. at 885.

[249] *See* Dorf, *supra* note 161, at 1226; *cf.* Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring) (listing numerous state regulations governing marriage).

[250] *See* Bhagwat, *supra* note 82, at 349–50; Dorf, *supra* note 161, at 1226–28.

[251] *See* Dorf, *supra* note 161, at 1226.

[252] For diverse views about whether state efforts to promote deliberation are consistent with the abortion right, see RONALD DWORKIN, LIFE'S DOMINION 151–53 (1993); Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175, 193–219 (1992); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 10–14 (1995); and Robert D. Goldstein, *Reading* Casey*: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 802–07 (1996).

[253] *See* Regan, *supra* note 90, at 1092.

[254] *See id.* at 1206–07; *see also* CTS Corp. v. Dynamics Corp., 481 U.S. 69, 95–96 (1987) (Scalia, J., concurring in part and concurring in the judgment) (observing that, notwithstanding contrary dicta, the Court generally does not and in any case should not apply a "balancing" test to invali-

of disproportionate impact, it is typically plausible to think that the statute's effect mirrors its purpose — that a statute that disproportionately disadvantages out-of-staters in economic competition with in-staters was enacted for the purpose of doing so.[255]

3. Purpose-Based Tests and the Judicial Role. — The most familiar explanation of the relevance of governmental purpose in constitutional law builds on Holmes's aphorism that "[e]ven a dog distinguishes between being stumbled over and being kicked."[256] The point, I take it, is that we often cannot even characterize an act without understanding what motivated it. Within deeply entrenched ethical structures, what people (like dogs) are often owed is concern, care, or respect, and not necessarily a particular outcome.[257] When constitutional doctrine is viewed against this background, there is nothing mysterious about the idea that the quality and permissibility of governmental acts, and hence their constitutionality, should sometimes depend on their purposes.[258]

Although it is relatively easy to see why action for forbidden motives offends constitutional norms, important questions remain unanswered. Why, for example, has constitutional doctrine, which frequently underenforces constitutional norms, come to include so many purpose tests? Purpose tests represent one important mechanism, but not always a necessary one, for protecting constitutional values. As I noted earlier, little more than twenty-five years ago the Supreme Court could plausibly maintain that governmental purpose was irrelevant under existing constitutional doctrine. Moreover, purpose inquiries are sometimes costly to conduct, often threaten insult to other branches of government, and may present formidable evidentiary difficulties.[259] Indeed, the Supreme Court continues to reject purpose-based inquiries in some areas of constitutional law.[260]

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date "statutes that neither discriminate against commerce nor present a threat of multiple and inconsistent burdens").

[255] *See* Sunstein, *supra* note 172, at 1708.

[256] OLIVER WENDELL HOLMES, THE COMMON LAW 7 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881); *see* Kagan, *supra* note 87, at 510; Tribe, *supra* note 78, at 17.

[257] *See* Fried, *Types*, *supra* note 1, at 64; Kagan, *supra* note 87, at 511; Tribe, *supra* note 78, at 17.

[258] This general explanation is also compatible with, although distinct from, Professor Pildes's insightful argument that purpose inquiries sometimes protect structural constitutional values; limiting the purposes for which government can act helps to restrain what otherwise might be the nearly boundless reach of governmental authority and influence. *See* Pildes, *supra* note 197, at 722–49; Richard H. Pildes, *Two Conceptions of Rights in Cases Involving Political "Rights,"* 34 HOUS. L. REV. 323, 325–29 (1997).

[259] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . . ."); Ely, *supra* note 235, at 1160; Karst, *supra* note 90, at 1164–65; Smith, *supra* note 219, at 284–90.

[260] The Court has determined, for example, that "[s]ubjective intentions play no role in ordinary, probable-cause . . . analysis" conducted to determine whether a search or seizure is reason-

A related question emerges from comparison of the prominence of purpose tests and their surrogates with the lesser roles played by some of the other constitutional tests discussed earlier. Why, under existing doctrine, does proof of unconstitutionality so often depend on satisfying either a purpose test or a surrogate for a purpose test?

The answer to these questions depends substantially on phenomena involving reasonable disagreement in constitutional law. First, within a doctrinal regime in which the Court frequently treats the possibility of reasonable disagreement as a ground for judicial deference, purpose tests single out a class of cases in which deference to the judgments of the political branches would be singularly misplaced. When political officials act for constitutionally illegitimate reasons, they forfeit any reasonable claim to judicial deference.

Second, as currently framed by the Supreme Court, purpose-focused constitutional doctrines respond to some of the problems arising from reasonable disagreement among the Justices themselves about the appropriate structure of constitutional doctrine. To see why, it is useful to consider which motives or purposes the Court deems constitutionally impermissible. It is difficult to generalize about this issue, because whether a purpose is forbidden often depends on the particular constitutional provision against which it is tested.[261] Nevertheless,

able and therefore permissible under the Fourth Amendment. Whren v. United States, 116 S. Ct. 1769, 1774 (1996). In *Ohio v. Robinette*, 117 S. Ct. 417 (1996), the Court applied this analysis to find that, when a police officer would be justified by the objective circumstances in asking a driver to exit an automobile, "subjective thoughts" are irrelevant. *Id.* at 421; *cf.* Harlow v. Fitzgerald, 457 U.S. 800, 817–19 (1982) (holding that governmental officials should not be stripped of their "qualified immunity" from suits for damages upon a showing that they acted for malicious purposes).

One way to view these cases is as illustrations of the thesis that some constitutional doctrines underenforce constitutional norms. Litigating the state of mind of an individual governmental actor is highly fact-intensive, and often it can intrude upon and disrupt ordinary governmental activity. *See, e.g.*, *id.* at 816–17. In cases involving constitutional challenges to statutes and to policies of general applicability, the Court has generally concluded that the costs of inquiries into purpose are worth bearing. On one hand, in the absence of purpose tests, constitutional norms could often be subverted on a broad scale; on the other hand, the costs of litigating statutory purpose in a single facial challenge will not normally be too large. By contrast, litigating the state of mind of individual decisionmakers on a case-by-case basis may reasonably be deemed too costly and inefficient a means of protecting constitutional values in some circumstances. It is also relevant, of course, whether other tests are available to protect underlying norms, and how effectively such tests do so. In the Fourth Amendment area, in particular, the Court obviously believes that the costs of litigation involving purpose would be high, and that underlying constitutional values can be reasonably effectively protected through "objective" tests that are easier to administer under the circumstances. *Cf. id.* at 815–17 (explicitly weighing costs and benefits in rejecting "subjective" motive inquiries in cases in which governmental officials are sued for damages in their official capacities, and making the scope of "good faith" immunity turn entirely on "objective" factors).

261 *See* Bhagwat, *supra* note 82, at 331–37 (arguing that the legitimacy of purposes depends on and varies with constitutional provisions); Choper, *supra* note 86, at 493–500, 502–08 (discussing permissible and impermissible motives under the religion clauses and the Equal Protection Clause).

it seems fair to say that, with few exceptions, the purposes that are held forbidden tend to reflect an overlap of, or consensus among,[262] otherwise competing constitutional theories.[263] For example, commentators have advanced a host of theoretical justifications for the First Amendment's Free Speech Clause.[264] Yet virtually all of the leading theories would find it impermissible — albeit for different reasons — for the government to attempt to stifle communication based on its hostility to particular ideas.[265] There is a similar competition of views about the reach of the Free Exercise Clause.[266] Again, however, all prominent theories agree that government may not purposely single out religious conduct for disfavored treatment.[267] A final example of overlapping consensus emerges from the dormant commerce clause.

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262 *Cf.* RAWLS, *supra* note 11, at 43–44 (arguing that the liberal principles characteristic of democratic societies reflect an "overlapping consensus" among reasonable "comprehensive" views that disagree in their further terms). Whereas the "comprehensive" views to which Rawls refers may overlap in their recognition of the full set of principles defining political justice, the overlap of competing constitutional theories on purpose tests may not similarly reflect any of those theories' full conception of constitutional justice. Rather, the theories may agree on the propriety of purpose tests, but disagree about *other* constitutional matters. Indeed, their disagreements may extend to the question whether purpose tests should be supplemented by other kinds of tests to ensure that constitutional values are protected adequately.

263 In at least some areas, of course, the question whether a particular purpose is permissible or impermissible is hotly contested. *See, e.g.*, Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1374 (1997) (involving a dispute between the majority and dissenting opinions over whether the state had a legitimate interest in "the stability of its political system[]," which it was entitled to support by "enact[ing] reasonable election regulations that [tend to] favor the traditional two-party system"); Samuel Issacharoff & Richard Pildes, *No Place for Political Gerrymandering*, TEX. LAW., Aug. 5, 1996, at 25 (challenging judicial acceptance of preservation of incumbents' seats as a legitimate state purpose in drawing voting districts).

264 For useful surveys, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–86 (1982), and Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–54 (1989).

265 To cite just a few examples of relevant First Amendment theories, legislation such as this would interfere with the free operation of the marketplace of ideas, *cf.* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"); it would infringe the "autonomy" interests of citizens in being able to decide for themselves what to read and believe, *see, e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215–20 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–60 (1991); it would offend the principle that governmental censorship is incompatible with the presuppositions of political democracy, *see, e.g.*, ELY, *supra* note 187, at 105; it would thwart individual efforts to achieve "self-realization" through expression and free traffic in ideas, *see* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982); and it would permit the stifling of the dissenting voices that a democratic and vibrant society ought to foster, *see* SHIFFRIN, *supra* note 7, at 90–96.

266 *Compare, e.g.*, Christopher Eisgruber & Lawrence Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448 (1994) (arguing that the Free Exercise Clause prohibits only governmental singling out of religious minorities and religious practices for disfavored treatment), *with, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168–69 (1992) (arguing that the Free Exercise Clause protects religiously motivated conduct).

267 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

Among those who accept that the Commerce Clause imposes limits on permissible state regulation, there is much dispute about which theory should guide judicial decisionmaking.[268] Nevertheless, nearly all concur that tax and regulatory legislation that is enacted for the purpose of protecting in-staters from out-of-state economic competition is virtually per se impermissible.[269]

There tends, if anything, to be even stronger consensus supporting those constitutional tests that can be seen as surrogates for explicitly purpose-focused inquiries. These tests generally apply heightened scrutiny to governmental regulations that are likely to reflect impermissible purposes. Some theories, and some Justices of the Supreme Court, might view elevated scrutiny as independently justified by the effects of such regulations. These effects frequently include keeping the public largely ignorant of disfavored points of view, when statutes regulate speech on the basis of content; burdening or stigmatizing minorities, when statutes classify according to race or analogous categories; and promoting economic balkanization and related inefficiencies, when state regulations disproportionately burden out-of-staters. But modern doctrine explicitly eschews effects-based review in many areas.[270] Even if other considerations also apply, the desire to erect a prophylactic barrier against regulations likely to be motivated by impermissible purposes almost certainly fortifies the doctrinal structure.

Because convergence of competing theories is important in determining which purposes are constitutionally impermissible, as well as when tests that function partly as surrogates for purpose inquiries ought to be employed, purpose tests and their surrogates are frequently examples of what Professor Sunstein calls "incompletely theorized agreements."[271] In articulating or enforcing a purpose-based test, the Supreme Court typically does not, and probably could not, fully explain why a particular purpose is constitutionally forbidden; there may be no full agreement on the reason, despite consensus concerning the judgment.[272] Nonetheless, the conclusion that particular purposes are forbidden, or that forbidden purposes are likely to underlie particular kinds of regulations, can be an important one. Such conclusions can

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[268] For overviews, see WILLIAM B. LOCKHART, YALE KAMISAR, JESSE H. CHOPER, STEVEN H. SHIFFRIN & RICHARD H. FALLON, JR., CONSTITUTIONAL LAW 228–34 (8th ed. 1996), and TRIBE, cited above in note 219, at 305–13.

[269] *See* Heinzerling, *supra* note 223, at 217–18 (asserting that "[t]he Court's nondiscrimination principle" and decisions applying it "have provoked little disagreement on the part of individual Justices, and legal scholars have overwhelmingly approved it").

[270] *See supra* section III.B.2.

[271] SUNSTEIN, *supra* note 11, at 4–5, 35–61.

[272] *See id.* at 47 ("The distinctly legal solution to the problem of pluralism is to produce agreement on particulars, with the thought that often people who are puzzled by general principles, or disagree on them, can agree on individual cases.").

provide the basis for stable legal agreement among those with differing background theories.[273]

When no further agreement is possible, and the Justices are unwilling to adopt balancing tests (for reasons discussed above),[274] purpose-based tests (and their surrogates) frequently define doctrines that are sharply limited in protective scope. In this setting, purpose tests and their surrogates tend to reflect not only an overlapping consensus, but also a lowest common denominator. The Supreme Court can often agree that action actually or presumptively taken for forbidden purposes should be invalidated, even when no majority believes that relevant constitutional norms merit the further protections that other constitutional tests (if used as supplements) would afford.[275]

E. Deferential Tests, Reasonable Disagreement, and Political Democracy

It is time to draw some strands together. Although the Supreme Court uses at least eight kinds of tests to implement constitutional

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[273] Because they tend to be supported by a genuine, enduring, overlapping consensus, *see supra* note 262, constitutional tests that identify forbidden governmental purposes have an important advantage over balancing approaches. In perhaps the most important sense in which the term is used, balancing is a highly controversial methodology, which assumes that constitutional rules should be specified at least in some cases by weighing competing "interests." Regardless of the validity of the well-known objections to this methodology, *see supra* pp. 79–80, those who think that balancing is irreducibly subjective or even incoherent will of course have an ongoing reason to object to any doctrine that requires it. By contrast, purpose-based tests are not so much a methodology as they are rules; once purpose-based tests are established, they can often be applied in a way that will not trigger further dispute about their coherence or workability.

[274] *See supra* p. 81.

[275] The concept of an overlapping consensus, *see supra* note 262, illuminates an interesting difference between purpose tests and balancing tests. As suggested above, adherents of different constitutional theories may concur that, as a matter of principle, action taken for certain purposes should be held constitutionally impermissible. Although they may disagree about whether relevant constitutional values should *also* be protected by effects or suspect-content tests, for example, adherents of diverse theories need not compromise any of their views to agree that, whatever else the Constitution may or may not forbid, it forbids action taken for certain illegitimate purposes. Whereas purpose tests are likely to reflect a partial convergence of otherwise competing conceptions of what would be constitutionally ideal, balancing tests may be more likely to represent a compromise or a second-best accommodation. Agreeing on the appropriate *result* in a particular case, the Justices may disagree (or be individually uncertain) about how they would rationalize the result and about how judicial doctrine would best reflect relevant constitutional principles. In a case such as this, even though they disagree about what test or analytical approach would be best in principle, the Justices may settle on a balancing test that rationalizes a shared conclusion, but does not reflect the view of some or even all of the Justices in the majority about how issues of the relevant kind would ideally be analyzed.

The point is not that balancing tests never reflect the principled view of a majority of the Justices about how doctrine would best be structured. There may be good reason, in at least some cases, to avoid determinate rules and instead employ balancing tests that leave room for discretion at the point of application. The point, rather, is that Justices who happen to regard balancing tests as second-best, but who would prefer *different* rules as offering the best justification for an agreed result, may sometimes agree on a balancing test (which they agree would yield the correct outcome in the case before them) as a compromise.

norms establishing individual rights, I have suggested that the most important doctrinal tests do not, as is widely thought, characteristically call for wide-open judicial balancing; that many of the most important doctrinal tests tend instead to sort constitutional challenges into a two-tier framework involving the suspect and the nonsuspect; that such doctrinal tests perhaps typically reflect an aspiration to defer to the judgments of political institutions except in cases in which the political process is manifestly or presumptively untrustworthy; and that purpose-focused constitutional doctrines both fit with and help to implement the agenda of affording deference when deference can plausibly be given.[276]

As Professor Ely most famously suggests, the conjunction and overlap of purpose-focused constitutional doctrines and highly deferential judicial review in many cases not involving suspect-content rules may appear to be a conspicuously, almost tautologically, "democratic" response to the problem of reasonable disagreement in constitutional law.[277] "Democracy" is a much contested term,[278] however, and the theory of political democracy that is reflected in purpose-focused constitutional doctrine and two-tiered review is quite minimalist.[279]

Comparison with modern versions of republican political theory[280] and with the kind of democratic theory often associated with the *Carolene Products*[281] case may illustrate the point.[282] Modern republican theory grounds the legitimacy of governmental action in an ideal of reasoned deliberation by representative decisionmakers in which all citizens are accorded equal concern and respect.[283] By contrast with versions of republican theory that would support judicial application of what I have called "appropriate deliberation" tests,[284] purpose tests

[276] *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 48–51 (1989) (arguing that the general aspiration of the Rehnquist Court is to defer to decisions by democratically accountable decisionmakers).

[277] *See generally* ELY, *supra* note 187, at 87–104, 181–83 (arguing for judicial review aimed at protecting processes of political democracy and safeguarding minorities from majority prejudice, but otherwise deferring to decisions of democratically accountable institutions).

[278] *See* WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 29–35 (3d ed. 1993) (treating "democracy" as an "essentially contested" concept).

[279] *See* Richard Davies Parker, *The Past of Constitutional Theory — And Its Future*, 42 OHIO ST. L.J. 223, 236–39 (1981).

[280] *See* sources cited *supra* note 171.

[281] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[282] *See id.* at 152 n.4. For an incisive critique of the *Carolene Products* theory, see Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 717–18 (1985).

[283] *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541–42 (1988); Sunstein, *supra* note 79, at 31–32.

