Florida State University Law Review

Volume 33 | Issue 1 Article 4

2005

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LAW REVIEW

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VOLUME 33 FALL 2005 NUMBER 1

Recommended citation: Brian Galle, *The Justice of Administration: Judicial Responses to Excute Claims of Independent Authority to Intrepret the Constitution*, 33 FLA. ST. U. L. REV. 157 (2005).

THE JUSTICE OF ADMINISTRATION: JUDICIAL RESPONSES TO EXECUTIVE CLAIMS OF INDEPENDENT AUTHORITY TO INTERPRET THE CONSTITUTION

BRIAN GALLE*

I. INTRODUCTION

In the United States now there is a gap between what the public expects of its President and how the courts treat executive officers. Presidents, of course, like to declare that elections are about "values," and one supposes they would not keep saying so unless a fair portion of the electorate agreed. Even legal academics increasingly say that the executive may be the best place for protecting certain constitutional values, like federalism, or more generally for representing national norms of justice above the more parochial concerns of congressmen.[1]

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* A.B. Harvard, J.D. Columbia. Appellate attorney, U.S. Department of Justice. I am grateful for the many helpful comments and suggestions I have received from readers, including John Bronsteen, Mike Dorf, Brandon Garrett, Robert Katzmann, Carlton Larson, Tom Merrill, Bernadette Meyler, Trevor Morrison, Michael Stokes Paulsen, Susan Sturm, Mark Tushnet and Robert Weisberg. Of course, any errors are mine, and the views here are mine alone and not those of the United States or of the Justice Department.

1. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2149-50 (2002); Jerry L. Mashaw, *Prodelegation: Why Administrators Should*

Unsurprisingly, then, we now see that executive constitutional interpretation, and executive ideals, of justice are at the center of difficult controversies. The Department of Defense is deciding what process is due for alleged enemy combatants.[2] The Environmental Protection Agency is deciding whether federal regulation of certain waterways would infringe on state land-use prerogatives.[3] The Internal Revenue Service (IRS) uses the Constitution as a baseline for deciding when nonprofit entities are acting against "public policy,"[4] as some argue they do when they engage in lobbying activities.[5] The Drug Enforcement Agency has attempted to define "appropriate" medical care to exclude physician-assisted suicide.[6] And nearly every agency prohibits those who receive agency funds from carrying out policies that have a disparate impact on racial minorities, despite the fact that the Supreme Court has said that such policies do not violate the Constitution.[7]

Courts seem confused about how to review these executive decisions, or indeed whether to permit them at all.[8] The confusion results from a collision between two trains of Supreme Court thought. From one direction, there is the legal realist view that assigning legal

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Make Political Decisions, 1 J.L. ECON. & ORG. 81 (1985), *reprinted in* ADMINISTRATIVE LAW ANTHOLOGY 20, 26 (Thomas O. Sargentich ed., 1994); John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 903-04, 926, 928-29 (2001).

2. John Mintz, *U.S. Outlines Plan for Detainee Review*, WASH. POST, Mar. 4, 2004, at A10.

3. *See, e.g.*, National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Facilities, 69 Fed. Reg. 68,444, 68,454 (Envtl. Prot. Agency Nov. 24, 2004) (giving individual field offices authority to determine whether regulated waterway is within constitutional reach of the EPA's Clean Water Act jurisdiction); Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Envtl. Prot. Agency Jan. 15, 2003); *cf.* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999) (directing federal agencies to take "action limiting the policymaking discretion of the [s]tates [through preemptive regulatory action] only where . . . the national activity is appropriate in light of the presence of a problem of national significance").

4. *See* David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779, 786-87 (2002).

5. *See, e.g.*, Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 280-82 (2004); Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the* McConnell *Decision*, 22 YALE L. & POL'Y REV. 235, 245-54 (2004); *see also* Fred Stokeld, *Group Complains to IRS About Falwell's Fund-Raising Letter*, 28 EXEMPT ORG. TAX REV. 464, 464 (2000).

6. Oregon v. Ashcroft, 368 F.3d 1118, 1120, 1123 (9th Cir. 2004), *aff'd,* 126 S. Ct. 904 (2006).

7. *See* Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 518-19 (2002).

