
Dan T. Coenen
A CONSTITUTION OF COLLABORATION: PROTECTING FUNDAMENTAL VALUES WITH SECOND-LOOK RULES OF INTERBRANCH DIALOGUE

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[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well.¹

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INTRODUCTION

In *Marbury v. Madison*, the Supreme Court asserted its power to strike down on constitutional grounds policy pronouncements of the Republic's highest ranking political officials. Building on that foundation, the Court has crafted over the years a body of doctrine that bespeaks a judicial preeminence in defining constitutional rights. Citing *Marbury*, the Court has declared itself the “ultimate interpreter” of constitutional protections. The Court's decisions, it has told us, are “final” and “supreme.” According to the Court, the “very purpose” of having constitutional rights is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”

This rhetoric supports a vision of constitutional law that many lawyers and laypersons take for granted. According to this view, the Court stands apart from the other branches—indepen-dent, even aloof—in executing the “solemn function” of judicial review. The political branches adopt rules; the Court evaluates the

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2. 5 U.S. (1 Cranch) 137 (1803).
4. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223, 240 (1995); see also *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (citing arguments why the Court's decisions should be final).
5. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). In *Marbury* itself, the Court emphasized that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” and that the Constitution is “a superior paramount law, unchangeable by ordinary means . . . [not] alterable when the legislature shall please to alter it.” *Marbury*, 5 U.S. (1 Cranch) at 177.
6. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). These *Marbury*-inspired pronouncements also must be read in light of *Marbury*'s achievement of the status of a national icon. No ruling is more familiar to those who study history, more central to the law student's work, or more entrenched in our legal canon as an unshakable precedent. As Professor Bickel put the point:

*Marbury v. Madison* . . . exerts an enormous magnetic pull. It is, after all, a great historic event, a famous victory; and it constitutes, even more than victories won by arms, one of the foundation stones of the Republic. It is hallowed. It is revered. If it had a physical presence, like the Alamo or Gettysburg, it would be a tourist attraction; and the truth is that it very nearly does have and very nearly is.

constitutionality of those rules; the Court declares those rules valid or invalid—and that's that.8

This "on-or-off" or "hard-and-fast" or "all-or-nothing" conception of the judicial role not only fits the Court's rhetoric, but also comports with many of the Court's actual rulings as well. Governments may not operate racially segregated classrooms;9 they may not criminalize pre-viability abortions;10 they may not require prayer in public schools11—all because the Court has told us so pursuant to an accepted notion of the judicial function.12 A Court-dominated, result-centered conception of the Marbury power thus captures much, perhaps most, of our constitutional law.13 But it also

8. See, e.g., John Agresto, The Limits of Judicial Supremacy: A Proposal for "Checked Activism," 14 GA. L. REV. 471, 471 (1980) (discussing in detail the historic notion "that the Supreme Court's word is authoritative and final"); Harry H. Wellington, The Nature of Judicial Review, 91 YALE L.J. 486, 487 (1982) (noting that "judicial review does stand out from other countermajoritarian practices by virtue of the apparent finality of constitutional decisions"). This conception of judicial review corresponds with familiar metaphors. The Court, from this perspective, acts like a tennis or baseball umpire. The tennis ball is in or out; the baseball is fair or foul. Right or wrong, the call is definitive. There are no "do overs."


12. Of course, the point is not that Roe—or the school prayer cases, or even Brown—are noncontroversial decisions. The point is that the technique of those cases—namely, the flat-out invalidation of the content or substance of duly enacted rules—dates back as far as Marbury itself. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding invalid, because inconsistent with Article III's definition of federal court authority, a congressional enactment permitting original-jurisdiction mandamus actions in the Supreme Court).

13. I already have given examples from the race discrimination, abortion, and school prayer contexts. See supra notes 9-11 and accompanying text. There are many other examples as well. See, e.g., Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause . . . ."); Terrance Sandalow, Judicial Protection of Minorities, 75 Mich. L. REV. 1162, 1186 (1977) (asserting that "no one can doubt that, within the traditions of our society, maiming is cruel and imprisonment is not"); 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, 109 (1991) (claiming that William Brennan, Robert Bork, and "much of the academic constitutional law establishment" take this "Type I approach to constitutional law"); Sandalow, supra, at 1184 (noting that "traditional constitutional analysis generally regards the decisionmaking process that precedes governmental action as irrelevant to the action's validity"); cf. THE FEDERALIST No. 78, at 483 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888) (describing the judiciary as an
fails to capture much of what is important about that law.

Close observers of the Court have recognized this fact, noting that political officials participate in constitutional decision making in a myriad of ways. Some analysts have emphasized the prominence of jurisdictional rules, particularly the "political-question" doctrine, that grant de facto authority to nonjudicial actors to make key constitutional choices. Others have noted that political officials

"excellent barrier to the encroachments and oppressions of the representative body").

14. See, for example, LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 1 (1992):

The complex and pervasive interactions among the branches of government in making constitutional law are largely unknown to students. They are taught that the courts are the dominant if not exclusive interpreters of the Constitution. Beginning with Marbury . . . students learn that judges are the "final arbiters" of the meaning of the Constitution, that all issues of constitutional moment percolate upwards to the Court for resolution, and that nonjudicial actors sit passively awaiting the Court's judgment. This picture is highly simplistic.

See also LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988) (exploring various ways in which political actors participate in interpreting the Constitution).

15. For example, in applying the political-question doctrine, the Court has committed constitutional determinations to the Congress, see Nixon v. United States, 506 U.S. 224 (1993); the President, see The Prize Cases, 67 U.S. (2 Black) 635 (1863); and the states, see Luther v. Borden, 48 U.S. (7 How.) 1 (1849). See generally Louis Henkin, Is There a "Political Question" Doctrine?, 85 YALE L.J. 597 (1976). Apart from the political-question doctrine, the Court has channeled de facto authority to the political branches to decide important constitutional questions by way of specialized standing rules. See, e.g., Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (refusing on jurisdictional grounds to consider whether transfer of government property to religious college offended the Establishment Clause); id. at 489 (asserting that it "is not a reason to find standing" that "no one would have standing"); United States v. Richardson, 418 U.S. 166 (1974) (rejecting standing of citizen; Court thus declined to decide whether failure to report CIA budget information offends public accounts requirement of Art. I, § 9); id. at 179 (noting that "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process"); Gene R. Nichol, Bivens, Chilicky, and Constitutional Damages Claims, 75 VA. L. REV. 1117, 1133 (1989) (noting that "abstract" constitutional infractions, such as the failure to disclose the CIA budget as seemingly required by the accounts clause, have been held to be beyond the strictures of the Article III case or controversy requirement"). The Court affords important opportunities for political-branch participation in the elaboration of constitutional values in its formulation of remedial, as well as jurisdictional, rules. See Barry Friedman, When Rights Encounter Reality: Enforcing Federal Remedies, 65 S. CAL. L. REV. 735, 740 (1992); see also Nichol, supra, at 1144 ("If Congress established an administrative agency to oversee the desegregation of the District of Columbia school system, no doubt a federal court could, at least preliminarily, relinquish control.")
often take up constitutional questions on their own—in deciding, for example, whether to enact laws, to veto legislation, or to confirm Supreme Court nominees. An ever-growing body of commentary emphasizes the congressional power to check federal judicial delineations of rights by constricting Article III jurisdiction. Other commentary suggests that, when viewed over time, constitutional rules often are reshaped by the Court in response to forces exerted by the political branches and the public at large.


17. See, e.g., Abner J. Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C. L. REV. 587, 606 (1983) (noting that “constitutional rhetoric occasionally finds its way into the legislative history of a statute and may even convince some members of Congress to act in a certain manner,” but also asserting that “for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment”); Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 2 n.7 (1975) (noting that “the ultimate authority of the Supreme Court does not exclude an interpretative role for Congress in the formation of legislation”).

18. See, e.g., Fisher & Devins, supra note 14, at 12 (describing President Jackson’s veto on constitutional grounds of a bill that would have rechartered the Bank of the United States despite the Supreme Court’s previous rejection of a constitutional challenge); see also id. at 4 (describing veto power as one of the ways executive gives effect to constitutional values).

19. In the hearings on the nomination of Judge Robert Bork to the Supreme Court, for example, substantial attention was given to his views on substantive due process. See, e.g., Paul R. Dimond, The Supreme Court and Judicial Choice—The Role of Provisional Review in a Democracy 4 (1989) (noting that the Senate “participat[ed] in [the] process of judicial choice in constitutional adjudication by rejecting the President’s nomination on the merits of Robert Bork’s judicial philosophy”).


21. See Dimond, supra note 19, at 11 (noting that “subsequent courts have in many ... instances eroded, distinguished, ignored, or directly overruled previous rulings in response to ... the reactions of the people and the political process over time”); Fisher & Devins, supra note 14, at 10 (“[The elected branches] participate before the courts decide and they participate afterwards as well. ... The process is circular, turning back on itself again and again until society is satisfied with the outcome.”); Owen J. Roberts, The Court and the
There is, however, a more immediate and important way in which an all-or-nothing, court-dominated conception of the Marbury power misdescribes our constitutional regime. Often the Court directly engages nonjudicial officials in a shared elaboration of constitutional rights. It does so through the use of doctrines that focus on whether nonjudicial actors have taken an appropriately close and sensitive look at policy judgments that threaten important constitutional values. In many of these cases, the Court in effect "remands" constitutionally controversial programs to the political branches—inviting a more studied consideration of the program than attended its initial adoption, and leaving open the possibility that the readopted program will be upheld against constitutional attack. By employing doctrines of this kind, the Court steers attention away from what a traditionalist would identify as the central elements of the usual constitutional case: the nature of the right infringed, the degree of infringement, and the available justifications for the state’s action. Instead, when a

CONSTITUTION 61 (1951) (discussing judicial revisions of constitutional doctrine in the post-New Deal period: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country."). See generally Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 643-48 (1993) (discussing challenges to judicial "finality"). In a similar vein, constitutional historians have remarked that the realistic range of permissible constitutional decisions is delimited by social mores that find expression in the actions of political branches. See, e.g., Michael J. Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1883 (1995) (arguing, for example, that "it is implausible to believe that either Plessy or Korematsu...could have come out the other way, given the background context of the decisions"). On a related point, see Calabresi, supra note 13, at 82 n.6:

As Alexander Bickel long ago suggested, even a [hard-and-fast] judicial decision is by no means the end of the process of constitutional lawmaking. Amendments, both formal and informal, can alter the Constitution and reject almost any "right" the courts have asserted. De facto or informal amendment can occur in a variety of interestingly complex ways. Many philosophers and judges dedicated to fundamental rights fail to consider the significance of constitutional amendability for their theories. The leading theorist on altering the Constitution at critical "constitutional moments," outside the textually specified amendment process, is Professor Bruce Ackerman. See BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

22. See, e.g., Calabresi, supra note 13, at 107 (noting that structural review "seeks to raise an issue that involves putative fundamental rights above the level of ordinary politics by having courts impose on legislatures the requirement of an open and thoughtful second look").

23. See, e.g., Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted
question arises as to whether a government rule offends some particular substantive constitutional value (like free speech, free exercise, or federalism), the Court focuses its inquiry on the policymaker's use of quality-enhancing processes and structures (like explanatory findings, preenactment studies, or sunset limitations) in deciding whether a constitutional violation has occurred. More and more, the modern Court has safeguarded substantive constitutional values by focusing, not only on the what of government policymaking, but also on the how.

The Court's structural doctrines range from the familiar vagueness rule to the little noticed judicial practice of disregarding statutory justifications no longer relied on by the state. Through the use of these and many other process-centered rules, the Court initiates a dialogue with and among nonjudicial actors, often deferring to decisions of political branches on how to resolve constitutional issues, so long as those decisions bear the earmarks of deliberation and care. These doctrines thus may be called "rights-driven rules of deliberation and dialogue" or "structural safeguards of substantive rights." In the interest of brevity, I refer to them in

injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.'). Of course, structural rules differ even more fundamentally from judicial tools of analysis that do not involve any apparent judicial balancing at all—most notably, the method of deriving case-deciding principles exclusively from historic practice or materials focused on the Framers' very specific understandings. See, e.g., Carmell v. Texas, 120 S. Ct. 1620 (2000) (drawing on detailed historical analysis to hold that the Ex Post Facto Clause bars laws that lessen the amount of proof necessary to convict a defendant of a particular crime).

24. See, e.g., Laurence H. Tribe, American Constitutional Law § 17-3, at 1682 (2d ed. 1988) (stating that due-process-of-lawmaking inquiries concern "who promulgated the provision, to what ends, and in what manner"); Mark V. Tushnet, Legal Realism, Structural Review, and Prophecy, 8 U. Dayton L. Rev. 809, 816 (1983) ("Structural review, in all the areas in which it appears, involves paying attention to the decisionmaker rather than to the decision.").

25. See, e.g., Bickel, supra note 6, at 233 ("[P]rocedural decisions for the most part point to infirmities that are curable. They deal with the 'how' of governmental action, whereas substantive decisions go to ends, dealing with the 'what.'"); Tribe, supra note 24, § 17-2, at 1682 (noting that the Court's expressions of "principled concerns with the link between political process and legal outcome" have been "surfacing with mounting frequency in the cases").


27. Other observers have referred to these sorts of rules as involving "structural due
this Article simply (and synonymously) as “second-look” or “structural” doctrines or rules.

Gregory v. Ashcroft\(^{28}\) provides a useful example. In Gregory, the issue was whether the Age Discrimination in Employment Act (ADEA) applied to state judges. The Court said it did not because Congress had not clearly expressed its intention to interfere with a state’s choice of its key decision makers in this way.\(^{29}\) In other words, the Court subjected Congress to a structural rule. Under this rule, if Congress is going to threaten a set of constitutionally recognized substantive interests—namely, “states’ rights” (and, more particularly, the “right” of a state’s citizenry to fashion its own system of selecting important government officials)—then Congress must jump through a judicially constructed “how” hoop by declaring its intention to do so with crystal clarity.

In an important sense, the Gregory rule focuses on the means of government action. This fact suggests that the rule may be merely one component or exemplification of the “judicial scrutiny of means-ends relationships” that pervades our constitutional law.\(^{30}\) The Gregory rule, however, does not assess the propriety of legislative means in anything like the way courts assess those means in process,” Laurence H. Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269 (1975), or “the due process of lawmaking,” Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 199 (1976). A coupling of these rules with the textual rubric “due process,” however, creates two avoidable risks. First, it threatens to mislead courts (and others) about the doctrinal source of these rules, which do not necessarily spring from the Constitution’s Due Process Clauses. (For a lengthy discussion of the source of these rules, see infra Part XIV.) Second, and in part because the due process label may misidentify the main taproot of these rules, that label invites unnecessary confusion about and unjustified criticism of structural doctrines. See Jonathan C. Carlson & Alan D. Smith, Comment, The Emerging Constitutional Jurisprudence of Justice Stevens, 46 U. CHI. L. REV. 155, 218 n.355 (1978) (noting that Professor Tribe uses “due process of lawmaking” more expansively than others); Philip P. Frickey, The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez, 46 CASE W. RES. L. REV. 695, 720 n.130 (1996) (noting that author uses the phrase “due process of lawmaking” in “a broader sense” than Justice Linde used it). Mainly for these reasons, I eschew due process sloganeering in favor of the nomenclature set forth in the text.


29. See infra notes 179-88 and accompanying text.

30. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 108 n.2 (13th ed. 1997); see also 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, 43 (1972) (“That judicial review of legislative means is justified is one of the most pervasive themes articulated in our constitutional jurisprudence.”).
applying standard forms of rational-relation, intermediate, or strict scrutiny. The reason why is that Gregory's rule of clarity does not concern the proper fit between a challenged rule's substantive content and the specific goals that underlie that very rule. The Court in Gregory, for example, did not ask whether Congress's inclusion of state judges in the statutory proscription on age discrimination would render the act unduly overinclusive with respect to its objective of countering stereotypical or irrational biases. Rather, the sort of rule involved in Gregory focuses on the special risk that government actions pose to identified substantive constitutional values and, in light of that risk, how carefully, in terms of procedures, the policymaker acted in taking the challenged action. Attention thus centers on such matters as how unmistakably the law-giver expressed itself, how painstakingly and dispassionately it proceeded, and how pointedly it invited objection to its proposed action by potential opposition groups.

For this reason, the rules we address bear a kinship to rules of procedural due process—rules, for example, that require a chance to be heard, an impartial decision maker, or a statement of reasons for government action. But the rules we consider do not, like ordinary procedural due process rules, focus on fair, well-informed and dignity-respecting decision making in the

31. For a discussion of these differing levels of review in the equal protection context, see City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985). It merits emphasis that invalidation of laws pursuant to means/ends rules often leads to legislative reprises. Thus, means/ends rules—like true structural rules—have a dialogic quality. I develop this point in discussing so-called "quasi-structural rules," infra notes 982-97 and accompanying text.

32. Fit-related questions include: Is the government's policy rationally related to the government's objective? Is the classification used by the government excessively overinclusive or underinclusive in light of the program's purposes? Or, does the challenged rule embody the least restrictive (or a "narrowly tailored" or a "reasonable" alternative) for achieving permissible program goals? See generally infra notes 995-98 and accompanying text. A classic treatment is Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 CAL. L. REV. 341 (1949).

33. Such an inquiry pays heed to the result that Congress has wrought and, in particular, to whether the outcome of Congress's action is too sweeping, too narrow, or unjustifiable in light of alternative approaches. See infra notes 997-98 and accompanying text.

34. See generally TRIBE, supra note 24, §§ 10-7 to 10-17.


adjudication of individual disputes. The matters addressed here instead concern the structural features of how broad policy is made.

In this respect, the rules that concern us resemble the process-centered aspects of “hard-look” review—linked closely to the Administrative Procedure Act’s prohibition on “arbitrary and capricious” action—that courts sometimes use to test the legality of agency rulemaking. As with structural constitutional rules, these “hard-look” principles take account of such matters as “detailed explanations,” the invited “participation in the regulatory process [of] a wide range of affected groups” and the focused consideration by rulemakers of purportedly “reasonable alternatives.” Hard-look rules differ from true structural rules, however, in three major ways. First, the hard-look rules of administrative law seem wholly, or at least largely, statutory in origin. Second, hard-look rules limit only the power of agencies, whereas the constitutional rules we consider cover all policymaking officials, including the Congress, the President, and state legislatures. Finally, hard-look review in administrative law tends to foster deliberation across the board in agency rulemaking proceedings; structural rules of constitutional law, in contrast, respond in particularized ways to particularly important substantive constitutional values.

38. See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (suggesting that right-to-be-heard procedural due process protections do not attach to broad legislative actions); Tribe, supra note 24, § 10-19, at 767 n.45 (noting “the dichotomy between adjudicatory and representational processes” for procedural due process purposes).


40. See infra note 450 and accompanying text.


42. See supra note 39.
Gregory concerns one important sort of structural rule: namely, a rule of clarity. For two separate reasons, however, Gregory does not stand alone. First, the Gregory rule exemplifies a wide array of clarity doctrines that protect not only "states' rights," but, in varying ways and in varying contexts, all sorts of substantive constitutional values. Second, and more important, these many rules of clarity are themselves only one part of a rich tapestry of structural doctrines. A full listing of these rules—each of which we will study in due course—is as follows:

1. Rules of Clarity;
2. Form-Based Deliberation Rules;
3. Proper-Findings-and-Study Requirements;
4. Representation-Reinforcing Structural Rules;
5. Time-Driven Second-Look Doctrines;
6. Thoughtful-Treatment-of-the-Area Rules;
8. Proper-Purpose Requirements; and

All these rules are structural in a pure sense for they share with the rule of Gregory four features that serve to engage political officials directly in constitutional decision making. First, each of these rules operates to safeguard some identifiable substantive constitutional value. (In Gregory, for example, the Court protected the substantive constitutional value of federalism.) Second, each rule facilitates a judicial "remand" of a challenged program for reevaluation by nonjudicial government policymakers. (In Gregory, for example, the Court remanded the ADEA back to Congress for a reconsideration of whether it should cover state judges.) Third, each of these rules authorizes the political actor to whom the remand is made to overturn the judicially effected result by putting back in place a program that is actually or functionally identical to the program the Court has provisionally rejected. (After Gregory, for example, it remained open to Congress to pass new legislation that afforded state judges the protections of the ADEA.) Finally, under each true structural rule, the judicially dictated

43. See infra Part III.
45. See id. at 467-70.
result may be "reversed" only if the policymaking process complies with judicially stipulated structural mandates. (Following Gregory, for example, Congress could extend the ADEA to state judges only if it made that policy choice unmistakably clear in the language of the statute itself.) A central message of this Article is that numerous constitutional doctrines are marked by each of these four characteristics. All of these doctrines thus invite a deep collaboration between judicial and nonjudicial authorities in the elaboration of constitutional law.

Apart from our nine types of "pure" structural rules, there are other doctrines—like specialized First Amendment burden-of-proof rules and Fourth and Fifth Amendment rules of vigorous de novo appellate review—that do not satisfy each of these four criteria, but that nonetheless protect identifiable substantive rights or values in structurally minded ways. I describe these rules as "quasi-structural" in character and will consider them in due course.

There is much to say about the nature, function, and legitimacy of all these doctrines and how they fit together. For now, however, it suffices to observe that their operation reflects three "big picture" notions that depart from common conceptions of the Marbury power.

First, structural rules reflect the work of Justices who do not see the elaboration of constitutional commands as a mechanistic task. In the eyes of many laypersons, and even many lawyers, constitutional interpretation involves little more than asking whether a particular government action contravenes a fixed linguistic command. Constitutional law, however, does not really

46. Of course, structural rules do not take hold solely through the actual "remand" of a policy pronouncement for a "second look" by the political branches. Sometimes, politically accountable officials anticipate the applicability and operation of such rules—for example, by enacting a statute that burdens state autonomy, in the first instance, with the requisite level of deliberation-enhancing clarity. In such circumstances, the Court need not and does not send back the program for a more sensitive evaluation of the challenged policy; instead it defers to the sensitive evaluation that already has occurred. For this reason, the rules we study do not have only a reactive function; like other rules, they also have an instrumentalist quality that operates to channel the making of public policy into preferred, constitutionally sensitive forms.

47. See infra notes 962-70 and accompanying text. See generally infra Part XII.

48. See United States v. Butler, 297 U.S. 1, 62 (1936) (stating that the Court's task "[w]hen an act of Congress is appropriately challenged . . . as not conforming to the constitutional mandate" is "to lay the article of the Constitution which is invoked beside the
work this way, in part because changing conditions require the adaptation of textual dictates, because the text often interacts in complex ways with other interpretive tools, and because some rights do not emanate from any particular piece of the text at all. The elaboration of constitutional doctrine is also more complex than simplified depictions of the Marbury power suggest, because rights, whatever their source, seldom operate as freestanding "trumps" on government action. Instead, they operate as embodiments of enduring values that the Court must balance against competing interests said to justify what the government has done. Structural rules contribute to the subtlety of the interpretive task because they draw into the decisional calculus such variables as the policy-maker's specialized capacities, its level of cautiousness, and its evidenced attentiveness to constitutional concerns. In short, a court receptive to structural rules, as our modern Supreme Court surely has been, is willing to think of constitutional law as adaptive, multifaceted, and responsive to complex, real-world conditions.


50. *See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)* (asserting that, with regard to a Constitution, "only its great outlines should be marked"). See generally William A. Kaplin, *The Concepts and Methods of Constitutional Law* 25 (1992) ("The drafters . . . may have made deliberate use of language's open texture, using vague words with no precise and fixed meaning, so as to allow future interpreters a range of discretion in attributing specific meanings to words in unforeseen circumstances.").

51. *See, e.g., Hans v. Louisiana, 134 U.S. 1, 11 (1890)* (applying Eleventh Amendment-type immunity to all federal actions against a state brought by citizens even though the Amendment, by its terms, covers only suits brought "by citizens of another State or by citizens or subjects of any foreign state" (quoting U.S. CONST. amend. XI)).


53. See Fallon, *Individual Rights*, supra note 52, at 390 (arguing that it is a mistake to "assume that rights are independent of governmental powers" and that "courts must pervasively engage in the balancing of interests").

54. See supra notes 29-33 and accompanying text.

55. See BICKEL, supra note 6, at 79 (emphasizing that judicial review is "a subtle and complex process"); see also TRIBE, supra note 24, § 17-1, at 1676 (noting that "structural norms through which a substantive value is best preserved may be expected to vary over time and from one setting to the next").
Second, the use of structural rules involves a vision of constitutional law that is, in contrast to the traditional Marbury model, deeply collaborative in nature. The Court, in other words, does not see itself as acting alone in the constitutional law business. To be sure, it remains "emphatically the province and duty of the judicial department to say what the law is." Moreover, in many cases the Court will safeguard constitutional values by issuing all-or-nothing declarations that certain state actions are off limits. In other cases, however, the Court stands ready to share the elaboration of constitutional values with other agents of government, precisely because "say[ing] what the law is" demands this accommodation. In Gregory, for example, the Court invoked a constitutionally grounded rule of statutory draftsmanship to reject a plausible view of the scope of a federal program in light of deep concerns about state autonomy. But precisely because the Court took a drafting-based approach to the case, rather than an on-or-off approach, the result it reached was dialogue-generating. In effect, the Court invited Congress to reconsider whether to subject state judges to the federal age discrimination law (and thus to override a constitutionally inspired ruling of the Court) by acting in an explicit (and thus a more thoughtful and cautious) manner. Through the issuance of this invitation, the implementation of constitutional values in the federalism area became a responsibility shared, in a concrete way, between Congress and the Court.

56. See supra note 27 and accompanying text.
57. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
58. See supra notes 9-13 and accompanying text.
59. To be sure, there are deep normative questions about whether collaboratively involving other branches in charting the contours of constitutional rights is inherently consistent with the judicial law-declaring function as both traditionally and properly understood. I touch on these and many other normative matters later in this Article.
60. See supra text accompanying notes 28-29.
61. Of course, the Court did not foreclose the use of an on-or-off rule to invalidate Congress's action if it later unambiguously extended the ADEA to state judges. But, even while leaving open the possibility that such a result might be reached later on, the Court's action unmistakably involved an invitation to dialogue. In particular, in deciding whether to apply an on-or-off rule to "off" any revised and more expansive statute, the Court (at a minimum) would have to pay heed to the justifications a more focused Congress had brought to the Court's attention.
62. For a sophisticated and extended defense of deeply involving persons other than judges in the process of making constitutional judgments, see Tushnet, supra note 24.
Third, as surely as structural rules involve power sharing, they also involve a measure of temperance and self-control. Discussions of judicial restraint are fraught with difficulty because of inevitable disagreements about operative baselines. To the strident critic of "states' rights," for example, Gregory hardly qualifies as an exercise of judicial self-abnegation; instead, in such a critic's eyes, the Court's action entailed an interventionist distortion of a sweeping federal antidiscrimination law to vindicate narrow-minded values of localism in the face of heinous class-based bias. In one sense, however, rules that protect constitutional values in a structural way are always more restrained than rules that protect those values with hard-and-fast prohibitions. This is so because the results that structural rules dictate are never fixed and unbending. In Gregory, for example, the Court did not block Congress from affording state judges the protections of federal age discrimination law; indeed, the Court invited Congress to reach that very outcome by rewriting its statute in clear terms. It is the inherently provisional character of such a structural decision that reveals its compatibility with restraintist themes in our constitutional tradition.

We operate always in a world of ideas given to us by those who went before. This is especially true in law. Sometimes legal concepts of great consequence are recognized in watershed moments of history. Sometimes such concepts are openly contested over time, with one side or another temporarily holding sway, until a dominant consensus of opinion emerges. And sometimes legal

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64. There is much more to say about whether structural rules are, all things considered, restraintist in character. In particular, one might argue that structural rules are not restraintist on two separate grounds. First, one might claim that the overall effect of such rules will be to induce the Court to question the permissibility of government action in many cases where the Court would hesitate to intervene if it could draw upon only an on-or-off rule. Second, one might argue that the nature of structural rules makes them highly invasive of legislative prerogatives because, by definition, they impinge on the legislature's choice of its own internal processes of policymaking. These critiques of structural rules, and other critiques as well, most assuredly merit further focused attention. For a brief discussion of 10 separate critiques, see infra notes 1085-1104 and accompanying text.
66. An illustration is provided by the so-called dormant Commerce Clause. Throughout the early decades of the Republic there was a deep and recurring debate within the Court about whether the Commerce Clause limits state authority in the absence of affirmative
concepts of surpassing importance steal upon us. They yield influence without bold notice. They build and grow, often from humble origins, through subtle forms of recognition and elaboration. They creep toward significance, not because of human deviousness, but because their validity is first felt, rather than declared, or because their scope of operation, though initially narrow, becomes expansive over time.

So it is, perhaps, with the idea considered in these pages. The idea is that the proper elaboration of substantive constitutional values bears a relationship, sometimes quite intimate, to the structural mechanisms through which government policy is made. The idea, more particularly, is that oftentimes the significance of policymaking structures is so dominant that, by acting with an adequate measure of care, political-branch decision makers can render constitutional a policy choice otherwise subject to judicial invalidation.

It would be wrong in the extreme to say that this point has never been made before. Other commentators—most notably Alexander Bickel, Laurence Tribe, and Guido Calabresi—have 

congressional authority. See, e.g., The License Cases, 46 U.S. (5 How.) 504 (1847). In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), however, the Supreme Court held that the Commerce Clause in and of itself does impose some limits, and the Court has consistently adhered to that position ever since.

67. See BICKEL, supra note 6.

68. See TRIBE, supra note 24, §§ 17-1 to 17-3; Tribe, supra note 27, at 269 (“The central purpose of this Article is to suggest a third category of constitutional limitation; a category that focuses neither on the substantive content of policies already chosen nor on the procedural devices selected for enforcing those policies, but rather on the structures through which policies are both formed and applied, and formed in the very process of being applied.”); see also TRIBE, supra note 24, § 17-1, at 1673 (asserting that structural review seeks to advance “human freedom not through any one characteristic structure of choice but through that combination of structures that seems best suited to those ends in a particular context”).

Dean Wellington, partly in collaboration with Professor Bickel, also has cast light on this subject, see Alexander M. Bickel & Harry H. Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 HARV. L. REV. 1 (1957); Wellington, supra note 8, as have two other distinguished former law deans, Terrence Sandalow and Judge Guido Calabresi, see Calabresi, supra note 13; Sandalow, supra note 13. In addition, the literature contains a number of treatments of particular types of structural rules. See, e.g., Frickey, supra note 27 (discussing federalism-based congressional findings requirements).

69. See Calabresi, supra note 13, at 83 (emphasizing the role of “Type III judicial review,” which “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 what I refer to as ‘hiding’”).
In a particularly illuminating passage, Judge Calabresi writes:

Legislatures often act hastily or thoughtlessly with respect to fundamental rights because of panic or crises or because, more often, they are simply pressed for time. At other times, they hide infringements of rights through vague language or give no thought to the reach of the language they have used. At still other times, they delegate to bureaucrats who are not accountable to the people and who therefore cannot be trusted with the protection of rights. Legislatures also often shirk responsibility by failing to repeal old laws that have come—either through growth in rights or through change in the effect of the old laws—to violate entitlements that would be deemed fundamental if the issue were truly addressed today. All the above cases are instances of a breakdown of accountability that affects fundamental rights, and thus could be called failures of "constitutional accountability." The two most general categories of such breakdown are "haste or thoughtlessness" and "hiding."

The Bickellian approach to judicial review is based on the notion that, even if majoritarian legislatures are generally more trustworthy and less dangerous than courts as the definers and bulwarks of fundamental rights, when there is haste or hiding we cannot rely only on legislators to protect such rights. When there is hiding, neither the people nor their representatives are genuinely speaking; when there is haste, they may be speaking, but without the attention required for the protection of rights.

_It is at 103-04; see also_ Richard Neely, _Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look, 131 U. PA. L. REV. 271, 277-78 (1982): [I]f we can find a respectable constitutional theory that does not preclude legislative reenactment, but requires only a second legislative look, the courts will not be required to perform constitutional legerdemain. Not only that, but the new constitutional theory will have developed within the common law tradition of case-responsive adjudication, so that it will itself be an incremental, entirely expected, and largely welcomed, change in the existing legal landscape.

The theory that accomplishes this purpose is "structural due process." _Id._ Other noteworthy efforts to propose something like a large-scale theory of structural decision making appear in the work of Professor Conkle, _see_ Daniel O. Conkle, _Nonoriginalist Constitutional Rights and the Problem of Judicial Finality, 13 HASTINGS CONST. L.Q. 9, 37 (1985) (proposing that Supreme Court“abandon the doctrine ofjudicial finality in selected individual rights cases”), and Professor Dimond, _see_ DIMOND, supra note 19, at 14-15 (advocating broad congressional power to overturn Supreme Court’s constitutional rulings except when (1) these rulings rest on the “relatively few substantive values” protected against “federal encroachment,” mainly by the Bill of Rights; or (2) the congressional action does not comport with judicially imposed “restraints on the process of national lawmaking”); Paul R. Dimond, _Provisional Review: An Exploratory Essay on an Alternative Form of Judicial Review, 12 HASTINGS CONST. L.Q. 201 (1985); see also_ Burt Neuborne, _Judicial Review and Separation of Powers in France and the United States, 57 N.Y.U. L. REV. 363, 365 n.9 (1982) (“Both Tribe and Linde advocate substantive as well as what Tribe calls ‘structural due process’ based review . . . . The combination theory asserts that sometimes courts must make substantive decisions and at other times the proper judicial function is merely to insure that some decision is made by an appropriate governmental body.”). Structuralist approaches have also been advanced for dealing with particular fields of constitutional law. _See, e.g.,_ Stephen Gardbaum, _Rethinking Constitutional Federalism, 74 TEX. L. REV. 795, 814 (1996):

[My suggestion is that . . . it is inappropriate for Congress to disrupt the
reflected extensively on the nature of structural review. What has not previously been offered, however, is anything like a unitary treatment of the many different ways that this idea has taken a practical hold. A comprehensive and systematic elaboration of structural rules is what I offer here. More specifically, after further defining the nature of structural review in Part II, I consider in Parts III through XII each of the nine categories of structural rules identified earlier, as well as a number of so-called “quasi-structural” rules. I also offer most pointedly in Parts XIII and XIV, but also at other stages along the way, an introduction to a systematic evaluation of the legitimacy and wisdom of structural review. In particular, Part XIII identifies ten arguments that may be made against structural rules (for example, that they are inherently unprincipled, surreptitiously activist, and unduly invasive of legislative prerogatives), and then also identifies ten arguments that may be made on their behalf (for example, that they wisely encourage lawmaker care, conserve judicial capital, and alert political decision makers to their own constitutional responsibilities). Part XIV follows up on this discussion by considering in detail the most basic critique of structural rules: namely, that their use is illegitimate because such use is unsupported by constitutional text and tradition. In rebuffing this challenge, this Article suggests, among other things, that structural rules comport with long-accepted process-centered themes in constitutional law and with the Framers’ own embrace of the value of “deliberative democracy.”

Why do all this?

One reason already has been suggested. If we are dealing here with a powerful, but subtle, force in constitutional decision making, then there is a need to learn what we can about it. Central to the rule of law is the notion that judicial decision making must be marked by reason, integrity, and consistency. Yet, each of these *desiderata* is undermined by resort to ill-defined doctrines that encourage haphazard and idiosyncratic application. The very general balance of federal-state powers without deliberating seriously about the need and merits of so doing, and without having reasonable grounds for its decision. This understanding of the federalism constraint . . . charts a third course between viewing federalism either as requiring areas of exclusive state power or as having no constitutional status at all.
Second, this enterprise is designed to counter a common misperception. Even those who have focused attention on structural rules tend to view their application as out of the ordinary.\textsuperscript{70} As we soon shall see, however, this sense of things is incorrect. Indeed, the principal inspiration for this Article was the felt need first to explore, and then to document, the too-long overlooked prominence of structural decision making.

Third, a well-informed awareness of structural rules will inevitably be of importance to lawyers and judges as they grapple with concrete cases. In the work-a-day world, rules are tools of advocacy and decision. Rules that are not recognized, however, cannot be used at all, and rules that are only dimly understood cannot realize anything approaching their full potential. This Article, then, seeks to arm those who read it with new ways of thinking and arguing about real-world cases.

Finally, this Article seeks to set the table for further thought and writing in this important field. Many questions about structural rules cry out for attention. Why have roughly nine or so separate types of structural rules emerged? How are these different rules related? How are they different? Are they legitimate? Are they wise? Are some structural rules more legitimate or wise than others? How, if at all, should these rules be refined? Are there as-yet-unrecognized structural rules that courts should endorse? Are there existing rules the Court should reconsider? This Article says much about these questions, but, far more important, it lays the groundwork for further and deeper reflection about them.\textsuperscript{71}

\textsuperscript{70} See, e.g., infra note 854 and accompanying text.

\textsuperscript{71} I also note that this Article could have been written in many different ways. One beguiling possibility was to shorten and condense the “descriptive” materials in Parts III - XII and to devote the bulk of the pages to the “normative” questions introduced in its final two parts. I rejected this approach, however, for two reasons that seem to me overwhelmingly powerful. First, it would not have worked to offer in one place both a comprehensive study of the nature and types of structural rules and a comprehensive treatment of their appropriateness. Each subject is sufficiently large that it deserves a full-scale article of its own. Second, at this point in time, a detailed treatment of the nature and types of structural review presents the more pressing need. The reason why is that, just as we must walk before we can run, any fruitful normative inquiry directed at structural
Others, I am sure, will find things to criticize in my treatment of structural doctrines. That, however, is as it should be, for increased dialogue on this heretofore little-explored subject is exactly what I seek to promote. I am particularly aware, and also excited, that others may challenge my proposed typology of structural rules. In the end, however, the essential message of this Article does not depend on precisely which rules should so count. Rather, the message is that, however the counting is done, doctrines that safeguard substantive rights in a structural way now occupy a large and prospering territory in our constitutional law.

I. THE NATURE OF STRUCTURAL RULES

To understand what structural rules are, it is useful to consider what they are not. Structural rules are not what we might call substantive rules; in other words, structural rules are not rules that foreclose to the government a substantive policy choice. In National League of Cities v. Usery,72 for example, the Court held that constitutional values of federalism foreclosed Congress from regulating “States qua States”73 with respect to “integral operations in areas of traditional governmental functions.”74 This “on-or-off” principle flatly precluded Congress from, among other things, fixing a minimum wage for key state employees, such as firefighters, hospital workers, and law enforcement personnel.75 It did not matter how carefully Congress spoke, how pure its purpose was, how many hearings it held, how many times it passed the statute, how long it took, how many findings it made, or how pointedly it promised to reconsider in the near future what it had done.76 In

decision making must proceed from a thorough understanding of how structural rules now actually operate in our law. It bears repeating in this regard that other commentators have touched on subjects considered in these pages. But their tendency, wholly understandable given the enormity of this topic, has been to focus on one or another individual category of structural rules. What has not been done before, and what I attempt to do here, is to catalogue in a comprehensive and organized manner the many different styles of structural review.

73. Id. at 847.
74. Id. at 852.
75. See id. at 850.
76. See, e.g., Sandalow, supra note 13, at 1184-85:

[T]raditional constitutional analysis generally regards the decisionmaking
other words, the way in which Congress acted did not matter in applying the National League of Cities rule. What alone mattered was the result of Congress's action. If that result invaded the "integral operations" of the states, the action was unconstitutional. The Court would ask no further questions, and its decision could be displaced only by way of a full-scale constitutional amendment. 76

In Garcia v. San Antonio Metropolitan Transit Authority, 77 the Court overruled National League of Cities, and six years later it handed down Gregory. 80 Gregory, like National League of Cities, protects constitutional values of federalism, but (as we have seen) it does so in an entirely different way. To be sure, the Court in Gregory focused on the substantive result worked by Congress's program when it declared that that program threatened state control over a "political function . . . intimately related to the process of democratic self-government." 81 That substantive finding, however, did not lead the Court to declare that application of the

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process that precedes governmental action as irrelevant to the action's validity. This indifference to process is manifested, first, by a failure to take into account where in the hierarchy of government an allegedly invalid decision was made. . . . The lack of concern for process is revealed also by the courts' frequent failure to consider whether enactment of allegedly invalid legislation was preceded by legislative consideration of the controlling issues.

77. See National League of Cities, 426 U.S. at 852.

78. See Dimond, supra note 69, at 213 (describing National League of Cities as involving the "final arbiter" mode of judicial review); see also Nichol, supra note 16, at 1135 ("[C]onstitutional interpretations are typically thought impervious to statutory revision."). To be sure, the National League of Cities rule was developed in later cases in the direction of stating something of an open-ended balancing test. See D. Bruce LaPierre, Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues, 80 NW. U. L. REV. 577, 597 (1985) (claiming that "most read [National League of Cities] to invite a balancing test"); Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1, 13 (1988) ("Subsequent opinions incorporated Justice Blackmun's 'balancing approach' into the National League of Cities formula. The Court never spelled out, however, what types of federal needs might outweigh the interest in state sovereignty or how this balance should be struck."). This refinement, however, did not alter the basic substantive character of the rule. This was so because, as with other traditional balancing tests, the reformulated National League of Cities approach still focused on the substance of the congressional action and its underlying justifications, rather than the processes by which that rule was adopted. See supra notes 30-33 and accompanying text.


80. For a description and discussion of Gregory, see supra text accompanying notes 28-29.

ADEA to state judges was flatly unconstitutional. Rather, it moved the Court to ask and answer a purely structural question: whether Congress had expressed an intention to regulate state selection of judges with sufficient clarity. In Gregory, unlike in National League of Cities, the outcome thus turned on the way that Congress had made policy. In addition, the Court in Gregory signaled that Congress could (at least quite possibly) override the Court's decision to exempt state judges from the ADEA by way of ordinary (albeit carefully drafted) legislation, without the need for a full-blown constitutional amendment.\textsuperscript{82} These contrasts between National League of Cities and Gregory illustrate the key differences between structural and nonstructural constitutional rules.

Structural rules, as that term is used here, must be distinguished from four concepts often invoked in constitutional talk about lawmaking "structures" or "processes." First, the rules we study do not include those rules that elaborate the Constitution's separation of powers—that is, the basic "structures" of the national government.\textsuperscript{83} We will not consider, for example, \textit{INS v. Chadha},\textsuperscript{84} in which the Court invalidated congressional use of the "legislative veto" to override executive action at the national level. It is true that Chadha outlawed a particular decision-making structure and that it did so, in part, "to protect liberty."\textsuperscript{85} Unlike the cases we consider, however, Chadha served to safeguard liberty interests in a highly indirect and generalized way. The rule of that decision did not derive from the First Amendment Free Speech Clause, the Privileges and Immunities Clause of Article IV, or the equal protection principle of the Fifth and Fourteenth Amendments. Thus, Chadha, as well as each of the many pure separation-of-

\textsuperscript{82} Again, this is not to say that a congressional extension of the ADEA to state judges would have been held constitutional. The important point is that the Court at least left that possibility open.

\textsuperscript{83} See Tribe, \textit{supra} note 24, §§ 2-1 to 5-24.

\textsuperscript{84} 462 U.S. 919 (1983).

\textsuperscript{85} Id. at 950.
powers cases it resembles, does not fall within our study of structural safeguards of substantive rights.

Second, although this Article focuses on lawmaking processes, its point of focus is not the "process-centered" mode of judicial review espoused by John Hart Ely. In his great work, Democracy and Distrust: A Theory of Judicial Review, Professor Ely advocated a theory of constitutional interpretation concerned with "process in a broader sense—with the process by which the laws that govern society are made." This Article has much to do with this subject; indeed all of Part VI is devoted to elaborating the second-look features of Professor Ely's representation-reinforcement mode of judicial review. This work, however, addresses the subject of lawmaking processes in a way that differs greatly from the approach of Professor Ely. To begin with, it is not the object of this Article to expound a "theory of judicial review"; rather this Article investigates only one strain, albeit an important strain, of constitutional methodology. This Article also does not dwell on those cases that most fascinated Professor Ely: the voting cases (like Reynolds v. Sims) and cases that concern "what majorities do to . . . religious, national, and racial minorities" (like Brown v. . . .

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87. Even if this distinction between separation-of-powers and nonseparation-of-powers cases fails to ring true, there is enough to be said about structural separation-of-powers rules to leave discussion of them to another time and place. See generally Tribe, supra note 24, § 17-3, at 1682 n.3 (separating out separation-of-powers cases from discussion of structural rules because those cases do not focus on "the substance of whatever law is ultimately produced").

88. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

89. Id. at 74.

90. See id. at 116-25.


92. Ely, supra note 88, at 76.
These cases are of great significance, and we visit some of them along our way. Of no less interest to us, however, are other classes of cases—cases that involve matters like federalism, the dormant Commerce Clause, and nonpolitical speech. To put too big a point in too small a phrase, Professor Ely focused on process values essentially to the exclusion of substantive values. Here, in contrast, we take as a given that substantive constitutional values exist and explore how the Court has given those values meaning by taking the measure of lawmaking processes. For these reasons and others, there are many points of difference between this Article and the work of Professor Ely, despite a deeply shared concern about constitutional restraints on how policy is made.

94. See infra notes 351-90 and accompanying text.
95. See infra notes 674-82 and accompanying text.
96. See infra notes 326-42 and accompanying text.
97. See Dimond, supra note 69, at 205:

Ely argues that the Court should interpret only those constitutional values that reinforce the ability of legislative and executive institutions to represent fairly the majority will. Under this interpretation, the Court acts as a final arbiter of key constitutional provisions concerning due process, universal suffrage, fair apportionment, and prohibition of we-they defects in the legislative process to insure that representative institutions work.

Dimond, supra note 69, at 205; see also Neuborne, supra note 69, at 366 (“As John Hart Ely has demonstrated, an expansive conception of process can support exercises of judicial review that go beyond remand to outright prohibition.”).

98. Of course, many commentators have vigorously questioned Professor Ely’s approach. See, e.g., Calabresi, supra note 13, at 84 n.9 (“The general problem with the legal process approach [of Ely] is that it presumes that such questions can be answered without an underlying substantive theory of rights. ... Without a theory of rights—a theory outlining what they are, where they come from, and how they are defined—it is impossible to know what institutions are best suited to articulate and defend them.”); see also Dimond, supra note 69, at 205 (“[Ely’s] restriction on the Court’s power to render decisions ignores many ... substantive provisions of the Constitution.”). See generally Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 470 (1981) (arguing that the Court cannot review legislative actions without making substantive political decisions); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063 (1980) (same). It is not among my goals to enter into this debate. Rather, I focus on other matters. In particular, I characterize as substantive some rights Professor Ely probably would call process-based (for example, rights of political speech). In doing so, however, I do not question the premises of Professor Ely; I simply investigate whether courts protect these rights (however others might be characterized) through the use of deliberation-enhancing structural rules.

99. It bears emphasis (as Judge Calabresi has already pointed out) that Professor Ely’s
There is a third type of "structures-related" analysis that this Article does not address. A decade before Professor Ely's book appeared, Professor Charles Black published his own important work, *Structure and Relationship in Constitutional Law.* In that book, Professor Black argued that judges had overemphasized the role of "the particular textual passage" and undervalued "the structures and relationships created by the Constitution." As surely as this Article is not about Professor Ely's "process-centered" theory, it also is not about Professor Black's "structural" interpretive approach. By way of illustration, Professor Black claimed that *Crandall v. Nevada,* which held that a state may not tax travelers who exit its borders, reflected deep "structural" postulates about the proper relation of citizen, nation, and state. *Crandall,* however, involved precisely the sort of hard-and-fast constitutional restriction that cases like *Gregory* eschew; under *Crandall,* states may not tax exiting travelers—and that is all there is to it. *Crandall* thus established a substantive rule, rather than a second-look doctrine. It concerned a "structural" doctrine only in the sense...
that its rule of decision derived from the Framers' set-up—that is their *structuring*, of the relationships at the root of our federal, republican system. This Article, in contrast, concerns those rules that are "structural" in the very different sense that they take account of the structures or procedures actually used in the making of a particular government policy subject to constitutional challenge.\(^\text{105}\)

Fourth and finally, any foray into the subject of deliberation-enhancing rules must take account of the work of Professor Cass Sunstein and particularly his book, *One Case at a Time: Judicial Minimalism on the Supreme Court*.\(^\text{106}\) Professor Sunstein's thesis is that the modern Court typically ought to, and in fact often does, "promote more democracy and more deliberation"\(^\text{107}\) by issuing constitutional rulings marked by a "decisional minimalism."\(^\text{108}\) It should come as no surprise that, in developing this thesis, Professor Sunstein looks at some of the second-look cases that will occupy our attention.\(^\text{109}\) (After all, what rulings could be more minimalist than ones that do not definitively decide a substantive constitutional issue but instead return it to the political branches for a more thoughtful consideration?)

Even so, the purpose and coverage of this Article differs greatly from the purpose and coverage of Professor Sunstein's illuminating book. One reason why is that Professor Sunstein directs attention to *all* decisions that are "narrow" in content and "shallow" in reasoning.\(^\text{110}\) A case that catches his eye, for example, is *Romer v.*
What is important from Professor Sunstein's perspective is that the Court in *Romer* "spoke narrowly and said nothing about the range of possible cases involving discrimination against homosexuals, such as exclusion from the military, or a ban on same-sex marriage." What is important for our purposes, however, is that the Court in *Romer* did, in traditional *Marbury* fashion, invalidate a state prohibition on affording gays, lesbians, and bisexuals the protection of antidiscrimination laws. The Court may not have dealt with gays in the armed forces or supplied a broad theoretical framework for assessing when government may subject homosexuals to disparate treatment. But on the subject at hand, whether narrow or not, the Court issued a flat-out on-or-off ruling. This Article, however, does not concern on-or-off rulings. It also does not consider such matters as "the general question of constitutional method," "philosophical ambition in law," or "a well-functioning liberal polity's 'core' [commitments]." Put another way, this Article differs from Professor Sunstein's book because it treats (from a very different angle and in much greater detail) one of a large variety subjects over which his musings about minimalism range.

To understand fully the distinctions between *Chadha, Sims, Brown, Crandall,* and *Romer* and the structural safeguards that concern us, we must elaborate just what those safeguards are. We turn to that subject in the ensuing parts of this Article by identifying and evaluating nine different sets of structural doctrines.

II. RULES OF CLARITY

Constitutionally driven rules of clarity, exemplified by *Gregory,* are many in number and varied in form. One way in which these rules differ from each other concerns the degree of clarity with

112. SUNSTEIN, supra note 106, at 10.
113. Id. at 9.
114. Id. at 247.
115. Id. at 63. It also merits mention that the structural rules we consider need not be, as minimalist theory might suggest, "incompletely theorized," see id. at 245; indeed, one reason for gathering these rules together in this one place is to begin to see whether some greater measure of theoretical unity might be brought to them.
which they require lawmakers to speak. In particular, although the Supreme Court has not described its work quite this way, there is much accuracy in saying that there are three basic categories of constitutionally driven clarity rules: (1) clear-statement rules; (2) super-clear-statement rules; and (3) extra-super-clear-statement rules. All of the rules within each of these categories safeguard substantive constitutional values in a structural way.

A. Clear-Statement Rules

The first constitutionally driven rule of clarity is the most familiar and widely invoked. It is a "cardinal principle," the Supreme Court has decreed, that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent

116. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (distinguishing "clear statement" and "super-strong clear statement rules"). It has been stated with accuracy that "[c]ourts and writers have often been ambiguous in their treatment of the rule of express legislative action vis-à-vis the doctrine of strict construction." Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 645-46 (1975). In this Article, I do not attempt to deal with this ambiguity in a significant way. I do, however, mean to group under the label "clear-statement rules" all rules of statutory interpretation designed to advance constitutional values, whether those rules are referred to as presumptions, rules of interpretation, or whatever. I reserve the more limiting label "super-clear-statement rules" for doctrines that unstintingly demand a high level of clarity in the statutory text itself. See infra notes 179-224 and accompanying text; cf. Eskridge & Frickey, supra, at 597 ("[C]lear statement rules . . . can only be rebutted by clear statutory text.").

117. The Supreme Court itself has used the term "clear-statement rule." See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 57 n.9 (1996). The term "super-clear-statement rule" is (to the best of my knowledge) one of my own making, though it is analytically akin to the term "super-strong clear-statement rule" used by Professors Eskridge and Frickey. See Eskridge & Frickey, supra note 116, at 597 ("[S]uper-strong clear statement rules . . . require a clearer, more explicit statement from Congress in the text of the statute, without reference to legislative history, than prior clear statement rules have required."). The term "extra-super-clear-statement rule" is also my own and is designed to describe a clear-statement rule so powerful that it operates even when the reviewing court cannot use an ambiguity-resolving rule of statutory construction to advance a constitutional purpose. See infra notes 225-80 and accompanying text.

Sometimes called "the avoidance principle" or the "doctrine of 'constitutional doubt,'" this rule has found its way into every nook and cranny of constitutional law.122

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120. Sunstein, Interpreting, supra note 119, at 468-69.


Illustrative is Kent v. Dulles.\textsuperscript{123} The issue in that case was whether the Secretary of State, under the authority of the President, could promulgate and invoke a regulation that barred the issuance of passports to Communist Party members. The Secretary claimed this power based on: (1) a statute that said that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate";\textsuperscript{124} (2) another statute that added that citizens could not leave the country "except as . . . provided by the President" during a presidential declaration of emergency (which declaration was then in place);\textsuperscript{125} and (3) "a large body of precedents . . . that the issuance of passports is 'a discretionary act' on the part of the Secretary of State."\textsuperscript{126}

Attentive to the obvious, the Court noted that "the power of the Secretary of State over the issuance of passports is expressed in broad terms."\textsuperscript{127} The Court also observed, however, that the statutes could be read to grant discretion to deny passports only in those two situations in which such a power historically had been used: times of war and instances of alleged unlawful behavior.\textsuperscript{128} Citing the avoidance principle, the Court opted for this narrower interpretation. Because "[f]reedom to travel is . . . an important aspect

\textsuperscript{123} 357 U.S. 116 (1958).
\textsuperscript{124} Id. at 123.
\textsuperscript{125} Id. at 122 n.4.
\textsuperscript{126} Id. at 124.
\textsuperscript{127} Id. at 127.
\textsuperscript{128} See id. at 122, 127.
of the citizen’s ‘liberty,’” the Court would “not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it.” The Court summarized its position in the closing passage of its opinion:

We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens’ right of free movement.  

What values does the avoidance principle serve? Often, it advances that goal of statutory construction widely viewed as most salient: the goal of implementing the underlying intentions of the law’s creators. The thought is that it is safe to assume that government policymakers prefer, whenever possible, to steer wide of constitutional danger areas. Given this premise, the avoidance principle puts in place a sensible ambiguity-resolving rule. So it is because the principle corresponds to a (probable) drafter mind-set that is hospitable to our nation’s founding document rather than a (not-so-probable) mind-set that is unheedful of constitutional concerns.
Insofar as the avoidance principle works this way, it has a backward-looking quality centered on reconstructing the policymakers' aims. The rule, however, also serves forward-looking, instrumentalist ends, as revealed by the oft-cited concurring opinion in Ashwander v. TVA. There, Justice Brandeis grouped the interpretive preference for avoiding constitutional difficulties together with such purely jurisdictional doctrines as those that require dismissal of collusive or unripe constitutional actions.

All of these rules, Justice Brandeis recognized, seek to empower the Court by disempowering it. By reserving constitutional intervention to instances of the most pressing urgency, the Court minimizes potentially power-sapping confrontations with coordinate branches, portrays itself as temperate in character, conserves judicial capital, and, through all this, solidifies its claim to exercise the power of judicial review.

There is, however, a more plainly structural purpose that lies behind the rule of interpreting statutes to sidestep constitutional inquiries. From this perspective, whenever the Court invokes the avoidance principle, it initiates a constitutional colloquy with the legislative branch. In effect, the Court says to Congress:

should assume that Congress is sensitive to constitutional concerns . . . .”). Notably, the Court's longstanding acceptance of the avoidance principle, see supra note 122, reinforces the likelihood that its application serves to advance underlying legislative designs. This is the case, because, as stated by Professor Eskridge: "[T]hese clear statement rules and presumptions are longstanding doctrines of which Congress ought to be aware. Not only can Congress overrule an erroneous public values interpretation of a statute, but it is on notice when it writes statutes that these principles will be applied." Eskridge, Public Values, supra note 119, at 1065.

136. See id. at 345-48.
137. See id. at 345-46; see also Poe v. Ullman, 367 U.S. 497, 503 (1961) (plurality opinion) (noting that the Court's role is "restricted by its very responsibility"); BICKEL, supra note 6, at 70-71 (explaining that Justice Brandeis viewed "techniques . . . for staying the Court's hand" as "most important . . . because they make possible performance of the Court's grand function as proclaimer and protector of [enduring] goals").
138. See generally Almendarez-Torres v. United States, 523 U.S. 224, 238 (1993) (asserting that avoidance doctrine "seeks in part to minimize disagreement between the Branches").
139. See Bickel & Wellington, supra note 68, at 34 (noting that "[t]he point . . . is to ask Congress for sober reconsideration, leaving to Congress the last word"); Samuel Estreicher, Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age, 57 N.Y.U. L. Rev. 1126, 1152-53 (1982) (describing avoidance principle as a device whereby "the legislature [is] brought into the constitutional lawmaking process").
A broad interpretation of your legislative work may be quite plausible, or even the most linguistically appealing one. That interpretation, however, would threaten the constitutional rights we have identified as important in this opinion. As a result, we will protect those rights by interpreting your intentions narrowly. At the same time, we invite you to clarify your intentions with an explicit statement if you truly desire, on further reflection, to be more intrusive. If you do so clarify your intentions, we then will consider and resolve all constitutional issues. But we will not address those issues until you act with the sort of clarity that shows you have thought hard about whether you really want to endanger the constitutional values we have shown to be at stake.140

Put another way, by demanding specificity, the Court forces Congress, if it is in fact inclined to override the statutory ruling the Court has embraced, to proceed in a cautious and deliberative mode.141 In addition, the Court pointedly identifies the

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140. For a similar pronouncement by the Supreme Court itself, see Greene v. McElroy, 360 U.S. 474, 507 (1959) (asserting that lawmaking choices that threaten constitutional values—here, the right to cross examine witnesses in connection with a discharge based on political association—"must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws"); see also Bickel & Wellington, supra note 68, at 31 ("The rule that a statute is to be interpreted so as to avoid constitutional doubts is another commonly applied canon of statutory construction that serves ... the function of remanding legislation to Congress for a new look."). It has been noted that:

The rule of express legislative action has significant corollary benefits. For example, requiring a specific statement by the legislature should discourage future litigation by making the factual and legal situation clearer. . . . Furthermore, by requiring an explicit legislative statement, the rule will not "enlist[t] too heavily the private social and economic views of judges." Thus the rule of express legislative action focuses the decisionmaking process on Congress, where it properly belongs, and not on the courts.

Wilkinson & Volkman, supra note 116, at 654 (citations omitted).

141. See, e.g., Sunstein, After The Rights Revolution, supra note 119, at 457 ("Clear-statement principles force Congress expressly to deliberate on an issue and unambiguously to set forth its will . . . ."); Calabresi, supra note 13, at 120 (noting that the "traditional principle that statutes should be interpreted strictly to avoid a constitutional issue . . . rests on the notion that judges should not attribute to the legislature an intention to impinge on fundamental rights unless the legislature has carefully considered the issue and clearly expressed its intention"); Linde, supra note 27, at 230 n.83 (citing the "argument . . . that policies of major importance or touching sensitive rights should be required to be made only
constitutional values that are at risk, so that legislators will have reason to take focused account of those values as they engage in the cost-benefit analysis that inevitably marks the lawmaking process.\textsuperscript{142} In sum, the doctrine of substantial doubt operates as a structural protection of those constitutional interests that give rise to the substantial question.\textsuperscript{143}

There are many rules of statutory construction, apart from this avoidance principle, that safeguard substantive constitutional rights in similarly structural ways.\textsuperscript{144} For example, in \textit{Felker v. Turpin},\textsuperscript{145} the Court refused to find in a statute that was aimed at curbing "successive petitions" a contraction of the Supreme Court's original jurisdiction over habeas corpus actions under section 14 of the Judiciary Act of 1789.\textsuperscript{146} In reaching this result, the Court did not cite the interpretive avoidance rule; instead it pointed to its well-aged decision in \textit{Ex Parte Yerger}.\textsuperscript{147} As explained by the Court,

\textit{by explicit legislative enactments, so as to assure that they represent the deliberate decision of the politically responsible legislature"; William V. Luneburg, Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction, 58 IND. L.J. 211, 220 (1982) ("Forcing Congress to directly and expressly address an issue will assure that it does so 'in a form which tends to focus its public responsibility for the action.' Congress is thus given the opportunity for 'sober second thought' which can occur in a context in which all affected interests will at least have an opportunity to have their say."); Wilkinson & Volkman, supra note 116, at 652-55 (emphasizing deliberation-enhancing quality of clear-statement rules; relying substantially on the work of Professors Saks and Jaffe).}

\textsuperscript{142} See BICKEL, supra note 6, at 188 ("[T]he Court can . . . see to it that the political judgment of necessity is undertaken with awareness of the principle on which it impinges. . . . [T]he Court can explain the principle that is in play and praise it, and thus also guard its integrity."); Eskridge, \textit{Public Values}, supra note 119, at 1020-21 (noting that "by narrowly construing statutes venturing close to the constitutional periphery, the Court can signal its concerns to Congress"); Estreicher, supra note 139, at 1152-53 (emphasizing role of avoidance doctrine in ensuring "that the statute, if reenacted, reflects a conscious legislative determination focusing on the court's concerns").

\textsuperscript{143} See Bickel & Wellington, supra note 68, at 34-35 (suggesting that the clear-statement rule protects constitutional values by targeting legal issues that are "close to, but not quite, constitutional ones").

\textsuperscript{144} See Eskridge & Frickey, supra note 116, at 598 (noting that "[a] good many of the substantive canons of statutory construction are directly inspired by the Constitution"); see also Richard H. Fallon, Jr., "The Rule of Law as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 44-45 (1997) (observing that even judges engaged in a "legal search for original understanding" tend to "observe canons of construction . . . that render statutes consistent with constitutional values").

\textsuperscript{145} 518 U.S. 651 (1996).

\textsuperscript{146} See id. at 660-61, 664. Actually, the case involved the statutory successor of section 14. See id. at 659 (discussing Act of Feb. 5, 1867, ch. 28, 14 Stat. 385).

\textsuperscript{147} 75 U.S. (8 Wall.) 85 (1868).
"we declined to find a repeal of § 14 . . . by implication then" and "we decline to find a similar repeal . . . by implication now." In effect, the Supreme Court, by adopting a clear-statement doctrine with respect to the removal of its jurisdiction to hear habeas appeals, vindicated in a structural way the array of substantive constitutional rights routinely invoked in habeas litigation. In particular, it gave protection to those rights by ensuring that their champions could get a hearing in the nation's highest Court. It simultaneously suggested, however, that Congress might remove or reduce that protection if it acted with a high level of deliberation-enhancing explicitness.

Both the rule of interpretation that disfavors removal of Supreme Court habeas jurisdiction and the rule of avoiding substantial constitutional questions safeguard a broad range of constitutional rights; indeed, the avoidance principle safeguards every constitutional right there is. Other constitutionally driven clear-statement rules take a more targeted form. Courts often interpret statutes, for example, to preserve "vested rights," thus protecting interests in, or closely tied to, property and contractual entitlements grounded in the Fifth Amendment and Article I, Section 9. The Court's antipathy toward "retroactive" application of new statutes serves, in an even broader way, to safeguard these same

148. Felker, 518 U.S. at 661.
149. See supra notes 119-23 and accompanying text. There are other interpretive rules that fit this mold. Perhaps the most important is the doctrine "that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." Webster v. Doe, 486 U.S. 592, 603 (1988); see also Shalala v. Illinois Council on Long Term Care, Inc., 120 S. Ct. 1084, 1110 (2000) (Thomas, J., dissenting) (arguing that this "presumption favors not merely judicial review 'at some point,' but preenforcement judicial review"); Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (noting "serious constitutional question! that would arise" upon denial of "a judicial forum for constitutional claims" presented by agency action; citing "strong presumption" Congress did not intend such a result). But see Shalala, 120 S. Ct. at 1097 (majority opinion) (responding that "any such presumption must be far weaker than a presumption against preclusion of all review").
150. See 73 AM. JUR. 2d Statutes § 349 (1974) ("Because every law that takes away or impairs vested rights under existing laws is generally reprehensible, dangerous, unjust, and oppressive, such retroactive laws have not been looked upon with favor, so that courts are loath to give a statute such effect. To the contrary, a prospective interpretation of statutes affecting substantive rights is favored" (citations omitted)); see also Winfree v. Northern Pac. Ry. Co., 227 U.S. 296, 301 (1913) (noting that it is an "almost universal rule that statutes are addressed to the future, not to the past" and that they "should not be held to affect what has happened unless, indeed, explicit words be used, or by clear implication that construction be required").
interests. In a very different field of law, the Court has said that Congress may override judicial rulings under the dormant Commerce Clause only by way of "unambiguous" action. With this rule, the Court has safeguarded in a structural way the long-recognized constitutional value of maintaining a borderless national market.

Professors Eskridge and Frickey have distilled from the cases another constitutionally inspired interpretive norm that favors so-called "Carolene groups." According to these commentators,
courts have used this rule to protect (even in the absence of substantial constitutional questions) "discrete and insular minorities" and other groups that have a special claim for judicial solicitude. These groups include African Americans, aliens, women, and persons with disabilities. A prominent exemplification of this tendency lies in the variety of clear-statement rules used to protect the "weak and defenseless people" who make up our nation's long-oppressed Native American tribes. The most
prominent clear-statement rules tied to specific constitutional values, however, do not involve the protection of individual interests in liberty and equality. Instead, they involve judicial preservation of so-called "states' rights."

The core principle reaches back a half-century to *Rice v. Santa Fe Elevator Corp.*, in which the Court confronted a preemption claim based on congressional action with regard to grain elevators, a "field which the States have traditionally occupied." In such an area, the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."  

intention to do so unmistakably clear") (internal quotation marks omitted); United States v. Dion, 476 U.S. 734, 738-39 (1986) (requiring "clear and plain" evidence of Congressional intention to abrogate Indian treaty rights to hunt bald eagles); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) ("Ambiguities in federal law have been construed generously in order to comport with... traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence."); *McClanahan*, 411 U.S. at 170-71 (noting presumption that "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply") (quoting U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAWS 845 (1958)). *See generally* Eskridge, *Public Values*, supra note 119, at 1047-48 (discussing the presumption that favors tribal authority). Professor Sunstein refers to the principle that holding "that statutes and treaties should, in the face of ambiguity, be construed favorably to Indian tribes." Sunstein, *Interpreting*, supra note 119, at 460. Referring to this interpretive principle, he explains: "There is no reason to think that this notion will tend accurately to describe congressional intent in particular cases. It is instead a judge-made rule responding to obvious disparities in bargaining power and to inequitable treatment of Native Americans by the nation in the past." *Id.; see also id.* at 483 (citing Indian-law canon as "the most conspicuous example" of judicial tendency to "resolve interpretive doubts in favor of disadvantaged groups"); *Wilkinson & Volkman*, supra note 116, at 617-20 (noting trend in courts to interpret ambiguous treaties in favor of Indian rights).  

162. *Id.* at 230.  
163. *Id.* (emphasis added).
Flying the flag of federalism, the Court has reiterated this principle in many cases and given it a broad application.

Federalism concerns also have prompted the development of a specialized clear-statement rule for federal criminal laws. In United States v. Bass, the Court confronted a criminal statute that targets the convicted felon "who receives, possesses, or transports in commerce or affecting commerce... any firearm." Emphasizing the disjunctive character of this clause, the government argued that the statute's prohibitions on receiving and possessing a firearm (as opposed to transporting one) applied without regard to the gun's connection to interstate commerce. Rejecting this interpretation, the Court reasoned: "Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." The Court added:

[Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.

... In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures


165. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (giving express preemption provision "a narrow reading" in light of Rice presumption); id. at 532-33 (Blackmun, J., concurring in part and dissenting in part) (same).


167. Id. at 337 n.1 (quoting then-existing 18 U.S.C. § 1202(a)).

168. See id. at 339-42.

169. Id. at 339.
that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.\footnote{170. Id. at 349. The Court has taken a Bass-like approach to federal criminal statutes in a variety of cases. See, e.g., Jones v. United States, 120 S. Ct. 1904, 1912 (2000) (applying Bass principle to read federal arson statute as inapplicable to the burning of a private residence not used for commercial purposes); id. at 1912-13 (Stevens, J., concurring) (agreeing that Bass principle applies and noting principle's "kinship [to] our well-established presumption against federal pre-emption of state law"); Fischer v. United States, 120 S. Ct. 1780, 1788 (2000) (rejecting broad construction of term "benefits" under federal antifraud statute in part because a contrary result "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance"); McNally v. United States, 483 U.S. 350, 360 (1987) (reading federal mail fraud statute not to reach assignment of state's insurance business to agency required to make kickbacks where scheme results in no loss to state; noting aversion to any national "setting [of] standards of... good government for local and state officials"); adding that: "If Congress desires to go further, it must speak more clearly than it has"); United States v. Enmons, 410 U.S. 396, 400 (1973) (holding Hobbs Act prohibition on extortion inapplicable to use of violence in labor disputes to obtain union objectives); Rewis v. United States, 401 U.S. 808, 811-12 (1971) (viewing Travel Act as not reaching illegal gambling operation); see also Kelly v. Robinson, 479 U.S. 36, 47 (1986) (refusing to find state restitution obligations imposed on state criminal defendants dischargeable in bankruptcy; relying on "the fundamental policy against federal interference with state criminal prosecutions" (quoting Younger v. Harris, 401 U.S. 37, 46 (1971))); cf. Wickard v. Filburn, 317 U.S. 111, 124 (1942) ("That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it.").}

It bears emphasizing that the Rice and Bass rules involve something more than a specialized adaptation of the avoidance principle.\footnote{171. See, e.g., Vermont Agency of Natural Res. v. United States ex rel. Stevens, 120 S. Ct. 1858, 1870 (2000) (invoking separately avoidance principle, on the one hand, and Gregory and Bass, on the other, in refusing to read federal qui tam statute to authorize actions against state defendants).} Indeed, at least since the demise of National League of Cities,\footnote{172. See supra notes 72-78 and accompanying text.} there has been no freestanding constitutional prohibition on the sort of congressional forays into "traditional" areas of state regulation that Rice and Bass concerned.\footnote{173. Indeed, the specialized protection of "traditional" state activities under the National League of Cities rule was among the features of that rule most vigorously criticized and repudiated in Garcia. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545-47 (1985).} Rather, as the Court made clear when it overruled National League of Cities in the Garcia case, safeguards against undue encroachment by the national government principally inhere in "the composition of the...
Federal Government," which "was designed in large part to protect the States from overreaching by Congress."174

Against this backdrop, the Rice and Bass rules are defensible on the ground that they help ensure that the national political process in fact does the job Garcia assigned to it. Confronted with a clear-statement rule, Congress cannot finesse its way through tough questions of federalism by "resorting to ambiguity."175 Instead, if Congress is to interfere with historic state prerogatives, it must do so self-consciously, thereby facilitating the operation of the built-in political restraints that guard against undue tampering by the national legislature with core state regulatory authority.176

174. Id. at 550-51.
175. TRIBE, supra note 27, at 317; accord, e.g., Calvin R. Massey, Etiquette Tips: Some Implications of "Process Federalism," 18 HARV. J.L. & PUB. POL'Y 175, 191 (1994) ("[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for law-making on which Garcia relied to protect states' interests." (quoting TRIBE, supra note 24, at 480)); see also Luneburg, supra note 141, at 216-17 (noting that "lack of clarity may be traceable to the unwillingness of the legislature to confront squarely the matter at issue").
176. See, e.g., TRIBE, supra note 24, § 6-25, at 479-80 (asserting that "reluctance to infer preemption in ambiguous cases ... further[s] the spirit of Garcia by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress"); Calabresi, supra note 13, at 119 (arguing that "the 'modern American Doctrine which refuses to impede to Congress the casual intention to make vast and far-reaching changes . . . in the federal balance,' can be seen as a judicial device for forcing caution and consideration in legislation that affects fundamental structural rights" citation omitted)); Eskridge, Public Values, supra note 119, at 1025 (citing variety of Supreme Court cases for proposition that "the rule against preemption of traditional state functions is often the occasion for the Court to protect important local values from inadvertent federal interference"); Massey, supra note 175, at 177 ("The net result [of Garcia] is the emergence of a hybrid form of federalism, neither completely political nor wholly legal. Rather, the emerging 'process federalism' is one characterized by a willingness to let Congress impose its will upon the states so long as that imposition is performed in a procedurally restrained fashion."); Paul E. McGreal, The Flawed 'Economics of the Dormant Commerce Clause, 39 WM. & MARY L. REV. 1191, 1283-84 (1998) ("For the political process to ensure protection of state interests, Congress must be aware that its legislation might affect the states. A clear statement rule looks for evidence of congressional deliberation on the face of the statute to prevent unthinking or incidental encroachment on states and their laws."). Notably, this line of analysis has recently appeared in two opinions (joined, in total, by five Justices) written by Justice Stevens. See Geier v. American Honda Motor Co., 120 S. Ct. 1913, 1939 (2000) (Stevens, J., dissenting) (reasoning that Rice clear-statement rule interacts with "the structural safeguards inherent in the normal operation of the legislative process . . . to defend state interests from undue infringement"(citing Garcia and Gregory)); Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 652 (2000) (Stevens, J., dissenting) ("Federalism concerns do make it appropriate for Congress to speak clearly when it regulates state action. But when it does so, as it has in these cases, we can safely presume that the burdens the statute imposes on the sovereignty
In short, the rules of clarity set forth in *Rice* and *Bass* seem to serve two discernible purposes beyond vindicating a presumed congressional intent. First, they vindicate federalism interests in an important constitutional field where few on-or-off restraints (at least as a historical matter) have limited action by Congress—namely, the field of localized commerce-affecting behavior engaged in by private parties.\(^\text{177}\) Second, these rules reinforce the underlying rationale for placing no such restraints on congressional action in the first instance. By focusing congressional attention on the costs to federalism threatened by particularly intrusive forms of proposed federal legislation, these rules of clarity tend to ensure that only well-identified interests of the highest national urgency will override strong claims of state autonomy.\(^\text{178}\)

\(^{177}\) See LaPierre, *supra* note 78, at 579 (noting that *Garcia* "held that because the national political process adequately protects the states' role in the federal system, the power of judicial review to limit national incursions on state autonomy should be exercised only in rare circumstances"). Of course, more recent cases show that the Court has not wholly abandoned the federalism field. Thus, in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 120 S. Ct. 1740 (2000), the Court struck down federal statutes on the ground that they fell outside of Congress's Commerce Clause power. See *infra* notes 351-75 and accompanying text. Similarly, in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), the Court held that Congress could not coerce state legislatures or state law enforcement officials to enact or to implement federal regulations. In light of these and other decisions (particularly in the Eleventh Amendment field), it is open to question whether any underenforced-constitutional-norm rationale for the *Rice* and *Bass* rules continues to carry much persuasive force. But cf. Bill Swinford & Eric N. Waltenburg, *The Supreme Court and the States: Do Lopez and Printz Represent a Broader Pro-State Movement?*, 14 J.L. & POL. 319, 331 (1998) (suggesting probable "narrowness" of *Lopez*).

\(^{178}\) See Tribe, *supra* note 24, § 5-8, at 317 (stating that the *Rice/Bass* rule is "an important complement to the political check on congressional exercise of the commerce power" because it keeps Congress "from resorting to ambiguity as a cloak for its failure to accommodate the competing interests bearing on the federal-state balance"). Notably, Professors Eskridge and Frickey have criticized the Rehnquist Court's strong use of clear-statement rules to protect federalism interests, by arguing that those interests are not deserving of the distinctively aggressive judicial protection they have received. See Eskridge & Frickey, *supra* note 116, at 642-44. Professors Eskridge and Frickey do not dispute, however, that structural rules of clarity—in contexts where they do properly apply—in fact work to safeguard constitutional values by encouraging dialogue and deliberation. See id. at 646.
B. Super-Clear-Statement Rules

Some rules of clarity pack an added punch. So it is with one doctrine we already have encountered: the rule of *Gregory v. Ashcroft*.\(^\text{179}\) That case addressed whether the ADEA barred the imposition of mandatory retirement rules for state judges.\(^\text{180}\) In resolving this question in favor of state autonomy, the Court unabashedly endorsed a "plain statement rule."\(^\text{181}\) Given the threat the ADEA presented to "an authority that lies at 'the heart of representative government,'"\(^\text{182}\) the Court declared that "we must be absolutely certain that Congress intended such an exercise" of its legislative powers.\(^\text{183}\)

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179. 501 U.S. 452 (1991); see also supra notes 28-29 and accompanying text.
181. *Id.* at 461, 464, 470.
182. *Id.* at 463.
183. *Id.* at 464 (emphasis added). To what other state activities does the *Gregory* principle extend? See *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1940 (2000) (Stevens, J., dissenting) (arguing for heightened presumption of nonpreemption when agency, rather than congressional action, is at issue; noting, for example, that "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of the states"); Pennsylvania Dept of Corrections v. Yeskey, 524 U.S. 206, 209 (assuming, without deciding, that *Gregory" govern[s] application of the ADA to the administration of state prisons" in that "management of state prisons, like establishing the qualifications of state government officials, is a traditional and essential State function"); see also *Philip P. Frickey*, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MiNN. L. REV. 199, 211 (1999) (suggesting that Court in the *BFP* case extended the *Gregory* canon, "which itself applied only to protect state governments . . . to federal preemption of core aspects of the local police power regulating private citizens, such as the state property laws"); adding that this extension was a great surprise and that "[b]ecause neither the *Gregory* canon, nor its *BFP* offspring was an 'established' canon, it is inescapable that the creation of both canons was judicial lawmakering"). As observed by Professors Eskridge and Frickey:

*Gregory* itself provides little guidance on when to apply the super-strong canon, referring at one time or another to "areas traditionally regulated by the States," state decisions of "the most fundamental sort for a sovereign entity," "authority that lies at 'the heart of representative government'" and intrusion on "state governmental functions."