[284] *See supra* sections II.A.6, III.B.3. The link between republican political ideals and commitment to judicial review to ensure appropriate legislative deliberations is by no means a necessary one. It is possible to hold republican beliefs about the legislature's proper function, yet believe that aggressive judicial review tends more to undermine than to further the responsible, deliberative *citizenship* that forms the core of the republican ideal. For example, James Bradley Thayer argued that deferential judicial review is appropriate to encourage more thoughtful delib-

and nonsuspect-content tests establish no judicially enforceable ideal of reasoned deliberation.[285]

A similar contrast exists with the democratic theory often associated with judicial efforts to protect "discrete and insular minorities."[286] Traditional minorities may suffer at least two types of disadvantage in the political and legislative processes. One is hostility.[287] The other is a relative dearth of sympathy, empathy, or concern.[288] In contrast with the appropriate-deliberation tests that would be supported by some political theories to protect traditionally disadvantaged minorities from a lack of equal concern in democratic deliberations, purpose-based tests and nonsuspect-content tests do not authorize courts to hold the legislature to ideals of sympathetic consideration of all groups' interests. Nor do such tests demand consideration of relative costs and benefits when the legislature "incidentally" burdens interests in the free exercise of religion or, sometimes, the freedom of speech.[289] Again, all that purpose and nonsuspect-content tests forbid is action

eration among legislators, who otherwise might proceed on the assumption that they can rely on the courts to correct their mistakes, and to ensure that "responsibility may be brought sharply home [to the people] where it belongs." Thayer, *supra* note 13, at 155–56. Moreover, strong similarities exist between modern republican and at least some liberal theories, including that of John Rawls, that also incorporate a political ideal of reasoned deliberation. *See* Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1730–31 (1989) (noting liberal analogues to and influences on modern republican ideals of reasoned political deliberation); Sunstein, *supra* note 283, at 1566–71 (drawing on Rawls's work in developing a theory of "liberal republicanism").

285 Such tests are generally consistent with "pluralist" political theories, which tend to depict politics as a pervasively self-interested struggle among contending interest groups. *See* Sunstein, *supra* note 79, at 32. On the whole, pluralist theories tend to support minimalist judicial review, based on the morally skeptical hypothesis that there is no objectively correct answer to political and distributive questions. *See, e.g.*, ELY, *supra* note 187, at 54 (observing that "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles"); Fallon, *supra* note 284, at 1718 (discussing pluralists' characteristic skepticism). Reasoning from this skeptical hypothesis, pluralists typically conclude that courts should, for the most part, defer to the resolutions reached by the political process and should intervene only to correct certain process failures in the political market. *See, e.g.*, ELY, *supra* note 187, at 54, 102–03 (asserting the inability of courts to appeal successfully to "objectively valid" moral principles and advocating a "representation-reinforcing" approach to judicial review under which courts should generally invalidate legislation under open-ended constitutional provisions only when systemic malfunctions of the "political market" render the political process "undeserving of trust").

286 *Carolene Products*, 304 U.S. at 153 n.4; *see also* Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (terming the *Carolene Products* case "[t]he great and modern charter for ordering the relation between judges and other agencies of government").

287 *See, e.g.*, *Carolene Products*, 304 U.S. at 153 n.4 (contemplating that "prejudice" might result in the enactment of "statutes directed at particular religious, or national, or racial minorities" (citations omitted)).

288 *See* Paul Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 14–15 (1976); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 341–44 (1987).

289 *See supra* note 168 (discussing anomalies in the application of the *O'Brien* test).

that is manifestly irrational or specifically taken for proscribed purposes.[290]

In short, purpose-focused and nonsuspect-content doctrines — at least when they are the practically exclusive mechanisms for the judicial implementation of constitutional norms — reflect at most a thin, minimalist conception of the democratic processes to which courts are often asked to defer. In an era characterized by widespread reasonable disagreement about constitutional and political ideals, this conclusion should probably come as no surprise. There is as much reasonable disagreement about the substantive content of the ideal of constitutional democracy as there is about the appropriate scope of fundamental rights.[291]

This observation, I hasten to add, is descriptive, not prescriptive. An important debate is under way about the substantive content, if any, of the ideal of constitutional democracy.[292] Appropriately, participants in this debate emphasize its central relevance not just to normative political theory, but to constitutional law.[293] Indeed, the Court itself, insofar as it acts to protect democracy, cannot help taking at least an implicit stand; adoption of a thin, minimalist conception of democracy implicitly rejects thicker, more substantive rivals. Moreover, the Court has in fact taken a strong, explicit, substantive stand with respect to at least one contested issue concerning the relationship of democratic theory to American constitutional law. In the name of federalism, a majority of the current Court tends to support doctrinal structures that protect state and local majorities against domination by national majorities speaking through Congress.[294] In the next Part, I

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290 This is not a conceptually necessary result under any test based on governmental purpose. *See* Strauss, *supra* note 83, at 956–57 (proposing a test under which discriminatory intent should be found in any case in which the government's decision would have been different if the adverse impacts "fell on whites instead of blacks, or on men instead of women"). In contrast with Professor Strauss's proposed conception, however, the definition of discriminatory purpose reflected under current law applies only when the government takes an action "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

291 For recent discussions of competing conceptions of democracy and their relevance to constitutional adjudication, see DWORKIN, FREEDOM'S LAW, cited above in note 19, at 15–26; Michelman, cited above in note 11; and Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 389–91 (1997).

292 *See* sources cited *supra* note 291. For an insightful, critical introduction, see Michelman, cited above in note 11.

293 *See, e.g.*, DWORKIN, FREEDOM'S LAW, *supra* note 19, at 15–26; SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (forthcoming 1997); Michelman, *supra* note 11.

294 *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (invalidating federal legislation requiring local officials to enforce a federal regulatory program); Seminole Tribe v. Florida, 116 S. Ct. 1114, 1128 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and holding that Congress lacks authority under the Commerce Clause to abrogate the states' Eleventh Amendment immunity from suit in federal court); United States v. Lopez, 514 U.S. 549, 567–68

deal at length with the Court's efforts to protect local as against national democracy, despite reasonable disagreement about which theory of democracy the Constitution embodies.

IV. THE SIGNIFICANCE OF DOCTRINE IN THE SUPREME COURT: THE ORDINARY AND THE EXTRAORDINARY IN CONSTITUTIONAL ADJUDICATION

Constitutional doctrine and the tests by which it is partly constituted matter enormously. Doctrine not only determines outcomes in the lower courts,[295] but also shapes the course of decision in the Court itself. As David Strauss notes, most constitutional adjudication occurs on the basis of precedent.[296] The argument among lawyers and Justices alike turns predominantly on the meaning of previous cases and the appropriate application of their tests.[297]

It is also a striking feature of our constitutional practice, however, that while recurrence to "first principles"[298] is not the norm, appeal to first principles is never, in principle, wholly out of order.[299] The result is a very rough, admittedly permeable distinction between "ordinary" and "extraordinary" adjudication in the Supreme Court. In "ordinary" cases, the Court — or at least a majority of the Justices — treats the issue before it as framed by precedent and the tests, norms, and limiting factors reflected therein.[300] The requirement of fidelity to the Constitution is met by fidelity to a reasonable structure for implementing the Constitution, grounds for reasonable disagreement notwithstanding. In "extraordinary" cases, the Court — or at least a majority — either treats the premise that a doctrine reasonably implements the Constitution as seriously in issue,[301] or it assumes that it cannot resolve the

(1995) (enforcing a limit, aimed at protecting state and local governments' regulatory prerogatives, on Congress's regulatory powers under the Commerce Clause).

295 For a critical and probing discussion of the obligation of lower courts to obey Supreme Court precedent, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 821–22 (1994).

296 *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 887–88 (1996); *see also* Harry W. Jones, *Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law*, 4 PACE L. REV. 11, 12 (1983) (analyzing the significance of stare decisis in constitutional adjudication); Monaghan, *supra* note 23, at 771 (same).

297 *See* John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 4 (1983).

298 *See supra* note 20 and accompanying text.

299 One measure of this phenomenon is the frequency, and sometimes the casualness, with which the Supreme Court overrules precedents. *See, e.g.*, Monaghan, *supra* note 23, at 742–43 (discussing Supreme Court decisions overruling precedents during the 1986 Term).

300 *Cf.* Kornhauser, *Path-Dependence*, *supra* note 15, at 173–77 (distinguishing among conceptions of stare decisis that would, respectively, bind successor courts to respect the results of precedents, the rules reflected in those precedents, and the reasons given by the courts establishing the precedents).

301 For discussion of the Court's practice of overruling its own precedents, see, for example, Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 117–31 (1991); Jerold H. Israel, Gideon v. Wainright: *The "Art" of Over-*

question before it without determining some fresh question of principle.[302]

No clear convention fixes when the Court will treat a case as extraordinary, and thus as requiring a direct examination of constitutional principles, and when the Court will purport to apply established doctrine as a matter of routine.[303] Some cases strike nearly everyone as obviously extraordinary. One relevant category includes cases that differ obviously and dramatically from those for which pre-existing doctrine was crafted. In a case decided during the past Term, for example, the Court confronted the question whether First Amendment doctrines developed for more traditional media should apply to speech on the Internet.[304] On other occasions, a decision in one case, possibly with striking or anomalous facts, may rest on principles that are not easily reconciled with the rationales of other cases. During the 1980s, for example, the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*[305] threw separation of powers jurisprudence into disequilibrium,[306] and the Court had to decide several other

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ruling, 1963 SUP. CT. REV. 211, 215–29; and Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1694–96 (1994).

302 My distinction between ordinary and extraordinary cases bears some similarity to Ronald Dworkin's famous distinction between routine cases, which can be decided pursuant to established legal rules, and "hard cases," which require recourse to the principles that underlie established understandings and, in some cases, a reformulation of recognized rules in light of underlying principles. *See* DWORKIN, *supra* note 51, at 81–88. Dworkin, however, insists that an ideal judge would use the same method in all cases — that is, that an ideal judge would, in each case, ascertain or verify that established doctrinal formulations in fact accord with the underlying norms or principles that such formulations ought to reflect. *See* DWORKIN, *supra* note 99, at 354. My claim is different. In ordinary cases, I argue below, the Justices frequently do and sometimes should follow precedents and apply doctrinal tests without reaching the question (at least in their published opinions) whether those tests precisely capture the underlying principles that the law ideally ought to reflect. In extraordinary cases, by contrast, the Justices confront questions of underlying principle directly. It is possible that even in ordinary cases, an ideal Justice's implicit decision to proceed within a pre-existing doctrinal framework might be conceptualized as reflecting a judgment that the existing framework accords with relevant constitutional principles. As I suggest below, however, decisions about when to accept and when to reject existing doctrinal equilibria appropriately have practical, prudential, and quasi-tactical elements that Dworkin's formulation, which characterizes adjudication in both hard and easy cases as a relentless effort to render judgments reflecting underlying legal principles, does not fully capture.

303 *See* Monaghan, *supra* note 23, at 746.

304 *See* Reno v. ACLU, 117 S. Ct. 2329, 2350 (1997) (invalidating provisions of the Communications Decency Act, which regulates speech on the Internet, as violative of the First Amendment).

305 462 U.S. 919 (1983).

306 *See id.* at 958–59 (invalidating a so-called "legislative veto" provision in a federal statute). Whereas a number of earlier cases had taken what commentators have described as a "functionalist" approach in upholding broad congressional power over the structure of government, *Chadha* adopted a more "formalist" conception of the separation of powers. *See generally* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522–31 (1991) (describing "formalist" and "functionalist" approaches to the separation of powers); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish In-*

cases on grounds of first principle to re-establish a reasonably stable doctrinal scheme.[307] Writings by Lawrence Lessig help to identify a third category of cases likely to be treated by the Court as extraordinary.[308] Lessig argues that judicial doctrine is often, almost inevitably, predicated on background assumptions about what is natural or reasonable.[309] As background understandings evolve, what once was substantially uncontroversial will grow contestable, and it will be only a matter of time until the Court acknowledges that the doctrine requires reconsideration.[310] This happened, Lessig argues, with respect to the "separate but equal" doctrine of *Plessy v. Ferguson*;[311] a similar phenomenon may be unfolding now with regard to traditionally accepted discriminations against homosexuals.[312]

A fourth category of potentially extraordinary cases probably reflects nothing more than the views, interests, or agendas of Justices who happen to sit on the Court at a particular time. Beginning with personal convictions about the desirability of doctrinal change, Justices may press, with more or less success, to persuade their colleagues to reconsider seemingly settled issues.[313] To cite just one more category, extraordinary cases can also be provoked by action by Congress, the Executive, or state legislatures aimed at prodding a judicial reconsideration of established doctrines. The most famous example involved the executive and legislative actions preceding the Court's "switch in

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consistency?, 72 CORNELL L. REV. 488, 510–26 (1987) (critiquing the Court's inconsistent use of formalism and functionalism in two separation of powers cases).

[307] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding the power of a commission in the judicial branch to promulgate sentencing guidelines); Morrison v. Olson, 487 U.S. 654, 696–97 (1988) (upholding provisions vesting the appointment of independent counsel in the judicial branch); Bowsher v. Synar, 478 U.S. 714, 726 (1986) (invalidating a delegation of executive powers to an official subject to removal by Congress by means other than impeachment). For a lively account of the issues at stake and of their ultimate resolution written by the Solicitor General who argued most of the central cases, see CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT 133–71 (1991).

[308] *See* Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1801–02 (1997) [hereinafter Lessig, Erie-*Effects*]; Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1400 (1997); Lessig, *Fidelity in Translation*, *supra* note 19, at 1211–14; Lessig, *Understanding Changed Readings*, *supra* note 19, at 410.

[309] *See* Lessig, *Understanding Changed Readings*, *supra* note 19, at 410–42.

[310] *See* Lessig, Erie-*Effects*, *supra* note 308, at 1800–07; Lessig, *Understanding Changed Readings*, *supra* note 19, at 410–42.

[311] 163 U.S. 537 (1896); *see* Lessig, *Understanding Changed Readings*, *supra* note 19, at 423–26.

[312] *See* Lessig, *Understanding Changed Readings*, *supra* note 19, at 415–19. *Compare* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996) (invalidating a state constitutional amendment denying homosexuals a broad panoply of rights that are available to other citizens), *with* Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (upholding a state statute outlawing homosexual sodomy).

[313] *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2386 & nn.1–2 (1997) (Thomas, J., concurring) (suggesting that the Court should re-examine the holding of *United States v. Miller*, 307 U.S. 174 (1939), and determine whether the Second Amendment creates a personal right to bear arms that is incompatible with existing regulatory schemes).

time" during the 1930s, which produced a vast overhaul of Due Process and Commerce Clause doctrine.[314]

Although many litigated issues seem plainly marked for the "ordinary" rather than the "extraordinary" category, the Constitution stands as a looming presence in every constitutional case in the Supreme Court. So located, the Constitution is always available to be drawn into the foreground, even when the Justices have reason — often rooted in some aspect of the phenomenon of reasonable disagreement — to want to keep fundamental issues discreetly in the background.

A. *Stare Decisis in Constitutional Adjudication*

The phenomenon of reasonable disagreement provides a potent reason for maintaining the principle of stare decisis in constitutional adjudication.[315] As I have emphasized repeatedly, reasonable people differ about how the Constitution would best be interpreted or applied. Complicating the problem, the division of views will not always be binary;[316] majority choice between clear, alternative positions is frequently not an option. Under such circumstances, the ideal of constitutional *law* requires willingness among those charged with implementing the law to accept reasonable, if not always ideal, premises as bases for coordinated decisionmaking.[317]

The doctrine of stare decisis helps to promote cooperation on these terms. First, stare decisis reflects an appropriate presumption that the

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[314] *See* Lessig, *Understanding Changed Readings*, *supra* note 19, at 444. For a discussion of competing historical and interpretive accounts, see *id.* at 444–72.

[315] The doctrine of stare decisis reflects the Latin maxim "*stare decisis et non quieta movere* — stand by the thing decided and do not disturb the calm." Rehnquist, *supra* note 23, at 347. Familiar justifications for the principle of stare decisis include its effects in promoting fairness, efficiency, predictability, and stability. *See, e.g.*, Monaghan, *supra* note 23, at 744–46 (discussing the role of stare decisis in limiting issues); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987) (same); Rehnquist, *supra* note 23, at 347 (discussing the virtues of constraint by precedent).

[316] Even if the choice as to which party deserves to prevail on a particular issue is binary, the choice among rationales or tests indicating the outcome is not. *See* Easterbrook, *supra* note 15, at 815–17.

[317] *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371–77 (1997). I do not mean to suggest that every Justice is obliged to accept every "reasonable" premise that could command majority acceptance in every case, even when he or she believes that a better alternative exists. As I have suggested already, the Justices' obligation of fidelity is best conceived as existing within a *project* of implementing the Constitution successfully that necessarily involves many participants and is extended over time. Within this framework, a Justice is surely entitled to take the long view and sometimes to advance positions that are rejected by a current majority but that he or she believes the Court, possibly in the remote future, should come to accept. My only suggestion would be that a Justice, in considering whether to join a majority opinion that he or she thinks less than optimal, or whether instead to concur separately or to dissent, should evaluate these alternatives partly in light of their likely effects on the overall project of implementing the Constitution successfully over time. *See generally* Kelman, *supra* note 17, at 248–74 (discussing institutional considerations that do and should affect Justices' decisions about when to dissent or to concur separately).

result reached by a prior court was, if not the best possible, at least reasonable.[318] Second, and related closely, treating precedent as presumptively authoritative means that precedent, along with the doctrine it embodies, becomes a "focal point"[319] for possible agreement among Justices who are motivated to reach a coordinated resolution — that is, a majority opinion — on reasonable terms.[320] Even if a precedent does not reflect every or even any sitting Justice's view of how the Constitution would most optimally be implemented, it may, because of its status, reflect the result best situated to win majority acceptance as a reasonable accommodation of competing considerations.[321]

In recent years, commentators have questioned whether the principle of stare decisis, on which the edifice of doctrine rests, carries weight in the Supreme Court.[322] The skeptical commentaries draw their plausibility from two phenomena. First, the Court not only can overrule its own precedents, but actually does so with some frequency.[323] Second, with respect to many contested issues, the Justices

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[318] *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988); Note, *supra* note 23, at 1349.

[319] Strauss, *supra* note 296, at 910–13 (internal quotation marks omitted). The concept of "focal points" traces to THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 58–80 (1960). Schelling introduced the term to refer to potential solutions to coordination or other problems that, for cultural or psychological reasons, are peculiarly salient and thus peculiarly capable of supporting agreements, coordinated behavior, and stable equilibria. *See id.*; *cf.* Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 78–82 (1989) (offering a game-theoretic interpretation of stare decisis as a coordination mechanism).