8. *See, e.g.*, Williams v. Babbitt, 115 F.3d 657, 661-63 (9th Cir. 1997) (analyzing the "complex question" of how courts should review agency decisions that may also implicate constitutional considerations).

meaning is a choice of policy.[9] That view has been the dominant paradigm in the judicial review of agency statutory interpretation since the Court's 1984 opinion in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, where the Court determined that it must defer to "reasonable" agency choices on the presumption that agencies have superior technical expertise, better information, and a more direct connection to popular policy preferences.[10] In this view, statutory texts have no single, fixed meaning; the best interpretation changes over time according to new facts and new politics.[11]

Yet from the other direction there are the Court's opinions in *City of Boerne v. Flores* and similar decisions, which suggest that Congress cannot redefine a constitutional provision that has already been interpreted by the Court.[12] These cases seem to propose the opposite view of interpretation when it arises in the constitutional context: Political choices are suspect, and the Court's chosen interpretation of the constitutional text is the "right meaing," to be second-guessed, if at all, only by the Court.[13] While congressional efforts to remedy or prevent constitutional violations are legitimate, even those may be struck down if under the guise of enforcement they attempt to change the Court's chosen definition.[14] Some commentators have labeled this view as "judicial exclusivity," because, in essence, only the Court is permitted to interpret the Constitution.[15]

This Article discusses the threshold question of whether a reviewing court can permit any independent executive interpretation of the Constitution—that is, irrespective of any deterrence, whether an agency even has the authority to take a view of the Constitution dif-

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9. *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394-98 (1996) (describing the realist movement).

10. 467 U.S. 837, 843-44 (1984); *see* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 100-01 (4th ed. 2002); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 621-27 (1996). Some accounts put the rise of realism much earlier—for example, with the Court's decision in *Erie Railroad. Co. v. Tompkins*, 304 U.S. 64 (1938), that each state is entitled to develop its own common law free of federal control, or with the development of administrative law during the middle of the last century. *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 47-48 (1998); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 263 (1955).

11. *See* Dorf, *supra* note 10, at 47; Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 309-17 (1989).

12. 521 U.S. 507, 519-20 (1997); *see* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-83 (2000); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 32-33 (1983) (noting tension between constitutional and nonconstitutional review of administrative action).

13. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 525 (2000).

14. *Boerne*, 521 U.S. at 519, 530.

15. Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 86 (1998).

ferent from the courts. Although doctrine is unresolved, it would seem as though there is at least a strong inference that the principles of *Boerne* must apply as much to agencies as to Congress—otherwise Congress could evade *Boerne* simply by delegating to an agency the power that the Court forbids Congress to exercise. Additionally, courts traditionally will read the scope of delegated authority narrowly to avoid a serious question about the constitutionality of an executive decision.[16] To the extent that the applicability of *Boerne* to agencies is in doubt, courts may simply presume that Congress does not intend to give agencies authority that might arguably approach the limits of its own power.

Although formally *Boerne* and its progeny address only the scope of Congress's power to "enforce" the Fourteenth Amendment, the underlying rationale for judicial exclusivity may extend much farther. The *Boerne* question overlaps significantly with a heated scholarly dispute about the interpretive independence of each of the three branches of government. The dominant view, called "departmentalism" in some quarters, holds that judicial interpretations of the Constitution are binding only within the scope of a particular case or controversy before a court.[17] For example, the departmentalist might say that although the Supreme Court has defined what sorts of political activities by certain nonprofit entities cannot be regulated by the government, the IRS might voluntarily take a broader reading of the First Amendment in exempting a wider class from regulation. The few academic opponents of departmentalism claim in contrast that the Constitution means, in essence, only what a court says it means.[18] The *Boerne* rule might be framed as a logical corollary of that view: the other branches can apply and enforce the Constitution

16. *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001); Rust v. Sullivan, 500 U.S. 173, 190-91 (1991).

17. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 106-08, 144 (2004); Devins & Fisher, *supra* note 15, at 88, 91, 96; Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105-06; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1269-70 (1996); Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 597-602 (2003); Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63, 63-65 & n.2 (1999). Michael Stokes Paulsen goes one step farther, arguing that the executive is sometimes not bound even by court judgments against it. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 264 (1994).

18. *See* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 455 (2000) [hereinafter Alexander & Schauer, *Defending Supremacy*]; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997) [hereinafter Alexander & Schauer, *Extrajudicial Interpretation*]; Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 993, 998-99 (1987).

as the judiciary has interpreted it, but they have no authority to act based on any constitutional interpretation other than that of the judiciary.