*Eskridge & Frickey, supra* note 116, at 634 (quoting *Gregory v. Ashcroft*, 501 U.S. 452 (1991)). Eskridge and Frickey also have expressed uncertainty about the extent to which the *Gregory* principle limits exercises of the Fourteenth and Fifteenth Amendment enforcement powers, as opposed to exercises of the commerce power. See *id.* at 635 n.206; see also *id.* at 643 (noting that the Court did not cite the *Gregory* principle in applying Voting Rights Act to election of state judges in *Chisom v. Roemer*, 501 U.S. 380 (1991), even though that case was decided on the same day as *Gregory*).
There can be no doubt that the Court in *Gregory* (and in other rule-of-clarity cases we soon shall discuss) has taken a "similar approach" to *Rice* and *Bass* in an effort to enhance deliberation in the federalism field. Indeed, quoting from *Bass*, the Court in *Gregory* explicitly stated that its purpose in requiring clarity was to ensure "that the legislature has in fact faced . . . the critical matters involved." Does it follow that the clear-statement rule of *Gregory* operates in exactly the same manner as the rule of *Rice* and *Bass*?

Apparently it does not, because the Court in *Gregory* emphasized that Congress had to make its intentions so "'unmistakably clear in the language of the statute'" that "it must be plain to anyone reading the Act that it covers judges." This mandate of textual explicitness seems to mark a departure from more garden-variety rules of clarity. Even in the face of *Rice*, for example, the Court

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185. As stated by Professor Frickey:

The clear-statement requirement adopted in *Gregory* is a forthright judicial effort to influence congressional processes. Most obviously, the approach attempts to force Congress to draft statutes clearly. More subtly, it essentially seeks not just to force the objection based on the invasion of state sovereignty onto the congressional agenda, but also to highlight it. The assumption must be that the *Gregory* canon of interpretation will lead to more thorough and thoughtful congressional deliberations concerning whether invasions of state sovereignty are justified, and is not simply a way to prevent wholly inadvertent intrusions on state authority.

Frickey, *supra* note 27, at 722; see also Eskridge & Frickey, *supra* note 116, at 597 ("[T]he Court may have a legitimate role in forcing the political process to pay attention to the [federalism] values at stake, and super-strong clear statement rules are a practical way for the Court to focus legislative attention on these values."); *Massey*, *supra* note 175, at 212 ("The plain statement rule of *Gregory* attempts to [protect state interests] by making sure that Congress is aware of federalism concerns when it enacts legislation impinging upon the States.").


188. *Id.* at 467 (emphasis added).

189. To declare the existence of this distinction is somewhat risky because the Court itself has not fleshted out in any detail the precise level of clarity each of these different rules demands. To understand how *Gregory* may differ from more orthodox clarity rules, however, it may be worth contrasting it with a clarity rule the Court has described with some level of explicitness—namely, the rule of *Chevron Oil Co. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that rule, courts are to reject an agency's construction of a statute the agency has been charged to administer when that construction is "contrary to clear
has found "implied" (as opposed to "express") preemption of state legislation,\(^{190}\) including through Congress's "occupying the field."\(^{191}\) The Court also has said that preemption may occur when state law "stands as an obstacle" to accomplishment of the aims of Congress, thus signaling that the revealed purposes of a law may generate preemption whatever the clarity of the actual statutory text.\(^{192}\) In congressional intent." \(\text{Id. at 843 n.9.} \) Courts, however, are to determine the clarity of congressional intent by "employing traditional tools of statutory construction"—not only by looking to statutory text. \(\text{Id. (emphasis added).} \) Other illustrative clear-statement rules that stand in contrast with the text-focused rule of \textit{Gregory} are suggested by \textit{Muscarello v. United States}, 524 U.S. 125, 138 (1998) (emphasizing that "[t]he simple existence of some statutory ambiguity, however, is not sufficient to warrant application" of the rule of lenity and that the rule applies only if there is "grievous ambiguity or uncertainty" after "seizing everything from which aid may be derived" with regard to the statute's meaning (citations omitted)), \textit{Bryan v. Itasca County}, 426 U.S. 373, 393 (1976) (stating that, under canon concerning statutes that terminate Native American immunities, congressional intent must "be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history" (quoting \textit{Mattz v. Arnett}, 412 U.S. 481, 504-05 (1973)), and \textit{West v. Gibson}, 527 U.S. 212, 222 (1999) (concluding that, even "if we must apply a specially strict standard [of interpretation to find a waiver of sovereign immunity]... the statutory language, taken together with statutory purposes, history, and the absence of any convincing reason for denying the EEOC the relevant power, produce evidence of a waiver that satisfies the stricter standard")). \(\text{Cf West, 527, at 228 (Kennedy, J., dissenting).} \) ("To the extent the majority relies on legislative history and other extratextual sources, it contradicts our precedents and sets us on a new course, for before today it was well settled that '[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text.'" (quoting \textit{Lane v. Pena}, 518 U.S. 187, 192 (1996))).

190. \textit{See, e.g., Freightliner Corp. v. Myrick}, 514 U.S. 280, 287-89 (1995) (holding that, even where federal statute's express preemption clause does not reach challenged state law, implied preemption by that statute might be found). \textit{See generally GUNther & Sullivan, supra note 30, at 342.}


192. \textit{See Hines}, 312 U.S. at 67. These forms of implied preemption have been recognized by the Court in a variety of cases. \textit{See, e.g., Geier v. American Honda Motor Co., 120 S. Ct. 1913, 1927 (2000) (finding state tort law auto-airbag cause of action preempted, in light of lack of need for a "formal agency statement of pre-emptive intent as a prerequisite" to conflict preemption based on frustration of congressional purpose, at least where "notice and comment rulemaking" has occurred; indicating that "clear evidence of a conflict," but not a "specific statement of preemptive intent," is required); Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) ("Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption... and conflict pre-emption, where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963))); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); see also Gardbaum, supra note 65, at 828 (arguing for rejection of existing doctrine that recognizes implied
Bass itself, the Court examined not only the criminal statute's phrasing, but also its legislative history, and inquired only whether Congress had "convey[ed] its purpose clearly" (in contrast to having used "clear language") to the effect that it was regulating guns that had not crossed state lines. Given these contrasts, Gregory seems to embody not merely a clear-statement rule, but a super-clear-statement rule that ratchets up the Rice/Bass explicitness requirement to an even higher level in a specialized set of states' rights cases.

Is this raising of the explicitness requirement defensible? Defenders of Gregory will argue it is on the ground that that case involved state interests of a distinctly high order. Few matters,

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194. Id. at 349.
196. Notably, New York v. United States, 505 U.S. 144 (1992), makes it clear that the clear-statement rule of Gregory is something different from the rule of avoiding substantial constitutional questions. See id. at 170 (identifying avoidance doctrine and Gregory as giving rise to “two reasons” for interpreting federal law as providing incentives, rather than mandates, to the States); see also Pennsylvania Dep’t of Corrections v. Yeskey, 524 U.S. 206 (1998) (separately analyzing Gregory and avoidance-principle issues). Of course, sometimes—as in the New York case itself—each of the two rules may work to push the Court away from an outcome that threatens particularly strong federalism concerns.
197. Compare Eskridge & Frickey, supra note 116, at 611-12 (citing Gregory rule as among “super-strong clear statement rules,” which establish very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text targeted at the specific problem“), with id. at 638 (“clear statement rules . . . require rebuttal on the face of, or by implication from, the statute itself” (emphasis added)). At the same time, it is important not to overstate the differing levels of clarity required by Gregory and Bass, for ambiguity exists in the case law (and indeed in Gregory itself) on this point. For example, in Salinas v. United States, 522 U.S. 52 (1997), the Court suggested that a close relation exists between the rules of Gregory and of McNally v. United States, 483 U.S. 350 (1987), which relied on Bass to construe a federal criminal statute narrowly because Congress had not “spoken in clear and definite language.” McNally, 483 U.S. at 360; see Salinas, 522 U.S. at 60 (citing the “plain-statement requirement articulated in Gregory and McNally”). Unlike in Bass, however, the government’s rejected statutory interpretation in McNally concerned the prosecutable activities of a state’s own legislative officials. Indeed, in rejecting the broader reading of the statute, the Court in McNally expressed particular reservations about “involv[ing] the Federal Government in setting standards of disclosure and good government for local and state officials.” McNally, 483 U.S. at 360. In any event, nothing in Salinas or McNally suggests that the Court in Gregory was stating a rule of clarity equivalent to the seemingly more modest rule of clarity set forth in Rice.
after all, bear more closely upon a state's authority to define itself than the identification of who may discharge its most basic governing responsibilities. The Court focused on this feature of state autonomy when it emphasized in *Gregory* that the case concerned not only "traditionally sensitive areas," but a "political function" at "the heart of representative government." It is settled doctrine that judicial scrutiny intensifies in equal-protection, substantive-due-process and free-expression cases as constitutional concerns become more acute. *Gregory* suggests that the Court will resort to a kindred sort of clear-statement "heightened scrutiny" when confronted with what it perceives to be a particularly grave congressional threat to "states' rights."

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198. Notably, the Court in *Gregory* made little resort to authority to substantiate this assertion. There is, however, a significant body of precedent that supports the claim. See *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J., announcing judgment of the Court in an opinion expressing his own views) ("No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices."); *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900) ("It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers... should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."); *In re Duncan*, 139 U.S. 449, 461 (1891) (describing as "the distinguishing feature" of a republican form of government "the right of the people to choose their own officers for governmental administration, and pass their own laws"); *Merritt*, *supra* note 78, at 50-55 (collecting cases); see also *Lance v. Plummer*, 384 U.S. 929, 932 (1966) (Black, J., dissenting from denial of certiorari) (questioning federal court's power to order dismissal of local sheriff as sanction for violating injunction in light of federalism-engendered "authority of a State to conduct its governmental operations by agents responsible to the people of the State"); *Cintron-Garcia v. Romero-Barcelo*, 671 F.2d 1, 5 (1st Cir. 1982) (suggesting that the Guarantee Clause supports "allowing the states themselves to decide whether, and when, to fill interim vacancies"). *See generally Massey*, *supra* note 175, at 192 ("[T]he authority of the people of the States to determine the qualifications of their government officials may be inviolate from congressional invasion via the Commerce Clause" (quoting *Gregory*, 501 U.S. at 464)); *Merritt*, *supra* note 78, at 41 (asserting that "states should have the power to control the procedures by which their government officials are selected").


200. *Id.* at 462.

201. *Id.* at 463; *see Massey*, *supra* note 175, at 192-93 (suggesting that "the plain statement rule" of *Gregory* "only operates when the substance of the congressional action is one which bites into the core of state sovereignty").

The Court's recent Eleventh Amendment cases point in the same direction. In Atascadero State Hospital v. Scanlon, the plaintiff argued that Congress had abrogated state sovereign immunity for purposes of suits under the Rehabilitation Act of 1973. On behalf of a five-Judge majority, Justice Powell responded:

In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to temper the requirement . . . that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. . . . We decline to do so, and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

In embracing this super-clear-statement rule, Justice Powell relied on "[t]he fundamental nature of the interests implicated by the Eleventh Amendment." He also cited the danger that those interests might otherwise be underenforced because "[federal] courts themselves must decide whether their own jurisdiction has been expanded" when they rule on Eleventh Amendment abrogation issues. In other words, because federal judges would see it to be

203. See Frickey, supra note 27, at 721 (noting that "Gregory apparently borrowed its approach [from cases] interpreting federal statutes arguably abrogating the states' Eleventh Amendment immunity to suit").


205. Id. at 242 (emphasis added).

206. Id. Atascadero also held that state relinquishments (as opposed to congressional abrogations) of Eleventh Amendment immunity must be embodied in "an unequivocal waiver specifically applicable to federal-court jurisdiction." Id. at 241. As Justice Brennan observed in dissent, this specialized and "stringent" constitutional rule of interpretation is in tension with the general principle that "a federal court . . . should attempt to construe the state law . . . as a state court would." Id. at 253 n.5. In essence, the majority adopted a clear-statement rule with regard to state waiver—just as it had adopted a clear-statement rule with regard to congressional abrogation—to advance substantive constitutional interests in maintaining a vital federal system.

in their own self-interest to expand federal court jurisdiction, those judges might well overreach in interpreting federal legislation to negate state immunity from federal-court suit. As a result, the Court adopted a structural rule to safeguard Eleventh Amendment values in a context where the threat to those values seemed particularly acute.\textsuperscript{208}

In dissent, Justice Brennan signaled his agreement that the Court should shape Eleventh Amendment abrogation rules to safeguard substantive constitutional interests. In his view, however, \textit{Atascadero}'s "special rules of statutory draftsmanship\textsuperscript{209} (plurality opinion) (stating that "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985))).

208. \textit{See} George D. Brown, \textit{State Sovereignty under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon, 74 Geo. L.J. 363, 390 (1985) (reasoning that \textit{Atascadero} provides "judicial oversight of the legislative process to ensure that Congress has considered the states' interests"). Notably, the Court has adopted a related, federalism-driven rule to control congressional invasion of state interests by way of conditional spending programs. Purportedly relying on principles of contract law, the Court has held that federal spending conditions, to be effective, must be stated unambiguously. \textit{See} Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); \textit{see also} New York v. United States, 505 U.S. 144, 172 (1992); Suter v. Artist M., 503 U.S. 347 (1992) (disallowing section 1983 suit under federal statute based on spending power pursuant to \textit{Pennhurst} unambiguousness rule; quoting case's "contract" reasoning); South Dakota v. Dole, 483 U.S. 203, 207-08 (1987); New York Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413-14 (1973) (requiring "clear manifestation of intention" to condition state access to federal grant program). The Court's contract law reasoning is shaky because it is not at all clear that there is a clear-statement rule in contract law with respect to contractual offers. (In fact, courts interpret and enforce ambiguous contracts on a daily basis.) The better justification for this clear-statement rule appears to be the same one that underlies the Court's other structural federalism decisions: namely, that added clarity will heighten congressional understanding of and attentiveness to the interference with state autonomy threatened by the federal program. \textit{See} Eskridge \& Frickey, \textit{supra} note 116, at 621 ("\textit{South Dakota v. Dole} quoted the \textit{Pennhurst} canon, and in context this clear statement rule seems to be the only meaningful constraint. Thus, judicial aggressiveness at the interpretive level correlates with judicial deference at the constitutional level."). The Court also applied the \textit{Atascadero} super-clear-statement rule in \textit{Will v. Michigan Department of State Police}, 491 U.S. 58 (1989), when it concluded that a state is not a "person" subject to suit under the basic civil rights enforcement statute, 42 U.S.C. § 1983. The Court noted that \textit{Will} might be deemed distinguishable from \textit{Atascadero} because \textit{Atascadero}, unlike \textit{Will}, "was an Eleventh Amendment case." \textit{Id. But cf.} Alden v. Maine, 527 U.S. 706 (1999) (later holding that immunity from suit recognized in Eleventh Amendment context extends to suits, like \textit{Will}, brought in state court). Citing \textit{Rice} and quoting \textit{Bass}, however, the Court emphasized that "a similar approach" to the one in \textit{Atascadero} had been taken "in other contexts." \textit{Will}, 491 U.S. at 65.

209. \textit{Atascadero}, 473 U.S. at 253 n.3.
undermined "essential constitutional values protecting the freedom of our people" by forcing "federal courts to protect States that violate federal law." Like the majority, Justice Brennan, by drawing on the Amendment's text and history, considered whether the federalism values embodied in the Eleventh Amendment justified an unmistakable-clarity approach. He argued, however, that the majority had vastly overstated the strength of the state-autonomy interests at issue in the case. In sum, in *Atascadero* both the majority and the dissent focused on whether substantive constitutional values warranted adoption of a *structural* rule of clarity. Their differing resolutions of that issue reflected a difference of opinion about which constitutional values to emphasize.

*Atascadero* may be one of those cases in which it turns out that timing was everything. So it is because, in *Atascadero* itself, Justice Brennan stood on shaky ground in bemoaning the majority's purported subversion of "essential constitutional values." The Rehabilitation Act, after all, was not a part of the Constitution, and other abrogation cases of that time period, like *Atascadero*, concerned enforcement of federal statutes, rather than constitutional rights.

210. Id. at 258.
211. See id. at 258-302.
212. See *Atascadero*, 473 U.S. 234.
213. See id. An interesting contrast to *Atascadero* is provided by *Hutto v. Finney*, 437 U.S. 678 (1978). In *Finney*, the Court—by way of a majority opinion authored by Justice Brennan—interpreted 42 U.S.C. § 1983 to authorize the recovery of attorneys' fees from state treasuries in section 1983 actions. The state had argued that "Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity." Id. at 694. Justice Brennan, however, deemed any requirement of "an extraordinarily explicit statutory mandate" inapplicable in a case (like *Finney*) that involved "expenses incurred in litigation seeking only prospective relief," rather than "retroactive liability for prelitigation conduct." *Id.* at 695. Citing the "values of federalism served by the Eleventh Amendment," Justice Powell wrote in dissent that he favored requiring "statutory language sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislation." *Id.* at 705. The majority in *Finney*, while eschewing a super-clear-statement rule, emphasized that there were "plain indications of legislative intent" to abrogate the Eleventh Amendment defense. *Id.* at 694 (emphasis added). See, e.g., *id.* (referring to, among other things, Congress's rejection of "at least two attempts to amend the Act and immunize state and local governments from awards").
214. *Atascadero*, 472 U.S. at 258.
In the wake of *Atascadero*, however, two developments have radically altered the lay of this juridical landscape. First, in *Seminole Tribe of Florida v. Florida*, the Court held that Congress, regardless of the clarity with which it speaks, may *never* deprive states of their sovereign immunity as part of a legislative program it passes pursuant to its core Article I powers; rather, Congress may subject states to suit in enforcing only the *constitutional* protections afforded by the Civil War Amendments. Second, in *City of Boerne v. Flores*, the Court held that, in enforcing those Amendments, Congress may not expansively create new rights; rather, it may give protection against only those affronts that courts have found or can find, through established processes of judicial interpretation, to violate the Amendments' substantive guarantees. As a result of these twin developments, the *Atascadero* super-clarity rule no longer operates in the sort of case that *Atascadero* itself presented—namely, a case that involves enforcement against a state of a congressionally created right of action. Rather, the *Atascadero* rule now operates as a restriction on only those attempted congressional abrogations of immunity that target true, judicially cognizable *constitutional* violations. It follows that Justice Brennan's "essential constitutional values" critique—although perhaps overdrawn in *Atascadero* itself—has a powerful resonance today.

It is doubtful that the current Court will rush to overturn *Atascadero*’s super-clear-statement rule in light of these post-*Atascadero* developments. After all, the rule continues to serve its purpose of sharply focusing legislators’ attention on congressional threats to Eleventh Amendment values, particularly the value of

(Developmentally Disabled Assistance and Bill of Rights Act).

217. See id. at 59, 65-66.
219. Id. at 532.
221. See, e.g., *Kimel*, 120 S. Ct. 640 (applying *Atascadero* super-clear-statement rule in case alleging only a Fourteenth Amendment-based abrogation).
222. See generally *BICKEL*, *supra* note 6, at 181-82:

Legislators are likely to be more acutely aware of just what they are being
state fiscal autonomy repeatedly trumpeted in the Court's recent federalism decisions. \(^{223}\) The argument for reconsideration, however, is hardly frivolous. In particular, if the Court crafts a structural rule to take substantive constitutional values into account, it must pay heed to all such values, not only those values enshrined in the Eleventh (or any other particular) Amendment. \(^{224}\) Because the

asked to do if the language of a bill clearly defines what is aimed at than if the language is relatively broad, although its concrete application is clarified in debate or is defined post facto by the Court on the basis of what was common knowledge at the time of enactment and may therefore fairly be imputed to the legislators.

\(^{223}\) See Alden v. Maine, 527 U.S. 706, 749 (1999). Of course, recognizing the deliberation-heightening function of the Atascadero rule carries with it important analytical consequences for concrete cases. In Kimel, for example, Justice Thomas rejected the majority's conclusion that the Age Discrimination in Employment Act (ADEA) abrogated state immunity with adequate clarity where it incorporated by reference a provision of the Fair Labor Standards Act (FLSA) that abrogated state sovereign immunity for purposes of that Act. See Kimel, 120 S. Ct. at 655. He reasoned that the "provision simply does not reveal Congress' attention to the augmented liability and diminished sovereignty concomitant to an abrogation of Eleventh Amendment immunity" in the ADEA context. Id. (Thomas, J., concurring and dissenting). Justice Thomas rejected in particular the majority's willingness to find a "clear statement by incorporation" of the FLSA enforcement provision into the ADEA because the relevant section of the FLSA had been amended to abrogate state sovereign immunity only after its incorporation into the ADEA. Id. As Justice Thomas explained:

Where Congress amends an Act whose provisions are incorporated by other Acts, the bill under consideration does not necessarily mention the incorporating references in those other Acts, and so fails to inspire confidence that Congress has deliberated on the consequences of the amendment for the other Acts . . . . And, given the purpose of the clear statement rule to "assur[e] that the legislature has in fact faced" the issue of abrogation, . . . I am unwilling to indulge the fiction that Congress, when it amended [the FLSA provision], recognized the consequences for a separate Act (the ADEA) that incorporates the amended provision.

\(^{224}\) Without putting the point quite this way, Professor Sunstein made the same observation in critiquing the spending-power clear-statement rule set forth in the Pennhurst case. See supra note 119. As he explained:

The Court decided Pennhurst on the basis of an interpretive norm derived from the constitutional background, not from the statute at issue.

For reasons explored above, federalism principles are properly invoked, at least in ordinary settings, to require a clear statement from Congress for the imposition of significant duties on the states. . . . But two considerations suggest that Pennhurst was incorrectly decided.
Atascadero rule, in the wake of Seminole Tribe and Flores, will operate to foreclose judicial recourse against states only for actual and otherwise remediable constitutional violations, it may well be seen to subvert, more than to serve, the Constitution's paramount substantive goals. And if that is so, there is every reason to say that this rule should not endure.

C. Extra-Super-Clear-Statement Rules

Clear-statement and super-clear-statement rules operate when both ambiguity and constitutional difficulty inhere in a legal text. Confronted with such cases, a court can skirt the constitutional problem by reading the statute in the way that makes the difficulty go away. What if, however, a court cannot interpret its way around the constitutional challenge because it cannot invoke a rule fairly characterizable as one of statutory construction? Is there still room to insist that, at least in acutely sensitive areas, the lawmaker must employ a greater measure of clarity before a court will address and resolve the "substantive" constitutional issue at hand?

In a sense, the vagueness doctrine recognizes such a judicial power. The settled rule is that federal courts lack authority to reject definitive state court interpretations of state statutes. Thus, in cases that present challenges to convictions under state statutes, a court cannot afford a petitioner relief on the ground that the state statute, properly interpreted, does not apply. By invoking the constitutional vagueness doctrine, however, a court can achieve the same result. In effect, a court can (and occasionally does) say to a state: "We concede that you may prosecute the conduct engaged in by this individual and that your statute, as properly interpreted,

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First, a constitutional norm calls for aggressive construction of statutes involving the developmentally disabled . . . .

Second, federalism principles have much less force in cases in which Congress attempts to protect a traditionally disadvantaged group from state political processes. The ordinary presumption in favor of state autonomy is countered by the fourteenth amendment—a self-conscious limitation on state power. Invocation of principles of state autonomy in the context of a socially subordinated group—to justify a narrow reading of a statute enacted on its behalf—is positively perverse in light of constitutional structure and history.

Sunstein, Interpreting, supra note 119, at 501.

225. See infra note 240 and accompanying text.
does proscribe that conduct. We are throwing out the conviction, however, because the statute, as it stands, is too indeterminate. In other words, you may regulate this conduct, but only with a statute that identifies with deliberation-enhancing clarity just what conduct is, and is not, proscribed.” In this way the vagueness doctrine serves much the same deliberation-enhancing purpose with regard to state statutes that constitutionally driven rules of statutory interpretation serve with respect to federal laws.226

May federal courts employ other clarity-driven techniques to deal with constitutionally problematic state statutes? At least according to Justice O’Connor’s dispositive concurring opinion in Thompson v. Oklahoma,227 they sometimes may. The issue in Thompson was whether the Cruel and Unusual Punishment Clause blocked Oklahoma from executing a person, properly tried as an adult as a matter of state law, who had committed a capital murder at the age of fifteen. Four justices, in an opinion by Justice Stevens, concluded that the Clause proscribed the execution of so young an offender in light of now-settled “evolving standards of decency.”228 Four justices, in an opinion by Justice Scalia, concluded that the Clause did not bar the execution because nineteen states authorized prosecution of fifteen-year-old offenders as adults, with the consequence that they became statutorily eligible for the death penalty.229 In other words, eight justices were prepared to decide the case on the basis of an on-or-off rule, with four justices deeming the rule to be “on,” and four others deeming it “off.”230

In her decisive opinion, Justice O’Connor chose a different pathway through the case. Gravitating toward, though not quite embracing, Justice Stevens’s analysis of the “evolving standards”

226. See BICKEL, supra note 6, at 201 (emphasizing close relationship between statutory interpretations driven by constitutional concerns and invocations of the vagueness and nondelegation doctrines). The vagueness rule embodies a number of structural features, and for this reason I focus on it in more detail later in this article. See infra notes 908-19 and accompanying text.
228. Id. at 821 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
229. See id. at 859-78.
230. See supra notes 7-13 and accompanying text. We shall see in due course that describing the Eighth Amendment’s evolving-standards principle as an on-or-off rule is an oversimplification. See infra notes 561-78 and accompanying text. For now, however, the description is apt for purposes of contrasting the opinions of Justices Stevens and Scalia from the more obviously and explicitly structural approach of Justice O’Connor.
issue, Justice O'Connor asserted that "a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist."\textsuperscript{231} Justice O'Connor, however, wanted "better evidence" on this subject\textsuperscript{232} and detected "narrower grounds" for ruling in favor of the inmate.\textsuperscript{233} Her concededly "unusual" approach\textsuperscript{234} to "this unique situation"\textsuperscript{235} emanated from what she saw as the Court's distinctively structural death penalty case law.

Justice O'Connor first noted that "[a]mong the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction."\textsuperscript{235} She added that "[t]he restrictions that we have required under the Eighth Amendment affect . . . legislatures," as well as "sentencing authorities."\textsuperscript{237} Then, in the critical passage of her opinion, Justice O'Connor explained:

Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.\textsuperscript{238}

She continued:

\textsuperscript{231} Thompson, 487 U.S. at 848-49 (emphasis added).
\textsuperscript{232} See id. at 849.
\textsuperscript{233} See id.
\textsuperscript{234} See id. at 858.
\textsuperscript{235} Id. at 857.
\textsuperscript{236} Id. at 856.
\textsuperscript{237} Id.; see also Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion) (suggesting need, in the death penalty context, for a "carefully drafted statute").
\textsuperscript{238} Thompson, 487 U.S. at 857.
Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma Legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.\footnote{Id. at 857-58.}

Put in simpler terms, Justice O'Connor concluded that, although Oklahoma statutory law, which the Supreme Court could not reinterpret,\footnote{See, e.g., New York v. Ferber, 458 U.S. 747, 767 (1982) (reaffirming that "the construction that a state court gives a state statute is not a matter subject to our review").} subjected fifteen-year-old murderers to capital punishment, the level of clarity with which the state legislature had spoken was not sufficient for Eighth Amendment purposes. For Justice O'Connor, the Amendment required more "careful consideration" and "serious reflection" than Oklahoma lawmakers had given this grave matter.\footnote{Thompson, 487 U.S. at 856-57.} If a state legislature were in fact going to subject fifteen year olds to the death penalty, it was necessary, at a minimum, that it pass a law that specifically provided for that result.\footnote{See State v. Stone, 535 So. 2d 362, 364-65 (La. 1988) (disallowing death penalty for fifteen-year-old offender because "[t]here is no evidence that the Louisiana legislature made the type of conscious, deliberate decision to impose the death penalty on those under the age of sixteen that Justice O'Connor found to be constitutionally mandated").}

Justice O'Connor's opinion was not happily received by Justice Scalia. He complained that it put in place "the loose cannon of a brand new principle"\footnote{Thompson, 487 U.S. at 877.} that wrongly intruded on "the process of legislation."\footnote{Id.} Such an approach, he added, could equally well justify "imposing a requirement that the death penalty for felons
under 16 be adopted by a two-thirds vote of each house of the state legislature, or by referendum, or by bills printed in 10-point type. Justice Scalia was particularly critical of Justice O'Connor's claim that she was taking a "narrower approach" than the majority to the case. As he explained:

I know of no authority whatever for our specifying the precise form that state legislation must take, as opposed to its constitutionally required content. We have in the past studiously avoided that sort of interference in the States' legislative processes, the heart of their sovereignty. . . . Thus, while the concurrence purports to be adopting an approach more respectful of States' rights than the plurality, in principle it seems to me much more disdainful.

There is much to say about Justice Scalia's potent critique of Justice O'Connor's structural approach to the Thompson case. For now, however, it suffices to note that much of his criticism applies to structural rules in general. The rules of Gregory and Atascadero, for example, very much concern "the precise form that . . . legislation must take" to reach a legislatively desired end. And we soon shall see that many other rules, because they are structural in nature, focus on "the States' legislative processes." The point is that Justice Scalia's critique must be assessed in light of the broader message of this Article: that the Court, in a wide variety of contexts, has protected substantive constitutional interests through the use of process-centered structural rules.

To say these things is not to say that cases like Gregory and Atascadero controlled the Thompson case. After all, both Gregory and Atascadero involved federal statutes subject to federal-court interpretation. Justice O'Connor's approach to Thompson, in contrast, inspired unease precisely because it overrode the meaning.

245. Id. at 875-76.
246. See id. at 877.
247. Id. at 876-77.
248. Id.; see, e.g., Frickey, supra note 27, at 722 (noting that Gregory embodies "a forthright judicial effort to influence congressional processes").
249. Thompson, 487 U.S. at 877. The rules that govern state affirmative action programs are illustrative. See infra notes 392-414 and accompanying text.
250. See supra notes 179-215 and accompanying text.
of state legislation that was no longer open to interpretation on the ground of ambiguity. This observation does not wholly undermine Justice O'Conner's analysis in Thompson because constitutional rulings often override authoritatively interpreted state statutes. It may help explain, however, why courts have not routinely embraced extra-super-clear-statement rules.

Even so, Justice O'Conner's approach to Thompson is not an isolated development. Realist commentators, for example, long

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251. See supra note 240 and accompanying text.
252. See supra notes 6, 9-13 and accompanying text.
253. There is another important point to be made in response to the argument that Thompson is readily distinguishable from Gregory and Atascadero because those cases involve mere statutory interpretation. The thought that underlies that argument is that courts must and do engage in statutory interpretation of ambiguous statutes all the time. Thus, the sort of exercise involved in Gregory and Atascadero falls comfortably within our judicial traditions (while the sort of exercise engaged in by Justice O'Connor in Thompson, it may be said, does not). There is, however, a conspicuously weak link in this chain of reasoning. Gregory and Atascadero involve a mode of "statutory interpretation" that is so unusual, so nonhistoric and so distinctively constitutional that it would seem to fall outside our ordinary interpretive traditions. This is the case because traditional statutory interpretation draws on a variety of sources (including, for example, underlying legislative purpose, interpretive canons, legislative history, and the like). Under Gregory and Atascadero, however, all traditional tools of interpretation are jettisoned; courts—in these unique and distinctively constitutional contexts—focus myopically on the statutory text and, even then, must find in it an extraordinarily high level of explicitness.

Put differently, Gregory and Atascadero do not involve statutory interpretation as that process is ordinarily conceived, but instead demand a stark departure from it. In effect, those cases require—in contravention of basic norms of statutory interpretation—an override of the unambiguous meaning of statutes as unambiguosness is ordinarily determined. Viewed in this light, the Court's approach to Gregory and Atascadero cannot be defended as "mere" statutory interpretation and, in fact, is not far removed from Justice O'Connor's approach to Thompson.

A possible response to this argument is that our tradition of statutory interpretation does recognize a judicial prerogative to override even "the plain and unambiguous meaning of statutory language" in "rare and exceptional circumstances." Salinas v. United States, 522 U.S. 52, 58 (1997) (quoting Ardestani v. INS, 502 U.S. 129, 135 (1991)); accord, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 100 (1996) (Souter, J., dissenting). But even if such a prerogative exists, the authorities indicate that it may be exercised only to effectuate "the most extraordinary showing of contrary intentions" in the legislative history," Salinas, 522 U.S. at 57 (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)), or perhaps "to avoid absurd or glaringly unjust results," Sorrells v. United States, 287 U.S. 435, 450 (1932). Such conditions, however, do not underlie the principles of Gregory and Atascadero; after all, those principles ignore (rather than implement) legislative history, and the exercise of federal court jurisdiction over federal claims (including age discrimination claims brought by state judges) can hardly be viewed as either "absurd" or "unjust."

254. Nor has Justice O'Connor's opinion gone without praise. See Quill v. Vacco, 80 F.3d 716, 739 (2d Cir. 1996) (Calabresi, J., concurring) (citing "[t]he powerful and telling,
have asserted that the Court sometimes uses the vehicle of statutory construction to advance constitutional (and other) values in the face of congressional pronouncements that are not genuinely subject to interpretive dispute. Indeed, Professor Bickel suggested that this description fairly fit the Court’s application of the avoidance principle in Kent v. Dulles. Even more to the point, a Ninth Circuit panel drew on Thompson itself to forge an extra-super-clear-statement rule outside the death penalty context before encountering a reversal of its ruling by a sharply divided en banc court.

In Jones v. Bates, the court dealt with the adoption by California voters of Proposition 140, which stated that “[n]o [state]...
Senator may serve more than 2 terms" and "[n]o member of the Assembly may serve more than 3 terms." \(^{258}\) The issue was whether the approval of this initiative, by way of a statewide popular vote unaccompanied by legislative action, constitutionally effected a lifetime (as opposed to a one-term) ban on the reelection of state legislators who had served the designated number of terms. \(^{259}\) Before the Jones case reached the Ninth Circuit, the state courts had held that the initiative, properly interpreted as a matter of state law, imposed a lifetime exclusion; \(^{260}\) thus, just as in Thompson (and unlike in Gregory and Atascadero), the federal circuit court confronted a law it could not reshape by way of an ambiguity-driven interpretative rule. \(^{261}\) Faced with this situation, the circuit court panel nonetheless ruled that the new law, to the extent it barred reelection for life, was unconstitutional on clarity-based grounds. \(^{262}\)

At the root of the court's analysis was its conclusion that Proposition 140 "did not clearly inform [voters] that they were being asked to adopt a lifetime ban." \(^{263}\) The panel emphasized that a similar lack of particularity would not prove fatal to most state policy reforms; rather, two special factors rendered a specific reference to a lifetime ban a constitutional necessity in this case. First, the reform effected by Proposition 140 came by way of a voter initiative. \(^{264}\) Echoing concerns expressed in literature going back to the Federalist Papers, the panel viewed with heightened skepticism "direct ballot measures" because they "lack the kinds of critical, deliberative filters that the Framers contemplated." \(^{265}\)

\(^{258}\) Id. at 845.

\(^{259}\) See id. at 845-46.

\(^{260}\) See id. at 846.

\(^{261}\) See supra note 240 and accompanying text.

\(^{262}\) As stated by Judge Fletcher in her dissent from the en banc opinion, "the process that produced Proposition 140 was infirm." Jones, 131 F.3d at 873 (emphasis added).

\(^{263}\) Id. at 856 (emphasis added in part).

\(^{264}\) See id. at 857.

\(^{265}\) Id. at 859. As the panel stated:

Before an initiative becomes law, no committee meetings are held; no legislative analysts study the law; no floor debates occur; no separate representative bodies vote on the bill; no reconciliation conferences are held; no amendments are drafted; no executive official wields a veto power and reviews the law under that authority; and it is far more difficult for the people to "reconvene" to amend or clarify the law if a court interprets it contrary to the voters' intent. The public also generally lacks legal or legislative expertise—or even a duty (as legislators have under Article VI) to support the Constitution. It lacks the
Second, according to the panel, Proposition 140 merited special scrutiny because it endangered "fundamental rights," namely, the rights to seek elective office and to vote for candidates of one's choice. Second, according to the panel, Proposition 140 merited special scrutiny because it endangered "fundamental rights," namely, the rights to seek elective office and to vote for candidates of one's choice. Pointing to these substantive values, the Court limited its holding to "instances like this, in which the measure raises serious constitutional questions" about "fundamental, constitutional rights, such as voting rights." In short, the panel in Jones embraced a structural rule of extra-super clarity to safeguard what the panel saw as distinctly important, and seriously threatened, substantive constitutional values.

It is a matter of no little consequence (particularly to officeholders in California) that the en banc court rejected the panel's disposition of the Jones case. In doing so, however, the en banc majority did not broadly question the use of structural rules. Rather, the majority "assumed, without deciding, that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot measure dealing with term limits." In the case at hand, however, the en banc court found no substantive constitutional interests were infringed by the term-limit rule and further declared that

ability to collect and to study information that is utilized routinely by legislative bodies.

Id. at 860 (citations omitted). In other words, the Court embraced a sort of structural "who" rule under which a policy, in this context, could be properly put in place through ordinary legislative processes, but not by way of direct voter action. For a systematic treatment of constitutional "who" rules, see infra Part XI.

266. See Jones, 131 F.3d at 857.

267. Id. at 860-61.

268. At least one commentator has voiced support for the decision of the panel in Jones. See Marci A. Hamilton, Buried Voices, Dominant Themes: Justice Hans Linde and the Move to Structural Constitutional Interpretation, 35 WILLAMETTE L. REV. 167, 179 (1999) ("Unfortunately, this judicial attack on public initiatives was overturned . . .").

269. See supra note 257-58 and accompanying text.

270. Jones, 131 F.3d at 846. In a separate concurring opinion, Judge O'Scanlain expressed the view that no such power exists in the federal judiciary, see id. at 852-55, even when "an initiative affects a 'fundamental right' and . . . when said initiative imposes a 'severe' limitation on that right." Id. at 853 n.4. No other judge of the court, however, joined this opinion, while two judges specifically found that a constitutional notice violation had occurred. Moreover, even Judge O'Scanlain did not dismiss the precedential force of Justice O'Connor's opinion in Thompson, emphasizing instead the ruling's distinguishable character because of its "limitation . . . to death penalty cases." Id. at 853 n.5.

271. See id. at 846-47.
California "provided sufficient notice making it clear that Proposition 140 required lifetime bans."\textsuperscript{272}

What is one to make of Thompson and Jones? In particular, do the sorts of extra-super-clear-statement rules identified in these cases have a future in our law?\textsuperscript{273} The answer to this question will depend in part on how courts come to conceptualize more orthodox clear-statement and super-clear-statement rules. If judges view those rules as garden-variety rules of statutory construction—aimed primarily at distilling a lawgiver's intent—then they offer limited predecendal support for extra-super-clear-statement principles.\textsuperscript{274} After all, extra-super-clear-statement rules operate only when subconstitutional meaning is settled;\textsuperscript{275} indeed, it is that very fact that induces application of the extra-super-clear-statement label.\textsuperscript{276} If, however, courts perceive cases like Kent, Gregory, and Atascadero as embodying rules that are (or are largely) constitutional in nature,\textsuperscript{277} those courts may be more receptive to the

\textsuperscript{272} Id. at 846.

\textsuperscript{273} For a post-Jones decision that focuses on the special features of death penalty cases and Justice O'Connor's approach to Thompson, see 
\textit{Harris v. Wright}, \textit{93 F.3d 581} (9th Cir. 1996). In his dissent in \textit{Harris}, Judge Pregerson invoked a Thompsonesque approach in advocating habeas corpus relief for a prisoner given a mandatory life sentence, without possibility of parole, for engaging in a capital offense when fifteen years old. The majority rejected this contention, however, on the following logic:

[T]here's no evidence of a consensus against mandatory life without parole for fifteen-year-olds and we don't subject life imprisonment without parole to the same searching scrutiny we apply to capital punishment. . . . Where the question isn't life or death, the Constitution doesn't require the state to prove its legislature contemplated each specific application of clearly phrased, general laws.

\textit{Id. at 585. See generally Herrera v. Collins}, \textit{506 U.S. 390}, \textit{399} (1993) ("In capital cases, we have required additional protections because of the nature of the penalty at stake."); \textit{Woodson v. North Carolina}, \textit{428 U.S. 280}, \textit{305} (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

\textsuperscript{274} \textit{Compare} Hilton v. South Carolina Pub. Rys. Comm'n, \textit{502 U.S. 197}, \textit{206} (1991) (suggesting that Gregory and related authority "describe the plain statement rule as 'a rule of statutory construction . . .,' rather than as a rule of constitutional law"), \textit{with id. at 207} (O'Connor, J., dissenting) ("The clear statement rule is not a mere canon of statutory interpretation. Instead, it derives from the Constitution itself.").

\textsuperscript{275} \textit{See supra} notes \textit{240-52} and accompanying text.

\textsuperscript{276} \textit{See supra} note \textit{253} and accompanying text.

\textsuperscript{277} \textit{See, e.g., EEOC v. Arabian Am. Oil Co.}, \textit{499 U.S. 244}, \textit{262-63} (1991) ("Clear statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them."); \textit{Posner, supra} note \textit{119}, at 285 (characterizing, but criticizing, avoidance principle as creating a "judge-made 'penumbra'"
sort of unambiguously constitutional deliberation-enhancing rule embraced by Justice O'Connor in *Thompson.*278 We already have seen reasons for conceptualizing the rules that require clear or super-clear statements as distinctively constitutional in character,279 and there are other reasons too.280 It also will aid the cause

around the Constitution's own terms); Frickey, *supra* note 27, at 722 ("Gregory is an approach for implementing Garcia's procedural focus, rather than some interpretive end in itself . . . .").

278. This sentence raises a question that is at once deeply important and almost surreally abstract: What does it mean to say that doctrines typically conceived of as rules of statutory interpretation “are (or are essentially or largely) constitutional in nature”? At a minimum, a rule’s constitutional pedigree is clear if Congress can displace that rule only by way of constitutional amendment. Could Congress, for example, repeal by statute the interpretive principle of constitutional doubt invoked in cases like *Kent v. Dulles*? And, even if Congress could, could it also repeal by statute the federalism-driven clear-statement rules applied in cases like *Rice and Bass*? Perhaps it could not. It has been suggested, after all, that the Court recognized the *Rice and Bass* rules in part to compensate for the erstwhile underenforcement of federalism values. See *supra* notes 174-78 and accompanying text. Yet, if these rules in fact reflect an effort to give minimum protection to otherwise underenforced constitutional commands, it is hard to see how Congress, consistent with those commands, can jettison those rules. There is, on top of this, a more basic point. Whether the *Rice and Bass* rules are constitutionally reversible, any acknowledgment that they spring from efforts to compensate for the underenforcement of constitutional norms necessarily would reveal that they have constitutional origins. Put another way, even reversible rules of interpretation can compensate—albeit less aggressively than nonreversible ones—for a perceived underenforcement of substantive guaranties. It is the derivation of the rule from the substantive guaranty—rather than its nonreversibility—that establishes its constitutional character.

In sum, the structural rules of clarity established in *Rice and Bass* have their origins in the Constitution. No obvious reason exists to say that rules of super clarity (like the ones applied in *Gregory* and *Atascadero*) are any less sturdily founded upon substantive constitutional values. And if both ordinary clear-statement and super-clear-statement rules are fairly said to derive from the Constitution, it hardly seems illogical to say that extra-super-clear-statement rules are derivable from the Constitution too.

279. See *supra* notes 252-56 and accompanying text. See generally Eskridge & Frickey, *supra* note 116, at 597 ("What the Court is doing is creating a domain of 'quasi-constitutional law' in certain areas: Judicial review does not prevent Congress from legislating, but judicial interpretation of the resulting legislation requires an extraordinarily specific statement on the face of the statute for Congress to limit the states . . . ."). That these rules have more of an implement-constitutional-values than find-the-intent-of-the-legislature function is suggested by sources cited in *supra* notes 255-56.

280. Consider, for example, *Dellmuth v. Muth,* 491 U.S. 223 (1989). There, the Court applied the super-strong *Atascadero* rule to a federal statute designed to protect the handicapped, which was adopted a decade before *Atascadero* was handed down. As observed by Professors Eskridge and Frickey: "[U]nder the Supreme Court's prevailing Eleventh Amendment precedent in 1975, when Congress adopted the statute, the jurisdictional language covering actions against the states plus the specific legislative history were probably enough to rebut the presumption against congressional abrogation of the states'
of extra-super-clear-statement rules if we can identify in the case
law other doctrines that cause constitutionality to turn on the form
that state law pronouncements take. We turn now to one set of
cases that involve doctrines of this kind.

III. FORM-BASED DELIBERATION RULES

A shared feature of clear, super-clear, and extra-super-clear-
statement rules is apparent upon reflection: each type of rule steers
lawmakers toward placing a sharper focus on the consequences, and
especially the constitutionally relevant consequences, of proposed
governmental action. Rules of clarity, however, do not provide the
sole means of fighting off legislative casualness in the service of
safeguarding constitutional values. Judges may foster a salutary
deliberativeness by insisting that certain forms of legislative
policymaking be deployed.

Consider the dormant Commerce Clause. From its earliest days,
this bedrock constitutional principle has outlawed state taxes that
favor intrastate over interstate business activity. At the same
time, the Court has signaled its willingness to uphold state-created
monetary subsidies for local businesses that have precisely the
same economic effect. How can this be?

Eleventh Amendment immunity . . . .” Eskridge & Frickey, supra note 116, at 638-39. The
Court, however, paid no heed to this then-existing legislative backdrop in distilling the then-
existing legislature's intent. Instead, it mechanically applied the thereafter-adopted
Atascadero rule in the same retroactive way it would apply any other constitutional doctrine.
Professors Eskridge and Frickey see in Dellmuth “a certain judicial haughtiness and
uncooperativeness that is surely inconsistent with the humble due process of lawmaking
rationale.” Id. at 638. I am not so sure. Assuming that Eleventh Amendment values in fact
justified the structural protection of those values enshrined in Atascadero, it seems fair to
say that those values are no less implicated by a congressional exposure of the states to suit
in 1975 than in 1995. In other words, if the purpose of Atascadero is to force a high level of
deliberativeness, rather than to discover true congressional intent, the ruling in Dellmuth
seems entirely consistent with the Atascadero case. For another case that arguably reflects
the same sort of nunc pro tunc approach of Dellmuth, see Vermont Agency of Natural Res.
v. United States ex rel. Stevens, 120 S. Ct. 1858 (2000). In that case, Justice Stevens in
dissent specifically complained that the Court's refusal to read the federal qui tam statute
to cover actions against states rested on postenactment authorities, apparently including the
Court's clear-statement decision in Will v. Michigan Dept' of State Police, 491 U.S. 58, 65

281. See generally Tribe, supra note 24, § 6-17 (discussing state discriminatory taxes
forbidden by the Commerce Clause).

Several explanations exist, but the core rationale is that the form of the state's action may act as a structural brake on (or stimulus to) the invasion of constitutional interests in fostering a borderless economy. From this perspective, there is every reason for courts to countenance subsidies more readily than targeted tax breaks. "Why? Because... government decisions about subsidies are more likely to provoke public critique and to generate periodic reevaluation than economically comparable decisions about tax policy." This is the case because a "subsidy involves the direct transfer of public monies" and thus is "subject to heightened political visibility." In addition, "[t]ax laws are generally effective until repealed," while "subsidies... routinely show up—and are subject to recurring evaluation—as expense items in perennially controversial state budget bills." In the same vein, "a variety of psychological reasons... suggest that citizens may well be more inclined to look the other way when legislators enact a tax break than when they adopt an affirmative monetary subsidy with comparable economic effects." In short, "for many reasons—focusing on visibility, intelligibility, self-limitation and..."
impermanence—subsidies pose less of a threat to dormant Commerce Clause values than discriminatory tax breaks."

The Court considered the role of form-based deliberation rules in a constitutional setting far removed from the dormant Commerce Clause when it expounded on criminal-jury-trial and burden-of-proof rights in *Apprendi v. New Jersey.* That case concerned a state "hate crimes" law that authorized increased punishment for any criminal offense when the trial judge found, by a preponderance of the evidence, that it had been committed "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." The Court concluded that this sentence-enhancement provision violated defendants' constitutional rights. At least as a rule, the Court reasoned, an adjudicative finding that supported a sentence greater than the statutory maximum punishment for the underlying crime itself (in this case, second-degree firearm possession for an unlawful purpose, which carried a punishment of five-to-ten years imprisonment) had to be assigned to a jury and made beyond a reasonable doubt. Because the New Jersey hate crime enhancement law authorized an additional ten years of imprisonment, and actually resulted in the imposition of a twelve-year term in Mr. Apprendi's case, the statute as applied offended this constitutional principle.

Four dissenters vigorously rejected this outcome as being based on "meaningless formalism." They reasoned that, consistent with the majority's reasoning, states could keep in place judge-made preponderance-of-the-evidence enhancements by simply expanding the possible maximum punishment for each underlying offense. For example:

First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one

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289. *Id.* at 1002. *See generally Boris I. Bittker, Bittker on the Regulation of Interstate and Foreign Commerce § 6.06[G], at 6-78 to 6-79 (1999) (discussing subsidy/tax-break distinction).

290. 120 S. Ct. 2348 (2000).

291. *Id.* at 2351 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).

292. *See id.* at 2363.

293. *See id.*

294. *See id.* at 2389 (O'Connor, J., dissenting).
who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years’ imprisonment.  

Moreover, even if the majority’s principle would not tolerate such a transparent evasion, New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years’ imprisonment for one who commits that criminal offense. Second, New Jersey could provide that a defendant convicted under the statute whom a judge finds, by a preponderance of the evidence, not to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence no greater than 10 years’ imprisonment.

According to the dissenters, a constitutional rule that tolerated such a hypothetical statute, while simultaneously invalidating the enhancement provision at issue in Apprendi, reflected “pure formalism,” the glorification of “approved phrasing,” and the endorsement of “a meaningless and formalistic difference in drafting . . . criminal statutes.”

Responding to the dissenters’ form-over-substance argument, the majority focused squarely on the importance of “structural democratic constraints.” First, according to the majority, the dissent’s proposed alternative would require a state legislature “to revise its entire criminal code if it wished to render sentence enhancements as broadly applicable as the New Jersey statute
challenged in Apprendi had made them. Second, the dissent's supposedly equivalent statutory proposals would openly "expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime." According to the majority:

This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequence, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate." The crux of this reasoning is that statutory form matters. Where the dissenters saw only opportunities for evasion, the majority detected opportunities to focus the legislative mind. Faced with an innovation that threatened to extend many prison terms based on fact findings made neither by a jury nor beyond a reasonable doubt, the Court deemed it critical that, at the least, the legislature focus painstakingly on what it was about to do. The Court in Apprendi thus remanded the matter of hate crime legislation to the New Jersey legislature. In taking this action, the Court said in effect: If in fact you wish to insist on abrogation of the ordinary jury-trial and burden-of-proof rules, you must demonstrate your consciousness of the trade-offs you are making by legislating in a form that is meticulous and attentive.

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302. Id.
303. Id. (Powell, J., dissenting) (quoting Patterson v. New York, 432 U.S. 197, 228-29 n.13 (1977)).
304. See id.
305. Another area in which the form of government action seems to matter to the Court is the area of state aid to religious schools. In particular, the Court has detected, even in the context of ostensibly neutral programs, "special Establishment Clause dangers' when money is given to religious schools or entities directly rather than . . . indirectly"—with "indirectly" meaning, for example, by way of cash grants or tax relief afforded to students or their families. Mitchell v. Helms, 120 S. Ct. 2530, 2546 (2000) (plurality opinion) (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 846-47 (1995) (O'Connor, J., concurring); accord Mitchell, 120 S. Ct. at 2556 (O'Connor, J., concurring). One explanation for this seemingly formal distinction has been suggested by Justice Thomas: "The reason for such
A preference for channeling policymaking into rights-sensitive decision-making forms may also help explain constitutional rules typically understood in nonstructural terms. For example, in *New York v. United States*, the Court outlawed the national government's direct enlistment of state officials to administer national programs, while recognizing that Congress could achieve the same end by conditioning federal grants on state administration of federal programs. In defending this mandated-regulation/conditional-spending distinction, the majority reasoned that giving states the option to take or not to take federal monies adequately protects constitutional interests in state autonomy. Others have noted, however, that states often have no real choice concern is not that form *per se* is bad, but that [direct-cash payments] create special risks that governmental aid will have the effect of advancing religion (or, even more, a purpose of doing so)." *Mitchell*, 120 S. Ct. at 2546 n.8; see also id. at 2555 (Souter, J., dissenting) (noting that "risk of diversion [to religious education] is obviously high when aid in the form of government funds makes its way into the coffers of religious organizations"). Justice Thomas's focus on "purpose" suggests that the form based direct-payment/indirect-payment distinction may well have structural roots. Put differently, the anticash payment rule might be a sort of prophylaxis against government creation of those programs that, even though superficially neutral, are most likely to reflect a *process* infected by the illicit purpose of supporting religious instruction. For a lengthy discussion of more orthodox purpose-centered rules, see infra Part X.

306. Along these lines, scholars have raised the question of whether certain ways of allocating political power (for example, requiring "supermajority support to enact legislation") may be preferable to others (for example, assigning "disproportional numbers ... to districts") because they are less "obscure" and "more likely to be continually revisited." SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 14 (1998). As Professors Issacharoff, Karlan, and Pildes note:

Perhaps voting rules embed these special protections in a more visible, and hence more publicly accountable, form. Unlike obscure features of institutional design, these kind of voting rules announce their presence each and every time policy is being made. Some political theorists have argued that the basic principles on which political power is organized must satisfy the condition of publicity: they must be capable of being publicly articulated and accepted. See JOHN RAWLS, A THEORY OF JUSTICE 133, 177-83 (1971). Can a case be made that minority preferences in voting rules satisfy this requirement better than disproportional numbers of voters allocated to districts? That the voting rule preference is more likely to be continually revisited than the latter?

Id.


308. See id. at 166-69, 171-72; see also id. at 208 (White, J., dissenting) (noting that "a similar measure" to the invalidated take-title provision would survive if Congress stipulated that "moneys collected in the surcharge ... be withheld or disbursed depending on a State's willingness to take title").

309. See id. at 185.
but to participate in conditional spending programs, so that this explanation may lack persuasive force. To the extent the free-choice rationale of New York is shaky, it becomes necessary to ask whether there is some other basis for distinguishing conditional-spending programs from outright congressional mandates that states implement federal programs.

One possibility is that the distinction drawn in New York finds support in a form-centered rationale—a rationale that focuses not on the choice faced by states in deciding whether to participate in the program, but on the choice faced by Congress in deciding to implement the program in the first instance. On this view, every congressionally adopted conditional-spending program, whatever the potential for genuine opt-outs by states, involves actual, measurable, and annually budgeted costs. These visible costs,
just like the visible costs of local-business-aiding subsidies,\textsuperscript{312} provide a built-in disincentive for the adoption of congressional spending programs absent strong justifications.\textsuperscript{313} Indeed, the Court's rulings in this area create a direct correlation between the degree of the threat to autonomous state decision making and the disincentive to congressional intervention. So it is because the greater the pressure Congress wishes to place on states to sacrifice their autonomy, the more Congress must pay.

Does the actual-and-visible-cost rationale for distinguishing congressional conditional-spending and mandated-regulation programs find support in anything more than the speculations of academic observers? The Court's decision in \textit{Printz v. United States}\textsuperscript{314} suggests that it does. In \textit{Printz}, the Court held that the anticommandeering principle of \textit{New York}\textsuperscript{315} covers congressional conscription of state executive officials as well as state legislatures.\textsuperscript{316} In referring to the conditional-spending cases, however, the Court in \textit{Printz} did not carry on about the choices such programs afford to states. Instead, the Court worried that the "power of the Federal Government would be augmented immeasurably if it were able to impress into its service—\textit{and at no cost to itself}—the police officers of the 50 states."\textsuperscript{317} The implication of this passage seems clear enough. The Court is prepared to tolerate congressional tampering with traditional state choices to pursue national goals, even to the point of drawing state officials

\textit{cf.} Calabresi, \textit{supra} note 13, at 149 (stating that "most laws that discriminate are passed by well-meaning people who favor a given result as long as they do not have to pay for it").

\textsuperscript{312} \textit{See supra} notes 281-89 and accompanying text.

\textsuperscript{313} \textit{See Roderick M. Hills, The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 865 (1996)} (claiming that "the federal government, burdened by deficits and public impatience with additional federal taxes . . . cannot offer unlimited bribes to nonfederal governments in return for unlimited cooperation"); \textit{La Pierre, supra} note 78, at 648 n.378 (1985) ("With respect to grant conditions, Congress is politically accountable because the expenditure is supported by taxes levied on the national electorate."); \textit{La Pierre, supra} note 310, at 1004 (same).

\textsuperscript{314} 521 U.S. 898 (1997).

\textsuperscript{315} \textit{See supra} notes 307-09 and accompanying text.

\textsuperscript{316} \textit{See Printz}, 117 S. Ct. at 2383-84.

\textsuperscript{317} \textit{Id.} at 2378 (emphasis added).
into the implementation of federal regulatory programs, but only if Congress is prepared "to put its money where its mouth is." 318

This form-centered view of the mandated-regulation/conditional-spending distinction may find reinforcement in a doctrine long embodied in our private law: the bedrock requirement of contractual consideration. An underlying purpose of the consideration rule, after all, is to promote caution and reflection as parties undertake important transactions. 319 The idea is that the very process of engaging in a bargained-for exchange, by forcing the formulation and proposal of a genuine trade, typically will stir the mind to carefully consider the costs and benefits of the contemplated action. 320 In light of this dynamic, so well recognized in our private law, it may not be surprising that the Court has crafted a public law rule by which Congress may not conscript state regulators with unfunded mandates. Instead, the Court has said that Congress must use the bargain-based tool of funded offers,

318. It merits emphasis that the form-based deliberation rule inherent in the Court's conditional-spending cases may not qualify as a "pure" structural rule. See supra note 44 and accompanying text. This is the case because the Court's preference for conditional spending programs over outright regulation of the states in the federalism area differs from its preference for subsidies over tax breaks in the dormant Commerce Clause area. This difference exists because outright subsidies do not involve additional actual costs when compared to tax breaks, at least if one accepts the basic tax-expenditure theory. See Coenen, supra note 283, at 985-87. In contrast, the conditional-spending approach forces Congress to incur substantial actual costs that Congress's simple, direct regulation of state behavior would not require. In short, whereas the subsidy/tax-break distinction involves a pure difference as to form, the conditional-spending/direct-regulation distinction involves differences of both form and substance. For this reason, we might describe the conditional-spending rule as quasi-structural in nature. See infra notes 330-31 and accompanying text. I discuss it here, nonetheless, because its relationship to purely formal rules seems to me both clear and telling and because (on the theory suggested here) it has a clear relation to fostering the sort of legislative caution and attentiveness that mark all structural doctrines.

319. See, e.g., Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 799-800 (1941) (discussing "cautionary" function of consideration); Stanley D. Henderson, Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts, 57 VA. L. REV. 1115, 1160 (1971) ("Consideration doctrine declares many promises unenforceable because the maker's deliberations are thought to be inadequate to impress upon him the seriousness of the transaction.").

320. See Fuller, supra note 319, at 816 n.27 ("In Bilateral Contracts [inconsiderateness] . . . is supposed to be prevented by the mutuality: each party contracting for his own pecuniary advantage; contemplating a quid pro quo; and therefore, being in that circumspective frame of mind which a man who is only thinking of such advantage naturally assumes." (quoting John Austin, Fragments-On Contracts, in 2 LECTURES ON JURISPRUDENCE 939, 940 (4th ed. 1873) (alterations in original)).
thereby raising the odds that Congress will move slowly and consider thoughtfully the trade-offs its action entails.\(^2\) In short, while permitting Congress to enlist state officials to administer federal programs, the Court has insisted, in effect if not by design, that that enlistment may occur only through use of a deliberation-enhancing regulatory form.\(^2\)

Judicial use of form-constraining constitutional rules also jibes with the modern Court's recurrent emphasis of the norm of democratic accountability.\(^2\) In keeping with this value, the Court in a number of recent cases has channeled the pursuit of government goals into forms that facilitate the intelligibility of government policy, the likelihood of public scrutiny, and the opportunity for voter response.\(^2\) In these cases, however, the Court has not sought simply to foster accountability for its own sake; rather, following the lead of its other structural decisions, the Court has tied its efforts to enhance accountability to the advancement of substantive values that have a special constitutional significance.\(^2\)

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\(^2\) See supra note 318 and accompanying text.

\(^2\) The same rationale also may help explain the Court's endorsement of the so-called "cooperative federalism" technique, by which Congress may give states the choice between administering federal programs or having state regulations preempted by federal rules. See New York v. United States, 505 U.S. 144, 167-69 (1992) (discussing "cooperative federalism" technique). After all, conditional preemption, just like conditional spending, involves the formulation of a congressional offer which the state is given the opportunity to accept or reject.

\(^2\) See Coenen, supra note 283, at 998-99.

\(^2\) We already have seen, for example, that the subsidy/tax-break distinction in dormant Commerce Clause cases reflects these sorts of concerns. See supra notes 281-89 and accompanying text. The Court also used accountability-centered reasoning in New York v. United States, 505 U.S. 144 (1992). See id. at 168 (reasoning that "the accountability of both state and federal officials [would be] diminished" by recognition of a congressional power to conscript state lawmakers to implement federal regulatory programs).

\(^2\) In New York v. United States, for example, the Court invoked accountability logic in vindicating constitutional values of federalism. See supra notes 307-13 and accompanying text. In similar fashion, accountability concerns supported the critical concurring opinion (written by Justice Kennedy and joined by Justice O'Connor) in Lopez v. United States, 514 U.S. 549 (1995). As stated by Justice Kennedy: "Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . [a] resultant inability to hold either branch of the government answerable to the citizens [would be] dangerous . . . " Id. at 577 (Kennedy, J., concurring). Both Lopez and New York reflect what we might call the principle of unblurred decision-making authority; the essential idea is that democratic processes work best when the electorate can clearly identify whom to hold responsible for particular policy choices within the vast and confusing structures of our far-flung government. This principle also received attention in Loving v. United States, 517 U.S. 748
One important set of accountability-centered cases involves commercial speech. In 44 Liquormart v. Rhode Island, for example, the Court confronted the question whether a state could discourage use of "vice' products, such as cigarettes, alcohol, or casino services, by banning truthful advertising about them even while declining to proscribe their use. The state attempted to justify such a ban by arguing, among other things, that the greater power to outlaw the consumption of vice products altogether carried with it the lesser power to prohibit sale-generating advertising about them. The Court, however, refused to uphold such advertising bans, focusing squarely on the connection between this form of regulation and accountable government decision making.

In a nutshell, the Court concluded that "a State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods." First and foremost, this distinction reflected the First Amendment's textual focus on protecting "speech" and "the press." By its terms, the Court reasoned, the Amendment does not cover exchange behavior, but very much does concern truthful communications, including communications embodied in commercial ads. The Court, however, supplemented its reliance on the First Amendment's text with an express invocation of the value of democratic accountability.

(1996). See id. at 758 ("The clear assignment of power to a branch . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance."); cf. FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1330-31 (2000) (Breyer, J., dissenting) (advocating judicial acceptance of FDA's assertion of regulatory jurisdiction over cigarettes in part because "the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold [the elected President and politically elected officials who support his policy in this area] politically accountable" and because "public scrutiny. . . . will take place whether it is the Congress or the Executive Branch that makes the relevant decision").

326. See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 568 n.9 (1980) (expressing concern about the government's choice of regulatory means that "could screen from public view the underlying governmental policy"); id. at 575 (Blackmun, J., concurring) (attacking regulatory techniques that cause "the State's policy choices [to be] insulated from the visibility and scrutiny that direct regulation would entail").

328. See id. at 508.
329. See id. at 511.
330. Id. at 512 (emphasis added).
331. U.S. CONST. amend. I.
332. See 44 Liquormart, 517 U.S. at 512.
Talking the talk of form-based structural rules, the Court reasoned that advertising bans unwisely "shield the State's anti-gambling [or other vice-countering policies] from the public scrutiny that more direct, nonspeech regulation would draw." 333

The Court's terse foray into accountability logic leaves behind an important question: How is it that advertising bans, more than other forms of vice-reducing regulation, unwisely "shield" the formation of government policy from "public scrutiny"? The answer to this question is that truthful-advertising restrictions create a potential accountability deficit in three separate ways.

First, government discouragement of vice activity by way of advertising restrictions is, or at least appears to be, largely cost free. In contrast, more direct regulatory strategies for discouraging vice product use—such as raising taxes on such products or implementing a state funded anti-vice information campaign—carry with them very visible and readily measurable costs for the taxpaying public. As a result, these forms of regulation are likely to focus the legislative and public mind on the appropriateness of government intervention more pointedly than does a speech ban. Put another way, the channeling rule adopted in 44 Liquormart tends to ensure that the state will not too readily restrict protected speech to pursue a state goal of restricting vice-product use that a more deliberate and reflective lawmaking process might not deem worth pursuing at all. 334

A second accountability problem created by the rule challenged in 44 Liquormart arises because such a rule obfuscates the underlying policy objective the legislature purports to be pursuing. Professor Sunstein explained why this is so in a concededly

333. Id. at 509.
334. Justice Scalia made much the same argument—albeit in a very different context—in Pennell v. San Jose, 485 U.S. 1 (1988). Addressing a Fifth Amendment takings claim not considered by the majority, he attacked a rent control scheme tied to individual tenant need because, in his view, it amounted to a government-imposed "welfare program privately funded by those landlords who happen to have 'hardship' tenants." Id. at 22 (Scalia, J., concurring in part and dissenting in part). Noting the value of "intelligent" democratic action, see id. at 23, Justice Scalia criticized the rent control regulation because it can "be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes." Id. at 22. He emphasized in particular that "voters might well see other, more pressing social priorities" if funds for this purpose were to come directly from "the municipal treasury" because "both economic effects and competing priorities [would become] more evident." Id. at 22-23.
"controversial account" of the Court's contraceptive decisions. As he explained:

Sometimes the Court effectively "remands" issues for fresh deliberation. Many of the modern privacy cases involving sexual autonomy can be understood accordingly. In these cases, the state defended laws restricting availability of contraception by reference to the goal of preventing premarital or extramarital activity. The Court did not deny that the state has a legitimate interest in preventing nonmarital sexual activity. We do not say that a law directly punishing such activity is unconstitutional. But, the state may not attempt to promote the underlying interest through the indirect means of preventing contraception. If the state is genuinely interested in preventing nonmarital sexual relations, it must pursue that policy in a way that receives meaningful democratic scrutiny and reflects actual democratic approval of the underlying judgment of policy and principle—through the criminal sanction.

The same sort of accountability-driven "unacceptable means" analysis supports the Court's ruling in 44 Liquormart. Tracking the reasoning of Professor Sunstein, a state that wishes to counter vice activity should pursue that goal in a "direct," rather than an "indirect," way so as to ensure that its "underlying judgment of policy" receives "meaningful democratic scrutiny and . . . actual democratic approval." This same logic may also help to explain other controversial decisions of the Court, including its recent

337. Sunstein, supra note 335, at 1184 (citations omitted). Wrapping up this discussion, Professor Sunstein added:

The more indirect and discriminatory route of preventing contraception is an unacceptable means of pursuing the relevant end. Because of its indirection, a ban on contraceptives does not accurately reflect a democratic judgment against extramarital relations. In fact, no such judgment followed the Court's cases because the public was unwilling to use the criminal sanction to punish extramarital relations directly.

Id.
338. See id.
339. Id.
vindication of the interests of gays and lesbians in Romer v. Evans. 340

Finally, the Court's channeling of vice regulation away from truthful advertising bans tends to foster democratic accountability because those bans block the flow of information about the very policy choice the government has made. If, for example, a state legislature permits casino gambling—but broadly prohibits advertising about it—citizens will not receive information of value in assessing whether it is wise as a matter of public policy to legalize gambling activities. Useful information obtainable from advertising includes such matters as how widespread casino gambling is: whether it is on the rise, where it is occurring, what forms it is taking, what other activities are associated with it, and the like. Put more bluntly, by barring advertising, a legislature can partially, and perhaps largely, remove from "visibility and scrutiny" the social costs created by its underlying choice to permit the vice activity. 341

It is for this reason (and not for the reason that well-informed shopping is important to self-government) that the Court in 44 Liquormart could fairly describe its form-centered analysis as comporting with "the essential role that the free flow of information plays in a democratic society." 342

340. 517 U.S. 620 (1996). In particular, this "unacceptable means" style of analysis might help to explain the Court's otherwise largely unexplained rejection of Justice Scalia's morality-based dissent in Romer. Justice Scalia, in Romer, defended Colorado's generalized restriction on the adoption of antidiscrimination protections for homosexuals on the ground it was a measured exercise of the state's far broader power to ban homosexual conduct altogether. See id. at 640-41 (Scalia, J., dissenting) (discussing Bowers v. Hardwick, 478 U.S. 186 (1986)). On the reasoning of 44 Liquormart and Professor Sunstein, however, Justice Scalia's approach may be flawed even if his premise about the existence of a broad prohibitive power is embraced. According to this reasoning, if government means to place sanctions on homosexual behavior per se, it must not "hide" what it is doing by way of using such indirect means as controlling the ability of homosexuals to secure antidiscrimination protection with respect to employment and other activities that are available to other groups. Instead, on this view, government must directly ban the undesired act, thus heightening the visibility of the policy objective it is trying to achieve.


In some respects, the subsidy/tax-break distinction recognized by the dormant Commerce Clause cases differs from the truthful-advertising/sale-regulation distinction recognized in *44 Liquormart*. For example, substituting a subsidy for a tax break may have no actual economic effect on anyone; substituting a casino gambling tax for an advertising ban, however, would significantly reallocate benefits and costs.\textsuperscript{343} Even so, these cases are marked by similarities that are, from a structural perspective, highly important. In both contexts, the state legislature seeks to advance a goal that the Court stands ready to tolerate (in the advertising cases, the discouragement of vice; in the subsidy cases, the encouragement of local industry). In both contexts, the state may pursue its goal only if it proceeds in a particular judicially endorsed form (in the dormant Commerce Clause cases, by way of outright cash subsidies; in the vice cases, by way of nonspeech-based regulation). And in both contexts, the preferred form of policymaking holds an advantage over the alternative because it enhances the operation of political processes in a manner that is sensitive to substantive constitutional values (in the subsidy cases, free-trade values; in the advertising cases, free-speech values). For these reasons, even though the rule of *44 Liquormart* may fail to qualify as a pure structural doctrine,\textsuperscript{344} its structural dimensions are unmistakable.\textsuperscript{345} Through use of this rule, the Court channels government

\textsuperscript{343} Another distinction is that it is the legislative end involved in the subsidy/tax-break cases—that is, the end of favoring local commerce—that constitutes the weak link in the legislature's action. (After all, it is not a problem as a general matter for government to dole out cash or offer tax relief. Government does these things all the time.) In contrast, in cases like *44 Liquormart*, the constitutional difficulty arises from the legislature's choice of means—that is, because the government pursues a concededly permissible goal of vice reduction through the vehicle of restricting speech. It is hard to understand, however, how this distinction might carry with it a critical analytical significance.

\textsuperscript{344} See supra note 343.

\textsuperscript{345} In particular, the structural dimensions of the *44 Liquormart* rule are more apparent and significant than the structural dimensions of other and more typical means-centered doctrines. See supra notes 30-33 and accompanying text. This is so because those other doctrines focus (in a highly content-conscious way) on the substantive fit between a regulation and its underlying purposes. This is not the nature of the means-centered rule of *44 Liquormart*. Indeed, there will be a perfect substantive fit between an advertising ban and the legislature's goal of vice-reduction if the ban in fact reduces vice to exactly the degree the state legislature desires. A perfect fit, however, would not save the advertising ban challenged in *44 Liquormart*, because the problem with the ban lies in its nature. Largely for structural, accountability-related reasons, the Court has declared that such a ban simply is
decision making in a constitutionally sensitive substantive area into a form designed to enhance democratic deliberation and dialogue.

IV. PROPER-FINDINGS-AND-STUDY RULES

Clear-statement and form-based structural rules create conditions that tend to heighten policymaker care in the making of choices that threaten constitutional values. There is, however, another way to bring about accentuated legislative or agency attentiveness: namely, by requiring direct evidence of such attentiveness in the policymaking process. This direct evidence might come in the form of a legislative finding that the decisionmaking body has actually confronted and resolved the relevant constitutional question. Alternatively, a court might look for explicit subsidiary findings—about, for example, the lack of less restrictive alternatives—that support the lawmaker’s assertions of constitutionality. Or a court might examine, even in the absence of any express findings, whether a meaningful study of key constitutional concerns took place in the legislative process. In fact, courts have paid heed to explicit or implicit findings in three key areas of constitutional law: (1) in making the case for congressional power to legislate in ways that impinge on historic state prerogatives; (2) in documenting remedial justifications for government action that threatens individual constitutional rights;

not a proper form of regulation. It is for this reason that we have paused to consider 44 Liquormart (and related matters) in this Part, rather than as part of our discussion of less obviously structural fit-centered means rules. See infra notes 990-1005 and accompanying text (discussing “quasi-structural” character of fit-related means rules).

346. See infra note 434.
347. See infra notes 408-23 and accompanying text.
348. For a recent discussion of this subject in the administrative context, see Geier v. American Honda Motor Co., 120 S. Ct. 1913, 1941-42 (2000) (Stevens, J. dissenting) (faulting agency for purporting to preempt state tort law—thus creating tension with federalism principles—by way of an “informal effort” founded largely on representations of its policies in litigation, rather than by way of “formal notice-and-comment rulemaking”). Of course, legislative findings—whether explicit or implicit—may be of greatly differing quality. See, e.g., Frickey, supra note 27, at 720 (distinguishing “the presence of formal congressional findings—which, after all, may be trumped-up or mere boilerplate” from “the development of a sound factual basis” for legislation and noting that Court is “unlikely” to take as much account of the former as the latter); Gardbaum, supra note 69, at 822 (noting that “there is a distinction between exercising judgment on [an] issue and resorting to incantation in the legislative text”).
and (3) in revealing the requisite means/end fit for nonremedial legislation subject to heightened judicial scrutiny. A look at each of these fields of law reveals a deep judicial uncertainty—approaching, one might even say, a judicial schizophrenia—about the wisdom and legitimacy of proper-findings-and-study rules.

A. Congressional Powers

The Court has consistently declared that Congress need not "make particularized findings in order to legislate."\(^{349}\) As with many sweeping claims, however, this pronouncement masks important subtleties, for some cases signal that congressional findings do play a role in legitimating congressional assertions of lawmaking authority.\(^{350}\) In particular, the Court has indicated that findings may be important in validating congressional overrides of state autonomy under both the Article I Commerce Clause and section

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349. Perez v. United States, 402 U.S. 146, 156 (1971); see, e.g., Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (observing that "no formal findings were made, which of course are not necessary"); see also United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (noting that "this Court has never insisted that a legislative body articulate its reasons for enacting a statute"); Townsend v. Yeomans, 301 U.S. 441, 451 (1937) (stating that "[t]here is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation," that "the legislature . . . is presumed to know the needs of the people of the State," and that "whether or not special inquiries should be made is a matter for the legislative discretion"); Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935) (rejecting argument that agency-promulgated rule was "void because the administrative body made no special findings of fact"); Palladio, Inc. v. Diamond, 321 F. Supp. 630, 633 (S.D.N.Y. 1970) (reasoning that "there is no constitutional requirement that the legislature conduct hearings and build a record when it passes a law"), aff'd, 440 F.2d 1319 (2d Cir. 1971); cf. EEOC v. Wyoming, 460 U.S. 226, 243-44 n.18 (1983) ("[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." (quoting Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948))). See generally Linde, supra note 27, at 226 ("Legislatures must follow some form of rational fact-finding, like courts and agencies, only in the rare cases when they adjudicate individual rights, as in contempt and impeachment and probably when expelling a member, but not when they legislate." (citation omitted)); Sandalow, supra note 13, at 1184-85 (noting "the courts' frequent failure to consider whether enactment of allegedly invalid legislation was preceded by legislative consideration of the controlling issues").

350. Of course, this is not to say that proper legislative findings negate all constitutional problems. As was said long ago: "It is clear that the legislative finding as to the fact upon which the validity of the legislation depends cannot be allowed to be binding upon the courts, since this would furnish a simple means of preventing judicial review of such legislation . . . ." Henry Wolf Biklé, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 HARV. L. REV. 6, 19 (1924).
five of the Fourteenth Amendment. We consider each grant of power in turn.

1. The Commerce Power

*United States v. Lopez*\(^{351}\) involved a prosecution pursuant to a federal statute that barred possession of a firearm within 1000 feet of a school.\(^{352}\) The defendant, convicted at trial, appealed on the ground that the statute exceeded Congress’s authority to “regulate . . . Commerce among the several states.”\(^{353}\) Taking a purely structural approach to the case, the Fifth Circuit had overturned the conviction in reliance on the fact that “[n]either the act itself nor its legislative history reflect any Congressional determination that the possession denounced by section 922(q) is in any way related to interstate commerce or its regulation.”\(^{354}\) As that court explained:

> Courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding. And, in such a situation there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states. Indeed, as in this case, there is no substantial indication that the commerce power was even invoked.\(^{355}\)

353. U.S. CONST. art. I, § 8, cl. 3.
354. *United States v. Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993), *aff’d*, 514 U.S. 549 (1995); *see* Frickey, supra note 27, at 703 (observing that “the Fifth Circuit made much of the role of formal or informal congressional findings in supporting exercises of the commerce power”). This style of analysis had previously been suggested by Professor Bogen, who argued that: “[W]here the relationship of the law to interstate commerce is not readily apparent, the Court should require Congress to relate the law to its impact on interstate transactions. This could assist in focusing Congressional concern on the proper issues.” David S. Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187, 198 (1972).
355. *Lopez*, 2 F.3d at 1363-64. The Court added: “Whether with adequate Congressional findings or legislative history, national legislation of similar scope could be sustained, we
While agreeing that the Act exceeded Congress's authority, the Supreme Court put to one side the lower court's analysis and emphasized instead that its prior broad constructions of the commerce power had all involved "regulations of activities that arise out of or are connected with a commercial transaction."\(^\text{356}\) Having thus distinguished its earlier decisions, the Court nonetheless turned to the subject of congressional findings and observed:

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.\(^\text{357}\)

The Court went on to reject the government's effort to defend the legislation based on congressional studies made in connection with previously enacted gun laws. In so doing, the Court explained:

The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. We agree, however, with the Fifth Circuit that importation of previous findings to justify § 922(q) is especially inappropriate here because the "prior federal enactments or Congressional findings [do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly

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\(^{356}\) Id. at 1368.