[320] In emphasizing the "reasonable," I loosely follow RAWLS, *supra* note 11, at 48–54. Rawls distinguishes the "reasonable" from the "rational" as a distinctive attribute necessary to social cooperation in identifying and implementing principles of justice: "Insofar as we are reasonable, we are ready to work out the framework for the public social world, a framework it is reasonable to expect everyone to endorse and act on, provided others can be relied on to do the same." *Id.* at 53–54; *see also* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 312 (1996) ("Reasonable principles reconcile the conflicting aims and interests of different people on terms that each could acknowledge as legitimate if they were to change places with those burdened by the pursuit of their ends.").

[321] *See* Strauss, *supra* note 296, at 913. This is especially true under circumstances in which "it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (citations omitted).

[322] *See* Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of* National League of Cities, 2 CONST. COMMENT. 341, 351 (1985) ("[S]tare decisis is probably often only a minor factor in each Justice's voting calculus."); Gerhardt, *supra* note 301, at 76–77 (noting "the apparent lack of consistency in the Justices' standards or reasons for overruling precedents"); Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467 ("It seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent — new or old — has been safe."); Rehnquist, *supra* note 23, at 371–75 (suggesting that precedents have little or no influence in stopping the Court from doing what it would wish to do without the precedents).

[323] *See, e.g.*, Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985)); Seminole Tribe v. Florida, 116 S. Ct. 1114, 1128 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)). For further discussion of *Agostini v. Felton*, see section IV.B.5 below. For discussion of the Court's overruling practices, see sources cited above in note 301.

who dissent in one case refuse to abandon their positions in subsequent cases.[324] In fact, however, these phenomena merely demonstrate what is not seriously in doubt: the principle of stare decisis is not absolute. It exerts some influence but does not determine every case.[325]

B. *Ordinary Adjudication*

The phenomenon of the Supreme Court's treating cases as occasions to apply doctrine is perhaps too banal to merit remark. Nonetheless, anyone wishing to understand the role of doctrine must attend to ordinary cases and their bearing on the issue of constitutional fidelity.

1. Constitutional Doctrine and the Judicial Agenda. — The Supreme Court's disposition to treat settled doctrine as a focal point for stable equilibrium[326] plays a large, recognized role in shaping the Court's agenda.[327] Some questions, once having been resolved, are subsequently assumed to be off the table, even though they were sharply contested in the past and could conceivably become controverted again. At the present time, for example, the Court appears uninterested in arguments disputing that the Fifth Amendment estab-

[324] Celebrated examples include the continuing insistence of some Justices that the Court erred in recognizing a "fundamental" right to abortion in *Roe v. Wade*, *see, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); the reiterated assertion of Justices Brennan and Marshall that the death penalty was per se unconstitutional, *see, e.g.*, Sorola v. Texas, 493 U.S. 1005, 1011 (1989) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari); and the longstanding position of Justice Black that, notwithstanding the Court's contrary decision in *Roth v. United States*, 354 U.S. 476 (1957), the First Amendment protected even "obscene" speech from governmental regulation, *see, e.g.*, Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting). *Cf.* City of Boerne v. Flores, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting) (urging reconsideration of the Free Exercise Clause test laid down in *Employment Division v. Smith*, 494 U.S. 872 (1990)); *id.* at 2186 (Souter, J., dissenting) (reiterating objections to *Smith* set out in an earlier case, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). *See generally* Kelman, *supra* note 17, at 248–58 (assessing the option open to Justices of refusing to recognize the authority of a decision from which they initially dissented).

[325] For a discussion of the varying degrees of influence that stare decisis appears to exert on different Justices, see Gerhardt, cited above at note 301, at 117–31.

[326] For a theory that doctrine reflects a different kind of equilibrium, see McNollgast, cited above at note 2, which characterizes stare decisis as "a self-enforcing equilibrium" resulting when judges "have no incentive to break with established precedent," because a clear Supreme Court majority exists and will reject efforts to resist the equilibrium. *Id.* at 1666–67. According to McNollgast, equilibrium tends to break down as a result of political forces — when, for example, newly appointed judges supported by strong political coalitions broadly resist existing doctrine, and the Supreme Court, for strategic reasons, abandons efforts to hold the line. *See id.* at 1635; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28–29 (1994) (developing a theory in which the Supreme Court attempts to create a sustainable legal equilibrium in light of the Justices' own policy preferences, the evolving positions of other branches of government, and emerging political forces).

[327] *See* Gerhardt, *supra* note 301, at 78 (noting the influence of stare decisis on the Court's exercise of its certiorari jurisdiction); Monaghan, *supra* note 23, at 744 (noting that "stare decisis plays a very large role in constitutional law" (emphasis omitted)).

lishes an equal protection norm that binds the federal government;[328] that the Equal Protection Clause protects against discriminations involving voting rights;[329] or that the Establishment Clause, as incorporated by the Fourteenth Amendment, forbids state as well as federal establishments of religion.[330]

Any of these claims might well be contested if the issues were treated as ones of first principle.[331] In addition, as I have suggested already, no formal obstacle precludes a party from raising any of the aforementioned issues for fresh consideration.[332] Nonetheless, a clear majority of the Justices regards these issues as settled.[333] Moreover, I doubt that any of the Justices would feel compelled to treat any of the issues listed above as requiring serious reconsideration even if a litigant pressed the demand. If not, why not? Why does fidelity to the Constitution not require reconsideration?

Part of the answer undoubtedly lies in stare decisis. Yet it seems doubtful that stare decisis, as a principle of only limited weight, could establish that it would be affirmatively wrong, independent of the merits, to reject any of the settled propositions recited above. If so, it seems fair to conclude that the Justices understand their *personal* obligations of fidelity to the Constitution as partly defined and limited by *others'* views about how the Constitution is appropriately interpreted. This is a defensible position. Implementing the Constitution successfully is a project that involves many elements and requires the coordinated efforts of many people. To invite indiscriminate re-fighting of constitutional battles, and to raise attendant doubts about the stability of doctrine generally, would do more to retard than to advance the project of constitutionalism, which requires reasonable closure of at

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[328] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211–15 (1995).

[329] *See* Abrams v. Johnson, 117 S. Ct. 1925, 1935–36 (1997); Miller v. Johnson, 115 S. Ct. 2475, 2483 (1995); *see also* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997) (applying the rule that "race [may] not predominate over . . . traditional districting principles").

[330] *See* Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997) (citing cases in which the Establishment Clause was applied against state, rather than federal, establishments of religion).

[331] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 590–91 (1964) (Harlan, J., dissenting) (arguing that the Fourteenth Amendment was not originally understood or intended to protect voting rights); School Dist. v. Schempp, 374 U.S. 203, 254 (1963) (Brennan, J., concurring) (acknowledging that "[i]t has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation 'respecting an establishment of religion' is conceptually impossible because the Framers meant the Establishment Clause . . . to foreclose any attempt by Congress to disestablish the existing official state churches"); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711 (1975) (noting that "[t]here is no textual warrant for reading into the due process clause of the fifth amendment any of the prohibitions directed against the states by the equal protection clause").

[332] Even if the Court does not grant certiorari with respect to one of these issues, a respondent is entitled to argue any ground consistent with the record on the basis of which the judgment might be sustained. *See* ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE 363–64 (7th ed. 1993).

[333] *See* cases cited *supra* notes 328–330.

least some issues about which people disagree. When an argument seems destined for rejection by a majority of the Court, the obligation of constitutional fidelity does not absolutely require individual Justices to take that argument seriously — even if, were they to do so, some of the Justices might be disposed to conclude that it deserved to prevail. Given the practical character of their roles, the Justices are entitled to some flexibility in choosing their occasions for revisiting first principles.

2. *Principled and Pragmatic Acceptance of Tests.* — It takes a test to beat a test. Confronted with a case that requires resolution, the Court must apply some constitutional standard. Clearly, however, the Justices feel no obligation to resolve every case pursuant to the test that they, personally, would regard as best. To cite a single, well-known example, the three-part Establishment Clause test of *Lemon v. Kurtzman*[334] appears to have survived for more than two decades, despite recurrent complaints,[335] only because no majority could be mustered for a test to replace it.

In recent years, Justice Scalia has sometimes complained that balancing tests are, at most, barely compatible with the rule of law.[336] Yet this past Term he not only joined decisions,[337] but actually authored one,[338] in which the Court followed precedent and applied a balancing test. Similarly, Justices Scalia and Thomas have sometimes argued that constitutional fidelity requires decisions in accord with the original understanding of constitutional provisions.[339] Last Term, however, both Justices joined opinions that did not advert to the original understanding and might well have proved difficult to support on that basis.[340]

The task of crafting a new rule or test — or even a serious proposal for one — is hard work, requiring resources that may not always lie at

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334 403 U.S. 602 (1971).

335 *See supra* note 214 and accompanying text.

336 *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 711–12 (1988) (Scalia, J., dissenting); Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring); Scalia, *supra* note 140, at 1187.

337 *See* Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1367 (1997); Chandler v. Miller, 117 S. Ct. 1295, 1298 (1997); Maryland v. Wilson, 117 S. Ct. 882, 884 (1997).

338 *See* Gilbert v. Homar, 117 S. Ct. 1807, 1810 (1997) (applying a doctrinally prescribed balancing test to determine that due process did not require a state employer to provide a hearing before imposing a temporary suspension on an employee charged with a felony); *see also* Scalia, *supra* note 140, at 1187 (acknowledging that, despite the desirability of a "law of rules," the Court "will have totality of the circumstances tests and balancing modes of analysis . . . forever — and for my sins, I will probably write some of the opinions that use them").

339 *See supra* note 19 and accompanying text.

340 *See, e.g.*, Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997) (assuming that the First Amendment, as incorporated by the Fourteenth Amendment, bars certain *state* practices amounting to "establishments" of religion); Abrams v. Johnson, 117 S. Ct. 1925, 1935–36 (1997) (applying the Fourteenth Amendment to subject majority-minority voting districts to heightened judicial scrutiny). On the contestability of these doctrines, see sources cited in note 331 above.

hand.[341] And a failed effort can be costly. Sometimes in constitutional law, as in medicine, the governing principle should be: "First, do no harm."[342] This point may appear banal, but it fits uneasily with a familiar, idealized view of the judicial function. Although idealized theories are often richly illuminating, none of the Justices is Hercules,[343] and the Justices rightly do not regard it as part of their obligation of fidelity to the Constitution to proceed in every case as if they possessed Herculean capacities. To recur to a formulation that I used earlier, the Justices' overriding obligation of fidelity involves the *project* of implementing the Constitution successfully. In pursuing this project, the Justices appropriately weigh the costs of delay against the risk of injudicious innovation.

3. Doctrine, Ordinary Adjudication, and the Avoidance of First Principles. — I have described the line between ordinary adjudication, in which the Court resolves cases in light of precedent without explicit re-examination of first principles, and extraordinary adjudication, in which questions of guiding principle are squarely at issue, as "rough" and "permeable." Sometimes some Justices will insist that a fundamental question be addressed, while others resist the demand. *M.L.B. v. S.L.J.*[344] was such a case. As discussed above, *M.L.B.* presented the question whether Mississippi could enforce a rule requiring the prepayment of costs for civil appeals against an indigent mother who wished to challenge a probate court order terminating her parental rights. By a 6–3 vote, [345] the Court accepted the mother's argument that the Mississippi rule created a scheme of unequal justice forbidden by the Fourteenth Amendment. As a matter of constitutional law, this argument drew its plausibility from a number of Supreme Court decisions, most rendered prior to the mid-1970s, holding that the states must sometimes waive rules that otherwise would preclude indigents from pursuing appeals or attempting to vindicate claimed legal

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341 Aware of their limited resources, Justices will occasionally signal that they would welcome fuller exploration of matters that they regard as relevant by other parties in future cases. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1628 (1997) (Thomas, J., dissenting) (expressing a tentative view that, contrary to the Court's prior decisions, the Import-Export Clause was originally understood to bar some discriminatory state taxes that are currently barred by the negative Commerce Clause).

342 Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2403 (1996) (Souter, J., concurring) (observing that, when the Court "know[s] too little to risk the finality of precision, ... the judicial obligation ... can itself be captured by a much older rule, familiar to every doctor of medicine: 'First, do no harm'").

343 *Cf.* DWORKIN, *supra* note 99, at 225–75 (developing a theory of law by depicting the approach to adjudication of an ideal judge, Hercules, with super-human powers); DWORKIN, *supra* note 51, at 105–30 (same).

344 117 S. Ct. 555 (1996).

345 Justice Ginsburg wrote the opinion of the Court, which was joined by Justices Stevens, O'Connor, Souter, and Breyer. *See id.* at 558. Justice Kennedy concurred separately. *See id.* at 570 (Kennedy, J., concurring).

rights.[346] Several of these decisions rested on a confusing mix of equal protection and due process grounds.[347] In addition, two cases from the 1980s had established that state procedures for terminating parental rights affected unusually important interests and, accordingly, that the requirements of due process were heightened.[348]

For Justice Thomas, who dissented,[349] *M.L.B.* raised issues that demanded re-examination of doctrinal premises. The petitioner relied on cases decided under the Due Process Clause. But if due process does not require a state to provide appeals at all — as the Court acknowledged[350] — Justice Thomas thought it bizarre to conclude that due process demands the waiver of financial barriers to appeals.[351] As a matter of principle, Justice Thomas therefore concluded, M.L.B.'s claim had to rest on the Equal Protection Clause.[352] But the Court had held, in the watershed case of *Washington v. Davis*,[353] that discriminatory impact does not trigger heightened judicial scrutiny in the absence of discriminatory intent.[354] On this understanding of the Equal Protection Clause, Justice Thomas argued, M.L.B.'s claim deserved to be rejected,[355] and older cases possibly ought to be overruled.[356] In any event, the Court needed to confront underlying questions of principle, both to resolve the case before it and to chart a doctrinal course for the future.

Writing for the Court, Justice Ginsburg rebuffed Justice Thomas's challenge. As framed by the Court, the case called for a relatively straightforward application of precedents under the Due Process and Equal Protection Clauses.[357] Justice Ginsburg suggested that the equal protection grounds for decision predominated,[358] but she by no

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[346] *See* Mayer v. City of Chicago, 404 U.S. 189, 193–95 (1971); Boddie v. Connecticut, 401 U.S. 371, 380–82 (1971); Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Griffin v. Illinois, 351 U.S. 12, 17 (1956).

[347] *See Mayer*, 404 U.S. at 193 (quoting *Griffin*, 351 U.S. at 17); *Griffin*, 351 U.S. at 16, 18; *see also M.L.B.*, 117 S. Ct. at 566 ("We observe first that the Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer*, reflect both equal protection and due process concerns." (citation omitted)).

[348] *See* Santosky v. Kramer, 455 U.S. 745, 753–54 (1982); Lassiter v. Department of Soc. Servs., 452 U.S. 18, 31 (1981).

[349] Justice Thomas's dissent was joined by Justice Scalia and in part by Chief Justice Rehnquist. *See M.L.B.*, 117 S. Ct. at 570 (Thomas, J., dissenting).

[350] *See M.L.B.*, 117 S. Ct. at 560.

[351] *See id.* at 572 (Thomas, J., dissenting).

[352] *See id.* at 571–72.

[353] 426 U.S. 229 (1976).

[354] *See id.* at 239–40.

[355] *See M.L.B.*, 117 S. Ct. at 572–75 (Thomas, J., dissenting).

[356] *See id.* at 575.

[357] *See M.L.B.*, 117 S. Ct. at 566 ("We place this case within the framework established by our past decisions in this area.").

[358] *See id.*

means disavowed reliance on due process.[359] Nowhere did she address the deep issues of principle that Justice Thomas raised.[360] Instead, by a process of analogy and distinction, she determined that M.L.B.'s case was most like those in which state rules impeding appeals by indigents had had to yield.[361]

M.L.B. stands as a paradigmatic example of what Professor Sunstein calls judicial minimalism:[362] the opinion is "incompletely theorized"[363] in at least one sense, and probably in two. First, the opinion offers no broad theory of either due process or equal protection. Second, it is quite likely that at least some of the Justices constituting the majority were themselves uncertain how to give a deep, principled account of why the judgment was correct.

Doctrine clearly abets incompletely theorized judgments by furnishing a framework in which determinations can be reached and "minimalistically" rationalized — that is, explained as defensible within the doctrinal framework, even if the framework is not itself justified by any broader theory. Given doctrine, the Justices frequently need not agree on much (including the grounds justifying the doctrine itself) in order to reach an agreed result. Moreover, as *M.L.B.* demonstrates, the Justices obviously believe that a shallow justification in terms of precedent at least sometimes satisfies their obligation of fidelity to the Constitution.

Professor Sunstein is relatively sanguine about this state of affairs. In his view, we have more reason to trust judges' quasi-intuitive, case-by-case judgments than we have to trust judges' capacity to frame broad, justifying theories.[364] As Sunstein recognizes, however, this is a generalization, not a rule.[365] Moreover, the best test of moral, political, and legal claims frequently involves their coherence with other propositions that we have good reason to accept.[366] Seen in this light, the

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359 *See id.* (treating due process cases and principles as part of the relevant doctrinal framework).

360 Although Justice Ginsburg offered no overarching theory of either the Due Process or the Equal Protection Clause, she did distinguish *Washington v. Davis*, 426 U.S. 229 (1976). Unlike the government test challenged in *Davis*, the statute involved in *M.L.B.* did not merely have a disproportionate impact on an identifiable group; the burdens that it imposed "apply to all indigents and do not reach anyone outside that class." *M.L.B.*, 117 S. Ct. at 569.

361 *See M.L.B.*, 117 S. Ct. at 565–70.

362 *See* Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV L. REV. 4, 20 (1996).

363 SUNSTEIN, *supra* note 11, at 4–5, 35–61.

364 *See id.* at 38–46, 194–96.

365 *See id.* at 195.