The academic literature, though, has not yet considered the significance of departmentalism as a rule of administrative law. That is, while commentators have explored whether departmentalism is an attractive theory for Congress and the President, they have not addressed whether it meets the institutional needs of the Court. For instance, one common argument against judicial exclusivity is that sometimes courts will act immorally, so there must be an option of public disobedience.[19] But we can hardly expect courts to design doctrine based upon that claim. And much of the existing analysis focuses on vetoes, pardons, and prosecutorial discretion—areas where judicial review is impossible, so judicial response is largely irrelevant.

Another significant gap in the existing literature is its apparent assumption that judicial exclusivity is an either-or proposition. On one side, judges must have exclusive power to interpret the Constitution, because the judiciary is in the best position to save us from wasteful and irreconcilable arguments about conflicting interpretations.[20] On the other side, judges have no realm exclusive to themselves, because constitutional law is policy, and because the benefits of experiment, superior information, and more complete accountability apply to constitutional and statutory law alike.[21] While the rule of *Boerne* may have many vices, it is more nuanced than the prevailing bipolar treatment suggests. The Court says that it prohibits "substantive change" of the Constitution but permits its "enforcement."[22] As others have pointed out, this structure permits a fair amount of what is probably in reality constitutional interpretation by Congress.[23] Yet there has been no thorough consideration whether this hybrid regime, which I call "partial exclusivity," can peacefully coexist with either competing camp.[24]

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19. *See infra* text accompanying notes 105-06.

20. *See* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1360-62, 1371-81.

21. *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy,* 92 CAL. L. REV. 1027, 1034-37 (2004). As I will explain, we should be careful not to confuse this position with lawlessness or executive supremacy. Those who are opposed to judicial exclusivity are not necessarily opposed to judicial *review,* in which the Supreme Court may be "supreme" in the sense that its views about what the law means in a given case are binding on the other branches of government and other litigants. *See infra* text accompanying notes 43-51.

22. City of Boerne v. Flores, 521 U.S. 507, 518-20 (1997).

23. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885 (1999).

24. Recently, Professor Alexander, writing with Lawrence Solum, appeared to argue that exclusivity might apply to some constitutional "rules" but not to some constitutional

This Article tries to fill those theoretical lacunae. Using *Boerne* as a starting point, I ask what rule of administrative law courts would likely adopt if they were motivated by the concerns that produced the *Boerne* opinion. How should courts respond when an agency claims that its policy choice is justified by the agency's understanding of the Constitution, where that understanding departs from what courts have said the Constitution means? Should courts read all delegations narrowly to exclude executive constitutional interpretations? If not, might there be at least some situations where courts should appropriately reject executive interpretations, even if they might be inclined to agree if they reached the merits? Or should there be no limits at all on these "independent" executive interpretations?

Although it is focused on the underpinnings of *Boerne*, this Article is only modestly descriptive. I confess here at the outset that my aim is to fit a theory of collaborative interpretation into the prevailing doctrine, which is nominally exclusivist. Thus, I engage *Boerne* and its possible justifications critically as a springboard for examining the institutional considerations that might, from the judiciary's perspective, justify either complete or partial judicial exclusivity vis-à-vis the executive.

I conclude that although a blanket presumption against independent executive interpretation is hard to defend, there is a fairly strong argument for *partial* exclusivity—a rule that would prohibit agencies from utilizing their own constitutional interpretations in some circumstances, but not in others. I readily concede the arguments of proponents of collaborative interpretation. Indeed, I am one of them. The utility of partial exclusivity is that it carves out some small portion of constitutional law beyond the reach of politics, but allows for collaboration and experimentation with the remainder, which may in turn benefit the judiciary's solitary elaboration of the apolitical core. I also agree that the formalist distinction between statutory and constitutional law is incoherent, and that any efforts to disarm popular resistance to countermajoritarian decisions based upon claims that the Court is uniquely "right" in the field of constitutional law are ultimately bound to fail. Further, as I explain, I am skeptical of the assertions made by *Boerne*'s academic defenders that exclusivity settles the law in a way that could not be replicated by ordinary judicial review using doctrines that encourage a high degree of administrative rigidity. I also doubt that settlement is so important that it should prevail over the values of collaboration.

"standards." Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1632-34 (2005) (reviewing KRAMER, *supra* note 17). Alexander and Solum do not explore whether their revised exclusivity can coexist with the rationale of Alexander and Schauer's seemingly more comprehensive views. I attempt that here.