\(^{357}\) Id. at 562-63 (alterations in original) (citations omitted).
new ground and represents a sharp break with the long-standing pattern of federal firearms legislation.\textsuperscript{358}

Faced with these passages, many Court watchers noted that thoughtful legislative studies might prove critical in future cases that concern borderline exercises of the commerce power.\textsuperscript{359} In

358. \textit{Id.} at 563 (alteration in original) (citations omitted). Notably, following the initial challenge to its school zones gun law in the lower courts, Congress had amended the law by making findings in support of its invocation of the commerce power. As explained by Professor Frickey, however, "[T]he congressional rescue effort failed. The Solicitor General did not contend that these later findings could operate \textit{nunc pro tunc}, instead making the more defensible argument that the post hoc findings simply added evidence to support the rational basis for a nexus with commerce." Frickey, \textit{supra} note 27, at 704-05. These developments leave open the question whether postenactment findings should be deemed the equivalent of contemporaneous findings in any circumstances.

359. See, e.g., Sunstein, \textit{supra} note 338, at 1194 n.73 (noting that Lopez "turned on a set of factors," including "the absence of clear findings from Congress"). This findings-oriented view of Lopez supports the notion that earlier commerce power cases at least obliquely had suggested the relevance of congressional findings. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 278-79 (1981) (noting "extended hearings" in Congress, "vast amounts of testimony and documentary evidence," and "years of the most thorough legislative consideration"); Perez v. United States, 402 U.S. 146, 154-55 (1971) (stating that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce," and holding that "[t]he findings of Congress are quite adequate on that ground"); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (declaring that absence of "formal findings . . . is not fatal . . . for the evidence presented at [congressional] hearings fully indicated the nature and effect of the burdens on commerce"); Heart of Atlanta Motel v. United States, 379 U.S. 241, 252-53 (1964) (reaching same conclusion as in \textit{Perez} and \textit{Katzenbach} with regard to "evidence that discrimination by hotels and motels impedes interstate travel"); Board of Trade v. Olsen, 262 U.S. 1, 10 (1923) (noting that detailed supportive findings had been made "after many years of investigation and examination of witnesses, including the advocates of regulation and those opposed, and men intimately advised in respect to the grain markets of the country"); see also Palmore v. United States, 411 U.S. 389, 409 (1973) (upholding congressional establishment of non-Article III court system for the District of Columbia pursuant to Article I powers in part because "Congress, after careful consideration, determined that it preferred, and had the power to utilize, a local court system staffed by judges without lifetime tenure").

For further discussions of the presence of findings in \textit{Perez}, see Lopez, 2 F.3d at 1362 n.41 (stating that "the opinion as a whole shows extensive consideration of and reliance on not only the evidence before Congress and the legislative history, but also the formal Congressional findings, which the Court had already observed were 'quite adequate' to sustain the act") and Frickey, \textit{supra} note 27, at 713 (stating that "\textit{Perez} does suggest . . . that procedural regularity and formal findings have some role to play in assessing the efficacy of an exercise of congressional commerce power"). See generally Lopez, 2 F.3d at 1362 (claiming that "the Supreme Court has consistently deferred to Congressional findings [of substantial effect on interstate commerce], both formal findings in the legislation itself and findings that can be inferred from committee reports, testimony before Congress, or statutory terms expressly providing for some nexus to interstate commerce").
Lopez, after all, the Court had conceded only that formal findings are not "normally ... required," had pointedly encouraged Congress to offer revelatory findings when no substantial effect on commerce "was visible to the naked eye," and had dismissed Congress's "previous findings" only because they did not "speak to the subject matter of section 922(q) or its relationship to interstate commerce." Not surprisingly, in his dissenting opinion, Justice Souter noted the possibility that, under the majority's reasoning, the making of congressional findings "could in principle have affected the fate of the statute here." In short, the Court's significant but oblique focus on the absence of legislative findings

360. See Lopez, 514 U.S. at 562 (emphasis added).
361. Id. at 563.
362. Id. (quoting Lopez, 2 F.3d at 1368); see Hamilton, supra note 268, at 173 (noting Court's "emphasis on congressional responsibility"); Robert F. Nagel, The Future of Federalism, 46 CASE W. RES. L. REV. 643, 652 (1996) ("The Court strongly suggests ... that Congress could regulate guns at schools if it would only make some factual findings or link its regulation to the movement of something across state lines."); see also Stephen Christopher Likes, Casenote, An Utter Disregard for Precedent: Misconstruing Commerce Clause Precedent in United States v. Lopez, 29 CREIGHTON L. REV. 811, 855 (1996) (noting, but questioning, Court's conclusion that "the lack of congressional findings was detrimental").
363. Lopez, 514 U.S. at 614 (Souter, J., dissenting); see also id. at 608-09 (asking if "[f]urther glosses on rationality review ... may be in the offing" such as inquiries into whether "the congressional statute ... contain[s] explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce"); Frickey, supra note 27, at 707 (observing that "as Justice Souter noted in his dissent, the Court did not clearly repudiate the proposition that formal findings might have tipped the scales in the case"). See generally Gardbaum, supra note 69, at 797 & n.13 ("[Lopez] can perhaps be interpreted as holding only ... that this particular attempt by Congress to regulate the field failed, without saying anything more general that would automatically disqualify all subsequent attempts ... One way of interpreting the Court's opinion in this manner is to focus on what it said about the absence of congressional findings."). Justice Souter went on to criticize the attention paid by the Court to the absence of findings in Lopez, arguing that "[i]f ... the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot." Lopez, 514 U.S. at 613 (Souter, J., dissenting). Justice Souter also observed, however, that findings are not "pointless" because they "may ... have great value in telling courts what to look for, in establishing at least one frame of reference for review, and in citing to factual authority." Id. at 614. In a separate dissent, Justice Breyer suggested that judicial reliance on congressional findings "would seem particularly unfortunate" because it "would appear to elevate form over substance." Id. at 617-18 (Breyer, J., dissenting). He also noted, however, that "the absence of findings, at most, deprives a statute of the benefit of some extra leeway" and that "[t]his extra deference, in principle, might change the result in a close case." Id. at 617.
in *Lopez* created much uncertainty about what role the presence of findings would have in assessing future commerce power cases.

In *Morrison v. United States*, the Court answered one important findings-related issue left behind by *Lopez*. *Morrison* concerned Congress's power under the Commerce Clause to create a private right of action for gender-motivated assaults. In contrast to the situation in *Lopez*, Congress had made "numerous findings" that such assaults greatly affect the national economy—by, for example, discouraging travel, causing missed work days, generating hospital costs, and reducing the consumption of goods and services. For the same five-Justice majority that had crystallized in *Lopez*, however, these findings were not enough. Because Congress had sought to regulate wholly "noneconomic, violent criminal conduct" based solely on a "costs of crime" and 'national productivity" rationale, even the most elaborate studies were beside the point.

At the same time, the Court in *Morrison* declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity" and went no further than to say that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." These passages stand tellingly together with the Court's quotation of its key findings-related language from *Lopez* and its reiteration that the absence of findings was among the "significant considerations [that] contributed to our decision" in that case. Viewed as a whole, these

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364. 120 S. Ct. 1740 (2000).
365. See id. at 1752.
366. Id. at 1754.
367. Id. at 1751.
368. See id. at 1752-54.
369. Id. at 1751.
370. Id. at 1752 (emphasis added).
371. See supra note 367 and accompanying text.
372. *Morrison*, 120 S. Ct. at 1749. Also of no little significance is the fact that the four dissenters in *Morrison* were prepared to distinguish *Lopez*, at least in part, because of "the mountain of data assembled by Congress ... showing the effects of violence against women on interstate commerce." *Id.* at 1760 (Souter, J., dissenting); see also id. at 1777 (Breyer, J., dissenting) (distinguishing *Morrison* from *Lopez* based on congressional fact finding). Sounding not at all that much different from the majority in both *Lopez* and *Morrison*, Justice Souter noted that: "Any explicit findings that Congress chooses to make, though not dispositive of the question of [the] rationality [of its commerce power judgment], may advance judicial review by identifying factual authority on which Congress relied." *Id.* at
materials suggest that congressional findings may still prove critical in future commerce power disputes. In particular, as one

1760 (Souter, J., dissenting). Justice Breyer, in a portion of his dissenting opinion joined by Justice Stevens but, interestingly, not joined by Justices Souter and Ginsburg, seemed ready to go further—perhaps even much further—in giving weight to structural considerations. He noted that "[c]ommentators . . . have suggested that the thoroughness of legislative procedures—e.g., whether Congress took a 'hard look'—might sometimes make a determinative difference in a Commerce Clause case." Id. at 1778 (Breyer, J., dissenting). While recognizing that such a process-oriented approach would pose difficulties—particularly because it "might itself intrude upon congressional prerogatives and embody difficult definitional problems" as to precisely what processes were adequate—Justice Breyer viewed those drawbacks as "less serious than those embodied in the majority's" noneconomic activity test. Id. at 1778. Given "that the law in this area is unstable," Justice Breyer concluded:

that time and experience may demonstrate both the unworkability of the majority's rules and the superiority of Congress' own procedural approach—in which case the law may evolve towards a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

Id.

373. Post-Lopez lower court decisions, which commonly have looked hard at congressional findings, lend credence to this view. See, e.g., United States v. Zizzo, 120 F.3d 1338, 1350 (7th Cir. 1997) ("Section 1955 stands in sharp contrast to the Gun-Free School Zones Act . . . . Congress supported the statute with extensive findings outlining the significant impact large-scale, illegal gambling operations can have on interstate commerce. Congress found that illegal gambling fills the coffers of organized crime, which in turn has a substantial effect on interstate commerce."); United States v. Robinson, 119 F.3d 1205, 1212 (5th Cir. 1997) ("If we do not readily perceive a clear connection to interstate commerce, we may nevertheless uphold the statute if the nexus is satisfactorily explained by congressional findings or the legislative history."); United States v. Wright, 117 F.3d 1265, 1269 n.5 (11th Cir. 1997) ("Because we find adequate support for the enactment of § 922(o) without reference to any legislative findings, we need not determine the proper role of such prior findings in conducting Commerce Clause review."), vacated in part on reh'g on other grounds, 133 F.3d 1412 (1997); United States v. Kirk, 105 F.3d 997, 999 (5th Cir. 1997) (per curiam) (Higginbotham, J.) ("[T]he court [in Lopez] did give weight to the absence of congressional findings relating to the commercial power . . . . Giving weight to the absence of congressional findings lies in the middle ground between an intrusive absolute insistence upon legislative findings and traditional rational basis inquiry."); id. at 1010 (Jones, J.) (favoring invalidation of federal machine gun prohibition because "it is supported neither by a jurisdictional nexus requirement nor by salvaging legislative findings"); id. at 1010 n.12 (stating that "the absence of such data mirrors the situation before the Court in Lopez and reinforces the consistency between these two cases"); id. at 1015-16 ("If Congress had made findings explaining the connection of mere intrastate possession of machineguns [sic] to interstate commerce, . . . § 922(o) might be vindicated under the second Lopez prong. These features are lacking . . . . [Section] 922(o) was inserted into FOPA with virtually no discussion of its content and with absolutely no discussion of its place in the broad scheme of federal firearms regulations."); United States v. McKinney, 98 F.3d 974, 979 (7th Cir. 1996) ("The Schoolyard Statute is part of a statutory scheme that sets out a number of congressional findings and declarations which pertain to the entire chapter and to federal regulations of controlled substances in the United States."); id. at 980 ("The same findings
that authorize the federal government to regulate all commerce in controlled substances support its authority to regulate a subset of commerce in controlled substances."); United States v. Tisor, 96 F.3d 370, 374 (9th Cir. 1996) ("The presence of Congressional findings in support of the Controlled Substances Act distinguishes this case from the situation presented to the Court in Lopez."); United States v. Kim, 94 F.3d 1247, 1250 (9th Cir. 1996) ("Unlike the Gun Act, Congress made specific findings concerning the effect that drug trade has on interstate commerce . . . . Based on these findings and the ample judicial recognition that an interstate market for illegal drugs exists, every circuit that has considered a Commerce Clause challenge to § 841(a)(1) after Lopez has upheld the provision's constitutionality."); United States v. Wall, 92 F.3d 1444, 1450 (6th Cir. 1996) ("Unlike § 922(q) . . . § 1955 contains reams of legislative historical information to guide the courts."); United States v. Kenney, 91 F.3d 884, 890-91 (7th Cir. 1996) ("Unlike § 922(q), § 922(o) is not a statute that 'plows thoroughly new ground and represents a sharp break with the longstanding pattern of federal firearms legislation,' and thus the lengthy legislative history of federal firearms regulation does 'speak to the subject matter of' § 922(o) . . . . In light of these findings and enactments, the 1986 addition of § 922(o) was not novel but incremental, merely preventing further growth in the number of machine guns in private hands as an exercise of the historic federal interest in the regulation of machine guns. As such, and quite unlike § 922(q), deference to Congress's accumulated institutional expertise is appropriate."); see also United States v. Beuckelaere, 91 F.3d 781, 785 (6th Cir. 1996) (upholding federal machine gun law in part because "Congressional findings indicate that intrastate possession, distribution and sale of firearms directly and injuriously affects the introduction of them into other states to the injury of the public health and welfare"); United States v. McMasters, 90 F.3d 1394, 1398 (8th Cir. 1996) (noting that in Lopez "Congress had made no legislative findings that the activity . . . affected interstate commerce," while "the legislative history of § 844(i) reflects Congress's concern that it not exceed its Commerce Clause authority, and Congress's determination that the statute was necessary to protect interstate commerce"); United States v. Wilson, 73 F.3d 675, 683 (7th Cir. 1995) (distinguishing Lopez in upholding Freedom of Access to Clinic Entrances Act because "Congress made no findings relevant to its Commerce Clause power in enacting the Gun-Free School Zones Act," whereas "Congress's findings [with respect to the FACE Act] reveal that there exists a substantial interstate market for reproductive health services"); United States v. Wacker, 72 F.3d 1453, 1475 (10th Cir. 1995) ("Congress had made no express findings regarding the effect on interstate commerce of possessing a gun in a school zone. In contrast, the conduct regulated by the Drug Act clearly implicates interstate commerce, and Congress made explicit findings explaining the conduct's 'substantial and direct effect upon interstate commerce.'" (citations omitted)), later decision at 131 F.3d 153 (1997) (unpublished table decision); United States v. Leshuk, 65 F.3d 1105, 1112 (4th Cir. 1995) (noting that in Lopez "the Court noted that Congress had made no express findings that the prohibited possession substantially affected interstate commerce . . . . In passing the Drug Act, Congress made detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, 'have a substantial and direct effect' upon interstate drug trafficking"); Cheffer v. Reno, 55 F.3d 1517, 1620 (11th Cir. 1995) (noting that in Lopez "no express legislative findings were made regarding the effects upon interstate commerce of gun possession in a school zone" whereas "extensive legislative findings support Congress' conclusion that the Access Act regulates activity which substantially affects interstate commerce"); Pryor v. Reno, 998 F. Supp. 1317, 1326 (M.D. Ala. 1998) (upholding Driver's Privacy Protection Act based on congressional findings that release of driver information fosters direct marketing nationwide), rev'd on other grounds, 171 F.3d 1281 (11th Cir. 1999); United States v. Riley, 985 F. Supp. 405, 407-
moves away from paradigmatic state police power cases that involve local schools (as in *Lopez*) and local violence (as in *...* 08(S.D.N.Y. 1997) ("In making such determinations, courts consider legislative and congressional committee findings regarding the activity's effect on interstate commerce.... In light of [the extensive] congressional commentary, I find that Congress has determined that Section 1959 prohibits conduct that, when viewed in the aggregate, has a substantial effect on interstate commerce."); United States v. Glidden Co., 3 F. Supp. 2d 823, 842 (N.D. Ohio 1997) ("CERCLA's legislative history does not contain any specific findings regarding the effect that the improper disposal of hazardous waste has on interstate commerce. It does, however, contain broad findings that provide a rational basis on which to conclude that the improper disposal of hazardous waste substantially affects interstate commerce."); United States v. Glidden Co., 3 F. Supp. 2d 823, 842 (N.D. Ohio 1997) ("CERCLA's legislative history does not contain any specific findings regarding the effect that the improper disposal of hazardous waste has on interstate commerce. It does, however, contain broad findings that provide a rational basis on which to conclude that the improper disposal of hazardous waste substantially affects interstate commerce."); rev'd in part, aff'd in part, United States v. Acres of Land, 204 F.3d 698 (6th Cir. 2000); Anisimov v. Lake, 982 F. Supp. 531, 535 (N.D. Ill. 1997) ("Finally, do congressional findings matter or should a court treat them as it would any other argument made in favor of a statute's constitutionality?... [T]his Court is not alone in its uncertainty concerning how the Supreme Court will approach [such] issues when it considers future challenges to congressional authority under the Commerce Clause."); Seaton v. Seaton, 971 F. Supp. 1188, 1192 (E.D. Tenn. 1997) (explaining that in *Lopez* "the Act was not precipitated by any legislative investigation into the effects the regulated activity may have on interstate commerce" and that "VAWA, unlike the Act in *Lopez*, contains extensive congressional findings into the impact of violence on interstate commerce"); United States v. NL Indus., 936 F. Supp. 552, 560 (S.D. Fla. 1996) (noting Court's focus on findings in *Lopez*); id. at 562 (upholding hazardous waste law because "[h]aving considered the express findings of Congress and the legislative history.... the Court cannot say that Congress did not have a rational basis on which to conclude that the improper disposal of hazardous waste substantially affects interstate commerce"); United States v. Nichols, 928 F. Supp. 302, 312 (S.D.N.Y. 1996) (upholding Child Support Recovery Act, in part because "Congress supported enactment of the CSRA, unlike the School Zones Act, with significant statistical findings"); United States v. Lowe, 924 F. Supp. 318, 319 (D. Mass. 1996) (noting that in contrast to statute in *Lopez*, "the legislative history of the carjacking statute is replete with findings as to the economic effect of car theft on interstate commerce"); United States v. Smith, 920 F. Supp. 245, 247 (D. Me. 1996) (stating that unlike "the statutory scheme of the Gun Act at issue in *Lopez*, Congress has made specific findings within the Drug Act that local drug traffic affects interstate commerce"); United States v. McMillan, 946 F. Supp. 1254, 1262 (S.D. Miss. 1996) ("When the Supreme Court decided *Lopez*, the Court had no congressional data, statistics and findings justifying Congress' reliance on the Commerce Clause.... [While] in enacting FACE, Congress rationally concluded, based on an extensive legislative record, that the regulated activity of abortion protesting affected interstate commerce."); United States v. Parker, 911 F. Supp. 830, 836 (E.D. Pa. 1995) (invalidating Child Support Recovery Act and noting that "a court may consider legislative factfinding as an aid in evaluating whether Congress had a rational basis for concluding a federal criminal statute substantially affects interstate commerce"); rev'd, 108 F.3d 28 (1997); United States v. Kremetis, 903 F. Supp. 250, 252 (D.N.H. 1995) ("In passing the Drug Act, Congress made detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, "have a substantial and direct affect" upon interstate drug trafficking and that effective control of the interstate problems requires the regulation of both intrastate and interstate activities.... This Court, as well as other courts, has relied upon these findings in concluding that Congress may regulate intrastate drug activities under the Commerce Clause." (quoting *Leshuk*, 65 F.3d at 1112)).
Morrison)—to environmental regulations, drug laws and even certain forms of weapons-possession restrictions\(^{374}\)—there remains much room to argue that congressional findings have significance in assessing whether congressional action offends constitutional interests in state autonomy.

It may go too far to say that Lopez and Morrison establish a now-fixed proper-findings rule. It is undeniable, however, that those decisions have an important structural dimension. This is so because, in both cases, the Court pointedly admonished Congress to identify and document the underlying sources of its claimed constitutional authority to act. At the very least, this rhetoric advances the goals of structural decision making by encouraging focused attention in congressional deliberations on the most basic constitutional issue that any effort to exercise the national legislative power presents.\(^{375}\)

2. The Fourteenth Amendment Enforcement Power

Close on the heels of Lopez, the Court encountered another federalism-based challenge to a major piece of national legislation. At issue in City of Boerne v. Flores\(^{376}\) was the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA).\(^{377}\) RFRA in effect sought to overturn the principle of Employment Division, Department of Human Resources v. Smith,\(^{378}\) which had exempted from free-exercise challenge generally applicable criminal laws, no

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374. See supra note 373.
375. See Frickey, supra note 27, at 720 ("At a minimum, after Lopez, a prudent Congress might wish to follow [this] model when exercising its commerce power: articulate the judicial standard (the subject of the statute must have a substantial effect upon interstate commerce) and then document the satisfaction of that standard through facts developed in hearings and other legislative methods."); see also Gardbaum, supra note 69, at 800 (advocating a "constitutional requirement, which in certain respects is similar in function to the statutorily derived 'hard look' doctrine that courts apply in their review of administrative decisionmaking"); Calvin R. Massey, The Tao of Federalism, 20 HARV. J.L. & PUB. POL'Y 887, 901 (1997) ("Because the post-1937 Court has deferred to congressional judgment concerning the scope of the commerce power, . . . [w]hen Congress regulates an activity that 'substantially affects' interstate commerce, after Lopez it had best declare the reasons for its conclusion.").
matter how substantially they burdened religious liberty, so long as they were enacted free of an intent to disadvantage particular religious sects or practices. In particular, RFRA specified that courts should, notwithstanding Smith and in conformance with a number of pre-Smith cases, strictly scrutinize generally applicable laws whenever they substantially burdened in effect the challenger’s free exercise of religion.

Congress sought to justify RFRA (insofar as it applied to the states) as a proper exercise of its power to “enforce,” under section five of the Fourteenth Amendment, the free-exercise right protected against state abridgment by section one of that Amendment. In responding to this assertion of legislative power, the Court initially held that section five authorizes only “measures that remedy or prevent unconstitutional actions,” rather than “measures that make a substantive change in the governing [constitutional] law.” The central question thus became whether RFRA could be viewed as “prevent[ing] and remed[y]ing] laws which are enacted with the unconstitutional object of targeting religious beliefs and practices”—that is, the sort of laws deemed unconstitutional under the narrowed view of the Free Exercise Clause set forth in Smith itself.

In examining whether such a “remedial or preventive object” could be attributed to RFRA, the Court first noted that Congress, in enacting earlier voting rights protections under its enforcement powers, had identified extensive Fourteenth and Fifteenth Amendment violations to which its vote protection legislation responded. The Court then turned to the legislative proceedings that produced RFRA and explained:

379. See id. at 884-85. The consequence in the Smith case itself was that the Court found no problem with Oregon’s application of a general drug use prohibition to Native Americans who used peyote, a hallucinogenic drug, in a profoundly serious religious ceremony.

380. See Flores, 521 U.S. at 529-35.

381. See id. at 516. On the subject of incorporation, see generally Tribe, supra note 24, § 5-14.

382. Id. at 519. Of course, the exact contours of the Fourteenth Amendment’s remedying-or-preventing power remain to be mapped. See, e.g., Oregon Short Line R.R. Co. v. Department of Revenue Or., 139 F.3d 1259, 1267 (9th Cir. 1998) (upholding the Railroad Revitalization and Regulatory Reform Act as properly enforcing the Equal Protection Clause by barring tax discrimination against railroads even though it reaches some discrimination not barred by the Clause itself).

383. Id. at 529.

384. Id. at 532.
In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. Much of the discussion centered upon... zoning regulations and historic preservation laws (like the one at issue here), which, as an incident of their normal operation, have adverse effects on churches and synagogues.... It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation.\textsuperscript{385}

\textsuperscript{385} Id. at 530-31. In referring to the voting rights cases, the Court cited its seminal decision in \textit{South Carolina v. Katzenbach}, 383 U.S. 301 (1966). \textit{See Flores}, 521 U.S. at 532-33. There the Court directly focused on the quality and content of the "voluminous legislative history of the Act." \textit{Katzenbach}, 383 U.S. at 309. As the Court stated in that case:

The constitutional propriety of the Voting Rights Act of 1955 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting... Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

\textit{Id.} at 308-09; \textit{see id.} at 328 ("Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."). \textit{See generally} Paul Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 SUP. CT. RES. 95, 116 n.109 (citing enforcement-power decisions in \textit{Oregon v. Mitchell}, 400 U.S. 112 (1970), and \textit{Katzenbach v. Morgan}, 384 U.S. 641 (1966), for the proposition that "Congress may enact legislation responsive to its own findings that state decisionmakers have acted out of impermissible motives").
This review led the Court to conclude, with regard to the all-important question of Congress's remedial authority, that there was a "lack of support in the legislative record." 386

Having offered these observations, the Court disclaimed a design to focus fixedly on legislative findings in resolving section five issues:

Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." ... As a general matter, it is for Congress to determine the method by which it will reach a decision. 387

386. Flores, 521 U.S. at 531. The Court carried forward this findings-centered mode of analysis in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), by exploring in great detail whether Congress had properly documented the need to remedy Fourteenth Amendment procedural due process violations by subjecting states to suit in patent actions. See id. at 637-48; see also Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 648-49 (2000) (noting that, in deciding whether legislation is properly remedial under section five, "[o]ne means by which we have made such a determination... is by examining the legislative record containing the reasons for Congress' action"; finding no adequate justification for abrogation of state immunity from suit under the ADEA because, while "Congress found substantial age discrimination in the private sector," it "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation"; and noting, in particular, that "Congress made no such findings with respect to the States" and that supposed evidence of remediable discrimination "consists almost entirely of isolated sentences clipped from floor debates and legislative reports"). Indeed, the Court in Florida Prepaid seemed to supplement the basic findings-and-study-centered analysis of Flores by adopting an additional findings-centered rule. The Court suggested that (in contrast to its usual practice, see supra note 349 and accompanying text), it would not consider a possible remedial justification for the exercise of the Fourteenth Amendment power (here, the need to remedy uncompensated takings by states rendered unconstitutional by incorporation of the Fifth Amendment into the Fourteenth) unless Congress itself had evidenced an intention to rely on that justification in the course of its legislative proceedings. See Florida Prepaid, 527 U.S. at 642 n.7.

387. Flores, 521 U.S. at 531-32. The Court in Florida Prepaid, as in Flores, backtracked to some extent from its extended inquiry into the adequacy of Congress's justificatory findings. As the Court observed in that case: "Though the lack of support in the legislative record is not determinative,... identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus...." Florida Prepaid, 527 U.S. at 646. The Court continued by observing that "[h]ere, the record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process." Id. In Kimel, its most recent section five case, the Court sounded a similarly ambivalent view. According to the Court:

A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments
As in *Lopez*, however, the Court couched this disclaimer in less-than-universal terms, declaring it operative only "[a]s a general matter" and "in most cases."\(^8\) Given both this qualifying language and the Court's actual focus on congressional findings in *Flores*, one is left by that case with much the same impression inspired by *Lopez*. In close cases, a careful study by Congress may well prove decisive in resolving whether legislation "contradicts vital principles necessary to maintain . . . the federal balance."\(^9\)

At the very least, the Court's opinions in *Lopez*, *Morrison*, and *Flores* send signals that simultaneously suggest an attentive and dismissive attitude toward congressional findings. In this environment, future rulings may break either way. Will the courts pay heed to congressional findings—giving them great or some or little weight—or will they ignore such findings altogether? While the answer to this question remains unclear, it may well hinge on the Court's developing attitude toward structural rules as a general matter. Given the Court's recurring willingness to use such rules in a variety of contexts, there is reason to think that, at least in some cases, the presence or absence of deliberated-upon findings will count in deciding whether Congress has exceeded its enumerated constitutional powers.\(^3\)

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were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry, *Flores*, Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.

*Kimel*, 120 S. Ct. at 649-50.


389. *Id.* at 536; *see also* Katzenbach v. Morgan, 384 U.S. 641, 669 (1966) (Harlan, J., dissenting) (objecting to validation of § 4(e) of the 1965 Voting Rights Act under section five power because "[t]here is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon"). Indeed, it has been argued by counsel for the challengers of RFRA in *Flores* that, wholly apart from federalism-based limits on the section five power, a lack of power-justifying findings supports invalidation of RFRA as applied to the federal government itself. *See* Marci A. Hamilton, City of Boerne v. Flores: A Landmark for Structural Analysis, 39 WM. & MARY L. REV. 699, 720 (1998) ("As applied to federal law, RFRA should not be upheld, if for no other reason than to send a message to Congress that when a law is unusual and the enumerated power issue is opaque, Congress is constitutionally obligated to provide at least a modicum of explanation of what power it believed itself to be engaging.").

390. *See* Frickey, *supra* note 27, at 722 (arguing that, given Gregory's use of structural means to advance federalism values, "other judicially constructed means may be forthcoming as well" and that "[n]one obvious candidate is a requirement of formal congressional findings
B. Remedial Findings Rules

In exercising the section five power after *Flores*, Congress must act much like a court, seeking to document how its remedial action addresses identifiable constitutional wrongs.\(^{391}\) Remedial policymaking, however, is neither limited to exercises of the section five power nor the exclusive province of the national Congress. Indeed, rules concerning remedial policymaking occupy much of the central battleground of modern equal protection law: the battleground of affirmative action.\(^{392}\)

The Court's most recent affirmative action decisions make it plain that race-conscious government programs (apart from those adopted in the educational setting) typically will survive only if they remedy unlawful past or continuing discrimination.\(^{393}\) Moreover, from the days of the Court's very first decision on the merits concerning a nonjudicially crafted affirmative action program—*Regents of the University of California v. Bakke*\(^{394}\)—shifting sets of Justices have signaled in a variety of settings that findings made in connection with a remedial program's adoption may well prove dispositive of its constitutionality.\(^{395}\)

\(^{391}\) See *supra* notes 376-90 and accompanying text.

\(^{392}\) For an overview of constitutional restraints on race-conscious affirmative action, see generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.10 (5th ed. 1995).

\(^{393}\) As noted in the text, the Court has not held that the only justification for all affirmative action programs is the remediation of past discrimination. As noted by Justice O'Connor in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 286 (O'Connor, J., concurring); see also NOWAK & ROTUNDA, *supra* note 392, § 14.10(b)(2), at 725 (noting that "it is difficult to believe" that Justice O'Connor's later opinions reject this view).


\(^{395}\) One explanation why findings matter in this context has been suggested by Mark S. Kende, Comment, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U. CHI. L. REV. 581 (1986). Kende writes: *E*ven if findings provide less than conclusive proof of a past violation, they still may be an important indicator of the institution's motive . . . . The process of
In *Bakke* itself, the issue was whether a medical school's race-conscious admissions program offended the Equal Protection Clause. Such a program, Justice Powell observed in his decisive opinion in the case, could not pass muster on a remedial theory "in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." The Board of Regents, Justice Powell continued, "does not purport to have made . . . such findings." Thus, the program could not be sustained on the ground that it addressed a compelling state interest in remediating past discrimination.

interpreting facts and weighing evidence will often cause the institution to deliberate and discuss whether discrimination has occurred, so a court can afford to be less suspicious that the body's motive was impermissible.

... Since the ultimate question is whether the institution's motive was remedial at the time it adopted the plan, contemporaneous findings are far more reliable than those made during later litigation. Hence, a court need not test the accuracy of contemporaneous findings with the same vigor it would give to non-contemporaneous findings.

*Id.* at 601-02.


397. *Id.* at 309.

398. See *id.* at 310. Turning to the argument that the challenged plan was no different in substance from disparate-impact based remedies under Title VII, Justice Powell again focused on the importance of findings. He wrote:

[T]he presumption in *Griggs*—that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute—was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination . . . . Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

*Id.* at 308-09 n.44; see also Fullilove v. Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring) (reiterating that in *Bakke*, "the Regents failed both [constitutional] requirements . . . [because] they made no findings of past discrimination"). Justice Powell, according to Professor Tribe, was "responsive to a sense that, if such quotas are to be imposed at all, they should be imposed in a more deliberate and cautious manner and by a more broadly accountable body than was the case in *Bakke*." Laurence H. Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864, 877 (1978).

With regard to Justice Powell's treatment of the proper policymaking body, see infra notes 842-48 and accompanying text. See also Kende, supra note 395, which argues that constitutionality turns on two distinct aspects of competence: the authority of the institution to adopt an affirmative action plan, and the findings of fact made by the institution which indicate past violations of the antidiscrimination laws. When both aspects of
In Fullilove v. Klutznick, the Court—in contrast to Bakke—found that Congress had made sufficient findings to justify a race-based set aside program for local public works projects. The plurality in Fullilove (consisting of Chief Justice Burger and Justices White and Powell) emphasized that “Congress had abundant evidence from which it could conclude that... [government] procurement practices... perpetuated the effects of prior discrimination,” including “direct evidence... that [a] pattern of disadvantage and discrimination existed with respect to state and local construction contracting.” In these circumstances, it made no difference that “the Act recites no preambulary ‘findings’ on the subject.” The key was that “Congress reasonably determined” that there was a need to remedy past discrimination in light of the “data” and “evidence” before it. In his separate concurrence in Fullilove, Justice Powell reiterated that there was no need to “treat Congress as if it were a lower federal court” so as to force it “to find facts.” At the same time, Justice Powell emphasized that it was insufficient in a case like Fullilove for a court merely to “perceive a basis’ for legislative action.” Instead, there had to be “a reasonable congressional finding of discrimination,” even if that finding was revealed only in “the legislative history.”

competence are present, it is likely that the institutional decision to adopt a race-conscious plan furthers a sufficiently compelling purpose and was not motivated by an impermissible desire to benefit one group more than another solely on the basis of race.

Id. at 582.
399. 448 U.S. 448 (1980).
400. Id. at 477-78.
401. Id. at 478 (emphasis added).
402. Id.
403. Id. at 502 (Powell, J., concurring).
404. Id. at 503 n.4.
405. Id. (emphasis added).
406. Id. at 503; see also id. at 498 (Powell, J., concurring) (asserting that “the governmental body that attempts to impose a race-conscious remedy... must make findings that demonstrate the existence of illegal discrimination”). In a highly structural dissenting opinion (indeed, one of the most explicitly structural opinions ever penned), Justice Stevens took issue with the majority’s assertion that an adequate congressional investigation had been made. In his view, Congress had given only “perfunctory consideration” to “an unprecedented policy decision of profound constitutional importance.” Id. at 550 (Stevens, J., dissenting). In particular, Justice Stevens argued that the innovative and starkly race-based character of the law was “not even mentioned in the statement of purpose of the Act
The Court has continued to stress the importance of legislative findings in its more recent affirmative action rulings. Most notably, in *City of Richmond v. J.A. Croson Co.*, a five-Justice majority relied on the lack of proper remedy-based findings to strike down a thirty percent set-aside for minority firms in the award or in the Reports" of either chamber or made "the subject of any testimony or inquiry in any legislative hearing." *Id.* at 549-50. Justice Stevens stated unashamedly that he saw "no reason why the character of [congressional] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law." *Id.* at 550; see Kende, *supra* note 395, at 588 (stating that "in Justice Stevens' view, even authorized institutions must show that they carefully considered their decision to adopt a race-conscious plan").

In interesting contrast to his position in *Fullilove*, Justice Stevens dissented in a later affirmative action case on the ground that "there was not a shred of evidence [that suggested] any procedural unfairness in the adoption of the agreement." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 318 (1986); see also Drew S. Days, III, *Fullilove*, 96 YALE L.J. 453, 469-70 (1987) (suggesting that "when Congress has taken the extraordinary step of adopting an explicit racial classification, as it did in [*Fullilove*], the Court has the responsibility to assure itself that the decision was reasoned and deliberate . . . not because Congress lacks the constitutional power to enact such legislation, but because it may have enacted legislation without proper attention to the degree that its actions may threaten 'values of permanent significance' in our society" (quoting Bickel & Wellington, *supra* note 68, at 27)).

In particular, the plurality in *Wygant* (discussed *supra* note 393) stated that: "[A] public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant*, 476 U.S. at 277. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court reiterated this passage from *Wygant* with seeming approval. *See id.* at 220-21; see also *Wygant*, 476 U.S. at 313, 318 (Stevens, J., dissenting) (arguing that affirmative action agreement between school and union should have been upheld regardless of formal findings, in part because "the procedures for adopting the provision were scrupulously fair"). Justice O'Connor, in a separate concurring opinion in *Wygant*, flatly rejected "a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs." *Id.* at 290 (O'Connor, J., concurring in part). Such a requirement, she reasoned, "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Id.*; see also *Fullilove*, 448 U.S. at 520 n.4 (Marshall, J., concurring) (rejecting the view that "Congress must make particularized findings that past violations . . . have a current effect"). The clear target of Justice O'Connor's concern, however, was any requirement that *formal* findings of an *actual* violation had to be made. Consistent with her joining the portion of the plurality opinion quoted at the outset of the footnote, Justice O'Connor stated that "sufficient evidence" to justify a remedial program must be mustered by the government "before it embarks on an affirmative action program." *Wygant*, 476 U.S. at 277. Indeed, in her own separate concurring opinion, Justice O'Connor went on to note that a remediation-based race-conscious hiring plan could be implemented only if "the Board had a firm basis for concluding that remedial action was appropriate." *Id.* at 293 (emphasis added).

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of a city's construction work. The Court in particular found unimpressive five predicate "facts" that the Richmond City Council had relied on in enacting the set-aside program, concluding that they offered "nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." The Court spoke forcefully of the need for "[pro]per findings" of remediable discrimination, made "with the particularity required by the Fourteenth Amendment." Even more importantly, the Court signaled that such findings must predate adoption of the program. As stated by the Court: "While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief."

The Court's affirmative action decisions have left in their wake a host of doctrinal uncertainties. In particular, none of the cases spells out definitively when or how remedy-supporting findings must be made. The Court's recurring references to findings, however, suggest that they do—and will continue to—play a role in the affirmative action context. And to the extent this is true, the Court's affirmative action jurisprudence is structural, for the validity of any challenged program turns not solely on its content, but on its demonstrated responsiveness to remediable discrimi-

409. Id. at 500 (emphasis omitted).
410. See id. at 510.
411. Id. at 492.
412. Id. at 504 (emphasis added); see also id. at 520 (Kennedy, J., concurring in part) (noting that the "legislative record" suggests affirmative action plan was not genuinely remedial).
413. See, e.g., Sunstein, supra note 335, at 1185 ("It is easy to be skeptical about the Supreme Court's affirmative action cases. From the standpoint of the rule of law, the cases are truly a mess.").
414. This assertion also finds support in rulings of lower courts that have considered the presence or absence of contemporaneous findings in the affirmative action context. See, e.g., Williams v. City of New Orleans, 729 F.2d 1554, 1575 & n.15 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part) (discussing "findings of law enforcement studies that public cooperation with and support of the police force are enhanced by minority representation that is reflective of [a] community"); In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026, 1034 (D. Minn. 1998) (noting "paucity" of congressional fact-finding); Price v. Civil Serv. Comm'n, 604 P.2d 1365, 1369-70 (Cal. 1980) (discussing findings of civil service commission regarding county's past hiring practices that supported its remedial order).
nation consciously identified and considered by those who put that program in place.

C. Nonremedial Findings Rules

Remediation-driven findings-and-study rules direct attention to legislative ends because their central function is to force policymakers to identify the specific wrongs their programs seek to rectify.415 Legislative ends, as we soon will see, are also the focus of the separate set of structural rules that concern the legitimacy of legislative motives.416 But structural rules—including legislative findings-and-study rules—may target legislative means as well.

This point is illustrated pointedly by the Court’s Internet free-speech decision in Reno v. ACLU.417 That case concerned the constitutionality of federal legislation that broadly prohibited transmission on the Internet of nonobscene, and thus constitutionally protected, “indecent” speech.418 In the opening section of its opinion, the Court emphasized the importance of the First Amendment interests threatened by the challenged enactment. Because the law both employed a stark form of content discrimination and had “unprecedented” prohibitive effects in that it covered all Internet communications,419 it was properly subject to “the most stringent review.”420 Undertaking this exacting means/ends appraisal, the Court in effect conceded the legitimacy of the congressional goal. The Court acknowledged: “[T]here is a compelling interest in protecting the physical and psychological well-being of minors,” which extend[s] to shielding them from indecent messages that are not obscene . . . .”421 Having found no problem with this legislative end, the Court shifted attention to legislative means, asking whether the program “has been carefully

415. See supra notes 393-98 and accompanying text.
416. See infra Part X.
418. See id. at 849.
419. See id. at 877.
420. Id. at 868.
421. Id. at 869 (quoting Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989)); see also id. at 875 (noting that Court has “repeatedly recognized the governmental interest in protecting children from harmful material”).
tailored to the congressional goal." As we have seen, although less-restrictive-alternative rules have an important second-look quality, they typically are more substantive than structural in nature because they focus attention on the content (and particularly the overinclusive or underinclusive content) of the challenged law.

In considering the less-restrictive-alternative issue in *Reno v. ACLU*, however, the Court took an openly structural turn. As it explained:

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently from others, such as chat rooms. Particularly in the light of the

422. Id. at 871.

423. At the same time, certain forms of less-restrictive, alternative-based rulings—particularly when they touch complex and shifting regulatory fields—have a very pure second-look cast. For example, in *United States v. Playboy Entertainment, Inc.*, 120 S. Ct. 1878 (2000), the Court invalidated a statute that required cable operators to fully block, or limit to late-night hours, sexually oriented programming. The Court reasoned that the government had failed to show: (1) that so-called "signal bleed" from partially blocked signals was actually creating a "real problem" of children viewing sexually oriented programming during daytime hours; and (2) that the less restrictive alternative of customer-requested blocking would not solve any problems that in fact did exist. See id. at 1891. The Court emphasized that the government has the burden of proof as to both issues and that the record in the case was devoid of useful evidence offered by the government on each question. The key point to be made about *Playboy Entertainment* is that its burden-of-proof-driven style of analysis leaves it open for Congress to fill the evidentiary void left behind by the government's lawyers. Thus, if Congress reenacted precisely the same statute struck down in *Playboy Entertainment*—after using its distinctively powerful investigatory tools to demonstrate the need for such a law based on the sort of sound "surveys and field tests" that government lawyers had not presented—there can be little doubt that it could render valid what was invalid before. See id. (noting that "near barren legislative record" generated when statute was enacted offered "no support" for the government's litigating position). In this sense, means/ends invalidations—and particularly invalidations based on a judicial sense that workable less restrictive alternatives seem to be available—often have a structurally pure, though largely hidden, remand-to-the-legislature dimension.
absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.\textsuperscript{424}

By employing this findings-centered style of means analysis, the Court injected an important structural dimension into First Amendment law. The Court said, in effect, that it was unprepared to recognize the implausibility of less speech-restrictive alternatives for protecting children when Congress had not even first studied the matter itself. Nor can the Court’s embrace of this approach be dismissed as aberrational, for a decade earlier the Court used exactly the same technique in invalidating a no-less-prominent act of Congress.

In the so-called dial-a-porn case, \textit{Sable Communications of California, Inc. v. F.C.C.},\textsuperscript{425} the Court considered whether Congress’s “total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages.”\textsuperscript{426} In rejecting the government’s argument to this effect, the Court first emphasized that “[t]he FCC, after lengthy proceedings,” had found that less restrictive alternatives (including credit card use or access code requirements) would satisfactorily address the problem.\textsuperscript{427} The Court then turned to the government’s entreaties that, notwithstanding the agency’s views, the Court should defer to Congress’s later reevaluation and repudiation of these regulatory alternatives. In rejecting this contention, the Court employed strictly structural reasoning. “[T]he congressional record,” the Court said, “contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government’s interest in protecting minors.”\textsuperscript{428} The Court was particularly troubled that, with regard to regulatory alternatives, it could find nothing in the legislative materials except “conclusory statements

\textsuperscript{424} \textit{Reno}, 521 U.S. at 879 (emphasis added).
\textsuperscript{426} Id. at 128.
\textsuperscript{427} Id.
\textsuperscript{428} Id. at 129 (emphasis added).
during the debates" and that "the congressional record . . . contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be." The Court concluded its assessment of the legislature's choice of means by observing:

The bill that was enacted . . . was introduced on the floor; nor was there a committee report on the bill from which the language of the enacted bill was taken. No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access . . .: For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages.

429. Id.
430. Id. at 130.
431. Id. The Court added:

On the other hand, in the hearings on H.R. 1786, the Committee heard testimony from the FCC and other witnesses that the FCC rules would be effective and should be tried out in practice. Furthermore, at the conclusion of the hearing, the Chairman of the Subcommittee suggested consultation looking toward "drafting a piece of legislation that will pass constitutional muster, while at the same time providing for the practical relief which families and groups are looking for." . . . The bill never emerged from Committee.

Id. (footnote omitted). Interestingly, Justice Scalia—writing only for himself—sought to minimize the majority's structural reasoning in a separate concurring opinion. He wrote:

In joining Part IV, I do so with the understanding that its examination of the legislative history . . . is merely meant to establish that no more there than anywhere else can data be found demonstrating the infeasibility of alternative means to provide (given the nature of this material) adequate protection of minors. I do not understand the Court to suggest that such data must have been before Congress in order for the law to be valid. Even though "[n]o Congressman or Senator purported to present a considered judgment" on infeasibility, . . . the law would be valid if infeasibility was true. Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.

Id. at 133 (Scalia, J., concurring) (alteration in original). It bears reiterating that no member of the Court—each of whom joined the relevant portion of Justice White's majority opinion—elected to join Justice Scalia's concurrence or to issue a like-minded disclaimer.
Given this reasoning, it is not surprising that the Court in *Reno v. ACLU* concluded that "[t]he lack of legislative attention to the statute at issue in *Sable* suggests [a] parallel with this case."\(^{432}\)

In cases that involve the most pressing substantive constitutional values, the Court has said that the government program must be "carefully tailored" to the government's ends.\(^{433}\) In both *Sable Communications* and *Reno v. ACLU*, the Court applied this mandate in a literal—and thus structural—way by genuinely examining whether the lawmaking process was in fact marked with carefulness. This style of reasoning suggests that the Court may be receptive to structural analysis—including structural means analysis—in other heightened-scrutiny cases, and the cases seem to bear this inference out. Indeed, in each of the following settings, the Court has signaled at least some measure of willingness to give weight to policymaker findings: (1) cases that involve sex (and perhaps a fortiori race) discrimination;\(^{434}\) (2) cases that involve

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434. As to discrimination on the basis of sex, see *United States v. Virginia*, 518 U.S. 515, 535 (1996) (rejecting educational-diversity justification for state operation of all-male military school because there was no evidence the state acted "with a view to diversifying, by its categorical exclusion of women"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 n.16 (1982) (noting that "[t]he state has provided no evidence whatever that the Mississippi Legislature has ever attempted to justify its differing treatment of men and women seeking nurses' training"); *id.* at 726 (also noting that underlying purpose of heightened scrutiny in sex discrimination cases is to generate "reasoned analysis" by policymakers who consider such rules); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (stating that "customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality"); *Califano v. Webster*, 430 U.S. 313, 320 (1977) (upholding Social Security retirement benefits scheme that favored women over men because it was "deliberately enacted to compensate for particular economic disabilities suffered by women"); *Califano v. Goldfarb*, 430 U.S. 199, 222-23 & n.9 (1977) (Stevens, J., concurring) (rejecting Social Security Act discrimination between nondependent widows and widowers because "Congress never focused its attention on the question" whether the law was justifiable in terms of administrative savings or compensating for past wrongs: "Perhaps an actual, considered legislative choice would be sufficient to allow this statute to be upheld, but that is a question I would reserve until such a choice has been made"). For structure-centered observations on some of these cases, see *Frickey*, supra note 27, at 724 ("In upholding the exclusion of women from the selective service in *Rostker v. Goldberg*, the Court stressed that the Congress had recently 'carefully considered and debated the alternatives.'"); *id.* at 725 ("By stressing the absence of appropriate congressional support as a factor negating constitutionality, *Goldfarb* is the equal-protection analogue to *Lopez.*"); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things
discrimination against legal aliens by the federal government (and perhaps a fortiori by the states)\(^3\) cases that involve allegedly

Undecided, 110 Harvard L. Rev. 4, 75-76 (1996) ("Virginia is linked with Kent insofar as it requires a current legislative judgment—here, that same-sex education is necessary to promote educational diversity. If the state reached its decision deliberatively and without infection from stereotypes about gender roles, and the decision promoted rather than undermined equal opportunity, the Court might uphold the program."). The Supreme Court uses clearly structural reasoning in the context of discrimination based on race or ethnicity. See Fullilove v. Klutznick, 448 U.S. 448, 551 (1980) (Stevens, J., dissenting) (expressing willingness to invalidate federal legislation "that would be subject to strict scrutiny under the Equal Protection Clause" when "classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose"); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 97-98 (1977) (Stevens, J., dissenting) (contending that Congress's failure to include one group of Native Americans in reparations award was unconstitutionally discriminatory because it was "the consequence of a legislative accident, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should"); see also David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 201 (1988) (stating "it is a commonplace that a legislative judgment that a statute is constitutional is generally entitled to some deference from a court, especially when that judgment is made after detailed consideration of the constitutional question").

435. In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Court rejected the Civil Service Commission's administrative-convenience rationale for excluding all aliens from all civil service jobs. In doing so, the Court wrote:

The Civil Service Commission, like other administrative agencies, has an obligation to perform its responsibilities with some degree of expertise, and to make known the reasons for its important decisions. There is nothing in the record before us, or in matter of which we may properly take judicial notice, to indicate that the Commission actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other.

Id. at 115; see also id. at 103 (first noting that "it may reasonably be presumed that the asserted interest was the actual predicate for the rule" when the rule-promulgating agency is responsible for protecting that interest, but then adding that "[t]hat presumption would, of course, be fortified by an appropriate statement of reasons identifying that relevant interest"). See generally Sunstein, supra note 41, at 67 n.172 (citing Mow Sun Wong and affirmative action cases as reflecting "general requirements of deliberation ... in cases concerning intrusions on constitutionally sensitive interests.")

For the use of findings-related structural reasoning in other equal protection contexts, see New York City Transit Authority v. Beazer, 440 U.S. 568, 609-10 n.15 (1979) (White, J., dissenting) (arguing that flat ban on methadone users as city transit authority workers violates equal protection: "Some weight should also be given to the history of the rule ... Petitioners admit that it was not the result of a reasoned policy decision and stipulated that they had never studied the ability of those on methadone maintenance to perform petitioners' jobs ... These factors ... point to a conclusion of invidious discrimination"), and Shapiro v. Thompson, 394 U.S. 618, 674 (1969) (Harlan, J., dissenting) ("[T]he legislatures which enacted these statutes have been fully exposed to the arguments ... as to why these residence requirements are unwise, and have rejected them. This is not, therefore, an instance in which legislatures have acted without mature deliberation."); Able v. United
unconstitutional regulatory takings,\(^4\) (4) cases that involve claims that ostensible content discrimination is justified by the "secondary effects" of sexually explicit speech;\(^3\) and (5) other free-speech cases

\(^{436}\) States, 155 F.3d 628, 632 (2d Cir. 1998) (noting, in upholding "don't ask, don't tell" policy challenged by gay service members, that court must "give great deference to Congressional judgments in matters affecting the military," especially "where, as here, the challenged restriction was the result of exhaustive inquiry by Congress in hearings, committee and floor debate"); Quill v. Vacco, 80 F.3d 716, 741 (2d Cir. 1996) (Calabresi, J., concurring) (rejecting state's distinction between "active' assisted suicide [and] 'passive' behavior" because "New York has never enacted a law based on a reasoned defense of the difference"), rev'd, 521 U.S. 793 (1997); see also Frickey, supra note 27, at 729 ("Treating the [lack-of-legislative-factfinding] concerns animating Lopez as constitutionally cognizable should mean that they are generalizable to analogous situations, such as some equal protection cases.").

436. In Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), the Court upheld state legislation that barred coal mining that causes the subsidence of buildings despite the Court's earlier invalidation of closely similar legislation in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). See Keystone Bituminous Coal Ass'n, 480 U.S. at 473-74. Justice Stevens, writing for the majority, noted that, unlike in Pennsylvania Coal, the Pennsylvania legislature had based the modern legislation "on detailed findings," id. at 474, and that the "[l]egislature specifically found that important public interests are served by enforcing [the] policy." Id. at 485; see also id. at 486 n.14 (noting that "[t]he legislature . . . set forth rather detailed findings about the dangers of subsidence and the need for legislation"). Based on these findings, the Court determined that the new act, unlike the old, "is designed to accomplish a number of widely varying interests" as to which (again, unlike with respect to the old act) no "alternative methods" of accomplishment were identifiable. Id. at 486.

437. In City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986), the Supreme Court upheld a city's zoning restrictions on businesses engaged in sexually oriented expression, pointing to the city's reliance on studies of the matter in other communities. The majority, however, did not require the city "to conduct new studies or produce evidence independent of that already generated by other cities." Id. at 51. Agreeing with the court of appeals, the dissenting Justices would have required more careful and community-specific findings to justify the city's use of a secondary-effects rationale. See id. at 60-62 (Brennan, J., dissenting); id. at 60 ("The City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater, and never considered whether residents' concerns could be met by 'restrictions that are less intrusive on protected forms of expression.' . . . As a result, any 'findings' regarding 'secondary effects' caused by adult movie theaters, or the need to adopt specific locational requirements to combat such effects, were not 'findings' at all, but purely speculative conclusions.").

Following Renton, some lower courts have focused on the presence or absence of findings with regard to secondary effects. See, e.g., Artistic Entertainment, Inc. v. City of Warner Robins, No. 97-00195-5-CV-3-HL, slip op. at 14 (M.D. Ga. Feb. 23, 1998) (noting that, although City had referenced studies in enacting the ordinance, the "application of these studies to the City of Warner Robins is of limited value"); rev'd in part, vacated in part, 157 F.3d 807 (1998) (unpublished table decision); Goldrush v. City of Marietta, 482 S.E.2d 347, 355 (Ga. 1997) ("Before enacting [such] an ordinance . . . a legislative body is required to consider specific evidence of the undesirable secondary effects."). In the Supreme Court's
most recent nude dancing decision, a plurality of the Court seemed to follow the approach of Renton by requiring some, but not much, legislative investigation of secondary effects. See City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1395 (2000) (plurality opinion) (stating that in order to justify secondary-effects-based ban as to nude dancing, “the city need not ‘conduct new studies or produce evidence independent of that already generated by other cities’... ‘so long as whatever evidence the city relies upon is reasonably believed to be relevant!’” (quoting Renton, 475 U.S. at 51-52) (emphasis added)).

Justice Souter's view of findings in this context is particularly interesting. In the earlier Barnes case, Justice Souter had minimized the relevance of legislative findings. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 583-85 (1991) (Souter, J., concurring). Shortly thereafter, this dismissive treatment of findings drew a vigorous critique from Guido Calabresi. See Calabresi, supra note 13, at 112 n.94 (“In Barnes, Justice Souter voted to uphold a law prohibiting nude dancing based on the strength of the evidence presented in Renton—he did so even though the state legislature that enacted the regulation in Barnes had not even referred to the sort of ‘secondary effects’ held subject to regulation in Renton. Justice Souter thus deferred to a hypothetical legislative rationale based on a study conducted in another state. This approach is as careless as that used by Justice Black in Korematsu ...” (citations omitted)). In City of Erie, Justice Souter retreated from his Barnes concurrence, but simultaneously issued uncertain signals about his current view of the role of legislative findings in this context. Thus, Justice Souter observed at one point in his separate City of Erie opinion that an “evidentiary basis may be borrowed from the records made by other governments if the experience elsewhere is germane to the measure under consideration and actually relied upon.” Id. at 1404 (Souter, J., concurring in part and dissenting in part) (emphasis added). He added that “the city councilors who enacted Erie's ordinance are in a position to look to the facts of their own community's experience as well as experiences elsewhere.” Id. at 1404 n.3. Having focused on defects in the Erie City Council's actual lawmaking process, see id. at 1402-05, however, Justice Souter went on to find that the “record” was inadequate in demonstrating a suitable remediation of secondary effects, see id. at 1405, and therefore advocated a “remand” of the case to give Erie the chance to develop the logic of its regulatory program in the lower courts. See id. at 1406. It remains unclear (at least in my mind) whether (in Justice Souter's mind) post hoc proof in court of a law's efficacy in countering secondary effects is adequate to establish a law's constitutionality even when the lawmaking body itself focused on such constitutional concerns very little or not at all.

438. See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102-03 (1973) ("[W]hen we face a complex problem with many hard questions ... we do well to pay careful attention to how the other branches of Government have addressed the same problem"; therefore “we must afford great weight to the decisions of Congress,” especially in dealing with an “industry [that is] dynamic in terms of technological change”); see also Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330-31 & n.12 (1985) (rejecting due process and First Amendment Challenge to $10 limit on amount payable to attorney who represents claimant for service-connected Veterans Administration death or disability benefits in part because argument is weak that the need for an attorney is great in such matters; noting that “[w]hen Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference”; but also noting that “we need not rely” on the findings here because “they are entirely consistent” with the record in the case); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 70-71 n.19 (1983) (noting that Congress, in revising century-old legislation crafted by Anthony Comstock “retained without any real discussion the ban on unsolicited advertisements” of contraceptives); Moser v. FCC,
wonder whether the Court now stands ready to apply some version

46 F.3d 970, 974 (9th Cir. 1995) (overturning district court's invalidation of ban on automated phone calls while stating that “Congress made extensive findings” and that “[t]he district court did not give sufficient weight to [those] findings”).

Of particular note are the Court's two separate opinions that deal with the constitutionality of the Cable Television Consumer Protection Act of 1992: *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*) (affirming lower court decision after remand in *Turner I*). In these cases, the Court faced complex predictive judgments about the possible demise of broadcast television stations unless a congressional must-carry requirement imposed on cable operators was sustained against First Amendment attack. In initially remanding the case for further study by the district court, Justice Kennedy focused on whether the must-carry rule was “narrowly tailored” to guard against broadcasters’ ruination, while emphasizing that “Congress is not obligated ... to make a record of the type that an administrative agency or court does to accommodate judicial review” with respect to such a question. *Turner I*, 512 U.S. at 666; *see also id.* at 670-71 n.1 (Stevens, J., concurring) (agreeing that “Congress need not compile or restrict itself to a formal record in the manner required of a judicial or administrative factfinder”). At the same time, the Court described the judicial task as ensuring that “Congress has drawn reasonable inferences based on substantial evidence,” *id.* at 666, and directed the district court to consider both “the predictive [and] historical evidence upon which Congress relied” and “additional evidence [offered] to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty.” *Id.* at 667. In a separate concurrence, Justice Blackmun emphasized “the paramount importance of according substantial deference to the predictive judgments of Congress ... particularly where, as here, that legislative body has compiled an extensive record in the course of reaching its judgment.” *Id.* at 669 (Blackmun, J., concurring). Similarly, Justice Stevens stressed that “findings by Congress, particularly those emerging from such sustained deliberations, merit special respect from this Court.” *Id.* at 671 (Stevens, J., concurring).

Following remand, and the return of the case to the high Court, it upheld the challenged statute. Justice Kennedy's opinion again asserted that “in the realm of First Amendment questions ... Congress must base its conclusions upon substantial evidence,” *Turner II*, 520 U.S. at 196, and said that “the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress.” *Id.* at 211 (emphasis added). The Court went on to find this standard satisfied in light of the expansive supportive record that Congress had in fact assembled. *See id.* at 196; *see also Turner I*, 512 U.S. at 646 (citing Congress's “unusually detailed statutory findings”). *See generally William E. Lee, Manipulating Legislative Facts: The Supreme Court and the First Amendment, 72 TUL. L. REV. 1261, 1315 (1998) (“The dominant theme of Justice Kennedy's *Turner II* opinion is judicial deference to Congress's judgment about complex communications issues.”).

Arguably, the role of congressional findings was diminished by the Court's recent decision in *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000). In that case, after all, the Court stated—in striking down a content-based speech ban—that the “question is whether an actual problem has been proven in this case.” *Id.* at 1891 (emphasis added). The Court nowhere suggested, however, that proof at trial stood alone as relevant to making the “actual problem ... in this case” determination. *Id.* Indeed, in finding an insufficiency in this regard the Court noted—along with trial-proof shortcomings—that “[n]o support for the restriction can be found in the near barren legislative record relevant to this provision.” *Id.*
of the analysis deployed in *Sable Communications* and *Reno v. ACLU* to a spectrum of individual-rights special-scrutiny cases—at least where the highest levels of judicial attentiveness are brought to bear.\(^439\) The embrace of structural rules in many other contexts lends support to the plausibility of such an approach.\(^441\) To be sure, it remains to be seen where all of this will lead.\(^442\)

\(^439\) For one case that concerned the relevance of means-based findings outside the First Amendment context, see *Middendorf v. Henry*, 425 U.S. 25 (1976). In *Middendorf*, a majority of the Court held that neither the Sixth Amendment right to counsel nor the Fifth Amendment Due Process Clause required representation by counsel in military summary court-martial proceedings, which are designed to cover "relatively minor offenses under a simple form of procedure." Id. at 32 (quoting *MANUAL FOR COURTS-MARTIAL* § 79A (1969)). The majority reasoned in part that this regime was justified by the special demands of "military necessity," see id. at 44, noting that Congress had refused to abolish summary courts martials in 1956 and 1968. See id. at 44-45 n.21. The Court asserted in a footnote that "Congress has considered the matter in some depth." Id. In dissent, Justice Marshall, joined by Justice Brennan, attacked the majority's reasoning on means-centered findings-and-study grounds. According to Justice Marshall:

[T]here is no evidence offered of any detailed congressional consideration of the specific question of the feasibility of providing counsel at summary courts-martial.

And, more importantly, there is no indication that Congress made a judgment that military necessity requires the denial of the constitutional right to counsel to summary court-martial defendants.

*Id.* at 68 (Marshall, J., dissenting). Justice Marshall noted in particular that Congress had not even been in a position to make proper findings in 1956 or 1968 because the Court's seminal right to counsel decision, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), was not handed down until 1972. See *Middendorf*, 425 U.S. at 68. In short, for Justice Marshall, the government's defense of its practice was insufficient because "there is simply no indication that Congress ever made a clear determination that 'military necessity' precludes applying the Sixth Amendment's right to counsel to summary court-martial proceedings." *Id.*

\(^440\) See *City of Erie*, 120 S. Ct. 1396 (noting that in decision that upheld draft-card-burning statute "[t]here was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests," but distinguishing "a case involving conduct" from "a case involving actual regulation of First Amendment expression"); *id.* at 1403 n.1 (Souter, J., concurring) (suggesting the "need for evidence may be especially acute when a regulation is content based on its face . . . rather than a time, place or manner restriction").

\(^441\) See, e.g., Frickey, * supra* note 27, at 697-98 (concluding "that the [findings-centered] approach taken in *Lopez* may be a plausible technique to encourage appropriate congressional procedures and consideration, but in principle cannot be cabined short of having applications outside the review of commerce-power exercises"); *id.* at 693 (suggesting extension of *Lopez* findings principle in the service of "promoting legislative attention to important but often undervalued constitutional interests"); *id.* at 728-29 ("When all is said and done, the heightened concern about congressional fact-development and factfinding suggested by *Lopez* could be a plausible technique for curbing legislative excess in noneconomic cases in general.").

\(^442\) See, e.g., Thomas H. Lee, Jr., *Note, Baltimore Teachers Union v. Mayor of Baltimore*:
least, however, the Court's use of structural means analysis in two of its highest profile free-expression decisions of the last dozen years leaves little doubt that this style of analysis now constitutes a significant feature of our First Amendment law.

D. Pros and Cons of Proper-Findings-and-Study Rules

What is one to make of these proper-findings-and-study cases? Such perceptive constitutional theorists as Professor Ely, Professor Tushnet, and Justice Linde have greeted findings rules with a healthy measure of skepticism. The concerns of these and other

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Does the Contract Clause Have Any Vitality in the Fourth Circuit?, 72 N.C.L. REV. 1633, 1646-50 (1994) (arguing that Court should take account of legislative findings concerning less restrictive alternatives in assessing alleged impairments of contract). In particular, many questions about the proper nature of findings—assuming that findings are required—remain to be asked and answered. For example, many questions about the significance of findings in the First Amendment area are raised in Professor William Lee's recent article. See Lee, supra note 438, at 1262 (discussing hypothetical television-viewing restriction: "Does the presence of express legislative findings affect the constitutionality of this law? That is, must a court accept the legislature's finding despite disagreement among scholars about television's impact on children?"). Of course, a generalized willingness to apply structural review in the individual-rights area does not mean that the Court should, or will, apply only structural review. See, e.g., id. at 1281 ("What if these laws had been supported by express legislative findings? For example, assume that the Ohio law had included an express finding indicating that the identity of a political pamphlet's author is critical to an informed electorate. Would this express finding have changed the outcome? Given the paramount importance that the Court attached to an author's decision to remain anonymous, it seems unlikely that this express finding would have mattered."). As the Court has made clear in many cases:

That Congress' predictive judgments are entitled to substantial deference does not mean . . . that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does "not foreclose our independent judgment of the facts bearing on an issue of constitutional law." Turner I, 512 U.S. at 666 (quoting Sable Communications, Inc. v. FCC, 492 U.S. 115, 129 (1989)).

443. See Ely, supra note 88, at 129-30 (expressing skepticism "that a method of forcing articulation of [legislative] purposes can be developed that will be both workable and helpful" because historically "court-induced articulation of purposes" has proven "likely to be so vague or all-inclusive as to be peculiarly unhelpful"); id. at 128 (opining that insistence on "more authoritative" articulated purposes—in the form of committee reports, for example—"would likely result in a laundry list of purposes . . . or more likely a few so all-encompassing in their generality that they could plausibly be used in every report the committee issues"); id. at 134 (concluding that while "ventilating legislative purposes is healthy . . . [and] critical to representative government," whether "there is any effective way of getting our representatives to set down their purposes in a form that will tell us anything we cannot
critics focus on the potential make-work nature of stated findings; the threat such requirements pose to legislative flexibility; and the unwisdom and dishonesty of requiring simplistic expressions of public-regarding rationales when, in reality, legislators often act in response to deeply subtle, widely varying, and purely political motivations. There is concern, too, about the difficulty of sep-

learn from the face of legislation” is open to “serious doubt”); Linde, supra note 27, at 231-32 (noting that “it is improbable that testimony” influences congressional votes for or against a given piece of legislation and that official findings and purposes may be “wholly the work of lawyers who know nothing about the findings themselves”); id. at 232 (“We have it on the high authority of Justice Frankfurter that the truth or falsity of congressional findings in a bill was immaterial, when the Court pushed aside the attack of the Communist party on a veritable essay of findings that prefaced the Subversive Activities Control Act of 1950.”); see also Mark Tushnet, Red, White and Blue 210 (1988) (predicting that insistence on articulation of reasons for a statute “would destroy the legislative process as we know it” since “[m]uch legislation is adopted by ... councils and ... legislatures, which keep quite rudimentary records of what precedes formal enactment”; also warning that “frequently—perhaps usually—there are no reasons for legislation except that the legislators who voted for it thought that they would win votes by doing so or that this statute seemed a fair compromise between contending political forces”; and concluding, as a result, that “it seems unsound to develop structural review in this direction”).

444. See Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 919 n.256 (1987) (“The legislative deliberation model might require Congress not only to compile an adequate record by having committee staff aggregate [a] diverse collection of documents, but also to insert planned colloquies and other boilerplate language in hearings.”); Sunstein, supra note 41, at 76 (“The first criticism, substantive in nature, would suggest that it is utopian to believe that representatives can be forced into the deliberative Madisonian mold. At most, it would produce ‘boilerplate’—rationalizations designed to placate the courts—rather than a genuine critical inquiry into issues of value and fact.”); Marcia Coyle, New Federalism Litmus: Rulings, Orals Show Findings by Congress Key Focus of Justices, NAT’L L.J., Jan. 24, 2000, at A1, A10 (noting “skepticism in the legal community about the weight the court should give to congressional findings,” and adding that one “lawyer who follows Congress closely” says findings “don’t mean anything at all” because “members just throw them in as part of the form they’re given”).

445. See Farber & Frickey, supra note 444, at 920 n.257, 919 n.256 (citing “difficulties a legislature [might] encounter in attempting to transform itself into a formal record-creating, deliberative institution” and “potentially severe costs on legislative practice, including rendering suspect any floor amendments that differed from the compiled legislative record but nonetheless were required for political compromise”).

446. As observed by Justice Linde:

Articulated reasons have their place in an agency’s pursuit of the goals assigned to it. Pursued into the legislative process, the hope for candor is more likely to produce hypocrisy. Recitals of findings and purposes are the task of anonymous draftsmen, committee staffs, and counsel for interested parties, not legislators. Such recitals will be an attempt to provide whatever, under prevailing case law, is expected to satisfy a court. Except for this purpose, a legislator has no reason to care about them nor to debate their truth or relevance as long as he favors
arating out sufficiently and insufficiently studious lawmaking efforts.\textsuperscript{447} In short, there is much to be said against these rules.

But there is also something to be said in their favor. To begin with, the most ardent criticisms of these rules focus on proposals to require highly formal findings. Proper-findings-and-study rules, however, need not and should not take the form of formal-findings rules.\textsuperscript{448} In addition, structural theory does not dictate (as some critiques seem to suppose) that proper-findings-and-study rules must apply to all forms of legislation. Rather, as the authorities considered here suggest, such rules may be reserved for vindicating only those constitutional values—like powerful First Amendment rights or underenforced norms of federalism—that may have a distinctively meritorious claim of need for structural protection.\textsuperscript{449} Concerns about workability also seem overdrawn. It is said, for example, that courts cannot distinguish adequate from inadequate policymaking processes. But why is that? In the field of administrative law, for example, courts routinely assess the procedural adequacy of policy formulation in applying the so-called "hard look" doctrine.\textsuperscript{450} Indeed, some authorities suggest that the Constitution itself mandates inquiries of this kind.\textsuperscript{451} One wonders why, if courts

\textsuperscript{447} See Lee, supra note 438, at 1263 ("Are findings that are the product of a methodical legislative process, such as hearings, reports, and extensive floor debates, entitled to judicial deference, while findings originating as floor amendments are discounted? Are implicit findings treated differently than explicit findings?").

\textsuperscript{448} See supra note 39.

\textsuperscript{449} See supra text accompanying note 44.

\textsuperscript{450} See, e.g., Sunstein, supra note 41, at 61 ("The most important doctrinal innovation in administrative law . . . is the 'hard-look doctrine.' In its current incarnation, the doctrine contains four principal features. Agencies must give detailed explanations for their decisions; justify departures from past practices; allow participation in the regulatory process by a wide range of affected groups; and consider reasonable alternatives, explaining why they were rejected."). For some other treatments of this approach, see Richard B. Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 HARV. L. REV. 1805, 1811-20 (1978); Emerson H. Tiller, Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making, 14 J.L. ECON. & ORG. 114, 114-18 (1998).

\textsuperscript{451} See Sunstein, supra note 41, at 67 (stating that "courts have suggested that the Constitution independently requires that participation and explanation be available in administrative rulemaking proceedings" (citing Burr v. New Rochelle Mun. Hous. Auth., 479 F.2d 1165 (2d Cir. 1973))); see also Shapiro & Levy, supra note 39, at 431 (arguing that "judicial review of the reasons for an agency decision" emanate from constitutional separation of powers, but not due process concerns); Stewart, supra note 450, at 1817 ("If the
can and should routinely review whether agencies have taken a sufficiently hard look at competing interests in promulgating a regulation, courts cannot consider whether legislative officials have taken a minimally hard look in that narrow band of cases in which the most vital constitutional interests are at stake. Most important, proper-findings-and-study rules—if thoughtfully applied—hold the potential to do much good.452 Even the quickest perusal of The Federalist Papers reveals that the Framers were driven at a fundamental level by concerns about legislative precipitousness and passion.453 Proper-findings-and-study rules can counter these tendencies by fostering—in at least some instances—a thoughtful reevaluation and reshaping of policy proposals.454 They do so by

court of appeals is prohibited from imposing procedural formalities not required by the APA, where does the Supreme Court obtain the authority to impose a ‘record’ requirement that is not found in the APA and that in some cases will obligate agencies to use procedures going beyond APA minimums?”).

452. See Farber & Frickey, supra note 444, at 919-20 & n.257 (offering arguments why “at the constitutional margin, a record of careful legislative deliberation might save an otherwise unconstitutional statute”); Tribe, supra note 398, at 877 (observing that “whatever else its legacy, at least Bakke’s contribution to heightened awareness of process and structure as independently significant dimensions of constitutional validity ought to be universally welcomed”).

453. See, e.g., THE FEDERALIST Nos. 10, 63 (James Madison); see also A Citizen, CARLISLE GAZETTE, Oct. 24, 1787, quoted in 1 THE COMPLETE ANTI-FEDERALIST 61 (Herbert J. Storing ed., 1981) (“Experience teaches us that individuals or simple bodies of men are liable to rash and hasty decisions—to party influence and cabal . . . .”). See generally Dan T. Coenen, Of Pitcairn’s Island and American Constitutional Theory, 38 WM. & MARY L. REV. 649 (1997) (comparing the fall of Pitcairn’s Island with antifederalist ideals). For an interesting commentary on these problems in the context of modern-day America, see Calabresi, supra note 13, at 122-23 (“The lack of strong party discipline and structures means that laws are often patched together quickly toward the end of a legislative session. And the rootlessness of our ‘frontier immigrant society makes us particularly prone to fads, to demands for conformism from ‘outsiders’ (all of us at one point or another), and to the requirement that we prove ourselves to be 120% American. These factors lead to bursts of haste and its excesses when a fad or a passion arises.”).

454. See, e.g., Frickey, supra note 27, at 728-29 (arguing that, at least in noneconomic cases, “heightened concern about congressional fact-development and fact-finding . . . could be a plausible technique for curbing legislative excess” and “could promote a meaningful dialogue between judiciary and legislature concerning just where the difficult-to-draw lines should exist concerning important constitutional values”); Sandalow, supra note 13, at 1188 (“Frequently, the issues that underlie a constitutional challenge to legislation have not been noticed in the course of its enactment, perhaps because they were overlooked, perhaps because the issues have become apparent only in particular applications of the legislation that were not clearly anticipated. Even when such issues have been noticed, they may have received only cursory examination, and then only in committee, for the attention of the Congress may have been directed at other features of the legislation or, as must often occur,
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slowing down the policymaking process and by bringing into sharper focus the potential costs of legislative action.

As we have seen, the cross-cutting arguments for and against proper-findings-and-study rules are reflected in the existing mix of Court decisions. Those decisions contain both rhetoric that suggests a wariness of such rules and rhetoric that (at least in certain contexts) seems to take their logic for granted. There is much more to be said about the normative claims of proper-findings-and-study rules. At least some proper-findings-and-study rules, however, are already up and running. As a result, the key issue that courts face today is not whether to embrace proper-findings-and-study rules. Rather, the most pressing questions concern when to embrace these rules and what level of policymaker deliberateness they should be deemed to require.

V. REPRESENTATION-REINFORCING STRUCTURAL RULES

In the most famous footnote in constitutional law, Chief Justice Stone wrote that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." The point of this passage is that representative government cannot operate in its constitutionally intended manner if it is marked by biases against, or the built-in

the legislation itself may have generated insufficient interest to elicit the full attention of Congress."; see also Sunstein, supra note 335, at 1184 (praising "hard look doctrine" because "the remand promotes better public deliberation by drawing attention to difficulties that had not yet received adequate attention, and by helping to produce better processes of deliberation for the future"); Wellington, supra note 8, at 490 ("[I]mpediments to the instant gratification of majorities allow proposals for legislative change to be considered carefully. This may be desirable even though the creation of a particular majority itself has been time-consuming. For it is surely the case that, in creating a majority for a proposal, proponents may fail to examine fully the proposal's demerits."). There are also other values served by proper-findings-and-study rules. See, e.g., Kende, supra note 395, at 611 (noting that a "findings requirement facilitates judicial review of the factual inferences that underlie a government body's decision").

455. Cf. Penson v. Ohio, 488 U.S. 75, 81-82 n.4 (1988) (noting, in support of a written disquisition by counsel who claims a client's appeal is meritless, that it provides an "inducement" for a "diligent review," cuts against "summary" action, and "can often shed new light").

underrepresentation of, unfairly marginalized groups.\textsuperscript{457} The recognition of this reality has inspired an important working principle of constitutional decision making: laws that disadvantage such marginalized groups "call for a correspondingly more searching judicial inquiry."\textsuperscript{458} Because this style of "representation-reinforcing" reasoning\textsuperscript{459} focuses on "political processes" rather than legislative outcomes,\textsuperscript{460} it seems a likely source of process-centered structural rules.