366 *See, e.g.*, NAGEL, *supra* note 12, at 109–25 (arguing that skeptical and relativist claims must be rejected if incompatible with other claims, including first-order ethical claims, that are better supported by reason and experience); JOHN RAWLS, A THEORY OF JUSTICE 20–22, 48–53 (1971) (developing the concept of "reflective equilibrium" as a test of the soundness of political beliefs); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 119 (1996). Antecedents of coherence tests in ethics and politics trace back to Aristotle. *See* STUART

Court's determined avoidance of questions of first principle in *M.L.B.* is at best a second-best approach.

The same might be said of ordinary, precedent-based adjudication in general. Despite the possibility of reasonable disagreement in constitutional law, we trust the Supreme Court to decide contested issues, largely on the ground that the Court's decisions will at least be disciplined by the demands of principle[367] and by the requirement of articulate reason-giving.[368] And reason-giving, within the domain of constitutional law, potentially runs deep. All agree that the Constitution has priority over any implementing test;[369] doctrine is therefore subject to challenge. For the most part, it may be fair for the Court simply to presume that prior decisions have established doctrine that reasonably implements constitutional principles. But when the Court's majority declines a dissenting opinion's express challenge to justify its decision at a deeper level, it refuses to accept the full discipline of articulate justification that helps to support the legitimacy of judicial review.

Even so, there sometimes is no preferable alternative. Given reasonable disagreement about deep justifications, it may be impossible to muster a majority for any deeply reasoned response to a challenge such as Justice Thomas's in *M.L.B.* In light of reasonable disagreement, shallow reason-giving may be all that is possible. Due to the possible absence of a better, practicable alternative, to label the approach of the *M.L.B.* majority as second-best is not necessarily to condemn it. Nonetheless, we should not delude ourselves about the gap between second-best and the constitutional ideal. More than fidelity theorists have appreciated, constitutional law needs a theory of the second best.

4. *Doctrine and Distortion.* — Critics often complain that doctrinal tests distort constitutional analysis: tests obscure, and ultimately frustrate the enforcement of, underlying norms.[370] As a blanket condemnation, this complaint fails. Doctrinal tests typically function as

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HAMPSHIRE, TWO THEORIES OF MORALITY 6–28 (1977). *But cf.* Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 275 (1992) (disputing that coherence is central to the justification of belief).

367 *See* BICKEL, *supra* note 91, at 69 ("When it strikes down legislative policy, the Court must act rigorously on principle, else it undermines the justification for its power.").

368 *See* Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, *in* JUSTIFICATION 71, 85–87 (J. Roland Pennock & John W. Chapman eds., 1986); *see also* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (terming "reasoned response to reasoned argument" an "essential aspect" of the judicial process).

369 *See supra* note 23 and accompanying text.

370 *See, e.g.*, Baker, *supra* note 10, at 116 ("[W]hen taken seriously, these judicial tests can confuse analysis and deflect discussion from the real issues."); Nagel, *supra* note 10, at 182 (arguing that the use of doctrinal formulas "achieves organizational control and intellectual respectability, to the extent it does so, . . . by impoverishing the Court's thought").

rules for decision.[371] As measured by reference to their underlying rationales, doctrinal tests, like all rules, are prone to both overinclusiveness and underinclusiveness.[372] Yet for a rule to work as a rule, it must have some capacity to block all-things-considered judgments and even to bar direct appeal to its underlying rationale.[373]

An example may clarify the point. A well-known First Amendment test establishes that content-based regulations of speech are invalid unless necessary to serve a compelling government interest.[374] Suppose that the underlying rationale for this rule is to prevent government from stifling speech based on its dislike of particular messages. Even on this hypothesis, it does not necessarily follow that the rule against content-based discrimination should not apply in a case in which the government's regulatory purpose does not involve hostility toward a speaker's message. Consider, for example, a case in which the government attempts to ban political editorials on election day;[375] it does so not because it dislikes the messages that such editorials generally communicate, but because it thinks that such editorials leave those on the other side with no fair opportunity to respond. Even if the rationale does not apply, the rule, if it is a good one, should be allowed to function as a rule.

The allure of "ordinary" adjudication pursuant to established tests does, however, invite (although it does not require) what might be viewed as a related pathology: the distension or manipulation of a doctrinal test in order to reach a result. As I have argued, for the Supreme Court to establish a doctrinal test is frequently a significant accomplishment. Effective implementation of the Constitution requires doctrine; and doctrine, once in place, serves as a focal point for reasonable agreement among the Justices. In addition, an exception to a rule stands on the same logical plane as the rule itself;[376] to recognize an exception therefore requires a decision of principle, which then may raise the issue of how far the principle supporting the exception ought to extend. In short, explicit departure from a test has the potential to upset a generally stable and relatively satisfactory equilibrium. What, then, should the Court do when straightforward application of a test would produce a result that some Justices regard as unacceptable?

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[371] *See* Schauer, *supra* note 9, at 308–09 (observing that the Supreme Court's First Amendment decisions have created a doctrinal structure dense with "rules" and "subrules"); Schauer, *supra* note 1, at 1470 ("[I]t may be appropriate to think of opinion writing as (at least in part) a conscious process of rule making.").

[372] *See* SUNSTEIN, *supra* note 11, at 130–31. Rules, by their nature, generalize, and most generalizations are less than wholly accurate. *See* SCHAUER, *supra* note 146, at 31–34.

[373] *See* SCHAUER, *supra* note 146, at 31–34.

[374] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116–18 (1991).

[375] *See* Mills v. Alabama, 384 U.S. 214, 215 (1966).

[376] *See* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 873 (1991).

For some Justices, *Turner Broadcasting System, Inc. v. FCC* (*Turner II*)[377] may have presented this question. A federal statute requires cable television systems to reserve some of their channels for local television stations; cable operators and programmers challenged the must-carry rule as a restriction on their freedom of speech.[378] In its decision last Term, as in an earlier case between the same parties, *Turner Broadcasting System, Inc. v. FCC* (*Turner I*),[379] the Court accepted the well-established test that makes content-based regulations presumptively unconstitutional.[380] The dispute in *Turner I* focused on whether Congress's purpose in enacting the statute was content-based; if Congress enacted the statute to protect over-the-airwaves broadcasters based on a preference for the local and public affairs programming that they tend to carry, a majority agreed that the statute must be treated as a content-based restriction.[381] In a 5–4 decision, the Court concluded in *Turner I* that the statute's purposes were not content-based.[382] Accordingly, the Court remanded the case to the district court for further factual findings to determine whether the must-carry provision survived intermediate scrutiny under the test of *United States v. O'Brien*.[383]

The district court upheld the statute,[384] and the Supreme Court affirmed, again by a 5–4 vote, in *Turner II*.[385] For the majority, the central points were that Congress had reasonably concluded that the must-carry provision furthered the important governmental interest of promoting fair competition[386] and that the regulation was narrowly tailored to preserve a multiplicity of broadcast stations.[387] Writing in dissent, Justice O'Connor emphasized that there was significant disagreement over whether must-carry provisions were necessary for the economic survival of significant numbers of television broadcasters.[388]

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377 117 S. Ct. 1174 (1997).

378 *See id.* at 1184.

379 512 U.S. 622 (1994).

380 *See Turner II*, 117 S. Ct. at 1198.

381 *See Turner I*, 512 U.S. at 641–52.

382 *See id.* at 652 ("In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems.").

383 *See supra* p. 74.

384 *See* Turner Broad. v. FCC, 910 F. Supp. 734, 751 (D.D.C. 1995), *aff'd* 117 S. Ct. 1174 (1997).

385 *See Turner II*, 117 S. Ct. at 1203.

386 *See id.* at 1186. Although concurring in the judgment, Justice Breyer appeared to disagree with this conclusion and based his concurrence on other government interests at stake: preserving the benefits of free, over-the-air local broadcast television and promoting the widespread dissemination of information from a multiplicity of sources. *See id.* at 1203–05 (Breyer, J., concurring).

387 *See Turner II*, 117 S. Ct. at 1186, 1199. In making these findings, Justice Kennedy emphasized the deference owed to Congress. *See id.* at 1203 ("We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination.").

388 *See id.* at 1207 (O'Connor, J., dissenting).

And if the provisions were not necessary, she argued, "it becomes evident that the [government's] interest has nothing to do with anticompetitive behavior, but has everything to do with content — preserving 'quality' local programming that is 'responsive' to community needs."[389] On this basis, Justice O'Connor and the three other dissenting Justices continued to insist, as they had in *Turner I*, that the must-carry provisions should be subjected to strict scrutiny under ostensibly unchallenged doctrine.[390]

According to one plausible view, the *Turner* cases represent an indefensible distension or manipulation of an established doctrinal test and an equally lamentable avoidance of an important question of constitutional principle. On this view, the government's purpose in enacting the must-carry regulations was clearly content-based: Congress wanted to preserve the economic viability of local, over-the-air broadcasters precisely because it valued the content of their programming, which typically includes local news, public service, and community affairs coverage.[391] But if the challenged must-carry rules cannot fairly be upheld under the *O'Brien* test for content-neutral regulations, this argument continues, it does not follow that they should be held unconstitutional. Instead, the *Turner* cases raise the question whether the Court should carve out an exception to the general rule prohibiting content-based regulation of speech for cases in which Congress regulates cable television (and possibly other media) for the purpose of promoting, not stifling, effective coverage of public affairs and diversity of programming.[392]

Should some or all of the Justices in the *Turner II* majority have reached this question of high principle? Several considerations seem relevant. First, not all of the Justices in the majority may actually have believed that the holding distorted, or even strained, the *O'Brien* doctrine. Second, if the Justices in the *Turner II* majority had confronted questions of first principle, it seems unlikely that they could

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389 *Id.* at 1212.

390 *See id.* at 1208.

391 *See, e.g., id.* at 1207 (asserting that "the only justification" supporting the purported governmental interest "is heavily content based"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring in part and dissenting in part) ("I cannot avoid the conclusion that [the statutory] preference for broadcasters over cable programmers is justified with reference to content."); *id.* at 685 (Ginsburg, J., concurring in part and dissenting in part) ("Congress' 'must-carry' regime . . . reflects an unwarranted content-based preference."); *see also* Baker, *supra* note 10, at 82 (critiquing the majority's conclusion that the statute was content-neutral); Eskridge & Frickey, *supra* note 326, at 47 ("[T]he statute's insistence that cable companies program local stations and public broadcasting stations appears to be animated by what those stations are likely to say, and that is content-based.").

392 *See* Baker, *supra* note 10, at 80–128 (arguing that the government should be permitted to regulate media entities in order to promote a desirable communications order and that the Court's preoccupation with doctrinal tests singling out content-based regulations for heightened scrutiny obscured the normative questions that it should have faced directly).

have coalesced on any approach other than the *O'Brien* test that would have produced their preferred outcome; among other indications of the potential difficulty, the Court had fractured badly in a recent case involving the regulation of sexually explicit and offensive material on cable television.[393] Third, the generally stable doctrinal equilibrium that prevails under the *O'Brien* test — rooted in the principle that content-based regulations are subject to strict scrutiny — is a very valuable one, given the obvious bases for reasonable disagreement (and attendant legal uncertainty) on numerous First Amendment questions were the prevailing equilibrium to be upset.[394]

Under the circumstances, a Justice who believed that it took some stretching of the *O'Brien* framework to reach the result that he or she thought correct (for reasons other than those reflected in the Court's opinion) might well have been justified in supporting some modest doctrinal distension. Much would depend on a calculation with a predictive, quasi-strategic element: how much would one or another approach to the case threaten to upset the doctrinal equilibrium established by *United States v. O'Brien*, and with what ill effects? The question is not, as I see it, simply one of doctrinal coherence to be considered as a matter of abstract, theoretical reason. Resolving the issue calls for more practical and predictive judgments about how others' willingness to accept *O'Brien* as a focal point for reasonable agreement might be affected in future cases. I do not mean to imply that the Justices should engage in strategic bargaining marked by bluffs and threats, offers and counteroffers. I do suggest, however, that they must

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393 *See* Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2381 (1996) (striking down some portions and upholding other portions of the Cable Television Consumer Protection Act ("the Act")). The two provisions of the Act that gave rise to the greatest division within the Court were § 10(a), which permitted cable television operators to prohibit patently offensive or indecent programming on leased access channels, and § 10(c), which did the same for public access channels. Justice Breyer, whose plurality opinion upholding § 10(a) but invalidating § 10(c) was joined by Justices Stevens and Souter, *see id.* at 2398, 2401, expressly disavowed application of any previously formulated First Amendment test and employed a highly contextual balancing methodology. *See id.* at 2384–88. Justice O'Connor generally agreed with Justice Breyer's methodology, but concluded that § 10(c) should also be upheld. *See id.* at 2403–04 (O'Connor, J., concurring in part and dissenting in part). Justice Kennedy, joined by Justice Ginsburg, would have struck down both provisions as content-based restrictions subject to strict scrutiny. *See id.* at 2405–06 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have upheld both provisions on the rationale that the First Amendment protected the rights of the cable operators, which were actually promoted by the Act, rather than those of the programmers and viewers who challenged it. *See id.* at 2410–32 (Thomas, J., concurring in the judgment in part and dissenting in part).

394 *Compare* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2100–06 (1991) (arguing in favor of state efforts, sometimes including regulation, to promote diversity and equality in speech), *with* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 226–27 (1992) (characterizing proposals to regulate speech in the name of equality as contrary to fundamental First Amendment principles and as a threat to liberty).

consider the importance of sustainable equilibria in domains of reasonable disagreement.[395]

5. Doctrinal Adaptation and "Ordinary" Overruling. — In discussing the possibility of doctrinal "distension," I should not create the impression that ordinary constitutional adjudication, focused mostly on precedent, leaves little room for doctrinal adaptation. The Supreme Court regularly deals with difficult cases that call for contestable judgments about the meaning of precedents and their analogical force. In addition, established constitutional tests are often far from determinate.[396] As one decision follows another, constitutional doctrine can change relatively profoundly, without any direct attention to first principles.[397]

Among last Term's cases, a striking illustration of this phenomenon emerged in *Agostini v. Felton*,[398] in which a majority of the Court, with very little reference to deep issues of principle, actually overruled two important Establishment Clause cases[399] on the ground that their rationales had been undermined by intervening decisions.[400] At issue in *Agostini*, as in the earlier cases of *School District of Grand Rapids v. Ball*[401] and *Aguilar v. Felton*,[402] were programs under which public school teachers enter parochial school classrooms to teach secular remedial and enrichment classes. In *Ball* and *Aguilar*, the Court, by a

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395 I believe that this position is consistent with Professor Shapiro's wise insistence on a carefully specified requirement of judicial candor. *See* Shapiro, *supra* note 368, at 737. I agree with Professor Shapiro that, for the obligation of candor to be satisfied, a Justice engaging in doctrinal distension must be willing to accept the implications in future, relevantly similar cases. *See id.* (noting the judicial obligation not to dissemble or mislead). I acknowledge, however, that what counts as a relevantly similar case will not always be obvious, and that future cases thus may provide occasions for bounding the distension introduced by the earlier decision.

396 *See, e.g.*, Scalia, *supra* note 140, at 1180, 1186 (arguing that balancing tests fail to provide "much general guidance" concerning the resolution of future cases).

397 As a result, the crude distinction between ordinary and extraordinary cases does not correlate perfectly with the equally crude distinction between cases in which the Court makes doctrine and those in which the Court instead applies doctrine. The Court treats some cases that call for the formulation of doctrine as entirely ordinary. For example, last Term's decision in *Clinton v. Jones*, 117 S. Ct. 1636 (1997), presented the novel question whether the Constitution required postponement of the trial of a civil suit against the President, based on "private" rather than "official" acts, until the end of the President's term in office. *See id.* at 1644. Eschewing questions of first principle, the Court undertook to resolve the issue by applying the framework established by *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which recognized an absolute presidential immunity in suits for damages predicated on the President's official acts, *see id.* at 749. Reached within the *Fitzgerald* framework, the Court's decision in *Clinton* rested largely on the empirical, predictive judgment that suits against the President arising from unofficial conduct were unlikely to interfere too much with the President's time. *See Clinton*, 117 S. Ct. at 1648.

398 117 S. Ct. 1997 (1997).

399 *See id.* at 2003, 2008. The two cases were *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled by Agostini*, 117 S. Ct. 1997 (1997), and *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by Agostini.*

400 *See Agostini*, 117 S. Ct. at 2010.

401 473 U.S. 373 (1985).

402 473 U.S. 402 (1985).

5–4 vote, found a violation of the "effects" prong of the three-part *Lemon v. Kurtzman*[403] test.[404] According to the majority, public employees on the premises of religious schools were likely to contribute to those schools' mission of religious inculcation;[405] in addition, the mixture of religious and secular education created a symbolic union of church and state and helped to finance religious education by sparing religious schools some costs that they might otherwise have borne.[406]

In overruling *Ball* and *Aguilar*, *Agostini* struck no blows at the continuingly resilient *Lemon* test.[407] Carefully parsing cases, Justice O'Connor's majority opinion first established that a subsequent decision had "abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[408] Justice O'Connor then argued that the Court had "departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid."[409] In support of this proposition, the Court pointed to *Witters v. Washington Department of Services for the Blind*,[410] which had upheld a state's provision of a vocational tuition grant to a blind person attending a Christian college and pursuing education for the ministry.[411]

In light of these intervening developments, Justice O'Connor concluded, the effect of governmental programs remained crucial to Establishment Clause inquiries,[412] but the applicable effects test — or, perhaps more precisely, the presumptions guiding its application — had changed.[413] Under more recent precedents, public employees are no longer per se forbidden to work in parochial school classrooms,[414] and the even-handed provision of benefits to students in religious as well as secular schools does not, without more, evidence a forbidden

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403 403 U.S. 602 (1971).

404 *See Aguilar*, 473 U.S. at 412–13; *Ball*, 473 U.S. at 392.

405 *See Ball*, 473 U.S. at 387–89.

406 *See Aguilar*, 473 U.S. at 410–11; *Ball*, 473 U.S. at 391–92.