Nevertheless, I argue for partial exclusivity, rather than complete freedom of executive interpretation, because some of the possible explanations for *Boerne* are surprisingly durable when employed sparingly. For example, by helping to reinforce the judicial self-image, exclusivity may at times promote principled behavior both by judges and those they review. If nothing else, exclusivity gives courts an empty platform from which to stage a pageant of moral leadership on divisive issues.

In the ensuing parts, I develop these themes and the debates that surround them in greater detail. Part II explains the existing state of the law on how courts should respond to executive claims of authority to interpret the Constitution, and situates that law in a larger debate about whether judges should be the exclusive interpreters of the Constitution. Part III moves on to the only really comprehensive defense of judicial exclusivity, which is the claim that judges alone are capable of settling the law so that it is more predictable and less wasteful. After assessing the arguments in favor of settlement as a premiere value, and finding them rather unconvincing, Part IV nevertheless assumes that even if settlement is our highest value and judges the best defenders of it, we would probably be content with judicial review instead of exclusivity. Part IV examines an alternative claim based upon the unique competence of judges—that keeping constitutional interpretation solely within the judiciary will further protection for rights conceived as "public goods" or "second-order preferences" (that is, as things we should all want but selfishly fail to preserve). Part IV finds, however, that exclusivity overextends judges and needlessly gives up better means for identifying and preserving these kinds of preferences. Part V posits that exclusivity might be an indispensable tool of judicial rhetoric. Part V first rejects the idea that exclusivity can be a useful component of Bickelian claims that judicial opinions reach "right" answers and so have unique moral claims on the public. It goes on to propose that rhetoric is part of the judiciary's efforts to define itself in contrast to the "unprincipled" world of politics, and thereby reinforces the judicial self-image as a principled defender of rights. The Part concludes by observing that, under this rationale, universal exclusivity would appear to be unnecessary. Part VI takes up that possibility, exploring whether only partial exclusivity is intellectually coherent, how it would affect other possible judicial goals, and how it relates to the *Boerne* rule. Part VII returns more directly to the doctrinal question that we began with, arguing that agencies might actually be less constrained in their constitutional interpretations than Congress. In Part VIII, I synthesize the various arguments for and against exclusivity to formulate a plausible test for when exclusivity ought to be invoked against execu-

tive interpretations. I then give a pair of examples demonstrating how the test might work in practice. Part IX concludes.

II. SOME BACKGROUND ON THE BACKGROUND RULES

This Part sketches the prevailing wisdom about an agency's authority to make decisions based upon constitutional reasoning. Because doctrine says little directly about the subject, my sketch swiftly expands into a more general picture of how a court ought to respond to executive claims to independent constitutional interpretative authority. In the last decade, the Supreme Court has asserted that it alone is the nation's authoritative interpreter of the Constitution, which obviously implies a chilly reception for agencies who think otherwise. But, as surveyed very briefly here, there are scarcely any commentators who find merit in the Court's position. Two of those who have dared most prominently to defend it have also been received frostily.

I begin with the scant doctrine. A handful of lower court decisions have suggested that agencies lack power to consider the Constitution independent of a court's views.[25] Yet others claim, perhaps contradictorily, that agencies can defy the clear mandate of statutory language in order to avoid violating the Constitution.[26] But the opinions in this second camp are ambiguous about whether the power they describe arises only to avoid constitutional questions a court has already identified, or if an agency can ignore Congress based on its own view of the Constitution. As a result, they offer little guidance about the power of an agency independently to interpret the Constitution.

Structural inferences from broader administrative law are not much clearer. Federal courts usually defer to federal agencies on questions of statutory interpretation.[27] Contemporary interpretative doctrine recognizes that the choice of a statute's meaning within the range of lexical possibilities created by the text is a policy decision, a

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25. Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997) (holding that courts should not defer to agency constitutional interpretations because agencies usually have no authority to issue them and, in any event, are not expert at them); Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1122-26 (9th Cir. 1988), *withdrawn*, 893 F.2d 205 (9th Cir. 1989); Plato v. Roudebush, 397 F. Supp. 1295, 1305-06 (D. Md. 1975); *see also* Johnson v. Robison, 415 U.S. 361, 368 (1974) (noting that agencies generally do not have jurisdiction to consider constitutional challenges to statutes); Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 545-47, 612-13 (1838) (stating in dicta that the President does not have power to order his officers to disobey Congress).