Professor Ely, the great champion of representation-reinforcement review, recognized the deep connection between process theory and the "second look" approach that defines structural review.\textsuperscript{461} In particular, he suggested the doctrinal implications of this connection in his discussion of the "case ... of women, where access was blocked in the past but can't responsibly be said to be so any longer."\textsuperscript{462} As he explained:

In cases of first-degree prejudice, or self-serving stereotyping where the access of the disadvantaged group remains blocked, the alternative of "remanding" the question to the political processes for a "second look" would not be acceptable: we don't give a case back to a rigged jury. Here, however, such a "second look" approach seems to make sense. Technically the Court's judgment would be the same in all situations of unallayed suspiciousness: "due process of lawmaking" having been denied, the law that emerged would have to be declared unconstitutional. The difference would emerge in the event—likely, precisely because access is no longer blocked—that the legislature after such a declaration of unconstitutionality

\textsuperscript{457} See Ely, supra note 88, at 152-53.

\textsuperscript{458} Carolene Prods., 304 U.S. at 153 n.4; accord San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (noting that group's relegation to "a position of political powerlessness" warrants "extraordinary protection from majoritarian political process").

\textsuperscript{459} See Ely, supra note 88, at 87.

\textsuperscript{460} See Carolene Prods., 304 U.S. at 153 n.4. Notably, in footnote four the Court fixed its focus on "political processes" in two separate passages—expressing concern about both "legislation which restricts ... political processes," and conditions that "curtail the operation of ... political processes." Id. at 152-53 n.4.

\textsuperscript{461} Ely, supra note 88, at 169.

\textsuperscript{462} Id. Of course, the underlying premise of Professor Ely—that full access to the channels of government by women has become unblocked—is subject to dispute. The critical point for present purposes is that, if such an unblocking has occurred, the Court's underlying reasoning in Carolene Products supports adoption of a structural approach.
reconsidered and repassed the same or a similar law. The fact that due process of lawmaking was denied in 1908 or even in 1939 needn't imply that it was in 1982 as well, and consequently the new law should be upheld as constitutional.\textsuperscript{463}

Professor Ely's message is that laws invalidated on the basis of their discriminatory treatment of women should, at least ordinarily, suffer no worse fate than being returned to the legislature for a second look. Even more important, the Court has signaled a receptiveness—or at least a possible receptiveness—to this structural style of constitutional analysis in the sex discrimination field.\textsuperscript{464}

\textsuperscript{463} \textit{Id.} One might fairly ask, of course, why there is need for judicial invalidation of old statutes that disadvantage women if women now can protect their own interests, including securing the repeal of oppressive laws. Professor Ely answered this question in persuasive fashion:

To put on the group affected the burden of using its recently unblocked access to get the offending laws repealed would be to place in their path an additional hurdle that the rest of us do not have to contend with in order to protect ourselves—hardly an appropriate response to the realization that they have been unfairly blocked in the past.

\textit{Id.} at 169 n.*; see also \textit{id.} at 103 (suggesting propriety of judicial intervention when elected representatives are "clogging the channels of change"). In other words, Professor Ely's concern is of a piece with the central concern of structurally minded analysts—namely, the proper location of the burden of legislative inertia. As observed by Justice Neely:

"Whenever we are confronted by an old statute, therefore, there is a force of inertia that will keep that statute in effect indefinitely unless some \textit{organized} political constituency urges change. Even then, if an organized political constituency fights the change, the odds are a hundred to one in favor of the status quo (and those are \textit{literally} the odds). According to Calabresi, the institutional imperative of a legislature causes an entirely unprincipled allocation of the burden of inertia."

\textit{Neely, supra} note 69, at 275.

\textsuperscript{464} \textit{See} Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980) (rejecting worker compensation law's presumption of widow's, but not widower's, entitlement to dependent benefits, and declining to embrace benign discrimination justification "simply by noting that in 1925 the state legislature thought widows to be more in need of prompt help than men"); Califano v. Goldfarb, 430 U.S. 199, 215 (1977) (rejecting sex-based classification in Social Security program adopted in 1939 because "[t]here is every indication that . . . the framers of the Act legislated on the "then generally accepted assumption that a man is responsible for the support of his wife and children."" (citing Wiesenfeld v. Weinberger, 420 U.S. 636, 644 (1975))). In \textit{Goldfarb}, Justice Stevens steered a course particularly close to this line of analysis. The case involved a Social Security statute that distinguished between the payment rights of widows and widowers. Surveying the legislative history, Justice Stevens had no difficulty finding this distinction to be "the accidental by-product of a traditional way of thinking about females," 430 U.S. at 223, and invalid for that reason. Recognizing that times had changed, however, Justice Stevens held open the possibility that "this statute," see \textit{id.}
In *Frontiero v. Richardson*, Justice Powell orchestrated a variation on Professor Ely's theme. The divisive issue in that case was whether the Court should apply strict scrutiny to laws that classify on the basis of sex. A razor-thin majority rejected this position, with Justice Powell—joined by Chief Justice Burger and Justice Blackmun—writing the decisive opinion in the case. According to Justice Powell, it was of central importance that "[t]he Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by Congress and submitted for ratification by the States." This fact—together with the susceptibility of the challenged legislation to invalidation under already-existing precedents—led Justice Powell to chide the four-Justice plurality for "reaching out" to address "unnecessarily" the strict-scrutiny question "at the very time when state legislatures . . . are debating the proposed Amendment." This reasoning suggests that Justice Powell desired to put off this "far-reaching" and "sensitive" question for "future" consideration only if and when that became necessary. But a representation-reinforcing structural theme may also have lurked in Justice Powell's analysis.

On this view, the obvious seriousness with which the ERA was being taken in 1973 provided evidence that, by that time, women and their political allies had come to wield significant influence within our political system. It followed that the legislatures of the nation, in effect, had reached the stage of inclusion assumed to exist at 223 n.9, could be upheld if passed by a modern-day Congress for reasons free from anything like "the 19th century presumption that females are inferior to males." *Id.* at 223; see also infra notes 465-69 and accompanying text (discussing *Frontiero* case); infra notes 792-96 and accompanying text (discussing legislative-purpose inquiries in sex discrimination cases).


466. See *id.* at 691 (Powell, J., concurring). A four-Justice plurality made up of Justices Brennan, Douglas, White, and Marshall asserted their willingness to apply strict scrutiny in an opinion written by Justice Brennan. See *id.* at 688 (plurality opinion). Five justices—including Justice Stewart, *id.* at 691 (Stewart, J., concurring), and Justice Rehnquist, *id.* (Rehnquist, J., dissenting), in addition to the signatories of Justice Powell's opinion—declined to join the Brennan opinion.

467. *Id.* at 692.

468. *Id.*

469. *Id.*
by Professor Ely when he published his book in 1982. From this perspective, because previously entrenched interests had opened up political processes to the protection of women, strict scrutiny of laws that discriminated on the basis of sex was inappropriate unless and until the ERA actually gained ratification. In other words, strict judicial scrutiny of the law challenged in *Frontiero* (and other laws that involved sex-based discrimination) might have been warranted in times gone by. But strict scrutiny was not warranted under modern conditions because the evidence suggested that the political process problems that once justified strict scrutiny had been rectified to a significant degree.

Structural representation-reinforcement reasoning surfaced in a more explicit form—particularly in the opinions of Justice Clark—in the Court's early reapportionment decisions. Justice Clark's views, however, did not carry the day. Rather, in a series of decisions, a majority of the Court eschewed evaluating the fairness of apportionment processes in favor of insisting on apportionment

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470. See supra note 463 and accompanying text.

471. In *Baker v. Carr*, 369 U.S. 186 (1962), for example, Justice Clark authored a concurring opinion that reasoned that judicial intervention was proper because Tennessee legislators had "riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented." *Id.* at 259. In deriding this "legislative straight jacket," Justice Clark emphasized that the people of Tennessee have "no initiative and referendum" procedure or other "practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.'" *Id.*; see also *ISSACHAROFF ET AL.*, supra note 306, at 134-35 (noting that Justice Clark's analysis in *Baker* "resonates in the language of the *Carolene Products footnote*" and quoting Michael Klarman for the proposition that "[i]t is difficult to imagine a more compelling case for judicial intervention on political process grounds than *Baker*" (alteration in original)). Taking a similar approach, Justice Clark dissented when a majority of the Court—in *Lucas v. Forty-Fourth Colorado General Assembly*, 377 U.S. 713 (1964)—invalidated a geographical representation plan for one house of Colorado's bicameral legislature that had been adopted in a statewide one-person-one-vote referendum. See *id.* at 741 (Clark, J., dissenting). Again focusing on process concerns, Justice Clark emphasized that, in part due to Colorado's "initiative and referendum system," the "State Assembly has been reapportioned eight times since 1881." *Id.* at 742. This fact indicated to Justice Clark "the complete awareness of the people of Colorado to apportionment problems and their continuing efforts to solve them." *Id.* Given the thus-evidenced proper operation of the political system, Justice Clark saw no reason why "courts should . . . interfere." *Id.*; see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 639 (1969) (Stewart, J., dissenting) (rejecting majority's invalidation of school board election system, in part, because "[t]he voting qualifications at issue have been promulgated, not by Union Free School District No. 15, but by the New York State Legislature, and the appellant is of course fully able to participate in the election of . . . that body").
outcomes that strictly reflected the principle of one-person-one-vote.\textsuperscript{472} More recently, however, Justice Powell took a strongly structural tack in casting the decisive fifth vote to sustain a specialized voting-rights restriction in \textit{Ball v. James}.\textsuperscript{473} The question in \textit{Ball} was whether Arizona could use a one-acre-one-vote system—rather than the typically mandated one-person-one-vote system—in providing for the election of directors of a water reclamation district.\textsuperscript{474} In deciding to sustain the acreage-based apportionment scheme, Justice Powell reasoned:

As this case illustrates, it may be difficult to decide when experimentation and political compromise have resulted in an impermissible delegation of those governmental powers that generally affect all of the people to a body with a selective electorate. But state legislatures, responsive to the interests of all the people, normally are better qualified to make this judgment than federal courts. Given the broad reforms effected by \textit{Reynolds v. Sims}, we should expect that a legislature elected on the rule of one person, one vote will be vigilant to prevent undue concentration of power in the hands of undemocratic bodies. The absence of just such a political safeguard was a

\textsuperscript{472} Most notably, a majority of the Court in \textit{Lucas} specifically rejected Justice Clark's structural analysis, reasoning that:

Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of [equal protection].


\textsuperscript{473} 451 U.S. 355 (1981). Notably, Justice Ginsburg also has voiced some receptiveness toward a structural representation-reinforcing view of at least some of the reapportionment cases. See Ginsburg, \textit{supra} note 1, at 1207-08 n. 143 ("The ultimate rationale to be given for \textit{Baker v. Carr} and its numerous progeny is that when political avenues for redressing political problems become dead-end streets, some judicial intervention in the politics of the people may be essential in order to have any effective politics. In Tennessee, [for example,] at the time its legislative composition was challenged in \textit{Baker}, there was a history of several years of unsuccessful state court litigation and unsuccessful efforts for corrective legislation." (alteration in original) (quoting ROBERT G. DIXON, JR., \textsc{Democratic Representation: Reapportionment in Law and Politics} 8 (1968))).

\textsuperscript{474} See \textit{Ball}, 451 U.S. at 360.
major justification for the Court's role in requiring legislative reapportionment.\textsuperscript{475}

Justice Powell continued:

The Arizona Legislature recently has demonstrated its control over the electoral processes of the District. It has reformed the District to increase the political voice of the small householder at the expense of the large landowner. This reform no doubt reflects political and demographic changes in Arizona since the District was established.\textsuperscript{476}

The message of these passages is unmistakable. In Justice Powell's view, if the challenged electoral scheme had been adopted and retained by a pre-\textit{Reynolds v. Sims}\textsuperscript{477} state legislature, it would have been subject to a most serious process-centered challenge. Arizona, however, had long since cleaned up its legislative-apportionment act, as evidenced by recent reforms that paid heed to "the political voice of the small householder."\textsuperscript{478} In these circumstances, an otherwise questionable apportionment mechanism put in place by a properly apportioned legislature would stand. Although the Arizona law would have been subject to process-based attack in an earlier era, it should and would survive constitutional challenge in the present day because, with the passage of time, process-based problems had been cured.\textsuperscript{479}

The Court's most recent resort to structural representation-reinforcing reasoning surfaced in \textit{Garcia v. San Antonio Metropolitan Transit Authority}.\textsuperscript{480} In that case the Court overruled its earlier holding in \textit{National League of Cities v. Usery},\textsuperscript{481} which had imposed significant substantive restraints on congressional regulation of "States as States"\textsuperscript{482} with respect to their "integral

\textsuperscript{475.} \textit{Id.} at 373 (citation omitted).
\textsuperscript{476.} \textit{Id.} at 374 (citation omitted).
\textsuperscript{477.} \textit{377 U.S.} 533 (1964).
\textsuperscript{478.} \textit{Id.}
\textsuperscript{479.} It is noteworthy in this regard that, in finding no constitutional problem, Justice Powell specifically cited to Justice Clark's concurring opinion in \textit{Baker}. See \textit{id.} at 373; see also \textit{supra} note 471 (quoting from, and discussing, Justice Clark's \textit{Baker} concurrence).
\textsuperscript{480.} \textit{469 U.S.} 528 (1985).
\textsuperscript{481.} \textit{426 U.S.} 833 (1976).
\textsuperscript{482.} \textit{Id.} at 845.
operations in areas of traditional governmental functions. Any federalism-based limit on congressional action, the Court concluded in *Garcia*, "must be tailored to compensate for possible failings in the national political process rather than to dictate ‘a sacred province of state autonomy.’" Developing this process-centered principle, the Court in *South Carolina v. Baker* refused to invalidate a federal law that removed a federal income tax advantage for holders of bearer bonds issued by South Carolina. The Court reasoned that that state had not been "deprived of any right to participate in the national political process" or "singled out in a way that left it politically isolated and powerless." In short, "[w]here, as here, the national political process did not operate in a defective manner, the Tenth Amendment is not implicated." While neither *Garcia* nor *South Carolina v. Baker* details the "extraordinary" process defects that might lead to a federalism-based invalidation of congressional action, potentially fatal deficiencies are identifiable. What if, for example, a traditionally favored group of states puts in place a procedural structure that ensures their favored position will persist? What if a group of states—particularly a small group—is seriously disadvantaged because the legislative process in a particular field becomes dominated by a powerful private interest group? Or what if a

483. Id. at 852.
486. Id. at 513.
487. Id.
488. See id. at 512.
489. Consider this hypothetical: The House develops a committee to oversee appropriations for building new federal highways. Eligibility for membership on the committee is determined by region, with the number of members from each region being set in proportion to the existing number of miles of federal highways located within each region. At first blush such a decision-making structure might seem sensible. However, under certain conditions (depending, for example, on the definition of each region, the number of representatives selected from each region, and the like), this system might effectively deny particular states from securing much-needed highway funds. Indeed, such a system could well generate the perverse result of "freezing out" the very states that most need more highways precisely because they now contain the fewest highway miles.
490. Cf. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150-51 (1963) (finding a lack of Congressional intent to preempt state law in part because the federal regulations in question have been drafted by a local trade group rather than by "impartial experts" with a nationwide constituency). The chances of finding a process problem in this
large body of legislators in fact "gang up" on one state by disadvantage its interests through use of unfair internal procedures? In each of these instances, a process problem might well lead to invalidation of substantive legislation. Precisely because the problem is one of process, however, the legislation's invalidation should not foreclose its successful reenactment. Rather, removal of the process problem should free the Congress to put in place a precisely identical law. Garcia thus confirms the modern Court's willingness to protect substantive constitutional values (here, the substantive value of state autonomy) with process-centered structural rules.

A common theme runs through all these cases despite their concerns with widely differing fields of law. From Frontiero to Ball v. James to Garcia and South Carolina v. Baker, judicial concern has focused on the "capture" of government processes by a powerful group. Legislatures that operated in earlier times—particularly before adoption of the Nineteenth Amendment and the Voting Rights Act of 1965—in fact reflected the social and political dominance of white males. Many pre-Reynolds state legislatures in fact had been captured by the electorates of rural counties. And while it may be a rare occurrence that a block of strong states captures congressional processes in an unfair way, the structural principle of Garcia speaks to the risk that on occasion such a problem will arise.

Viewing the representation-reinforcement cases as involving problems of capture helps to reveal their structural dimension. After all, just as surely as government processes may be captured by self-interested factions, they may become "uncaptured" as well. If this sort of purification of a decision-making body occurs, there is no good reason, on process grounds, to invalidate any rule it generates, even if the same rule might have been subject to

situation would obviously increase if the dominant interest group carried significant clout in most, but not all, states.

491. See, e.g., EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990) (noting in rejecting Garcia/Baker attack on application of Americans with Disabilities Act to state judges that "[t]here is no suggestion that Congress surreptitiously enacted any legislation without notice to the State of Vermont").

492. See ISSACHAROFF ET AL., supra note 306, at 135 (describing early reapportionment cases, and process-based invalidations in general, as involving instances where "the political process succumbed to capture by a self-interested faction").
invalidation at an earlier time. To follow Professor Ely's metaphor, a defendant convicted by a "rigged jury" is entitled to a new trial.\(^4\) But if that new trial takes place before a jury that is not rigged, the new jury's verdict should stand.

VI. **TIME-DRIVEN SECOND-LOOK RULES**

Theorists who are structurally minded plead the case of so-called "second-look" doctrines.\(^4\) We now have seen four separate instances in which courts might, when confronted with rules that raise particularly serious constitutional concerns, apply this style of analysis: where legislative clarity is lacking; where the form of policymaking is suspect; where legislative findings or studies seem inadequate; and where curable problems of inadequate representativeness have infected policymaking processes. There is a fifth category of cases in which the claim of second-look rules seems self-evidently strong: cases that involve challenges to constitutionally problematic statutes enacted in a bygone era. Robert Dahl and other scholars have made the case that traditional exercises of the *Marbury* power are often, if not typically, explicable by the passage of time.\(^4\) But the linkage between the outdatedness of laws and judicial intervention may be even closer in the field of structural review. Courts, for example, sometimes "update statutes by construing them to reflect society's evolving values as they relate to the Constitution."\(^4\) This style of statutory interpretation is structural...

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\(^{493}\) See ELY, supra note 88, at 169 (quoted supra text accompanying note 463).

\(^{494}\) See, e.g., text accompanying note 461.

\(^{495}\) See generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (discussing the Court's counter-majoritarian jurisprudence from a historical perspective). As stated by Professor Tushnet:

> When [Dahl] examined Supreme Court decisions holding federal statutes unconstitutional, he discovered that most often the Court invalidated statutes enacted many years before its decision; the countermajoritarian thrust of the decisions was weakened because the statutes might not have retained majority support when the Court acted . . . . Most of the time judicial review does little more than ease the burden on those who wish to take obsolete statutes off the books; they can turn to the courts instead of having to overcome legislative inertia.

TUSHNET, supra note 24, at 197-98. Professor Tushnet also notes the political science literature that updates Professor Dahl's findings. See id. at 198 n.23.

\(^{496}\) Eskridge, supra note 119, at 1021. See generally West v. Gibson, 527 U.S. 212, 218 (1999) ("Words in statutes can enlarge or contract their scope as other changes, in law or in..."
because—just like with clear-statement rules—it invites the legislature to reconsider the wisdom and scope of a prior enactment in light of constitutional values viewed through the prism of current conditions.497

Some structural representation-reinforcement rules also have a time-tied dimension.498 For example, the second-look approach to sex discrimination cases advocated by Professor Ely responds to dramatically altered circumstances. In essence, Professor Ely argues that courts should take a second-look approach to statutes that classify on the basis of sex because a moral enlightenment driven by the passage of time has reshaped political institutions in a manner largely curative of process defects. This development in turn requires a legislative reconsideration—but not necessarily the permanent interment—of many old gender-based laws.499

An acceptance of this type of time-tied review raises a large, but little-noticed, question in constitutional law. The question is this: If the Court can use time-tied structural rules to protect groups burdened by “suspect classifications,” why should it not also make use of such rules to safeguard “fundamental rights”? Other commentators—particularly Judge Guido Calabresi—have made the case for judicially mandated legislative reconsideration of old laws that impinge in new ways on important constitutional values.500 At

the world, require their application to new instances or make old applications anachronistic.”). According to Professor Sunstein: “The Court's decision in Bob Jones can be understood in [this way]. Changing legislative and judicial developments had made racial discrimination inconsistent with 'public policy' in the 1980's even if no such inconsistency existed when the charitable deduction was first enacted.” Sunstein, supra note 119, at 495 (discussing Bob Jones Univ. v. United States, 461 U.S. 574 (1983)). Accordingly, the Court interpreted relevant statutes narrowly to uphold the denial of tax-exempt status to charitable institutions that discriminate on the basis of race. See id. at 585-602.

497. See supra Part III.
498. See supra Part VI.
499. See supra notes 461-64 and accompanying text.
500. Judge Calabresi laid out this approach in his lengthy treatment of structural rules in the Harvard Law Review. See Calabresi, supra note 13, at 122 (“Checks and balances . . . impede the repeal of old laws, including those that have over time come to violate entitlements that philosopher-judges deem fundamental; and this survival of old laws is a particularly important, if frequently unnoticed, form of hiding.”). He later applied this approach in his concurring opinion in the assisted-suicide case, Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), rev'd, 521 U.S. 793 (1997). There he reasoned that “the absence of a recent, affirmative, lucid and unmistakable statement of why the state wishes to interfere with what has been held by the Supreme Court to be a significant individual right, dooms these statutes.” 80 F.3d at 741. Both the Harvard piece and the Quill opinion emanate to some
least in its explicit holdings, the Court has never endorsed this style of review in a generalized way. At the same time, the Court has given momentum to a variety of discrete structural techniques designed to address outdatedness concerns.

In this area, as elsewhere, a resort to categories may oversimplify. There appears, however, to be at least five types of time-tied rules that protect fundamental substantive values in a structural way: (1) the no-longer-advanced-justification rule; (2) the rule of desuetude; (3) remand-to-the-legislature rules triggered by changed factual circumstances; (4) rules of interbranch dialogue based on “evolving standards”; and (5) constitutional sunset rules. We turn now to an examination of each of these time-tied structural methodologies.

A. The No-Longer-Advanced-Justification Rule

Laurence Tribe has focused attention on one rule that responds to changed conditions in a structural way. According to Professor Tribe, courts engaged in means/ends inquiries (at least in heightened scrutiny settings) should and do ignore legislative goals that actually induced enactment of a challenged statute, if not pressed as justifications for the statute by the state’s representatives in present-day litigation. Professor Tribe says this technique took hold in *Griswold v. Connecticut*, or at least in Justice White’s extent from Judge Calabresi’s earlier and more generalized study of judicial treatment of outmoded statutes. See GUIDO CALABRESE, A COMMON LAW FOR THE AGE OF STATUTES (1982). Professor Sunstein also has expressed some receptivity to fundamental-rights-driven structural invalidations of old laws, including in the same right-to-die context considered by Judge Calabresi in *Quill*. See Sunstein, *supra* note 434, at 95 (“A court might decide not to invalidate any and all legislative efforts to interfere with private choice, but to say more modestly that a state invoking old laws has not demonstrated an adequate reason to interfere with a private choice of this kind—unless and until a recent legislature is able to show that there is a sufficiently recent commitment to this effect to support fresh legislation.”).

501. See TRIBE, supra note 24, § 16-32, at 1604-06; Tribe, supra note 27, at 298-303.

502. Tribe, supra note 27, at 299 & n.96. Of course, it is possible to take account of the nonassertion of certain state interests in a variety of ways, including where the nonassertion seems to have nothing to do with the passage of time. See, e.g., Hill v. Colorado, 120 S. Ct. 2480, 2508 (2000) (Scalia, J., dissenting) (faulting Court’s majority because “in order to sustain a statute, [it] has relied upon a governmental interest not only unasserted by the State, but positively repudiated”).

503. 381 U.S. 479 (1965).
concurring opinion in that case. Griswold concerned the constitutionality of Connecticut's ban on contraceptive use, which apparently had been propelled to adoption in 1879 by a moral antipathy to nonreproductive-minded sexual intercourse. Neither the Court majority nor Justice White, however, gave this potential justification for the law even the shortest shrift. The reason why, according to Justice White, was that there lurked in the record "no serious contention that Connecticut thinks this use of . . . contraception immoral." Put another way, there was no good cause for the Court to invoke a morality-based justification to uphold a controversial statute when the state itself declined to defend the statute on that ground.

No less tellingly, in Cleveland Board of Education v. LaFleur, a majority of the Court sidestepped a no-longer-advanced-justification for a wholesale ban on teaching by women more than four months pregnant. The Court noted that the policy, which had been initiated in 1952, "may have originally been [adopted] . . . . to insulate schoolchildren from the sight of conspicuously pregnant women," with the four-month cut-off date selected because "this was when the teacher 'began to show.'" The Court, however, brushed aside this initially significant justification for the rule in assessing the rule's constitutionality. It did so because the defendants had not "contended in this Court" that this "outmoded" way of thinking supported the challenged policy in the present day.

504. See id. at 527-29 & n.2 (Stewart, J., dissenting).
505. Id. at 505 (White, J., concurring); see Tribe, supra note 27, at 299; cf. Poe v. Ullman, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting) (noting in responding to a pre-Griswold attack on the Connecticut contraception statute, that the state "asserts that . . . it considers the practice of contraception immoral in itself").
507. See id. at 634.
508. Id. at 641 n.9.
509. The majority nonetheless signaled some skepticism about this rationale, describing it as "less weighty" than interests in ensuring teacher competence and continuity of instruction. See id. The Court further noted that the comments about "when the teacher 'began to show'" suggested "the possible role of outmoded taboos in the adoption of the rules." Id.
510. Id.; see also id. at 651, 653 (Powell, J., concurring) (noting that the defendant school boards "[do] not advance . . . today" the policy's original purpose of "keep[ing] visibly pregnant teachers out of sight").
Is the no-longer-advanced-justification-rule itself justifiable? Common sense suggests that the answer to this question is "yes" for the simple reason that courts should hesitate to second guess a state's own thoughtful choice not to defend its own challenged law on a potentially available ground. And at a deeper level, the rule reflects both the significance of time's passage and a sensitivity to judicial restraint. As Professor Tribe has explained: "If the original justification for a law has faded and the state can come up with no other justification that substantially fits the law, then we can perhaps describe a court which strikes the law down as more acknowledging a change in social values than inventing one."\(^{511}\)

One might quibble about whether this no-longer-advanced-justification rule involves a true second-look doctrine. Unlike other second-look rules, after all, it does not—at least at first glance—entail a judicial remand to political authorities for a focused reconsideration of the law at issue. Even so, the driving force behind the rule is a second look: namely, the second look taken by modern state authorities—typically, the state's governor or attorney

\(^{511}\) Tribe, supra note 27, at 299; see also id. at 316-17 ("It was inertia, then, rather than real consensus that the Supreme Court displaced when it forced those entrenched bureaucracies to abandon their automatic and comfortable reliance upon formal criteria rooted in a morality that was no longer widely shared—maternity leave rules originating in Victorian attitudes toward women, sex, and schools . . . . Much like legislatures that could forestall their own reform by resisting reapportionment, institutions capable of perpetuating their habitual norms even after those norms have ceased to reflect anything like a consensus make a weak case for judicial deference."). This approach also played a prominent role in one of the early abortion cases. See Abele v. Markle, 342 F. Supp. 800, 805 (D. Conn. 1972) (Newman, J.) (invalidating Connecticut abortion law enacted in 1860 where original justification was protection of maternal health, although government did not defend statute on that ground; and conceding that, ordinarily, disappearance of original rationale did not justify invalidation, but that judicial intervention was proper when law raised severe constitutional doubts). One may also view Justice Stevens's dissenting opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), as using something like this mode of review. See id. at 219 (faulting majority for upholding state sodomy law only as applied to homosexuals when law, as both originally enacted and as still written, applied to both heterosexuals and homosexuals and Court advanced no defense of the law as applied to both groups); see also Carlson & Smith, supra note 27, at 218 n.354 (stating that in McGinnis v. Royster, 410 U.S. 263, 270 (1973), the "Court . . . appeared to equate 'articulated' with 'argued on appeal'"). See generally Gunther, supra note 30 (considering propriety of "articulated rationale" approach in a variety of contexts). But cf. Tribe, supra note 27, at 299 n.96 (noting that "Professor Gunther's formulation . . . is somewhat ambiguous; he suggests that the only purposes to be considered are those expressed or at least entertained by the enacting legislature . . . but at some points he also suggests the only purposes to be considered are those argued by the state's representatives in the lawsuit").
general—called on in the context of modern-day litigation to identify all plausible justifications invocable in support of the challenged law.

Indeed the no-longer-advanced-justification rule embodies three separate and significant structural features. First, it operates as a temporally driven constitutional "who" rule, shifting decisional authority from a long-gone state legislature to current state actors who possess a greater competence to weigh the worthiness of a law in light of present-day real-world conditions. Second, the rule collaboratively engages accountable political officials in the constitutional lawmaking process. To be sure, state legislators are not responsible for defending state laws challenged in constitutional litigation. But state attorney generals and others who defend such laws typically are politically accountable (as well as motivated to advance all justifications that may be offered with a straight face in support of the rules they are employed to defend). Finally, wholly apart from the deference it accords to state executive branch advocates, the no-longer-advanced-justification rule does invite a second legislative look. The mere fact that the state's lawyers decline to invoke an original justification for a law does not mean that the legislature must agree with that choice. If the law, thus defended, is struck down, the legislature may reenact it, making clear in the process that the law's original purpose continues to have merit. Any such action would supply the statute with an added justification—distinctively powerful precisely because of its recent endorsement—to which courts would have to pay heed in the context of any post-reenactment litigation.

512. See infra Part XI; see also TRIBE, supra note 24, § 16-32, at 1684 ("[D]eclining to uphold the enforcement of a law on a theory that its enforcers are unwilling to espouse serves a role analogous to the careful examination of actual enactment processes and purposes in cases like Hampton v. Mow Sun Wong . . . ."); infra notes 837-48 and accompanying text (discussing that case).

513. But cf. TRIBE, supra note 24, at 1606 (suggesting that, at least sometimes, "a legislature can defend its predecessors' enactments when the executive will not").

514. See ELY, supra note 88, at 126 ("The lawyer wants to win, and in order to do so is likely to rely on any purpose that will help . . . .").

515. See BICKEL, supra note 6, at 207.
B. The Rule of Desuetude

In his famous treatment of "the passive virtues," Alexander Bickel did not touch on most of the structural rules we consider here. He did, however, devote much attention to one rule, albeit "not an everyday, familiar doctrine of Anglo-American law." It is," Professor Bickel explained, "the concept of desuetude"—that is, the notion that rules may become unenforceable by going unenforced over an extended period of time.

_Poe v. Ullman_ was an earlier attack on the contraceptive statute at issue in _Griswold v. Connecticut_, and Professor Bickel published _The Least Dangerous Branch_ after the Court decided the former case but before it decided the latter. Professor Bickel's book does not reveal how he would have voted in _Griswold_. It offers strong signals, however, that he would have drawn on the desuetude concept to avoid the Court's controversial on-or-off inquiry into substantive privacy rights. In his plurality opinion in _Poe_, Justice Frankfurter briefly alluded to desuetude as he voted to dismiss on standing grounds a declaratory action brought by doctors and patients. Professor Bickel was skeptical about a jurisdictional dismissal of the _Poe_ case. He, like Justice Harlan, saw in _Poe_ "a perfectly real, concrete, and fully developed controversy" in that "law-abiding" plaintiffs—notwithstanding a long history of nonenforcement—were in fact refraining from prescribing and receiving contraceptives due to the statute's existence. The proper question, Professor Bickel asserted, was not whether the plaintiffs had standing, but "whether a statute that has never been enforced and that has not been obeyed for three quarters of a century may suddenly be resurrected and applied." In Professor

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516. The term "The Passive Virtues" provides the title of Chapter IV of Bickel's _The Least Dangerous Branch_. See id. at 111.
517. Id. at 148.
518. Id.
520. 381 U.S. 479 (1965); see supra notes 503-04 and accompanying text.
521. See BICKEL, supra note 6, at 143-56.
522. See Poe, 367 U.S. at 503-05.
523. See BICKEL, supra note 6, at 146-47.
524. Id. at 146.
525. Id. at 148.
Bickel's view, there were many reasons for saying it could not be, and these reasons revealed his gravitation toward a structural approach to the case.

The essential problem, according to Professor Bickel, was that "[w]hen the Connecticut anti-birth control statute was enacted, in 1879, . . . it was the product of very different political forces and a very different climate of opinion."\(^{526}\) The ensuing decision by prosecutors not to enforce the statute revealed a "play of political forces which . . . could will no more than that the statute remain . . . quiescent."\(^{527}\) More important, nonenforcement stripped the original enactment of any claim of being "present legislative policy."\(^{528}\) This was so because there was little, if any, reason for "legislative reconsideration" in a setting where no persons were being subjected to the law's punitive provisions.\(^{529}\) Thus, Professor Bickel opined, an actual criminal prosecution of those involved in "use of contraceptives by a doctor's prescription" should fail "on the grounds of desuetude."\(^{530}\)

One salutary effect of such a ruling, he added, would be to remove the Court from the necessity of definitively deciding (here, on controversial constitutional privacy grounds) "issues on which the political processes are in deadlock."\(^{531}\) Instead, such a ruling would "turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature, where the power of at least initial decision properly belongs in our system."\(^{532}\) In short, Professor Bickel wanted to force upon Connecticut lawmakers the need to restudy—and, if then warranted, to reenact—the challenged statute before it was used again. In keeping with other second-look doctrines, application of the desuetude rule thus would shift the "burden of inertia" to the present-day legislature.\(^{533}\)

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526. *Id.* at 147.
527. *Id.* at 154.
528. *Id.* at 152.
529. *See id.* at 152.
530. *Id.* at 154.
531. *Id.* at 146.
532. *Id.* at 148.
533. *See supra* note 463 and accompanying text. For other examples of the use of this sort of reasoning, see *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (Calabresi, J., concurring), rev'd, 521 U.S. 793 (1997) (discussed *infra* note 558) and *Franklin v. Hill*, 444 S.E.2d 778, 783 (Ga. 1994) (Sears-Collins, J., concurring) (advocating application of a desuetude-based approach
Is the structural desuetude doctrine that Professor Bickel espoused part and parcel of our federal constitutional law? Professor Bickel claimed that it is, or at least that it should be, by “consanguinity” to the similarly structural and uncontroversial vagueness doctrine. Professor Bickel also reasoned that in Poe the doctrine in substance had taken hold. Because the concept of desuetude has surfaced infrequently since Poe, one might conclude that Professor Bickel’s position on this matter has not won the day. But the Supreme Court has never rejected the doctrine; Professor Bickel did not prophesy its frequent embrace; and judges do, from time to time, say that statutes may become unenforceable because they have lain unexercised too long. To be sure, there are

to “forc[e] the General Assembly to reexamine the tort of seduction in view of modern day concepts”). See generally Sunstein, supra note 434, at 39, 95 (noting that “[a] court might invoke the doctrine of desuetude to require more in the way of accountability and deliberation,” and adding that the “principle has strong democratic foundations” because, through authorized violation of a moribund law, citizens “are permitted to call democratic attention to the space between the law as popularly conceived and approved and the law as it exists on the books”).

534. See BICKEL, supra note 6, at 149-52. Professor Gunther has noted Professor Bickel’s relation of the desuetude doctrine to the vagueness rule. See Gunther, supra note 30, at 19; see also Committee on Legal Ethics v. Printz, 416 S.E.2d 720, 724 (W. Va. 1992) (describing doctrine of desuetude as “[c]losely akin to the doctrine of ‘vagueness”). Notably, Professor Bickel also observed that any “formal rejection of the [desuetude] doctrine” by the courts would not necessarily betoken a failure to apply the doctrine’s substance; rather, he observed, courts often defang desuetude statutes through enthusiastic interpretation. BICKEL, supra note 6, at 148-49.

535. See BICKEL, supra note 6, at 154; Calabresi, supra note 13, at 122 n.136 (referring to Professor Bickel’s view that “desuetude had been implicitly recognized by Justice Frankfurter’s majority opinion in Poe”); Gunther, supra note 30, at 19-20 (noting that Professor Bickel claimed that “Poe really rests” on desuetude and describing this reading of Poe as an “ingenious though not invulnerable reinterpretation”); see also Printz, 416 S.E.2d at 725 (citing Poe, in asserting that “[t]he United States Supreme Court has also recognized the concept of desuetude”).

536. See Estreicher, supra note 139, at 1132 n.14 (asserting that “[t]he doctrine that laws might become inoperative through long-continued nonuse, while recognized in Scottish law, has never taken root in the common law of England or the United States” (citation omitted)).

537. See United States v. Elliot, 266 F. Supp. 318, 325-26 (S.D.N.Y. 1967) (noting that “Supreme Court’s consideration of [desuetude] has not resolved the question,” but that “[r]ecent commentators . . . have found some vitality to the doctrine”); State v. Linares, 630 A.2d 1340, 1346 n.11 (Conn. App. 1993) (citing Printz with seeming approval but refusing to address issue because not raised below); Printz, 416 S.E.2d at 724-27 (applying doctrine to invalidate application of state extortion law to lawyer who threatens criminal prosecution as part of a negotiation over civil claims: “Although seldom used, desuetude is a widely accepted legal concept”); see also Quill, 80 F.3d at 735 (Calabresi, J., concurring) (relying in part on fact that the “enforcement of the laws themselves has fallen into virtual desuetude”
few cases along these lines. But the dearth of cases is hardly surprising when one recalls that desuetude-based attacks arise, by definition, only with respect to statutes that are almost never enforced.

Nor can the desuetude doctrine's distinctive constitutional significance be gainsaid. The thrust of Professor Bickel's argument is that the rule of desuetude (like the rule of vagueness) remediates the constitutional vice of "erratic, prejudiced, discriminatory" enforcement.\textsuperscript{538} Even more importantly, as we have seen, the rule

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Professor Sunstein has referred to the doctrine of desuetude as "largely implicit but still vibrant." Sunstein, supra note 434, at 8. He asserts that the Court's VMI decision, concerning single-sex education "can . . . be understood as one of desuetude," id. at 36 n.488, and that some assisted-suicide laws might be vulnerable on this ground, see id. at 93-95. \textit{See also} Cass R. Sunstein, \textit{The Right to Die}, 106 \textit{Yale L.J.} 1123, 1156-59 (1997) (analyzing both the Quill and VMI decisions under the theory of desuetude). He also has observed that: Probably \textit{Hardwick} should have been decided (if it was to be decided by the Court at all) the other way and very narrowly—as a case involving the old and nicely minimalist idea, with democratic foundations, of desuetude. A challenge of this sort was not raised or passed on by the Court, and hence that challenge could be accepted without overruling \textit{Hardwick}'s substantive due process holding.

Sunstein, supra note 434, at 68 (footnotes omitted). For another treatment of desuetude by Professor Sunstein, see SUNSTEIN, supra note 105, at 108-15. Robert Bork, who studied under Professor Bickel, has written of long-unused laws:

There is a problem with laws like these. They are kept in the codebooks as precatory statements, affirmations of moral principle. It is quite arguable that this is an improper use of law, most particularly of criminal law, that statutes should not be on the books if no one intends to enforce them. It has been suggested that if anyone tried to enforce a law that had moldered in disuse for many years, the statute should be declared void by reason of desuetude . . . .


\textsuperscript{538} BICKEL, supra note 6, at 151; accord Printz, 416 S.E.2d at 724 (stating that "a law . . .
that condemns desuetude (like the rule that condemns vagueness) is driven by an effort to redirect authority from individual prosecutors and jurors to more accountable, more deliberate, and more representative legislative assemblies. The rule of desuetude (again like the rule of vagueness) thus brings into play Professor Bickel's apt observation with respect to the full range of doctrines of this kind:

When should the Court recall the legislature to its own policy-making function? Obviously, the answer must lie in the importance of the decision left to the administrator or other official. And this is a judgment that will naturally be affected by the proximity of the area of delegated discretion to a constitutional issue. The more fundamental the issue, the nearer it is to principle, the more important it is that it be decided in the first instance by the legislature.

It is noteworthy in this regard that in both Poe and the post-Poe opinions, judges have directed the desuetude concept at laws that distinctively threaten "fundamental" constitutional rights or groups made the subject of "suspect classifications." In short, as with other structural doctrines, the rule of desuetude protects significant substantive constitutional values by forcing studied attention of those values in the context of a judicially insisted-upon reconsideration by nonjudicial authorities.

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539. See supra notes 531-33 and accompanying text.
540. BICKEL, supra note 6, at 161.
541. Certainly, this was true of the concurring opinions in both Quill, 80 F.3d at 735 (Calabresi, J., concurring) (invoking structural reasoning to strike down assisted-suicide laws that had "fallen into virtual desuetude" because this legislation "comes close to violating fundamental substantive constitutional rights"), and Franklin, 444 S.E.2d at 782 (Sears-Collins, J., concurring) (expressing willingness to apply desuetude concept "in this case, where the constitutionality of the statute is doubtful" on sex discrimination grounds); see also Bonfield, supra note 537, at 415 ("[T]he possibility should not be ignored that the use of these doctrines in this way and for this purpose may depend upon several extrinsic factors. Significant weight might, for example, be given to the nature of the particular right threatened....").
C. Changed-Facts Second-Look Doctrines

There is reason to wonder whether the no-longer-advanced-justification rule or the concept of desuetude does or can have much practical importance. There is, however, another style of changed-circumstances decision making that holds the potential to work significant real-world effects.

The root of this principle lies in United States v. Carolene Products Co., 542 for there the Supreme Court identified the driving thought: "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist." 543 The essential point is that changed circumstances may transform a once-valid enactment into one that can no longer find shelter in the Constitution. But who should determine whether the circumstances have so changed? And how definitively and permanently controlling is a judicial judgment that a critical change has occurred? As the Court often has recognized, factually laden empirical and predictive decisions are best made by legislatures or agency experts. 544 Consequently, at least as a practical matter, judicial invalidations on fact-based changed-circumstances grounds often will have a provisional, second-look dimension.

542. 304 U.S. 144 (1938).
543. Id. at 153. For another expression by the author of Carolene Products of essentially the same thought, see Harlan F. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 24 (1936) ("Action plainly unreasonable at one time and in one set of circumstances may not be so in other times and conditions."). For a commentary that aggressively questions the wisdom of changed-circumstances rules, see Linde, supra note 27, at 234-35 ("If a court finds a law unconstitutional because facts have changed, this implies—using our premise that the government must have failed a duty to follow the Constitution—that there is a constitutional obligation to make new laws. But what laws, and when is the obligation met?").
544. See, e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665-66 (1994) ("Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue [that is] complex and dynamic . . . ."); accord, e.g., Strauss, supra note 434, at 205 ("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."). For a seminal discussion of the subject, see Archibald Cox, The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 99-108 (1966).
Illustrative of the point are cases that concern technological advances. In *Southern Pacific Co. v. Arizona*, the Court confronted a dormant Commerce Clause challenge to Arizona's singularly restrictive train length law. The state sought to justify the law by arguing that longer trains have more "slack action" and thus create a greater risk of serious accidents. Responding to this assertion, the Supreme Court emphasized that:

> [o]n comparison of the number of slack action accidents in Arizona with those in Nevada, where the length of trains is now unregulated, the trial court found that with substantially the same amount of traffic in each state the number of accidents was relatively the same in long as in short train operations.

In addition, "reduction of the length of trains . . . tends to increase the number of accidents because of the increase in the number of trains" and "[t]he record lends support to the trial court's conclusion that the train length limitation increased rather than diminished the number of accidents." Faced with these facts, the Court struck down the law, ruling that state safety interests were "so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it." Lurking in the background of the case was the fact that Arizona's train length law had been enacted more than thirty years earlier. Given this fact—and the intervening, uniform trend toward allowance of longer trains in all other states—there was every reason to suppose that (as the trial court in fact found) the state's asserted safety concerns no longer were well grounded. Moreover, the apparent lack of a true safety justification supported a structural intervention to make sure that the then-sitting legislature was being "responsive to the people," rather than to the clamoring of a

545. 325 U.S. 761 (1945).
546. See id. at 776.
547. Id. at 777.
548. Id. at 777-78.
549. Id. at 776.
550. See id. at 763.
551. See id. at 771, 774 n.4.
552. See supra note 548 and accompanying text.
narrow interest group well positioned to block legislative reform.\footnote{553} What if, however, following the Supreme Court’s ruling, the Arizona legislature had conducted extensive new hearings? And what if those hearings had generated support for the state’s claimed safety justification based on, for example, new comparative studies of train wrecks in Arizona and states other than Nevada? What if, in short, Arizona had taken a “second look” at its train length law, had found it defensible on accident reduction grounds, and therefore had reenacted it without one whit of alteration? We cannot say for sure how a renewed constitutional challenge to such a statute would have fared. But the Court’s oft-expressed willingness to defer to the superior fact-finding capacities of legislative bodies suggests that any challenge to the new train length law would have been derailed.\footnote{554} And if this is so, a ruling like the one in \textit{Southern Pacific} necessarily embodies a structural remand-to-the-legislature rule.\footnote{555}

Time-tied changed-circumstances review is not limited to train laws. This style of review has taken hold with respect to laws concerning underground gas storage tanks,\footnote{556} abortion,\footnote{557}

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\item 553. \textit{See} Calabresi, \textit{supra} note 13, at 145 (noting that “second-look doctrines are designed to make legislatures and executives \ldots responsive to the people”). Of course, the court’s attentiveness to changed circumstances is hardly a legal novelty. Courts, for example, are closely attentive to the presence of changed circumstances in applying the doctrine of stare decisis. \textit{See}, \textit{e.g.}, State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (“[S]tare decisis is not an inexorable command \[i]n the area of antitrust law, where there is a competing interest \ldots in recognizing and adapting to changed circumstances \ldots” (citation omitted)).

\item 554. \textit{See supra} note 544 and accompanying text. The likelihood of this result is heightened by the Court’s longstanding deference to state judgments about public safety in the dormant Commerce Clause context. \textit{See}, \textit{e.g.}, Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970).

\item 555. \textit{See} ROBERT A. BURT, \textbf{THE CONSTITUTION IN CONFLICT} 364 (1992) (noting that in a remand-to-the-legislature situation, the reenacted law may stand if its advocates “can provide some more persuasive justification for it \ldots than the losing litigant had advanced in the original court proceeding”); \textit{see also} West Virginia \textit{ex rel. S.M.B. v. D.A.P.}, 284 S.E.2d 912, 915 (W. Va. 1981) (noting that “there is an argument to be made for striking this statute founded in the evolving concept of structural due process which recognizes that statutes which are entirely rational at the time they are enacted by the legislature may, by the passage of decades, become irrational when applied to an entirely changed social structure”).

\item 556. \textit{See} Leather v. City of Burns, 444 P.2d 1010, 1018 (Or. 1968) (finding ban on underground tanks exceeding 3000 gallons unconstitutional in light of expert testimony that minimized present-day safety risks). As Justice Linde noted in commenting on \textit{Leathers}: “No one stopped to question the original validity of the ordinance under the conditions of 1949; only the conditions at the date of trial were considered.” Linde, \textit{supra} note 27, at 218.

\item 557. \textit{See} Abele v. Markle, 342 F. Supp. 800, 807-10 (D. Conn. 1972) (Newman, J.,
assisted suicide, sex discrimination, and other subjects as well. By taking a changed-circumstances approach, courts in

558. See Quill v. Vacco, 80 F.3d 716, 732, 735 (2d Cir. 1996) (Calabresi, J., concurring) (noting, in voting to invalidate New York's assisted-suicide law, that: "the statutes at issue were born in another age," and that "the bases of these statutes have been deeply eroded over the last hundred and fifty years"; thus concluding: "I would therefore leave open the question of whether, if the state of New York were to enact new laws prohibiting assisted suicide (laws that either are less absolute in their application or are identical to those before us), such laws would stand or fall.").

559. See Wengler v. Druggists Mut. Life Ins. Co., 446 U.S. 142 (1980). Wengler struck down a law that automatically provided workers' compensation death benefits to widows, while requiring widowers to prove dependency. See id. at 151-52. The Court asserted that the burden of defending this sex-based classification "is not carried simply by noting that in 1925 the state legislature thought widows to be more in need of prompt help than men." Id. at 151. The Court noted that there may be "levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny" but faulted the state for offering no "persuasive demonstration as to what the economic consequences to the State or to the beneficiaries might be" if widows and widowers received equal treatment today. Id. at 152.

For another interesting changed-circumstances sex discrimination case, see Adkins v. Children's Hosp., 261 U.S. 525, 553 (1923) (striking down minimum-wage law for women, notwithstanding Court's validation of maximum-hour law for women in the earlier Muller case: "The ancient inequality of the sexes, otherwise than physical, as suggested in the Muller case... has continued with 'diminishing intensity.' In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point."). Adkins was overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937), albeit not because of any intervening legislative findings that supported a greater need for protection of women workers than men. For further discussion of sex discrimination-related changed-circumstance rules, see supra notes 498-99 and accompanying text.

560. Indeed, in a curious twist, the very statute the Court upheld in Carolene Products was later invalidated under the changed-circumstances principle suggested by that case. See supra notes 542-43. Thus, in Milnot Co. v. Richardson, 350 F. Supp. 221 (S.D. Ill. 1972), the court struck down the Filled Milk Act as applied to the same milk product, called "Milnot," involved in Carolene Products. The court relied on the following changed circumstances: (1) "through technical advancements since 1944," id. at 223, there exist "at least six other food products now moving in interstate commerce (that) have almost identical appearance and consistency to milk," id. at 225; (2) thus, the "possibility of confusion... which justified the statute in 1944" no longer applied to Milnot, id.; (3) in 1944 "the presently accepted dangers of cholesterol in animal fat were almost unknown," id. at 224 n.1; and (4) "there is a growing trend of manufacture and sale of filled milk overseas, and... widespread use thereof by American armed forces overseas," id. at 225. As a strict matter of theory, perhaps Congress could not reenact the Filled Milk Act consistent with the Milnot decision because the court in that case found the Act to be "devoid of rationality." Id. at 225. The court, however, repeatedly noted the outdatedness of the Act, and it is hard to believe a new version of the act would fail if Congress reenacted it following a new and careful study. For another
effect say to state policymakers: "Show me!" The state may be permitted to reinstitute a challenged program that has become constitutionally suspect because it is well aged. The state may do so, however, only if its policymakers can conclude—in the focused context of a judicially compelled present-day reexamination—that the program continues to serve a proper purpose in a changing world.

D. Evolving-Standards Rules

In Southern Pacific, the Court in effect remanded a government program to a particular state legislature for a determination whether it wished to maintain that program in light of changed factual conditions. In some cases, however, the Court uses its structural remand power in a very different manner: it sends back constitutionally sensitive policy decisions to society at large for a thoughtful reconsideration of their continuing merit in light of changing values.

illustration of a changed-circumstances approach, see Walters v. National Association of Radiation Survivors, 473 U.S. 305, 367 (1985) (Stevens, J., dissenting) ("In this case, the passage of time, instead of providing support for the fee limitation, has effectively eroded the one legitimate justification that formerly made the legislation rational."). Occasionally, the passage of time may operate to bring a once-unconstitutional statute back from the dead. This phenomenon is most likely to surface under doctrines that focus on a rule's current effects. In Hunter v. Underwood, 471 U.S. 222 (1985), for example, the Court confronted an equal protection challenge to an Alabama law that disenfranchised persons who committed crimes of "moral turpitude." See id. at 223. Because the law was adopted with the intent to neutralize the African American vote, see generally infra notes 764-69 and accompanying text, the Supreme Court struck it down. See id. at 233. In doing so, however, the Court noted that the law continued to disenfranchise African Americans in disproportionate numbers, see id. at 227, thus implying that the law would have been sustained if it had been found to produce no continuing discriminatory impact. A case in which a court upheld a law under similar conditions is Coleman v. Miller, 117 F.3d 527, 529-30 (11th Cir. 1997) (holding that absent showing of present discriminatory effect, discriminatory motivation of Georgia legislature in adopting Confederate battle flag as component of Georgia state flag is irrelevant). For a discussion of Coleman, see infra notes 817-32 and accompanying text. See also Gardbaum, supra note 69, at 800 (discussing preemption: "although at Time 1, a reviewing court may find that the required congressional determination balancing relevant national and state interests does not reasonably justify national or uniform regulation, relevant circumstances and evidence may change to render the regulation reasonable at Time 2").

561. See supra notes 545-49.
The most famous illustration of this approach came in *Furman v. Georgia*, when the Court invalidated every death penalty statute in the United States, relying on the “evolving standards of decency” principle of the Eighth Amendment. In other words, the Court intervened in a field of extreme importance and moral sensitivity on the theory that changing values had rendered invalid practices previously deemed constitutionally unassailable. At the same time, the critical opinions in *Furman* took pains to emphasize that the Court’s ruling extended only to the death penalty “as now administered.” By taking this approach, the Court in effect (and almost surely by design) triggered a societywide plebiscite on the continued legitimacy of capital punishment. Two separate components of this judicial initiative rendered it highly structural in nature.

First, by way of its decision in *Furman*, the Court threw the burden of inertia with respect to the death penalty issue squarely onto the backs of then-sitting state legislators. No longer could

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563. Id. at 242 (Douglas, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); see also *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (“[O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’” (quoting *Trop*, 356 U.S. at 101)).
564. *Furman*, 408 U.S. 238, 312 (1972) (White, J., concurring); see also id. at 302 (Brennan, J., concurring) (stating “there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes”); id. at 304 (adding that there is “no substantial reason to believe that the punishment of death, as currently administered, is necessary for the protection of society”).
565. See id. at 403 (Burger, C.J., dissenting) (noting that “legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment”).
566. There is in fact a third reason why the Court’s ruling in *Furman* qualifies as highly structural. That reason, however, has little to do with the passage of time, and we therefore focus on it in discussing so-called “thoughtful treatment” rules. See infra notes 619-26 and accompanying text.
567. The importance of shifting this burden has been described in forceful (if somewhat hyperbolic) terms by Justice Neely:

A legislature is an organization designed to do nothing . . . . Legislatures were not designed to pass good laws but rather to prevent the passage of bad laws.

. . .

The way legislators avoid ever having to say “no” personally, or being on record as opposing any of the myriad self-serving schemes of their constituents,
local lawmakers finesse the capital punishment debate by standing by as dusty death penalty statutes did their dark work. Rather, for death penalty regimes to endure, they had to attract new majorities in both houses of present-day legislative assemblies, avoid blocking efforts by death penalty foes, evade potential gubernatorial vetoes, and the like. It was also no small matter that state death penalty statutes had to rise from the ashes of a fire built on the sober moral judgment of the nation's highest tribunal.

is to construct elaborate institutional machinery that says “no” automatically. This machinery is known as the committee system, and when the committee system is combined with the seniority system (through which certain members of the “leadership” determine the agendas of different committees) spectacular nay-saying results can be achieved with almost every individual legislator privately saying “yes.” Thus a legislature is not a neutral, majoritarian body that impartially studies all intelligent suggestions for law changes; rather, it is a machine deliberately, intelligently, and efficiently designed to say “no” unless some Herculean force kicks it in its institutional tail.

Neely, supra note 69, at 273-74.

Of course, the legislative tendency not to reexamine laws enacted in a past moral climate is not unique to death penalty laws. As noted by Judge Calabresi:

The statute in Griswold presents a prime example of hiding through the failure to repeal old laws. When the Connecticut statute outlawing the use of contraceptives was enacted in 1879, it was quite consistent with many state laws and with the then-prevailing view of rights in this country. Over the years, however, attitudes changed, and the law came to be viewed by many as violating fundamental rights. Still, one can sympathize... that it was hard to find in the Constitution any [on-or-off] prohibition against such an “uncommonly silly law.” The problem was simply that the law, although unwanted, unworkable, and incapable of reenactment, was politically hard to repeal. It was easier for legislators to use checks and balances to duck the issue than to vote one way or the other on it.

Calabresi, supra note 13, at 122 n.136 (citation omitted).

See supra note 553 and accompanying text.

See BURT, supra note 555, at 364 (noting that even temporizing judicial invalidation of a law will “alter the terms of... subsequent combat” because the constitutional claim “has been given heightened public visibility and moral sanction”); Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 208 (1952) (calling Supreme Court Justices “teachers in a vital national seminar”); see also BICKEL, supra note 6, at 26 (“Their insulation and the marvelous mystery of time give courts the capacity to appeal to men’s better natures, to call forth their aspirations, which may have been forgotten in the moment’s hue and cry.”); Dimond, supra note 69, at 239 (noting that “[t]he myth of the Court as final arbiter does usually cause the people to reflect and their representatives to pause”); Steven L. Winter, Tennessee v. Garner and the Democratic Practice of Judicial Review, 14 N.Y.U. Rev. L. & Soc. Change 679, 690 (1986) (same).
Second, by tying its Eighth Amendment jurisprudence to national moral standards, the Court in Furman required something more than the sort of remand to a single legislature involved in Southern Pacific. Why? Because if only a single state (Or three? Or five?) had reenacted a death penalty statute, the argument would have been powerful that the death penalty no longer comported with the modern-day moral consensus required by the Eighth Amendment. Put another way, the Court in Furman did not remand the issue of capital punishment solely to the legislature of Georgia. It remanded the issue to the nation as a whole and then awaited word from “We the People” on where our “evolving standards” stood. What’s more, the Court listened when the nation’s citizens, acting through their representatives, broadly reendorsed the death penalty as an appropriate punishment for aggravated murder.

The ruling of Furman does not stand alone as a structural device designed to take account of changing (or unchanging) social values. Because the Court’s entire Eighth Amendment jurisprudence is tied to “evolving standards”—and those standards are significantly evidenced by the actions of state legislatures—other decisions under that Amendment involve precisely the sort of dialogue between judicial and nonjudicial actors that defines structural decision

571. See supra note 563 and accompanying text.
572. See Gregg v. Georgia, 428 U.S. 153, 179 (1976) (Stewart, J.) (“The petitioners in the capital cases before the Court today renew the ‘standards of decency’ argument, but developments during the four years since Furman have undercut substantially the assumptions upon which their argument rested”; noting that the “legislative response to Furman” provided a “marked indication of society’s endorsement of the death penalty for murder”); ELY, supra note 88, at 65 (“Following Furman there was a virtual stampede of state reenactments of the death penalty, and the clarity of that community reaction surely had much to do with the Court’s turnaround on the issue.”); Winter, supra note 570, at 688 (stating that “the Gregg opinion is best understood as an affirmation, as a national value, of ‘society’s endorsement of the death penalty for murder’ based on an assessment of the normative expressions of a variety of democratic decision makers”).
573. See supra note 563 and accompanying text.
making.\textsuperscript{574} In \textit{Thompson v. Oklahoma},\textsuperscript{575} for example, a majority of the Court refused to assume that nineteen states' generalized subjection of certain juveniles to adult criminal law regimes (which, in turn, incorporated the death penalty) adequately evidenced a societywide value judgment that fifteen-year-old murderers may receive the ultimate punishment.\textsuperscript{576} At the same time, a different majority of the Court signaled that it would stay its hand if many states expressed a specific intent to permit the execution of such juveniles.\textsuperscript{577} Thus, wholly apart from its clear-statement-based remand to the Oklahoma legislature,\textsuperscript{578} \textit{Thompson} embodied a generalized remand to the people as a whole. In short, \textit{Thompson} operated in much the same way as \textit{Furman}, albeit with respect to a more discrete Eighth Amendment question.

There are a number of constitutional rules, tied to our "legal traditions... and practices," that embody the same sort of dialogic focus on evolving morality that pervades the Eighth Amendment cases.\textsuperscript{579} In \textit{Bowers v. Hardwick},\textsuperscript{580} for example, the Court drew on this style of analysis in holding that Georgia's criminal proscription of sodomy, as applied to homosexuals, comported with substantive

\begin{footnotesize}
\begin{enumerate}
\item See Friedman, supra note 21, at 597 & 602 nn.119 & 120 (emphasizing Court's turning "time and again to a head count of states" in applying constitutional provisions and documenting the use of this technique in Eighth Amendment cases); see also Winter, supra note 570, at 688-89 ("[I]n \textit{Coker v. Georgia}, the Court recognized that '[t]he current judgment with respect to the death penalty for rape... obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman...,' and in fact deferred to that judgment. In \textit{Enmund v. Florida}, the Court noted and relied on '[s]ociety's rejection of the death penalty for accomplice liability in felony murders...').
\item 487 U.S. 815 (1988).
\item This majority was formed by the four adherents to Justice Stevens's lead opinion and Justice O'Connor. See supra notes 222-37 and accompanying text.
\item This majority was formed by the four adherents of Justice Scalia's dissenting opinion and Justice O'Connor. See id.
\item See supra notes 240-42 and accompanying text.
\item See, e.g., \textit{Washington v. Glucksberg}, 521 U.S. 702, 721 (1997) ("Our nation's history, legal traditions, and practices... provide the crucial 'guideposts for responsible decisionmaking,'... that direct and restrain our exposition of the Due Process Clause."); see also \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, 480 U.S. 470, 475 (1987) (upholding coal mining subsidence law against Takings Clause attack despite invalidation in 1922 of comparable prohibition in part because it reflected "the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades"); id. at 488 (noting that "circumstances may so change in time" as to convert a "purely private concern" into a matter of "public" interest (quoting \textit{Block v. Hirah}, 286 U.S. 135, 155 (1921))).
\item 478 U.S. 186 (1986).
\end{enumerate}
\end{footnotesize}
due process restraints. Bowers differs from Furman in a fundamental way: Because in Bowers the Court upheld the challenged law, it neither shifted the burden of inertia to state legislatures to reconsider their "ancient" sodomy bans nor otherwise mandated a thoughtful revisitation of whether or how to regulate homosexual intimacy. Even so, a measure of structural-mindedness inhered in Bowers's partial reliance on present-day patterns of legislative regulation. To put the matter in concrete terms, if after Bowers the number of state sodomy statutes were to dwindle from twenty-four to four (Or six? Or eight?), the Court could no longer reason that "the laws of . . . many States . . . still make such conduct illegal." By thus linking its decision to the actual number of operative legislative prohibitions, the Court effectively invited the

581. Notably, the Court ruled only on the substantive due process issue, and not on any Eighth Amendment, Ninth Amendment, or Equal Protection issues the case might present. See id. at 196 n.8.

582. See id. at 192.

583. Cf. supra notes 567-70 and accompanying text.

584. For another, more recent illustration of this sort of structural reasoning in the substantive due process context, see Washington, 521 U.S. at 710 ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."); id. at 716 ("Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed."); id. at 774-75 (Souter, J., concurring) ("Criminal prohibitions on such assistance remain widespread, as exemplified in the Washington statute in question here."); see also Troxel v. Granville, 120 S. Ct. 2054, 2063 (2000) (plurality opinion) (finding parental rights substantive due process violation in part based on state's departure from the rule of "many other States . . . that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party"); County of Sacramento v. Lewis, 523 U.S. 833, 847-48 n.8 (1998) (suggesting that compatibility of executive action with "substantive due process" hinges on "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them"); Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting) (noting, in voting to invalidate ban on married couple's use of contraceptives, "the utter novelty of this enactment").

585. See Bowers, 478 U.S. at 193-94 (noting that "today, 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults").

nation's citizens, acting through their legislative representatives, to participate in the process of constitutional law reform.\footnote{Furman and Bowers show why constitutional rules that look to nationwide patterns of legislation have a structural bent. And if this is so, structural rules are widespread, for doctrines of this kind are commonplace in our law. In its seminal incorporation decisions, for example, the Court adverted repeatedly to then-recent patterns of legislative choice. In shaping the Fourth Amendment law of "unreasonable" searches and seizures, the Court likewise has consulted prevailing positions of state policymakers. When using laws and practices in the Nation" bore heavily on incorporation questions. Baldwin v. New York, 399 U.S. 66, 70 (1970) (quoting Duncan, 391 U.S. at 161); accord Johnson v. Louisiana, 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring); see also Mitchell v. United States, 526 U.S. 314, 330 (1999) (explaining that "[p]rinciples once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition"; relying in part on adoption of no-inference principle by "some 44 states" prior to its incorporation in 1965); Winter, supra note 570, at 686 (discussing relevant cases, including Duncan, Baldwin, and Johnson, and describing the incorporation process as "an almost explicit exercise in nose counting").}
traditional means/ends analysis under the Fourteenth Amendment, the Court sometimes considers whether the challenged rule is well-entrenched or on the decline in other jurisdictions.\(^5\) All these

591. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (upholding minimum wage law for women: "The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it."); supra note 579 (discussing Washington v. Glucksberg); see also Sosna v. Iowa, 419 U.S. 393, 404-05 (1975) (noting, before turning to means/ends analysis, that "48 states impose [a durational residency requirement] as a condition for maintaining an action for divorce"); cf. Hunt-Wesson, Inc. v. Franchise Tax Bd., 120 S. Ct. 1022, 1027 (2000) (invalidating under Due Process and Commerce Clauses state law limitation on deductibility of interest expenses through unallocated attribution to "nonunitary" and thus nontaxable—corporate income; noting that "[n]o other taxing jurisdiction, whether federal or state, has taken so absolute an approach"). This style of analysis also has surfaced in First Amendment cases. See McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) ("A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality."); Burson v. Freeman, 504 U.S. 191, 206 (1992) (relying in part on "widespread and time-tested consensus" with regard to speech-restricted areas around polling places to uphold prohibition on campaigning within 100 feet of voting locations); New York v. Ferber, 458 U.S. 747, 749 (1982) (noting that the federal government and 47 states had enacted statutes "specifically directed at the production of child pornography"; that at least half of these jurisdictions did not require "that the materials produced be legally obscene"; that 35 states and Congress had passed legislation prohibiting the distribution of such materials; and that 20 states prohibited the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978) ("While not dispositive, we note that more than 40 States having similar commissions have not found it
doctrines involve our political representatives in the elaboration of constitutional rights. All these doctrines involve the Court in a constitutional dialogue with those representatives, and ultimately with us. All of these doctrines belie the common notion that the *Marbury* power is solely a tool for imposing judicial conceptions of the Constitution on elected authorities. And all of these doctrines thus have a structural dimension that emanates from the significance they attach to "evolving social values" in applying constitutional protections.

E. Constitutional Sunset Rules

The four varieties of time-tied rules we have looked at so far share a common bond. Each permits judicial invalidation of a law rendered suspect by the passage of time. There is, however, another time-tied way in which courts can allocate the burden of legislative inertia to foster a thoughtful reconsideration of constitutionally necessary to enforce confidentiality by use of criminal sanctions against nonparticipants.").

592. See supra notes 55-61 and accompanying text.

593. See Winter, supra note 570, at 685 ("[C]ases like Garner exemplify a process of dialogue in the 'explication of basic shared values' that has become one of the major, though not exclusive, modes of constitutional exposition."); see also Tribe, supra note 27, at 301 (observing that, through judges' use of a structural approach, "[t]he judiciary's most important role becomes that of giving structure to the evolution, or rather participating in the structure of the evolution, of social norms and understandings as they come to find expression in the law").

594. See supra notes 7-8 and accompanying text. See generally Winter, supra note 570, at 685 ("Those at the top of the political organization may have the power to declare and require adherence to societal norms—that is, to 'the law.' But the process requires dialogue because the viability of those norms and the legitimacy of their enforcement depends to a very large extent on the existence of a consensus—whether emerging or preexisting—amongst society.").

595. Woodson v. North Carolina, 428 U.S. 280, 297 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Before leaving the field of "evolving standards" rules, it is worth noting three related legal phenomena that share a structural character. First, the constitutional law of obscenity is directly attached to "contemporary community standards." Miller v. California, 413 U.S. 15, 21 (1973). Thus, that body of law—much like the rules noted in the text—involves nonjudicial actors in the formulation of constitutional norms. Second, on a far grander scale, the notion of evolving standards seems closely tied to the notion of "constitutional moments" at which large societywide changes in belief systems precipitate major shifts in constitutional doctrine. See ACKERMAN, supra note 21, at 44-50 (suggesting we have experienced two such moments since the original founding, in the wake of the Civil
suspect policies. I refer to these doctrines as "constitutional sunset rules."

We noted at the outset that the Framers adopted the Constitution's basic requirements of bicameralism and presentment to foster reflective and cautious governmental policymaking as a general matter. Likewise, as we now have seen, the Supreme Court has crafted a variety of care-engendering policymaking rules to vitalize in structural ways particular substantive constitutional guarantees. The Framers and the Court, however, are not the only sources of law that aim at encouraging the thoughtful formulation of government policy. Legislators themselves sometimes put in place lawmaking structures that seek the same end.

War and at the time of the New Deal). Third, and perhaps most deeply of all, one broad philosophy of the proper judicial role—what is sometimes called "noninterpretivism"—gives much attention (at least in most of its manifestations) to evolving moral standards in the broader society. See, e.g., BICKEL, supra note 6, at 236 (suggesting that Justices should "extract 'fundamental presuppositions' . . . from the evolving morality of our tradition"); Owen M. Fiss, The Supreme Court, 1978 Term--Forward: The Forms of Justice, 93 HARV. L. REV. 1, 9 (1979) ("The task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals."); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 706 (1975) (discussing the Court's "role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution," but rather derives from "contemporary moral and political ideals"); Sandalow, supra note 13, at 1050 ("The entirety of [our] history, together with current aspirations that are both shaped by it and shape the meaning derived from it, far more than the intentions of the framers, determine what each generation finds in the Constitution."); Tribe, supra note 27, at 317 n.138 (stating that "injustice inheres in any process of decision that relies on fixed rules to limit important liberties whenever the values codified by the rules have passed into a state of disintegration"). But cf. Neil K. Komesar, Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis, 51 U. CHI. L. REV. 366, 379 (1984) (arguing that "the judicial system is poorly placed to receive information on the desires and preferences of the public or any given part of it"). I note that most of these citations are drawn from Conkle, supra note 69, at 20 n.46. Professor Conkle himself says that "the ultimate source of the Supreme Court's decisional norms lies not in a set of unchanging values constitutionalized by the framers, but rather in the evolutionary development of societal thinking concerning issues that implicate individual rights." Id. at 25. Any notion of the judicial role centered on "evolutionary development of societal thinking" would seem closely related (though on a more overarching scale) to the "evolving standards" doctrines outlined in the text.

596. See supra notes 84-87 and accompanying text.

597. I say "as we now have seen" because all the judicial techniques we have discussed so far concern these sorts of deliberation-enhancing rules.
The most familiar rule of this sort is the so-called "sunset law."\textsuperscript{598} For example, when Congress enacted the latest version of the independent counsel statute, it specified that authority to make appointments under it would lapse in 1999.\textsuperscript{699} This feature of the law carried with it a profound consequence because, in its absence, the independent counsel statute (like most enactments) would have persisted until affirmatively repealed.\textsuperscript{600} Due to its time lapse provision, however, the independent counsel statute ran a different course; like a setting sun, it slipped away into nothingness at the designated transformative hour.

The sunsetting of a law by statute effects precisely the same sort of change worked by judge-made structural constitutional rules. Both sets of rules, after all, operate to shift the burden of inertia onto the legislature by requiring it to act affirmatively if its program is to endure.\textsuperscript{601} In a similar vein, the sunset law—just like judge-made structural devices—tends to inform and focus legislative deliberations. In particular, the sunsetting of a legislative program makes it probable that that program will not persist absent a continuing need for it under current circumstances, as revealed by the program's actual and recent operation.\textsuperscript{602} For these reasons, informed observers have celebrated sunset rules as friends of thoughtful government\textsuperscript{603}—a fact that suggests that a struc-

\textsuperscript{598} The term "sunset law" may be used in different ways. Sometimes it refers to an overarching law that requires periodic reconsideration of all, or large categories of, statutes or administrative regulations. Here, in contrast, we use the term to include built-in time limits attached to particular laws. See generally Bruce Adams, Sunset: A Proposal for Accountable Government, 28 ADMIN. L. REV. 511 (1976) (analyzing use of the sunset device); Dan R. Price, Sunset Legislation in the United States, 30 BAYLOR L. REV. 401 (1978) (analyzing the history, effects, and values of sunset legislation).


We take for granted that statutes once enacted continue in force until a later legislature takes affirmative action by a fresh majority to repeal or amend. Few statutes other than appropriation measures are enacted for limited periods; practically none expires with the legislature that enacted it despite the sometimes tenuous majority that enacted it. Although that majority no longer commands voter support, its law continues in force until a new coalition can be mustered to enact a new statute.

\textsuperscript{601} See supra note 567 and accompanying text.

\textsuperscript{602} See Adams, supra note 598, at 514.

\textsuperscript{603} See, e.g., Price, supra note 598, at 418-19 ("Sunset is a genuine review and evaluation
turally minded Supreme Court might be inclined to use this same technique to safeguard important constitutional rights. In effect, if not by design, the Court has done just that.

Constitutional sunset rules have taken hold, for example, in the Court's application of the Contract Clause of Article I, section 9. During the Great Depression, Minnesota adopted the Mortgage Moratorium Law of 1933, which authorized judicial extensions of redemption rights with respect to foreclosed-upon properties. The 1933 Act specifically provided, however, that its protections would not operate beyond May 1, 1935. In *Home Building & Loan Ass'n v. Blaisdell*, the Court upheld this legislation against Contract Clause attack. Finding that that clause "is not to be read with literal exactness like a mathematical formula," the Court in effect applied a balancing analysis that focused on a variety of considerations. Most significant to the Court, however, was the fact that "[t]he legislation is temporary in operation." The Court's focus on this factor clearly reflected substantive concerns. Because the Minnesota law afforded only "temporary relief," its intrusiveness on the reliance and expectancy interests safeguarded by the Contract Clause was diminished as a substantive matter. In other words, the Act's temporary nature contributed to the "limited character of the measure"—a logically relevant factor in any substantive balancing analysis.

The Court's time-tied approach to the case, however, also carried with it a structural dimension. By keying on the "temporary restraint" worked by the law, the Court in effect required the state to conjoin similar contract-disrupting rules with the structural safeguards that sunset laws put in place. Indeed, the Court in *Blaisdell* acknowledged the possibility that Minnesota could revisit,

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604. 290 U.S. 398 (1934).
605. Id. at 428.
606. Id. at 447.
607. See id. at 439-40.
608. TRIBE, supra note 24, § 9-9, at 616.
609. See supra note 23 and accompanying text.
610. See id.
611. See supra notes 602-03 and accompanying text.
and with proper justification renew, its mortgage-moratorium law in 1935. "[T]he operation of the statute," however, "could not validly outlast the emergency or be so extended as virtually to destroy the contracts." In later cases courts have confirmed that built-in expiration dates may save laws from Contract Clause attack.

Constitutional sunset rules operate in other fields as well. The Court, for example, has noted the temporary nature of congressional actions in assessing the constitutionality of remedial legislation enacted under section five of the Fourteenth Amendment. Likewise, the Court's opinions suggest that the

612. Blaisdell, 290 U.S. at 447.

613. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250 (1978) (noting, inter alia, "permanent ... change" affected by law in finding it distinguishable from "state laws that in the past have survived challenge under the Contract Clause"); Baltimore Teachers Union v. Mayor and City Council, 6 F.3d 1012, 1020 (4th Cir. 1993); Parsonese v. Midland Nat'l Ins. Co., 706 A.2d 814, 819 (Pa. 1993). Of course, this is not to say that a public purpose sufficient to sustain contract-disrupting legislation can only "be addressed to an emergency or temporary situation." Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983). And it is also not to say that the incorporation of a sunset feature in a law will inevitably immunize it from Contract Clause attack.

614. One area in which such a rule may operate already has been touched upon; the built-in "sunsetting" of appropriations measures helps justify the distinction between discriminatory subsidies and tax breaks in the dormant Commerce Clause field. See, e.g., Coenen, supra note 283, at 988. See generally supra note 289 and accompanying text (noting this distinction). Justice Frankfurter also noted that sunset considerations might have mattered in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring) (distinguishing President Truman's unlawful emergency seizure of nation's steel mills from earlier seizures that "had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given"). Another sunset-related practice that courts may use to involve nonjudicial actors in the elaboration of constitutional rights involves judicial invitations to political branch officials to construct constitutional remedies during a limited period of time. See, e.g., United States v. Virginia, 518 U.S. 515, 525-26 (1996) (noting that circuit court had afforded state remedial flexibility after invalidating all-male education at Virginia Military Institute and that circuit court had found a proper remedy when state proposed to establish parallel all-female program at Mary Baldwin College); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964) (stating that "a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy, such as initiative and referendum"). This cautious approach to judicial remediation inevitably involves political officials in constitutional lawmaking for the simple reason that the nature and scope of constitutional rights are inextricably tied to the remedies that violations of those rights ultimately bring. See generally Friedman, supra note 15, at 735-36 ("Without an available and enforceable remedy, a right may be nothing more than a nice idea. Any meaningful discussion of rights, therefore, must focus on remedies available to implement the rights.").

615. See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S.
temporary character of remedial affirmative action programs may prove determinative of constitutionality.\textsuperscript{616} The critical observer might ask how on earth a race-based denial of a job becomes less of an “equal protection” violation because undertaken pursuant to a temporally defined program, rather than an open-ended law that is repealable at any time. One answer to this question is that the temporariness of an affirmative action program may help to reveal a requisite remedial proportionality.\textsuperscript{617} For the structuralist, however, an additional explanation is also available: A sunset provision wisely forces the policymaker, in a not-too-distant time, to reweigh the program’s costs and benefits in light of its actual and recent effects.\textsuperscript{618}


\textsuperscript{617} See Flores, 521 U.S. at 533 (noting that “termination dates,” while not invariably required, “tend to ensure Congress’ means are proportionate to ends legitimate under § 5”); see also City of Richmond v. Croson, 488 U.S. 469, 510 (1989) (observing that specific findings of past discrimination are necessary in part to assure citizens “that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter”).