407 *See supra* notes 214–215 and accompanying text.

408 Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997). In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the use of a state-employed sign language interpreter to assist a deaf student in a parochial school. *See id.* at 13.

409 *Agostini*, 117 S. Ct. at 2011.

410 474 U.S. 481 (1986).

411 In a unanimous opinion, *Witters* deemed it crucial that the state made tuition grants generally available, without preference for religious schools or those wishing to attend them. *See id.* at 487.

412 *See Agostini*, 117 S. Ct. at 2010.

413 *See id.*

414 *See id.* Dissenting in *Agostini*, Justice Souter read *Zobrest* narrowly and argued that its "rejection of such a *per se* rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer." *Id.* at 2023 (Souter, J., dissenting).

effect of promoting religion.[415] Through ordinary adjudication, proceeding by narrow if contestable arguments about how agreed tests should be applied or prior decisions understood,[416] the Court concluded that the framework of constitutional law had not only changed, but had changed sufficiently dramatically to justify the overruling of *Ball* and *Aguilar*.[417]

6. Shadows of Principle in Ordinary Adjudication. — Ordinary, doctrine-based adjudication purports to focus on the correct application of closely analogous precedents and agreed tests. On the surface, the disputes involve technical canons constituting "the artificial [r]eason of the law."[418] When is a precedent distinguishable? When is a case on point? When is an analogy a good one?[419]

Judicial debates focused on questions such as these often seem both wooden and tendentious.[420] It is notorious, even to the Justices themselves, that a broad ambit frequently exists for reasonable disagreement about how precedents are best interpreted and tests best ap-

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415 *See Agostini*, 117 S. Ct. at 2014 ("[W]here the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis[,] . . . the aid is less likely to have the effect of advancing religion.").

416 Justice Souter's dissenting opinion in *Agostini*, joined in whole by Justices Stevens and Ginsburg and in part by Justice Breyer, disagreed with this approach. Adverting directly to first principles, Justice Souter rejected the doctrinal framework applied by the majority insofar as it compromised the principle, which he thought too fundamental to be dismissed based on a few possibly mistaken precedents, that the government should not provide direct financial subsidies or their equivalents to religious institutions. *See id.* at 2020 (Souter, J., dissenting). Justice Ginsburg also wrote a dissenting opinion, addressing the procedural question whether the Court should have heard the *Agostini* case at all. *See id.* at 2027–28 (Ginsburg, J., dissenting).

417 In the wake of *Agostini*, the looming question of foremost practical importance involves the constitutionality of "voucher" programs, through which school districts might help to fund the choices of parents and students who prefer religious to public, secular education. *See, e.g.*, Tamara Henry & Lori Sharn, *Schools Decision Could Affect Rulings on Vouchers*, USA TODAY, June 24, 1997, at 3A; Douglas Kmiec, *School Choice: Why Hasn't Its Time Come?*, CHI. TRIB., Aug. 25, 1997, at 13. Although some of the language in *Agostini* suggests that voucher programs would be permissible, *see Agostini*, 117 S. Ct. at 2011–12, the opinion seems too incompletely theorized to dictate a result, at least when the effect would be significant financial support for the religious education of proportionately large numbers of students, or when voucher programs might suggest an endorsement of religious education as superior to secular, public education. Justice O'Connor, who wrote the majority opinion in *Agostini* and whose vote would likely determine the constitutionality of a voucher program, has championed an "endorsement" test in other Establishment Clause cases. *See supra* note 219 and accompanying text. Not alluding to "endorsement" concerns, her opinion in *Agostini* did not bind her or any other Justice to a judgment about the permissibility of school voucher programs substantially broader than the program involved in *Witters*, 474 U.S. 481 (1986).

418 Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981) (internal quotation marks omitted).

419 For a lucid discussion of the philosophical presuppositions of reasoning by analogy, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926 (1996).

420 *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 56 (1997) (asserting that many arguments of this kind are conducted in a kind of "bad faith").

plied.[421] Yet when the Court itself applies doctrine, clashing majority and dissenting opinions commonly characterize opposing views as flatly wrong about the force of analogies, the meaning of precedent, and so forth. What, one reasonably might ask, is going on?

One possibility is that the doctrinal disputes characteristic of ordinary adjudication are substantially independent of debates about constitutional first principles. On this view, doctrine blocks recourse to principle, much as rules, in order to function as rules, must bar all-things-considered judgments.[422] The difficulty with this view is obvious: in cases in which there really is room for reasonable disagreement about how doctrine would best be applied,[423] debates about application, if divorced from issues of constitutional principle, would be not only arid, but obtuse. Ordinary adjudication — in a case such as *Agostini*, for example — ineluctably occurs in light of the Justices' sometimes divergent conceptions of underlying values[424] even if the Justices neither advert explicitly to first principles, nor attempt to defend or attack the doctrinal framework within which ordinary adjudication takes place. Even in ordinary adjudication, in other words, views about matters of background principle almost certainly dominate the interstices of doctrinal argument and guide contestable judgments. Nonetheless, the central debate is often submerged, and, it might be asked, to what defensible end?

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[421] This is especially clear in the Court's habeas corpus jurisprudence. Even before receiving congressional direction to do so, the Court ruled that federal habeas corpus relief generally is not available to state prisoners if the challenged state court decision was "reasonable" (even if not "correct") at the time their convictions became final. *See, e.g.*, Butler v. McKellar, 494 U.S. 407, 414 (1990); Teague v. Lane, 489 U.S. 288, 310 (1989). In applying this standard, the Court typically views the bounds of reasonable disagreement as very broad indeed. *See, e.g.*, O'Dell v. Netherland, 117 S. Ct. 1969, 1977–78 (1997) (holding that barring a capital defendant from informing a sentencing jury that he was parole-ineligible was not unreasonable under judicial precedent); Butler v. McKellar, 494 U.S. 407, 416 (1990) (finding that permitting police interrogation following a suspect's request for counsel in a separate investigation was not unreasonable). The Court has also taken explicit account of doctrinal uncertainty and indeterminacy in other areas in which it has made legal consequences turn on the question whether one of the parties to a case either relied on or asked a court to craft "new law." For a discussion of doctrines incorporating a concept of "new law," see Fallon & Meltzer, cited above in note 57, at 1734.

[422] *See supra* p. 118.

[423] I do not mean to suggest that every case falls within this category. *See, e.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 405–07 (1985) (discussing the numerous easy cases in constitutional law).

[424] *Cf.* Raines v. Byrd, 117 S. Ct. 2312, 2324 (1997) (Souter, J., concurring) ("Because it is fairly debatable whether appellees' injury is sufficiently personal and concrete to give them standing [under judicially fashioned standing tests], it behooves us to resolve the question under more general separation-of-powers principles underlying our standing requirements."). *See generally* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Adjudication*, 100 HARV. L. REV. 1189, 1231 (1987) (arguing that considerations within different categories of constitutional argument frequently suffuse and inform judgments about matters formally within other categories).

Again, the justification for the submersion of what is most fundamentally at stake must be that this is a second-best way of implementing the Constitution under circumstances of reasonable disagreement. To cite just one example, the five Justices who constituted the majority in *Agostini* have disagreed, sometimes bitterly, about the precise principles that Establishment Clause jurisprudence ought to reflect.[425] Reasonably disagreeing (or, aware of grounds for reasonable disagreement, being individually uncertain) about how guiding principles would best be specified, a majority of the Justices may nonetheless agree about a result and about a shallow explanation, and they may further agree to keep intact a doctrinal structure that they believe helps to implement constitutional values reasonably well.

Recognition that ordinary adjudication is only a species of second-best may help to explain why some of the best constitutional theory literature explicitly offers an idealized or reconstructed account of constitutional adjudication, not a descriptive theory of what actually happens.[426] It is a bit discomfiting to recognize how much of the contest of principle occurs in the interstices of doctrinal frameworks that may themselves be accepted only on second-best grounds, and equally discomfiting to acknowledge how much of the influence exerted by differing views of principle is implicit, rather than explicit. As I have suggested already, however, an ideal of what would be first-best should not obscure the practical need for approaches that are second-best; second-best approaches are sometimes necessary, in practice, for the Constitution to be implemented reasonably successfully.

C. *Extraordinary Adjudication*

Cases framed to involve a direct consideration of ultimate principles are the most watched, and typically the most important, that the Court decides. Not all such cases are of equal importance. Some involve relatively minor issues not likely to have significant ripple effects in other doctrinal areas.[427] Other cases, by contrast, call for reassessment of principles that have come to support broad doctrinal struc-

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425 Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas have all attacked the "objective observer" test favored by Justice O'Connor. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763–70 (1995) (Scalia, J.); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). And in *Lee v. Weisman*, 505 U.S. 577 (1992), the Chief Justice and Justices Scalia and Thomas divided sharply with Justice Kennedy. *See id.* at 635.

426 *See, e.g.*, DWORKIN, *supra* note 99, at 176–275; DWORKIN, *supra* note 51, at 105–30; *see also* Brewer, *supra* note 419, at 962 (offering a philosophically reconstructed and partially idealized account of legal reasoning by analogy).

427 *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1598 (1997) (holding that Commerce Clause doctrine generally forbidding discriminatory state taxation recognizes no exception permitting discriminatory state tax preferences for certain not-for-profit organizations).

tures and patterns of reliance; cases of this kind hold the potential for doctrinal revolution.[428]

The conundrums posed by reasonable disagreement are most acute in extraordinary cases. The Justices must confront competing claims of substantive principle, questions about the deference appropriately given to political branches, and the challenges of achieving agreement within the Court itself. Beyond questions of first principle lie problems of implementation. Crafting doctrine to protect constitutional principles may prove no less difficult than identifying the principles that deserve protection. Indeed, a majority of the Justices can sometimes reach agreement on a constitutional principle of potentially broad, generative significance, but fail to unite on a robustly protective test. When this happens, the result of an extraordinary case may be continuing doctrinal flux — a period of waiting to see whether the decision will prove to be a "mustard seed" or a "mule."[429]

1. A Case Both Extraordinary and Easy: Boerne v. Flores. — In *City of Boerne v. Flores*,[430] the Supreme Court confronted a question about the scope of congressional power under Section 5 of the Fourteenth Amendment — whether Congress, believing that a Supreme Court decision gave too little protection to constitutional rights, could enact a statute conferring precisely those protections that Congress thought the Court had erred in not providing.[431] The origins of *Boerne* lay in the Court's 1990 decision in *Employment Division v. Smith*.[432] *Smith* presented a claim that a state law prohibiting the use of peyote violated the free exercise rights of members of the Native American Church, for whom ingestion of peyote was a sacrament. In an opinion by Justice Scalia, the Court distinguished precedents that had used an effects test to trigger strict judicial scrutiny of statutes that substantially burdened religious practices.[433] Instead, Justice Scalia substituted a nonsuspect-content rule: neutral laws of general

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428 *See generally* Fried, *supra* note 20, at 15–17 (discussing the potential of Supreme Court decisions based directly on "first principles" to effect doctrinal "revolution").

429 *Id.* at 42–45 (distinguishing "mustard seeds," or decisions from which large and important doctrines ultimately grow, from "mule[s]," or decisions that prove unable to spawn the progeny needed for ultimate doctrinal significance).

430 117 S. Ct. 2157 (1997).

431 In separate dissenting opinions, Justices Souter and Breyer declined to reach this issue. Each thought that the Court, before doing so, should reconsider the correctness of its ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See Boerne*, 117 S. Ct. at 2185–86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting). Justice O'Connor, who also dissented, devoted most of her attention to arguing that *Smith* was wrongly decided. Unlike Justices Souter and Breyer, Justice O'Connor said explicitly that she would agree with the majority's Section 5 analysis if she thought *Smith* were rightly decided. *See id.* at 2176 (O'Connor, J., dissenting).

432 494 U.S. 872 (1990).

433 *See id.* at 883.

applicability do not trigger elevated judicial scrutiny simply because of their effects in burdening religion.[434]

Congress, by overwhelming majorities, responded to the *Smith* decision by enacting the Religious Freedom Restoration Act ("RFRA").[435] The statute's preamble referred directly to the Constitution's guarantee of the free exercise of religion, observed that laws neutral on their face "may burden religious exercise as surely as laws intended to interfere" with religion, adverted critically to *Smith*, and — addressing a concern expressed by the majority opinion in *Smith*[436] — found that "the compelling interest test as set forth in prior Federal court rulings is a workable" one.[437] Substantively, RFRA purported to restore by statute what Congress took to be the pre-*Smith* doctrinal structure:[438] substantial burdens on the exercise of religion could not be sustained unless shown to be the least restrictive means of advancing a compelling government interest.[439]

(a) The Decision of Principle. — *Boerne* held RFRA unconstitutional. The Court ruled that the statute, by conferring broader substantive protections of religious freedom than did the decision in *Smith*, exceeded Congress's power under Section 5 of the Fourteenth Amendment "to enforce" the Amendment's substantive guarantees.[440] In an opinion authored by Justice Kennedy and joined by five other Justices,[441] the Court found that the enforcement power given by Section 5 does not encompass a power to "alter[]" the meaning of constitutional rights.[442] Congress can provide remedies for violations of judicially defined rights, and it can enact statutes reasonably aimed at preventing violations. But "[l]egislation which alters the meaning of

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[434] *See id.* at 878–79.

[435] 42 U.S.C. § 2000bb (1994).

[436] *See Smith*, 494 U.S. at 885–89.

[437] 42 U.S.C. § 2000bb(a).

[438] Even some ardent critics of the *Smith* decision acknowledge that the Supreme Court, prior to *Smith*, had not applied the "compelling interest" test with characteristic stringency. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–10 (1990) (noting that, although it used highly protective language, "the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims").

[439] *See* 42 U.S.C. § 2000bb-1.

[440] *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2160 (1997). Section 5 provides that "[t]he Congress shall have the power to enforce, by appropriate legislation," the substantive guarantees of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. It is well established that the Fourteenth Amendment incorporates, or makes applicable against the states, the right to the free exercise of religion guaranteed by the First Amendment. *See Boerne*, 117 S. Ct. at 2163 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

[441] Chief Justice Rehnquist and Justices Stevens, Thomas, and Ginsburg joined the entire opinion. Justice Scalia joined in all but Part III-A-1, discussing the legislative history of the Fourteenth Amendment. *See Boerne*, 117 S. Ct. at 2172–76.

[442] *See id.* at 2164.

the Free Exercise Clause," as RFRA did, "cannot be said to be enforcing the Clause."[443]

Several factors appear to have helped the Court to agree to this principle. First, the Court found strong support in the history of the Fourteenth Amendment for the view that Congress's power to "enforce" the Constitution does not encompass a power to "alter[]" constitutional meaning.[444] There is widespread agreement that history must at least be reckoned with in interpreting the Constitution,[445] and some Justices are disposed to treat original understandings as conclusive.[446] Second, recognition of congressional power to confer substantive legal protections in all cases in which the Court has not enforced constitutional norms to their full conceptual limits, as supported by some champions of expansive congressional power under Section 5,[447] would have threatened a considerable diminution of the Court's central role in implementing the Constitution. As I have emphasized, reasonable disagreement is widespread in constitutional law, and rarely could it be said with confidence that Supreme Court decisions enforce constitutional norms to their full conceptual limits. Not surprisingly, the Court thought that reserving to itself the last word as to constitutional meaning would serve constitutional values best.

Significantly, the dissenting opinions in *Boerne* did not contest the majority's interpretation of Section 5 and its specification of the line separating judicial from legislative power, but instead argued that *Smith* itself should be reconsidered.[448] Among the dissenting Justices,

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443 *Id.*

444 *See id.* at 2164–65 (citing the legislative history of Section 5).

445 *See, e.g.*, Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1252 (1997) (asserting that in interpreting constitutional provisions, "[w]e must begin . . . by asking what — on the best evidence available — the authors of the text in question intended to say"); Larry Kramer, *Fidelity to History — And Through It*, 65 FORDHAM L. REV. 1627, 1627 (1997) (characterizing "[m]ost of those who engage seriously with problems of constitutional interpretation" as "'weak' originalists").

446 *See supra* note 19.

447 *See* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 153–65 (1995); Sager, *Underenforced Norms*, *supra* note 6, at 1239–40. The launching pad for this view of congressional power lies in Justice Brennan's opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which asserted that Congress has power under Section 5 to enforce rights, but that Section 5 "does not grant Congress power to exercise discretion in the other direction and to . . . 'dilute'" constitutional guarantees. *Id.* at 651 & n.10. It bears emphasis that the Court could have upheld RFRA on other grounds — for example, the ground that RFRA constituted reasonable prophylactic legislation regulating "state conduct that creates a risk of constitutional violations." Brief for the United States at 7, *Boerne* (No. 95-2074), *available in* 1997 WL 13201; *see* Laycock, *supra*, at 153, 165–67.

448 *See supra* note 431. As in *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996), discussed above at pp. 114–17, the majority opinion did not respond explicitly to the demand of the dissenting Justices to reconsider whether relevant precedent could be sustained upon a re-examination of first principles. There are important distinctions, however. First, the *Smith* decision attacked by the dissenting Justices in *Boerne* was a recent one, the authority of which had not plausibly been undermined by intervening judicial decisions. Second, and in some ways more important, Justice

Justice O'Connor said specifically that she would agree with the majority's analysis if she thought *Smith* were correctly decided.[449] Justices Souter and Breyer declined to address the Section 5 issue at all until the predicate issue of *Smith*'s correctness had been reconsidered.[450]

Notwithstanding the Court's near unanimity concerning *Boerne*'s central holding, the Court's reasoning is less than wholly satisfying. The most troubling issue involves fair allocations of power under the Constitution: in light of reasonable disagreement between the Court and Congress over the scope of constitutional rights, why should the Court's views always prevail? Why should Congress not have a role in cases in which democratic majorities want broader protection for constitutionally based liberties than the Court has provided?[451]

Although the Court did not address this question directly, the best answer that I can imagine, and that is reasonably consistent with the *Boerne* majority's manifest views, would have three parts. First, notwithstanding reasonable disagreement about constitutional matters, there may be good reason to want issues of first principle to be resolved by a deliberative institution, such as the Court, that is removed from the preoccupations of electoral politics.[452] Second, the Court may actually have some capacity to respond to the problem of reasonable constitutional disagreements among concerned citizens and state and federal officials that Congress does not. On one quite plausible view, constitutional decisionmaking should, as a matter of fairness, be tempered in light of reasonable disagreement.[453] The Court, as an institution, may be acculturated to take reasonable disagreement into account

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Scalia — the author of the *Smith* decision — wrote a concurring opinion in *Boerne* (joined by Justice Stevens) specifically to respond to "the claim of Justice O'Connor's dissent . . . that historical materials support a result contrary to the one reached in" *Smith*. *Boerne*, 117 S. Ct. at 2172 (Scalia, J., concurring in part).