26. *See* Marozsan v. United States, 852 F.2d 1469, 1492 & n.4 (7th Cir. 1988) (en banc) (Easterbrook, J., dissenting); *cf.* Cont'l Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444, 1455-56 (D.C. Cir. 1988) (holding that an agency has authority to construe a statute in light of constitutional concerns, even though it cannot pass on the constitutionality of the statute itself).

27. *See* United States v. Mead Corp., 533 U.S. 218, 227-28 (2001).

choice of the "best" reading of the statute.[28] Because an agency's capacity for gathering information about a problem, for accumulating technical expertise, and for sensitivity to public norms about the most desirable resolution are all (mostly) superior to the comparable capacity of federal courts, the Court allows the agency to choose the "best" meaning, absent some strong indication that the agency has acted contrary to congressional intent.[29] That is the core of the *Chevron* doctrine—the rule that a court must defer to the reasonable views of an agency authorized by Congress to interpret an ambiguity in a particular statute.[30] Of course, *Chevron* depends on the assumption that an agency has actually exercised its capabilities. Thus, courts can also review the process of agency decisionmaking to ensure that it is relatively transparent, democratic, and deliberative, or, in the doctrinal formula, not "arbitrary and capricious."[31]

These two principles, which form the bedrock of modern administrative law, seem to translate poorly to the realm of constitutional interpretation. The Supreme Court, especially over the last decade, has resisted the claim that interpretations of constitutional text, like readings of statutory text, are political decisions. Most prominently, in *City of Boerne v. Flores*, the Court reacted almost with disdain to the possibility that constitutional decisions could be reduced to the status of "ordinary" politics.[32] Thus, it held that Congress's power under Section 5 of the Fourteenth Amendment to "enforce" the Fourteenth Amendment gave Congress authority only to enact norms derived directly from the Court's own understanding of the Constitution's meaning.[33] Congress could try to remedy or prevent constitutional injuries, but only after it demonstrated that the injuries its legislation targeted were harms that the Court itself would consider breaches of the Constitution.[34] In effect, *Boerne* announced a rule of "judicial exclusivity"; only courts can decide what the Constitution means, no matter how popular, deliberative, or informed Congress's choices might be.[35]

The question for this Article is to what extent the rationale of *Boerne* extends to agency interpretations of the Constitution. Can an

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28. *See* Rubin, *supra* note 9, at 1394-98, 1401.

29. Barnhart v. Walton, 535 U.S. 212, 222 (2002); 1 PIERCE, *supra* note 10, § 2.6, at 97-98.

30. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); *see Mead*, 535 U.S. at 229-31.

31. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43-44 (1983); 1 PIERCE, *supra* note 10, § 7.1, at 413.

32. City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

33. *Id.* at 519-20.

34. *Id.* at 519, 532; *see also* United States v. Georgia, 126 S. Ct. 877, 880-82 (2006); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

35. Devins & Fisher, *supra* note 15, at 93.

agency, citing its own independent view of the First Amendment, in effect reenact the Religious Freedom Restoration Act struck down by the Court in *Boerne* by obliging states doing business with it to avoid undue burdens on religious exercise? Can it curtail its own enforcement of a statute it superintends by explaining that, although the Court's precedents allow such enforcement, the agency believes it would be unconstitutional?

Strictly doctrinal reasoning might suggest not. If the Court's intent is to curtail Congress, it hardly seems likely to let an agency reach the same result after Congress delegates, with a wink and nudge, power to do it. The "arbitrary and capricious" standard could be a formal tool for articulating that line of reasoning. Conventionally, an agency acts arbitrarily when it bases its decision on a factor Congress did not want it to consider.[36] We might similarly say that a factor that Congress *could* not have itself considered cannot be passed along to the agency for the agency's use.

Of course, nominally *Boerne*'s doctrinal reach is very narrow: it constrains only Congress's efforts to use Section 5 of the Fourteenth Amendment. But its rhetorical claims seem very large. Suppose, for example, that a court was in the rare position of deciding whether Congress's reason for enacting a statute is a legitimate purpose—for instance, when deciding whether a statute can withstand First Amendment scrutiny. Can a statute survive constitutional balancing when Congress asserts that the justification for the statute is to protect another constitutional right, and that other right as defined by Congress differs from the Court's prior interpretations? If we take the rhetoric of *Boerne* at face value, then perhaps not; only the Court can define rights, and therefore Congress can have little interest in preserving a "right" that in the Court's view does not exist.