\textsuperscript{618} See Burt, supra note 555, at 372-73 (advocating approach to affirmative action cases that “would require particularistic, fact-based legislative inquiry in their initial formulation and recurrently throughout their implementation”); Lisa A. Chang, Remedial Purpose and Affirmative Action: False Limits and Real Harms, 16 YALE L. & POL’Y REV. 59, 61 (1997) (advocating “[r]equirements such as time limits and the equivalent of affirmative action business plans” because they would “ensure containment, periodic political review, and reassessment of race-conscious measures”); id. at 106 (“A time limit on affirmative action programs, much like the regular review and enactment of budgets, would make the programs subject to regular political review and support (or dismantling) and would prevent the adoption and perpetuation of unexamined set-asides.”).
VII. THOUGHTFUL-TREATMENT-OF-THE-AREA RULES

In Part VII we saw that *Furman v. Georgia*\(^{619}\) served substantive Eighth Amendment values in two important structural ways. First, it swept the decks clean of death penalty statutes, thus forcing states—if they wished to retain such statutes—to affirmatively reconsider and then to reenact them.\(^{620}\) Second, *Furman* required not just an individual state’s reenactment of the death penalty, but a broad social approval evidenced by a pattern of reenactments.\(^{621}\) *Furman*, however, also required something more: It mandated that, if a state were going to succeed in enacting valid death penalty legislation, that legislation had to reflect a thoughtfully structured treatment of how and when the death penalty would be imposed.\(^{622}\) State death penalty laws had to spell out a limited list of aggravating factors.\(^{623}\) The factors themselves had to be assigned a meaningful and restrictive content.\(^{624}\) States were called on to put in place arbitrariness-defeating procedures, such as rules that require comparative evaluation of individual sentences by appellate judges.\(^{625}\) The Supreme Court’s insistence that states include such features in any new death penalty statutes surely reflected the substantive goal of fostering fair and equal treatment of individual defendants.\(^{626}\) But it also served a structural end. In effect, the Court told state legislatures something like this: We will permit you to impose the death penalty only if we find you have passed legislation that evidences a careful and systematic treatment of this subject.

The Court has crafted “thoughtful-treatment-of-the-area” rules in First Amendment, as well as Eighth Amendment, cases. Most

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620. See supra notes 562-70 and accompanying text.
621. See supra notes 571-72 and accompanying text.
622. See *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring).
624. See id. at 428-29.
626. See infra note 629 and accompanying text.
notably, there are "many decisions... holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." These decisions serve *substantive* ends in two ways. First, by forcing the adoption of objective criteria, they reduce overall restraints on speech; a licensor forced to apply "narrow... standards" is simply less able to block speech than one who is given unfettered authority. Second, objective standards mitigate the danger of viewpoint discrimination—that is, the risk of "encouraging some views and discouraging others through... arbitrary application." Substantive concerns about viewpoint discrimination—much like concerns about race discrimination in capital sentencing—largely explain the Court's insistence in these cases on discretion-limiting objective rules.

But there is also a structural component to the constitutional mandate of "narrow, objective, and definite standards." A requirement of such standards inherently ensures some measure of care and deliberation in the lawmaking process itself. In effect, these rules preclude the policymaker from acting at such a high level of abstraction that no real policy is made at all. Such rules

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629. See, e.g., Furman v. Georgia, 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring) (explaining that "discretionary statutes are... pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments").

630. See, e.g., *Ely, supra* note 88, at 177.

631. Shuttlesworth, 394 U.S. at 151.

632. See id. The process-related dangers of standardless licensing were recently touched on in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). There, a public television broadcaster, operating with no preexisting standards, cited a candidate's lack of financial support as one factor that justified excluding him from a televised debate. As Justice Stevens observed in dissent, however, "that factor might have provided an independent reason for allowing him to share a free forum with wealthier candidates"; thus, in his view, rulemakers should have considered in advance (uninfluenced by the particular content of any particular speaker's message) the roles to be played by this and other decision-informing factors. *Id.* at 692 (Stevens, J., dissenting) (emphasis added). Justice Stevens's
force lawmakers to reflect with some care about what policy, if any, they wish to make. In turn, this process of reflection slows down the lawmaking process and heightens the likelihood that attention will focus on problems—including constitutional problems—that the proposed program’s implementation portends.

First Amendment thoughtful-treatment rules reach beyond the licensing context. For example, in a bygone era, the Court invoked thoughtful-treatment reasoning to give more deference to state laws that targeted specific categories of speech than to the “generally applicable” regulations the Court now seems to favor. The Court’s analysis has an unmistakable process-centered structural component: Rules that mandate preapplication formulation of objective criteria facilitate thoughtful consideration of competing considerations in an environment free of passion and backward-looking rationalization. See New York Times Co. v. United States, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring) (recognizing a broad presidential power to preserve confidential information in the fields of foreign affairs and national defense, but suggesting that this duty must be discharged “through the promulgation and enforcement of executive regulations” and that “in the cases before us we are asked neither to construe specific regulations nor to apply specific laws”); see also Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 35 (1979) (Marshall, J., dissenting) (advocating a constitutional requirement of stated parole criteria). For a suggestion that this sort of thoughtful-treatment-of-the-area rule might operate in the affirmative action area and, indeed, operate there with respect to both public and private employers, see Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 634 (1987), in which the Court suggested that sex-based hiring was permissible in part because the employer had in place an affirmative action plan that guided hiring decisions. See also Chang, supra note 618, at 61 (suggesting that adoption of “discrete measures” required by such plans “minimizes the risks associated with affirmative action”).

633. This point is made in Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413 (1996). If the law concerning direct and incidental restraints seems too obvious to merit . . . discussion, consider as a preliminary matter that the distinction first arose, and then operated for years, in a form converse to that of modern doctrine. In Gitlow v. New York, the Court contrasted a statute directly targeting certain forms of advocacy to a statute “prohibit[ing] certain acts involving the danger of substantive evil, without any reference to language itself.” The Court noted that it had greater call to review an application of the general statute to speech than to review an application of the targeted statute. In the latter case, the Court seemed to reason, the legislature already had made a considered judgment that the speech at issue posed the requisite danger; in the former case, the legislature had made no such judgment, and might have concluded to the contrary, had it ever considered the matter. The unintentionality of the incidental restraint worked against it; the purposefulness of the direct restraint worked in its favor. The end result was a doctrine that treated the restriction of speech through a generally applicable law as more, rather than less, problematic than the restriction of speech
more enduring First Amendment vagueness rule calls for "careful deliberation before [policymakers] substantially alter the legal landscape" by forcing the expression of legal standards at a meaningful, and thus thought-focusing, level of precision. Finally, the Court on occasion has balked at applying highly generalized disturbing-the-peace laws to particular forms of speech-related activity that might be regulated under a more thoughtfully drawn statute. In Garner v. Louisiana, for example, Justice Harlan reasoned that it was impermissible to convict peaceful lunch-counter sit-in protestors, said to have created an imminent risk of danger in the then rigidly segregated South, under a "general and all-inclusive breach of the peace prohibition." According to Justice Harlan, the protected First Amendment character of the defendant's activity justified prosecution, if at all, under "a statute or clause 'narrowly drawn to define and punish specific conduct.'"

For Justice Harlan, in the peaceful sit-in context, thoughtful-

through direct legislation.

Id. at 493 (footnotes omitted). Professor Kagan goes on to profess her preference for the modern tendency that reverses this set of presumptions in favor of generally applicable rules. See id.

634. See Wellington, supra note 8, at 491 (noting also that "these doctrines impose upon law-makers duties of care" in drafting rules); see also Tribe, supra note 24, § 17-2, at 1678 n.7 (noting the structural concern about a law "so general as to afford . . . insufficiently focused debate among its initial proponents and opponents"). See generally Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion) (observing that "speech restrictions must generally precisely define the speech they target"). In a similar vein, the Court has said that the overbreadth doctrine tends to ensure that speech-prohibiting rules "represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973) (emphasis added). In particular, the overbreadth doctrine serves this purpose by invalidating rules drawn so uncarefully that they cover a substantial amount of protected speech. See id. at 612; see also Massachusetts v. Oakes, 491 U.S. 576, 586 (1989) (reasoning that "[t]he overbreadth doctrine serves to protect constitutionally legitimate speech not merely ex post, . . . but also ex ante, that is, when the legislature is contemplating what sort of statute to enact"). See generally Henry Paul Monaghan, Overbreadth, 1981 SUP. CT. REV. 1, 31-32 (discussing overbreadth and federal statutes). For invocation of a similar line of "underbreadth" analysis in the affirmative action area, see Fullilove v. Klutznick, 448 U.S. 448, 538-39 (1980) (Stevens, J., dissenting) (rejecting "slapdash" effort at affording race-based reparations reflecting in essence a "random distribution to a favored few" to provide "compensation for an injury shared by many").

637. Id. at 202 (Harlan, J., concurring).
638. Id. (quoting Cantwell, 310 U.S. at 311).
treatment concerns demanded more than Louisiana had offered. As he put it:

[S]ound constitutional principles demand of the state legislature that it focus on the nature of the otherwise "protected" conduct it is prohibiting, and that it then make a legislative judgment as to whether that conduct presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed. 639

Another close encounter with thoughtful-treatment-of-the-area rules, outside both the First Amendment and the Eighth Amendment contexts, occurred in BMW of North America, Inc. v. Gore. 640 In the BMW case the Court recognized and applied a "gross excessiveness" limit on punitive-damage awards derived from the Fourteenth Amendment's Due Process Clause. 641 The case involved a $2 million punitive-damages judgment awarded for nondisclosure of the presale repainting of an otherwise good new car. 642 Five Justices voted to overturn that judgment, with Justice Breyer filing a critical concurring opinion. 643 According to Justice Breyer, the

639. Id. at 203 (emphasis added). Such a focused legislative determination, Justice Harlan made clear, would not be definitely binding on the Court. See id. Because such a determination would be entitled to deference, however, see id. at 203 n.10, Justice Harlan left open the question "whether Louisiana could by a specifically drawn statute constitutionally proscribe conduct of the kind evinced in these two cases," id. at 204. In short, Justice Harlan very clearly brought to the case a thoughtful-treatment remand-to-the-legislature approach. See also Whisenhunt v. Spradlin, 464 U.S. 965, 969 (1983) (Brennan, J., dissenting from denial of certiorari) (expressing concern under vagueness principles about disciplining police officers for "cohabitation" under good-behavior rules set forth in highly general terms; [b]y demanding that government articulate its aims with a reasonable degree of clarity, the Due Process Clause ensures that state power will be exercised only on behalf of policies reflecting a conscious choice among competing social values). For a line of reasoning that bears at least some resemblance to that of Justice Harlan in Garner, see Hill v. Colorado, 120 S. Ct. 2480, 2496-97 (2000), a case in which the Court upheld a floating buffer zone statute in part because of the "comprehensiveness of the statute," which covered all medical facilities with a "bright-line prophylactic" eight-foot rule, rather than applying open-ended rules "that focus exclusively on the individual impact of each instance of behavior."

641. See id. at 568-86.
642. See id. at 562.
643. See Sunstein, supra note 434, at 81 (noting that "Justice Breyer's argument is . . . different from the Court's"; "is not best understood simply by reference to excessiveness"; and is related "both with the void-for-vagueness cases and with the constitutional attack on the
essential problem in the case flowed from “the constitutional importance of legal standards that provide ‘reasonable constraints’ within which ‘discretion is exercised.’” In finding that the BMW case revealed a lack of such restraints, Justice Breyer emphasized three facts:

1. “[T]he Alabama statute that permits punitive damages does not itself contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards.”
2. “[T]he state courts neither referred to, nor made any effort to find . . . an economic theory . . . [that] might have provided a significant constraint on arbitrary awards.”
3. “[T]here are no other legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards.”

In making these observations, Justice Breyer said to Alabama’s lawmakers in so many words: If you are going to authorize huge punitive awards, you must do so with far less sloppy policymaking than this. By requiring the promulgation of substantive rules, Justice Breyer thus imposed a structural demand: He would not vote to uphold a sky-high punitive judgment unless the actions of the state’s lawmakers evidenced a serious effort to grapple with the troubling constitutional complexities of punitive-damages policy.

death penalty in Furman”.

644. BMW of N. Am., 517 U.S. at 587 (Breyer, J., concurring).
645. Id. at 588.
646. Id. at 592.
647. Id. at 595.
648. For a similar evaluation, see Sunstein, supra note 434, at 82. In Professor Sunstein’s view:

   Justice Breyer’s approach can be connected with many of the cases discussed thus far, including Kent v. Dulles. . . . Most importantly, it requires state officials to set out criteria on their own and is in that way democracy-forcing. Like the void-for-vagueness doctrine, it is intended to catalyze and improve, rather than to preempt, democratic processes.

See id. An interesting question is whether the punitive judgment in BMW would have stood if the state’s largely open-ended substantive standards had applied, but the Alabama legislature had enacted a damages cap that was higher than the award. Another question is whether the BMW case would have gone the other way if Alabama had legislated with some care in the general field of punitive damages while not altering the governing rules
The Justices have made use of various styles of thoughtful-treatment reasoning in a number of constitutional settings.\textsuperscript{649} Applicable to the BMW case itself (for example, by putting damage caps on certain classes of claims, while not capping awards for tortious misrepresentation). Perhaps the result in BMW would not have changed in these circumstances. After all, Justice Breyer's opinion focused hard on the lack of constraints on discretion placed on the particular jury that had socked BMW with the multimillion dollar punitive judgment. See id. at 81 (observing that "Justice Breyer noted that the jury had not operated under a statute with standards distinguishing among permissible punitive damage awards"). On the other hand, in striking down the punitive award, Justice Breyer did note the lack of any "legislative enactments . . . that classify awards and impose quantitative limits." BMW of N. Am., 517 U.S. at 595.

Speaking of cases that involve this sort of situation, Professor McCormack has observed:

> When federal, state or local government has acted in a general field but has left gaps in coverage, less intense scrutiny on a constitutional level may be required in the gaps than would be mandated if there had been no action at all. The judicial scrutiny in this instance may be called strict but still be less intense in the sense of the Court's willingness to accept governmental justifications. This result flows from the realization that the political process is working to choose which problems should be solved first. For example, almost identical cases dealing with local housing ordinances might be decided differently under the same strict scrutiny rubric before and after federal enactment of fair housing legislation. This for the reason that the Court would rather rely on Congress to solve housing problems generally than use its own limited devices under the Constitution.

Wayne McCormack, \textit{Race and Politics in the Supreme Court: Bakke to Basics}, 1979 UTAH L. REV. 491, 520. To Professor McCormack's thought may be added the further observation that "gaps in coverage" are often the result of an overarching substantive design, and not merely of an incrementalist "one-step-at-a-time" approach. In either event, Justice Breyer's approach in BMW provides at least a starting point for advocating a thoughtful-treatment-related style of judicial review.

649. For example, Justice Powell emphasized in \textit{Ball v. James}, 451 U.S. 355 (1981), that the Arizona legislature had actually taken steps "to increase the political voice of the small householder" in the governance of the water reclamation districts whose directors were selected on a challenged "one-acre, one-vote" basis. \textit{Id.} at 372-74 (Powell, J., concurring); see supra notes 473-78 and accompanying text. Thus the demonstrated "will" of the legislature to deal with the apportionment question—together with the absence of underlying fair-representation problems in the state legislature itself—was "decisive" for Justice Powell in rejecting the constitutional attack. \textit{See Ball}, 451 U.S. at 374. In contrast, in finding Tennessee's apportionment of its state legislature constitutionally challengeable in \textit{Baker v. Carr}, the majority emphasized that the state had not engaged in reapportionment since 1901. 369 U.S. 186, 186 (1962). Justice Clark, in a separate concurring opinion, reasoned that "[t]he frequency and magnitude of the inequalities in the present districting admit of no policy whatever." \textit{Id.} at 254. In short, the districting system reflected the antithesis of a thoughtful consideration of the area; it was instead the product of a "legislative strait jacket." \textit{Id.} at 259. Justice Clark expressed the "flipside" of this thought in his dissenting opinion in \textit{Lucas v. Forty-Fourth General Assembly}, when he advocated upholding an apportionment of the Colorado legislature found by the majority to be unconstitutional: "As a result of the action of the Legislature and the use of initiative and referendum, the State Assembly has been reapportioned eight times since 1881. This indicates the complete awareness of the
Moreover, the Court sometimes uses thoughtful-treatment reasoning in upholding challenged laws, as well as in striking them down. In many contexts and in many ways the Justices thus seem ready to reward policymaker attentiveness and to punish policymaker sloth. A thoughtful treatment of the area—as reflected in a focused, overarching policymaking effort—may tip the scales toward judicial validation of a government practice that otherwise would be found to offend substantive constitutional values.

people of Colorado to apportionment problems and their continuing efforts to solve them." 377 U.S. 713, 742 (1964) (Clark, J., dissenting); cf. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 271 (1995) (Ginsburg, J., dissenting) (asserting that "in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case"); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 685-86 (1966) (Harlan, J., dissenting) (refusing to read the Equal Protection Clause to bar state poll taxes in part because Congress had recently passed, and states had approved, the Twenty-Fourth Amendment, which barred poll taxes only in federal elections). Another area in which the Court seems to have paid heed to the presence or absence of thoughtful legislative intervention concerns the availability of damages in so-called Bivens actions. See infra notes 715-30 and accompanying text. See generally Nichol, supra note 15, at 1149 & 1153 n.203 (noting that the Court has permitted Congress to preempt otherwise available constitutional remedies when its "inaction has not been inadvertent" or where "the comprehensiveness of the statutory scheme" counsels against supplementary remedies).

650. In Washington v. Glucksberg, for example, the Court declined to invalidate a state law restricting access to assisted suicide, noting that "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues." 521 U.S. 702, 719 (1997). There are also indications that the thoughtful and systematic construction of a state taxing package might cause courts to reject otherwise valid tax-discrimination claims by characterizing one tax as "compensatory" for another. See Annenberg v. Commonwealth, Nos. 003, 004 M.D. 1997, 2000 WL 718216 (Pa. June 1, 2000) (rejecting claim that stock clause of county-imposed personal property tax should be viewed as compensatory in part because it was not included in an integrated, comprehensive taxing scheme that treated both it and the capital and franchise taxes it allegedly equalized).

651. Notably, although this Article focuses on use of care-heightening structures by government decision makers, constitutional doctrine might also take account of the use of care-heightening structures by private actors. For example, the issue in Boy Scouts of America v. Dale, was whether the Boy Scouts of America, on the basis of a claimed constitutional right of expressive association, could deny assistant scoutmaster status to "an avowed homosexual and gay rights activist" in violation of state antidiscrimination law. 120 S. Ct. 2446, 2449 (2000). The four-Justice bloc of dissenters rejected the Boy Scouts' claim because its "policy statements fail to establish any clear, consistent and unequivocal position on homosexuality." Id. at 2466 (Stevens, J., dissenting). Rather, the dissenters concluded, the record showed only a "mixture of contradictory positions" taken over the years, id. at 2465, that reflected a "group ... unable to identify its own stance with any clarity," id. at 2470. In effect, the dissenters argued that a necessary minimum predicate to trumping state antidiscrimination laws was an effort to "explain clearly and openly why the presence of homosexuals would affect [the group's] expressive activities." Id. at 2466; accord id. at 2479
VIII. CONSTITUTIONAL COMMON LAW AND COMMON-LAW-LIKE RULES

Twenty-five years ago, Professor Henry Monaghan published his seminal work on "constitutional common law." In that article, Professor Monaghan argued that the Supreme Court had used and should use common law rules to vindicate constitutional rights, particularly in "protecting civil liberties." Professor Monaghan's descriptive position—and even more so his normative view—have engendered much discussion and debate. Today, however, few

(Souter, J., dissenting) (expressing the view that "no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way"). This structural approach—like the structural approaches identified throughout this Article—raised the odds that the relevant decision makers' action would reflect serious thought about an extremely important issue, a significant consensus among group members as to that issue, and a thoughtful and informed choice by the group's leadership on the membership's behalf.

Monaghan, supra note 17, at 3.

See id. at 18-19 (asserting that "the case law . . . is at least highly suggestive of a sizable body of constitutionally inspired implementing rules" and that "the desirability of some such undertaking seems clear"); Henry P. Monaghan, Third Party Standing, 84 COLO. L. REV. 277, 314 n.199 (1984).

The major critique is Thomas S. Schrock & Robert C. Welsh, Reconsidering the Constitutional Common Law, 91 HARV. L. REV. 1117 (1978). Professor Monaghan himself—citing the Schrock and Welsh critique—has itemized some key objections to the recognition of constitutional common law:

Whatever its perceived advantages, a theory that posits a judicial competence to fashion a constitutionally inspired common law of civil liberties must deal adequately with . . . objections: development of such a body of law is inconsistent with the original intent of the framers; the line between true constitutional interpretation and constitutional common law is too indeterminate to be useful; the existence of such judicial power is inconsistent with the autonomy of the executive department in enforcing law as well as the rightful independence of the states in the federal system.

Monaghan, supra note 653, at 315 n.201 (citation omitted). Professor Tribe, who considers this matter in his treatise, seems ambivalent about constitutional common law. He praises Professor Monaghan's effort "to find some place for Congress, and thus by implication for other nonjudicial actors, in the process of constitutional interpretation." TRIBE, supra note 24, § 3-4, at 37. On the other hand, Professor Tribe worries that "the uncertain line" between court-mandated constitutional law and constitutional common law "would complicate the process of constitutional adjudication and would exacerbate the tension between Congress and the Court." Id. Professor Tribe, on balance, seemed prepared to eschew the Monaghan approach in favor of a capacious congressional power to use section five of the Fourteenth Amendment to enforce constitutional rights. See id. The key difference between these two approaches—a difference Professor Tribe does not discuss—lies in the role that constitutional common law (but not even the broadest section five power) can play in shifting the burden.
scholars would question that a body of doctrine at least loosely describable as "constitutional common law" does in fact exist.655

One way of thinking about these rules is that they are not required so much as inspired by the Constitution.656 As a result, they are modifiable by legislative authorities657 and thus invite just the sort of interbranch dialogue that structural rules envision.658 It is important to recognize, however, that constitutional common law rules are not all cut from the same cloth. Indeed, at least three separate types of rules, reflecting different levels of resistance to legislative alteration, seem to lurk in the cases. These rules might be called: (1) reversible rules; (2) replaceable rules; and (3) rules that are modestly reducible.

of inertia in favor of constitutional rights. See supra note 567 and accompanying text. In any event, the Court now seems to have rejected the sort of broad section five power that Professor Tribe endorsed. See supra notes 376-89 and accompanying text (discussing the Flores case). Will this reshaping of constitutional space cause Professor Tribe to advocate a broader role for constitutional common law? His strong inclination to involve nonjudicial actors in the explication of constitutional values—at least for "underenforced norms," TRIBE, supra note 24, § 3-4, at 38—suggests that the answer to this question may well be "yes."

655. Even Professors Schrock and Welsh, while questioning the wisdom of this development, have recognized the reality of constitutional common law. See Schrock & Welsh, supra note 654, at 1117. As they observe:

Implicit in the Court's current treatment of the exclusionary rule—as well as of several rules outside the fourth amendment context—is a suggestion that the Court has a general authority to impose on state courts and state officials rules grounded not in the constitutional rights of the persons seeking to invoke them but rather in a subconstitutional calculation of costs and benefits.

Id. at 1118; see also Turpin v. Mailet, 579 F.2d 152, 158 (2d Cir. 1978) (noting that "[t]he development of the exclusionary rule and the required provision of Miranda warnings might well be examples of 'common law' development," which "invigorates the political process" by opening a dialogue with Congress), vacated sub nom. City of West Haven v. Turpin, 439 U.S. 974 (1978).

656. See Monaghan, supra note 653, at 314.


658. See Friedman, supra note 15, at 780 n.233 ("Professor Monaghan's theory of constitutional common law promotes the Court's 'dialogue' with Congress . . . ."); Monaghan, supra note 17, at 27 (stating that constitutional common law "provides the Court with a means for involving Congress in the continuing process of defining the content and consequences of individual liberties").
A. Reversible Rules

Our law recognizes many judicially crafted doctrines that are—withstanding their constitutional origins—freely and fully reversible by Congress. One such group of rules, to which Professor Monaghan paid only scant attention, is rooted in the federal courts' "supervisory authority." Drawing on this authority over the years, the Supreme Court has applied to federal proceedings a rich variety of rules protective of constitutional values that Congress may overturn at its pleasure. For this reason, these

659. See Monaghan, supra note 17, at 38-40.
661. See, e.g., Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 808 & n.19 (1987) (overturning on supervisory power grounds a criminal contempt conviction based on violation of an injunction that was prosecuted by the lawyer of the defendant's adversary in the civil action; Court relied on "basic notions of fairness" and cited circuit court authority that viewed the "appointment of interested prosecutor [as a] due process violation"); United States v. Hale, 422 U.S. 171, 180 n.7 (1975) (using supervisory power to order a new trial because of an "evidentiary matter [having] grave constitutional overtones"); Grunewald v. United States, 353 U.S. 391, 423-24 (1957) (noting that where an "evidentiary matter has grave constitutional overtones . . . we feel justified in exercising this Court's supervisory control to pass on such a question"); Ballard v. United States, 329 U.S. 187 (1946) (relying on supervisory power to void an indictment handed down by a grand jury from which women had been excluded); see also United States v. Williams, 504 U.S. 36, 46 (1992) (recognizing supervisory authority to establish rules that are "a means of enforcing or vindicating" constitutional prohibitions); United States v. Hastings, 461 U.S. 499, 505 (1983) (recognizing that federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution"). See generally Monaghan, supra note 17, at 39 (citing cases and asserting, for example, "that the McNabb-Mallory rule, promulgated in the name of the Supreme Court's supervisory power, had substantial constitutional underpinnings").
662. See, e.g., Dickerson v. United States, 120 S. Ct. 2326, 2332 (2000) (noting that "Congress retains the ultimate authority to modify or set aside [supervisory rules"]; Carlisle v. United States, 517 U.S. 416, 428 (1996) (rejecting the federal courts' "inherent power" to act in contravention of applicable Rules"); Vance v. Terrazas, 444 U.S. 252, 265 (1980) (upholding statute overturning evidentiary standard for expatriation established by Supreme Court because not constitutionally mandated); Palermo v. United States, 360 U.S. 343, 345-48, 353 n.11 (1959) (upholding statute that recognized narrower duties of prosecutorial disclosure than previously dictated by a Supreme Court decision); United States v. Pugh, 25 F.3d 669, 675 (8th Cir. 1994) (reading federal statute as overturning McNabb-Mallory rule; collecting other authorities); see also BICKEL, supra note 6, at 201 ("Procedural decisions in
doctrines are not hard-and-fast; rather, they are structural in nature.

The operation of supervisory rules is illustrated well by the Supreme Court's actions in the wake of its seminal "dynamite charge" decision in *Allen v. United States.*663 The Court in *Allen* had broadly upheld standard forms of instructions, delivered to deadlocked juries in criminal cases, designed to push them toward reaching a verdict.664 In the wake of *Allen,* however, the Court outlawed charges that were unduly "coercive" as violative of due-process restraints.665 This anticoercion rule was and is substantive, rather than structural, because it flatly and irreversibly prohibits a particular category of jury instructions in both state and federal criminal trials.666 Also following *Allen,* the Court held in *Brasfield v. United States*667 that the risk of "improper influence" precluded judicial inquiries into the numerical division of a jury after that jury informed the judge it was unable to reach a verdict.668 In later decisions, however, courts made it clear that the *Brasfield* rule—in contrast to the on-or-off anticoercion rule itself—was not constitutionally mandated.669 Rather, the rule is "grounded in the Court's supervisory power,"670 inapplicable to the states,671 and defeasible by Congress insofar as it operates in federal court.672 Other similarly provisional rules—also connectable to constitutional values—operate in various areas of criminal procedure.673
Another deeply constitutional doctrine that bears a little-noticed, but very real, resemblance to these supervisory-power rules is the so-called "dormant Commerce Clause." In many cases the Court has deployed this principle to protect constitutionally grounded interests in maintaining a national free market by invalidating state laws that block cross-border business transactions. The Court, however, has consistently decreed that Congress may overturn dormant Commerce Clause rulings without resort to constitutional amendment. Indeed, the Court has drawn on this congressional-reversibility principle in shaping the substantive contours of constitutional restraints on commerce-impeding state regulations.

In Quill Corp. v. North Dakota, the Court considered the continuing vitality of National Bellas Hess, Inc. v. Department of Revenue, which had barred imposition of tax obligations on "a vendor whose only contacts with the taxing State are by mail or common carrier." The Court in Quill reaffirmed the Bellas Hess rule, but in doing so it relied solely and squarely on the dormant Commerce Clause, rather than on the Due Process Clause (which, on the prevailing view, generates rules reversible only by consti-

674. See generally Bittker, supra note 289, §§ 6.01 to 10.05; Tribe, supra note 24, §§ 6-1 to 6-22.
676. See, e.g., Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 472 U.S. 169, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (upholding South Carolina's discriminatory insurance-premums tax because it was validated by congressional passage of the McCarran Act). See generally Bickel, supra note 6, at 230 (1957) ("Every decision forbidding this or that state regulatory or taxing measure in the name of the Commerce Clause is subject to congressional reprise."). Notably, to authorize state legislation otherwise violative of the dormant Commerce Clause, Congress must act in a structurally sensitive way by making its intention "unmistakably clear." See Maine v. Taylor, 477 U.S. 131, 138-39 (1986). For a discussion detailing the forms and purposes of rules of clarity, see generally supra Part III.
678. 386 U.S. 753 (1967).
679. Quill Corp., 504 U.S. at 311.
680. See id.
tutional amendment\(^{681}\). Even more important, the Court revealed the structural, dialogue-centered nature of its ruling when it noted:

> [I]n recent years Congress has considered legislation that would "overrule" the *Bellas Hess* rule. Its decision not to [act] may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest. Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.\(^{682}\)

Congressionally reversible rules drawn from the Constitution have surfaced in other fields as well.\(^{683}\) For example, the Court long

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681. I say "on the prevailing view" because of the important work of Professor William Cohen that casts some doubt on this position. In a seminal article, Professor Cohen has argued that:

Congress should be able to remove constitutional limits on state power if those limits stem solely from divisions of power within the federal system. In other words, Congress should be able to approve unconstitutional policy choices in state laws when Congress is not constitutionally prohibited from directly adopting the same policy itself. In appropriate circumstances, Congress should be able to authorize the states to enact legislation that, in the absence of congressional consent, would run afoul of the due process or equal protection clauses of the fourteenth amendment, deny the privileges and immunities of citizens of other states in contravention of article IV, or impair the obligation of contracts in violation of article I, section 10.

William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 388 (1983). For example, in Professor Cohen's view, Congress has the power to override Fourteenth Amendment due-process-based state-tax-nexus rules because these "limits are inapplicable to federal regulation, and therefore Congress should be able to remove them." *Id.* at 401. As noted elsewhere, Professor Cohen's view would "structuralize" a variety of state-limiting constitutional rules by rendering them repealable by Congress without the need for constitutional amendment. See generally *infra* notes 894-97 and accompanying text.

682. *Quill Corp.*, 504 U.S. at 318 (footnote omitted).

683. For example, the states-rights-driven abstention rule of *Younger v. Harris*, 401 U.S. 37 (1971), appears to be congressionally reversible. See *Massey*, *supra* note 175, at 206 (likening the *Younger* rule to the dormant Commerce Clause because it is a "provisional constitutional judgment of the courts"). The federalism-based prohibition on pursuing state-tax recoveries in federal courts likewise has common law roots. See *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100 (1981); *Luneburg*, *supra* note 141, at 224 n.84, 249 n.267. The nationalism-driven tax immunity rules that flow from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), seem to be congressionally reversible. See *Dimond*, *supra* note 69, at 212. And at least some constitutionally inspired rules in the criminal law area—in addition to the supervisory rules already spelled out—may be subject to
has relied on the special national responsibility for dealing with Native American tribes—as well as the historic oppression of those peoples—to generate a specialized body of doctrines that concerns Native Americans. Illustrative is *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, in which the Court reaffirmed a line of rulings to the effect that Native American Nations enjoy a broad immunity from suit in both state and federal court. In *Kiowa Tribe*, however, the Court also emphasized that this presumptive immunity is reversible by Congress. As the Court put the point: “Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress . . . can alter its limits through explicit legislation.” In a similar vein, the Court reaffirmed in *White Mountain Apache Tribe v. Bracker* that states, when acting on their own, lack authority to govern conduct that occurs in so-called “Indian country.” States may, however, regulate activity in these locales when specifically authorized to do so by Congress. Other judicially developed Native-American-law doctrines operate in much the same way. These doctrines draw their inspiration from constitutional values, yet they openly invite review and revision by the political branches of the national government. Thus, just like the Court’s supervisory-authority and dormant

686. Id. at 759.
688. See id. at 151.
689. See WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 35-46 (3d ed. 1998); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 162-63 (3d ed. 1991). In his *Kiowa Tribe* dissent, Justice Stevens seemed bent on casting a cloud over the Court’s creation of common law rules in this area when he asserted that “[t]he fact that Congress may nullify or modify the Court’s grant of virtually unlimited tribal immunity does not justify the Court’s performance of a legislative function.” *Kiowa Tribe*, 523 U.S. at 764 (Stevens, J., dissenting). The majority rightly declined to embrace this reasoning as it is both question-begging and antihistorical. The whole point of a common law power—the extensive existence of which even Justice Stevens acknowledges in the Indian law field, see id.—is to allow courts to act in the first instance. To say that courts in such cases are engaged in the performance of a “legislative function” is thus wrong. So long as courts act within the ambit of their recognized common law powers, they are not, by definition, improperly performing a “legislative” task.
690. See, e.g., Eskridge & Frickey, supra note 116, at 602 (describing Indian peoples as among “discrete and insular minorities” properly afforded heightened protection by courts).
691. See supra notes 686-88 and accompanying text.
Commerce Clause decisions, these components of our national law protect substantive constitutional values in a structural way.\textsuperscript{692} It is a fair subject of debate whether the rules described here fairly bear the label "common law." Professors Schrock and Welsh have argued, for example, that it is an error to describe in constitutional common law terms the Court's dormant Commerce Clause decisions.\textsuperscript{693} Instead, those rulings embody, in the view of these analysts, a principle required (not just inspired) by the Constitution to the effect that the states are disqualified (in the absence of congressional action) from regulating commerce in certain ways.\textsuperscript{694} The argument of Professors Schrock and Welsh might cause one to describe the congressionally reversible rules collected here as no more than common-law-like in nature. Beyond making this concession, however, I need not enter their debate,\textsuperscript{695} for what is important for our purposes is that all of these doctrines share the essential features of the other doctrines we looked at earlier. They are judicially deployed devices that both protect identifiable constitutional values and are subject to reversal by legislative authorities without the need for a constitutional amendment. All of these rules—whether or not properly characterized as "constitutional common law"—are accordingly structural in nature.

B. Replaceable Rules

In the supervisory-power, dormant Commerce Clause, and Native-American-law contexts, Congress may reject altogether judicial vindications of constitutional values. Another, less-
provisional brand of constitutional common-law-like rule is illustrated by *Miranda v. Arizona*. In *Miranda*, the Court invoked the Fifth Amendment to hold that police officers, in order to avoid exclusion of custodial confessions, must supply suspects with a litany of warnings: that they are entitled to remain silent; that their statements may be used against them; that they have a right to a lawyer; and that, if necessary, the state will supply one at no cost.

After offering this enumeration, however, the Court went on to declare: "The warnings required ... in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." The Court added that:

> [T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.

Building on this thought, Professor Monaghan argued that a state could jettison the *Miranda* rule altogether if it admitted into evidence only those custodial statements made in the presence of counsel. This approach, he reasoned, would be permissible

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697. See id. at 467-72.
698. Id. at 476 (emphasis added).
699. Id. at 490. A recently published law review article collects correspondence between the Justices that suggests that *Miranda's* invitation for formulation of equally effective safeguards was an important component of the Court's opinion, and that the record "leaves no doubt that the principal authors of *Miranda* considered its procedures the minimum required by the Fifth Amendment." Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 123-25 (1998) (emphasis added). For another case that seems to involve a similar sort of potentially replaceable constitutional protection, see *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (plurality opinion) (noting that, despite right to meaningful appeal in state courts for indigent defendants and requirement to supply transcript in the case at hand, state need not "purchase a stenographer's transcript in every case where a defendant cannot buy it;" rather, the state "may find other means of affording adequate and effective appellate review").
700. See Monaghan, *supra* note 17, at 33-34.
because it would give the accused a protection against police coercion no less valuable than that afforded by the *Miranda* warnings themselves.\textsuperscript{701} Others have suggested that the creation of this sort of "replaceable" constitutional common law is a commendable exercise of the Court's power to expound the Constitution because it is at once both vigorous and restrained in protecting constitutional values. It is vigorous in that it fixes a line of constitutional protections that government officials may not breach. It is restrained, however, in that, so long as officials operate above that line, they may freely experiment with alternative approaches.\textsuperscript{702}

Many hard questions follow, however, from recognizing a broad judicial authority to forge replaceable, common-law-like constitutional rules. Take the Fourth Amendment exclusionary rule. This rule, while laced with exceptions,\textsuperscript{703} requires in general that all evidence seized in violation of the amendment be excluded from criminal trials.\textsuperscript{704} The primary purpose of the rule, the Court often has said, is to deter unconstitutional behavior by law enforcement authorities in the investigation of crimes.\textsuperscript{705} What if, however,

\textsuperscript{701} See id.; see also Strauss, supra note 434, at 201 ("The *Miranda* Court's willingness to consider legislative alternatives to the *Miranda* rules is no different in principle from [the] traditional canon of deference [to congressional assessments of constitutionality]. It amounts to a statement that the Court will consider carefully, and may defer to, a legislative effort to strike the balance that the relevant constitutional and institutional concerns require."). Drawing on the Supreme Court's sometimes cautious interpretation of *Miranda* beginning in the 1970s, a few lower-court decisions suggested that (at least for purposes of federal prosecutions) *Miranda* embodied the same sort of freely reversible rule reflected in the Court's dormant Commerce Clause and Native-American-law cases. See, e.g., United States v. Rivas-Lopez, 988 F. Supp. 1424 (D. Utah 1997). Reversing a Fourth Circuit decision to this effect, the Court squarely rejected this view in *Dickerson v. United States*, 120 S. Ct. 2326 (2000). Even in the wake of *Dickerson*, however, it remains true that *Miranda* embodies a form of "common law" rule that, like other structural protections of substantive rights, invites active participation by the political branches in the formulation of constitutional safeguards. Indeed, the Court in *Dickerson* specifically reiterated *Miranda*'s reference to the potential development of "legislative solutions [that are] 'at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.'" Id. at 2334; see also Robert L. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 Sup. Ct. Rv. 81.

\textsuperscript{702} See, e.g., Merrill, supra note 695, at 72.

\textsuperscript{703} See generally 3 LAFAVE & ISRAEL, supra note 670, §§ 9.1 to 10.6 (discussing the scope and administration of the exclusionary rule).


\textsuperscript{705} See, e.g., *Stone v. Powell*, 428 U.S. 465, 486 (1976) (citing deterrence as the "primary
Congress or a particular state decided to take a very different approach to the problem of illegal searches? Assume, for example, that Congress adopted the Court's existing exclusionary-rule jurisprudence subject to these important qualifications:

1. In cases that involve violent crimes, the exclusionary rule operates only when the government agent knowingly or recklessly violates Fourth Amendment rights.\(^{706}\)

2. In any case that results in a capital or life sentence, the exclusionary rule may be invoked in federal collateral proceedings whether or not the defendant had a fair opportunity to seek exclusion at trial and on direct appeal.\(^{707}\)

3. Any defendant who otherwise lacks "standing" may invoke the exclusionary rule if government agents conducted a search of a nondefendant's personal premises or property in an effort to gather evidence against investigative targets with actual knowledge or reckless disregard of the search's illegality.\(^{708}\)

Following the replaceable-rule model of \textit{Miranda}, our hypothetical search-and-seizure-statute case presents two separate questions. The first is whether the Fourth Amendment exclusionary rule could be—like the \textit{Miranda} warnings—replaced by nonjudicial officials with safeguards that embody a "fully effective equivalent."\(^{709}\) Some authorities suggest it could be. In \textit{Pennsylvania Board of Probation and Parole v. Scott},\(^{710}\) for example,\(^{711}\)

\begin{footnotes}
\footnote{706}{Of course, "knowingly or recklessly" could be defined in a variety of ways. The key point is that the terms—by focusing on a wrongful state of mind—would in every case require something quite more than a simple Fourth Amendment violation for the exclusionary rule to take hold. \textit{Cf. United States v. Leon}, 468 U.S. 897 (1984) (holding that evidence obtained in violation of the Fourth Amendment by police acting in "good faith" reliance on a search warrant issued by an independent judicial officer need not be excluded). Thus, this modification, to the extent it applied, would disadvantage defendants and benefit prosecutors and police.}
\footnote{707}{This rule would modify, in a way helpful to certain defendants, the Court's ruling in \textit{Stone v. Powell}, 428 U.S. 465 (1976). Whether the states acting alone (as opposed to acting in conjunction with Congress) could bind the federal courts to such a "wholesale waiver" of the \textit{Stone v. Powell} rule presents a question well beyond the scope of this Article.}
\footnote{708}{This rule would modify, in a way helpful to defendants, the Court's ruling in \textit{United States v. Payner}, 447 U.S. 727 (1980).}
\footnote{709}{See text accompanying note 699 (quoting \textit{Miranda}).}
\footnote{710}{524 U.S. 357 (1998).}
\end{footnotes}
the Court observed that the exclusionary rule "is prudential rather than constitutionally mandated." 711

Even assuming the exclusionary rule is replaceable, however, the second and harder question concerns what sort of replacement rule would suffice. With respect to this issue, there is a strong argument that our hypothetical three-part exclusionary-rule statute would not fill the constitutional bill. That statute, after all, differs in a fundamental way from Professor Monaghan's rule-substitute for \textit{Miranda}. 712 In particular, the Monaghan reformulation of custodial-interrogation safeguards puts in place an equivalent prophylactic protection for \textit{each and every} prospective criminal defendant. The idea is that, for any person in custody, the actual presence of a lawyer will provide (or is at least properly presumed to provide) no less protection of the Fifth Amendment privilege than the mere recitation of the \textit{Miranda} warnings.

In contrast, the three-part rule substitute for unconstitutional searches reshuffles the entire deck of protections in the field of Fourth Amendment law. As a result, moving from current law to the three-part statutory substitute would improve the situation of some persons (primarily persons accused of—or destined to be accused of—capital crimes) while worsening the situation of others (primarily persons accused of—or destined to be accused of—all other violent crimes). 713 Moreover, even if this "reshuffling" problem

711. \textit{Id.} at 363 (emphasis added); \textit{see also} Brecht v. Abrahamson, 944 F.2d 1363, 1371 (7th Cir. 1991) (observing that the exclusionary rule is "an extra-constitutional device that helps motivate adherence to [constitutional values], but that exclusion is not itself compelled by the Constitution"); Turpin v. Mailet, 579 F.2d 152, 158 (2d Cir. 1978) (noting that both \textit{Miranda} and the Fourth Amendment exclusionary rule might be examples of "common law development"), \textit{vacated sub nom}. City of West Haven v. Turpin, 439 U.S. 974 (1978); Monaghan, \textit{supra} note 653, at 314-15 (viewing exclusionary rule cases as constituting constitutional common law); Schrock & Welsh, \textit{supra} note 654, at 1118 (suggesting that "the Court's current treatment of the exclusionary rule" reflects "a subconstitutional calculation of costs and benefits"). \textit{Cf.} Franks v. Delaware, 438 U.S. 154, 171 (1978) (providing for suppression of illegally seized evidence "in the absence of a more efficacious sanction").

712. \textit{See supra} text accompanying notes 700-01.

713. There is a strong argument that the unconstitutionality of this worsening effect in the Fourth Amendment context follows a fortiori from \textit{Miranda}. In at least one important area, after all, the Court has suggested that the substantive reach of Fourth Amendment exclusionary rule protections should and do reach farther than \textit{Miranda}-based protections. \textit{See} Oregon v. Elstad, 470 U.S. 298, 306-07 (1985) (viewing the Fourth Amendment exclusionary rule as more far-reaching than \textit{Miranda}'s Fifth Amendment exclusionary rule with regard to fruit-of-the-poisonous-tree evidence).
is itself shuffled to one side, another separate question looms: Does the substitute program, even in its aggregate operation, provide protections fairly characterized as "equivalent" (or even nearly equivalent) to the protections provided by the Court's extant exclusionary-rule jurisprudence?

It is not at all clear (at least to me) how the Court would deal with our hypothetical statutory-substitute case. Would it authorize any substitute at all for the exclusionary rule? If so, would it require equivalent individual protections (for example, through the provision of an immunity-free private damages action, with some assured minimum recovery, for every victim of an unlawful search)? Would the proposed three-part statutory program meet a test of aggregate equivalence, assuming the Court deemed an overall-impact standard applicable? Would the answer to that question differ for state defendants (many of whom would get additional protections in federal collateral proceedings) and federal defendants (who presumably would not)? Might the Court permit a substitute program that provided something less than protections "fully" equivalent to those afforded by the existing exclusionary rule? If so, would the three-part substitute surmount whatever lower threshold the Court imposed? Might the Court even go so far as to say that the exclusionary rule is repealable en toto whether or not substitute protections are afforded? By Congress? By the individual states? These questions illustrate the complexities—and, for many, the dangers—that come with giving the Court authority to frame constitutional common law rules.

C. Rules That Are Modestly Reducible

We have seen that some constitutionally inspired common-law-like rules permit outright reversal by Congress, while other rules empower Congress and the states to put in place "equivalent" legal

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714. Notably, the Court's recent Dickerson decision indicates that any attempted legislative reversal of the exclusionary rule, with no simultaneous adoption of any rule substitute, would be without effect. After all, the exclusionary rule—just like Miranda—has always applied to "prosecutions arising in state court." Dickerson v. United States, 120 S. Ct. 2326, 2333 (2000). See also Oregon v. Elstad, 470 U.S. 298 (1985) discussed supra note 713.

715. See supra notes 659-95 and accompanying text.
safeguards. Still other rules, it appears, give Congress the power to reduce, to a limited degree (but only a limited degree), constitutionally inspired judicial protections. The most prominent of these rules concerns the availability of money damages to remedy the sort of constitutional tort first recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics. In Bivens, the Court upheld a money damages action against individual federal agents who violated a plaintiff's Fourth Amendment rights. In reaching this result, the Court noted that it might decline to grant comparable redress in other constitutional settings if Congress crafted its own remedial scheme. After failing to find a proper remedial alternative in two post-Bivens cases, the Court invoked this limiting principle in Bush v. Lucas to restrict the relief available to a federal civil-service employee demoted for exercising his First Amendment rights. In the Court's view, the remedy available under the Civil Service Reform Act of 1978—even though not an "equally effective substitute" for a Bivens action—was "constitutionally adequate." Again, in Schweiker v. Chilicky, the Court rejected the claimant's request for a fully compensatory Bivens-based award (including emotional distress damages) following an allegedly unconstitutional termination of Social Security benefits. The Court reasoned that a retroactive reinstatement of benefits, even though not "complete relief,"

716. See supra notes 696-714 and accompanying text.
717. See Burt, supra note 701, at 129 (noting possibility that Congress might have authority to revise Miranda "around the edges").
719. See Bivens, 403 U.S. at 397.
720. See id.; Friedman, supra note 15, at 752 (noting that: (a) "in language that later proved significant, the Court [in Bivens] implied the cause of action only because . . . Congress had not provided an alternative remedy that the Court believed to be adequate"; and (b) "this caveat seems inconsistent with the Marbury principle").
723. Id. at 372-73 & nn. 8-9.
724. See id. at 378 n.14.
726. Id. at 420.
sufficed for *Bivens* purposes because it emanated from Congress's expansive and carefully crafted Social Security remedies scheme.\(^{727}\)

In light of *Bush* and *Chilicky*, the damages rules of *Bivens* and its progeny seem to meet the description of constitutional common law: they are part of a "substructure of substantive, procedural and remedial rules drawing inspiration and authority from, but not required by, various constitutional provisions."\(^{729}\) At the same time these rules operate in a constraining way. Congress may not (at least in the absence of extraordinary circumstances) jettison otherwise-operative "constitutional" damages rules in their entirety, putting nothing in their place;\(^{729}\) rather Congress may pare those rules down, but only if its substituted scheme "provides meaningful remedies."\(^{730}\)

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727. *See id.* at 425. These developments may have been foreshadowed by the Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980). As Dean Nichol has observed:

In *Carlson*, then-Justice Rehnquist complained that the adopted "approach permits Congress to displace this Court in fashioning a constitutional common law of its choosing merely by indicating that it intends to do so." Justice Brennan, who is not unaccustomed to debating with the Chief Justice, offered no reply for the majority. The opinion thus suggests an accommodation that is best left unexplored.


728. *Monaghan*, *supra* note 17, at 2-3; *see Nichol, supra* note 15, at 1142 ("The *Bivens* decisions, though based on the constitutional text, have conceded a significant role for congressional oversight."); *see also id.* at 1121 ("Courts . . . are not the only entities charged with making the guarantees of the Constitution meaningful. The focus throughout the *Bivens* decisions on alternative remedies afforded by other branches of government is, therefore, not only legitimate; it has, if anything, been underdeveloped."). The Supreme Court itself noted in *Lucas* that "(I)n the absence of . . . a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal . . . ." *Bush*, 462 U.S. at 378; *see also id.* at 388 (noting that, in light of congressional intervention, "the question we confront today is quite different from the typical remedial issue confronted by a common-law court").

729. *See Nichol, supra* note 15, at 1145 (noting that "mere congressional declaration that the plaintiff 'may not recover' is no appropriate bar to a *Bivens* claim"). I say "at least in the absence of extraordinary circumstances" because the Court has not wholly foreclosed the possibility that, in some highly discrete and exceptional contexts, a wholesale congressional ban on *Bivens* recoveries would be effective. *See, e.g., Bush*, 462 U.S. at 378 n.14; *Davis v. Passman*, 442 U.S. 228, 246-47 (1979) (refusing to dismiss damages claim against a congressman, based on allegedly unconstitutional sex discrimination, where an "explicit" congressional ban on such suits was lacking); *cf. Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (rejecting *Bivens* actions brought by military personnel against superior officers in part because "Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy").

730. *Bush*, 462 U.S. at 386; *see also Nichol, supra* note 15, at 1143 (emphasizing that
A recent decision outside the Bivens context that might be viewed as involving a modestly reducible constitutional common law rule is Smith v. Robbins. Robbins concerned a habeas corpus petitioner’s claim that his appointed counsel’s handling of his state appeal had violated the constitutional principles of Anders v. California. In Anders, the Court had “found inadequate California’s procedure—which permitted appellate counsel to withdraw upon filing a conclusory letter stating that the appeal had ‘no merit’ and permitted the appellate court to affirm the conviction upon reaching the same conclusion following a review of the record.” The Court in Anders went on “to set out what would be an acceptable procedure for treating frivolous appeals—a procedure that entailed the filing by counsel of ‘a brief referring to anything in the record that might arguably support the appeal’ and a follow-up review by the appellate court to identify potentially appealable issues.

Rejecting the lower court’s conclusion that use of this procedure was “obligatory upon the States,” a five-Justice majority in Robbins deemed it merely “prophylactic” and declared that “the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant’s right to appellate counsel.” Having formulated this standard, the Court found

“congressional authority to bar constitutional damages actions without providing adequate alternative remedies . . . is inconsistent with our traditions of judicial review”; see id. at 1145 (adding that “the Court’s traditional role as ultimate arbiter of the Constitution necessitates that the final determination of adequacy be a judicial one”).

731. 528 U.S. 259 (2000). I say “might be viewed” for two reasons: (1) Robbins may not involve what we would normally think of as a constitutional common law rule, see infra note 747; and (2) the result in Robbins may go well beyond merely modestly reducing a preexisting judicially declared rule, see infra notes 739-44 and accompanying text. Because both of these points are debatable, however, Robbins is treated here.

733. Robbins, 528 U.S. at 264.
734. Id. at 271.
735. Id. (quoting Anders, 386 U.S. at 744).
736. Id. at 272.
737. Id. at 265; see also Dickerson v. United States, 120 S. Ct. 2326, 2344 (2000) (Scalia, J., dissenting) (describing Anders as having “outlined a procedure that would meet [the Sixth Amendment] standard . . . decreed, for safety’s sake, by this Court”). The Court also offered what appeared to be alternative formulations of its operative legal standard, including one found particularly objectionable by the dissenting Justices. See infra note 739 and accompanying text; see also Robbins, 528 U.S. at 284 (requiring procedures that afford “adequate and effective appellate review”).
sufficient a state procedure that—while not requiring a full-scale *Anders* brief—did require a filing by counsel that summarized the case "with citations of the record," a review by an "appellate project staff attorney" to double check for arguable trial errors and an independent appraisal "of the entire record" (arguably more exacting than the review required by *Anders*) by the appellate court itself.\(^\text{738}\)

Four Justices vigorously dissented from the Court's ruling in *Robbins*, decrying in particular its foggy suggestion that an *Anders* substitute need only "reasonably ensure[] that an indigent's appeal will be resolved in a way that is related to the merit of that appeal."\(^\text{739}\) The dissenters acknowledged that the Court had "not held the details of *Anders* to be exclusive," but they also emphasized that *Anders* provided the constitutional "benchmark."\(^\text{740}\) The core of this benchmark, according to the dissenters, was that counsel must "show affirmatively, subject to evaluation, that he has made the committed search for issues and the advocate's assessment of their merits that go to the heart of appellate representation in our adversary system."\(^\text{741}\) In the dissenters' view, *Anders* had ensured this result by specifically requiring "counsel to flag the best issues [in writing] for the sake of keeping counsel on his toes and giving focus to judicial review of his judgment."\(^\text{742}\) Because the system at issue in *Robbins* omitted this key safeguard—and therefore failed to ensure "the partisan scrutiny . . . that defendants with paid lawyers get as a matter of course"\(^\text{743}\)—it did not "measure up" to the minimum requirements put in place by *Anders*.\(^\text{744}\)

*Robbins* illustrates the rich possibilities for post hoc inventiveness created by a regime of constitutional common law. In that case the Court cut back on the protections afforded to indigent

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\(^{738}\) *Robbins*, 528 U.S. at 265, 266 n.1.

\(^{739}\) *Id.* at 296 (Souter, J., dissenting) (quoting *id.* at 276-77); *id.* at 289 (Stevens, J., dissenting) (same).

\(^{740}\) *Id.* at 297 (Souter, J., dissenting).

\(^{741}\) *Id.*

\(^{742}\) *Id.* at 298.

\(^{743}\) *Id.*

\(^{744}\) See *id.* at 297; *id.* at 291 & n.2 (Stevens, J., dissenting) (noting that "simply putting pen to paper can often shed new light on what may at first appear to be an open-and-shut issue" and that the challenged procedure "does not force counsel to 'put pen to paper' regarding those things most relevant to an appeal-legal issue").
defendants by *Anders*—perhaps even (if one takes the view of the dissenters) to the point of emasculation. Constitutional common law provided the key to effectuating this result. In *Anders*, after all, the Court did not say that its directives were subject to state-by-state revision (particularly in ways that would dilute those directives’ protections), but it also did not—at least in absolutely express terms—foreclose that possibility either. This background reality set the table for *Robbins*. In effect, the Court in that case characterized (or more accurately, recharacterized) *Anders* along the lines of a common law decision. It was only because the Court could and did make this analytic move that it was able to uphold—without purporting to overrule *Anders*—a lessened measure of appellate counsel’s duties.

There is a curious and ironic aspect to this outcome, given the Court’s essentially contemporaneous refusal to cut down the *Miranda* rule in *Dickerson v. United States*. After all, both *Miranda* and *Anders* were Warren Court landmarks handed down

745. *See id.* at 298 (Souter, J., dissenting) (arguing that the validated system “does no more to protect the indigent’s right to advocacy than the no-merit letter condemned in *Anders*”); *id.* at 289 (Stevens, J., dissenting) (arguing that the “procedure reviewed in *Anders* . . . would easily have satisfied [the majority’s] standard”). This point of course is highly debatable. The majority might well respond that the system involved in *Robbins* involved a “third layer of review” that compensated (wholly or at least largely) for removal of the requirement that counsel itemize possibly appealable issues. *Id.* at 266 n.1.

746. The suggestion in the text that *Anders* lacked “absolutely express terms” is subject to fair dispute, because the key language in the case was mandatory, not advisory or precatory. *See Anders*, 386 U.S. at 744 (noting that appellate counsel’s request to withdraw based on determination of appeal’s frivolousness “must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal” (emphasis added)). The key point, however, is that the Court did not take the next step, by further stating that its mandatory directive was not replaceable, at least without adoption of a substitute procedure that was no less effective in protecting the interests of indigent defendants. *Cf. supra* notes 698-99 and accompanying text (discussing the use of such language in *Miranda*).

747. I say “along the lines of a common law decision” because *Anders*—as recast in *Robbins*—may be viewed in either of two ways. First, it might be viewed as a true common law decision—that is, a default rule that operates in the absence of a state’s formal adoption of an alternative procedure by the legislature or an authorized rulemaking body like the state supreme court. Second, it might be viewed as merely providing a “safe harbor” suggestion—that is, an advisory-opinion assurance that states would meet constitutional requirements if (but not only if) they complied with the *Anders* procedures. In either event, *Anders* (as reconceived in *Robbins*) is at least a common-law-like case in that it invited just the sort of alternative-procedure reprise that the Court in *Robbins* ultimately upheld.

748. 120 S. Ct. 2326 (2000). *Dickerson* is discussed *supra* notes 714 & 737.
within the span of a single year. Yet, it was in *Miranda* that the Court specifically acknowledged the modifiable nature of its ruling and trumpeted its intention not to place states in a "constitutional straightjacket." No similar rhetoric appears in *Anders*, presumably because the Court assumed its opinion set forth a hard-and-fast constitutional rule. In the longer term, however, the Court's explicit acknowledgment of the common law features of *Miranda*—and, in particular, its replaceable common law case—may well have given that decision a greater precedential strength. Put another way, the lack of any talk about "fully effective equivalent" substitutes in *Anders* may have eased the judicial retrenchment that occurred in *Robbins*. In sum, *Robbins* reveals the potentialities of judicial nonspecificity in a world that recognizes constitutional common law.

**D. Constitutional Common Law and Structural Review**

Are the Court's constitutional common law and common-law-like rules structural in the pure sense? Most assuredly yes. To some, these rules may appear, at least at first blush, to differ markedly from other structural doctrines in our law. Rules of the common law variety, for example, may not seem to resemble rules of clarity because rules of clarity necessarily involve a judicial response to a statute—that is, to something that a legislature has done. In a very real sense, however, constitutional common law rules also respond to what the legislature has done; their special mission is merely to operate when what the legislature has done turns out to be *nothing*. To say nothing, after all, is always to say something in the world of law. For example, if a legislature says nothing about custodial confessions made without warnings, it really is saying that such confessions may be used in court under the preexisting background principle that all relevant evidence is admissible. Thus, just as

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749. *Miranda* was handed down on June 13, 1966, and *Anders* was handed down on May 8, 1967.


751. See supra note 746 (discussing mandatory, rather than precatory, verbiage of *Anders*).


753. See, e.g., *FED. R. EVID. 402*. 
surely as rules of clarity respond to rules of law propounded by a legislature, constitutional common law rules respond to legislatively endorsed rules, albeit rules set forth in background norms allowed to operate in constitutionally sensitive settings.

In the end, constitutional common law and common-law-like rules operate like other structural doctrines. They protect substantive constitutional values. They safeguard those values in a provisional way. And they provide this provisional protection by placing the burden of inertia on the side of those constitutional values they are designed to protect. What's more, structural rules of the common law ilk work to focus the attention of nonjudicial policymakers on the constitutional values those rules embody and reflect. They do so by establishing presumptively valid and clearly visible governing principles, to which legislators must pay heed in crafting revisions, if they choose to act at all.

There are other constitutional rules with a common law cast that we shall not pause to canvass here. Nor shall we add more to the already extensive and lively commentary about the wisdom and legitimacy of these sorts of rules. Enough has been said to show

754. See, e.g., County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991) (holding that “the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework” so that “individual states may choose to comply in different ways”); Daniel J. Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1 (1994) (asserting that the Chapman beyond-a-reasonable doubt harmless error rule is modifiable “common law”); Henry P. Monaghan, First Amendment Due Process, 83 Harv. L. Rev. 518, 550 (1970) (suggesting that ban on state court power to issue coercive orders against federal officers “stems from a judicially fashioned (and congressionally reversible) common law of federalism”); Monaghan, supra note 17, at 20 (viewing Wade-Gilbert lineup rules as akin to Miranda); Monaghan, supra note 653, at 314 (suggesting that certain third-party-standing rules designed to vindicate substantive rights may constitute constitutional common law); Schrock & Welsh, supra note 654, at 1143-44 (asserting that Chapman harmless-error rule is modifiable “common law”); see also United States v. Cappas, 29 F.3d 1187, 1193 (7th Cir. 1994) (recognizing the emerging view that the Chapman harmless error standard is constitutional common law).

755. Compare Susan Bandes, Reinventing Bivens: The Self-Executing Constitution, 68 S. Cal. L. Rev. 289, 329-31 (1995) (expressing worry that Monaghan's notion of constitutional common law may dampen acceptance of non-textual substantive rights), Merrill, supra note 695, at 57 (questioning broadly the legitimacy of constitutional common law except when used to permit Congress to formulate adequate substitutes for judicial protections of constitutional rights), and Schrock & Welsh, supra note 654, passim (questioning both the authority for and the utility of constitutional common law), with Meltzer, supra note 754, passim (arguing that constitutional common law is less intrusive than mandating
that the Court, in a wide variety of settings, has used a common law style of decision making to invite political-branch reevaluation of judicially propounded "constitutional" doctrines. Such decisions—whether labeled as "constitutional common law" or the "subterranean homesick blues"—shift the burden of inertia to legislative bodies, focus the mind of those bodies on constitutional concerns, and push along an interbranch dialogue about the proper reification of constitutional rights. As a result, these rules—whatever we might call them—are deeply structural in character.

IX. PROPER-PURPOSE RULES

One important category of structural rules concerns legislative motive. The application of these rules hinges upon whether a constitutional rights, that courts have a distinctive expertise in formulating remedies, and that such remedies need not be a necessary component of due process in order to justify their imposition).

756. BOB DYLAN, BRINGING IT ALL BACK HOME (Warner Bros. Records 1965).

757. As noted by Professor Friedman:

The Bivens approach... is perfectly suited to foster... dialogue.... Bivens is an invitation to Congress to join the remedial process... Bivens permits Congress to voice popular opinion as to a remedy that meets majoritarian concerns, such as overdeterrence of official conduct. The Court reserves its say as well, in that Congress cannot choose an "inadequate" remedy (whatever that means); thus, Bivens is a doctrine that allows the branches of government to work.

Friedman, supra note 15, at 770.

758. For some leading treatments of motive-based constitutional rules, see Brest, Conscientious Legislature's Guide, supra note 16, at 589-94; Brest, supra note 385, at 99-102, 111-15; Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36, 99-156 (1977); John Hart Ely, Legislative and Administrative Motivation in Constitutional Law, 79 YALE L.J. 1205 (1970); Symposium, 15 SAN DIEGO L. Rev. 925 (1978). The subject also is considered at length in BICKEL, supra note 6, at 208-22, and in ELY, supra note 88, at 136-45. Attentive to key definitional questions, Professor Kagan has written:

I make no distinction between such terms as "purpose," "intent," "motive," "basis," and "reason." The Court has used these terms interchangeably, both in First Amendment jurisprudence and elsewhere; in O'Brien, for example, the Court treated the terms "motive" and "purpose" as synonymous. Moreover, attempts by scholars to distinguish among these terms have proved unhelpful.

Kagan, supra note 533, at 426 n.40 (citing David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. CHI. L. Rev. 935, 951 (1989), as noting "the interchangeable use of these terms in equal protection law," and Ely, supra, at 1217-21, as criticizing efforts to distinguish among these terms). I am in full agreement with Professor Kagan on these matters, and the discussion that follows reflects that definitional perspective.
challenged policy was the product of an impermissible purpose. These doctrines are structural, rather than substantive, because they neither focus on nor preclude policymakers from achieving the outcome embodied in the law at issue. Instead, purpose-centered rules involve disinfecting the work of lawmakers by ridding it of prohibited reasoning processes. Like other structural safeguards, purpose-centered doctrines direct attention away from what rule the lawmaker has issued to how the lawmaker has proceeded. As a result, invalidations of rules on improper-purpose grounds always have a temporizing, remand-to-the-legislature quality.

An illuminating example is provided by Hunter v. Underwood. In that case, the Court considered whether Alabama's disenfranchisement of any person who committed a "crime . . . involving moral turpitude" violated the Fourteenth Amendment's Equal Protection Clause. The Court found a violation, but only because the Alabama Constitutional Convention of 1901, which promulgated the rule, was driven by a purpose of discriminating against potential African American voters. As a result, Hunter left the door open for Alabama to reenact, without alteration, its 1901 disenfranchisement rule in or after 1985. The Court,

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759. See, e.g., infra notes 782-96 and accompanying text (describing various rules).

760. See, e.g., Ely, supra note 88, at 137 (noting "that the very same governmental action can be constitutional or unconstitutional depending on why it was undertaken").


762. See, e.g., Brest, supra note 385, at 115 (asserting that a motive-based inquiry "focuses on the process by which the rule or decision was made; it asks what criteria or objectives the decisionmaker took into account"); Frickey, supra note 27, at 724 (arguing that motive-based review "contemplates a judicial inquiry into the legislative process").

763. See Burt, supra note 555, at 383-84 (observing that "it follows from the logic of [a purpose-based] disapproval that the legislature might reenact the statute if it can provide a more explicit, fact-based justification for its action"); J. Morris Clark, Legislative Motivation and Fundamental Rights in Constitutional Law, 15 San Diego L. Rev. 953, 1033 (1978) (noting that, on a motive-based review, "[t]he decisionmaker . . . is generally entitled to reach the same decision again 'in identical form, provided only that it is made for licit reasons" (quoting Brest, supra note 385, at 115)); see also infra note 779 and accompanying text (noting criticism of motive-based rules based on this feature).


765. id. at 223 (quoting ALA. CONST. of 1901, art. VIII, § 182).

766. See id. at 225, 233.

767. See id. at 233 ("Without deciding whether § 182 would be valid if enacted today
however, emphatically demanded that, if Alabama's lawmakers wished to retain this rule, they had to adopt it anew. The weighty burden of inertia thus was placed where it had been before the state's 1901 decision, with a clarifying insistence that lawmakers could resuscitate this restriction only if they proceeded free of the noxious taint of racism.

Critics long have questioned the wisdom of purpose-centered doctrines. They complain, for example, that these rules pose deep problems of application; indeed, the Court itself has characterized judicial inquiry into legislative purpose as "extremely difficult" and a "hazardous matter." Why? In part because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." In

without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and ... continues to this day to have that effect. As such, it violates equal protection ....". Of course, such a reenactment, even if not subject to renewed attack on race-discrimination grounds, might be challenged on a different constitutional theory. Cf. McLaughlin v. City of Canton, 947 F. Supp. 954, 973 (S.D. Miss. 1995) (holding that disenfranchisement of misdemeanants violates the "fundamental right" component of the Fourteenth Amendment Equal Protection Clause).

768. See supra note 567 and accompanying text (noting significant practical effects of location of burden of inertia).

769. See Hunter, 471 U.S. at 232 (stating that "an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks" and suggesting that even if "the State has a legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude," care should be taken—when defining such crimes—not to include crimes "thought to be more commonly committed by blacks"); id. at 233 (advising that despite "implicit authorization of § 2 [of the Fourteenth Amendment] to deny the vote to citizens 'for participation in rebellion, or other crime,'" the Court is "confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182").

770. See, e.g., United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting) (citing "a wise and ancient doctrine that a court will not inquire into the motives of a legislative body" and arguing that "the process of psychoanalysis [should not be carried into such] unaccustomed fields").

771. See, e.g., Clark, supra note 763, at 954 ("The major argument against a motivation-based test of constitutionality is a practical one. It is usually impossible to know the subjective motivation of legislators by direct evidence, such as legislative history, with enough certainty to declare a law unconstitutional as a result."). But see, e.g., Sunstein, supra note 41, at 81 (stating that "it is often possible, notwithstanding the problems of mixed motivations and the evidentiary difficulties, to discern the dominant motivation by using conventional techniques").


774. Id. at 384; see also Frank H. Easterbrook, Statutes' Domains, 50 U. CHI. L. REV. 533,
addition, "even if a consensus among legislators existed, it might be difficult to ascertain because the views of few legislators are recorded." The Court also has said that:

[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons. For these reasons and others, the case against motive-centered review has garnered much support. But the Court has responded to the case against proper-purpose rules—a case largely articulated in the Court's own

547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."); Farber & Frickey, supra note 444, at 880-82 (discussing Judge Easterbrook's contention).

775. Clark, supra note 763, at 974; see Lawrence A. Alexander, Introduction: Motivation and Constitutionality, 15 SAN DIEGO L. REV. 925, 938 (1978) (asserting that "the evidentiary problems are staggering, especially when ... one keeps in mind that there is no difference in theory between enacting and repealing on the one hand (action), and failing to enact or repeal on the other (inaction)"). The problem presented by identifying wrongful motives is compounded by "the ease of legislatures' offering pretextual motives and the difficulty of courts' discovering the real ones." Kagan, supra note 633, at 414.

776. Palmer, 403 U.S. at 225; see Brest, supra note 385, at 125 (noting that legislators' ability to "conceal their illicit objectives" may strengthen this "futility" argument).

777. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring) (citing as support Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979), in which Maine's statutory rape law was upheld, and Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), in which New Hampshire's statutory rape law was struck down).

778. See, e.g., Clark, supra note 763, at 974-75 ("[S]triking] down useful laws passed for putatively bad purposes ... would be dysfunctional because it would serve only to chasten legislative immorality rather than to advance the public good. [I]n addition,] psychological examination by courts of coordinate branches of government (or of state government) has been said to be demeaning or disrespectful.").

779. In addition to the materials already cited (and particularly the Court's decisions in O'Brien and Palmer, see supra notes 772-74), see, for example, Fleming v. Nestor, stating that: "Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." 363 U.S. 603, 617 (1960); see also infra note 784 (noting, inter alia, the City of Erie plurality opinion which declined to strike down a statute on the basis of an illicit motive).
opinions\textsuperscript{780}—by recognizing such rules in almost every area of constitutional law.\textsuperscript{781}

The following examples prove the point:

- Government rules that advance religion violate the Establishment Clause unless (among other things) the policymaker acted with “a secular legislative purpose.”\textsuperscript{782}

\textsuperscript{780} \textit{See supra} notes 770-77 and accompanying text.

\textsuperscript{781} Related to improper-purpose rules is what we might call the rule of improper recital or phrasing. In \textit{City of Atlanta v. McKinney}, for example, the Georgia Supreme Court invalidated a city ordinance that provided benefits to “domestic partners” because the ordinance recognized domestic partnerships as involving “a family relationship.” 454 S.E.2d 517, 521 (Ga. 1995). Given this recital, the court found that the law exceeded the city’s constitutional authority because “cities in this state may not enact ordinances defining family relationships.” \textit{Id.} at 520. Following the decision in \textit{McKinney}, however, the city reenacted much of the same ordinance but excised all references to familial relations. When the new ordinance found its way back to the Georgia Supreme Court, Justice Carley lodged a vigorous protest to the city’s “semantic maneuver.” \textit{See City of Atlanta v. Morgan}, 492 S.E.2d 193, 197 (Ga. 1997) (Carley, J., dissenting). As he wrote:

\begin{quote}
The City’s ordinance disclaims the creation of marital relationship and the intent to alter or affect Georgia laws regulating private or civil relationships. However, phraseology cannot save a municipal ordinance which is unconstitutional. The “special laws” provision of the Georgia Constitution, which prohibits a municipality from enacting an ordinance defining a family relationship, “would be nullified if by play upon words and definitions the courts should hold valid a special law when there existed at the same time of its enactment a general law covering the same subject-matter.” \textit{Id.} (quoting \textit{City of Atlanta v. Hudgins}, 19 S.E.2d 508, 511 (Ga. 1942) (emphasis in original)). By a five-to-two vote, however, the Court upheld the new ordinance because “the City followed our holding in \textit{McKinney} and carefully avoided the constitutional flaw in its previous benefits ordinance by eliminating from [the] definition of ‘dependent’ any language recognizing any new family relationship similar to marriage.” \textit{Id.} at 195. For a case that presented an analogous issue, see \textit{Wallace v. Jaffree}, which invalidated a moment-of-silence law because it specifically authorized “meditation or voluntary prayer.” 472 U.S. 38, 41 (1985). Justice O’Connor, concurring in \textit{Jaffree}, found the particular statute unconstitutional even though “moment of silence laws in many States should pass Establishment Clause scrutiny,” \textit{id.} at 76, and noted that “the face of the statute . . . may clearly establish that it seeks to encourage or promote voluntary prayer,” \textit{id.} at 73; see also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 828-36 (1995) (rejecting the argument that allowance of write-in candidacies transformed the state’s stipulation of an ostensibly impermissible qualification based on prior service into a permissible regulation of the “Manner” of holding elections under Article I, Section 4, Clause 1 of the Constitution; relying in part on the statutory preamble that specified an intent to “limit the terms of elected officials”). \textit{Id.} at 78.
\end{quote}

\textsuperscript{782} \textit{Lemon v. Kurtzman}, 403 U.S. 602, 612 (1971) (emphasis added); \textit{accord}, e.g., \textit{Edwards v. Aguillard}, 482 U.S. 578, 590 (1987) (striking down a creation-science statute because of
Strict scrutiny under the Free Exercise Clause is triggered "if the object of a law is to infringe upon or restrict practices because of their religious motivation."\textsuperscript{783}

In assessing whether a law is "unrelated to the content of expression"—so as to avoid strict scrutiny under the Free Speech Clause—courts deem the "government's purpose . . . the controlling consideration."\textsuperscript{7784}

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"the legislature's preeminent religious purpose"; see also Larson v. Valente, 456 U.S. 228, 255 (1982) (holding a fund-collecting restriction unlawful because of legislators' "express design—to burden or favor selected religious denominations").

783. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993) (emphasis added); see id. at 534 (emphasizing that "[f]acial neutrality is not determinative" because "[t]he Free Exercise Clause protects against governmental hostility which is masked as well as overt").

784. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added); accord, e.g., Hill v. Colorado, 120 S. Ct. 2480, 2491 (2000) (following Ward in declining to invalidate a state medical buffer-zone law that "was not adopted 'because of disagreement with the message it conveys'"); id. at 2506 (Scalia, J., dissenting) (noting that "because of" question is "the principal inquiry" under Ward); id. at 2517 (Kennedy, J., dissenting) (advocating invalidation of the statute in part because "testimony to the Colorado legislature revealed that "the legislature's true purpose" was "to restrict speakers on one side of the debate: those who protest abortions"); id. at 2521 (concluding that "the statute is a failed attempt to make the enactment appear content neutral, a disguise for the real concern of the legislation"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 645 (1994) (stating that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys"), \textit{later opinion after remand}, 520 U.S. 180 (1997); Young v. American Mini Theatres, Inc., 427 U.S. 50, 81 n.4 (1976) (Powell, J., concurring) (noting that "an intent or purpose to restrict the communication itself because of its nature would make the O'Brien test inapplicable"). But cf. City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1392 (2000) (plurality opinion) (upholding a prohibition on nude dancing and relying on O'Brien in declaring: "As we have said before, . . . this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive"); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582 (1991) (Souter, J., concurring in judgment) (voting to uphold a nude dancing law against First Amendment attack in part because "[a]n appropriate focus is not an empirical enquiry into . . . actual intent"). \textit{See generally} Kagan, \textit{supra} note 633, at 414 (arguing that "notwithstanding the Court's protestations in O'Brien, . . . First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives"). An early example of purpose-based analysis in the free-expression area is provided by Grosjean \textit{v. American Press Co.}, 297 U.S. 233, 250 (1936) (striking down a tax applicable to widely circulated periodicals "because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled"). A useful discussion of \textit{Grosjean} appears in ELy, \textit{supra} note 88, at 143-45.
\end{quote}
State laws that inhibit interstate commerce are subject to a “virtually per se rule of invalidity” if rooted in a “discriminatory purpose.”

Government restrictions offend the Fourteenth Amendment’s protection of liberty if their “purpose . . . is to place a substantial obstacle in the path of a woman seeking [a previability] abortion.”

In applying the Bill of Attainder Clause, “[t]he question . . . is whether the legislative aim was to punish [an] individual for past activity.”

Rules that focus on lawmaker motives protect a variety of other constitutional rights as well.

Perhaps most important, the Court has developed two separate purpose-centered doctrines in the equal protection field. First, facially neutral government policies trigger heightened scrutiny if enacted with the motive of discriminating against a protected or quasi-protected class. Under this principle, any rule adopted with

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786. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (emphasis added); see also Stenberg v. Carhart, 120 S. Ct. 2597, 2620 (2000) (Ginsburg, J., concurring) (reiterating and applying Casey’s “purpose or effect” standard); id. at 2650 n.19 (Thomas, J., dissenting) (reading Justice Ginsburg’s concurrence “to suggest that even if the Nebraska statute does not impose an undue burden on women seeking abortions, the statute is unconstitutional because it has the purpose of imposing an undue burden”).

787. Flemming v. Nestor, 363 U.S. 603, 614 (1960) (emphasis added) (quoting De Veau v. Braisted, 363 U.S. 144, 160 (1960) (plurality opinion)); accord, e.g., BellSouth Corp. v. F.C.C., 162 F.3d 678, 690 (D.C. Cir. 1998) (“BellSouth II”) (rejecting the argument that section 271 of Telecommunications Act of 1996, which restricted the provision of long distance telephone service by Bell operating companies, was an impermissible bill of attainder, in part because “there is no unmistakable evidence of legislative intent to punish”); see also United States v. Lovett, 328 U.S. 303, 311, 314 (1946) (discussing legislative history that showed a goal of “purging” government of subversives, which constituted an impermissible “purpose” of the bill’s sponsors).