449 *See Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting).

450 *See id.* at 2185–86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

451 The conclusion that Congress should not have such a role is not a necessary implication of the concept of judicial review, nor can it be derived directly from the Court's holding in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See* TRIBE, *supra* note 219, at 349. Professor Tribe argues:

> It is not difficult to reconcile congressional power to define the content of fourteenth amendment rights with *Marbury v. Madison* and judicial review. Judicial review does not require that the Constitution always be equated with the Supreme Court's view of it. It is the Court's responsibility, under *Marbury*, to strike down acts of Congress which the Court concludes to be unconstitutional — nothing more. *Marbury* implies nothing about the criteria by which the Court should determine whether an act of Congress is unconstitutional . . . .

Id. (footnote omitted).

452 For further elaboration and discussion of this claim, see section V.A below.

453 *See* Jeremy Waldron, *The Circumstances of Integrity*, 3 LEGAL THEORY 1, 19 (1997) (explicating a view in which officials exercising social power "must go beyond [their] particular views about justice" and accommodate divergent positions in order to "claim legitimacy in relation to the community as a whole"). For further discussion of this position, see pp. 144–45 below.

in rendering constitutional decisions. By contrast, Congress, as a more majoritarian institution, may be less restrained; the maxim of politics may too often be that to the victors belong the spoils.

This second argument may appear to ring hollow in the context of RFRA, a principal aim of which was to protect religious minorities. For the Court's position to be defensible, a third consideration must also come into play: among the reasons that constitutional interpretation should sometimes be tempered in light of reasonable disagreement, and should not simply reflect the substantively reasonable view preferred by the national political majority (as reflected in congressional legislation under Section 5), is that the national majority will not always be the local majority. In a case such as *Boerne*, principles of federalism are at stake. Although the Court generally operates with a thin theory of political democracy,[454] a majority clearly believes that the Constitution should be read to protect the authority of state and local governments to make important decisions free from national domination.[455]

The Court's federalist stance is, of course, a contestable one, reflecting a theory of political democracy under the Constitution with which many reasonable people disagree. It is unclear what weight, if any, the Court gave to this consideration in reaching its decision in *Boerne*. I discuss below the significance that the Court *ought* to attach to reasonable disagreement among concerned citizens in ruling on constitutional issues.[456]

(b) The Doctrinal Test of Congress's Section 5 Power. — Having agreed that Congress can provide remedies and protections for substantive constitutional rights, but cannot alter the content of those rights, the Court faced the task of applying this principle to RFRA and of creating doctrine to guide its application in future cases. Although the *Boerne* opinion was less than wholly clear, the Court appears to have employed a purpose test. Although Congress would be entitled, under *Smith*, to attempt to prevent or remedy government measures adopted for the purpose of burdening religion, RFRA could not be justified as a "preventive" or "remedial" measure, the Court concluded, because it swept too broadly.[457] As the encompassing scope of the legislation made clear, "Congress' concern was with" legislation that im-

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454 *See supra* pp. 103–05.

455 *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (holding that Congress cannot compel state officials to implement a federal regulatory program); Seminole Tribe v. Florida, 116 S. Ct. 1114, 1119 (1996) (holding that Congress lacks power under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity from suit in federal court); United States v. Lopez, 514 U.S. 549, 567–78 (1995) (enforcing a limit, aimed at protecting state and local governments' regulatory prerogatives, on Congress's regulatory powers under the Commerce Clause).

456 *See infra* Part V.

457 *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2170 (1997).

posed "incidental burdens" on religion, not with legislation enacted or enforced due to hostility to religion.[458]

The Court's agreement to a purpose test should hardly be surprising. As noted above, purpose tests frequently reflect the overlapping consensus of competing views about how constitutional principles would best be enforced.[459] Purpose tests also tend to be narrow in the protections that they provide. Accordingly, the use of a purpose test in *Boerne* is entirely consistent with the Court's acknowledgement that Congress retains broad preventive and "remedial" powers.[460] Significantly, the Court either affirmed, rationalized, or distinguished all of the most important Section 5 precedents,[461] including one, *Katzenbach v. Morgan*,[462] which upheld congressional power to forbid the use of literacy tests,[463] even though the Court had previously found that such tests did not, in principle, violate the Constitution.[464]

It is crucial, however, that the central constitutional principle underlying the *Boerne* decision is potentially broader than the purpose test by which the majority implemented that principle in *Boerne* itself. In a future case, nothing in *Boerne*'s rationale would prevent the Court from imposing more stringent limits on the scope of congressional power; in determining whether a congressional enactment impermissibly "alters" substantive rights, the Court could augment *Boerne*'s purpose test with an effects test or other doctrinal formulations.

Meanwhile, many important questions remain about whether congressional prohibitions against discrimination based on nonsuspect criteria, such as age,[465] should now be upheld or invalidated. As the difficulty of such questions might suggest, it may have been the narrowness of the implementing test in *Boerne* that made possible the Court's near unanimity on the scope of congressional power under

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[458] *Id.* at 2169.

[459] *See supra* pp. 99–102.

[460] *See* 117 S. Ct. at 2164.

[461] *See id.* at 2166–68.

[462] 384 U.S. 641 (1966).

[463] *See id.* at 646–47.

[464] *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–53 (1959) (upholding constitutionality of state literacy tests). The *Boerne* Court distinguished *Katzenbach* on the ground that Congress, in barring some uses of literacy tests, permissibly acted on a predicate finding that there were widespread, otherwise unremedied violations of constitutional rights under judicially (rather than congressionally) established standards. *See* 117 S. Ct. at 2168. Under one rationale advanced in *Katzenbach*, the *Boerne* majority observed, the challenged provision of the Voting Rights Act was "a remedial measure to deal with 'discrimination in governmental services.'" *Id.* (quoting *Katzenbach*, 384 U.S. at 653). Under another rationale, *Katzenbach* rested on the Court's acceptance of Congress's determination that literacy tests were in fact implemented for unconstitutional purposes. *See Boerne*, 117 S. Ct. at 2168.

[465] *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994) (prohibiting preferential hiring or firing on the basis of age or pension concerns).

Section 5. In short, whether *Boerne* will prove to be a "mule" or a "mustard seed" remains to be seen.

2. The "Brady Bill" Case: Implementing Constitutional Federalism. — Although the Constitution clearly embodies principles of federalism,[466] the Court, historically, has had peculiar difficulty in specifying those principles and in formulating workable tests to implement them.[467] In the most general terms, the current Court's Eleventh Amendment cases have shown a recurrent impulse to accord the states heightened protection against federal judicial power,[468] but it has proved difficult for the five Justices most concerned about judicial federalism[469] to agree on a doctrinal structure that effectively guards the states from suit in federal court.[470] In its recent decision in *United States v. Lopez*,[471] the Court manifested a renewed disposition to protect a domain of exclusive state regulatory authority by holding that Congress lacked power under the Commerce Clause to prohibit, without more, the sale of guns within a school zone.[472] Although the result reflected a concern with returning federalism doctrine to "first princi-

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466 For a lucid, balanced account of the constitutional status of federalism principles, see SHAPIRO, cited above in note 157.

467 *See generally* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 664–81 (1993) (discussing often failed historical efforts by the Supreme Court to formulate judicially enforceable principles of constitutional federalism); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 67–71 (1984) (tracing the tortured and frequently misguided history of Eleventh Amendment doctrine).

468 *See, e.g.*, Idaho v. Coeur D'Alene Tribe, 117 S. Ct. 2028, 2040–43 (1997) (finding that a suit against state officials, attempting to determine ownership of the bed of a lake and its navigable tributaries, should be treated as an unconsented-to suit against the state barred by the Eleventh Amendment, despite the rule of *Ex parte Young*, 209 U.S. 123 (1908), that suits against governmental officials engaged in continuing conduct that is unlawful under federal law are not suits against the state for Eleventh Amendment purposes); Seminole Tribe v. Florida, 116 S. Ct. 1114, 1118 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and holding that Congress lacks authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity).

469 The five Justices who have joined the majority in all of the Court's important recent cases developing or applying federalism doctrines are Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. *See* Printz v. United States, 117 S. Ct. 2365, 2368 (1997); *Seminole Tribe*, 116 S. Ct. at 1119; United States v. Lopez, 514 U.S. 549, 550 (1995); New York v. United States, 505 U.S. 144, 147 (1992).

470 For example, in last Term's *Coeur D'Alene* case, the five majority Justices were unable to agree on a rationale for their holding that suit was barred by the Eleventh Amendment: Justice O'Connor's concurring opinion, joined by Justices Scalia and Thomas, rested the decision on a much narrower basis than that adopted by Justice Kennedy, joined by Chief Justice Rehnquist, in the "principal" opinion. Justice O'Connor's opinion was closely tailored to the peculiar facts of the case, involving a claim of ownership of a lakebed. *See* 117 S. Ct. at 2043–45 (O'Connor, J., concurring in part and concurring in the judgment). By contrast, Justice Kennedy's opinion would have revised the seemingly settled general rule that suits for injunctive and declaratory relief against state officials engaged in continuing patterns of federally unlawful conduct are not suits against the state for Eleventh Amendment purposes. *See Coeur D'Alene*, 117 S. Ct. at 2033–40.

471 514 U.S. 549 (1995).

472 *See id.* at 551–52.

ples,"[473] no clear doctrinal test emerged.[474] As a result, the implications of *Lopez* remain uncertain.

Another line of cases involving constitutional federalism addresses Congress's capacity under the Commerce Clause and the Tenth Amendment to regulate the activities of state and local governments. In 1976, in *National League of Cities v. Usery*,[475] the Court suggested that Congress could not permissibly regulate the performance by states of traditional governmental functions that were somehow integral to state sovereignty.[476] But the *National League of Cities* test proved difficult to administer. Citing this problem, the Court, by a 5–4 vote in *Garcia v. San Antonio Metropolitan Transit Authority*,[477] reversed its earlier decision. The states' constitutional protection against congressional overreaching, the Court held in *Garcia*, must come principally if not exclusively from political "safeguards inherent in the structure of the federal system."[478] More recently, however, the Court has breathed at least some life back into doctrines that limit Congress's capacity to regulate the states as states. In *New York v. United States*,[479] the Court invalidated a federal statute that required the states either to take title to nuclear waste within their borders or to make legislative provision for the waste's disposal. Congress, the Court held, could not single out the states as states and effectively "commandee[r their] legislative processes."[480]

Last Term's confrontation with issues involving federal regulation of state and local governments, *Printz v. United States*,[481] arose from an effort by Congress to enlist local law enforcement officials in enforcing a federal regulatory program. To implement an earlier statute forbidding sales of handguns to people in certain prohibited categories, the Brady Handgun Violence Protection Act[482] commands the Attorney General to establish a national system to check the backgrounds of prospective purchasers of handguns. As an interim measure, the

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473 *Id.* at 552.

474 *See, e.g.*, Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 692 (1995) (noting that "[t]he Court's decision rests on the confluence of almost a dozen factors" and claiming that, as a result, *Lopez* will be readily distinguishable in future cases); Donald A. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995) (claiming that, even after *Lopez*, Commerce Clause doctrine is internally contradictory and "a mess").

475 426 U.S. 833 (1976).

476 *See id.* at 851.

477 469 U.S. 528 (1985); *see id.* at 546–47.

478 *Id.* at 552; *see also id.* at 551 n.11 (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)).

479 505 U.S. 144 (1992).

480 *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1991)) (first alteration in original) (internal quotation marks omitted).

481 117 S. Ct. 2365 (1997).

482 Pub. L. No. 103-159, 107 Stat. 1536 (1993).

Brady Act required the chief law enforcement officer of the jurisdiction in which a would-be buyer resides to make "a reasonable effort to ascertain within 5 business days" whether it would be unlawful for that person to buy a handgun.[483] In a 5–4 decision, a sharply divided Court held that the Brady Act violated principles of constitutional federalism.

(a) Sources of First Principles, Democracy, and Disagreement. — In invalidating portions of the Brady Act, Justice Scalia's majority opinion sought support from a variety of sources. Noting at the outset that "there is no constitutional text speaking" to the "precise question" before the Court, he first looked for guidance "in historical understanding and practice."[484] History, he concluded, revealed numerous instances of federal compulsion of the states to exercise judicial power, but few if any early instances in which Congress had compelled state executive officials to enforce a federal regulatory program.[485] Justice Scalia acknowledged, however, that historical practice was "not conclusive."[486] Turning next to considerations of constitutional structure, Justice Scalia found that the prevailing principle was one of federalism, as "reflected in numerous constitutional provisions."[487] Finally and "most conclusively," Justice Scalia looked "to the prior jurisprudence of this Court."[488] In his view, *New York v. United States* clearly established that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[489] Coming from Justice Scalia, who is often disposed to read the Constitution as a narrow, historically defined list of commands and prohibitions,[490] the majority opinion in *Printz* was a remarkable tour de force.

Writing in dissent, Justice Stevens offered pointed counterarguments concerning history and practice,[491] constitutional structure,[492] and precedent.[493] What gave his opinion its force and passion, however, was less its individual arguments than an animating view about the prerogatives of political democracy in the face of reasonable uncertainty about constitutional meaning. The relevant sources, Justice

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483 18 U.S.C. § 922(s)(2) (1994).

484 *Printz*, 117 S. Ct. at 2370.

485 *See id.* at 2376.

486 *Id.* at 2376.

487 *Id.* at 2379 n.13.

488 *Id.* at 2379.

489 *Id.* at 2383 (quoting New York v. United States, 505 U.S. 144, 188 (1992)) (internal quotation marks omitted).

490 *See* SCALIA, *supra* note 94, at 38–47 (defending an approach to constitutional interpretation based on the "original understanding" against the "ascendant school of constitutional interpretation [that] affirms the existence of what is called The Living Constitution, a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society").

491 *See Printz*, 117 S. Ct. at 2389–94 (Stevens, J., dissenting).

492 *See id.* at 2394–97.

493 *See id.* at 2397–2401.

Stevens argued, furnished no adequate basis "for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces."[494] Especially given the possibility that emergencies might reasonably require federal compulsion of modest state assistance, why not let the people decide?[495]

From the perspective of the *Printz* majority, the answer is obvious. The dissenting opinion invokes a strongly nationalist conception of democracy. By contrast, the Justices in the majority read the Constitution to protect state and local majorities against national majorities, at least within the domain covered by *Printz*. *Printz*, even more than *City of Boerne*, reflects the commitment to revitalizing constitutional federalism that has surfaced recurrently in the Court's recent Terms.

(b) The Test. — In service of the principle of constitutional federalism, *Printz* laid down a forbidden-content rule: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[496] Forbidden-content rules provide the most stringent protection within their domain. But the *Printz* rule, like most forbidden-content tests, is strikingly narrow. As Justice Stevens noted in dissent, "nothing in the majority's holding [necessarily] calls into question" Congress's power to "require the States to implement its programs as a condition of federal spending"[497] or to regulate the states pursuant to "a program that affects States and private parties alike."[498] As long as these mechanisms remain available, *Printz* may possess more symbolic than practical importance.

Eager to establish further doctrinal protections of constitutional federalism, Justice Thomas filed a concurring opinion in which he suggested that the Court should go far beyond the cautious holding of *United States v. Lopez* in restricting congressional regulatory power under the Commerce Clause.[499] He also intimated that federal regula-

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494 *Id.* at 2387.

495 *See id.*

496 *Printz*, 117 S. Ct. at 2384. Justice Stevens protested that a forbidden-content rule would deny needed federal power in cases of emergency. *See id.* at 2387 (Stevens, J., dissenting). For Justice Scalia, however, the benefits of a rule were paramount. *See Printz*, 117 S. Ct. at 2381 ("[A]n imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.").

497 *Id.* at 2396–97 (Stevens, J., dissenting); *see also id.* at 2385 (O'Connor, J., concurring) (noting that Congress may amend the Brady Act by conditioning federal funding on compliance with federal regulations); New York v. United States, 505 U.S. 144, 167 (1992) (acknowledging that Congress may attach conditions to receipt of federal funds); South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding a statute conditioning the award of federal highway funds on adoption of minimum drinking age).

498 *Printz*, 117 S. Ct. at 2397 (Stevens, J., dissenting); *see New York*, 505 U.S. at 160.

499 *See Printz*, 117 S. Ct. at 2385 (Thomas, J., concurring).

tion of the sale and possession of firearms might run afoul of a properly construed and revitalized Second Amendment.[500] But no other Justice joined Justice Thomas's *Printz* concurrence.

Although united on *Printz*'s relatively narrow holding, the five majority Justices apparently remain uncertain or divided about how federalism principles should be specified and implemented beyond the facts of the few particular cases that they have decided in recent Terms. Before *Printz*, despite a proliferation of pro-federalism cases and doctrines, uncertainties and disagreements among the most pro-federalism Justices had precluded doctrinal formulations that would give principles of federalism broad, effective protection.[501] *Printz* did not much alter this situation, though it does maintain the apparently building momentum for a larger doctrinal overhaul. As the Court continues to contemplate such an overhaul, a central question is what weight, if any, the Justices who believe strongly in federalism values will give to the reasonable view of others — which scholars once regarded as the uncontested centerpiece of post-New Deal constitutionalism[502] — that courts should afford the federal government broad latitude to address problems that are reasonably regarded as national.