Turning back to agencies, it is apparent that we need to understand more about *Boerne* before we can answer our questions. Courts review the reasons agencies give for their decisions in almost every case—either directly, or indirectly, in the form of an assumption that the agency's decision is entitled to deference. Does *Boerne* stand for the proposition that the political branches can never rest their decisions on constitutional deliberation, unless that deliberation takes the Constitution to mean strictly what the Court has said?

It is important to recognize that as long as this question is open, it not only raises doubts about the legitimacy of many agency decisions, but also in many cases actually forecloses them. That is because courts also presume that Congress, absent clear statutory authorization, does not intend to delegate to an agency power that would skirt

36. *See* 1 PIERCE, *supra* note 10, § 7.4, at 452.

the edges of the authority the Constitution permits.[37] This is an aspect of "constitutional avoidance"—the principle that courts should deflect unresolved constitutional questions rather than answer them.[38] The effect is usually to give stronger protection to the underlying constitutional right without exhausting as much of the Court's political capital as might be expended in an outright constitutional holding.[39] For example, as Professor Bickel once observed, in presuming that agencies cannot exercise any power that might approach a constitutional limit, a court forces the agency to return to Congress for unmistakable statutory authorization—a process that is both time-consuming and difficult and that also arguably makes Congress's decision to challenge the Court more visible to the public.[40] Thus courts might, in the name of avoiding a *Boerne*-type question, prevent agencies from using any independent constitutional judgment (unless Congress clearly requires it).

The avoidance rationale suggests that this reasoning might well be backward. If avoidance is supposed to afford greater protection of rights, then it might be perverse to make it harder for an agency to give a more expansive interpretation of a constitutional right than the Court, burdened by doubts about its policymaking competency and democratic pedigree, is willing to declare. This is the essence of the argument offered by critics of the *Boerne* rule. Courts, these critics say, should cooperate with the political branches, nurturing rights interpretation where it sprouts outside the courthouse walls and drawing on the expertise and popular insight of the other two branches in making the judiciary's own interpretations better.[41] Other commentators broaden this approach beyond the government entirely, arguing that since "the people themselves" are the ultimate arbiters of constitutional meaning, we should trust that an informed

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37. *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001); 1 PIERCE, *supra* note 10, § 2.6, at 93. Despite this presumption, the Court sometimes is forced to confront the constitutionality of a delegation, as where it is clear that Congress intended to authorize an agency to approach the constitutional limits of its authority. *See, e.g.,* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846-47 (1986).

38. Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 82-83; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

39. *See* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 27-28 (1957); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

40. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 156-69 (2d ed. 1986); *see also* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 358-59 (1999).

41. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 24-27 (1999); Dorf, *supra* note 10, at 69-73; Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 150-51 (1997); Post & Siegel, *supra* note 13, at 516-19.

populace can offer the check on unjust political interpretations of the Constitution that courts now claim to provide.[42]

The applicability of *Boerne* to agency decisions also intersects another, related, academic debate about the Supreme Court's "supremacy." Scholars have wrestled with the extent to which the Court's interpretations of the Constitution should bind other branches of government. Although terminology is often muddled, there is widespread agreement about most points. There are three basic flavors of supremacy. The first two form the core of what we traditionally think of as the power of judicial review. In the first, which we might call *Merryman* supremacy, the other branches are bound to follow the holding of a case in which they participate as a party.[43] With the exception of Professor Paulsen, and possibly Dean Kramer, no one has seriously argued that a coordinate branch can disregard a judgment entered against it.[44] The second flavor we might call *Klein* supremacy; it would hold that Congress and the Executive cannot order courts to give up a judicial interpretation of the Constitution in favor of the view of one of the coordinate branches.[45] The critical feature of *Klein* supremacy is that its focus is on what courts do. While political actors cannot direct a constitutional rule of decision for a court, *Klein* supremacy says nothing directly about what the Constitution means for nonjudicial actors not subject to judicial review. This, too, is generally uncontroversial; it is the variety of supremacy at stake in Professor Monaghan's seminal work on "constitutional common law."[46] As Monaghan describes it, a court can draw lines separating constitutional holdings, which cannot be "overturned" legislatively, from constitutional common law, a regime under which the court's view can be superseded by statute or regulation.[47]

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42. KRAMER, *supra* note 17, at 247-48; Jeremy Waldron, The Core of the Case Against Judicial Review, 3 (Mar. 16, 2005) (unpublished manuscript), http://www.ucl.ac.uk/spp/download/seminars/0405/Waldron-Judicial.pdf; *see* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 30-32, 177-94 (1999); *see also* Alexander & Solum, *supra* note 24, at 1623-24 (explicating, but disagreeing with, KRAMER, *supra* note 17).