789. See, e.g., Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (noting that a “facially neutral law” is subject to strict scrutiny “if it can be proved that the law was ‘motivated by a racial purpose or object’” and that such a determination requires “a ‘sensitive inquiry into such circumstantial and direct evidence of intent as may be available’”); Washington v. Davis, 426
the purpose of disadvantaging persons based on race, ethnicity or sex (even if the law is facially neutral) carries with it a powerful presumption of invalidity.\textsuperscript{790} Hunter illustrates well the operation of this rule.\textsuperscript{791}

Second, if a government rule is subject to elevated means/ends equal protection scrutiny (most often, because it creates a suspect classification on its face), the Court will consider in defense of that rule only those goals that its propounders in fact intended to pursue.\textsuperscript{792} In \textit{Mississippi University for Women v. U.S.} 229, 241 (1976) (noting that the “necessary discriminatory . . . purpose” need not be “express or appear on the face of the statute”); see also \textit{Jefferson v. Hackney}, 406 U.S. 535, 548 (1972) (rejecting a constitutional challenge to a state’s welfare program disbursement scheme in the absence of evidence that the “difference in treatment among . . . grant classes” was racially motivated). \textit{But cf. Michael M. v. Sonoma County Superior Court}, 450 U.S. 464, 472 n.7 (1981) (plurality opinion) (“Even if the preservation of female chastity were one of the motives of the statute, and even if that motive be impermissible, petitioner’s argument must fail because ‘[i]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.’” (alteration in original) (quoting \textit{United States v. O’Brien}, 391 U.S. 367, 383 (1968))). Of course, it has been controversial whether equal protection jurisprudence should focus on purity of process as opposed to evenhandedness of results. \textit{See generally} Paul Brest, \textit{The Supreme Court, 1976 Term—Foreword: In Defense of the Antidiscrimination Principle}, 90 \textit{HARV. L. REV.} 1 (1976) (arguing for a continuing strong judicial role in enforcing the antidiscrimination principle); Owen M. Fiss, \textit{The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education}, 41 \textit{U. CHI. L. REV.} 742 (1974) (analyzing various arguments in support of both process-based and results-based approaches); Michael J. Perry, \textit{The Disproportionate Impact Theory of Racial Discrimination}, 125 \textit{U. PA. L. REV.} 540 (1977) (calling for a more thorough analysis by the Court of disparate racial impact theories). Whatever position one might bring to this debate, \textit{Washington v. Davis} and its progeny in fact reflect the modern Court’s insistence on examining legislative purpose.


\textsuperscript{791} \textit{See} supra notes 764-69 and accompanying text. Some analysts have claimed that the substantive right affected by the allegedly invidious decision helps determine the intensity of motive review, particularly in voting rights cases. As stated by one such observer: “Judicial intrusion can be properly heightened without reducing the institutional legitimacy of the court where those interests essential to individual participation in the democratic process are at stake.” Sheila Foster, \textit{Intent and Incoherence}, 72 \textit{TUL. L. REV.} 1065, 1118-19 (1998). This aspect of motive analysis, if in fact it is present in our law, comports with basic structural theory by adapting structural protections to take account of the nature and intensity of the substantive interest at issue. \textit{See} supra notes 530-31 and accompanying text.

\textsuperscript{792} \textit{See}, e.g., \textit{Califano v. Goldfarb}, 430 U.S. 199, 212-17 (1977) (rejecting an argument that “Congress may reasonably have presumed that nondependent widows, who receive benefits [under the OASDI program], are needier than nondependent widowers, who do not, because of job discrimination against women (particularly older women), and because they
Hogan, for example, the Court considered the constitutionality of Mississippi's operation of an all-women's nursing school, which the state's lawyers sought to justify as compensating for longstanding discrimination against women. Because the program involved a sex-based classification, the Court required the state to show "that the alleged objective is the actual purpose underlying the discriminatory classification." Examining the legislative record (and noting the inherent implausibility of a remedial need to expand nursing-career opportunities for women), the Court found that "the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination."

are more likely to have been more dependent on their spouses" since "inquiry into the actual purposes of the discrimination," as shown by statutory text and legislative history, reveals Congress was not motivated by this reasoning (citations omitted) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)); Weinberger v. Wiesenfeld, 420 U.S. 636, 648-53 (1975) (rejecting a characterization of the OASDI "classification . . . as one reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families" because "it [was] apparent both from the statutory scheme itself and from the legislative history of § 402(g)" that Congress in fact "intended to permit women to elect not to work and to devote themselves to the care of children"); id. at 649 (warning that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"); id. at 648 n.16 ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."); Eisenstadt v. Baird, 405 U.S. 438, 448 (1972) (rejecting state's defense of its anticontraception law in part because "we cannot agree that the deterrent of premarital sex may reasonably be regarded as the purpose of the Massachusetts law"); see also TRIBE, supra note 24, §17-2 at 1681 (observing that "the Court has with growing frequency found itself . . . prepared, as a form of intermediate review, to reject justifications for a government action where those justifications had not actually been considered"). By forcing policymakers to identify and focus on actual, permissible purposes, this rule disciplines the policymaking process in much the same way as findings-and-study rules. See supra Part V. As Professor Sunstein has stated: "Identification of the legitimate public purposes purportedly served by statutory classifications should improve representative politics by ensuring that the deliberative process is focused on those purposes and the extent to which the classifications serve them . . . ." Sunstein, supra note 41, at 78; see also id. at 84 ("The requirement that measures be justified rather than simply fought for has a disciplining effect on the sorts of measures that can be proposed and enacted. At the same time, this requirement will make it more likely that citizens and legislators will act for public-regarding reasons.").

794. See id. at 727.
795. Id. at 730 (emphasis added).
796. Id. at 730 n.16.
The Court has imposed this same actual-purpose limitation in other heightened-scrutiny cases, and some observers have advocated its extension to the minimum-scrutiny context as well. See, e.g., Saenz v. Roe, 526 U.S. 489, 505-06 (1999) (considering a Fourteenth Amendment Privileges and Immunities Clause challenge and deeming irrelevant possible justificatory purpose for law where the state “represented to the Court that the legislation was not enacted for any such reason”); Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 308-09 (1998) (suggesting a need to focus on what “actually is a rationale” for a statute challenged under the Article IV Privileges and Immunities Clause); Erznoznik v. Jacksonville, 422 U.S. 205, 214-15 (1975) (invalidating a ban on nudity for publicly visible outdoor movie screens on free speech grounds; noting that claimed traffic-safety motivation was unsupported by the legislative record); see also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 829-30 (1995) (rejecting an argument that forcing selected incumbents to run as write-in candidates was permissible “manner” regulation and noting that “[w]e must... accept the state court's view of the purpose of its own law,” which was to “limit the terms of elected officials’”); cf. Lochner v. New York, 198 U.S. 45, 64 (1905) (eschewing, in the context of substantive due process, a “proclaimed purpose” because the Court cannot “shut [its] eyes to the fact” that many similar laws are “passed from other motives” that are impermissible).

See Gunther, supra note 30, at 20-22, 37-38, 43-46. In Schweiker v. Wilson, 450 U.S. 221 (1981), Justice Powell noted in dissent that “[w]hen a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice.” He added, however, that “the Court should receive with some skepticism post hoc hypotheses about legislative purpose, unsupported by the legislative history” in order to “preserve equal protection review [under the Fifth Amendment] as something more than ‘a mere tautological recognition of the fact that Congress did what it intended to do.’” Id. at 242-45 (Powell, J., dissenting) (quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in judgment)); see also id. at 244 n.6 (noting that while some Supreme Court cases “suggest that the actual purpose of a statute is irrelevant... and that the statute must be upheld ‘if any state of facts reasonably may be conceived to justify its discrimination, . . . ascertaining of actual purpose to the extent feasible... remains an essential step in equal protection” (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961))); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 187-88 (1980) (Brennan, J., dissenting) (discussing cases that support his argument that “this Court has frequently recognized that the actual purposes of Congress, rather than the post hoc justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test”); cf. Ely, supra note 88, at 129 (noting that, “while I share the instinct that animated Professor Gunther’s suggestion and that seems intermittently to be moving the Court, I’m skeptical that a method of forcing articulation of purposes can be developed that will be both workable and helpful”); Linde, supra note 27, at 222 (criticizing Professor Gunther’s approach to rational-basis review, under which “a judge is to assess the challenged law in relation to actual, not merely conjectural, purposes”).

In one set of purportedly rational-basis cases, the Court arguably has invalidated laws on the basis of wrongful actual motivations, without seriously exploring the possibility that another rightful purpose might justify the statute. See Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432 (1985); United States Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973). For an interesting discussion of these cases, see Sunstein, supra note 434, at 10 (arguing that “Romer v. Evans... show[s] a willingness to
The Court, however, has shied away from this position by often expressing its willingness to assess run-of-the-mill constitutional challenges on the basis of hypothesized legislative ends.799 This tendency, it bears emphasis, does not bespeak an antipathy to structural doctrines. Rather, the Court's reservation of this specialized structural protection for heightened-scrutiny cases reveals exactly what we should expect and what we have seen before: Structural protections are most likely to take hold when the substantive rights they safeguard apply with the greatest force.800

Although motive-based analysis has attracted a bevy of detractors, most critiques occupy ground that is already well-covered.801 There is, however, one distinctive critique that cannot be sidestepped in the context of this work: namely, the claim of Professor Bickel that motive-based analysis is not structurally justifiable because it provides an ineffectual tool for fostering fruitful interbranch dialogue.802

799. See, e.g., Fritz, 449 U.S. at 176 (discussing Jefferson v. Hackney, 406 U.S. 535, 549 (1972)); id. at 179 (stating that "[w]here . . . there are plausible reasons for Congress' action, . . . it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision" (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))); McGowan v. Maryland, 366 U.S. 420, 425 (1961) (stating that a law is to be upheld "if any state of facts reasonably may be conceived to justify it" and citing for support Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947), Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580 (1935), Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), and Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U.S. 96 (1899)). See generally Gunther, supra note 30, at 20 (discussing "traditional" deference to legislative ends exemplified by McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969)). For a strong version of the critique on purpose-related inquiries in this context, see Linde, supra note 27, at 233 (claiming that "nothing limits a lawmaker to purposes that qualify for benefit-cost analysis").

800. See, e.g., supra notes 540-41 and accompanying text.

801. See supra notes 770-79 and accompanying text.

802. See BICKEL, supra note 6, at 215-21.
According to Professor Bickel:

The Court, as in *Kent v. Dulles*, may fail to apply a statute in the teeth of a reasonably well-determined legislative purpose, because it embarks upon a colloquy with the legislature, asking it to pass on certain consequences of the statute once more and more explicitly. This is in itself not altogether fictive. Something that is made explicit in the statute is more soundly imputable to the majority than if it is merely mentioned in debate or otherwise known. At any rate, the end to be achieved is quite clear and real; and that is to obtain a second legislative consideration.\(^8\)

He continues:

But the method of motive can lead to no similar colloquy, can produce no such end. If a statute is denied application for being impermissively motivated, how is the legislature to respond? It can respond to *Kent v. Dulles* by re-enacting the statute with certain explicit provisions in it. How can it respond so as to make sure that its statute is correctly motivated? Presumably only by imposing upon some of its members a requirement of less candor in debate. This is scarcely a desirable consummation. Even so, it may not suffice, since the wrong motive may be found in other materials than the debates; it is, after all, as difficult to disprove as it is to prove. As a colloquy, therefore, as a device of not doing which gives the legislature the opportunity to overrule the Court, the method of motive is euphemistic; it is an unacknowledged way, either of cutting off legislative power, or of leaving its specific exercise wholly to the discretion of judges to allow or forbid, with no relation to principle or, indeed, to articulable reason.\(^8\)

Although this argument is provocative, three points suggest that Professor Bickel misstepped in concluding that a motive-based invalidation “permits no effective legislative reprise.”\(^8\) First, it is not true that a legislature that wishes to consider reenactment of a law invalidated on motive-based grounds will inevitably resort to

\(^8\) Id. at 216.
\(^8\) Id.
\(^8\) Id. at 221.
"less candor in debate." If the Court has a special expertise and role to play in safeguarding constitutional values, as it surely does, one should not assume lightly that its instructions will be blithely ignored. Indeed, in another part of his book, Professor Bickel advanced much the same observation in eloquent and forceful terms:

[The Court can . . . see to it that the political judgment of necessity is undertaken with awareness of the principle on which it impinges. In American life, the Court is second only to the presidency in having effectively at its disposal the resources of rhetoric. Hence . . . the Court can explain the principle that is in play and praise it, and thus also guard its integrity. . . . No one should underestimate the dominion of ideas in a nation committed to the rule of principle as well as to majoritarian democracy.]

Given these premises, why should we suppose that legislatures will greet judicial pronouncements of wrongful motive with little more than self-serving strategic behavior? Legislators, like judges, take an oath of fealty to the Constitution. It thus seems neither accurate nor fair to assume that those who legislate will simply ignore a judicial directive, aimed directly at them, that expounds in pointed fashion what motivations for acting the Constitution does and does not permit.

806. Id. at 216.
807. Id. at 188; see also id. at 252 (noting the Court’s “great and mystic prestige” and “the skilled exertion of its educational faculty”); Gerald Gunther, The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1, 7 (1964) (describing judges as “effective ‘teachers to the citizenry’” (quoting BICKEL, supra note 6, at 69)); Wellington, supra note 8, at 503 (opining that “often it is difficult for Congress to ignore values that may be of constitutional dimension and that are called to its attention by the Supreme Court”).
808. See FISHER, CONSTITUTIONAL CONFLICTS, supra note 14, at 233-34 (“All public officers—executive, legislative, and judicial—are constitutionally required by Article VI, Clause 3, ‘to support this Constitution.’ As elaborated by statute, executive and legislative officials ‘solemnly swear (or affirm) . . . [to] support and defend the Constitution of the United States against all enemies, foreign and domestic; . . . bear true faith and allegiance to the same; . . . take this obligation freely, without any mental reservation or purpose of evasion; and . . . well and faithfully discharge the duties of their office.’” Id. (alterations and omissions in original) (quoting U.S. CONST. art. VI, cl. 3 and 5 U.S.C. § 3331 (1994)).
809. See Eisenberg, supra note 758, at 116 (noting that “[s]ome legislators, after being informed that they initially acted unconstitutionally, may refuse to vote for reenactment”).
A second problem with Professor Bickel's depiction of how motive-based remands operate is that it overlooks a vital force in our constitutional processes: the built-in time lag that almost always accompanies judicial review of legislative action. This dynamic ensures that a motive-based invalidation of legislation followed by an effort at reenactment typically will produce a fresh appraisal by "new politicians in a new set of circumstances, and with a new set of people looking at them."\textsuperscript{810} Whatever one might assume about the defiant deviousness of a legislature whose own motives have been impugned, one cannot suppose that a reconstituted legislature will resort to dissembling to protect the wrongful work of a body that no longer sits. For this reason too, Professor Bickel's suggestion that motive-based rulings are exercises in futility, inevitably destined to be met with legislative deviousness, overlooks important practical realities.

Finally, Professor Bickel overstates the case to be made against motive-driven rules based on their supposed susceptibility to judicial abuse. All doctrines are abusable, so the real question is whether there is some special reason for attacking motive-based rules on this ground.\textsuperscript{811} Professor Bickel, however, fails to show that motive-based doctrines carry with them a distinctive risk of judicial misbehavior. Why, for example, must we conclude that a motive-based ruling "decides the issue ... without facing it as such"\textsuperscript{812} by "cutting off legislative power" in "an unacknowledged way?"\textsuperscript{813} To be sure, some judges might try to manipulate motive-based

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\textsuperscript{810} Calabresi, supra note 13, at 105.

\textsuperscript{811} As Justice Story observed in \textit{Martin v. Hunter's Lessee}, "[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse." 14 U.S. (1 Wheat.) 304, 344 (1816).

\textsuperscript{812} BICKEL, supra note 6, at 221.

\textsuperscript{813} Id. at 216.
doctrines, but we are in a bad way if we must assume that our courts in general behave in this manner. No less important, the fact remains that motive-based rulings (like other structural rulings and unlike traditional hard-and-fast dispositions) have an intrinsic self-containing quality because they always leave open at least some possibility of a successful legislative reprise. There is, moreover, a practical fact—perhaps unknowable to Professor Bickel more than thirty years ago—that should substantially reduce the worries he expressed about judicial overreaching. The fact is that real-world decisions, particularly decisions of the Supreme Court, reveal a marked attentiveness to applying motive-based rules not with recklessness, but with restraint.

All these points—which focus on the potential for fruitful dialogue driven by motive-based rules, the importance of time's passage in this process, and the reluctance of courts to reach too far based on wrongful motivations—are illustrated by the Eleventh Circuit's ruling in Coleman v. Miller. In Coleman, the plaintiff challenged Georgia's incorporation of the Confederate Battle Emblem into its state flag. Georgia had taken this action in 1956, close on the heels of the Supreme Court's declaration that the South had to bring about the desegregation of its public schools. Based

814. See infra notes 1090-91 and accompanying text.
815. See supra notes 63-64 and accompanying text.
817. 117 F.3d 527 (11th Cir. 1997).
818. See id. at 528 (noting that the "flag design was adopted during a regrettable period in Georgia's history when its public leaders were implementing a campaign of massive resistance to the Supreme Court's school desegregation rulings"); Brown v. Board of Educ., 349 U.S. 294 (1955) ("Brown II"); Brown v. Board of Educ., 347 U.S. 483 (1954) ("Brown I").
on this fact and others, the district court found "that discriminatory purpose was a motivating factor in the legislature's passage of [the flag bill], though it was not the only factor." This finding put that court in a position to invoke the same motive-centered structural rule deployed by the Supreme Court in the Hunter case. In particular, the district court might have remanded the entire matter to the state legislature for an untainted, present-day consideration whether race-neutral concerns of regional pride (or the like) warranted continued use of the Confederate symbol. Put another way, the court could have held that, if Georgia's waving of its Confederacy-celebrating flag was to persist, it had to be the product of a fairer fight than occurred in 1956.

In the end, however, both the district court and the circuit court panel avoided this result by holding that the plaintiff had not shown that the Georgia flag carried with it any continuing discriminatory effects. From a structural perspective, this reasoning is interesting in two respects. First, the courts' analysis of discriminatory effects reflects the application of a sort of

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820. See supra notes 764-69 and accompanying text.

821. The unfairness of the fight cannot be gainsaid, particularly given the powerful presence of the Ku Klux Klan in the state during that time and the association of the Confederate Battle Flag with its causes. It bears emphasis that the sort of political dynamics that surrounded adoption of the Georgia flag, laden with prejudice against blacks and charged with rage about school desegregation, are paradigmatic of the sort of conditions a traditional Carolene Products approach would deem supportive of judicial intervention. See supra notes 458-60 and accompanying text. More fundamentally, these background circumstances suggest the presence of the sort of passion-laden factional action that most centrally concerned James Madison and other Framers of the Constitution. See supra note 453 and accompanying text.

822. See Coleman, 117 F.3d at 530 (finding plaintiff's evidence at the summary judgment hearing "insufficient to establish 'disproportionate effects of the Georgia flag along racial lines'" because the record contained only "anecdotal evidence of intangible harm to two individuals, without any evidence regarding the impact upon other African-American citizens or the comparative effect of the flag on white citizens" and a "mere allegation, without any accompanying support" that "the flying of the flag promotes violence against blacks and continues to represent a symbol of Georgia's efforts against integration"); id. at 531 n.8 (concluding that "appellant has failed to demonstrate that the Georgia flag presently imposes a discriminatory racial effect"); Coleman v. Miller, 912 F. Supp. 522, 530 (N.D. Ga. 1996) (holding that "Plaintiff . . . failed to make a specific showing that he . . . suffered disparate harm from the [Georgia] flag's existence" because he "rest[ed] solely on his own assertions that he . . . suffered a disparate impact").
We already have seen how changed circumstances may warrant the invalidation of a dated program coupled with a judicial invitation for legislative reassessment. Here, in contrast, changed conditions appeared to block a judicial remand for legislative reconsideration. Both the district and circuit courts in Coleman suggested, in so many words, that while the state flag might once have been unconstitutional, it no longer was so in light of a modern-day muting of its message of white supremacy and constitutional defiance.

Second, the courts’ sparse-record reasoning on the discriminatory-effects issue creates a very real chance that another plaintiff in another case could fill the evidentiary breach. Might a federal court, faced with bolstered proof of a continuing disparate and harmful impact, call on the Georgia legislature to take up de novo the proper content of the state flag? To ardent proponents of state autonomy, such a result might seem anathema. But such an intervention surely is no more invasive than the race-driven judicial reconstruction of state school systems (spearheaded by the “liberal” Warren and Burger courts in the 1960s and 1970s) or of legislative voting districts (spearheaded by the “conservative” Rehnquist Court in the 1990s). Indeed, precisely because the purpose-centered rule that would induce a reconsideration of the proper content of the Georgia flag is structural in nature, concerns about judicial overreaching should be much reduced. It seems, after all, a limited affront to a state’s autonomy for a court simply to call on its present-day legislature to consider this important issue afresh, free of past segregationist motives.

823. See generally supra notes 494-618 (discussing time-driven structural rules).
824. See supra notes 542-60 and accompanying text.
825. See supra note 822 and accompanying text.
828. See supra notes 63-64 and accompanying text.
829. Nor would it suffice to say that the state can remove the flag, if its existence is no longer justified, simply by repealing the law that put it in place. Such an argument did not prevail in Hunter v. Underwood, 471 U.S. 222 (1985), see supra notes 764-69 and accompanying text, and misses the essential point about properly allocating the burden of inertia that underlies judicial application of structural constitutional rules. See generally...
To be sure, the current impact of the Georgia flag on African Americans and others in the state may be difficult to calibrate and capture in an evidentiary record. But this fact merely raises, rather than answers, key constitutional questions presented by a case like Coleman. In particular, the difficulty of measuring discriminatory effect triggers the question whether a court can readily infer, in the face of a finding of wrongful purpose, a decisive dissipation of a preexisting discriminatory impact when psychological harms, rather than statistically measurable outcomes, are at issue.\(^8\) In addition, this difficulty presents the question whether a finding of unlawful purpose, at least in a psychological-impact case, should shift the burden of proof on the discriminatory-effects issue from the challenger to the state.\(^8\) Finally, it raises the question whether, if in fact the burden is so shifted, the state must generate an evidentiary record that is substantial to dispel the presumption of continuing discriminatory impact. In Coleman, the lower courts in effect answered these questions in favor of the state, but did so without even acknowledging their presence in the case.

Judge Guido Calabresi has asserted that our “jurisprudence requires that when the legislature has acted with haste or hiding in a way that arguably infringes even upon the penumbra of fundamental rights, courts should invalidate the possibly offending law and force the legislature to take a ‘second look’ with the eyes of the people on it.”\(^2\) Will the federal courts, if confronted with a better-documented case of current discriminatory effects, employ this approach in resolving the Georgia flag question? If they take this route, it will be because a structural motive-centered doctrine provides the vehicle for doing so.

\(^{830}\) Put another way, Hunter’s seeming insistence that the voter-disqualification law must continue to have a demonstrable disparate impact made some sense, since the impact of such a law on actual voter eligibility is statistically measurable. A similar statistical determination is not possible with respect to the effects of a symbol.

\(^{831}\) Cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977) (reasoning that proof that the “decision by the Village was motivated in part by a racially discriminatory purpose would . . . have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered”).

\(^{832}\) Calabresi, supra note 13, at 104.
Many rules of procedural due process focus on who qualifies as a proper decision maker.\(^{833}\) The Constitution commands, for example, that only an impartial judge and jury may sit in a civil or a criminal case.\(^{834}\) Fair-decision-maker requirements of this sort bear a kinship to the structural "who" rules that we shall consider here. In particular, both sets of rules reflect a deep concern with those "legal process" values that drive much of modern constitutional law.\(^{835}\)

Constitutional "who" rules, however, differ from due process proper-decision-maker rules in two major ways. First, the "who" rules on which we focus do not identify appropriate adjudicators of discrete disputes, but instead designate the proper propounders of broad government policy. Second, proper-decision-maker rules in the procedural due process field vindicate generalized interests in adjudicative fairness. In contrast, constitutional "who" rules, like other structural doctrines, embody specialized protections of particular substantive constitutional values such as federalism, free speech, or religious liberty.\(^{836}\)

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833. See, e.g., Tumey v. Ohio, 273 U.S. 510, 531-32 (1927) (disqualifying a judge who could recover a fee for his services only if he found the defendant guilty); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824-25 (1986) (extending Tumey to civil context where the judge has a personal stake in the damages award); Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (applying Tumey to agency adjudications where members of an agency board would benefit from the decision).


835. See Calabresi, supra note 13, at 84 n.9 (noting that "the legal process school, of which Ely is a distinguished member... asks which institutions are best suited to do which job in a given polity. It also asks what controls or roadblocks should be put in the way of any institution to prevent abuses of power"). In particular, as Professor Strauss has explained: "The Carolene Products rationale... that is seldom criticized as illegitimate judicial usurpation... rests on an assessment of comparative institutional competence: the courts should intervene in areas where they are competent and the legislatures are institutionally likely to go wrong." Strauss, supra note 434, at 208-09.

836. As we soon shall see, the suggested separation between due process fair-decision-maker rules and constitutional "who" rules is blurred at the margins, in part because adjudicative rules, like structural rules, sometimes respond to particular substantive constitutional values. See, e.g., infra notes 962-70 and accompanying text. Nonetheless, the
A leading case on constitutional "who" rules is *Hampton v. Mow Sun Wong.*[^337] There the Court considered whether the Fifth Amendment permitted a broad prohibition on governmental employment of lawful resident aliens promulgated by the federal Civil Service Commission.[^338] In striking down this regulation, the Court did not say that the Commission had exceeded its delegated authority.[^339] The Court also did not proclaim that the discriminatory ban was ipso facto invalid under equal protection principles.[^340] Instead the Court scuttled the rule on the ground that the Commission was not a proper promulgator of the prohibition in light of the government interests invoked in its support. Those interests included (1) giving the President a bargaining chip in treaty negotiations by enabling him selectively to waive the alien-employment ban; and (2) encouraging aliens to become American citizens and thereby participate more fully in our national life.[^341] These interests, the Court said, might have supported the ban if it had been adopted by Congress or the President.[^342]


[^338]: See id.

[^339]: See *Tribe, supra* note 24, § 17-2, at 1679; Tushnet, *supra* note 24, at 817. As Professor Tushnet has explained:

> [T]he Court did not invalidate the regulation because Congress had failed to authorize the Commission to take foreign policy into account in formulating its employment policies. Had it done so, *Hampton* would be an ordinary case in administrative law, a case about an agency that exceeded the bounds of its statutory authority.

Id.

[^340]: See Tushnet, *supra* note 24, at 817 (noting that decision was not based on grounds that it unlawfully discriminated against aliens as a substantive matter).

[^341]: See *Mow Sun Wong,* 426 U.S. at 104.

[^342]: See id. at 105; TUSHNET, *supra* note 443, at 203; Sunstein, *supra* note 434, at 47; see also Komesar, *supra* note 595, at 386 ("[T]he Court, concluding that these were not normal...")
eyes, however, the pursuit of these goals was too "far removed from [the] normal responsibilities" of the Civil Service Commission, which has "no responsibility for foreign affairs . . . or for naturalization policies." In short, given the important substantive equal protection values at stake, the Commission was not a proper "who."  

Commentators interested in structural rules have lavished attention on *Mow Sun Wong*. For our purposes, however, the most noteworthy feature of the case is that it does not stand alone. In fact, *Mow Sun Wong* is surrounded by decisions in which the Court has shaped substantive constitutional doctrine by taking account of the differing capacities of different government decision makers. Some of these rulings operate in a "who"-centered way that is both familiar and noncontroversial. These decisions assume the permissibility of policymaking by a government authority, while ratcheting the level of judicial review up or down to take account of that decision maker's structural strengths or weaknesses. Settled doctrine, for example, mandates judicial deference to the choices of generals, admirals, and other nonjudicial authorities because their circumstances, required clearer indications of deliberativeness . . . in the prior delegation of responsibility.


844. *Id.* at 114; *see also id.* at 116 (requiring that, if this decision is to be made by the Civil Service Commission, it "be justified by reasons which are properly the concern of that agency"). A final justification offered for the rule—that of establishing a bright-line test of total exclusion when security concerns undeniably render citizenship a proper requirement for some jobs—also did not support the ban. The Court recognized that this interest, driven by "administrative convenience" and "promotion of an efficient federal service" fell within the ambit of the Commission's legitimate concerns. *Id.* at 114-15. But this justification failed because (1) it was far from clear that the justification made sense; (2) there was no indication the Commission had actually considered or studied the matter; and (3) any conceivable merit in the justification was overwhelmed by the powerful "interest in avoiding the wholesale deprivation of employment opportunities," *id.* at 115, which was an "aspect of liberty" protected by the Fifth Amendment, *id.* at 116. The second of these rationales demonstrates *Mow Sun Wong*'s structural character not only as a "who" rule case, but also as a case deeply concerned about proper findings-and-study rules. *See supra* Part V; *see also supra* notes 792-97 (identifying a structural actual-purpose requirement developed in heightened means/ends scrutiny cases).

845. *See Tushnet*, *supra* note 443, at 203 ("Hampton's approach finds unconstitutional the delegation of some authority to the wrong agency."); *id.* ("[T]he Court said that Congress' attempt to authorize the Commission to worry about foreign policy was constitutionally impermissible.").

capacity to evaluate military exigencies is far superior to that of the
courts.\textsuperscript{847} I group these sorts of cases under the rubric "quasi-
structural 'who' rules" and will illustrate their operation in short
order.\textsuperscript{848}

In another set of cases, well exemplified by \textit{Mow Sun Wong}, the
Court has drawn on concerns of institutional capacity to forge true
second-look rules. It has done so by wielding the tool of outright
disqualification to channel important decisions from one set of
political-branch policymakers to another, thereby forcing a de novo
reassessment of a constitutionally sensitive substantive policy
choice. These rulings thus entail judicial remands to political
authorities\textsuperscript{849} but, for two important reasons, do not produce
"remands to the legislature" in the usual sense. First, the
invalidation of a policy on "who"-rule grounds does not necessarily
return that policy to Congress or the state's lawmaking assembly.
In \textit{Mow Sun Wong}, for example, the decision about employing aliens
was redirected to either the Congress or the President. In fact,
following the Court's decision, President Ford reinstated the hiring
ban by way of executive order, and that action—not surpris-
ingly—was upheld in the courts.\textsuperscript{850} Second, in contrast to an
ordinary remand-to-the-legislature rule, structural "who" rules
never operate to return an invalidated policy to the same decision
maker that propounded it in the first instance.\textsuperscript{851} Indeed, the
essential purpose of "who" rules is to shift policymaking respon-
sibility away from the initial decision maker. Despite these
differences, constitutional "who" rules share a deep connection with
typical remand-to-the-legislature techniques because both sets of
devices respond to a "legitimacy deficit" that marks the initial

\textsuperscript{847} See infra notes 943-46 and accompanying text.
\textsuperscript{848} See infra notes 930-61 and accompanying text.
\textsuperscript{849} See, e.g., TRIBE, \textit{supra} note 24, \textsection 17-2, at 1680; Sunstein, \textit{supra} note 434, at 96
(likening the who-based approach of \textit{Mow Sun Wong} to the remand-to-the-legislature
approach used in the desuetude context discussed \textit{supra} notes 516-41 and accompanying text;
noting that with "desuetude . . . the problem is temporal rather than bureaucratic," but that
"the basic problem—the legitimacy deficit—is the same").
\textsuperscript{850} See \textit{Mow Sun Wong} v. Campbell, 626 F.2d 739 (9th Cir. 1980); Vergara v. Hampton,
581 F.2d 1281, 1287 (7th Cir. 1978). See generally TRIBE, \textit{supra} note 24, \textsection 17-2, at 1680 n.15;
TUSHNET, \textit{supra} note 444, at 203.
\textsuperscript{851} See TRIBE, \textit{supra} note 24, \textsection 17-2, at 1680 (noting that cases like \textit{Mow Sun Wong}
envision judicial validation of "a somewhat revised provision if . . . reconsideration leads to
its enactment . . . in the same form but by a different body").
formulation of the challenged rule. The special feature of “who” rules is that this deficit exists because of the incapacity, interest, or other institutional shortcoming of the “who” whose action has been attacked.

Even the most skilled students of constitutional law tend to assume that judicial use of structural “who” rules is “unusual.” After all, under “[c]onventional constitutional analysis,” it is the substance, rather than the source, of a challenged policy that determines its compliance with the Bill of Rights and Civil War Amendments. The Justices, however, have endorsed a wide array of structural “who” rules that parallel the doctrinal approach of Mow Sun Wong. Consider the following important examples:

852. See Sunstein, supra note 434, at 47, 96.
853. See, e.g., Lawrence Gene Sager, Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enter., Inc., 91 HARV. L. REV. 1373, 1414 (1978). As noted by Professor Sager:

Mow Sun Wong posits a right to procedural due process which requires that some legislative actions be undertaken only by a governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution.

Id.; see also Carlson & Smith, supra note 27, at 230 (noting that Justice Stevens’s “analysis of delegated lawmaking responsibilities in Mow Sun Wong . . . suggests an expansive judicial role in determining that certain bodies—because of lack of interest, information, or expertise—are unlikely to act rationally, and hence are not competent lawmakers”); Sunstein, supra note 434, at 48 (noting that the “democracy-forcing” function of Mow Sun Wong “was expressly founded on the idea that publicly accountable bodies should make the contested decision that was challenged in the case”), See generally Farber & Frickey, supra note 444, at 924 (observing that this “appropriate decision maker” model is quite promising”). For an unsuccessful invocation of capacity-centered logic in a rational-relation equal protection case, see United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 190, 193 (1980) (Brennan, J., dissenting) (expressing concern about retirement-benefit legislation that disadvantaged “no longer active railroaders” where legislation was developed, at Congress’s request, by current railroad management and labor representatives who did not “represent the interests” of the disadvantaged group and whose “frequent and unrebutted” misrepresentations were “relied on” by Congress).

854. See TUSHNET, supra note 443, at 202 (describing rules of this sort as “novel”); Adler, supra note 119, at 867 (describing Mow Sun Wong as “an unusual case”).

855. Sandalow, supra note 13, at 1192-93; see, e.g., ISSACHAROFF ET AL., supra note 306, at 710 (identifying the “view that for constitutional analysis, all law is the same, regardless of its source”, stating that this approach is the “position the Court has generally taken”; but asking “does this only show that the Court continues to fail to think carefully about the difference between different lawmaking processes?”). See generally supra notes 6-13 and accompanying text (discussing conventional constitutional analysis).
Justice Powell's dispositive opinion in *Regents of the University of California v. Bakke* expounded the view that broadly accountable state officials—rather than "isolated" university authorities—should take responsibility for forging remedial race-conscious admissions programs. In *Fullilove v. Klutznick*, a plurality of the Court applied the flipside of this approach in upholding a race-based contract-set-aside program in part because it had been adopted by the national Congress. Rightly or wrongly, these opinions tend to channel decisional responsibility in the affirmative-action field to broadly representative and politically accountable

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857. As Justice Powell wrote:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

> [The Board of Regents] does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality.

> [Isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

Id. at 307, 309 (citations omitted).
858. 448 U.S. 448 (1980).
859. See id. at 476-78.
860. One criticism of Justice Powell's approach in *Bakke* is that it may push decision making about educational affirmative action away from those persons who are most knowledgeable about the justifiability and wisdom of intervention. *Cf. Kende*, supra note 395, at 608 (stating that in post-*Bakke* cases "courts have been extremely deferential to school boards which have found that they themselves discriminated in the past" and that "findings of fact in these situations are made more reliable by their special access or proximity to the violation"). In addition, the Powell position has been criticized as "seriously underestimat[ing] the degree of political attention that university affirmative action plans ... receive," whether or not they are formulated by school officials. TUSHNET, supra note 443, at 207. Approaching the issue from yet another angle, Justice Stewart in *Fullilove* faulted the Powell position for vesting de facto judicial authority in legislatures that have "neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy." *Fullilove*, 448 U.S. at 527 (Stewart, J., dissenting); see also Kende, supra note 395, at 587 (discussing Justice Stewart's position). For a similar view, see *Wygant v. Jackson Board of Education*, 476 U.S. 267, 313 (1985) (Stevens, J., dissenting). *See also Chang*, supra note 618, at 88 (suggesting that the "institutional differences between the judicial branch on one hand and the legislative and executive branches on the other simply preclude legislators and agencies from objectively and apolitically considering the need for affirmative action").
officials who operate in conditions of high visibility.\(^{861}\) Bakke and Fullilove thus can be understood, in keeping with the broader goals of structural review, as decisions that "promote both democracy and deliberation" in the framing of government policy in a field of great constitutional delicacy.\(^{862}\)

The Court has fashioned another set of structural "who" rules to deal with the "area of special constitutional sensitivity" occupied by cases that concern government discrimination against aliens.\(^{863}\) In Plyler v. Doe, for example, the Court held that Congress, rather than the states, must balance whether the criminality of a parent's immigration justifies the exclusion of illegal-alien children

861. See Fullilove, 448 U.S. at 498-99 (Powell, J., concurring) (reiterating that in Bakke, the Regents lacked authority to remedy identified discrimination because they were "entrusted only with educational functions," whereas "[u]nlike the Regents . . . , Congress properly may—and indeed must—address directly the problems of discrimination in our society"); see also Kende, supra note 395, at 591 (noting that "while he required that nonlegislative bodies such as the Regents make particularized findings, Justice Powell significantly relaxed the stringency of this requirement for Congress"); id. at 606 (arguing that the findings requirement should be relaxed when it is applied to Congress as it was by the Court in Fullilove).

862. Sunstein, supra note 434, at 48; accord, e.g., Tushnet, supra note 443, at 205-06; see also Sunstein, supra note 41, at 67-68 n.172 (stating with regard to Mow Sun Wong: "The basic notion is that deliberative processes are a necessary surrogate for broad representation; when the latter is absent, the former is required. The same notion is at work in opinions concluding that only proper decisionmakers, susceptible to special electoral control or reflecting broad deliberation, may undertake 'affirmative action'."). The play-out of "who" questions in the difficult affirmative action area has been predictably confusing. Issues include: Do those bodies that can adopt remedial plans include local legislative bodies? Do they include all elected decisionmakers? Do they include school boards (whether elected or not)? Do they include unelected agencies when they act pursuant to, or not pursuant to, explicit or implicit legislative declarations? When acting to remedy their own past wrongs? When they are marked by a high level of visibility or specialized expertise? Lower court cases that touch on these issues are collected in Kende, supra note 395. Kende advocates "an approach that aligns the rigor of the findings requirement with the strength of the authorization" to engage in remedial affirmative action. Id. at 612. Kende further argues:

State legislatures, like Congress, have characteristics which indicate a high degree of reliability in finding past violations; the courts should not require particularized findings before judging them competent to adopt such plans. Local representative bodies share some of these characteristics, though to a lesser extent, and should therefore be required to make somewhat more particularized findings. Unelected government administrative agencies may also be competent, but in most situations only after compiling much more specific findings.

Id. at 623.

from public schools. Similarly, in cases involving legal aliens, the Court has shifted policymaking authority from state lawmakers to Congress by holding that "state classifications denying aliens benefits receive strict scrutiny while congressional acts which do the same thing are only subject to the rational basis test." In Nyquist v. Mauclet, the Court added to this principle the notion that the encouragement of naturalization was a goal properly pursued only by the federal government and not by the individual states. By constitutionally confining particular decisionmakers to the advancement of particular ends, the Court in Mauclet followed exactly the same analytical path earlier laid down in Mow Sun Wong.

In Lucas v. South Carolina Coastal Council, the Court in effect devised a "who" rule in the service of protecting private property rights under the Fifth Amendment Takings Clause. In that case, the Court held that land use restrictions are presumptively unconstitutional when they deprive landowners of all "economically beneficial or productive use of land." At the same time, the Court declared that "background principles of the State's law of property and nuisance" could justify regulatory action that negated all such valuable use of one's property. In taking this approach, the Court effectively disqualified state legislatures from engaging in total takings without compensation, while simultaneously authorizing such action by state courts through the creative shaping of state

864. See id. at 224-25 (stating "we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education").

865. Tribe, supra note 24, § 16-23, at 1551 n.57; accord, e.g., Conkle, supra note 69, at 49 n.160 ("Relying on Congress' power over immigration and naturalization, . . . the Court typically upholds federal classifications that disadvantage aliens even though similar state classifications are likely to be invalidated under the Equal Protection Clause."). A leading case on this point is Mathews v. Diaz, 426 U.S. 67, 84-86 (1976).

866. See 432 U.S. 1, 10 (1977); see also id. at 7 n.8 (distinguishing a case upholding federal, as opposed to state, statute on grounds that "Congress . . . enjoys rights to distinguish among aliens that are not shared by the States"); Tribe, supra note 398, at 875 (discussing Mauclet).

867. See supra notes 837-45 and accompanying text.


869. Id. at 1015.

870. Id. at 1029.
nuisance law. Lucas thus allocated authority in a way that structural theory would predict: In an area fraught with constitutional difficulty, it shifted power away from potentially faction-dominated state legislatures to the presumably more temperate members of state judicial departments.

In *New York Times Co. v. United States*, the famous “Pentagon Papers Case,” a decision-determining bloc of three Justices applied a “who”-centered analysis to quash a government ban on the publication of alleged military secrets. According to these Justices, the prohibition was constitutionally defective because no support existed for it in any action of the Congress. In other words, a unilateral executive-branch claim that suppression was justified failed to meet First Amendment standards even though the executive’s action apparently would have stood if coupled with congressional authorization. In another

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871. The majority recognized, in this regard, that applicable “background principles of nuisance and property law” were typically embodied in indeterminate standards; that these principles were to be applied by state courts “in the circumstances in which the property is presently found”; and that “changed circumstances or new knowledge may make what was previously permissible no longer so.” *Id.* at 1030-31. The point is that, to render a total taking noncompensable, the state “must do more than proffer the legislature’s declaration that the uses... are inconsistent with the public interest.” *Id.* (emphasis added); *see id.* at 1052 n.15 (Blackmun, J., dissenting). At the same time, broad authority was left in state courts to endorse legislative predictions that particular land uses constitute common law nuisances under present-day conditions.

872. *See*, e.g., Craig v. Harney, 331 U.S. 367, 376 (1947) (“Judges are supposed to be men of fortitude, able to thrive in a hardy climate.”). Of course, many state judges are popularly elected and thus more susceptible to political influences than their federal counterparts. Even so, many “who”-related reasons support the channeling of takings-determinative state-nuisance-law “rulings” from state legislatures to state courts. For example, state judges—even if elected—are trained in law; perceived as having a countermajoritarian role; selected in typically less partisan elections; immersed in a work culture that strongly emphasizes impartiality; and routinely responsible for deciding cases that present constitutional claims of entitlement. In addition, because state legislatures have responsibility for balancing state budgets—they may be more predisposed than courts to look with disfavor on even the most powerful claims of entitlement to takings-based compensation.

873. 403 U.S. 713 (1971).

874. *See* TRIBE, supra note 24, §§ 17-1 to 17-2, at 1676-77. The structural lay of the land in the case has been aptly sketched by Professor Komesar:

There were three dissenters and, of the six Justices who rejected the government’s plea, three took positions suggesting that the result would have been different had the injunction been sought on the basis of a violation of an act of Congress or even of the violation of a prior Executive Order. It appears,
national security case, *Greene v. McElroy*, the Court used unmistakable "who"-rule logic to undo a Defense Department ban on the employment of Communists by military contractors.\(^8\)\(^7\)\(^5\) Citing First Amendment association rights, the Court swept away the prohibition, while signaling that it might well have withstood challenge if (as in *Mow Sun Wong*) the policy had received "explicit authorization from either the President or Congress."\(^8\)\(^7\)\(^6\)

thus, that the government might well have been able to impose a prior restraint on publication if the proper political institution had made the decision—a formulation quite analogous to the "structural due process" approach taken in *Hampton*.

Komesar, *supra* note 595, at 392. Professor Komesar goes on to note that: "Justices Marshall and White stressed the absence of congressional action outlawing such publication. Justices Stewart and White stressed the absence of either a congressional act or clearly promulgated executive regulations." *Id.* at 392 n.86 (citations omitted). As Professor Komesar's statement indicates, it is possible, in light of Justice Stewart's concurring opinion, that the publication ban would have stood up if supported (even in the absence of congressional action) by preexisting "executive regulations." *See New York Times Co.*, 403 U.S. at 729 (Stewart, J., concurring). But Justice White's separate opinion clearly focused on the "absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these." *Id.* at 731 (White, J., concurring) (emphasis added). Notably, even the dissenters in the *Pentagon Papers Case* embraced constitutional "who"-type reasoning "to protect the values of the First Amendment against political pressures." *Id.* at 757 (Harlan, J., dissenting). In their view, "the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer." *Id.*


876. *Id.* at 508. As Professor Adler has noted:

This distinction in *Greene* between agencies and elected bodies (the President and Congress) is particularly significant for a theory of restraint in the administrative state, both because it properly views the administrative state as potentially directed by, but not equivalent to, the Presidency, and, reciprocally, because it raises the possibility that presidential, like congressional, direction might give reviewing courts proper grounds for restraint.

Adler, *supra* note 119, at 866. This sort of "who"-centered thinking, according to Professor Adler, provides the "best defense" of the Court's controversial decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). *See Adler, supra* note 119, at 872. Professor Adler begins by recognizing that the agency-promulgated abortion gag rule at issue in that case was vulnerable to serious structural attack under the avoidance principle. *See supra* notes 118-43 and accompanying text. He then proposes, however, the following refutation to this challenge:

Good restraintist grounds to refrain from invalidating the agency's gag rule also exist. In particular, the gag rule rests upon the anti-abortion policy that this Presidency has very publicly espoused, which, we must assume, has the support of the majority of the citizenry. So, whatever the applicability of the "serious constitutional doubts" test in some other case, it is inapplicable here.
Cases that involve application of rules of clarity often have an important "who"-rule dimension. In *Kent v. Dulles*, for example, the Court struck down a prohibition on international travel by Communists, because Congress had not definitively empowered the executive branch to adopt this policy in enabling legislation. By using the interpretive avoidance principle in this way, the Court deflected a constitutionally sensitive policy choice from the Secretary of State, whose day-to-day work focuses on national security concerns, back to Congress, whose broadly representative membership might well bring to the issue a more balanced and embracing perspective. Likewise, in *United States v. Rumely*, the Court protected First Amendment freedoms by reading a congressional grant of authority to an investigative committee as failing to permit it to punish a witness who would not identify the buyers of a controversial political tract. Analysts have said that these decisions and others like them resuscitate the long-stagnant nondelegation doctrine in those situations.

Adler, supra note 119, at 872. Professor Adler concludes his discussion by noting that "[o]n this reading, the debate between majority and dissent in *Rust* replicates, in the domain of constitutional law, the debate about the role of the Presidency that has been conducted, with great vigor, within ordinary administrative law." Id. See generally Estreicher, supra note 139, at 1144-45 n.54:

> With respect to the broader question of legitimacy, certainly agencies are without authority to override statutory limits. Within the zone of the discretion permitted by the organic statute, however, they can be sensitive to majoritarian shifts in policy preferences—communicated through the appointment and confirmation processes and at several points of executive and congressional influence.

877. 357 U.S. 116 (1958). *Kent* already has received extended attention. See supra notes 123-31 and accompanying text.

878. Cf. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) (noting that "one might claim that courts, when interpreting statutes, should assume in close cases that a decision with 'enormous social consequences' should be made by democratically elected Members of Congress rather than by unelected agency administrators"; basing this assertion in part on *Kent*’s assumption that "Congress did not want to delegate the power to make rules interfering with exercise of basic human liberties").

879. 345 U.S. 41 (1953). For a discussion of *Rumely* and related cases, see BICKEL, supra note 6, at 156-64, 181-83. In one of those related cases, *Barenblatt v. United States*, 360 U.S. 109 (1959), the Court did find a proper delegation of authority to a congressional committee. In a vigorous dissenting opinion in that case, Justice Black wrote: "[W]e are dealing here with governmental procedures which the Court itself admits reach to the very fringes of congressional power. In such cases more is required of legislatures than a vague delegation to be filled in later by mute acquiescence." Id. at 139-40 (Black, J., dissenting).
where particularly important constitutional rights are at stake.\textsuperscript{880} Whatever the merits of this characterization, these cases are suggestive of an important "who"-driven principle: Courts will not readily infer that Congress has delegated authority to intrude on important constitutional values to a less-than-wholly-representative agency or committee that engages in just one line of work.\textsuperscript{881}

\textsuperscript{880} See Adler, supra note 119, at 842; \textit{id.} at 839 n.214 (collecting cases). Judge Calabresi has made this point in these terms:

Obviously, what was unconstitutional to Chief Justice Hughes in the 1930s as undue delegation would typically not be so today. But this is not because the concept of undue delegation has changed. Rather, it is because the entitlements to which the concept was applied no longer seem even putatively fundamental. The doctrine can thus be readily applied to new cases in which a challenged rule approaches the violation of fundamental rights.

Calabresi, supra note 13, at 120 n.131 (citations omitted). Elsewhere he has noted that:

The Court's opinion in \textit{Kent} and Justice Black's dissent in \textit{Barenblatt} relied in part on a pair of delegation opinions by Chief Justice Hughes dating from the 1930s. These were treated as using a similar approach because, in the 1930s, the statutes at issue were at the fringes of congressional power under the Commerce Clause.

\textsuperscript{881} As noted by Professor Black:

The Court's typical—and seemingly harmless—solution [for vague delegations of authority] has been to read the delegation itself as not including the power to tamper with important constitutional rights, so that—on this purportedly statutory ground—the official is held without power to do what he has done. This was the holding in \ldots \textit{Kent v. Dulles} \ldots. I have called this method of solution harmless, and it is that, as long as the Court keeps firmly in mind that in such a case it is not confronting Congress at all, and remains institutionally free, and indeed bound, to make its own judgment unembarrassed by presumptions.

\textit{Black, supra} note 100, at 79. Professor Sunstein has voiced much the same view:

In \ldots cases [like \textit{Kent v. Dulles}], the Court has suggested that the Constitution
The Court can divert constitutionally sensitive decisions from specialized policymakers to the more representative and accountable full membership of Congress without speaking the language of "clear statement" or "nondelegation." The Court recently indicated, for example, that it might well channel decisions from federal agencies to federal legislators through the application of differing levels of means/ends scrutiny to congressional and administrative pronouncements. The key suggestion along these lines came in *Turner Broadcasting System, Inc. v. F.C.C.* in which the Court deferred to a decision made by Congress to force cable television operators to carry broadcast stations' programming. In the process of upholding this "must-carry" legislation, the Court pointedly observed: "In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.' . . . [S]ubstantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency." The implications of this

permits certain disabilities to be imposed on groups only when an accountable actor has so decided. . . . Decisions of this sort impose a "clear-statement" principle to the effect that important decisions are to be made by accountable actors and that only a clear statement to the contrary will rebut this presumption.

Sunstein, *Interpreting*, supra note 119, at 470 n.237; see also Estreicher, *supra* note 139, at 1151 n.76 ("The 'clear statement' doctrine enjoys a special force as a basis for selective insistence on explicit legislative authorization of agency action operating pursuant to very broad statutory grants."). The dangers of lawmaking by agencies—including, most prominently, risks of capture and nonaccountability—are explored at length by other writers. See, e.g., Ely, *supra* note 88, at 131-32 (noting, among other things, the risk of buck-passing by Congress). Professor Sunstein makes an interesting argument that the Court erred, under the principle of cases like *Kent v. Dulles*, in sustaining capital punishment in the military context in the absence of explicit Congressional action:

The factors that justify a decision of death should be chosen by the legislature, not by the President (in this context, bureaucrats of some kind, realistically speaking). Congress may not grant open-ended discretion to impose the death sentence to someone who is not, under the constitutional regime, the national law maker. The authority for this proposition comes from the clear statement cases, which show that there is a problem from the standpoint of legitimacy when certain constitutionally sensitive decisions are made by the executive.


882. 520 U.S. 180 (1997) (*Turner II*).

883. Id. at 195; see also *City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 n.1 (2000) (Souter, J., concurring) (noting that "[t]he nature of the legislating institution might . . . affect" judicial analysis of "means-end fit"; citing *Turner II* for the proposition that "[w]e do not
suggestive observation remain unclear, particularly because the Court noted that its differing-deference principle applied only "in this context."

It may be, for example, that the Court someday will declare that a rule of elevated deference to congressional pronouncements applies only in "heightened scrutiny" cases, or only in First Amendment cases or only in First Amendment cases of a certain kind. Whatever the scope of the principle, however, it responds to the same perceptions that have spawned other constitutional "who" rules. The controlling notion is that courts should shape constitutional doctrine

require Congress to create a record in the manner of an administrative agency and we accord its findings greater respect than those of agencies"). Justice Souter also suggested that the differing-deference approach of Turner II might well reach beyond the Congress-agency context. See id. at 311 n.1 (suggesting that the Court, in applying means/end review, "might . . . defer less to a city council than we would to Congress").

884. Turner II, 520 U.S. at 195.

885. See supra note 440 and accompanying text (discussing similar possibilities in application of findings-and-study rules). One signal that there may be limits on the principle comes from a case of some antiquity, Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935). There the Court considered a state agency's order that stipulated the size and shape of berry containers. See id. In upholding the order, the Court wrote:

It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of the legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.

Id. at 185-86 (citations omitted). In Turner II, the Court did not cite Pacific States Box, and perhaps that case is somehow outside the orbit of the Turner II principle because it did not involve the sort of "predictive judgment," related to emerging technologies, involved in the must-carry context. Alternatively, the Court's utterance in Turner II might have been meant to involve not the comparison of different constitutional standards, but of a constitutional standard applicable to Congress and a statutory standard applicable to federal agencies under the Administrative Procedure Act. The more natural reading, however, surely is that different levels of constitutional deference are to be accorded to Congress and to administrative agencies.
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in light of institutional strengths and weaknesses, which in this case include the superior representative (and perhaps factfinding) capacities of legislative institutions and the susceptibility of administrative agencies to narrow-mindedness and capture.\(^{886}\)

886. See Adler, supra note 119, at 857 ("Might not a court legitimately invalidate a rule, order or action as violating some constitutional criterion (some aspect of justice), and yet subsequently uphold a statute with the same or similar content, just by virtue of the institutional differences between legislatures and agencies?"). Existing commentary suggests that the courts should act (or already have acted) in this differing-deference way. See, e.g., id. at 764 (suggesting "the possibility that arguments for judicial restraint, effective with respect to the judicial practice of invalidating statutes, might have little or no force with respect to the practice of invalidating agency rules, orders and actions"); Shapiro & Levy, supra note 39, at 429 (noting that, according to seminal Supreme Court decisions, "administrative agencies, unlike legislatures, are not entitled to the same presumption of correctness because they are neither politically accountable nor directly subject to checks and balances"); Sunstein, supra note 41, at 66 n.163 ("For a time, agency decisions were treated with the same respect as legislative enactments. Now, it is clear that less deference is applied, both because of constitutional principles and because of the Administrative Procedure Act."). See generally Farber & Frickey, supra note 444, at 887 (noting that interest group influence is strongest when, among other things, "the group is able to move the issue to a favorable forum"). There also have been suggestions that, in particular constitutional contexts, the Court should or does engage in different levels of review based on whether it confronts legislative or agency action. See Foster, supra note 791, at 1128 ("Policy decisions by administrative bodies [in the Court's impermissible-motive cases] receive less judicial restraint than if the same decision would have been made by a legislature or more accountable executive actor. Decisions made by administrative bodies lack the level of direct accountability that would otherwise accompany a similar legislative decision."); see also Brest, supra note 385, at 130 n.171 (advocating application of "clear and convincing" standard to motive inquiries, but suggesting possibility of applying "different standards to judicial review of administrative and legislative decisions" under which courts would require "proof beyond a reasonable doubt as to the latter"). A concrete effort to apply differential review to strike down an agency program appears in Justice White's dissenting opinion in New York City Transit Authority v. Beazer, 440 U.S. 568 (1979). In that case the issue was whether an equal-protection violation inhered in a New York City Transit Authority rule that barred employment of methadone users. See id. Among Justice White's arguments for invalidation was the following:

Petitioners are not directly accountable to the public, are not the type of official body that normally makes legislative judgments of fact such as those relied upon by the majority today, and are by nature more concerned with business efficiency than with other public policies for which they have no direct responsibility. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 103, (1976) [sic]. Both the State and City of New York, which do exhibit those democratic characteristics, hire persons in methadone programs for similar jobs. Id. at 609-10 n.15 (White, J., dissenting) (citations omitted). Justice White's argument, of course, did not persuade the Court that the rule lacked the "rationality" required by minimum-level equal-protection review. See id. at 593. An interesting question is whether the argument would have fared better in a heightened-scrutiny context.
There are occasional suggestions by federalism-minded commentators that only Congress—and not federal agencies—may adopt measures that preempt state law.\textsuperscript{887} The Court, however, does not (at least so far) seem drawn to this idea.\textsuperscript{888} Even so, some Justices have warmed to the thought that agency efforts at preemption should (at least sometimes) be viewed with more circumspection than similar efforts of Congress itself.\textsuperscript{889}

\textsuperscript{887} See Massey, supra note 175, at 193 (arguing for a Congress/federal-agency distinction with respect to the displacement of state law). In suggesting this approach, Professor Massey has argued:

A plain statement by the agency of its intent to direct state behavior should not be sufficient, because the reason for the plain statement rule is to ensure that the national political process of Congress is conscious of its decision to intrude upon state sovereignty. There is no similar assurance of the consciousness of the national political process, consisting of state representatives deciding the issue, when federal administrators act pursuant to vaguely worded statutory authority.

\textsuperscript{888} See, e.g., Hillsborough County v. Automated Med. Labs, Inc., 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes.").

\textsuperscript{889} For example, in the Hillsborough County case, see id., the Court declared itself "more reluctant to infer pre-emption from the comprehensiveness of regulations"—that is, from the actions of agencies—"than from the comprehensiveness of statutes"—which entail full-scale congressional action.\textsuperscript{id.} at 717-18. In reaching this result, the Court relied on considerations of both competency and capacity, noting that agencies have "specialized functions" and the flexibility to express preemptive intentions through a "variety of means," such as "regulations, preambles, interpretive statements, and responses to comments." Id. Citing Hillsborough County, Justice Stevens argued in Geier v. American Honda Motor Co., for application of a super-clear-statement rule when agency action (rather than congressional action) is implied to preempt (whether via "conflict" or "field" preemption) historic forms of state regulation. 120 S. Ct. 1913, 1940-41 (2000) (Stevens, J., dissenting); cf supra notes 161-65 and accompanying text (discussing clarity rules with respect to congressional preemption). Focusing squarely on structural concerns, he reasoned that such an approach would appropriately tend "to ensure that States will be able to have a dialog with agencies regarding pre-emption decisions \textit{ex ante} through the normal notice-and-comment procedures ..." Geier, 120 S. Ct. at 1940-41; see also id. at 1923 (objecting on federalism grounds to the determination that airbag tort actions are preempted, and noting that "[t]he rule the Court
Perhaps the best way to conceive of the "dormant Commerce Clause" is to say that it embodies yet another constitutional "who" rule. On this view, the validity of government policies that endanger the value of economic nationalism depends upon their source. Courts will uphold such policies if they emanate from the nationally minded Congress, but will not uphold them (absent congressional authorization) if they come from state or local authorities who are presumed to take a more short-sighted and parochial view. As Professors Schrock and Welsh have put the point, the dormant Commerce Clause principle involves "determining the locus of power in a federal union." In other words, the dormant Commerce Clause concerns "who decides which rule is to govern a particular transaction, Congress or the states."

In addition to rules already endorsed by the Court, a variety of proposed "who" rules have surfaced in the legal literature. Perhaps the best known proposal comes from Professor William Cohen, who has argued that the principle of congressional reversibility that marks the dormant Commerce Clause cases should operate in other fields of law as well. In particular, Professor Cohen contends that

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890. The dormant Commerce Clause is discussed supra notes 674-82 and accompanying text.
891. As stated by one commentator:
[T]he Constitution and Marbury v. Madison require such legislation to be overturned precisely because state legislatures would otherwise predictably opt for the short-term benefits of economic protectionism rather than for the long-term benefits of free trade and free movement, given that out-of-staters bearing the most immediate burdens of economically protective laws are unrepresented in the legislatures.
Clark, supra note 763, at 986-87.
892. Shrock & Welsh, supra note 654, at 1140.
893. Id. at 1139 (emphasis added). Some constitutional "who" rules work the other way around, in the sense that they channel authority away from the national government. For example, judicial applications of the Eleventh Amendment may in general be overturned only by the very state governments the Amendment aims to protect; overrides by Congress (except pursuant to the federalism-diminishing Fourteenth Amendment) are impermissible. See Seminole Tribe v. Florida, 517 U.S. 44 (1996).
894. See Cohen, supra note 681, at 387-88.
the power of the congressional override should extend to judicially crafted, Fourteenth Amendment due process nexus rules, judicial extrapolations of the Article IV Contract Clause, and any other constitutionally inspired court pronouncement that applies only to the states.895 As Professor Cohen articulates his thesis: “[T]he issue in each case concerns the constitutional limits on congressional power. If the limits on state power are wholly inapplicable to Congress, Congress can remove those limits from the states.”896 This proposal —like the dormant Commerce Clause—embodies a “who” rule that shifts decisional authority in constitutionally sensitive areas from state to federal policymakers. Thus far, however, the Court has not embraced Professor Cohen’s creative brand of “who”-centered structuralism.897

895. See id. at 400. For a similar suggestion, see Shapiro v. Thompson, 394 U.S. 618, 644 (1969) (Warren, C.J., dissenting) in which Chief Justice Warren, in dissent, voted to uphold a one-year residence requirement for state welfare benefits eligibility, which would otherwise have been deemed unconstitutional, because authorized by Congress. See also id. at 675 (Harlan, J., dissenting) (asserting that a “presumption of constitutionality attaches to state statutes, particularly when, as here, a State has acted upon a specific authorization from Congress” (citing United States v. Des Moines Navigation and Ry. Co., 142 U.S. 510, 544-45 (1892) and Powell v. Pennsylvania, 127 U.S. 678, 684-85 (1888))).

896. Cohen, supra note 681, at 400. Professor Cohen’s thesis is usefully elaborated in the following passage:

Justice Rutledge’s theory [of congressional reversibility] is not limited to the commerce clause. Nor is it restricted to those limitations on state power that are implied from the existence of federal power. The limitations imposed by the due process and equal protection clauses of the fourteenth amendment, the privileges and immunities clauses, and the contracts clause are not always matched by identical limits on federal power. The federal government is permitted to make decisions that are forbidden to the states. To the extent that the Constitution does not “outlaw the action taken entirely from our constitutional framework,” Congress should be able to consent to otherwise unconstitutional state laws.

Id. at 400 (quoting Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 436 (1946)). One example Professor Cohen offers concerns ASARCO, Inc. v. Idaho State Tax Commission, 458 U.S. 307 (1982), in which the Court held that a state tax apportionment formula violated the Due Process Clause of the Fourteenth Amendment because it operated to tax income earned beyond the state’s borders. In Professor Cohen’s view, Congress could respond to the ASARCO ruling by authorizing the state’s apportionment formula precisely because the sovereignty-tied due-process limits relied on by the Court in ASARCO are inapplicable to the national government. See Cohen, supra note 681, at 389-90, 401. For a brief discussion of the impact of Professor Cohen’s thinking on state regulation of electronic commerce, see Walter Hellerstein, State and Local Taxation of Electronic Commerce: Reflections on the Emerging Issues, 52 U. MIAMI L. REV. 691, 723 & n.111 (1998).

897. See, e.g., Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992) (stating that with respect to constitutional tax-nexus rules, “while Congress . . . may authorize state actions
Other proposals for making some or all constitutional decisions issued by the judiciary “reversible” by Congress have been advanced. These proposals, however, seem more far-reaching than Professor Cohen's and thus even less likely to gain a sweeping judicial endorsement. There is one area, however, in which the Court has recognized a significant congressional power to overturn judicial decisions that define the constitutional authority of the states. According to the Court, Congress may, in a proper case, reverse a state's assertion that a state rule is constitutional—even when that assertion has been upheld by the federal courts—by exercising its enforcement powers under the Thirteenth,

that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause”). But cf. Hellerstein, supra note 896, at 723 & n.112 (quoting Professor Regan for the view that there is “no settled doctrine on this question” and opining that it is “unlikely” that the Supreme Court would block “an administratively workable solution to the problem of state taxation of electronic commerce” by invoking congressionally nonreversible due process rules).

898. The main suggestions along these lines come from Professors Conkle, Dimond, and Komesar, Dean Sandalow, and Judge Calabresi. See, e.g., Calabresi, supra note 13; Conkle, supra note 69; Dimond, supra note 69; Komesar, supra note 595, at 368; Sandalow, supra note 13, at 1188-99, 1192-93 (suggesting that policies that trench on “fundamental” values might be constitutional if they reflect the “deliberate judgment of representative institutions,” rather than “subordinate” governmental actors). In a related vein, Robert Bork has proposed a constitutional amendment that would permit legislative rejection of constitutional decisions by majority vote. See ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 117 (1996); see also MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 163-64 (1999) (suggesting the possible advisability of abandoning judicial review altogether, while noting that courts can protect constitutional values in other ways; observing, for example, that “[a] court that took [subconstitutional ultra vires rules] very seriously could end up finding any official action unauthorized unless the legislature specifically authorized it”). Notably, a sweeping power of legislative revision of constitutional rulings has been built into Canadian constitutional law. See id. at 127. As noted by Professor Conkle: “Although Canada’s new constitution, for example, authorizes judicial review, it generally permits Parliament and the provincial legislatures to override judicially protected constitutional rights.” Conkle, supra note 69, at 14 n.20 (citing CHARTER OF RIGHTS AND FREEDOMS §§ 24(1), (33); see also Neuborne, supra note 69 (discussing at length the connection between constitutionality and the source of challenged policy under French law).

899. For example, Professor Conkle has described Dean Sandalow’s approach in these terms:

Although Sandalow does not fully delineate the ramifications of his theory for the doctrine of judicial finality, the theory would appear to suggest that every Supreme Court decision protecting individual rights should be subject to reversal by deliberate congressional legislation (and perhaps by deliberate legislation adopted by a majority of the states).

Conkle, supra note 69, at 51 n.164.
Fourteenth, and Fifteenth Amendments. This aspect of the enforcement power does not reflect a constitutional “who” rule in the ordinary sense because it does not entail a wholesale judicial disqualification of state decision makers from framing policy in sensitive areas. Indeed, this body of enforcement-power law may be said to embody a sort of reverse “who” rule in that it grants to Congress a power to overturn state exercises of authority that have been specifically authorized by the courts. Whatever label we put on the principle, however, it reflects at bottom the same sort of institutional considerations that drive more unalloyed structural “who” rules: the perception that Congress has a greater capacity (vis-a-vis the states) to implement national constitutional norms and a greater competence (vis-a-vis the courts) to structure sweeping institutional remedies.

One much-discussed modern “who”-rule issue concerns statewide plebiscites conducted by way of voter initiatives and referenda.

900. See Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding a law that made a literacy-test ban applicable nationwide); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding Congress’s reliance on section five to outlaw certain literacy tests for voting even though prior opinions had upheld literacy tests generally against constitutional attack).

901. See Katzenbach v. Morgan, 384 U.S. 641, 656 (1966) (noting the “specially informed legislative competence” of Congress); South Carolina v. Katzenbach, 383 U.S. at 309 (noting the failure of the states to protect constitutional rights); id. at 313 (describing the inadequacy of judicial remedies). Another quite different “who”-rule-related attempt to recognize a power to reverse (or at least sidestep) a finding of constitutionality surfaced in Justice Stevens’s dissenting opinion in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). There the Court majority upheld against equal protection attack a Minnesota law that banned milk sales in plastic nonreturnable containers. See id. Applying minimum scrutiny, the Court reasoned that the law was rationally related to the legitimate purpose of environmental protection. See id. In his dissent, Justice Stevens acknowledged that such a holding would have been correct had the Supreme Court been reviewing a ruling of a lower federal court. See id. But in this case, the Minnesota statute had been struck down by the Minnesota Supreme Court. See id. In this context, Justice Stevens argued that the state court’s ruling should stand because “this federal tribunal [should not] conduct its own de novo review of a state legislative record in search of a rational basis that the highest court of the State has expressly rejected.” Id. at 482 (Stevens, J., dissenting). In other words, Justice Stevens was prepared to give state courts broad authority to “unconstitutionalize,” on national-law grounds, otherwise constitutional state legislation in light of considerations of competence and federalism: “[I]t is not our business,” Justice Stevens reasoned, “to disagree with the state tribunal’s evaluation of the State’s own lawmaking process.” Id. at 483-84. Justice Stevens’s position, however, is not the law; indeed, it was rejected by the majority in Clover Leaf Creamery as “extraordinary and unprecedented.” Id. at 463 n.6.

902. Initiatives are voter-written statutes, or constitutional amendments in some states, which go to direct ballot (or, in some instances, to the state legislature) if sufficient petition signatures are gathered. Referenda are laws enacted by local or state legislative bodies that
Drawing on the Madisonian commitment to representative government, many observers have urged courts to channel constitutionally sensitive decisions away from the “unmediated”—and thus potentially uninformed and intemperate—direct vote of electoral majorities. Prominent candidates for invalidation include initiative-generated laws that impose “English-only” requirements, affirmative-action bans, and limits on available legal protections for gays, lesbians, and bisexuals. According to critics of direct democracy, such decisions, or at least many of them, can and should be made only in the presumably more deliberative environment of state and national legislative assemblies. The Supreme Court has not
yet studiously explored or staked out a definitive position on the constitutional status of lawmaking by way of citizen initiative. At

Mulkey, 55 Cornell L. Rev. 881, 905-10 (1970) (arguing that the Guarantee Clause should be used to challenge "discrimination-prone" public referenda); see also Calabresi, supra note 500, at 71 ("Like most proposals to do away with checks and balances, [proposals that endorse a shift to direct-democracy] fail for the... fundamental reason that all such changes would reallocate power and make law revision too easy, in ways that have never found acceptance in the United States."). See generally James S. Fishkin, Democracy and Deliberation: New Directions for Democratic Reform (1991).

Other articles have argued against special judicial skepticism about initiatives and referenda. See, e.g., Robin Charlow, Judicial Review, Equal Protection and the Problem with Plebiscites, 79 Cornell L. Rev. 527 (1994); Mark Tushnet, Fear of Voting: Differential Standards of Judicial Review of Direct Legislation, 1996 Ann. Surv. Am. L. 373. Notably, some have suggested the particular appropriateness of lawmaking by initiative or referendum, and thus the propriety of affording greater judicial deference toward these devices, in certain constitutionally sensitive contexts. See, e.g., Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 742 (1964) (Clark, J., dissenting); id. at 758 (Stewart, J., dissenting); Baker v. Carr, 369 U.S. 186, 258-59 (1962) (Clark, J., concurring) ("Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee... . Tennessee has no initiative and referendum."). As stated by one observer: it would be a singular perversion of Madison's reasoning to interpret his argument against legislative control of qualifications as a justification for excluding the electors themselves from adding extra qualifications for the elected through state constitutions. Madison's argument was a defense of the elector's power, not a limitation of it. His argument was premised on the power of the electors, the state peoples, to control the elected.

Roderick M. Hills, Jr., A Defense of State Constitutional Limits on Federal Congressional Terms, 53 U. Pitt. L. Rev. 97, 122 (1991); see also Issacharoff et al., supra note 306, at 11-12 (suggesting the possible appropriateness of differing scrutiny of apportionment schemes set by direct public vote versus those established by "political insiders"). To these thoughts, Judge Calabresi has added the interesting observation that, at least in California, virtually all state-constitution-based rulings that strike down legislation are subject to a "second look" by way of the initiative process:

In California, amendments to the state constitution are relatively easily achieved through citizen-initiated referenda. As a result, a holding of unconstitutionality by the California Supreme Court may have no greater effect than a remand for a second look. The remand is simply to the public rather than to the legislature.

Calabresi, supra note 13, at 105 n.72 (citation omitted).

906. See Lazos Vargas, supra note 902, at 405 (stating that, "rather shockingly, the Supreme Court has failed to provide a coherent or even internally consistent analysis of how courts ought to go about reviewing direct democracy measures affecting minority interests and rights"). But cf. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 809 n.19 (1995) ("We are aware of no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly through amendment of the state constitution."); James v. Valtierra, 402 U.S. 137, 141 (1971) ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."). For a recent discussion of possible
least one lower court has suggested, however, that something like a constitutional "who" rule sometimes should block policymaking by direct popular vote when "fundamental interests" are at stake.907

Perhaps the most familiar of all constitutional "who" rules is the longstanding prohibition on "vagueness."908 In his seminal treatment of the vagueness doctrine, Professor Amsterdam demonstrated that it has long been used not so much to provide fair notice as a general matter as to give special protection to the most pressing constitutional values,909 particularly freedom of speech.910

Constitutional limitations on direct democratic action in a highly specialized context, see California Democratic Party v. Jones, in which Justice Stevens, in dissent, questioned whether action by state initiative—rather than state legislation—can control "the Times, Places and Manner" of electing "Senators and Representatives" consistent with Article I, Section 4, Clause 1. 120 S. Ct. 2402, 2422 (2000) (Stevens, J., dissenting).

907. See Jones v. Bates, 127 F.3d 839, 857 (9th Cir. 1997), rev'd en banc, 131 F.3d 843 (9th Cir. 1997); supra notes 266-80 and accompanying text.

908. See generally TRIBE, supra note 24, § 12-31, at 1033 (discussing the vagueness doctrine).

909. See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67, 87-88 (1960) (noting that "the vagueness doctrine is most frequently employed as an implement for curbing legislative invasion of constitutional rights other than that of fair notice."); id. at 74-75 n.38 (noting that the "void-for-vagueness doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation"; adding that "[s]ince the advent of the New Deal Court, by contrast, there has been one economic vagueness case, and with the ever increasing emphasis upon protection of first amendment liberties, free speech vagueness cases have begun to proliferate"); see also BICKEL, supra note 6, at 182 (arguing, in agreement with Justice Harlan, that a vagueness attack was available against the application of a disorderly conduct statute in a state-action sit-in case because "unimportant as it might be in the common run of other situations, the statute here raised a constitutional issue"). See generally John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 196 (1985) ("As Professor Amsterdam has taught us, a paramount concern is whether the law's uncertain reach implicates protected freedoms.").

910. As explained in one commentary:

The primary thesis advanced here is that the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms. With regard to one class of cases, those involving potential infringement of first amendment privileges, this buffer-zone principle has always been expressly avowed in the Court's opinions and recognized by the commentators.

Note, supra note 909, at 75; id. at 75 n.39 (noting that "the so-called first amendment vagueness cases are precisely what that name implies"). There are many cases that suggest the special role of vagueness rules in the First Amendment context. See, e.g., Reno v. ACLU, 521 U.S. 844, 871-72 (1997) (noting that vagueness "is a matter of special concern" when dealing with a content-based criminal statute "because of its obvious chilling effect on free speech"); Dombrowski v. Pfister, 380 U.S. 479, 494 (1965) (applying vagueness rule because
It is equally true that the vagueness doctrine protects these substantive values in a structural way. This is true in part because the vagueness doctrine operates as a thoughtful-treatment-of-the-area rule; it does so by forcing policymakers, whoever they might be, to substitute deliberation-enhancing focus for sloppiness and evasion when they frame laws that threaten important constitutional rights.911

But the vagueness doctrine also operates as a structural “who” rule. The Court suggested why this is so in Kolender v. Lawson, when it observed: “[W]e have recognized recently that the more important aspect of the vagueness doctrine ‘is not actual notice, but the other principle element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.’” Put another way, the vagueness doctrine serves to

“overly broad statute . . . creates a ‘danger zone’ within which protected expression may be inhibited”); Speiser v. Randall, 357 U.S. 513, 526 (1958) (noting that when rules are vague, speakers will “steer far wider of the unlawful zone”); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 533 (1952) (Frankfurter, J., concurring) (stating that vagueness rule “is especially to be observed when what is so vague seeks to fetter the mind and put within unascertainable bounds the varieties of religious experience”); see also Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (“The uncertain meanings . . . require [people] to ‘steer far wider of the unlawful zone,’ than if the boundaries . . . were clearly marked.”). See generally GUNTER & SULLIVAN, supra note 30, at 1338 (noting that “a finding of First Amendment vagueness has greater bite than a finding of due process vagueness”); Jeffries, supra note 909, at 216 (“Where legal uncertainty threatens free expression, the search for indefiniteness has a special rigor.”).

911. See supra Part VIII.

912. 461 U.S. 352, 358 (1983) (citation omitted) (emphasis added); accord, Smith v. Goguen, 415 U.S. 566, 572-73, 575 (1974) (noting that the vagueness doctrine “requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent ‘arbitrary and discriminatory enforcement’”; worrying that “[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections”); Cantwell v. Connecticut, 310 U.S. 296, 303-08 (1940) (worrying about “leaving to the executive and judicial branches too wide a discretion” where “liberties guaranteed by the First Amendment” are at stake); United States v. Reese, 92 U.S. 214, 221 (1876) (expressing worry about laws that “substitute the judicial for the legislative department”); see also Herndon v. Lowry, 301 U.S. 242, 263-64 (1937) (“The law, as thus construed, licenses the jury to create its own standard in each case . . . . No reasonably ascertainable standard of guilt is prescribed.”). Professor Bickel noted the wide variety of non-legislative officials who are empowered by vague statutes:

A decisive consideration here, as Mr. Amsterdam demonstrates, is . . . that a loosely worded statute allows latitude for “discontrol, irrationality, and irregularity,” for erratic, prejudiced, discriminatory, or overreaching (the adjectives are all Mr. Amsterdam’s) exercises of authority. The danger is greatest from administrative officials—particularly from petty officials—but it should be guarded against as well with prosecutors, who have power to harass,
push responsibility for constitutionally troublesome judgments about criminality away from individual law enforcement officers (as well as individual prosecutors, courts, and juries) onto the agenda of more representative, more accountable, and more deliberative lawmaking assemblies.\textsuperscript{913} By operating in this way, the doctrine not

and with judges and juries.