3. Constitutional Fidelity and the Judicial Role: The Right to Die Cases. — In recent years, the Supreme Court has treated substantive due process cases as almost inherently extraordinary,[503] and the Court's decisions in such cases have become occasions for visible struggles concerning the nature of constitutional fidelity.[504] For this reason among others, the Court's "right to die cases" — *Washington v. Glucksberg*[505] and *Vacco v. Quill*[506] — were perhaps the most watched, and in some ways the most revealing, of the 1996 Term.

(a) The Holdings. — By the seemingly remarkable vote of 9–0, the Court reversed decisions by the Second and Ninth Circuit Courts of

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500 *See id.* at 2386.

501 *Lopez*, for example, is too vaguely written to have clear effect in restricting federal power. *See supra* note 474 and accompanying text. And despite the Court's manifest concern for federalism in recent Eleventh Amendment cases, *see supra* notes 468–470 and accompanying text, the connection between suability in federal court under the Eleventh Amendment and the protection of substantive state authority remains uncertain, due in part to the obligation of state courts to enforce federal law. *See Printz*, 117 S. Ct. at 2371 (recognizing obligations of state courts to enforce federal law against the states).

502 *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105–30 (1991).

503 A partial exception was last Term's decision in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997), in which the Court — although divided on other issues — unanimously agreed that a law providing for the civil commitment of persons likely to engage in sexually predatory acts because of mental abnormalities did not offend substantive due process principles as established in prior cases. *See id.* at 2079; *id.* at 2088 (Breyer, J., dissenting) (agreeing that the substantive due process requirements were satisfied by the Kansas statute).

504 *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Michael H. v. Gerald D., 491 U.S. 110 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986).

505 117 S. Ct. 2258 (1997).

506 117 S. Ct. 2293 (1997).

Appeals and upheld New York and Washington statutes forbidding physician-assisted suicide. Chief Justice Rehnquist wrote the opinions of the Court, which were joined by four other Justices in both cases.[507] The main statement of the Court's views came in *Glucksberg*. In that case, in which the court of appeals had found a "strong," constitutionally protected "liberty interest in determining how and when one's life shall end,"[508] the Chief Justice "carefully formulat[ed]"[509] the question before the Court as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[510] He answered in the negative.[511] In a separate opinion in the *Quill* case, the Chief Justice found that New York did not offend the Equal Protection Clause by permitting terminal patients to hasten their deaths by terminating or refusing medical treatment, while at the same time forbidding physician-assisted suicide.[512]

Although unequivocal in upholding the challenged state laws against facial attack, the Court's decisions were narrow. Strikingly, the majority opinion in *Glucksberg* included, with only slight equivocation, a "right to refuse unwanted lifesaving medical treatment" at the end of a list of fundamental rights *already* recognized under the Due Process Clause.[513] The Court made similarly favorable reference to, without explicitly recognizing, "a constitutionally protected right to refuse lifesaving hydration and nutrition."[514] Finally, Chief Justice Rehnquist's opinion in *Glucksberg* grudgingly acknowledged that the door remained open for challenges claiming that the New York and Washington statutes were unconstitutional as applied to particularized facts.[515]

The Chief Justice's concession grows in significance when it is read in light of the five concurring opinions filed in *Glucksberg*. Although none offered a definitive pronouncement, the five concurring Justices (including Justice O'Connor, who joined the Court's opinion) all ap-

507 Justices Scalia, Kennedy, and Thomas joined the Court's opinions without further elaboration of their views. Justice O'Connor also joined the opinions of the Court but filed a separate concurring opinion as well. *See* Washington v. Glucksberg *and* Vacco v. Quill, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring).

508 Compassion in Dying v. Washington, 79 F.3d 790, 812 (9th Cir. 1996) (en banc).

509 *Glucksberg*, 117 S. Ct. at 2269.

510 *Id.*

511 *See id.* at 2271.

512 *See* Vacco v. Quill, 117 S. Ct. 2293, 2301–02 (1997).

513 *Glucksberg*, 117 S. Ct. at 2267 ("We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional [common law] right to refuse unwanted lifesaving medical treatment.").

514 *Id.* at 2269 (quoting Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 (1990)) (internal quotation marks omitted); *see also id.* at 2270 ("[A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." (quoting *Cruzan*, 497 U.S. at 287 (O'Connor, J., concurring)) (internal quotation marks omitted)).

515 *See id.* at 2275 n.24.

peared open to the possibility that a state would violate due process if it were to bar "a patient who is suffering from a terminal illness and who is experiencing great pain" from "obtaining medication . . . to alleviate that suffering, even to the point of causing unconsciousness and hastening death."[516]

(b) Substantive Due Process, Democracy, and Reasonable Disagreement. — Although six Justices wrote opinions in either *Glucksberg*, *Quill*, or both, there was little disagreement about the centrality of three considerations: the doctrinally established propriety of substantive due process adjudication; the precariousness, nonetheless, of judicial invalidation of legislation on substantive due process grounds; and the appropriateness of some deference to the claims of political democracy.

The Chief Justice, joined by those Justices generally most hostile to substantive decisionmaking under the Due Process Clause, frankly acknowledged that, beyond ensuring fair procedures, "[t]he Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."[517] This acknowledgement may have been necessary in part to hold the votes of Justices O'Connor and Kennedy, who in previous cases have specifically eschewed the view that the rights protected by due process can be cabined by any rigid formula.[518] But the other Justices joining in the majority opinion (Chief Justice Rehnquist, Justice Scalia, and Justice

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[516] *Glucksberg and Quill*, 117 S. Ct. at 2303 (O'Connor, J., concurring). In an earlier formulation, Justice O'Connor appeared to hold open the somewhat broader question whether a state would violate the Due Process Clause if it were to deny "a mentally competent person who is experiencing great suffering" the right to "control[] the circumstances of his or her imminent death." *Id.* at 2303. In light of the later formulation quoted in the text, however, it is unclear whether Justice O'Connor, in particular, contemplated the possibility of a constitutional right broader than the right to take medication sufficiently powerful to alleviate pain, even when the predictable effect would be unconsciousness or death. *See* Yale Kamisar, On the Meaning and Impact of the U.S. Supreme Court's Recent Rulings in the Physician-Assisted Suicide Cases, Prepared Remarks for the Panel on Physician-Assisted Suicide at the American Bar Association Annual Meeting 8–12 (Aug. 2, 1997) (transcript on file with the *Harvard Law Review*). Justice Breyer's separate opinion concurring in the judgments, although it includes some broader language, also focuses most concretely on issues involving pain relief. *See Glucksberg and Quill*, 117 S. Ct. at 2310, 2311–12 (Breyer, J., concurring in the judgments).

Based on the limited available evidence, Professor Kamisar appears correct that "Justices Stevens and Souter are, if anything, probably more receptive than Justices O'Connor, Ginsburg and Breyer to arguments for a right" to physician-assisted suicide. Kamisar, *supra*, at 14. Without specifically adverting to the case of a terminally ill person with acute pain that could be relieved only by terminal sedation, Justice Stevens suggested that individual liberty interests would outweigh state interests in prohibiting assisted suicide in at least some cases. *See Glucksberg and Quill*, 117 S. Ct. at 2305 (Stevens, J., concurring in the judgments). Justice Souter also reserved the relatively open-ended question whether the individual interest might prevail over the states' interest "in some circumstances." *Glucksberg*, 117 S. Ct. at 2290 (Souter, J., concurring in the judgment).

[517] *Glucksberg*, 117 S. Ct. at 2267.

[518] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 847–49 (1992).

Thomas) have themselves all relied on the Due Process Clause as the source of a substantive prohibition against affirmative action by the federal government.[519] In *Glucksberg*, with the propriety of substantive due process adjudication accepted, the question became one of applicable restraints, largely to protect the democratic "arena of public debate and legislative action."[520] Wary of intruding on democratic prerogatives, the majority insisted that fundamental rights under the Due Process Clause must be limited to those rooted in history and tradition and must be defined narrowly, again by reference to history.[521] Although this appears on its face to be a stringent standard, the majority's indication, as noted above, that rights to refuse unwanted hydration and lifesaving medical treatment likely enjoy protection under the Due Process Clause seems to soften the otherwise rigid language.

The concurring Justices also took careful, moderate stands. Justice Stevens, though insisting that some applications of the challenged statute would be invalid, acknowledged that "[h]istory and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide."[522] In the face of reasonable disagreement, he welcomed more public and political debate,[523] as did Justice O'Connor, in an opinion joined by Justices Ginsburg and Breyer.[524] Among Justice O'Connor's main themes was that the Court — even in reserving the question whether dying people in great, unrelievable pain possess a right to terminal sedation — should respect the competency and prerogatives of state political processes.[525] Justice Souter, concurring in the judgment, offered a sustained defense of the view, which he attributed to Justice Harlan, that the Court's mandate under the Due Process Clause was to identify and invalidate "arbitrary impositions and purposeless" restraints.[526] On their face, some of Justice Souter's formulations claim potentially sweeping judicial power, and the majority opinion challenged them on this basis.[527] In the course of his opinion, however, Justice Souter emphasized that the Court had "no warrant to substitute one reasonable resolution of the contending positions for another, but [rather has] authority to supplant

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519 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 227–31 (1995); *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240–41 (Thomas, J., concurring in part and concurring in the judgment).

520 *Glucksberg*, 117 S. Ct. at 2268.

521 *See id.*

522 *Glucksberg and Quill*, 117 S. Ct. at 2305 (Stevens, J., concurring in the judgments).

523 *See id.* at 2310.

524 *See id.* at 2303 (O'Connor, J., concurring).

525 *See id.*

526 *Glucksberg*, 117 S. Ct. at 2282 (Souter, J., concurring in the judgment) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (internal quotation marks omitted).

527 *See Glucksberg*, 117 S. Ct. at 2268.

the balance already struck . . . only when it falls outside the realm of the reasonable."[528]

Although no Justice said so, the continuing controversy surrounding *Roe v. Wade*[529] almost surely played a large role in the Court's thinking.[530] In *Roe*, the Court handed down a broad, rule-like opinion, aimed at removing from politics a moral issue that engendered passionate, frequently reasonable disagreement. In retrospect, many believe that *Roe* did as much to foment discord as to resolve it,[531] and that its premature constitutional ruling frustrated the potential capacity of the political process to reach a balance of competing views.[532]

Although *Glucksberg* reflected none of the judicial hubris often ascribed to *Roe*, the question might be asked whether the very moderation of the Court's stance in *Glucksberg* does not display the opposite vice. Should the Supreme Court, under the Due Process Clause or elsewhere, *always* defer to political institutions in cases of genuinely reasonable disagreement among the citizenry or between courts and the political branches about constitutional law? Is the Court's role properly limited to cases in which legislatures depart from clearly applicable historical traditions, behave wholly irrationally, or act for forbidden purposes? Perception of reasonable disagreement clearly did not stop the Court from taking a contestable position contrary to that reached by the political majority in every other extraordinary case decided during the 1996 Term. Did something about *Glucksberg* make deference especially appropriate, and if so, what was it?

V. REASONABLE DISAGREEMENT AND THE JUDICIAL ROLE

The phenomenon of reasonable disagreement has been at the center of debates about judicial review virtually from the outset of American constitutional democracy.[533] Judicial review, after all, is itself a means of implementing the Constitution. And implementing the Constitution, as I have emphasized, is a project that necessarily involves many people (not just courts) and often calls for accommodation and defer-

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[528] *Id.* at 2281 (Souter, J., concurring in the judgment).

[529] 410 U.S. 113 (1973).

[530] *Cf.* Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1161 (1997) (observing that "*Roe* looms . . . clearly in the background of the discussion of a constitutional right to die").

[531] *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385–86 (1985) ("The political process was moving in the early 1970s . . . . Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.").

[532] *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 42–43 (1987) (arguing that the Supreme Court "could have authorized the states, within broad limits, to work out legislation which would have treated the abortion question in all its complexity and with the gravity it deserves"); *cf.* Sunstein, *supra* note 530, at 1149–51 (noting the "plausible view" that *Roe* "truncate[d] ongoing processes of democratic deliberation, and by doing so" was "futile or even counterproductive").

[533] *See supra* note 13.

ence. Just as the Court can take reasonable disagreement into account in crafting tests to protect recognized constitutional values — a matter discussed at length in Part III — so too can the Court attach significance to various forms of reasonable disagreement in determining, in some cases, which values the Constitution is best understood to encompass at a particular time.

Although strong judicial deference is a theoretical option in identifying constitutionally protected values, the American tradition of judicial review, in which the Supreme Court generally operates and continued to operate in the 1996 Term, typically displays at least a moderately robust judicial role.[534] But that role is by no means undifferentiated. Witness, for example, the juxtaposition of the Court's generally deferential stance in the right-to-die cases with its more assertive role in *Boerne* and *Printz*. In addition, the Court's definition of its function always remains open to challenge as a matter of first principle. At that level, one large question is whether a robustly independent judicial role in specifying constitutionally protected values is generally defensible in a world of widespread reasonable disagreement about constitutional matters. If that question is answered affirmatively, another issue involves the circumstances, if any, in which the courts should temper their approach in light of reasonable disagreement among the citizenry or between judges and legislatures about particular issues.

A. Courts and Constitutional Principles

Not deducible from the necessary logic of constitutionalism or even from the concept of judicial review, the Supreme Court's relatively independent interpretive role needs a pragmatic justification.[535] If judicial review as we know it deserves to be continued, it must be because moderately robust judicial review is likely, over time, to lead to better, more successful specification and implementation of constitutional values than would alternative regimes, such as one under which courts would uphold any governmental action that could reasonably be viewed as constitutional. People differ about whether relatively robust judicial review tends in fact to produce beneficial effects.[536] Alexander Bickel offered the classic modern argument in support.[537] Bickel's ar-

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[534] *See, e.g.*, DWORKIN, FREEDOM'S LAW, *supra* note 19, at 4 (asserting that processes of interpretation aimed at advancing a "moral reading" of the Constitution are "thoroughly embedded in constitutional practice"); Grey, *supra* note 331, at 710–13 (noting the lack of firm textual support for many of the Court's constitutional rulings).

[535] *See* BICKEL, *supra* note 91, at 24; DWORKIN, FREEDOM'S LAW, *supra* note 19, at 34–35.

[536] Criticisms come from both the political right, *see, e.g.*, BORK, *supra* note 19, at 17, and the political left, *see, e.g.*, RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 4 (1994); Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 986–87 (1993).

[537] *See* BICKEL, *supra* note 91, at 23–28.

gument assumes that the Constitution reflects a continuing commitment of the American people to respect shared values or principles that they would want brought to bear on issues of governance. Proceeding from this assumption, he argues that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."[538] Bickel's point is not that legislatures and executives do not, or cannot, take constitutional principles into account in a thoughtful way. It is, rather, that questions of principle are more likely to be at the forefront of judicial deliberations and to be framed in a context that "lengthen[s] everyone's view."[539] Thus, he maintains, it is rational for a people committed to respecting shared values, as well as to democracy, to preserve a reasonably robust, sometimes countermajoritarian role for an institution charged with respect for and deliberation about matters of constitutional principle.

It is crucial to this argument, which I generally endorse, that recognition of reasonable disagreement should not devolve into radical skepticism, in light of which further, thoughtful deliberation would be pointless. We can recognize that people reasonably disagree about moral, political, and constitutional matters without also accepting that what ought to be done is a matter of mere subjective opinion.[540] The "burdens of judgment"[541] that are imposed by the limits of current knowledge and by the frailty of our rational powers do not establish that there is no truth to be known or, in practical matters, that one course of action is as good as another.[542] Experience confirms the common sense distinction between good and bad judgment.[543] Recognizing that reasonable people differ, we can still vest responsibility for relatively nondeferential constitutional decisionmaking in a nonmajoritarian institution, with rational hope of getting better determinations of constitutional principle and more successful constitutional implementation than we would get from the not necessarily unreasonable judgments of other, more politically accountable institutions.[544]

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538 *Id.* at 25.

539 *Id.* at 26; *see also* Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 138 (1993) ("The principal reason for doubting that ordinary politics can generally do a good job of specifying constitutional indeterminacy is that for most members of the Congress, incumbency is a fundamental value.").

540 *See* RAWLS, *supra* note 11, at 150–54; Robert P. George, *Law, Democracy, and Moral Disagreement*, 110 HARV. L. REV. 1388, 1394–1400 (1997) (reviewing AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996)).

541 RAWLS, *supra* note 11, at 54–58 (characterizing the "sources, or causes, of disagreement between reasonable persons" — including inadequate evidence and divergent weighings of relevant normative considerations — as "the burdens of judgment").

542 *See id.* at 58.

543 For discussions of judgment, see RONALD BEINER, POLITICAL JUDGMENT 72–82 (1983); ISAIAH BERLIN, *Political Judgement*, *in* THE SENSE OF REALITY 40 (Henry Hardy ed., 1996).

544 Among other relevant considerations, Congress in enacting a bill does not typically purport to make a determination of constitutionality, nor could it sensibly decide a statute's constitutionality as applied to particular facts. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID

B. Tempering Considerations

Within our tradition of judicial review, the Court's role in interpreting and implementing the Constitution is of course not unconstrained. Conventions of legal argument and constitutional interpretation impose significant structure on judicial decisionmaking.[545] As reflected in at least some of the Justices' opinions in the right-to-die cases, two further considerations sometimes counsel judicial caution in assigning to constitutional language and interpretive precedents an expansive meaning that they would bear, but that is not required by entrenched understandings.

First, even when interpreting the Constitution in the face of reasonable disagreement, the Court appropriately acts in a representative capacity,[546] charged with effectuating the (assumed) interest of all members of the constitutional community in having constitutional principles brought fairly to bear on matters of practical governance. The relevant question for the Justices is not what resolution would bring constitutional doctrine most nearly into line with their personal moral views, or even with their best personal understanding of values that the Constitution reflects,[547] without regard to the reasonable views of others. The question, which implicates considerations involving the fair allocation of political power, is how the Constitution ought to be interpreted and implemented in light of history and of the diverse, more or less intense, and possibly fluid array of reasonable moral views within the society.[548]

L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 77 (4th ed. 1996). Moreover, neither Congress nor the executive branch "is so organized as to be able, without aid from the courts, to build up a body of coherent and intelligible constitutional principle, and to carry public conviction that relevant principles are being observed." *Id.*

545 *See* DWORKIN, FREEDOM'S LAW, *supra* note 19, at 10–11; Fallon, *supra* note 424, at 1192–94 (discussing implicit norms of the practice of constitutional adjudication); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1224–25 (1995).