43. Johnsen, *supra* note 17, at 108; *see* Alexander & Solum, *supra* note 24, at 1608. Professor Paulsen describes what he hypothesizes as the President's power to defy judgments as "*Merryman* Power," after the clash between Lincoln and the Supreme Court over Lincoln's suspension of the writ of habeas corpus at the outset of the Civil War. *See* Paulsen, *supra* note 17, at 277-84.

44. *See* KRAMER, *supra* note 17, at 201; Alexander & Solum, *supra* note 24, at 1614; Paulsen, *supra* note 17, at 277; *see also* Post & Siegel, *supra* note 21, at 1033-34 (interpreting Kramer's claims).

45. United States v. Klein, 80 U.S. 128, 146 (1871); *see* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995); *see also* United States v. Nixon, 418 U.S. 683, 703-04 (1974) (rejecting the President's claim that his interpretation of executive privilege should bind the Court).

46. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

47. *Id*. at 23-30.

The third flavor, and the marginally more controversial one, asks whether nonjudicial actors must treat the Constitution as though it means only what courts have understood it to mean, even if the constitutional question arises in a context very unlikely ever to reach a court. The dominant contemporary view, generally called "departmentalism," holds that they do not.[48] For example, departmentalists claim that when the President pardons an individual on the theory that the statute criminalizing her conduct is unconstitutional, the President may apply his own independent understanding of the Constitution and not simply what a court has said (or, perhaps, would say).[49] In a sense, *Boerne* is the inverse of departmentalism, in that *Boerne* seems to depend on an assumption that, at least for nonjudicial constitutional decisions that later come before the Court for review, valid "constitutional" interpretation can mean only interpretation that echoes what the Court itself has already said.[50] Again, academic defections from the departmentalism camp are scarce. Most prominently, one lonely pair, Larry Alexander and Fred Schauer, argue that this third variety of supremacy—they call it "exclusivity"—is normatively attractive because it produces many of the goods Monaghan claimed for *Klein* supremacy: stability, certainty, and "settlement"—the opportunity for the Court to take "off the table" disputes that society will only waste time and effort trying to solve for itself.[51] Their view, though, is not widely shared.

This Article is about how courts should respond to the claims of departmentalism. Are those claims persuasive? Even if they are, can a court accept them and still go about its business? Or are the three supremacies in some respects interwoven, so that a court must claim supremacy in all three fields in order for any one of them, even the anti-*Merryman* power, ultimately to be effective? And is this last concern so serious that courts should presume broadly that Congress does not intend to delegate departmentalist-type power, or is it a concern that can be addressed more effectively case by case?

Before moving on, it will be helpful to clarify two last points. The third variety of supremacy may prohibit independent constitutional interpretation, but it would seem not to affect agency efforts to predict what courts will say. That is, an agency might curtail enforce-

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48. *See supra* note 17 and accompanying text; *see also* Alexander & Solum, *supra* note 24, at 1612-13 (outlining the departmentalist view); Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1359 (describing view they criticize as "a consensus . . . among scholars and officials").

49. *See* Alexander & Solum, *supra* note 24, at 1629-30; Paulsen, *supra* note 17, at 264-67.

50. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 352-53 (1998) (describing "judicial supremacy"); Johnsen, *supra* note 17, at 119.

51. *See* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1371-81.

ment activities for constitutional reasons in two distinct ways. The first is because it wants to avoid invalidation by a court on constitutional grounds. The other is because it concludes, based on its own reading of the Constitution, that its actions are unconstitutional and therefore are to be avoided. This is an important difference because the predictive model acknowledges judicial supremacy in constitutional interpretation, while the second ignores or defies it. Thus, *Boerne*-type exclusivity should accept without much difficulty extrajudicial constitutional interpretation that is only an extrapolation of what courts have done, engaged in for the purpose of avoiding judicial invalidation. My focus in the rest of this Article accordingly sets aside that situation, which I view as an easy case, and concentrates instead on the issue of the permissibility of truly independent constitutional reasoning by the Executive.