BICKEL, supra note 6, at 151.

913. See TRIBE, supra note 24, § 17-2, at 1678 n.7 ("This focus of modern vagueness cases demonstrates that the form of the statute is important primarily because the legislature, rather than the executive branch, must make the discretionary policy choice about which actions are criminal."). As noted by Professor Jeffries:

Justifications for nulla poena sine lege, the vagueness doctrine, and the rule of strict construction cluster around three kinds of arguments. The first concerns the association of popular sovereignty with legislative primacy and the consequent illegitimacy of judicial innovation. In contemporary constitutional discourse, this sort of assertion is called "separation of powers."

Jeffries, supra note 909, at 201; see Sunstein, supra note 439, at 38 ("A court might strike down vague laws precisely because they ensure that executive branch officers, rather than elected representatives, will set the content of the law."); see also, e.g., United States v. Lanier, 520 U.S. 259, 265-66 n.5 (1997) (stating that "the fair warning requirement... reflects the deference due to the legislature, which possesses the power to define crimes and their punishment" and citing HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-96 (1958) for the "principle of legality," which stipulates "that conduct may not be treated as criminal unless it has been so defined by [a competent] authority... before it has taken place" (alteration in original)).

For this reason, the vagueness doctrine has a connection to the rule of lenity, which is based in part "on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." Bryan v. United States, 524 U.S. 184, 205 (1998) (citing United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820), for the proposition that "the legislature, not the Court, is to define a crime"). For the same reason, the vagueness doctrine—at least in the federal context—bears a relationship to the prohibition on common law crimes. See Bousley v. United States, 523 U.S. 614, 621 (1998) (noting that "only Congress, and not the courts, can make conduct criminal"). Indeed, Professor Tribe has suggested that the seminal decision that produced the "who"-related prohibition on common law crimes was issued "undoubtedly for reasons related to freedom of speech and press." TRIBE, supra note 24, § 17-2, at 1677 (discussing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812)). The connection between the common-law-crime ban and the vagueness doctrine is illustrated by United States v. Evans, 333 U.S. 483 (1948). There a federal statute barred (1) bringing illegal aliens into the country and (2) harboring illegal aliens. See id. at 483-84. The statute went on to detail a penalty for the bringing-in offense, while specifying no penalty whatsoever for the harboring offense. See id. at 484. In a prosecution for harboring, the government urged the Court to extrapolate a penalty for the harboring offense (preferably the same penalty applicable to the bringing-in offense), using ordinary tools of ambiguity-resolving statutory interpretation. See id. at 485. The Court, however, concluded that "the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all." Id. at 486. The Court added that "there are limits beyond which we cannot go in finding what Congress... has left undefined or too vague for reasonable
only safeguards First Amendment and other liberty interests; it also advances the constitutional norm of equality by removing “a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.” It is important to recognize that vagueness-based invalidations are not—at least not primarily—centered on the substantive reach of the challenged law because they do not inevitably demand a narrowing of the law’s coverage. Consider, for example, a prohibition on bringing “dirty pictures” to school. One possible reprise to a vagueness-based invalidation of such a rule would be for the policymaker to target only that small amount of material that is obscene in the technical constitutional sense. But the lawgiver might also cure the vagueness problem by excluding all items that include any image of “a naked human being.” It seems clear that this latter rule would, in operation, be more restrictive of free speech than the rule it replaced. Depictions of “any naked human being,” after all, appear in many issues of National Geographic and in innumerable anthologies of great painting, sculpture, and photography that can hardly be described as “dirty.” And that is the critical point. A vagueness-based remand to the legislature in a case like our “dirty pictures” hypothetical is not based on the overreaching content of the law. It is the law’s ill-defined, oblique, and cryptic form, rather than its unduly expansive scope, that compels a legislative reconsideration.

For these reasons, the vagueness doctrine, like other structural “who” rules, does not seek to shape substantive outcomes so much as it seeks to engender policymaker care. So long as the assurance of its meaning” because “so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.” Id.; see also Bickel, supra note 6, at 151-52 (arguing that “it is far from a sterile conceptualism to say that a vague statute delegates power to make decisions that do not derive from a prior legislative decision”).

914. Kolender, 461 U.S. at 360; see Jeffries, supra note 909, at 197 (“Many vagueness cases are irresistibly suggestive of racial bias, and the invalidation of the laws involved often may plausibly be viewed as a prophylactic against such abuse.”). The principles of Kolender were recently restated and applied in City of Chicago v. Morales, 527 U.S. 41 (1999).


917. See Bickel, supra note 6, at 202 (“Unlike constitutional doctrines properly so called, the devices of vagueness, delegation, procedure, and construction leave the other institutions, particularly the legislature, free—and generally invite them—to make or remake their own decisions for prospective application to everyone in like cases . . . .”); see also Neal Devins,
legislature defines its terms, it can, consistently with the vagueness rule at least, go so far as to criminalize prayers directed to St. Joseph when offered in the homes of female Korean Americans. For vagueness purposes, it is not the "what" of the rule but instead the "how" that is constitutionally all-important. At the same time, the "how" helps shape the "what" in the important (but limited) sense that it pushes decision making away from the potentially idiosyncratic and uneven judgments of individual government officials. In short, the vagueness doctrine tends to ensure that responsibility for making policy falls where it is meant to lie in a republic: in the presumably more systematic and less erratic hands of legislative assemblies.

The Last Word Debate: How Social and Political Forces Shape Constitutional Values, A.B.A. J., Oct. 1997, at 46, 50 (claiming that the invalidation of congressional treatment of an Internet indecency law "on 'void for vagueness grounds,' returned that issue to elected officials").

918. See BICKEL, supra note 6, at 152 (stating that the vagueness doctrine "does not hold that the legislature may not do whatever it is that is complained of but, rather, asks that the legislature do it, if it is to be done at all").

919. Professor Bickel put the point this way:
A vague statute delegates to administrators, prosecutors, juries, and judges the authority of ad hoc decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact. In addition, such a statute delegates authority away from those who are personally accountable, at least for the totality of their performance, to those who are not, at least not directly. In both aspects, it short-circuits the lines of responsibility that make the political process meaningful.

Id. at 151. Professor Jeffries has made much the same observation:
The power to define a vague law is effectively left to those who enforce it, and those who enforce the penal law characteristically operate in settings of secrecy and informality, often punctuated by a sense of emergency, and rarely constrained by self-conscious generalization of standards. In such circumstances, the wholesale delegation of discretion naturally invites its abuse, and an important first step in constraining that discretion is the invalidation of indefinite laws.

Jeffries, supra note 909, at 215; see Note, supra note 909, at 90 (suggesting that the vagueness doctrine is "responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy-making organs of society"). Additional discretion-dampening "who" rules responsive to substantive constitutional rights are recognizable. The Cruel and Unusual Punishment Clause requirement that legislatures cabin sentencing-authority discretion in capital cases is illustrative. See Godfrey v. Georgia, 446 U.S. 420, 427 (1980); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring). So are free-speech/free-press prohibitions on standardless licensing. See supra notes 627-31 and accompanying text. In particular, Professor Schauer has argued that, in the field of First Amendment prior restraints, "[i]t is the identity and discretion of the restrainers and not the
There is a curious and significantly structural flipside to the legislature-favoring approach embodied in the vagueness doctrine. The Court has insisted in some cases, not that legislatures wield discretion-limiting power, but instead that they leave significant discretion with front-line government officials. In the Eighth Amendment area, for example, the Court has said that the sentencing authority—typically a trial jury—must have the final say on whether to withhold the death penalty in light of the precious uniqueness of every human life. In the free-exercise field, the Court has insisted that front-line agency officials consider an individual's religious-based justifications for claiming unemployment benefits regardless of legislatively created "bright-line" rules that all able-bodied persons who can work must do.

Professors Gunther and Sullivan suggest three possible arguments against nonjudicial prior restraints, at least the latter two of which focus on who-related concerns:

1. It is easier for an official to restrict speech 'by a simple stroke of the pen' than by the more cumbersome apparatus of subsequent punishment and thus prior restraint is likely to restrict more speech;
2. Censors will have an [sic] professional bias in favor of censorship, and thus will systematically overvalue government interests and undervalue speech;
3. Censors operate more informally than judges and so afford less procedural safeguards to speakers.

GUNThER & SULLIVAN, supra note 30, at 1344; see also City of Lakewood v. Plain Dealer Publ'g Co., 488 U.S. 750, 760 (1988) (expressing concern about a censorship framework that calls for decision by an "official charged particularly with reviewing speech . . . , breeding an 'expertise' tending to favor censorship over speech"); BICKEL, supra note 6, at 141 ("[A] certain attitude of mind seems always to be engendered in professional censors (or perhaps it propels people into the profession), which results in excesses and stupidities . . . ."); Note, supra note 909, at 94 ("The probability of [rights] deprivation has been consistently regarded as a function of what kind of tribunal is empowered to make the potentially deprasive value judgment. Power given to courts appears more tolerable than power given to administrative agencies . . . .").

Another First Amendment line of decisions related to reducing law-applier discretion is identified in Lee, supra note 438. As he states:

In early clear and present danger cases, the United States Supreme Court contrasted convictions based on common law or general statutes with those based on statutes specifically targeting expression. The Court emphasized that sanctions for general offenses, such as contempt of court, "do not come to us encased in the armor wrought by prior legislative deliberation."

Id. at 1273-74 & n.77 (citing Bridges v. California, 314 U.S. 252, 296-303 (1941), as a case involving "whether there was a 'real and substantial threat to impartial decision' in a pending case unaided by the benefit of state legislation addressing the issue").

921. The operative case is Employment Division v. Smith, 494 U.S. 872 (1990). There the
A similar attentiveness to individual dignity—combined with substantive concerns about gender equality and reproductive liberty—explains the Court's rejection in *Cleveland Board of Education v. LaFleur* of a "conclusive presumption" that all women more than four months pregnant are unfit to teach.\(^9\)

\(^9\) Court rejected the case for free-exercise-based exemptions from generally applicable criminal laws, but distinguished exemptions from laws that lend themselves "to individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. The Court noted that the "good cause" standard for unemployment-benefits eligibility "created a mechanism for individualized exemptions." *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). Thus, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend [its] system to cases of 'religious hardship' without compelling reason." *Id.* In short, to the extent it reaffirms *Sherbert, Smith* sacrifices a state-preferred rule of legislatively decreed equal treatment on the altar of free exercise. It does so by requiring a regime of individualized evaluations of religious sincerity, albeit only when a system of individualized evaluation already is in place, instead of something quite like a discretion-defeating conclusive presumption that insincerity is present.  

\(^{922}\) 414 U.S. 632, 647-48 (1974); see also *Tribe, supra* note 24, § 16-29, at 1577 (discussing *LaFleur*). Other Supreme Court cases seem to fit this pattern. *See, e.g.*, United States Dept't of Agric. v. Murry, 413 U.S. 508 (1973) (striking down a statute that denied food stamps to any household that contained an individual over the age of eighteen who was claimed as a tax dependent for the previous year); *id.* at 518 (Marshall, J., concurring) ("[W]here the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices."); *Vlandis v. Kline*, 412 U.S. 441, 454 (1973) (invalidating a statute that classified individuals as permanent nonresidents ineligible for reduced tuition at state universities based solely on their having a legal address outside the state at the time of application to the university); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (invalidating a statute that automatically deprived unwed fathers of custody of their illegitimate children upon the mother's death without allowing an individualized showing of parental fitness); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (invalidating an automatic suspension of the license of every driver involved in an accident who would not post the demanded security to cover alleged damages without allowing the driver to present evidence of ultimate nonliability). As commentators have suggested, such rules of individualized determination may make the most sense when recognized as less restrictive alternatives required by heightened review under the Equal Protection Clause or other strong constitutional protections. *See, e.g.*, *Note, The Irrebutable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974). Many cases seem to fit this mold. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 199 (1976) (discussing the Court's insistence in sex discrimination cases that "legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comport with fact"); *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (rejecting as a justification for a sex-based classification the idea "that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact"); *Police Dep't v. Mosley*, 408 U.S.
These individualized-determination rules have a substantive dimension. Under them, fewer felons will die, more free exercise will occur, and a greater number of pregnant women will stay at work. But these rules also pay close attention to how and through whom government policy takes shape, lest the constitutional

92, 100-01 (1972) ("Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (invalidating a statutory preference for male over female administrators under the Equal Protection Clause because the state could not use mandatory sex preference “merely to accomplish the elimination of hearings on the merits [and thus avoid] intrafamily controversy”); Carrington v. Rash, 380 U.S. 89, 95 (1965) (mandating that state reject a conclusive presumption and instead develop procedures to “winnow” out, for purposes of voting qualifications, servicemen who are not bona fide residents); see also Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 543-45 (1942) (Stone, C.J., concurring) (suggesting that state sterilization of specified classes of criminals could be permissible, but only if an individual criminal had a hearing on whether he possessed “demonstrably inheritable” injurious tendencies); cf. United States v. Brown, 381 U.S. 437, 440 (1965) (striking down as a bill of attainder a criminal provision that barred every member of the Communist party from serving as a union officer or non-menial employee). See generally GUNTHER & SULLIVAN, supra note 30, at 915 noting critics’ argument that “the finding of an unconstitutional irrebuttable presumption was essentially the same as holding a classification overbroad under equal protection” and concluding that “irrebuttable presumption analysis seemed to be the equivalent of an extremely strict variety of ‘means’ scrutiny”). For two of many lower-court cases that involve the proper scope of discretion-mandating constitutional rules, compare Williams v. Salerno, 792 F.2d 323, 328 (2d Cir. 1986), which rejected an irrebuttable presumption that would “have the effect of completely disenfranchising a person who abandons a former residence in a state other than New York with the intent of becoming a domiciliary of the community in New York where he or she attends school” by denying voting rights to all recently arriving students who live in school dormitories, with Beller v. Middendorf, 632 F.2d 788, 808 n.20 (9th Cir. 1980), which noted that: “[t]he due process clause does not require the Government to show with particularity that the reasons for the general policy of discharging homosexuals from the Navy exist in a particular case before discharge is permitted,” and that “individual hearings might be appropriate on an equal protection theory” or “in some circumstances ... by substantive due process,” but that “[t]his case ... involves neither middle-tier equal protection analysis nor a situation where the only alternative means available to satisfy the Government's goals consistent with due process is an individual showing of unfitness.” Within or near the field of mandatory discretion-granting rules, one might also place the ancient, overarching principle that supports so-called jury nullification—that is, the rule that “it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offence charged.” Sparf v. United States, 156 U.S. 51, 105 (1895). The arguable kinship of this “who”-related doctrine to particularly significant substantive constitutional rights is suggested by what may well have been its most famous invocation: the press-freedom, seditious-libel trial of colonial publisher John Peter Zenger. See, e.g., IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 176-79 (1965).
These rules require, as Professor Tribe has explained, "leaving room for rebuttal and discretionary adjustment where mandatory, per se rules are . . . too insensitive to personal differences in matters of great moment."\footnote{25} planning" and "in the assault on 'conclusive presumptions' which the Supreme Court has levied against disfavored legislative generalizations"; questioning this approach, but noting that "at least it purports to concern the process of policy formulation, not the policy"). \footnote{24. See Tribe, supra note 27, at 306 n.113 (advocating the appropriateness, in certain situations, of "an individualized hearing of the case's facts—a particularized confrontation with a reality unprocessed by rule-bound categories"). It bears emphasis, particularly in light of the Court's decision in \textit{Alden v. Maine}, 527 U.S. 705 (1999), that courts also may use "who"-centered individualized-assessment rules to protect constitutional interests unrelated to individual dignity. In \textit{Alden}, the Court held that Congress may not authorize private money-damages actions against states, in state as well as federal court, under the Fair Labor Standards Act or other legislation enacted pursuant to its Article I powers. \textit{See id. At the same time the Court indicated that Congress could authorize "a suit by the United States on behalf of the employees" because such a suit differs from a direct action by the employees themselves. \textit{Id. at 759. In particular, the Court explained that a suit initiated in the name of the United States "implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State." \textit{Id. at 759-60. From one angle, this claimed distinction seems faulty; after all, by expressly providing for individual actions under FLSA, "the National Government"—through the action of Congress—specifically declared that cases like Mr. Alden's were "of sufficient importance to take action against the State." \textit{Id. Effectively establishing a new "who" rule, however, the Court in \textit{Alden} held that congressional action standing alone was insufficient to overcome the strong constitutional presumption of state immunity from suit. \textit{See id. at 757-60. Rather, to override this immunity, it was necessary for the legislative and executive branches of the national government to act in tandem, and in particular for the executive branch to make a discrete decision to pursue a specific private person's distinctive FLSA claim in the specialized context of assessing only that single claim of wrongdoing. \textit{See id. Such a process protects substantive constitutional interests in state autonomy in a structural way. By providing a "double-check" against the pursuit of FLSA claims against states—and a mandatory individualized-assessment requirement by the executive branch before such suits are brought—the rule of \textit{Alden} tends to ensure that money-damages actions against states will be prosecuted only when most justifiable.\footnote{25. \textit{TRIBE, supra note 24, § 17-3, at 1684 (emphasis added). Professor Tribe has written extensively and provocatively on this subject, particularly in the 1975 article from which he drew in a more limited discussion of the same subject in the second edition of his treatise. \textit{See Tribe, supra note 27. Professor Tribe advocates in his article "the ideal of conducting dialogue within a mutually acceptable frame of reference when limiting important areas of liberty." \textit{Id. at 306. He urges in particular that when competing values involve a "mix of the widely agreed and the deeply debated, the dialogue . . . cannot be meaningful if it can be terminated by the [government's] invocation of a rule of thumb about [such matters as] unwed mothers in school." \textit{Id. at 304 (emphasis omitted). Professor Tribe adds: \begin{quote} Rule-of-thumb disposition of human liberty in an area affected by deep currents of social flux is vulnerable to attack from yet another structural due process perspective: such decisionmaking, whatever its legitimacy in the individual}
At first blush, these individualized-decision cases seem to stand in awkward tension with discretion-countering "who" rules like the vagueness doctrine. But tension is not inconsistency, and these doctrines can and do peacefully coexist. Indeed, the discretion-mandating rule of LaFleur and the discretion-cabining rule of the vagueness cases counter much the same danger: the risk of destructively discriminatory stereotyping by powerful government decision makers. LaFleur responds to this risk by disallowing blunderbuss rules, typically crafted by efficiency-minded government managers, in favor of insisting on case-specific dialogue with individual human beings. The vagueness rule, as the Court explained in Papachristou v. City of Jacksonville, also addresses the risk of unfair stereotyping. It does so, however, by helping to

case, permits the state to avoid participation, through a series of cases, in what should be a dialogue over time about social values.

Id. at 306. According to Professor Tribe, his mode of analysis not only explains Supreme Court decisions like LaFleur, but also

might plausibly be urged for pregnant girls and unwed mothers in public school, for homosexual teachers, and for runaway adolescents challenging automatic return laws, to suggest but a few obviously analogous cases. The rapid flux in our culture's mix and range of attitudes relevant to childhood and sex roles and the effect of that flux on important, agreed-upon liberties with respect to family style, could go far toward justifying the Supreme Court's insistence on individualization in those settings.

Id. at 308. But cf. Beller, 632 F.2d at 808 n.20 (noting that the Constitution "does not necessarily require the Government in each case involving changing norms to show that the reasons for the regulation apply in the particular case"). Professor Tribe also has emphasized a "feedback" justification for individualized decisionmaking. See Tribe, supra note 27, at 306. He argues, by way of example, that high schools may not flatly ban attendance by unwed mothers in part because

a board operating by rule-of-thumb is not contributing, either through its decisions or through the reasons it offers for them, to what the general social view of a particular matter like unwed motherhood in the schools—a matter about which views had once been widely shared—now ought to be.

Id. Individualized decision making, Professor Tribe argues, will generate "new arguments" and "new data" from which "a new consensus might emerge." Id. at 307. Of course, it is important to see that these rules—like other structural rules—find expression only in narrowly defined areas that involve, as Professor Tribe puts it, "matters of great moment." Tribe, supra note 24, §17-3, at 1684. The desire to limit individualized-determination rules to a limited set of exceptional cases is driven not only by the desire for equal treatment and predictability in the law, but also by powerful efficiency concerns. See, e.g., Foster, supra note 791, at 1107 (citing the "unbearable cost" on the policymaking process [generated] by requiring government to create "procedures for deciding every [issue] on its individual merits" (quoting ELY, supra note 88, at 155)).

926. LaFleur, 414 U.S. at 645-47.
927. 405 U.S. 156, 162 (1972).
equalize on-the-street treatment of "minorities as well as majorities" and "the poor as well as the rich."928 Viewed through this lens, the contrasting approaches of LaFleur and Papachristou hardly reveal doctrinal incoherence. They show instead that our Constitution may generate different structural rules in different contexts, even when responding to the same substantive values.929

XI. QUASI-STRUCTURAL CONSTITUTIONAL RULES

The structural rules we have looked at so far share a common bond. Each rule facilitates interbranch dialogue by letting judges insist that the political branches use specialized structures to evaluate (and often to reevaluate) constitutionally troublesome policy pronouncements.930 There are, however, many other ways in which courts may safeguard substantive constitutional rights with rules that focus on governmental processes and interbranch give-and-take. I refer to these devices as "quasi-structural rules" and explore in this Part three doctrines of this sort. They are what I call (1) quasi-structural "who" rules; (2) structural rules of adjudicative procedure; and (3) means-centered proper-fit rules. Space limitations preclude us from considering other important quasi-structural devices and permit us to take only a brief glance at the three quasi-structural techniques we shall explore.931 This quick

928. Id. at 171.
929. Professor Tribe makes a similar observation with respect to other ostensibly dissonant constitutional rules:

[A] judgment that respect for unconventional ideas or choices of lifestyle precludes overly personalized government action in a context where pamphleteers are being licensed is consistent with a judgment that the same respect for the unconventional compels highly individualized adjudication where custody decisions affecting unmarried males, or employment decisions affecting pregnant females, are at stake. Again inescapable is the substantive question: given the cultural and bureaucratic realities, which path currently points toward the freedom protected by the relevant constitutional provisions?

TRIBE, supra note 24, § 17-1, at 1674-75.
930. See supra note 44 and accompanying text.
931. There are at least four dialogue-related quasi-structural tools we will not consider further, except to mention them. First, even while upholding a law, a court may try to spur legislative reform by volunteering its view that the law is unfair or unwise in light of constitutional values. For example, in Coleman v. Miller, 117 F.3d 527, 530 (11th Cir. 1997), discussed supra notes 817-31 and accompanying text, the Eleventh Circuit offered the observation that the Confederate Battle Emblem "offends many Georgians" and "has, in our view, no place in the official state flag." See generally Neal Kumar Katyal, Judges as
visit nonetheless serves to confirm the point at the heart of this Article—that structurally minded doctrines lurk in every corner of constitutional law.

A. Quasi-Structural "Who" Rules

True constitutional "who" rules channel policymaking authority from one set of decision makers to another by wielding the sword of outright disqualification. There is, however, another set of who-centered doctrines—what we might call “quasi-structural ‘who’ rules”—that involve not the redirecting of decision-making authority from one policymaker to another, but the calibration of judicial scrutiny to take account of the nature of the government policymaker whose action is at issue. In Madsen v. Women’s Health Center, Inc., for example, the Court confronted a broad injunction, issued by a state trial court, that limited the expressive activities of anti-abortion protestors. This injunction, the Court held, was a content-neutral restriction on speech in a traditional public

Advisors, 50 STAN. L. REV. 1709 (1998). Second, even while upholding a law, the Court may engender caution in the law’s application by indicating that it stands ready to revisit the law in future cases in light of its potential impacts. See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 887 (1992) (noting that validation of twenty-four-hour waiting period for abortions was based “on the record before us” and made “in the context of this facial challenge”). Third, a court might openly indicate that—while the court itself cannot invalidate a state rule—Congress has the power to preempt it in light of constitutional considerations. See Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) (upholding state literacy tests, while noting that they do not violate any existing “restriction that Congress, acting pursuant to its constitutional powers, has imposed”). Finally, the Court might seek to trigger political-branch involvement in sorting through tough constitutional questions by rendering rulings that are highly fact-specific. As explained earlier, see supra notes 106-09 and accompanying text, Professor Sunstein claims that the Court has used this technique in dealing with the hard issues presented by race-conscious affirmative action and in many other contexts as well. See, e.g., SUNSTEIN, supra note 106; Sunstein, supra note 335, at 1198 (“[T]he Court has . . . authority to issue highly casuistical rulings that do not settle much, but that operate as a kind of ‘remand’ to the public, alerting people to the existence of hard issues of principle and policy. In the affirmative action context, the Court, whether or not intentionally, has done precisely this.”). Others have made similar observations as well. See, e.g., Michael Wells, Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments, 47 EMORY L J. 89, 96 n.22 (1998) (noting the possibility that “jurisdictional complexity is a good thing because it permits some matters to remain unsettled and subject to reconsideration”).

932. See supra Part XI.
The Court noted that it assesses such restrictions, when issued by a legislative body, by asking whether they are "narrowly tailored to serve a significant governmental interest." In the Court's eyes, however, its "standard time, place, and manner analysis" was "not sufficiently rigorous" when applied to judicially crafted injunctions. The Court thus asked not whether the injunction was "narrowly tailored," but whether it was "necessary to serve a significant government interest."

The Court justified its resort to elevated scrutiny in this context by explaining that content-neutral injunctions issued by individual judges differ from content-neutral rules that "represent a legislative choice." Making much the same point that recurs in the vagueness cases, the Court explained that legislative pronouncements are "imposed generally" and thus contain a "practical guaranty against arbitrary and unreasonable government"; in contrast, injunctions issued by a single judge in a single case "carry greater risks of censorship and discriminatory application." In short, the Court in Madsen adopted a quasi-structural "who" rule. The Court did not, along the lines of Mow Sun Wong, channel the task of issuing speech-inhibiting injunctions from judges to other government officials. Rather, the Court recognized that, while injunctions inevitably must come from individual judges, the nature of judicial—as opposed to legislative—decision making poses distinctive risks to free-expression values. As a result, "in this context" the Court opted for "a somewhat more stringent application of general First Amendment principles."

934. See id. at 762-63.
935. Id. at 764 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
936. Id. at 765.
937. Id.
938. Id. at 764.
940. Id.; see also Hill v. Colorado, 120 S. Ct. 2480, 2488 (2000) (citing Madsen in noting distinction between "judicial decree" and "general ordinances" with respect to dangers to First Amendment values).
941. See supra notes 837-48 and accompanying text.
942. Madsen, 512 U.S. at 765. Interestingly, the Justices who concurred and dissented in Madsen also relied on who-related considerations to support their own proposals for specialized forms of judicial review. Contrary to the majority, Justice Stevens argued that "injunctive relief should be judged by a more lenient standard than legislation." Id. at 778 (Stevens, J., concurring in part and dissenting in part) (emphasis added). Such a rule, he argued, "gives appropriate deference to the judge's unique familiarity with the facts" of the
Rules of this ilk pervade our law. The Court, for example, often ratchets up the level of deference given to decisions made by certain officials—like school, prison, and military authorities—who bring specialized experience and training to difficult fields of action. On the other hand, the Court may ratchet down the case. Id. at 779. On the other hand, Justice Scalia contended that speech-constricting injunctions should be viewed as content-based restrictions subject to full-bore "strict scrutiny." Id. at 791 (Scalia, J., concurring in the judgment and dissenting in part). He reasoned in part that: "[Injunctions] are the product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman." Id. at 793.

943. See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (rejecting a First Amendment challenge to teacher control of school newspaper's editorial content in part because of the "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (emphasizing the Court's "reluctance to trench on the prerogatives of state and local educational institutions" because federal courts are not well "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members").

944. See, e.g., Block v. Rutherford, 468 U.S. 576, 589 (1984) (upholding a bar on pretrial detainees' contact visits with friends and family because "reasonable, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the [detention] facility").

945. See, e.g., United States v. Albertini, 472 U.S. 675, 689-90 (1985) (rejecting a First Amendment claim because a "commanding officer has broad discretion to exclude civilians from a military base" and because the Constitution denies "the judiciary the authority to manage military facilities throughout the Nation"); Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998) (upholding a "don't ask, don't tell" policy in part because "in the military setting... constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions"); see also United States v. Stanley, 483 U.S. 669 (1987) (barring a former serviceman from mounting constitutional claim against military officials for subjecting him involuntarily to LSD); Chappell v. Wallace, 462 U.S. 296 (1983) (rejecting a damages claim in discrimination suit against military superiors). With regard to the Court's deference to congressional judgments in the field of military matters, see, for example, Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (upholding an exclusion of females from draft registration: "None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. . . . [B]ut the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.").

946. See, e.g., United States v. Bajakajian, 524 U.S. 321, 335-36 (1998) (emphasizing the need to defer to legislative judgments about appropriate punishments in assessing claims under the Excessive Fines Clause); NLRB v. Gissel Packing Co., 395 U.S. 575, 620 (1969) (stating that "a reviewing court must recognize the [Labor] Board's competence in the first instance to judge the impact of [speech] in the context of the employer-employee relationship"). Taking an approach akin to that of Madsen, the Court has said that, in the
deference it applies to choices made by other decision makers because of concerns about interest, capacity, and the like.\textsuperscript{947} \textit{Madsen}, as we have seen, reflects a rule of ratcheted-down deference applicable to judicial decisions that concern First Amendment values.\textsuperscript{948} Distinguishing the "adjudicative decision" concerning only "an individual parcel," from more trustworthy "legislative determinations classifying entire areas," the Court, in \textit{Dolan v. City of Tigard},\textsuperscript{949} likewise endorsed an intensified review of discrete agency actions to safeguard Fifth Amendment protections against uncompensated takings.\textsuperscript{950} Some quasi-structural "who" rules demand more aggressive review of state policies than of federal policies when valued constitutional rights are at stake.\textsuperscript{951} For example, the rule that requires strict scrutiny

substantive due process field, the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

\textsuperscript{947} See \textsc{tribe, supra note 24, § 17-2, at 1678 n.7 (expressing a concern on accountability grounds about constitutionally sensitive choices made by "a group of private citizens"); see also Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 368 (1998) (declining to extend Fourth Amendment exclusionary rule applicable to police officers to parole officers because police officers, unlike parole officers, are "engaged in the often competitive enterprise of ferreting out crime" (quoting United States v. Leon, 468 U.S. 897, 914 (1984))).

\textsuperscript{948} See \textit{supra} notes 933-42 and accompanying text.

\textsuperscript{949} 512 U.S. 374, 385 (1994).

\textsuperscript{950} In \textit{Dolan}, the Court entertained a Takings Clause challenge to a planning commission's grant of a permit to modify property that was conditioned on the dedication of part of the parcel for a flood-control greenway and a pedestrian/bicycle pathway. In finding that the imposition of these conditions constituted an unlawful taking, the Court distinguished earlier, government-supporting land-use rulings on the ground that "they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision [concerning] an individual parcel." \textit{Id.} In these circumstances, the Court insisted that the burden of proof should be borne by the city—rather than by the landowner—on the issue of whether the government action was constitutional. \textit{See id.} at 391-92 n.8. \textit{But see id.} at 413 n.* (Souter, J., dissenting) (questioning majority's characterization of Commission's decision as "adjudicative"). For the suggestion that a differing intensity of review should apply to certain legislative and agency actions, see Linde, \textit{supra note 27, at 234-35 (suggesting strong distinction between agencies and legislatures with respect to judicial review of refusals to reconsider policies in light of changed circumstances); see also supra notes 882-85 and accompanying text (discussing differential review suggested by the Court's \textit{Turner Broadcasting} decision).

\textsuperscript{951} This style of rule may reflect, at least in part, the deeply important point noted by Justice Scalia's concurring opinion in \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469 (1989): "An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history." \textit{Id.} at 523; \textit{see also Coenen, supra note 453, at 660-62 (noting centrality of this proposition to James Madison's political thought and to his defense of the reforms reflected
of state—but not federal—regulations that target legal aliens responds to concerns that state decision makers may be insufficiently tuned in to the dangers of citizenship-based discrimination.\footnote{\textsuperscript{952}}

in the American Constitution). For commentary along these lines that touches on important doctrinal points, see, for example, Jeffries, supra note 909, at 197 (suggesting that Court has applied vagueness doctrine more aggressively to local laws than to federal laws because Court sees greater risk of discriminatory enforcement by local authorities); McCormack, supra 648, at 519-20 ("Hierarchical values accord a degree of deference to judgments of governmental units depending on the breadth of constituency represented by the unit and the unit’s position within the hierarchy of the overall governmental structure. When approaching actions with a disproportionate racial impact, a court is more likely to infer discriminatory intent on the part of a local, isolated unit of government than on the part of Congress. When race is used consciously to disfavor a minority group, strict scrutiny is the rubric applied to all levels of government, but only those actions involving national security interests are likely to survive. The higher a unit stands in the hierarchy of government, the more important are the social problems with which it is likely to be dealing and the more likely it is to have been responsive to the competing interests of a broadly based constituency." (footnote omitted)); Note, supra note 909, at 82-83 ("[V]agueness attacks upon state legislation have in general been far more successful than vagueness attacks upon federal legislation (over whose enforcement the Supreme Court has considerably more flexible powers of control) . . . ."). Distinctions between state and federal regulation in discrete constitutional areas resonate with longstanding suggestions that, in general, the Court should be more willing to apply judicial review to state, rather than federal, programs. See, e.g., Bickel, supra note 6, at 33 ("Many judges and commentators who have questioned the power of judicial review of federal legislation have freely conceded the same power when exercised with respect to state actions."); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 154 (1893) ("If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department."). The Madisonian insight about differences between large and small governments also might help support constitutional rules that distinguish between state and local governments. See, e.g, Kende, supra note 395, at 616 n.151 (arguing that stricter scrutiny should apply to affirmative action plans adopted by local legislatures than those adopted by state legislatures in part because of the Madisonian insight "that factions may more easily dominate smaller, local legislative bodies" (citing The Federalist No. 9 (Alexander Hamilton)); see also Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (reaffirming that Eleventh Amendment immunity applies to states, but not to counties and cities); cf. Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (holding that municipalities are "persons" for purposes of 42 U.S.C. § 1983, even though states and state agencies are not).

952. See supra note 865 and accompanying text. In a similar vein, the Court for many years drew a distinction between the levels of scrutiny it would afford to state and federal affirmative action programs. See, e.g., Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990). In Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), however, the Court overturned the decisions that most strongly supported this state-federal distinction, by holding that "strict scrutiny" applies to "all governmental racial classifications." Id. at 227-28 (emphasis added).
Rules of this kind do not disqualify a government entity from making constitutionally sensitive decisions. Judges still may issue speech-related injunctions. Planning commissions still may limit certain land uses. And states are not foreclosed altogether from placing many types of restrictions on legal aliens. The Court, however, elevates the level of scrutiny in each of these settings for a class of government decision makers to protect important constitutional rights.

Some of these rules are controversial, but the root of their logic is not. Indeed, the sort of institutions-related reasons that support all these rules drive much of our constitutional law. The institutional limitations of courts, for example, help explain innumerable doctrines that bear the mark of judicial restraint.

Even while adopting this principle of "congruity," however, the Court issued a who-related disclaimer of potentially great significance: "It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. We need not, and do not, address these differences today." Id. at 230-31 (emphasis added) (citations omitted). By way of this observation, the Court left open the door for application of a more deferential form of strict scrutiny to at least some types of federal (as opposed to state) affirmative action programs.

By way of example, the Court in Madsen splintered into three camps with regard to level of judicial scrutiny. Yet each of the opinion writers argued for his own preferred level of scrutiny based on who-centered institutional considerations. See supra note 942 and accompanying text.

953. By way of example, the Court in Madsen splintered into three camps with regard to level of judicial scrutiny. Yet each of the opinion writers argued for his own preferred level of scrutiny based on who-centered institutional considerations. See supra note 942 and accompanying text.

954. See ISSACHAROFF ET AL., supra note 306, at 11 (noting the centrality of questions about "which institutional arrangements should be used for resolving . . . substantive questions"). For an important consideration of how institutional capacities and substantive interests interact in the field of federal-courts law, see Wells, supra note 931. Drawing on the work of Professor Henry Hart, Professor Wells observes:

A distinctive feature of our system is its variety of government institutions. There are federal courts, state courts, and legislatures at both the state and federal levels, as well as state and federal administrative agencies. For Henry Hart, this complexity was more an advantage than a source of confusion, for each of these bodies may be better or worse at particular tasks. Consequently, decisionmaking can and should be allocated with due regard for the competence of a given organ of government to handle a particular kind of problem. . . . Competence . . . refers to judgments as to which institution is better suited in terms of ability and experience to do a good job with a particular issue.

Id. at 97-98 (footnotes omitted).

955. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 65 (1981) (deferring to Congress on military matters because "lack of competence on the part of the courts is marked"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41-42 (1973) (stating that "Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues" and noting "this Court's lack of specialized knowledge and experience" with regard to
The entire body of equal protection "suspect classification" jurisprudence responds in large measure to who-related worries about the institutional capacities of representative bodies when certain forms of regulation are at issue. Similar institutional concerns have inspired other judicial interventions in such fields as legislative apportionment, protection of the national market, constitutional doctrines may also reflect the comparative institutional strengths of the judicial branch. See, e.g., Ely, supra note 88, at 102-03 (emphasizing special judicial competence with regard to matters of process); Komesar, supra note 595, at 379 ("Where the legislation under review affects judicial procedure or quasi-judicial, administrative procedure, judges feel more confident, probably with justification, in their ability to dispose accurately and efficiently of the issue than where the legislation concerns subjects farther from their common experience."); Nichol, supra note 15, at 1132 ("There are few tasks to which courts are more accustomed than attempting to affix damages awards to deprivations of legal rights."). Indeed, the rule of Marbury itself reflects institutional considerations. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) (expressing concern that failure to recognize judicial review would give to Congress "a practical and real omnipotence"); id. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

956. See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); Calabresi, supra note 13, at 93 (noting that "[i]f the burdened group has traditionally carried little weight in the political process, the results of that process are necessarily untrustworthy, whether or not intent to discriminate is manifest"). Of course, the flipside of this principle is that judicial review should be most lenient if the interests requesting judicial protection are necessarily well-represented in the political decision-making process. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985) (rejecting strong judicial restraints on state-restricting federal legislation because states' influence in national political process is inherent "in the selection both of the Executive and the Legislative Branches of the Federal Government").

957. See, e.g., supra notes 471-79 and accompanying text.

958. Compare Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945) (emphasizing, in invalidating state train-length law, that "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected"), with Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981) (rejecting dormant Commerce Clause attack on milk-container restrictions in part because "[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against
interstate migration, and governmental abrogation of contract duties.

What is important for our purposes is that the pervasiveness of quasi-structural "who"-related doctrines lends credence to the ostensibly more controversial true "who" rules typified by Mow Sun Wong. After all, if the Court can, as in Madsen, ratchet up constitutional scrutiny based on who makes a government policy, why can it not in some cases raise the bar to the level of outright disqualification? The broader point is that the full-fledged "who" rules recognized in cases like Mow Sun Wong bear a kinship that is easily overlooked, but nonetheless very close to well-settled doctrines in our law.

B. Quasi-Structural Rules of Adjudicative Procedure

Full-scale structural rules bear a resemblance to another settled set of constitutional doctrines—what I call "quasi-structural rules of adjudicative procedure." In New York Times Co. v. Sullivan, for example, the Court made history by holding that publishers can be liable for defamation of a public official only if they act with "actual malice." In a less-noticed corner of its opinion, the Court also held something more: that public-official plaintiffs have the burden of legislative abuse).

959. See, e.g., Edwards v. California, 314 U.S. 160, 174 (1941) (striking down ban on in-state migration of indigents in part because "non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy").

960. See, e.g., United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977) (adopting "dual standard" of Contract Clause review because in evaluating a state's impairment of its own contract "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake"); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 413 n.14 (1983) (recognizing "the stricter standard of United States Trust Co.," but finding it inapplicable "because Kansas has not altered its own contractual obligations").

961. Professor Strauss made essentially the same point in defending certain forms of constitutionally inspired "irrebutable presumption" rules. See Strauss, supra note 434, at 191-95. As he puts it, "there is no sensible reason to distinguish between . . . a barely rebuttable presumption and the explicitly conclusive presumption" in determining the legitimacy of rules that are based on constitutional values and institutional limitations. Id. at 192.


963. Id. at 280.
proving a publisher's malice with "convincing clarity." In later cases, the Court has laid down a plethora of similar rules of "First Amendment procedure." Many of these rules—like the rule of the New York Times case—operate in defamation actions. Additional rules of First Amendment process apply to disputes that concern obscenity, content discrimination, press access to trials, and other nondefamation-related matters. The Court has
Boston, Inc., 515 U.S. 557, 567 (1995) (applying independent appellate review to the question of whether petitioner’s activity was protected speech); Press-Enterprise Co. v. Superior Court of Cal., 466 U.S. at 511-12 (collecting prior cases that support First Amendment independent appellate judgment of purportedly factual findings, including with respect to fighting words, obscenity, child pornography, and incitement to riot); Carroll v. President and Comm’rs of Princess Anne, 393 U.S. 175, 180 (1968) (stating that “there is no place within the area of basic freedoms guaranteed by the First Amendment for [ex parte] orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate”); Dombrowski v. Pfister, 380 U.S. 479, 496 (1965) (striking down state law that required members of certain organizations to register with the state as communists because statute relied on impermissible presumption-based nonjudicial listing of organization as “Communist fronts”); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (noting that burden of proof as to obscenity of film being screened is on censor); Spelser v. Randall, 357 U.S. 513, 526 (1958) (holding that “due process certainly requires . . . that the State bear the burden of persuasion” where exemption is denied based on taxpayer’s alleged support of violent overthrow of government); see also Air Line Pilots Ass’n v. Miller, 523 U.S. 866, 874 (1998) (noting that First Amendment required “procedural protections for [public] nonunion workers who object to the [agency-fee] calculation” to ensure that fee payments do not go “to political candidates and to express political views unrelated to [the union’s] duties as exclusive bargaining representative”; procedural requirements include explanation of the basis of the fee, prompt opportunity to challenge its amount before an impartial decisionmaker, and an escrowing of disputed amounts until the dispute is resolved); Manual Enters., Inc. v. Day, 370 U.S. 478, 498 (1962) (Brennan, J., concurring) (providing decisive votes for reversal of Post Office’s ban on allegedly obscene mailing; relying on substantial First Amendment question “whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any forum except a court”); Monaghan, supra note 754, at 536 (collecting cases in which “the Court indicated that, like seizures, injunctions must follow adversary hearings, absent an overriding emergency” when speech-related materials or activities are at issue); Volokh & McDonnell, supra note 966, at 2437-38 (“Recent cases have faithfully applied Bose to alleged obscenity, incitement, negligent publication of criminal solicitation, speech by lawyers supposedly interfering with the administration of justice, government employee speech, speech in a possibly nonpublic forum, commercial speech, and content-neutral speech restrictions.” (footnotes omitted)). See generally TRIBE, supra note 24, §§ 12-37 to 12-39, at 1054-61. In addition to these illustrative rules of First Amendment procedure, there are a variety of proposals for additional rules. See, e.g., Gilles, supra note 965, at 1798-1800 (advocating modified pleading rules in defamation cases); id. at 1802-04 (advocating entitlement to interlocutory appeal of denials of summary judgment in libel actions); see also Monaghan, supra note 966, at 246 (raising question, in light of Supreme Court’s Bose decision, whether there is “a special requirement of some appellate review in first amendment cases,” notwithstanding “the general rule that there is no constitutional right to appellate review in any civil case”); Monaghan, supra note 754, at 519 (broadly asserting that “[i]f the Constitution requires elaborate procedural safeguards in the obscenity area, a fortiori it should require equivalent procedural protection when the speech involved—for example, political speech—implicates more central first amendment concerns”). The Court, of course, does not always embrace sought-after procedural safeguards of First Amendment
recognized constitutional process rules outside the First Amendment area as well.\textsuperscript{668} There are, for example, rules that mandate particularly close appellate scrutiny of trial court rulings.

\begin{quote}
See, e.g., Calder v. Jones, 465 U.S. 783, 790-91 (1984) (rejecting special personal jurisdiction rules for media defendants in libel action: "We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws").

\textsuperscript{668} See, e.g., United States v. Bajakajian, 524 U.S. 321, 337 n.10 (1998) (requiring "\textit{de novo} review" of the question whether "a fine is constitutionally excessive" under the Eighth Amendment); Thompson v. Keohane, 516 U.S. 99, 112-16 (1995) (applying independent review to in-custody determinations for purposes of \textit{Miranda v. Arizona}, 384 U.S. 436 (1966)); see also Roe v. Flores-Ortega, 120 S. Ct. 1029, 1038 (2000) (requiring "presumption of prejudice"—but not "a \textit{per se} prejudice rule"—when defendant "was—either actually or constructively—denied the assistance of counsel altogether"); United States v. Hubbell, 120 S. Ct. 2037, 2045 (2000) (reaffirming that defendant granted immunity "does not have the burden of proving that his testimony was improperly used"; rather, there is "an affirmative duty on the prosecution"); Troxel v. Granville, 120 S. Ct. 2054, 2062-63 (2000) (plurality opinion) (rejecting—in light of substantive due process rights of a fit parent—the placing of the burden of proof on that parent to show that grandparent visitation rights would harm child; insisting instead on adherence to "the traditional presumption that a fit parent will act in the best interest of his or her child" at least where visitation is not wholly blocked and judge offers only "slender findings" in support of visitation order); \textit{id.} at 2066-67 & n.2 (Souter, J., concurring) (expressing similar concerns about lack of presumptive controlling effect of parent's decision); Kastigar v. United States, 406 U.S. 441, 460 (1972) (holding grant of derivative-use immunity consistent with Fifth Amendment puts the "burden of proof" on the prosecution not only to establish "a negation of taint," but also to carry out the "affirmative duty" of showing "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony"); BICKEL, supra note 6, at 179-80 (reading the \textit{Garner} sit-in case, in which the Court overturned a disturbing-the-peace conviction, as requiring "the trier of fact [to] expressly face the question of probable public alarm and disturbance, and [to] place the basis for his conclusion in the trial record"; noting that, while such procedures "may not ordinarily be required" they were "here required" because the case involved a "grave constitutional issue," which warranted a "colloquy with the trial court"). Outside the First Amendment context, as within it, see \textit{supra} note 967, commentators have proposed the adoption of new structural rules of adjudicative procedure. See, e.g., Brest, \textit{supra} note 385, at 128-30 (arguing that courts should not eschew motive-based constitutional analysis, but adding that they should refuse to invalidate a decision on the ground that it was designed to serve illicit objectives unless that fact has been established by "clear and convincing evidence"); see also Monaghan, \textit{supra} note 966, at 272 n.237 (noting existence of specialized "Eighth Amendment due process" in the capital punishment context and the possibility that it "requires that at least some state appellate court engage in constitutional fact review").
\end{quote}
on the voluntariness of confessions\textsuperscript{969} and on the existence of probable cause under the Fourth Amendment.\textsuperscript{970}

The important thing to see is that these rules are not so much rules of procedural due process as they are safeguards of substantive constitutional protections, such as the First Amendment.\textsuperscript{971} The Court's burden-of-proof rules in the defamation field, for example, are not designed—at least not primarily—to facilitate fair and accurate determinations in individual cases. Instead, their mission is to lessen the "chilling effect" that exposure to defamation actions places on hardball speech in the real world.\textsuperscript{972} These burden-

\textsuperscript{969} See Miller v. Fenton, 474 U.S. 104, 114 (1985) (applying Bose by analogy in the Fourteenth Amendment Due Process Clause context to the question whether a confession was voluntary); Brooks v. Florida, 389 U.S. 413, 415 (1967) (same); Davis v. North Carolina, 384 U.S. 737, 741-42 (1966) (requiring the court to reexamine the entire record in order to make an independent determination of whether confession was coerced); Watts v. Indiana, 338 U.S. 49, 50-52 (1949) (same); see Monaghan, supra note 966, at 261 (noting establishment of Supreme Court's authority "to make an independent judgment on constitutional law application . . . particularly in the areas of coerced confessions [and] jury discrimination"); Note, Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases, 14 STAN. L. REV. 328, 336-51 (1962).

\textsuperscript{970} See Ornelas v. United States, 517 U.S. 690, 697-99 (1996) (applying de novo review to probable cause decisions under the Fourth Amendment); Recznik v. City of Lorain, 393 U.S. 166, 169-70 (1968) (authorizing reviewing court redetermination of matters affecting legality of an arrest); Volokh & McDonnell, supra note 966, at 2460 n.167 (noting that Ornelas is hard to square with earlier cases and that "the best explanation seems to be that the latter cases involved nonconstitutional matters that were peripheral to the merits"); cf. Monaghan, supra 966, at 265-66 (noting Court's unwillingness to apply independent review of constitutional fact in dormant Commerce Clause; speculating that First Amendment cases are distinguishable because they involve "personal constitutional rights"). For another, recent independent-appellate-review case, see Lilly v. Virginia, 527 U.S. 116, 137 (1999) (plurality opinion) (stating that "when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, [appellate] courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause").

\textsuperscript{971} See Monaghan, supra note 754, at 518-19 (noting that "rather than attempting to apply the traditional requirements of due process to obscenity determinations, the Court has judged the adequacy of procedures by a different [First Amendment] standard"); Monaghan, supra note 966, at 230 (observing that the Bose rationale is "grounded entirely upon concerns assertedly peculiar to the First Amendment"); id. at 259 n.167 (noting that the Court indicates that "the general prohibition . . . contained in the Fourth Amendment and in the due process clause takes on a special meaning where important substantive constitutional values—such as freedom of speech—are at stake").

\textsuperscript{972} See Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect", 58 B.U. L. REV. 685, 685 (1978) (noting that the "chilling effect concept has been recognized most frequently and articulated most clearly in decisions chiefly concerned with the procedural aspects of free speech adjudication"); accord, e.g., Bose Corp., 466 U.S. at 505
of-proof-based structural rules of adjudicative procedure, in other words, serve a substantive constitutional end. Indeed, they serve the same end advanced by the substantive actual-malice rule itself: to ensure a "robust" and "wide open" debate on critical issues of self-governance.973

There is another important set of rules that address substantive constitutional values by shaping the processes of dispute resolution: rules that concern the identity and jurisdiction of adjudicative decision makers. In Younger v. Harris,974 for example, the Court relied on "our Federalism" in ordering federal courts to abstain from deciding constitutional issues already under consideration in

(indicating that First Amendment procedural rules are required "to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas"); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963) (noting need for "procedures that will ensure against the curtailment of constitutionally protected expression"); Gilles, supra note 965, at 1766 ("Since New York Times, it has been clear that the aim of First Amendment process is to minimize the chill on speakers . . . ."); Volokh & McDonnell, supra note 966, at 2465 (expressing concerns about "chilling effects"; "rigorous procedural safeguards" are needed because "the freedoms of expression must be ringed about with adequate bulwarks"). Other cases sound a similar theme in the nondefamation context. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230 (1990); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561 (1975); Blount v. Rizzi, 400 U.S. 410, 416-17 (1971).

973. See Monaghan, supra note 754, at 519 ("Like the substantive rules themselves, insensitive procedures can 'chill' the right of free expression. Accordingly, wherever first amendment claims are involved, sensitive procedural devices are necessary . . . ."); see also David A. Anderson, Is Libel Law Worth Reforming?, 140 U. Pa. L. Rev. 487, 494 (1991) (noting that, in the New York Times case, the Court "greatly expanded judges' control of juries—a development that has had far greater practical effect than the actual malice rule itself"). Another set of safeguards that bears a kinship to these special procedural protections is what we might call "individualized notice rules." The essential thought is that, when particularly important rights are at stake, the government must give an individualized warning to the target of its sanction, offering that target the chance to discontinue any violation of the state's rule. This principle, for example, may help to justify the Supreme Court's First Amendment hostile-crowd-reaction decision in Feiner v. New York, 340 U.S. 315, 321 (1951), which authorized a disorderly conduct prosecution for delivery of a speech that threatened a disturbance when the speaker persisted in delivering after police officers twice requested him to stop. See also United States v. Emerson, 46 F. Supp. 2d 593, 610-11 (N.D. Tex. 1999) (refusing to apply statute disallowing gun possession by anyone subject to a domestic violence protection order, absent specific warning of this obscure prohibition, given the protected liberty interest in possession of firearms).

parallel state-court litigation. In Flast v. Cohen, the Court forged an exception to the general prohibition on taxpayer actions in the service of safeguarding First Amendment Establishment Clause values. And the Court has carefully structured its third-party standing rules in such a way as to facilitate the vindication of substantive due process, equal protection, free speech, and other personal rights that might otherwise go unprotected.

975. But cf. Monaghan, supra note 754, at 549 & n.128 (arguing that because "federal courts are particularly sensitive to first amendment claims...the Court should completely eliminate the abstention doctrine when first amendment interests are involved," and noting that "substantial inroads on the abstention doctrine in the first amendment context" have already been made in Supreme Court cases); Wells, supra note 931, at 91-92 (arguing that given proper, though hidden, pervasiveness of "naked ideology" in federal-courts law, "advocates ought to be permitted to argue openly that free speech claims deserve a special exception from the doctrine of Younger...because federal courts are more sympathetic to free speech claims").


979. See infra notes 990-94 and accompanying text (discussing overbreadth doctrine); see also GUNther & Sullivan, supra note 30, at 1327; Monaghan, supra note 754, at 532 (stating that the standing rule embodied in the overbreadth doctrine exists "at least in part because of the overriding first amendment interest in seeing that legislation which chills first amendment rights is struck down as soon as possible"). But cf: Monaghan, supra note 734, at 4 (arguing that overbreadth involves first party, not third party, standing by barring punishment under defective laws). See generally Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853 (1991) (providing a general analysis of the overbreadth doctrine and how the courts should apply it in the future).

The Supreme Court has protected substantive constitutional values not only by adopting specialized jurisdictional rules, but also by developing rules that define the nature of proper factfinders. In *Witherspoon v. Illinois*, for example, the Court limited the state's power to excuse prospective capital-case jurors who have serious scruples about the death penalty. As explained by Professor Tribe:

> *Witherspoon...* seems most comprehensible as a simultaneous expression and prophylactic enforcement of the eighth amendment: it is morally unacceptable *per se*, and hence "cruel and unusual," to execute a person as to whom a representative cross-section of community belief could not be convinced that the death penalty is appropriate.... The Court in *Witherspoon* evidently assumed the absence of an abhorrence toward capital punishment so widely shared as to legitimate judicially...
declaring the death penalty unconstitutional. Instead, the Court mandated a structure through which eighth amendment principles would be linked to community sentiments. Defendants in individual cases would be entitled by that structure to an opportunity for protection by the full range of community belief at a given time on the death penalty question; and a fully representative jury system, expressing itself through the number and kinds of cases in which death penalties were inflicted, would be an important reflector of evolving values over time.983

In a similar vein, the Court in Freedman v. Maryland,984 set forth a group of “procedural safeguards” to protect First Amendment values against potentially overzealous state movie licensors.985 The Court’s ruling in Freedman mandated that any pre-screening obscenity determination had to be made the subject of a prompt reconsideration by a judicial officer wielding de novo review authority.986 The purpose of such a rule is unabashedly to safeguard substantive First Amendment values with rules that target decision-making processes. In particular, the Freedman rule steers final licensing authority away from bureaucrats to judges who are less susceptible to factional passions, more sensitive to rule-of-law values, and (in part because of the generality of their work) more likely to escape capture and predispositions in favor of censorship.987

983. Tribe, supra note 27, at 295-96 (footnotes omitted).
985. See id. at 58 (adopting “procedural safeguards designed to obviate the dangers of a censorship system”). Various post-Freedman cases have adapted its procedural requirements to a wide array of other First Amendment settings. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (licensing of sexually oriented businesses); Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (obscene film review by court rather than agency censor); National Socialist Party of Am. v. Skokie, 432 U.S. 43 (1977) (per curiam) (parade permit); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (refusal of permission to stage the musical “Hair”); Carroll v. President and Comm’rs of Princess Anne, 393 U.S. 175 (1968) (permit for political rally); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) (per curiam) (film censoring ordinance that provided review within 50-57 days); see also Monaghan, supra note 754, at 524-26 (exploring implications of Freedman required-judicial-determination principle in other areas, including student expulsions, public-employee firings, congressional contempt, and Labor Board rulings on speech-related unfair practices).
987. See id. at 57-58 (“Because the censor’s business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected
As with quasi-structural "who" rules, quasi-structural rules of adjudicative procedure help legitimize full-scale second-look doctrines. The main point lacks complexity. If courts may and do craft numerous rules of adjudicative procedure to protect substantive constitutional values, why should courts not also be able to craft rules of policymaking procedure as well? One possible answer to this question is that a power to fashion legislative-process rules does not follow from a power to craft adjudicative-process rules because the Court has more experience and competence in the latter field. The Court, it might be said, is itself an adjudicative tribunal, constantly reviews the adjudicative labors of lower courts, and long has had responsibility for framing rules of adjudicative procedure, such as the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The full corpus of the Court's work, however, is hardly limited to superintending the actions of adjudicative officials. The Court, for example, routinely safeguards constitutional values against invasion by state law enforcement officers and members of the "co-equal" federal executive branch.

Even more to the point, the institution of judicial review in its very nature involves the Court in routinely overseeing the work of administrative agencies, state and local legislatures, and the federal Congress. There is much more to explore about these matters. But enough already has been said to show that the

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989. In particular, one must face the predictable refrain that it is too invasive and disruptive of legislative processes to implement rules of this kind. See supra notes 243-47 and accompanying text (noting argument of this sort made by Justice Scalia in dissent in...
pervasive presence of quasi-structural doctrines of adjudicative
procedure supports to some degree process-centered second-look
doctrines directed at policymaking bodies.

C. Means-Centered Proper-Fit Rules

Under the overbreadth doctrine, the Court may strike down in
toto a statute "that is designed to burden or punish activities that
are not constitutionally protected" if "as drafted, it also includes
activities protected by the First Amendment." This doctrine
differs from others we have studied in that it focuses attention
squarely on the coverage of the challenged rule. Put another way,
the overbreadth doctrine has a substantive dimension because it
kicks in only when the substantive reach of a rule sweeps in
protected, as well as unprotected, speech.

At the same time, the second-look nature of an overbreadth
invalidation is apparent. In no uncertain terms, the Court instructs
the lawmaker that he or she may outlaw the same sort of
conduct—and often the very same conduct—the Court has freed
from the criminal sanction. To achieve that result, however, the
lawmaker must act again, legislating with greater care and
circumspection as a penalty for its prior display of sloppiness and
overreaching.


990. NOWAK & ROTUNDA, supra note 392, § 16.8, at 996. As pointed out by Professors
Nowak and Rotunda, the rule thus marks a departure from the general principle that "one
to whom application of a statute is constitutional" may not challenge it in federal court
litigation. Id. (quoting United States v. Raines, 362 U.S. 17, 21 (1960)).

991. See generally Tribe, supra note 24, §§ 12-27 to 12-29 (discussing the overbreadth
doctrine). Later cases have indicated that, for the rule to apply, the challenged rule—at least
as a general proposition—must be "substantially overbroad." See Broadrick v. Oklahoma, 413

doctrine permits attacks on statutes "even though the conduct of the person making the
attack is clearly unprotected and could be proscribed by a law drawn with the requisite
specificity").

993. See, e.g., GUNThER & SULLIVAN, supra note 30, at 1325 ("The flaw in laws invalidated
on [overbreadth] grounds is procedural: government went about things the wrong way even
if the speaker might constitutionally be restricted if government went about it in a different
way."); Wellington, supra note 8, at 504-05 ("The class of plainly non-final decisions might
best be understood in terms of the Court saying to another governmental entity: 'You may
be able to achieve the substantive result you desire but you must proceed toward your
objective in a different fashion.' There is a family of such doctrines, procedural or structural
Court has described the overbreadth doctrine as designed to ensure "a considered legislative judgment that a particular mode of expression has to give way."\textsuperscript{994} This deliberation-enhancing conception of the overbreadth rule directs attention to a deeper matter, for the rule imposes only one of many restrictions on pursuing good goals by way of bad means. In particular, the close linkage between structural rules and overbreadth suggests that there may be a close linkage, too, between structural rules and the innumerable means-centered doctrines that pervade constitutional law.\textsuperscript{995} These doctrines raise issues like: Is a legislative classification "rationally related" to achieve the government's purpose?\textsuperscript{996} Is the government's method for achieving its ends "narrowly tailored" or "the least restrictive or least intrusive means?"\textsuperscript{997} Is the legislative proscription "underinclusive" (or overinclusive) in regard to advancing the particular aims of the challenged government program?\textsuperscript{998}

In one sense, the structural nature of these means-based rules is apparent. On its face, a means-based invalidation does not preclude the government from pursuing the underlying goal of the invalidated statute. Rather, it invites political-branch officials to take a second look at whether they wish to pursue that same goal, albeit in a different way.\textsuperscript{999} At the same time, as we saw at the

\textsuperscript{994} Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973) (emphasis added).
\textsuperscript{995} See Gunther & Sullivan, supra note 30, at 108 n.2 (noting that "judicial scrutiny of means-ends relationships . . . may well be the most frequently invoked technique in the judicial review of the validity of federal and state legislation").
\textsuperscript{998} See Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).
\textsuperscript{999} This essential point was made by Justice Jackson in his famous celebration of the merits of means-based equal-protection review vis-à-vis ends-centered substantive due process scrutiny. See Railway Express Agency v. New York, 336 U.S. 106, 111 (1949) (Jackson, J., concurring). As Justice Jackson observed: "Invalidation of a statute or an ordinance on due process grounds leaves ungoverned or ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand." Id. at 112.
outset, means-centered doctrines are distinguishable from "true" second-look structural rules because—like overbreadth rules—they focus on the content that marks challenged legislation. To recognize this distinction, however, is hardly to say that proper-means rules have no relation to process-centered structural rules. They do, in

merits noting, in this regard, that the Court does not always couch means-centered analysis in means-centered terms. For example, in Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999), the Court considered the constitutionality of a ban on advertisements about gambling. In invalidating the statute, the Court expressed its reluctance to characterize a state's claimed interest in minimizing the social costs of gambling as "substantial" because of the widespread "approval of state legislation that authorizes a host of public and private gambling activities." Id. at 187. The important point to recognize is that a remand-to-the-legislature quality inheres in this sort of analysis whether one sees the problem presented in terms of means-end fit or in terms of the substantiality of a legislative goal. This is so because, either way, the legislature is free to discourage gambling—perhaps even in speech-hampering or other constitutionally questionable ways—so long as the legislature cleans up the statute books (in particular, by peeling away the "host" of ways it currently endorses gambling).

1000. See supra notes 30-33 and accompanying text.

1001. The key point is that impermissible-means rules, in contrast to impermissible-ends rules, do—all the structural rules we have studied—invite a curative legislative reprise. See BICKEL, supra note 6, at 232 (noting, by way of example, that "when the Commerce Clause forecloses an economic regulation by a state, and very often when a state tax is struck down, another measure, achieving much the same and sometimes precisely the same purpose, arises to take its place"); Coenen, supra note 283, at 1001 & n.183 (describing "second look" character of Court's means-related invalidation of truck-length law in Kassell v. Consolidated Freightways Corp., 450 U.S. 662 (1981)); Gunther, supra note 30, at 26 (noting the Court's means-based invalidation in James v. Strange, which permitted the Court to avoid a "broad ground of decision" and instead strike down "only [the law of] Kansas with its unique curtailment of debtor exemptions"). See generally Dimond, supra note 69, at 231 (noting that "the Court [can] use rational relationship review 'with teeth' or a suspensive veto to remand congressional responses that do not fit the articulated purposes of the statute"). This point was made well by Professor Freund in discussing the Court's means-related invalidation of state restrictions on door-to-door canvassing. As he observed:

Jehovah's Witnesses may not be forbidden by ordinance to knock on doors, but presumably an ordinance may make it criminal to do so where the householder has posted a notice. In actuality, therefore, these momentous constitutional cases frequently come down to such details as whether the city fathers may place on receptive householders the burden of posting a welcome or must place on resistant householders the burden of posting a sign of inhospitality. The difference is by no means trivial, but it need not be inflated to the dimensions of irreconcilable principles.

Paul A. Freund, The Supreme Court and Civil Liberties, 4 VAND. L. REV. 533, 553-54 (1951) (quoted in BICKEL, supra note 6, at 232-33). Professor Burt has been particularly enthusiastic about the structural dimension of means-based components of "mid level" scrutiny. "Its great virtue," he says, "is its conversational character: when the Court invalidates a statute on this basis, this action permits and even invites a legislative response." BURT, supra note 555, at 364. In similar fashion, Professor Gunther has emphasized the structural advantages of
fact, have a close relation because questionable content may be seen, with good reason, as merely a proxy for problems of process that the law should be slow to tolerate. Following this thought, many commentators have asserted that the essential purpose of means-centered review is to flush out process problems, particularly problems of impermissible motive. The Court itself, on occasion,

means-centered scrutiny as part of a stepped-up rational-relation review. In his opinion:
Means scrutiny . . . can improve the quality of the political process—without second-guessing the substantive validity of its results—by encouraging a fuller airing in the political arena of the grounds for legislative action. Examination of means in light of asserted state purposes would directly promote public consideration of the benefits assertedly sought by the proposed legislation; indirectly, it would stimulate fuller political examination, in relation to those benefits, of the costs that would be incurred if the proposed means were adopted.

A common defense of extreme judicial abdication is that the state has considered the contending considerations. Too often the only assurance that the state has thought about the issues is the judicial presumption that it has. Means scrutiny would provide greater safeguards that the presumed process corresponds to reality—and would thereby give greater content to the underlying premise for deferring to the state's resolution of the competing issues. Means scrutiny would thus resemble the judicial technique of remanding to the legislature, familiar in other areas of constitutional law.

Gunther, supra note 30, at 44-45.

1002. This point may have particularly strong application to underinclusive legislation. The problem with such legislation is that its targeting of a narrow group opens the door for witting or unwitting oppression of minorities by majority factions. The most famous articulation of the thought appears in Railway Express Agency v. New York, 336 U.S. 106 (1949):

Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that [governments] must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. . . . [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Id. at 112-13 (Jackson, J., concurring); see also BICKEL, supra note 6, at 228 (noting that "to hold that 'the prohibition or regulation must have a broader impact' would indeed be to invite more responsible—extraordinarily responsible—political action before deciding an issue of principle that is extraordinarily difficult and far reaching").

1003. See ELY, supra note 88, at 145-46 (describing the "doctrine of 'suspect classifications,' though not generally so understood, . . . as a handmaiden of motivation analysis" and noting
has echoed this sentiment, by explicitly linking means-centered rules to the quest for "reasoned analysis" and "reasoned judgment" by government policymakers. These pronouncements lend support to structural rules by suggesting that an essential purpose of content-conscious means rules is to serve structural deliberation—

that "special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of 'flushing out' unconstitutional motivation"; Alexander, supra note 775, at 941 ("In a motive theory, suspect classifications, . . . 'fit,' and less restrictive alternatives would all serve evidentiary functions with respect to uncovering the motivation behind the enactment . . ."); Brest, supra note 385, at 122 (arguing that "the fact that a regulation, though minimally related to the promotion of health or educational achievement, is poorly or dubiously suited to its supposed legitimate objectives, would lend support to other evidence of illicit motivation"); Dimond, supra note 69, at 220 (noting "the Court often uses a means-end analysis as one aid in determining whether an invidious purpose or naked preference has skewed the official decisionmaking process"); Kende, supra note 395, at 622 n.174 ("[M]eans-end scrutiny is primarily a way of discerning whether a racial preference is impermissibly motivated."). Professor Kagan has focused on this point in the free-speech context. See Kagan, supra note 633, at 414 ("[T]he application of First Amendment law is best understood and most readily explained as a kind of motive-hunting."); id. at 440-41 ("[If courts cannot determine motive directly, by exploring what went into the legislative process, perhaps they can determine motive obliquely, by looking at what came out of it. . . . We might think of these rules as proxies for a direct inquiry into motive or as rules of an evidentiary nature. These rules use objective criteria, focusing on what a law includes and excludes, on what classifications it uses, on how it is written. But in making such inquiries, the rules in fact serve as an arbiter of motive.").

1004. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725-26 (1982) ("The purpose of requiring that close relationship [of means to ends] is to assure that the validity of a classification is determined through reasoning analysis rather than through the mechanical application of traditional, often inaccurate, assumptions. . . ." (emphasis added)); Plyler v. Doe, 457 U.S. 202, 217 (1982) (reasoning that intermediate scrutiny is designed to provide "assurance that the classification reflects a reasoned judgment"). With regard to the linkage of questionable means and questionable motives, see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) ("The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation."); and Sunstein, supra note 434, at 45 ("In Griswold, Justice White suggested that the weakness of the connection between means and ends showed that the statute in fact rested on something other than the state's asserted justification."). See also Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 486 (1987) (distinguishing prior ruling that struck down coal-mining-subsidium law because it impermissibly focused on advancing "private," rather than "public," interests based on reasoning that private purpose of earlier legislation was signaled by its inapplicability to coal-miner-owned lands, whereas landowner coal miners could engage in subsidence mining under the latter Act only if the state consented). An interesting example of this kind of reasoning surfaced in Lochner v. New York, 198 U.S. 45 (1905). There the Court reasoned that the connection between maximum ten-hour workdays and baker health was, in its view, "shadowy and thin." See id. at 62. The Court added that "[w]hen assertions such as we have adverted to" are made in support of a statute, "it gives rise to at least a suspicion that there was some other motive"—that is, an impermissible one—"dominating the legislature." Id. at 62-63.
enhancing aims. After all, if the Court may seek to engender "reasoned" policymaking through the indirect vehicle of means-centered review, why should it not be able to pursue the same goal by focusing directly on the quality of the policymaking process itself?

The rhetoric of content-based means rules also helps to legitimate a structural style of judicial review. This is so because, not infrequently, the Court has expressed its test of heightened means-centered scrutiny in terms of whether policymakers have "carefully" tailored legislative programs to their underlying purposes.\footnote{1005} This description of the nature of means-based scrutiny raises a simple and telling question: If reviewing policymaker carefulness is the key in applying the great host of means-centered constitutional doctrines, why should courts not consider whether—apart from the content of resulting laws—government decision makers have used policymaking structures that in their nature comport with policymaker care? The Court has answered this question more with its actions than with its words, by utilizing the profuse mix of structural rules catalogued above above.

\footnote{1005. See Reno v. ACLU, 521 U.S. 844, 846 (1997) (expressing concern whether program is "carefully tailored to the congressional goal of protecting minors"); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 783, 806 (1996) (Kennedy, J., concurring and dissenting) (finding challenged restriction on speech was not "drawn with enough care" in part because "[p]artial service of a compelling interest is not narrow tailoring"); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (stating that "the means must be carefully tailored to achieve [congressional] ends"); Orr v. Orr, 440 U.S. 268, 283 (1979) (striking down state law because classification "must be carefully tailored"); see also Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999) (couching means/end inquiry in terms of whether challenged regulation reflects that government "carefully calculated' the costs and benefits' of its program); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993) (finding violation of "reasonable fit" requirement applicable to commercial speech where city ordered removal of 64 of over 1500 news racks on litter prevention grounds because they contained commercial handbills, rather than newspapers; failure to regulate news racks' size, shape, appearance, or number indicates that [city] has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition"); Board of the Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (noting that while the rational-basis test bars judicial inquiry into whether a challenged rule advances a permissible purpose at "inordinate cost," commercial-speech standards "require the government goal to be substantial, and the cost to be carefully calculated").}
CONSTITUTION OF COLLABORATION

XII. THE NORMATIVE CLAIMS OF STRUCTURAL RULES

Structural rules raise nettlesome questions of legitimacy and worth. Where do structural rules come from? Do they serve good ends? Do they carry with them substantial dangers to the operation of legislatures, the integrity of courts, and the development of public policy marked by intelligence and justice? In the preceding chapters we began the process of addressing these questions by constructing a typology of the many structural rules that are at work in our law. This typology should aid any investigation into the propriety of judicial use of structural rules, but it may also complicate the investigation. It aids the inquiry by revealing that the territory occupied by structural rules is far broader than might first meet the eye. If, as Holmes told us, "[t]he life of the law . . . has been experience," the critic must grapple with the persistent and growing pervasiveness of structural review in constitutional decision making. Looking at these rules together also shows that superficially disparate doctrines may be closely related, thus complicating efforts to debunk any particular doctrine without taking fair account of its "neighbors" in the law. Finally, our enumeration of these rules raises questions about their deepest nature—about why they exist, why they take varied forms, how they are linked, and how far their differing principles extend. Any fruitful normative inquiry must attend to these matters of innermost structure, logic, and scope.

There is, however, also some danger in gathering these rules together. The danger is that important differences among the rules may be underestimated or missed. Structural doctrines—at least so far—are not tied together by the thread of a single neat theme. To be sure, all pure structural rules are describable as "structural" because they share one common characteristic: they support judicial "remands" of challenged policies for a "second look" by political authorities that is procedurally protective of some particular substantive constitutional value. Beyond this, however, different structural rules have different impacts on the legislative process, the role of courts, and the development of public policy. Therefore, a careful analysis of each rule is necessary to fully understand its implications.

1007. In a similar vein, a holistic focus on structural rules may support construction of the sort of arguments by analogy that are common in our law. See supra note 534 and accompanying text (noting Professor Bickel's reliance on vagueness doctrine to support rule of desuetude).
1008. See supra note 22 and accompanying text.
structural rules may well advance very different purposes in very different ways.

Consider again the rule of *Gregory v. Ashcroft*. We already have suggested that this rule—which requires a super-clear statement for Congress to interfere with a state's selection of key governing officials—springs from the confluence of four thoughts:

1. Important substantive constitutional values are endangered when the national government threatens state autonomy in this distinctively invasive way. We already have suggested that this rule— which requires a super-clear statement for Congress to interfere with a state's selection of key governing officials—springs from the confluence of four thoughts:

2. These interests are not (or at least historically have not been) adequately protected by judicial use of on-or-off constitutional restraints.

3. The Court has justified this nonuse of on-or-off restrictions by relying on structural protections of state interests in the national lawmaking process.

4. A super-clear-statement rule augments the operation of those processes by forcing Congress to confront squarely the impairment of state autonomy its proposed action portends.

A comparison of *Gregory* and *Reno v. ACLU*—which struck down an Internet pornography law through use of a means-centered findings rule—illustrates the many ways in which structural doctrines may differ from one another. For example:

1. The *Reno v. ACLU* rule does not protect Tenth Amendment values of federalism. Instead, it implements First Amendment values of free expression.

2. First Amendment values, unlike federalism values, have long been routinely protected by courts with on-or-off rules. The argument based on judicial “underenforcement” of rights available in *Gregory* thus may well be out of reach in *Reno v. ACLU*.

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1010. *See supra* note 182 and accompanying text.

1011. *See supra* note 177 and accompanying text.

1012. *See supra* note 178 and accompanying text.

1013. *See supra* note 185 and accompanying text.


1015. For a discussion of this underenforcement rationale, see *supra* note 177 and accompanying text.
3. Heavy reliance on political processes to protect constitutional values is hardly a dominant theme in First Amendment law. If anything, our traditions suggest that courts must protect free-speech values with the most vigorous constitutional safeguards lest majority factions undermine too readily the basic freedoms of dissidents and minorities.\textsuperscript{1016} Gregory's "protective-process augmentation" argument thus does not easily carry over to the *Reno v. ACLU* context.\textsuperscript{1017}

4. Finally, the rule of *Reno v. ACLU* differs from the Gregory rule with regard to the nature of the structural protection it affords. The Gregory rule focuses on the specificity with which Congress expresses its ultimate will. By mandating clarity, Gregory pushes Congress to wrestle with the yea-or-nay value judgment it has been called on to make about national regulation of state selection of important decisionmakers. The *Reno v. ACLU* rule, in contrast, involves a judicially compelled legislative examination of alternative means for achieving a concededly permissible end. The point of the rule is not (or at least not merely) to induce a careful weighing of constitutional costs and offsetting benefits; instead the Court seeks to force the legislature to engage in a thoughtful evaluation and ranking of a range of goal-advancing options by bringing to bear the significant predictive and fact-finding advantages that legislatures possess.\textsuperscript{1018}

This brief comparison raises tough questions. Why, for example, should the Court have applied a structural rule in *Reno v. ACLU* if First Amendment values (unlike—at least arguably—the federalism values involved in Gregory) are not generally underenforced?\textsuperscript{1019}

Was a structural intervention justified because that Amendment

\textsuperscript{1016} See, e.g., GUNther & SULLIVAN, supra note 30, at 1030 (stating that "the Court treats speech as enjoying strong presumptive protection, and frequently intervenes to strike down government regulation").

\textsuperscript{1017} For a discussion of this argument, as applicable to cases like Gregory, see supra note 185 and accompanying text.

\textsuperscript{1018} See supra note 544 and accompanying text.

\textsuperscript{1019} See, e.g., Eskridge & Frickey, supra note 116, at 631 (hypothesizing that Court has backed off from applying avoidance principle in certain First Amendment contexts "because those constitutional protections are not underenforced to the same extent" as others).
occupies a "preferred position" that the Court felt a need to safeguard in some way, even though it could not bring itself to deploy an on-or-off rule? Was a structural intervention appropriate in *Reno v. ACLU* because that case concerned developing technologies that distinctively justified a provisional, instead of a conclusive, treatment of the constitutional issues the Court confronted? Was a means-centered dialogic approach particularly appealing because of Congress's superior capacity to assess alternative approaches to dealing with complex problems (and all the more so because of their emerging, technological dimension)?

Was the Court in *Reno v. ACLU* inclined to use a second-look invalidation, rather than a flat-out invalidation, because the case involved "lower value" indecent speech?

These questions reflect the rich mix of factors courts must consider as they work with structural rules. These questions also suggest why different rules may emerge in different contexts to protect different constitutional values in different ways. At the same time, structural rules, in all their forms, reflect a distinctively provisional and dialogue-centered approach to judicial review. This fact raises the very large question toward which we have been advancing: Does the "hard look" approach of these cases itself hold up under the hard look of a systematic appraisal?