546 *See* Richard H. Fallon, Jr., *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. CHI. L. REV. 1523, 1538–44 (1989); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 10 (1989) (attributing this view to Alexander Bickel); Perry, *supra* note 539, at 163.

547 Variants of this view are by no means unheard of, *see, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 123 (1982); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 883 (1989), and I cannot provide a full refutation here. Nonetheless, it strikes me as quite implausible to think that the Constitution would license judges to give so direct a role to their individual, possibly eccentric, views about justice and morality. For further discussion, see Fallon, cited above in note 546, at 1540–41.

548 *See* Waldron, *supra* note 453, at 19. Waldron asserts:

> Exercises of social power must claim legitimacy in relation to the community as a whole; they must claim also the allegiance and obligation of every member of the community. They will be hard put to do this if their legitimacy is based solely upon conceptions of justice that some members of society reject.

When the question is framed in this way, the Court's charge is to speak authoritatively in an institutional capacity for the constitutional community and to bring the community's values, as reflected in the Constitution and in evolving traditions, to bear on constitutional adjudication.[549] In a radically pluralistic society, the effort to represent the community's morality in interpreting the Constitution requires imagination, judgment, and sometimes a constructive effort to identify an "overlapping consensus"[550] of deep, general principles, notwithstanding arguments about their appropriate application to particular issues. In moving from general principles to concrete resolutions, courts sometimes must make contestable judgments about how the community's immanent morality would best be specified, in a sense of "best" that includes an irreducibly moral dimension.[551] Nonetheless, the Justices' work in interpreting the Constitution and in crafting implementing doctrine must be rooted in values that can reasonably be viewed as shared. Without surrendering its prerogatives of judgment or compromising its obligation to uphold constitutional values in the face of political opposition,[552] the Court, in specifying the *meaning* of constitutional principles, must be accountable at least in part to manifestations of reasonable moral and political commitments displayed by the citizenry, both nationally and locally.[553]

With respect to issues concerning the right to die, the Court was therefore correct to note that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."[554] The earnestness, profundity, and widespread nature of the debate reduced and perhaps eliminated the Court's relative advantage over legislatures in formulating relevant principles and bringing these principles to bear on contested general issues. The right-to-die debate triggers fewer concerns than some other issues about the capacity of the legislature to give fair

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Id.; *cf.* Ronald Dworkin, *Introduction* to Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon & Judith Jarvis Thomson, *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41, 42 ("[W]hen circumstances make it possible, wide public discussion is a desirable and democratic preliminary to a final Supreme Court adjudication.").

549 *See* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION 86, 149–50 (1990).

550 RAWLS, *supra* note 11, at 43–45.

551 *See* Fallon, *supra* note 546, at 1539–40. *See generally* DWORKIN, *supra* note 99, at 52 (defining "constructive interpretation" as "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong").

552 *Cf.* Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), *in* EDMUND BURKE ON GOVERNMENT, POLITICS AND SOCIETY 156, 157 (B.W. Hill ed., 1976) ("Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.").

553 *Cf.* BICKEL, *supra* note 91, at 239 (arguing that "the Court should declare as law only such principles as will — in time, but in a rather immediate foreseeable future — gain general assent .... The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own").

554 Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (1997).

consideration to all relevant interests and perspectives.[555] As Justice O'Connor emphasized in her concurring opinion in *Glucksberg* and *Quill*, "[e]very one of us at some point may be affected by our own or a family member's terminal illness."[556] Finally, the volatility of the underlying moral issue left the Court with no firm grasp of the nature, depth, and scope of the reasonably divergent views that it ought to take into account before removing an issue so fraught with moral passion from democratic politics.

A second limiting consideration involves the Court's capacity to fashion doctrine that will implement constitutional values effectively. To develop sound doctrine, the Court requires a grasp of the institutional, sociological, and psychological contexts in which possible doctrinal rules would operate. In the right-to-die cases, uncertainty predominated — uncertainty about the likely effect of rules permitting assisted suicide on the terminally ill, on their doctors and families, on organizations funding and providing medical care, and on public attitudes toward life, death, and dying.[557]

Along the dimensions of both the Court's representative capacity and its grasp of relevant facts, the right-to-die cases contrasted with past extraordinary cases in which the Court had successfully exercised a leadership role, notably including *Brown v. Board of Education*.[558] In *Brown*, the underlying value of equality was clearly articulated in the constitutional text, and widely shared understandings confirmed the "suspect" quality of race-based discrimination.[559] In addition, school segregation presented a paradigmatic case of the "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[560] Despite disagreement about whether school segregation should be adjudged unconstitutional, the Court's decision offered a morally compelling interpretation of an accepted norm. The Court could justifiably hope, and even anticipate, that its ruling would help to sway opinion and forge an informed consensus on the reasonableness, and ultimately the rightness, of its deci-

[555] *Cf.* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1697–1703 (1997) (arguing that when the political process mirrors inequalities in the society, its outcomes lack legitimacy).

[556] Washington v. Glucksberg *and* Vacco v. Quill, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring).

[557] *See Glucksberg*, 117 S. Ct. at 2290–93 (Souter, J., concurring in the judgment); Sunstein, *supra* note 530, at 1141–46.

[558] 347 U.S. 483 (1954).

[559] *Cf.* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

[560] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). In contrast, right-to-die cases involve concerns by which "[e]very one of us at some point may be affected." *Glucksberg and Quill*, 117 S. Ct. at 2303 (O'Connor, J., concurring).

sion.[561] With regard to knowledge of the contexts of application, *Brown* again stood apart from the right-to-die cases. In contrast with the uncertainty prevailing in *Glucksberg* and *Quill*, there could be no doubt that "the social meaning of segregation [was] the putting of the Negro in a position of walled-off inferiority" and "that such treatment is hurtful to human beings."[562] In light of contrasts such as these, the Court correctly perceived that the right-to-die cases called for an unusual degree of judicial deference to state legislatures about which relevant rights, if any, the Constitution should currently be held to confer.

C. *Fidelity and Claims of Rights*

My argument in favor of judicial deference in the right-to-die cases does not presuppose personal uncertainty among the Justices about whether the best "moral reading"[563] of the Constitution would identify a right to physician-assisted suicide. I have meant to suggest that even a Justice who believes that the Constitution can reasonably be read to encompass such a right, and that this interpretation would represent a substantive moral advance, would have powerful, countervailing reasons not to recognize a constitutional right to physician-assisted suicide at this time. For a Justice who believes that there is a moral right to physician-assisted suicide, and that the Constitution would ideally be read to reflect such a right, the argument for deference may seem to conflict with the imperative of constitutional fidelity. As a result of the Court's decision to uphold laws that prohibit physician-assisted suicide, some victims of severe and debilitating illnesses will carry unwanted burdens of wasting bodies, suffering inflicted on loved ones, and physical and psychological pain. In *Glucksberg* and *Quill*, the representatives of people so situated came before the Court, invoking constitutional rights. Whatever else might be said for the Justices staying their hands in light of empirical uncertainties and reasonable disagreement, is the Justices' deference to political institutions — at least for now — consistent with their obligation of constitutional fidelity?

The answer, again, is that the Justices' duty of fidelity to the Constitution must be defined at least partly in light of a defensible conception of their judicial role. Within that role, a Justice's job is not just to reach a personal judgment about how the Constitution, viewed in light

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561 *See* BICKEL, *supra* note 91, at 239–41.

562 Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960). To the remaining prospect of practical difficulties of implementation, the *Brown* Court responded with the famous formula of "with all deliberate speed." Brown v. Board of Educ., 349 U.S. 294, 301 (1955). *See generally* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 609–10 (1983) (describing the Court's sensitivity to the context of implementation in forging remedies for school segregation).

563 DWORKIN, FREEDOM'S LAW, *supra* note 19, at 2–4 (describing and advocating a "moral reading" of the Constitution).

of correct moral principles, would best be read on the assumption that anyone claiming a right is entitled to this judgment. The Justices' role is also, at least as importantly, one of taking into account and sometimes accommodating the reasonable views of others. The Justices' role, moreover, is not exclusively one of truth-telling about the meaning of the Constitution (as each, personally, thinks that it ideally would be understood), but is also one, sometimes predominantly, of participating in a necessarily cooperative project of implementing the Constitution. This project is a practical one, extended over time. The Justices would be unfaithful to their roles if, trying to do too much too fast with inadequate resources, they prematurely spoke the truth as they personally saw it and crafted bad doctrine that frustrated reasoned debate and democratic experiment.

D. *Variables Affecting the Judicial Role*

If the Court's obligation of fidelity is substantially to a project of implementing the Constitution successfully over time, and if advances in this project require both a sensitivity to diverse and fluid public moral sensibilities and practical insight into the likely effects of doctrine in varied institutional contexts, it follows that the Court's capacity to embark successfully on bold new paths of doctrinal development may vary over time. At least two variables deserve attention.

The first, made pertinent by the Court's function as a kind of representative decisionmaker, involves the moral and political climate within the society and, in particular, the relative consensus or lack of consensus on underlying values. Whatever state of affairs may have prevailed in the past, political theorists now take moral disagreement as a fact of modern life with which any political theory must reckon.[564] So, I have argued, must any theory of judicial review. Although constitutional adjudicators cannot be paralyzed by reasonable disagreement, they must take into account their capacity to function effectively as representative decisionmakers, whose judgments should exercise at least some influence, over time, on the moral consciences of those who might immediately be inclined to disagree.[565] In light of recent experience, notably with respect to *Roe v. Wade*,[566] the current Supreme Court has good reason to doubt its capacity to lead moral opinion effectively if it were to push too far ahead of prevailing sentiment with respect to many controverted issues.

A second relevant variable concerns the composition of the Court and its capacity to perform a representative function. In one way, of course, the federal judiciary, including the Supreme Court, is more di-

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[564] *See* GUTMANN & THOMPSON, *supra* note 11, at 1; RAWLS, *supra* note 11, at 36, 54–58; George, *supra* note 540, at 1388.

[565] *See* BICKEL, *supra* note 91, at 239.

[566] 410 U.S. 113 (1973).

verse and arguably more representative than ever before.[567] For example, the first African-American Justice was not appointed until 1967,[568] the first woman until 1981.[569] Today, the Court includes one African-American[570] and two female Justices.[571] In another sense, however, the current Justices seem less well equipped to play a representative role than many of their predecessors. In the past, the Supreme Court often included figures of impressive political experience, whose sense of shared and evolving public morality had been shaped and tested by a broad and critical public.[572] Today, by contrast, the Court is dominated by lawyers and academics of generally narrower experience. Although I would not wish to put the point too strongly, there may be a consequent loss in the Court's capacity to gauge the resonance of its judgments with relevant public moral understandings.

In view of the Court's responsibility to act on a representative basis and the current obstacles to its doing so effectively, it is no personal criticism of any sitting Justice to say that the Court, as an institution, today seems doubtfully situated to exercise successful moral or practical leadership on a large scale. The Court may sometimes be able to do better, whereas at other times it would likely do worse, in moving ahead of predominant or emerging currents of public morality to implement broad programs of doctrinal revision. In the present state of affairs, the current Court would probably serve best by serving — as it did in the right-to-die cases — modestly.

CONCLUSION

In this Foreword, I have examined the Supreme Court's role, including its obligation of fidelity, in implementing the Constitution.

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567 *See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 15–17 (1996) (discussing the increasing racial and gender diversity of the federal bench since the Carter Administration); Carl Tobias, *Increasing the Balance of the Federal Bench*, 32 HOUS. L. REV. 137, 140–50 (1995) (describing the dramatic increase in minority and female federal judges since 1977); Thomas Walker & Deborah Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 596 (1985) (assessing the impact of diversification of the federal judiciary).

568 Justice Thurgood Marshall joined the Court in 1967. *See* LOCKHART, KAMISAR, CHOPER, SHIFFRIN & FALLON, *supra* note 268, at 1556.

569 Justice Sandra Day O'Connor joined the Court in 1981. *See id.*

570 Justice Clarence Thomas was nominated by President George Bush and confirmed by the Senate in 1991 to occupy the seat previously held by Justice Thurgood Marshall. *See id.* at 1558.

571 The two are Justices Sandra Day O'Connor and Ruth Bader Ginsburg. *See generally* Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 901–05 (1995) (examining opinions of Justices O'Connor and Ginsburg during the 1993 Term for evidence of a distinctive female "voice").

572 *See* Sanford Levinson, *Contempt of Court: The Most Important "Contemporary Challenge to Judging"*, 49 WASH. & LEE L. REV. 339, 342 (1992); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 756–63 (1992) (contrasting the Court that decided *Brown v. Board of Education*, and the political experiences of its members, with the current Court).

Implementation is a complex function, which requires practical judgment and collaboration. The mission of the Court in implementing the Constitution is not the sum of the individual obligations of each of nine Justices to record his or her personal views about what the Constitution means in every case.

Much more often than is commonly recognized, a gap exists between constitutional norms and the doctrine crafted by courts to implement those norms. Shaping doctrine successfully requires an acute sense of institutional, sociological, and psychological dynamics, as well as good judgment about how to balance competing values. The Justices are statespersons as well as truth-tellers. The measure of their success often lies in the practical effect of the doctrines that they develop.

Because so much doctrine is made by the Supreme Court on the basis of practical judgments, we can learn much about the Court, and its conception of its role, by examining the *kinds* of doctrines that the Court has shaped. In this Foreword, I have identified eight distinctive types of tests that the Court sometimes employs to enforce constitutional norms protecting individuals against government. On the whole, the Court's selection of tests has produced doctrines that tend more to underprotect than to overprotect constitutional norms. The Court's choices are of course contestable, but fair criticism needs to take account of at least three considerations, all related to the phenomenon of reasonable disagreement in constitutional law. First, strong arguments frequently exist for according at least some deference to the reasonable judgments of politically accountable agencies concerning what the Constitution permits. Second, because the Justices often may disagree among themselves about the optimal doctrinal test, there may be a natural, even unavoidable tendency to settle on the least common denominator. Third, the Court in recent years has shown a defensible reluctance to rely too heavily on balancing tests, which invite problems of reasonable disagreement to break out again in applications to future cases. Yet the Court itself almost unavoidably carries out multifactor balancing calculations in determining which kinds of tests to use to implement constitutional values.

Once formulated by the Court, constitutional tests and doctrine have a powerful tendency to shape argument and determine outcomes, even within the Court itself. This phenomenon is not so self-explanatory as is sometimes assumed. The Court is rightly regarded as a forum for the consideration of ultimate constitutional principles. Yet one important function of doctrine, at least in the general run of cases that I have categorized as "ordinary," is to block appeals to first principles. The question then arises whether fidelity to doctrine, even when some Justices believe it less than optimal, is consistent with the obligation of fidelity to the Constitution.

The answer, I have suggested, arises from viewing the Justices' obligation of fidelity as owed, in part at least, to the collective project of implementing the Constitution successfully. Successful implementation — which, again, is sometimes a different aim from providing a personal account of what the Constitution means — requires the Justices to collaborate in establishing and maintaining reasonably stable doctrinal rules. Once established, doctrine frequently serves as a focal point for reasonable agreement among the Justices, despite their divergent views about how the Constitution would best be interpreted or implemented.

Especially in the Supreme Court, however, the force of doctrine is importantly limited. In the loosely defined class of cases that I have dubbed "extraordinary," a majority of the Court accepts that decision requires recourse to first principles. Cases of first principle call upon the Court not only to resolve a particular dispute but also to mark a doctrinal path for the future. In considering the Court's function in such cases, I have again emphasized issues and challenges arising from the phenomenon of reasonable disagreement in constitutional law. A recurrent question, itself rising to the level of first principle, involves the Court's obligation, if any, to take the reasonably divergent views of others into account in interpreting and implementing the Constitution.

I have argued that the Court has such a responsibility. When questions of constitutional principle are at stake, the Court's obligation is to act as a representative decisionmaker. The Justices' task is not to construe the Constitution directly in light of their own, possibly quirky, views of freedom, equality, and democracy, for example, but to take reasonable disagreement into account in determining which conclusions a court can fairly derive from shared but vague or contestable principles. Reasonable disagreement should not paralyze the Court. Notwithstanding reasonable disagreement, judgments can be right or wrong, better or worse. Moreover, our tradition of robust judicial review reflects a rationally grounded hope that the Court, having taken reasonable disagreement into account, can often resolve questions of constitutional principle better than more majoritarian institutions. Nonetheless, because the Court must speak for a diverse and sometimes reasonably divided constitutional community, not just for the Justices themselves, deference and accommodation are sometimes appropriate.

In its extraordinary cases during the last Term, the Court decided most issues of first principle relatively narrowly. But the Court placed strong reliance in some cases on a highly contestable theory of constitutional federalism that restricts national political majorities in order to preserve the prerogatives of local majorities. Rendered in the face of reasonable opposition, including that of apparent national political majorities in several cases, the Court's decisions may augur a coming doctrinal revolution. For revolution to occur, however, it would first be necessary for the Justices to reach further agreements about how to implement their principles through broad and enforceable doctrinal tests.

For those supporting revolution, the justification sounds in terms of fidelity — fidelity to the Constitution as the founders intended it, or fidelity to the Constitution as seen in the best, locally democratic light. But these are contestable positions. In addition, the Court's obligation of fidelity encompasses the responsibility to craft doctrine prudently, so that the doctrine will prove stable and workable over time and command the allegiance of people of diverse views.

The capacity of the Court to make and remake constitutional doctrine successfully, especially in light of its representative obligations, is a variable, not a constant. Sometimes the Court should proceed with special caution. The Court's most cautious decisions of the 1996 Term, rendered in the right-to-die cases, were also perhaps its wisest.