It may be surprising—given the now-demonstrated pervasiveness of structural rules in our law—that there is any ground for controversy about the meritoriousness of this doctrinal approach. Simply assuming the appropriateness of structural rules, however, would be deeply wrong for at least two reasons. First, the Court itself (and, indeed, the broader academic community) has not focused on structural decision making as a unitary phenomenon. There is, accordingly, no systematic treatment of the merits and

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1021. See infra note 1045 and accompanying text.

1022. See Sunstein, *supra* note 425, at 8 (noting that "a minimalist path usually... makes sense when the Court is dealing with an issue of high complexity").

1023. See, e.g., *GUNTHER & SULLIVAN*, *supra* note 30, at 1155 (noting that Justice Stevens has been a "leading advocate" of reduced scrutiny of "lower value" indecent speech).

1024. See *supra* notes 44, 62 and accompanying text.

1025. For a brief comparison of structural rules and the "hard look" doctrine of administrative law, see *supra* notes 39-42 and accompanying text.
demerits of these rules in the academic literature and, even more so, in the cases. One might say the Court has quietly—perhaps even subconsciously—gravitated in the direction of structural rules. It is an open question whether this doctrinal drift is a good idea.

Second, to the extent the Court has grappled with the wisdom of structural approaches, it has been of two minds. Even while endorsing proper-purpose rules, for example, the Court often has excoriated purposive analysis in constitutional law. In addition, there are strong signals that structural analysis—in at least some important contexts—has attracted one strong critic on the Court. If, as Justice Scalia has suggested, “content” (rather than “form” and “processes”) must, at least ordinarily, determine the constitutionality of state policy pronouncements, the future of structural rules seems dim indeed. Among the other members of the Court, Justice Stevens seems unflinchingly committed to structural decision making. Other Justices—quite understandably—have been groping their way through the pros, the cons, and the complexities of structural analysis. The Court’s opinions in *Lopez* are telling in this regard. In his majority opinion, Chief Justice Rehnquist (joined by Justices O’Connor, Scalia, Kennedy, and Thomas) clearly sounded structural themes by noting the absence of congressional affecting-commerce findings, while simultaneously downplaying the significance of this omission. In his dissenting opinion, Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg), questioned the relevance of congressional findings, but refused to say they would have no weight. Even Justice Souter, who seemed most bent on marginalizing the absence of congressional findings in evaluating commerce power questions, seemed unable in the end to go the whole distance. Against this backdrop, there can be no escape from the hard work of carefully assessing the rightness of structural review.

1026. See supra notes 67-70 and accompanying text.
1027. See supra notes 770-81 and accompanying text.
1028. See supra note 247 and accompanying text.
1029. See supra notes 399-406, 417-38, 837-44 and accompanying text (discussing *Mow Sun Wong, Fullilove, Sable Communications, and Reno v. ACLU*).
1030. See supra notes 351-63 and accompanying text.
1031. See supra note 363 and accompanying text; see also supra note 372 (discussing Justice Breyer’s dissent in the *Morrison* case).
1032. See supra note 363 and accompanying text.
Along our way, we have touched on arguments for and against judicial use of structural rules. Before developing a more comprehensive and systematic list of arguments, it is worth putting the role of structural rules in a broader context. Structural review—as we consider it here—is not the exclusive, the dominant, or even the most important style of constitutional decision making. It is merely one tool that courts may and do use to give meaning and protection to constitutional guarantees. This one-arrow-in-the-quiver view of structural rules helps to focus the normative inquiry. The question is not whether structural rules are wise in the abstract or standing alone. The question is whether it makes sense for the Court to use these rules, along with many forms of on-or-off rules, in carrying out its vital work as the judicial guardian of the Constitution.

The arguments for using structural rules in this manner may be counted and cast in different ways. A bill of particulars, however, almost certainly would include the following litany of defenses:

1. Structural review recognizes the centrality of democratic self-government, without stripping the Court of a special role in protecting constitutional rights. Put another way, structural rules reflect a wise and deeply rooted commitment to judicial restraint. At the same time, these

1033. See, e.g., supra notes 443-55 and accompanying text (discussing pros and cons of proper-findings-and-study rules).
1034. See supra notes 6-13 and accompanying text.
1035. See, e.g., FISHER, supra note 14, at 230 ("Through what Alexander Bickel once called the Court's 'continuing colloquy' with the political branches and society at large, the judiciary's search for constitutional principles can be reconciled with democratic values."); TRIBE, supra note 24, § 3-4 at 39 (stating "democracy is surely less threatened by a system of constitutional interpretation in which many may share significant and respected roles than by a system with but one authoritative voice"); Dimond, supra note 69, at 209 ("This vision of the Court as initiator of a dialogue about the meaning of the Constitution certainly makes judicial review more consistent with the traditional theory of democracy.").
1036. On the wisdom of and justifications for judicial restraint, see generally United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (arguing that "head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be benificial to either"); worrying that "the public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches"); Furman v. Georgia, 408 U.S. 238, 470 (1972) (Rehnquist, J., dissenting) ("[J]udicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review."); BICKEL, supra note 6, at 19 ("[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral
rules leave courts with significant powers, including (as we just have noted) the power to deploy traditional on-or-off doctrines in appropriate cases.\textsuperscript{1037}

2. Structural rules comport with—and hold the potential of largely systematizing—the reality that an interactive interpretation of the Constitution, deeply involving nonjudicial authorities, is pervasive and inescapable.\textsuperscript{1038} This fact, perhaps overlooked in earlier times, is now well documented.\textsuperscript{1039} Courts can use structural review to deal
with this phenomenon in a conscious, constructive, and intellectually honest way.\textsuperscript{1040}

3. Structural review facilitates a positive, cooperative, and fruitful collaboration among the different branches of government.\textsuperscript{1041} It does so by drawing on the strengths of lawmakers are likely to shape the Constitution together."). Others have made valuable contributions too. See, e.g., DIMOND, supra note 19, at 4 ("Over time, we the people respond to the Court's interpretation, either by acquiescing in the ruling or by framing a different understanding, whether by legislation, argument before the Court or in other public arenas, our conduct, the appointment of new Justices, or constitutional amendment."); FISHER, supra note 14, at 12 (noting that "careful studies by Robert Dahl, David Adamany, and Richard Funston show that the Court generally stays within the political boundaries of its times"); Nagel, supra note 363, at 659 ("It does seem to be true that sooner or later the Supreme Court goes along with the dominant trends of the time."); cf. WILLIAM G. ANDREWS, COORDINATE MAGISTRATES: CONSTITUTIONAL LAW BY CONGRESS AND THE PRESIDENT (1969). As noted by Professor Friedman: "Robert Dahl observed in his now-famous article that over half of the Supreme Court decisions striking down congressional legislation occurred more than four years after the legislation was passed. Where legislation was overruled in less than four years, Dahl found that Congress' policy view generally won out, albeit after a struggle." Friedman, supra note 21, at 641 n.326 (citation omitted) (citing Dahl, supra note 495, at 157-63); see also Tushnet, supra note 24, at 813 (discussing work of Dahl and concluding that "Supreme Court decisions make a difference, it seems, when contemporary political majorities, or near-majorities, want them to make a difference").

\textsuperscript{1040} See Eskridge & Frickey, supra note 116, at 646 (worrying that "a lack of recognition and candor about what the Court has done recently with quasi-constitutional law has submerged a variety of hotly contestable normative and empirical issues").

\textsuperscript{1041} See id. ("[I]n the abstract there are powerful arguments for quasi-constitutional law rooted in a vision of our public lawmaking processes as a partnership in which the judiciary plays an active role, but eventually defers to the democratically accountable branches."). Professor Sunstein (in speaking of the related subject of narrow, deliberation-forcing judicial rulings) captures much the same idea:

\begin{quote}
Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation. It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary. But the Court can certainly increase the likelihood that those solutions will be good ones.
\end{quote}

Sunstein, supra note 439, at 101; see also John Denvir, Towards a Political Theory of Public Interest Litigation, 54 N.C. L. REV. 1133, 1139 (1976) ("Too often, litigation and legislation have been seen as competing modes of reform, rather than as complementary approaches."); Edward H. Levi, Some Aspects of Separation of Powers, 76 COLUM. L. REV. 371, 391 (1976) ("[T]he authors of the Constitution... did not envision a government in which each branch seeks out confrontation; they hoped the system of checks and balances would achieve a harmony of purposes differently fulfilled. The branches of government were not designed to be at war with one another. The relationship was not to be an adversary one, though to think of it that way has become fashionable."); Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 226 (1986) ("[T]here need not be overt confrontation between the judicial branch and the
each branch, by providing the judiciary with valuable and usable feedback to its thinking, and by generating in the end a "more vibrant and durable constitutional interpretation."

4. Structural rules offer courts a much-needed middle ground for handling cases that involve such perplexing difficulties as "a lack of information, . . . changing circumstances, or . . . moral uncertainty." These rules wisely provide courts with room to maneuver when either an outright validation or an outright invalidation of a government program constitutes a response that is too crude.
5. Structural review facilitates judicial action that is appropriately proportionate to the "creative" judge-made character of many constitutional doctrines.\textsuperscript{1047} It does so by permitting courts to identify constitutional norms while simultaneously insisting that courts recognize the need to involve other institutions in defining the contours of those norms in light of preexisting and emerging societal values.\textsuperscript{1048}

\textsuperscript{1047} See ARCHIBALD COX, THE COURT AND THE CONSTITUTION 377 (1987); Sandalow, supra note 13, at 1173 (noting that the "perception that the rules enforced by courts are not contained in the Constitution poses a formidable challenge for the institution of judicial review"); see also Calabresi, supra note 13, at 84 ("[T]heorists and judges have yet to reach any sort of consensus on what counts as a fundamental right" and it "is precisely the indeterminacy of such an inquiry ... that strongly commends the use of alternative modes of judicial review in addition to [on-or-off fundamental rights] review.").

\textsuperscript{1048} See FISHER, supra note 14, at 5 (arguing that, in applying "competing sections" of the Constitution "that contain conflicting political and social values," the Court needs "the conscientious guidance and participation of the legislative and executive branches"); Agresto, supra note 8, at 483 (noting that the "Constitution ... is responsive to popular needs [and] legislative acts"); Burt, supra note 701, at 128 (suggesting, in support of common-law-like constitutional rules, that "Congress ... can operate with greater flexibility than the Court and can balance competing objectives with a more sensitive touch"). Professor Sandalow offered particularly interesting insights on this point. As he explained:

[C]onstitutional law [must be] understood as the expression of evolving societal norms. A court cannot lay a challenged statute beside a societal norm and decide whether the former squares with the latter. Societal norms are not a "brooding omni-presence" merely awaiting discovery by a sufficiently keen observer. They must be constructed and, inevitably, their construction must be effected through some process. A judgment whether governmental action is consistent with societal norms is, for that reason, closely bound up with judgments about the process through which the norms should be constructed. In deciding whether governmental action does conform to societal norms, accordingly, a court must consider whether, by reason of the decisionmaking process leading to it, the action ought to be understood as establishing those norms.

Sandalow, supra note 13, at 1185 (footnote omitted). Professor Winter has added:

(\"[W]hat is most salient is the importance of the dialogue between the Court and society over the content of our norms and deepest values. Dialogue is instrumental in maintaining the quality of the process of norm articulation and the resulting norms. It also increases the legitimacy of that process. A Court unconstrained by societal judgments in the explication of values would be insufferably undemocratic. Conversely, a society that left the articulation and development of its values solely to the partisan political process and the experience of governance would risk moral enfeeblement. By raising the process from the unconscious and unspoken to the articulated and dialogical, we achieve a significant advance over the dangers of the ad hoc and the questionable legitimacy of value imposition.\"

Winter, supra note 570, at 701. See generally Devins, supra note 917, at 50 (claiming that Court's recent assisted-suicide decisions "reflect ... an increasing recognition on the part of
6. Structural safeguards permit courts to educate nonjudicial authorities about constitutional rules and principles.\textsuperscript{1049} These rules also provide tools to spur those authorities—and the public at large—to reassert their proper responsibilities to pay heed to, and participate in bringing to life, the Constitution's commands.\textsuperscript{1050}

progressives, most notably Ruth Bader Ginsburg, that the Supreme Court does little more than 'prolong divisiveness' when it 'ventures too far in the change it orders'). One might add to these observations, albeit at the risk of gilding the lily, the thought that structural doctrines comport with some of the very deepest values—temperance, modesty, humility, and self-control—that our culture has endorsed for thousands of years. See, e.g., Ginsburg, supra note 1, at 1208 (advocating "a temperate brand of decisionmaking, one that was not extravagant or divisive"); Strauss, supra note 1036, at 891 (noting that "the traditionalism that is central to common law constitutionalism is based on humility" as well as the "idea . . . that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time"); Sunstein, supra note 434, at 43 ("Those who favor narrow decisions and incompletely theorized arguments tend to be humble about their own capacities."); id. at 20 (noting that "the democratic argument for minimalism invokes the need for prudence, social adaptation over time, and humility in the face of limited judicial capacities and competence").

\textsuperscript{1049} See, e.g., Rostow, supra note 570, at 208 ("Justices are inevitably teachers in a vital national seminar."); see also Sunstein, supra note 335, at 1182 (noting Court's important role in "call[ing] public attention to a problem without foreclosing public judgment").

\textsuperscript{1050} See, e.g., CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 13 (1993) ("[E]lected representatives and citizens in general ought to be involved in the process of deliberating about the contemporary meaning of constitutional principles. This process of deliberation is not only for the judges."); Estreicher, supra note 139, at 1152-53 (describing one key purpose of the remand to the legislature—and one that was "certainly more important [than issue avoidance] to Bickel and Wellington"—as ensuring "that the statute, if reenacted, reflects a conscious legislative determination focusing on the court's concerns"); also noting that through judicial use of this technique, "the legislature has been brought into the constitutional lawmaking process"); Anthony T. Kronman, Alexander Bickel's Philosophy of Prudence, 94 YALE L.J. 1567, 1587 (1985) ("By offering a partial or reversible solution to a constitutional problem, a solution that bespeaks its own uncertainty regarding the principle or principles involved, the Court invites the other branches of government, and the public, to rise to a consideration of principle and address the problem in the same spirit."); see also Sunstein, supra note 335, at 1187 (commending Court's largely restrainist affirmative action decisions: "if we step back a bit, we might conclude that the Court has helped keep the nation's eye on the affirmative action issue—on the questions of policy and principle that lie behind the debate—while at the same time failing to preempt processes of public discussion and debate" about them). Concerns about desensitizing the public to its constitutional responsibilities may be traced back at least to the seminal work of Professor James B. Thayer, who observed: "The tendency of a common and easy resort to [on-or-off judicial review] . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." JAMES BRADLEY THAYER, JOHN MARSHALL 107 (1901). A prominent modern proponent of the same idea is Professor Cass Sunstein. See, e.g., SUNSTEIN, THE PARTIAL CONSTITUTION, supra at 9 ("[T]here has been far too much emphasis, in the last generation,
7. Structural rules help conserve and consolidate the judicial power by reducing "friction between the Court and Congress"\(^{1051}\) and between the Court and other nonjudicial actors, too.\(^{1052}\) Structural rules also guard the Court against the dangers of "self-inflicted wounds"\(^{1053}\) created by erroneous outright on-or-off rule invalidations,\(^{1054}\) while still

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\(^{1051}\) Eskridge, supra note 119, at 1017.

\(^{1052}\) See, e.g., Sunstein, supra note 119, at 468-69 (noting that "[t]he principle that statutes should be construed so as to survive constitutional challenge" is defensible because, among other things, it "minimizes inter-branch conflict"). Many observers have noted that techniques like structural decision making tend to preserve the Court's decision-making authority. See, e.g., FISHER, supra note 14, at 6 ("Because of the shaky foundation of judicial review, the Court consciously circumscribes its activities and invites other branches to participate."); id. at 12 (noting that "[t]he Court maintains its strength by steering a course that fits within the permissible limits of public opinion" and that "[f]or their own institutional protection, courts must take account of social movements and public opinion"); Neuborne, supra note 69, at 377 (noting that structural review tends to "minimize the unavoidable waste of a court's political capital that results from direct conflict with the coordinate branches"); Sandalow, supra note 13, at 1193 (asserting that "a more modest statement of the courts' role may add significantly to its legitimacy"); Wellington, supra note 8, at 502 ("If it can be shown... that often there is less finality in a constitutional decision than meets the eye, ... then perhaps we can accept more readily the legitimacy of judicial review."); see also Gregory A. Caldeira & James L. Gibson, The Etiology of Public Support for the Supreme Court, 36 AM. J. POL. SCI. 635, 660 (1992) ("[T]he bolder the Court is in confronting the policies of Congress, the less confidence citizens bestow it as an institution."); see generally ELY, supra note 88, at 47 ("[W]e are told that the Court's 'essentially anti-democratic character keeps it constantly in jeopardy of destruction': it knows 'that frequent judicial intervention in the political process would generate such widespread political reaction that the Court would be destroyed in its wake.'" (quoting Philip B. Kurland, Toward A Political Supreme Court, 37 U. CHI. L. REV. 19, 20 (1969) and Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L. J. 1363, 1366 (1973))).

\(^{1053}\) CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928).

\(^{1054}\) See, e.g., Agresto, supra note 8, at 485 (observing that "the obvious theoretical reason for viewing the Court as a partner in the process of constitutional exegesis and not as the last word ... is that the Court can, and often has, made serious errors regarding the meaning and demands of the constitutional text"; citing as examples the "racial cases of the 1880's, the economic decisions of the earlier part of this century and the crisis of constitutional adjudication in the first years of the New Deal"); Friedman, supra note 15, at 777-78 (describing "majoritarian participation in defining rights" as "both inevitable and appropriate ... because the Court is neither omniscient nor invincible [and] [b]ecause courts, including the Supreme Court, do not get everything right the first time, or even the second or third
deeply involving the Court in identifying and shaping and giving life to constitutional values.  

8. The essential "democracy-forcing" goals of structural review are powerfully good ones. Structural doctrines cause policymakers to focus on the impact of their work, to take account of constitutional values, and to craft rules with care. These doctrines also wisely encourage "reason-giving in the public domain" and "promote democratic accountability and democratic deliberation." In these ways, structural review tends to enhance both the quality and the public acceptance of government rules.

1055. See Agresto, supra note 8, at 493 (arguing that "if fear of mistake—fear of finality—induces the desire for restraint, then the answer is to elucidate ways to restore the Court into the active partnership of checks and balances, and not to ask it to be passive").

1056. See Sunstein, supra note 434, at 100.

1057. See, e.g., supra notes 448-54 and accompanying text.

1058. Sunstein, supra note 434, at 8.

1059. Id. at 7. To follow the thought of Professor Bickel, if the legislature has made a policy "back-handedly, off-handedly, less explicitly than is desirable" then it seems self-evidently sensible to remand that policy for an "orderly, deliberate, explicit, and formal reconsideration," when an issue of "grave importance" is at stake. BICKEL, supra note 6, at 166. For similar views, see DIMOND, supra note 19, at 17 (arguing that "the people's representatives . . . have an obligation to raise and to decide . . . issues frontally on the merits" when "fundamental national rights" are at stake because otherwise "Congress may inadvertently resolve the issue without even understanding itself what is being decided, let alone allowing the people to debate the issue publicly"); Neuborne, supra note 69, at 377 (defending rules under which "acts in derogation of significant values would require interbranch cooperation and at least an opportunity for reflection"); Sandalow, supra note 13, at 1188 (claiming that "if governmental action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate and broadly based political judgment"); see also Carlson & Smith, supra note 27, at 232 (noting Justice Stevens's gravitation to structural rules, so as to negate "arbitrary or uninformed decisions"); Sunstein, supra note 434, at 37 ("[C]ourts should provide spurs and prods when either democracy or deliberation is absent."). See generally Farber & Frickey, supra note 444, at 926 ("Although still developing, 'due process of lawmaking' has the potential to strengthen the democratic process.").

1060. See Gardbaum, supra note 69, at 825 (arguing that federalism-driven structural restraints might, "like other required aspects of the national political process, significantly affect both the content of federal legislation and the regard in which such legislation is generally held"); see also George A. Bermann, Taking Subsidiarity Seriously: Federalism in
9. Courts can use structural doctrines to fill the breach with respect to otherwise underenforced constitutional norms.\textsuperscript{1061} In addition, structural rules can be adapted to take account of the very dynamics that have caused an underenforcement of norms in the first place.\textsuperscript{1062}

10. Structural rules wisely comport with a view of the judiciary that emphasizes its role in sharpening and strengthening

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the European Community and the United States, 94 COLUM. L. REV. 331, 391 (1994) (suggesting that inquiries by the European Court of Justice into whether the political institutions have adequately examined alternatives before legislating would generate greater trust in the European Union's legislative outcomes); Clark, supra note 763, at 954 ("Laws enacted because of 'impure' motive or prejudice ... create a sense of breach of faith between the governor and the governed."). See generally Robert S. Summers, Evaluating and Improving Legal Processes—A Plea for "Process Values," 60 CORNELL L. REV. 1, 4 (1974) (emphasizing importance of process "not only as a means to good results, but also as a means of implementing or serving process values such as participatory governance, procedural rationality, and humaneness").

1061. See, e.g., Adler, supra note 119, at 862 (quoting approvingly Professor Sunstein's suggestion that "aggressive construction of questionable statutes, removing them from the terrain of constitutional doubt, can be understood as a less intrusive way of vindicating norms that do in fact have constitutional status; and this point applies even if courts would not invalidate those statutes if they were forced to decide the question"); Frickey, supra note 27, at 728 (claiming that "a critical factor" in the Court's findings-related and narrow ruling in Lopez probably was that the federalism values it implemented "are difficult to enforce through judicial review"); Sunstein, supra note 119, at 468-69 (noting that, among other purposes, the avoidance principle "strengthens judicially underenforced constitutional norms"); see also Rapaczynski, supra note 310, at 379 ("[T]he very essence of the process-oriented approach is that certain fundamental values cannot be sufficiently protected by a conferral of entitlements on individuals, either because their enforcement would be inefficient or because the courts would lack any manageable standards of adjudication. But precisely because the values at stake are fundamental, if some institutional arrangements can be devised to protect them indirectly, such arrangements may themselves become a part of the constitutional structure . . . ."). See generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212 (1978).

1062. See supra note 175 and accompanying text (discussing role of federalism-driven clear-statement rules in facilitating informed operation of political processes relied on to protect federalism values). One phenomenon related to the underenforcement of rights (what we might call the phenomenon of "congressional underexercice of powers") is exemplified by the judicially enforced principle of a borderless national market embodied in the so-called dormant Commerce Clause. Traditional justifications for this principle focus on Congress's predictable noninterference with commerce-undermining protectionist measures adopted by states, due to tit-for-tat logrolling within Congress and Congress's preoccupation with other, more pressing matters. To the extent these institutional deterrents exist, they cause a failure to negate state measures incompatible with the constitutional plan. On this view, the structural dormant Commerce Clause can be justified on underenforced-constitutional-norm grounds.
\end{quote}
the processes of government. ¹⁰⁶³ This process-centered conception of the judicial role—a conception that is deeply ingrained in modern constitutional thought ¹⁰⁶⁴—responds to the courts' institutional strengths, serves to distinguish judges from legislators, and comports with (rather than subverts) the basic constitutional commitment to democratic self-government. ¹⁰⁶⁵

One signal of the potency of these arguments lies in a listing of the champions of structural review. We surely cannot say that any one group of scholars would endorse all the structural doctrines enumerated in this Article. This is especially true because this itemization of rules has not appeared before, because all these rules are subject to controversy, and because the existing commentary on structural rules is limited and largely doctrine-specific. ¹⁰⁶⁶ At the same time, the list of scholars who, among others, have endorsed significant forms of structural review reads like a virtual all-star

¹⁰⁶³. See, e.g., Linde, supra note 27, at 255 (“If this republic is remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes, not for its perfection of unique principles of justice and certainly not for the rationality of its laws. This recognition ... may well take our attention beyond the processes of adjudication and of executive government to a new concern with the due process of lawmaking.”); Neuborne, supra note 69, at 368-69 (“When substantive-review judges identify values and totally insulate them from majority will, the troublesome question of why judges are better than other officials at identifying and weighing fundamental values cannot be avoided. But the assumption is less questionable in the context of process-based review. When judges merely identify those areas in which scrupulous regard for procedural regularity is most appropriate, their functional superiority would not be seriously questioned.”).

¹⁰⁶⁴. See supra notes 88-93, 456-60 and accompanying text.

¹⁰⁶⁵. See, e.g., Ely, supra note 88, at 88 (advocating process-driven, representation-reinforcing judicial review on two main grounds: “The first is that a representation-reinforcing approach to judicial review, unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy. The second is that such an approach, again in contradistinction to its rival, involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials”); Wellington, supra note 8, at 500 (emphasizing that “process ... is a comfortable and familiar domain of lawyers and judges”); see also Eskridge & Frickey, supra note 116, at 631 (arguing that superstrong clear-statement rules are “not ultimately undemocratic, because Congress can override the norm” and that “ultimately such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution”).

¹⁰⁶⁶. See supra notes 67-69 and accompanying text (noting limited prior treatment of structural rules).
team of constitutional analysts: Bickel, Brest, Calabresi, Ely, Eskridge, Farber, Frickey, Gunther, Linde,

1067. See, e.g., supra notes 506-30 (discussing Professor Bickel's views on desuetude); see also Calabresi, supra note 13, at 103 (noting that use of second-look rules "could appropriately be called the 'Bickellian' approach").

1068. See Brest, supra note 385 (defending motive-based review).

1069. See supra note 69 and accompanying text (noting strong structural views of Judge Calabresi); see also Quill v. Vacco, 80 F.3d 716, 742 (1996) (Calabresi, J., concurring) ("What I do say is that no court need or ought to make ultimate and immensely difficult constitutional decisions unless it knows that the state's elected representatives and executives—having been made to go, as it were, before the people—assert through their actions (not their inactions) that they really want and are prepared to defend laws that are constitutionally suspect."); rev'd, 521 U.S. 793 (1997).

1070. See supra notes 461-64 and accompanying text (discussing structural aspects of Professor Ely's process-centered style of review).

1071. See Eskridge & Frickey, supra note 116, at 631 (identifying values of "super-strong clear statement rules").

1072. See Farber & Frickey, supra note 444, at 919 ("The prima facie unconstitutionality of some classes of legislation should be rebuttable, if at all, only by clear and persuasive congressional deliberation. At least, if evidence establishes that Congress did not make a deliberate choice, otherwise 'suspect' legislation should receive even less judicial deference."); id. at 918 ("[I]n our view due process of lawmaking is sufficiently tied to constitutional structure, to the Madisonian constitutional ideal of deliberative legislative policymaking, and perhaps even to the federal common law to justify its continued use in constitutional adjudication.").

1073. See supra note 1071; see also Frickey, supra note 27.

1074. See Gunther, supra note 30, at 44-45 (advocating expanded use of means-based scrutiny in part because it would "resemble the judicial technique of remanding to the legislature, familiar in other areas of constitutional law").

1075. See Linde, supra note 27. Justice Linde's name, it seems to me, belongs on this list, notwithstanding his aversion to proper-finding-and-study rules, at least in the rational-relation context, see supra note 340. Justice Linde, after all, coined the "due process of lawmaking" moniker and strongly encouraged courts to give less attention to the substance of ordinary legislation and more attention to legislative processes. See supra note 1063. See generally Hamilton, supra note 268, at 179 (emphasizing Justice Linde's role in encouraging structural analysis). While Justice Linde's seminal article did not focus specifically on the interaction of structural and substantive constitutional rights, nothing in that article denies the possibility of such a connection; indeed, Justice Linde's reliance on notions of a procedural Due Process Clause—which take account of the nature of the private rights at stake, see Mathews v. Eldridge, 424 U.S. 319, 335 (1976)—suggests his likely receptiveness to strengthening process-centered rules when concerns about free speech, free exercise, and other core constitutional interests are at risk. Finally, Justice Linde has revealed strong structural tendencies in casting a skeptical eye on lawmaking by popular initiative where dangers of factional oppression are great. See supra note 905; see also Hamilton, supra note 268, at 169 (noting Justice Linde's "fidelity to his structural perspective on the Constitution" in broadly questioning lawmaking by way of popular initiative). It is not surprising, then, that one of the most structural of all opinions—Justice Stevens's dissent in the Fullilove case—drew most heavily upon the work of Justice Linde. See Fullilove v. Klutznick, 448 U.S. 448, 549 n.24, 550-51 n.26 (1980) (Stevens, J., dissenting).
Monaghan, Sandalow, Sunstein, Tribe and Wellington. If one may judge doctrines by the company they keep, the case for some serious version of structural review seems strong indeed.

On the other hand, structural doctrines have not escaped enthusiastic criticism. Perhaps the most encompassing critique has come from the powerful pen of Professor Mark Tushnet. Justice Scalia, in addressing Justice O'Connor's concurrence in *Thompson v. Oklahoma*, also voiced a hearty skepticism that logically extends to a number of structural rules. And the dissenting opinion of Justice Souter in *Lopez v. United States* expressed concerns about excessive use of structural review exercised by way of proper-findings rules. By drawing on the work of these and other analysts, it is possible to construct a body of arguments against the use, or at least the expansive use, of structural review. These arguments, offered here in highly simplified form, are as follows:

1. There is no proper constitutional source for structural rules. Indeed, judicial extrapolation of structural rules clashes with the Constitution's express specification of only certain lawmaking structures (such as bicameralism and presentment) and the Court's longstanding insistence that due process protections do not attach to government policymaking.
2. Structural rules should be rejected because they lack a limiting principle. They leave courts at sea not only in deciding when to trigger structural protections, but also in choosing what structural protections to apply.

3. Structural rules threaten a proper separation of powers by permitting courts to regulate internal legislative processes. This form of judicial intervention is deeply inconsistent with legislative autonomy as revealed and defined by deep-seated legal authorities and traditions.

4. Structural rules encourage judicial overreaching by giving courts a too-convenient tool for invalidating government decisions.

1087. For examples of the invocation of this criticism see supra notes 243-45 (noting Justice Scalia's assertion of this criticism in Thompson). See also Lopez, 514 U.S. at 614 (Souter, J., dissenting) (questioning, in commerce power context, judicial "review [of congressional action] for deliberateness" when exercised "under standards never expressed and more or less arbitrarily applied"); Merrill, supra note 695, at 58-59 (critiquing Professor Monaghan's conception of constitutional common law on the ground it "is constitutionally unprincipled"); Sandalow, supra note 13, at 1194 ("[T]he suggestion that courts ought to distinguish between those acts of Congress that do and do not represent deliberate decisions fails to indicate how courts are to make that determination. Although I believe that they can do so, and that constitutional decisions are in fact often influenced by judicial perceptions of the deliberateness of congressional judgments, the argument remains to be made."); Schrock & Welsh, supra note 654, at 1146 ("Regrettably, while he acknowledges that providing criteria by which to distinguish between irreversible constitutional exegesis and constitutionally reversible constitutional common law is 'obviously crucial' to his entire enterprise, Monaghan fails to provide workable criteria."). See generally Brogan v. United States, 522 U.S. 398, 406 (1998) (expressing worry about an "expansive, user friendly judicial rule" to the effect that "criminal statutes do not have to be read as broadly as they are written" because "there is no way of knowing when, or how, the rule is to be invoked").

1088. See, e.g., Tushnet, supra note 24, at 823 ("[S]tructural review fails to specify how much attention an issue must get in the legislature and "would leave the judges wholly unconstrained in their determination of what the 'right' agency is.").

1089. See supra note 247 and accompanying text (noting Justice Scalia's view that "interference in the States' legislative processes" goes to "the heart of their sovereignty" and that he knows "of no authority whatever" for "specifying the precise form that state legislation must take"); Lopez, 514 U.S. at 614 (Souter, J., dissenting) (suggesting that "review [of congressional action] for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court"); see also Linde, supra note 27, at 242-43 (asserting that "most courts and commentators find it improper to question legislative adherence to lawful procedures" and attribute this restraint in part to "respect between coordinate branches"); cf. Brest, supra note 385, at 129-30 ("Especially where the decisionmaker claims to have pursued only legitimate objectives, a judicial determination of illicit motivation carries an element of insult; it is an attack on the decisionmaker's honesty. These concerns apply to lower-echelon officials as well as to legislators and high executive officials. Our constitutional traditions, however, accord greater respect to the integrity of the higher agencies.").
policies. Worse yet, these rules encourage judicial subterfuge by letting courts hide substantive decisions in purportedly provisional rulings that are only theoretically reversible by political authorities.

5. Structural rules carry with them the same doctrine-corrupting vices that mark the "passive virtues" championed by Professor Bickel. In particular, structural rules invite
the distortion and dilution of otherwise useful substantive doctrines like the vagueness rule.  

6. The employment of structural rules is inherently wasteful, futile, and encouraging of deviousness by nonjudicial authorities. This is so because policymakers who encounter structural rulings often can and will resuscitate invalidated laws simply by engaging in phony exercises of feigned procedural attentiveness.

7. The availability of structural rules, particularly in large numbers, risks the dilution of vital constitutional protections. This is so, in large part, because courts offered the ready option of structural review too often will "chicken out" when called on to do the unpopular work of using outright declarations of invalidity to safeguard constitutional freedoms.

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1093. See id. at 21 (worrying that Bickel views "narrow constitutional doctrines such as vagueness as essentially unprincipled").

1094. See, e.g., supra note 763 and accompanying text (noting Supreme Court's expression of concern about motive review because of its potential futility).

1095. See, e.g., Farber & Frickey, supra note 444, at 876 (worrying that "remanding an issue to the legislature... is futile because the mechanistic process of legislation eliminates the possibility of a thoughtful legislative response"); id. at 918 (stating that "the deliberation approach sometimes may be useful in screening out 'backroom deals,' but it can be evaded by sophisticated legislators who are savvy enough to construct an appropriate legislative history"); see also Tushnet, supra note 443, at 211 (suggesting that "structural review is not constitutional review at all" because "it imposes no substantive limitations on legislative activity").

1096. See, e.g., Schrock & Welsh, supra note 654, at 1159, 1165 (worrying that "adoption of the constitutional common law methodology might precipitate a dilution or annihilation of rights," because they would be placed "on a less firm foundation, since a common law rule is reversible by Congress while a constitutional right is not"); see also Bandes, supra note 755, at 328-32 (suggesting that Professor Monaghan gives unintentional credence to the textualist notion that what is not spelled out in the Constitution is not within the realm of legitimate interpretation, thus undermining the Court's ability to enforce, with on-or-off rules, important rights not derived directly from constitutional text). Professor Tushnet has expressed a particular worry along these lines—namely, that "[s]tructural review would force into the legislative arena precisely those issues on which we are skeptical of the legislature's ability to act fairly." Tushnet, supra note 443, at 210. He argues that this problem is illustrated by Justice Powell's opinion in Bakke, see supra notes 394-98 and accompanying text, which (he says) unwisely supports the idea that "legislatures may do things to or for [suspect or quasi-suspect] groups" so long as it is clear "that [this] is what the legislature really wants." Id.

1097. See, e.g., Calabresi, supra note 13, at 105 n.71 ("When he first described such a scheme of judicial review, Bickel was criticized for providing too narrow and conservative a role for the judiciary. The criticism was that judges who could use..."").
8. Frequent use of structural rules will erode the Court's power by demythologizing the Court and its work and by creating a continuing source of conflict between the Court and Congress. These problems will grow as the Court's use of structural rules fosters a perception that its work—being often concededly provisional—lacks a foundation in law and even the firm backing of the Court itself. Against this backdrop, political officials and the public may come to see the Court as little more than an unelected policymaking organ with no special constitutional competence or responsibility.

hesitate to employ [outright] nullifications in the hope that the legislature would fail to reenact the offending law and the issue would disappear. For the expression of yet another worry about judicial enfeeblement, see DIMOND, supra note 19, at 154 ("[T]here is always a risk that a Court fearful of congressional override under provisional review will just duck the issue.").

1098. See DIMOND, supra note 19, at 19 ("The fiction of the Supreme Court as the final arbiter in all constitutional cases has served to compel the people to give at least a respectful second look at the merits of legislation overturned by the Court. If the fiction were uncovered by the Court's explicit embrace of provisional review, it is possible that the Congress would feel free to run roughshod over the Court's point of view; and the people might then lose respect for the Court altogether."); Burt, supra note 701, at 133-34 (suggesting that a recognition "that Congress has, to whatever degree, an 'independent' role in interpreting the Constitution—is likely to remove an important restraint on Congress which has, in the past, usually counseled great wariness in trespassing on the Court's prerogatives" and that the Court "will have surrendered, in part at least, one of the Court's most potent institutional weapons: the authoritative tone of its constitutional ipse dixit"); Schrock & Welsh, supra note 654, at 1175 n.288 ("Outright judicial legislation undermines judicial authority not only by being cavalier about constitutional sources for particular subconstitutional rules but also, and more damagingly, by obscuring the boundaries of judicial review—and by showing a willingness to dissipate its identity as a court by casually donning a legislative hat. Asserting a novel legislative, subconstitutional jurisdiction, the Court jeopardizes its established Marbury, judicial and constitutional, jurisdiction."); see also Conkle, supra note 69, at 53 (noting that "overuse of provisional review . . . might reduce the force of all of the Supreme Court's constitutional opinions").

1099. See Schrock & Welsh, supra note 654, at 1154-55, 1157-58 (arguing that a Court that aggressively uses provisional rulemaking techniques "becomes hard to distinguish from an administrative agency or, . . . from a legislature," and once it has lost "its grip on the idea of the judicial office" the Court "will encounter difficulty in summoning up a sense of judicial authoritativeness on those occasions when the Constitution and country need an authoritative Supreme Court").

1100. See Kronman, supra note 1050, at 1587 (describing a "reversible solution to a constitutional problem" as "a solution that bespeaks [the Court's] own uncertainty regarding the principle or principles involved").

1101. See DIMOND, supra note 19, at 153 ("[I]f the people or their representatives in Congress ever come to understand that the Court's decisions are in any part judge-made
9. Structural rules are rooted in unrealistic assumptions about political processes. Among those assumptions is the false notion that legislative officials can and should act like judicial officials as they hammer out government policy in an environment inescapably pervaded by party influence, political logrolling, vote-seeking, and practical accommodation.

10. Structural rules, in any event, lack a proper precedential pedigree.
These arguments—particularly in the aggregate—cast a cloud of doubt over structural doctrines. We cannot, however, even begin to evaluate each of them on the merits in this already lengthy Article. At the same time, any self-respecting appraisal must at least preliminarily consider the first and most fundamental objection to structural rules—namely, that they are wholly illegitimate because they lack a proper source in the Constitution itself. An examination of this foundational question will occupy this Article’s final Part. That that examination involves many twists and turns may help along the critique that structural rules are too inherently “freewheeling” in nature to provide workable tools of judicial review. That examination also will reveal, however, that the case for structural rules is not based on political and moral theory alone. Rather, that case—as we now shall see—finds support in constitutional text, tradition, history, and precedent.

XIII. THE SOURCE OF STRUCTURAL RULES

What is the source of structural rules? This question, like many in constitutional law, turns out to have an answer that is both simple and complex. The simple part of the answer goes something like this: Structural safeguards of substantive constitutional rights emanate from the substantive rights they serve to safeguard. The complexities arise because of the need to confront counterattacking arguments that challenge the legitimacy of structural rules based on constitutional text and precedent. There are three arguments

1105. See Gunther, supra note 807, at 25.
1106. See generally supra notes 1087-88 and accompanying text (discussing lack-of-principle criticisms of structural rules).
1107. Before turning to these arguments, it is worth reemphasizing that structural rules are not all cut from the same cloth. See supra notes 1008-18 and accompanying text. For this reason examination of the source of structural rules must be, to a significant extent, contextual. For example, it may be that at least some rules of clarity have such a strong justification in the law of statutory interpretation that an investigation of their constitutional roots is beside the point. But see supra note 251 (suggesting difficulty of justifying super-clear-statement rules solely on traditional statutory-interpretation grounds). In a similar vein, the vagueness doctrine is such a longstanding feature of our law that any suggestion it is illegitimate would be farfetched indeed. Even with respect to the vagueness doctrine, however, it remains important to consider whether the structural features of the doctrine (as opposed, for example, to its well-accepted fair-notice features) are constitutionally legitimate. Identifying well-founded structural justifications, after all, may well affect the scope and operation of the doctrine. See, e.g., City of Chicago v. Morales, 527 U.S. 41, 58-59 (1999)
of this kind. According to the first argument, judicial recognition of structural protections (or at least many of them) is barred by a negative implication drawn from the Constitution's express recognition of only certain structural lawmaking requirements, particularly bicameralism and presentment. According to the second argument, judicial recognition of structural rules (or at least many of them) conflicts with the Court's longstanding insistence that due-process-type limits do not apply to government policymaking. According to the final argument, it is just too much of a stretch to extrapolate structural rules (or at least many of them) from such obviously substantive guarantees as the First, Eighth, and Tenth Amendments. We turn now to a point-by-point assessment of these critically important lines of attack.1108

A. The Negative-Implication Argument

Even the most careful reader will find in the Constitution no "structural rights" clause. The Constitution, however, does lay out a number of structural protections to be honored in the lawmaking process, particularly the requirements of bicameralism and presentment.1109 The negative-implication argument thus is made: If our Constitution specifically mandates certain lawmaking structures (namely, bicameralism and presentment), but makes no mention whatsoever of other structures (such as legislative fact-

1108. The arguments are, as I say in the text, important precisely because it is a "critical question" whether "these [structural] approaches can be traced fairly to constitutional constraints on legislative and executive lawmaking." Farber & Frickey, supra note 444, at 917-18. See generally Frank H. Easterbrook, Legal Interpretation and the Power of the Judiciary, 7 HARV. J.L. & PUB. POL'Y 87 (1984) (emphasizing the need to trace judicial decisions to independent sources of authority); Sunstein, supra note 434, at 77 n.205 (same). Interestingly, it remains possible to argue for the legitimacy of even the most controversial structural rules we have studied (such as proper-findings-and-study rules and constitutional "who" rules) whether or not they can be "fairly traced to constitutional constraints" in the narrow sense. The way to get to this outcome is to characterize such rules as themselves proper manifestations of the permissibly structural constitutional common law. See supra Part IX. This "house of cards" rationale can succeed, however, only if structural rules in general (and constitutional common law rules in particular) do not abridge some constitutional dictate. The ensuing text advances the argument that they do not.

finding), how can courts force lawmakers to use those other structures consistent with the constitutional text? Other pieces of the Framers' handiwork bolster the negative-implication argument. In particular, although generally imposing only the structural requirements of bicameralism and presentment, the Constitution provides that certain types of legislative action must conform to specialized structural rules. Tax laws, for example, must originate in the House of Representatives.\textsuperscript{1110} Congressional appropriations to "raise and support Armies" shall not "be for a longer Term than two Years,"\textsuperscript{1111} and some legislative actions—such as the ratification of treaties—require a supermajority vote.\textsuperscript{1112} To the negative-implication argument, we thus may add a kicker: Because the Framers knew how to stipulate heightened structural safeguards in specialized contexts, we may assume they did not intend to create the highly contextual, but wholly nontextual, structural rules that concern us here. \textit{Expressio unius est exclusio alterius!}\textsuperscript{1113}

This \textit{expressio unius} argument may have a bark, but it has no real bite. To begin with, it tells us little, if anything, about what structural safeguards the Court can demand of state—as opposed to federal—lawmakers. This is so because the Constitution's treatment of such matters as bicameralism, presentment, and the two-thirds-vote requirements concern the operation of only the national government. Put another way, it is unwarranted to extrapolate a wholesale preclusion of structural requirements for state authorities from constitutional provisions that do not concern state authorities at all. Indeed, to find a contraction of judicial authority over state governments in clauses that concern only the national government would seem to violate the \textit{expressio unius} principle itself.\textsuperscript{1114}

\textsuperscript{1110} See U.S. CONST. art. I, § 7, cl. 1.
\textsuperscript{1111} U.S. CONST. art. I, § 8, cl. 12.
\textsuperscript{1112} See U.S. CONST. art. II, § 2.
\textsuperscript{1113} One possible translation is: "The expression of one thing implies the exclusion of another."
\textsuperscript{1114} Of course, one might try to derive a separate negative-implication argument from the Republican Form of Government Clause, \textit{see} U.S. CONST. art. IV, § 4, which does concern the states. Perhaps the largest problem with such an argument is that this Clause is so indeterminate that it is hard to say that—following the \textit{expressio unius} formulation—it is an "expression of one thing" that is any way inconsistent with the recognition of structural rules. \textit{See supra} note 1113 and accompanying text. Indeed, several commentators have suggested that the Republican Form of Government Clause itself may constitute a proper
Even more important, the *expressio unius* argument fails to undermine any of the many structural doctrines—whether applicable to the states or the national government—that emanate from the Bill of Rights and other constitutional amendments. The very point of the amendments is, after all, to qualify, within the realm of their operation, the Constitution's preexisting text.\textsuperscript{1115} It follows that any of the many structural rules traced to the later-adopted Amendments—such as rules derived from the First, the Eleventh, or the Fourteenth Amendments—are immune to the negative-implication argument because that argument is based on the original Constitution. *Lex posterior derogate priori!*\textsuperscript{1116}

This *lex posterior* response to the *expressio unius* argument carries with it a profound practical consequence because most structural rules do in fact spring from the constitutional amendments.\textsuperscript{1117} At the same time, two structural rules—namely, the "findings" rule derivable from *Lopez*\textsuperscript{1118} and the structural

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source of democracy-enhancing structural doctrines. See *Tribe, supra* note 24, § 17-2, at 1678 n.7 ("It may be that decisions insisting that at least some types of governmental action be taken only by bodies officially accountable to the constituencies most significantly affected could rest more comfortably on article IV, § 4's guarantee of a 'republican form of government' than on 'due process' notions."); *Hamilton, supra* note 268, at 178 (seeming to approve Justice Linde's invocation of the Guarantee Clause to "extend[] the concept of legislative responsibility, which is at the heart of the Court's recent structural decisions," including by carefully scrutinizing lawmaking by way of initiative); Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681, 682, 696-99 (1981) [hereinafter Note, *Niche*] (asserting that the Guarantee Clause "authoriz[es] judicial action where individual rights defined in other provisions of the Constitution are threatened by structural defects in state or local government.").

\textsuperscript{1115} See, e.g., *Tribe, supra* note 24, § 3-25, at 174 (discussing Eleventh Amendment's overturning of law under original Constitution as expressed in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

\textsuperscript{1116} One possible interpretation is: "Later laws abrogate prior contrary laws." One response to this line of argument might be that laws must be read *in pari materia*—that is, they must be "construed together." *Balleinse's Law Dictionary* 632 (3d ed. 1969). Of course, any harmonious-interpretation argument made against amendment-based structural rules is a distant cry from the all-out, prohibitory negative-implication argument with which this discussion began. It also seems to me that such an argument adds little to the undue-interference separation of powers argument identified earlier. See *supra* note 1089 and accompanying text. A full investigation of that argument, like the other policy arguments previously enumerated, see *supra* notes 1085-1104 and accompanying text, must await another day.

\textsuperscript{1117} By way of example, see *supra* Part X (identifying various motive-based rules derived from constitutional amendments).

\textsuperscript{1118} See *supra* notes 351-74 and accompanying text.
representation-reinforcing rule derivable from *Garcia*—seem to arise from the original Constitution and thus to contravene that document's express stipulation of particular structural safeguards. Again, the argument is uncomplicated: Because Article I by its terms requires only bicameralism and presentment when Congress exercises its powers, it is wrong for courts to derive from Article I additional findings requirements or other process-purifying structural rules. As a result, the structural second-look features of *Lopez* and *Garcia* should be rejected as incompatible with the Constitution's text.

There are at least three difficulties with even this much-narrowed version of the negative-implication argument. First, the argument flows from the text’s requirement of bicameralism and presentment when Congress exercises its Article I powers; the *Lopez* and *Garcia* principles concern, however, whether Congress has acted within its Article I powers at all. The question about whether Congress has acted within its enumerated powers (the question presented by *Lopez* and *Garcia*) is different from, and preliminary to, the question about how Congress can exercise the powers it undoubtedly possesses. Thus what the Constitution

1119. See *supra* notes 479-90 and accompanying text.

1120. One might think it odd to conceive of the structural rules involved in *Lopez* and *Garcia* as involving the seemingly "substantive" question whether Congress has exceeded its enumerated powers. Perhaps this conception will seem less odd if one recalls Chief Justice Marshall's fundamental admonition that Congress may not "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Reasoning from this principle, it is quite possible to conceive of *Lopez* and *Garcia* as giving rise to ways for determining whether Congress has acted pretextually—that is, outside its proper powers.

1121. See, e.g., *Hamilton*, *supra* note 268, at 173 (noting, in supporting *Lopez*'s emphasis of legislative findings, that "Congress's constitutional power to enact a law is a threshold question that Congress has a duty to answer on the face of the act or through an explanatory statement"). The difference between the two questions is illustrated well by *INS v. Chadha*, 462 U.S. 919 (1983). There the Court considered whether the House or Senate could overturn, by way of a so-called "legislative veto," a congressionally authorized suspension by the Attorney General of a particular alien's deportation. In a concurring opinion, Justice Powell found such congressional action unconstitutional because it constituted an exercise of the judicial—rather than the legislative—power. See *id*. at 959-67 (Powell, J., concurring). The majority, in contrast, found a constitutional violation not because Congress lacked power to bring about the deportation, but because it had exercised its power to take such action in a constitutionally impermissible one-house-veto form. See *id*. at 944-59. In short, Justice Powell asked and answered the "whether" question, which the Court's majority recognized as wholly distinct from the "how" question on which it focused. See *id*. at 957 n.22 (reasoning that because challenged veto constituted "legislative" action, it was "subject to the procedures
says about the latter "how" question logically tells us little, if anything, about the separate "whether" question presented by Lopez and Garcia.

Second, the structural principles of Lopez and Garcia can be said to spring no less from the Tenth Amendment than from the original Constitution itself. If this is so, however, the narrowed negative-implication argument is dashed on the same shoals that undid the negative-implication argument in its broader application to other amendment-based structural rules. Again, the point is simple: Structural rules based on the amendments are not subject to negative implications based on the original text, for the very purpose of the amendments is to "trump" that text. This argument would seem to apply with no less force to Amendment X than to Amendments I through IX and to Amendments XI through XXVII.

Finally, even if anything remains of the negative-implication argument, an irony would mark any effort to invoke it to scuttle the structural rules suggested by Lopez and Garcia. The reason is that these rules protect interests in federalism, and in this setting (probably more than any other) the modern Court has not hesitated to embrace nontextual, and even countertextual, doctrines to vindicate underlying postulates of the Constitution. Perhaps the

set out in Art. I); see also id. at 967 (Powell, J., concurring) (refusing to consider "whether legislative vetoes are invalid under the Presentment Clauses" because Congress "exceeded the scope of its constitutionally prescribed authority").

1122. See, e.g., New York v. United States, 505 U.S. 144, 155-57 (1992) (emphasizing significance of Tenth Amendment in discussing federalism-based limits on congressional power); see also infra note 1124 and accompanying text.

1123. See supra note 1115 and accompanying text.

1124. One possible response to this point is that the Tenth Amendment is different from the other amendments because it simply restates that the limited lawmaking powers granted by the original Constitution are in fact so limited. See United States v. Darby, 312 U.S. 100, 124 (1941) (describing the Tenth Amendment as stating a "truism"); United States v. Butler, 297 U.S. 1, 68 (1936) (suggesting that the Tenth Amendment was adopted merely to forestall suggestion that the United States is not a government of limited delegated powers). The Supreme Court, however, has made it clear on a variety of occasions that the Tenth Amendment does have legal effect. See, e.g., Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (stating that "the Tenth Amendment . . . is not without significance").

Court should scrap the structural rules of *Lopez* and *Garcia* (and other structural doctrines as well) because they are unwise, unworkable, anti-historical, or the like.\textsuperscript{1126} To say these things, however, is not to say that structural rules are fundamentally illegitimate because they offend the specific directives of the constitutional text.

\textbf{B. The Due Process Argument}

A second text-based critique of structural rules stems not from the original Constitution, but from the Fifth and Fourteenth Amendments. Each of those amendments bars government deprivations of "life, liberty or property without due process of law."\textsuperscript{1127} These few words—as even the constitutional newcomer knows—place a sweeping array of process-based restrictions on both the federal and the state governments.\textsuperscript{1128} Beginning with *Londoner v. City of Denver*\textsuperscript{1129} and *Bi-Metallic Investment Co. v. State Board of Equalization*,\textsuperscript{1130} however, the Court has drawn a strong distinction between adjudicative action (to which due process protections clearly apply) and legislative actions (to which, it is said, they do not).\textsuperscript{1131} This line of demarcation between law-applying and law-giving drives the second argument against structural review. According to the argument, courts may not bring in through the back door constitutional rules against which the front door has been bolted and blocked. In other words, if the Due Process Clause does not support process-based restrictions on government policymaking, then surely those restrictions may not be imported by way of the more linguistically substance-focused Free Speech Clause, Equal Protection Clause, Takings Clause, and the like.

\begin{flushright}
\textsuperscript{1126} \textit{See supra} notes 1085-1104 and accompanying text (collecting arguments to this effect). \\
\textsuperscript{1127} U.S. Const. amends. V, XIV. \\
\textsuperscript{1128} \textit{See, e.g., Tribe, supra note 24, §§ 10-7 to 10-19.} \\
\textsuperscript{1129} 210 U.S. 373 (1908). \\
\textsuperscript{1130} 239 U.S. 441 (1915). \\
\textsuperscript{1131} \textit{See Kende, supra note 395, at 607 n.114 (noting the distinction between "legislation" and "adjudication" for procedural due process purposes); accord, e.g., San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570 (Cal. 1974).}
\end{flushright}
The first problem with this second argument is that its major premise rests on an overreaching reading of the relevant authorities. Londoner and Bi-Metallic did not hold that the Due Process Clauses have no application to government policymaking. In fact, courts often draw on these clauses when they strike down legislative actions, as illustrated pointedly by the Court's expansive abortion law jurisprudence. Nor do the Londoner/Bi-Metallic line of cases hold that procedural (as opposed to substantive) due process puts no limits whatsoever on government policymaking. There is authority, for example, that rulemaking by agencies may be subject to procedural due process attack. Even more importantly, the Londoner and Bi-Metallic cases do not purport to foreclose all procedural due process challenges aimed at the outputs of legislative bodies. Rather, these cases establish only that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy" or

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1132. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 847-48 (1992) (plurality opinion) (reaffirming the "essential holding" of Roe based on the Due Process Clause, invoking the clause to invalidate a spousal-notification requirement, and itemizing numerous cases in which the Court has applied the Clause's "substantive component" to invalidate legislation); Roe v. Wade, 410 U.S. 113 (1973) (relying on Fourteenth Amendment Due Process Clause to invalidate state's criminal ban on abortion). I shall not pause here to explore the complex linkage between substantive and procedural due process. I shall pause, however, to make one obscure point. It might be said that so-called "substantive due process" review serves as a prophylactic protection of the process values centrally embodied in the Due Process Clause. On this view, substantive due process review is legitimate in constitutional law for much the same reason that (some have said) substantive-unconscionability review is legitimate in contract law. In both instances, the argument goes, results that are seriously overreaching as a matter of substantive outcome suggest such a high probability that procedural defects led up to that outcome that a court should intervene. The obscure point to be made is that, if this process-driven justification for substantive due process review were embraced, it would carry with it significant consequences for structural review. After all, if courts can invoke the Due Process Clauses to impose substantive prophylactic restraints to purify legislative processes, how can the clauses not be read to permit the imposition of direct and focused procedural restraints as well?

1133. See, e.g., Thompson v. Washington, 497 F.2d 626, 634-35, 641 (D.C. Cir. 1973) (voicing the view that "basic considerations of fairness may under exceptional circumstances require oral submissions even in a legislative-type proceeding"); see also Linde, supra note 27, at 225 (noting that, "with or without the aid of administrative procedure acts or statutory standards of judicial review, courts have spun out various procedural duties of agencies which require them to articulate their aims and their assumptions of fact, to examine available evidence and consider alternative solutions, and sometimes to subject their hypotheses to scrutiny and possible rebuttal by interested parties"); supra note 451 and accompanying text.

a right of "direct public participation in government policymaking." The safeguards that concern us, however, do not entail any such claim of right. They involve instead such devices as form-based deliberation and proper-findings rules made applicable only in discrete contexts when pressing constitutional interests are in play. These rules, in contrast to the broad and overarching right-to-be-actually-heard rules rejected in Londoner and Bi-Metallic, do not threaten a "massive intrusion" that could cause our governments to "grind to a halt."

There is a second and no less serious problem with the Londoner/Bi-Metallic-based attack on structural rules. The problem is that, contrary to the argument's minor premise, a generalized rejection of structural safeguards under the Due Process Clauses would not logically lead to a repudiation of all structural rules

1135. Id. at 285 (emphasis added); see also United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 244-45 (1973) (reiterating the Bi-Metallic principle that "no hearing" is required when the lawmaker is "promulgating policy-type rules or standards"). The case most commonly associated with a lack of nonstatutory restrictions on agency rulemaking, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978), also does not generally provide that the Due Process Clauses have no application to any form of government rulemaking. The Court in Vermont Yankee reaffirmed "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." Id. at 544. The Court's focus, however, was on what "Congress intended," id. at 546, with respect to agency experts "familiar with the industries which they regulate," id. at 525 (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965)). Even in this context, the Court applied its ban on judicial supplementation of agency process requirements only in the absence of "constitutional constraints or extremely compelling circumstances." Id. at 543; see, e.g., id. at 542 (noting possibility of judicial intervention when agency departs from "procedures of long standing"); id. at 544 (noting prior holding that agency "normally be allowed" to exercise discretion with respect to appropriate procedures, and that courts should not intervene in such matters "in the absence of substantial justification for doing otherwise" (quoting FPC v. Transcontinental Pipe Line Corp., 432 U.S. 326 (1976))). Moreover, much as in Bi-Metallic, the Court's concerns were focused on the risk that agencies would be forced to "adopt full adjudicatory procedures in every instance" of administrative rulemaking. Id. at 547; see also Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990) ("Vermont Yankee stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA"); id. at 655-56 (noting absence of due process challenge to agency procedures); cf. id. at 654 (noting case authority to the effect that APA § 706(2)(A), which directs a court to ensure that an agency action is not arbitrary and capricious, . . . imposes a general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision").

1136. See supra note 44 and accompanying text (itemizing and defining structural rules).


1138. Id.
under other constitutional provisions. The reason why is that the content of the Due Process Clauses (particularly to the extent they have been read not to embrace far-reaching structural rules applicable to all forms of lawmaking) exists independent of the content of other constitutional provisions (particularly to the extent that those provisions give rise to targeted doctrines that protect discrete constitutional values untethered to the due process guarantee). By way of example, even the strongest judicial rejection of a generalized due process right to legislative findings would not answer the question whether courts may and should recognize carefully focused First Amendment or federalism-based proper-findings rules.\footnote{1139}

The final difficulty with the Londoner/Bi-Metallic-based challenge to structural rules is that it comes too late in the day. After all, the Court already has indicated that structural doctrines may find their origins in the Due Process Clauses. In *Hampton v. Mow Sun Wong*,\footnote{1140} for example, the Court was clear on this point. "[W]e deal," the Court said, "with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process."\footnote{1141} In similar fashion, the Court has left no doubt that the vagueness doctrine (which, we have seen, is highly structural in nature) has its roots in the Constitution's due process guarantees.\footnote{1142} It is hardly surprising, in light of these cases, that prominent observers have linked to the Due Process Clauses a variety of structural doctrines.\footnote{1143}

\footnote{1139. See supra Part V.}
\footnote{1140. 426 U.S. 88 (1976). See generally supra notes 837-44 and accompanying text (discussing *Mow Sun Wong*).}
\footnote{1141. *Mow Sun Wong*, 426 U.S. at 102-03. The Court was equally clear that its ruling in *Mow Sun Wong* rested squarely on *procedural* due process grounds. See supra note 1132 and accompanying text (contrasting substantive and procedural due process). Recognizing that the Fifth Amendment Due Process Clause "has a substantive as well as a procedural aspect," the Court found that it was "not necessary to resolve respondents' substantive claim" because "essential procedures have not been followed." *Mow Sun Wong*, 426 U.S. at 103 (emphasis added).}
\footnote{1143. See, e.g., *TRIBE*, supra note 24, § 17-3, at 1683 & n.8 (advocating the rejection of "formal" and "all-or-nothing" distinction between "rule-making and rule-applying" to "better approximate due process concerns"); *Dimond*, supra note 69, at 226 ("Due process of law can . . . apply to congressional lawmaking. . . ."); *Linde*, supra note 27, at 239 ("What might 'due process of law' mean in lawmaking? The obvious answer is that government is not to take}
These authorities do more than undercut the due process-based attack on judicial recognition of structural rules. They suggest that the Due Process Clauses themselves provide a proper source—indeed, a source that is already recognized—for structural review. In the end, however, we need not rely on the Due Process Clauses to conclude that structural doctrines have constitutional legitimacy. Structural rules are properly grounded in the Constitution if, as we now shall explore, they emanate from the particular substantive constitutional provisions to which they give meaning and protection.

C. The Judicial Overreach Argument

The final argument against the legitimacy of structural rules builds on a substance-centered vision of the constitutional clauses that concern free speech, cruel and unusual punishment, equal protection, and the like. The argument posits that the historic and intended role of these safeguards is to cabin the content of life, liberty, or property under color of laws that were not made according to a legitimate lawmaking process. There is nothing very obscure in this reading of "due process" . . . ."; id. (arguing that "the relevant question of due process in lawmaking is never what law was made, but how it was made"); id. ("arguing that reading 'process' to mean 'process' requires us to decide which lawmaking processes are legitimate and which are not"); see also ELY, supra note 88, at 137 (suggesting that impermissibly motivated government decisions might involve a "denial of due process"); cf. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) (stating that due process "is a restraint on the legislative as well as on the executive and judicial powers of the government"); adding that Congress, accordingly, is not "free to make any process 'due process of law,' by its mere will").

Notably, the courts might well draw on the constitutional due process right in another way to recognize structural protections: They might reason that the due process guarantee operates in conjunction with other constitutional protections, such as freedom of speech, to generate a "hybrid" right. Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990). Although Smith may represent the Court's most well-known articulation of a hybrid-rights approach, that case hardly stands alone. See, e.g., Smith v. Robbins, 120 S. Ct. 746, 759 (2000) (indicating that the constitutional right to a state-aided criminal appeal emanates from the joint operation of the Equal Protection and Due Process Clauses); Reno v. ACLU, 521 U.S. 844, 865 (1997) (describing Ginsberg v. New York, 390 U.S. 629, 639 (1968), as a case involving both free speech rights and "the parents' claim to authority in their own household to direct the rearing of their children"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980) (plurality opinion) (reasoning that the rights to free speech, free press, and free assembly together give rise to a right of access to criminal trials); Stanley v. Georgia, 394 U.S. 557, 564 & 568 (1969) (invoking both the right to free expression and the right of privacy in holding that the viewing of obscene materials within one's home is constitutionally protected).
government action. Because these protections target substantive policy, the argument continues, courts should implement them with content-driven on-or-off rules. It is, in short, simply too much of a stretch to extract from the Constitution's great protections of substantive rights a plethora of proscriptions on policymaking processes.\textsuperscript{1144}

One difficulty with this argument is that it overlooks how "substantive" constitutional protections work in the real world. Take, for example, motive-based rules.\textsuperscript{1145} These rules are pervasive in constitutional law. Yet, under these rules, the content of a law does not determine its conformance with constitutional requirements. To the contrary, these rules focus fixedly on process; under them, it is the thought process of government decision makers that is determinative of constitutionality.\textsuperscript{1146} Quasi-structural rules of adjudicative procedure (as we already have noted) likewise key on the "how," rather than the "what," of government decision making, and they do so notwithstanding their origins in the First Amendment and other purportedly substantive protections.\textsuperscript{1147} The Court has said that the First Amendment overbreadth doctrine reflects concerns about lawmaking process.\textsuperscript{1148} All these examples show that there is nothing exotic in rooting structural rules in supposedly "substantive" rights.

There is a deeper reason why courts may properly ground structural rules in the Bill of Rights and other protections of substantive constitutional values. The reason is that our constitutional law is laced with doctrines designed to protect interests of constitutional dimension in causative, instrumentalist ways. Perhaps the most familiar example is the rule of Miranda v. Arizona.\textsuperscript{1149} The Fifth Amendment decrees that no one "shall be compelled in any criminal case to be a witness against himself."\textsuperscript{1150}

\textsuperscript{1144} This overreach argument might also seek to draw on the constitutional text. To take a simple example, the First Amendment says that "Congress shall make no law ... abridging the freedom of speech ... ." Consequently, according to this argument, the role of the amendment is to void laws that in fact abridge free speech, not to void only those abridgements that are accompanied by careful findings or superspecific statutory terms.\textsuperscript{1145} See supra Part X.
\textsuperscript{1146} See supra notes 761-62 and accompanying text.
\textsuperscript{1147} See supra notes 962-89 and accompanying text.
\textsuperscript{1148} See supra note 994 and accompanying text.
\textsuperscript{1149} 384 U.S. 436 (1966).
\textsuperscript{1150} U.S. Const. amend. V.
It does not say a word about the need to give warnings to persons in custodial settings. In Miranda, however, the Court extrapolated a right to warnings (as well as a right to counsel)—or, more accurately, an exclusionary sanction if warnings or counsel were not provided—to render meaningful the basic anticompulsion guarantee. In short, the Court safeguarded Fifth Amendment values with a prophylactic rule.

Similar rules, which likewise give meaning to highly general constitutional phrases in particular ways, abound in our law. The First Amendment, for example, says nothing about public forums. It says nothing about compelling state interests or less restrictive alternatives. It says nothing about unconstitutional conditions. It says nothing about overbreadth or chilling effect. It says nothing about actual malice. It says nothing about content or viewpoint discrimination or undue discretion or de novo review. The First Amendment does not, by its terms, distinguish among political, indecent, or obscene speech; or between the print and broadcast media; or between primary and secondary effects. Yet, the Supreme Court has recognized the constitutional importance of all these concepts. It has done so by expounding the First Amendment in a common-law-like fashion to protect the underlying values of the free-speech guarantee.

1151. See Miranda, 384 U.S. at 498.
1159. See, e.g., Lovell v. City of Griffin, 303 U.S. 444 (1938).
1166. See, e.g., Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion) ("[S]ome procedural requirements are mandated by the First Amendment and some are not... None of us have [sic] discovered a general principle to determine where the line is to be drawn... We must therefore reconcile ourselves to answering the question on a case-by-case basis, at least until some workable general rule emerges."); Bose Corp. v. Consumers Union of United
Many constitutional rules have a prophylactic or instrumentalist quality in that they establish standards and sub-rules designed to safeguard broadly conceived constitutional values derived from the constitutional text. In addition, as Professor Ely most famously...

...
demonstrated (drawing on the Carolene Products footnote), these doctrines often focus squarely on addressing subtle and recurring problems in the lawmaking process. The Court’s commitment to policing policymaking processes is particularly well revealed by its adaptation of constitutional doctrine to the institutional weaknesses and strengths of particular government decision makers. The Court sometimes even acknowledges that “sub-

1168. Addressing such problems is, perhaps most significantly, the overarching purpose of doctrines supported by the Court’s famous “footnote four,” see Carolene Prods. Co. v. United States, 304 U.S. 144, 152 n.4 (1938). See generally supra note 456, and the seminal work of Professor Ely. See, e.g., Ely, supra note 88, at 136 (advocating a “process-oriented system of review”); id. at 100 (arguing for an “elaborate scheme designed to ensure that in the making of substantive choices the decision process will be open to all . . . , with the decision-makers held to a duty to take into account the interests of all those whose decisions affect”); see also Linde, supra note 27, at 251 (“It is not a new thought that ‘to guarantee the democratic legitimacy of political decisions by establishing essential rules for the political process is the central function of judicial review, as Dean Rostow and Professor Strong, among others, have argued.” (quoting Rostow, supra note 570, at 210 and citing Frank R. Strong, Toward an Acceptable Function of Judicial Review, 11 S.D. L. Rev. 1 (1966)). See generally Gilligan v. Morgan, 413 U.S. 1, 11 (1973) (emphasizing courts’ proper role in attempting “to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes”).

1169. See supra notes 932-60 and accompanying text. As noted by Professor Strauss: [I]n deciding constitutional cases, the courts constantly consider institutional capacities and propensities. That is, to a large extent, what constitutional law consists of: courts create constitutional doctrine by taking into account both the principles and values reflected in the relevant constitutional provisions and institutional realities.

Under any plausible approach to constitutional interpretation, the courts must be authorized—indeed, required—to consider their own, and the other branches’, limitations and propensities when they construct doctrine to govern future cases. It is true that the relevant constitutional provisions—the first, fifth, and fourteenth amendments, for example—do not explicitly instruct the courts to take institutional realities into account . . . . But it makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that those realities be ignored.

Strauss, supra note 434, at 207-08. Notably, although Professor Ely does not consider structural rules in detail, he strongly embraces reasoning that would seem to support their recognition on institutional-competence grounds. See, e.g., Ely, supra note 88, at 21 (stating that “what procedures are needed fairly to make what decisions are the sorts of questions lawyers and judges are good at”); id. at 102 ("Lawyers are experts on process writ small, the processes by which facts are found and contending parties are allowed to present their claims. And to a degree they are experts on process writ larger, the processes by which issues of public policy are fairly determined . . . ."); see also Calabresi, supra note 13, at 136-37 (noting that “legislatures are uniquely inept at . . . correcting their refusals to be held
stantive” doctrines exist, at least in part, to serve deliberation-enhancing, due-process-of-lawmaking ends. In short, our constitutional heritage is a common law heritage that often has involved the Court in deriving from broadly phrased substantive guarantees a rich tapestry of discrete protections, including safeguards that aim at enhancing policymaking processes. Against this backdrop, it seems a small step—if a step at all—to say that the Court may extrapolate rights-specific structural safeguards from the great “invitational” clauses of our Constitution.

D. The Broader Logic of Structural Rules

What has been said so far suggests that support for structural rules lies in a myriad of sources: the Constitution’s text, the Court’s process-centered jurisprudence, a long-evidenced judicial willingness to unfold constitutional doctrine in common-law-like fashion, and the explicit structural rhetoric that marks many Supreme Court decisions. The argument for structural rules, we also have seen, gains strength from ten separate arguments that focus on such values as judicial restraint, the wisdom of doctrinal adaptability, and cultivation of the Article III power. The case for constitutionally accountable”).

1170. See supra note 1004 and accompanying text.
1171. See KAPLIN, supra note 50, at 131. This seems all the more true if we conceive the purpose of indeterminate constitutional language in something like the manner it has been depicted by Professor Waldron. As he has written:

Perhaps . . . we sometimes try too hard to determine a precise prescriptive meaning for legal and constitutional provisions. Our urge is to get into a position where we can always answer the question, “Well, is this prohibited or is it not?” However, sometimes the point of a legal provision may be to start a discussion rather than settle it, and this may be particularly true of the constitutional provisions that aim at restricting and governing legislation. The purpose of these provisions may be to have an impact on the process of legislating rather than merely on the validity of legislation conceived as some sort of finished product. The rule of law, under this account, involves not just the production of determinate norms, but respect for a certain heritage in the subject matter and style of our legal and political debates.

. . . We do not agree on many things in our society, but perhaps we can agree on this: that we are a better society for continuing to argue about certain issues than we would be if such arguments were artificially or stipulatively concluded.

1172. See supra notes 1035-65 and accompanying text.
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structural review, however, does not stop there. It is carried along by yet another enduring source of constitutional doctrine: the discernible purposes and aspirations of the Founders themselves.1173

"Above all," Professor Sunstein has written, "the American Constitution was designed to create a deliberative democracy."1174 The term "deliberative democracy," of course, is not self-defining. At its heart, however, lies the idea that our constitutional arrangements were framed to advance two great goals, one substantive and one structural in nature. From a substantive perspective, the Framers conceived the overarching function of government, particularly in the legislative department, as promoting "the public good."1175 Government's purpose was not to pay heed to the best organized interest group or even to respond to "the sum or consensus of the particular interests that made up the community."1176 Rather, the mission of government was to pursue "the greater good of the whole."1177 It was "to discover somehow above all the diverse and selfish wills the one supreme moral good."1178 An Enlightenment-driven philosophy took as a starting point the existence of values that transcended short-term majoritarian wishes and reflected a sober, deeper, longer view. The role of government representatives was to seek out such public-spirited values and to pursue them with public-spirited measures.

From a procedural perspective, the great desideratum of republican government was open-minded, reflective, and dialogic deliberation. The underlying notion was that representatives with "enlightened views and virtuous sentiments" would serve as "a 'disinterested and dispassionate umpire in disputes between different . . . interests in the State.'"1179 This vision of "heroic impartiality,"1180 in which "public officials [had] to invoke the public

1173. See, e.g., Linde, supra note 27, at 207 (noting that constitutional rules "may be implied from the constitutional text or from history").
1174. SUNSTEIN, supra note 1050, at 19-20.
1176. Id. at 58.
1177. Id. at 53.
1178. Id. at 59.
regarding reasons on behalf of their actions,"1181 required "widespread discussion among representatives and the citizenry at large."1182 It envisioned and encouraged the "exchange of reasons in the public sphere"1183 and the "modification of views to meet the opinions of minorities."1184 "The framers," in short, "designed a system in which representatives would . . . engage in a form of collective reasoning,"1185 including by "deliberating about the contemporary meaning of constitutional principles."1186 These dual fixations of deliberative democracy—on advancing public values and on fostering democratic dialogue—lend a credence, if not an elegance, to judicially crafted structural rules. The overarching purpose of these rules is, after all, to promote both the "public good"1187 and "the process of discussion."1188 As to the matter of advancing public values, there is an endemic problem in constitutional law. The difficulty is that the pursuit of the public good can provide little practical guidance in forging doctrine because the line between public and private values is inevitably "thin."1189 This will-of-the-wisp-ness difficulty, however, does not undermine the case for deliberation-driven structural rules. Why? Because, if any substantive values qualify as having a "permanent validity,"1189 they are the values that structural safeguards, by definition, distinctively seek to protect—namely, those enduring substantive values (like free speech, free religion, equal protection, and federalism) rooted in the Constitution itself. In similar fashion, structural doctrines unmistakably comport with the deeply dialogic procedural vision of deliberative democracy. They implement that vision because their very reason for being is to "promote deliberation."1191 All of the structural rules we have considered—despite their many differences—aim to enhance the deliberative process by requiring of lawmakers heightened levels of dialogue,

1181. Sunstein, supra note 1050, at 61.
1182. Id. at 10.
1183. Id. at 24.
1184. Id. at 134-35 (quoting John Dewey, The Public and Its Problems 207-08 (1927)).
1185. Id. at 22.
1186. Id. at 13.
1187. See supra note 1175 and accompanying text (quoting Gordon S. Wood).
1188. Sunstein, supra note 1050, at 22.
1189. Id. at 35.
1190. Bickel, supra note 6, at 27.
1191. See The Federalist No. 70 (Alexander Hamilton).
focus, and care. In short, structural rules emerge from, build on, and resonate with the deepest themes of the founding period.

To say that there is a connection between deliberative democracy and structural review, of course, hardly ends debate about the proper role and shape of second-look rules. An appeal to history—especially one stated at a high level of generality—will not answer hard questions about whether specific structural safeguards, invoked in specific circumstances, should apply in the modern world. At the same time, the nexus between structural rules and the Founders' fundamental motivations has a practical importance. The linkage of these rules to deliberative democracy suggests that courts themselves must deliberate with seriousness about whether, when, and how structural doctrines should take hold. History conjoins with policy to show that courts may not reject structural arguments out of hand.

There is another reason why structural rules merit judicial respect, and it is a proper point on which to close our study of structural decision making. If this Article—in all its length and breadth—has accomplished nothing else, it has shown that structural rules embody an important and continuing tradition in constitutional law. There are nine separate categories of structural doctrine, many of these categories include multiple subcategories, and each is reflected in a variety of decisions from the United States Supreme Court. Viewed as a whole, the Court's structural decisions reinforce one another. They explode the notion that structural review is aberrational and exotic. They show that, if the Court wishes to apply structural rules more openly and aggressively, there already exists a broad platform from which to...

1192. See supra notes 1056-60 and accompanying text.
1193. See Farber & Frickey, supra note 444, at 918 (arguing for "continued use" of structural review in part because it "is sufficiently tied to constitutional structure, [and] to the Madisonian constitutional ideal of deliberative legislative policymaking"); Sunstein, supra note 434, at 8 (discussing vagueness doctrine, clear-statement rules, doctrine of desuetude, and actual-purpose rules: "All of these doctrines are connected with the basic foundations of the system of deliberative democracy. They serve to ensure against outcomes reached without sufficient accountability and reflecting factional power instead of reason-giving in the public domain."); Sunstein, Interpreting, supra note 119, at 471 (urging that deliberative democracy "suggests, for example, that courts should develop interpretive strategies that promote deliberation in government—by, for example, remanding issues involving constitutionally sensitive interests or groups for reconsideration by the legislature or by regulatory agencies when deliberation appears to have been absent").
launch this project. They show, in other words, that if the Court wishes to systematize or expand judicial use of structural rules, it need not embrace revolutionary reforms or innovate much at all. It need only build on the many structural decisions that already fill the pages of the United States Reports.

In short, the most important fact about structural rules may be summarized in two words: They're there. The persistent and pervasive presence of structural rules in our law demands the attention of judges, lawyers, and scholars. We must think systematically about these rules—about their different forms, about their common nature, and about the normative claims that may be made both against them and on their behalf. The need to think through these matters will not go away. Rather, the opportunities created by structural review for increased dialogue and restrained adaptiveness suggest that just the opposite is true. Pressures to apply structural rules will only mount with the increasing complexity of modern law and modern life.