It is also worth emphasizing that I see a difference between review for whether an interpretation is permissible and review for whether that interpretation is correct. *Boerne*, for example, seems to consist of two separate inquiries: first, whether the constitutional right recognized by Congress protects the same conduct safeguarded by judicial opinion—whether Congress is "right" about the law—and then to the extent that it deviates, whether it goes too far, or instead is sufficiently "congruent and proportional" with the underlying right.[52] If we entirely rejected departmentalism, we would terminate the *Boerne* inquiry at the end of the first prong, once we had concluded that Congress's action could only be justified by an independent constitutional judgment. On the other hand, a very strong departmentalist rule might avoid the need for the first step altogether; it would be enough that Congress's judgment rested on its own view of the Constitution, and the Court would have no authority to second-guess that determination. Thus, the question whether independent interpretation is permissible may avoid entirely the need to judge whether an interpretation is "right" in the court's view.[53] As *Boerne* shows, we then face an additional puzzle about how, or whether, to impose other limits on permissible nonjudicial interpretations. But that is an inquiry I leave for later work. What follows considers only whether agency interpretations of the Constitution may be valid irrespective of whether a court would say that they are "correct."

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52. Tennessee v. Lane, 541 U.S. 509, 519-21 (2004).

53. For this reason, I disagree with the claim by Professors Alexander and Solum that departmentalism is ultimately pointless. They argue that in the end, all nonjudicial interpretations can be brought before a court for examination on the merits, so that permitting initial independent interpretation accomplishes little. Alexander & Solum, *supra* note 24, at 1614-15. But that seems to presume their case; if courts are willing to tolerate "constitutional" norms established by other political actors without demanding judicial review of the accuracy of the norm, then judicial control over the shape of the norm is not at all inevitable.

III. COMPARATIVE INSTITUTIONAL COMPETENCE, OR *BOERNE EST MORT*

As I suggested in the last Part, scholarly debate over extrajudicial constitutional interpretation now centers on the question of whether the judiciary is in some way uniquely capable of authoritative interpretation. That is, if the main argument against departmentalism is "settlement," the burden falls on critics of departmentalism to show that judges can provide settlement that politics cannot. And, naturally, the critics also have to show that settlement matters. Indeed, the principle objection to Professors Alexander and Schauer is not that they are wrong in that courts are more adept at "settling" the law, but rather that it is often better to be accurate than to be final.[54] In the realm of purely statutory interpretation, it is generally agreed that the political branches are more likely to be "right" as a matter of policy.[55] Schauer ripostes, however, that there are some issues we know we cannot trust the political branches to answer "correctly."[56]

In this Part, I try, with all due respect to the current combating scholars, to refine the terms of their debate. Part III.A considers the running debate over whether the law's settlement function is a logical choice as the highest value for our legal system to pursue, and if so, whether judges are best positioned to defend it. I conclude that although it is probably correct that judges are likely to be better able to settle the law, the case for settlement as an overarching concern is tenuous, especially considering that we do not make the same claim for the interpretation of statutes. Part III.B, however, accepts both premises, but argues that we might still not agree that these premises entail judicial exclusivity rather than the more limited supremacy entailed by judicial review.

A. Well, That Settles It. Right?

For Alexander and Schauer—at least when they are writing together—"settlement" is a premiere value.[57] For them, the rule of law is all: Consistent and predictable constitutional rules make planning easier, and prevent wasteful efforts to alter its existing form or to

54. *See* Devins & Fisher, *supra* note 15, at 103-04.

55. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150-51 (1991); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984) (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)); JOHN HART ELY, DEMOCRACY AND DISTRUST 4-5 (1980); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630-31 (1992); Manning, *supra* note 10, at 627.

56. Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1055, 1064-66 (2004).

57. Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 473.

predict how a rule will develop.[58] They argue against departmentalism by discussing Professor Monaghan's familiar point that society benefits from avoiding debate about contentious issues.[59] And they suggest that these values outweigh any benefits that might inure to society from rules that were more adaptable and more open to outside input.[60]

This Part considers the arguments against settlement, starting with common points by critics and moving on to some thoughts of my own. On the whole I think settlement fares somewhat better than the current consensus suggests, although I do not think either side has a real knock down argument.

1. Empirical Challenges

The first problem with the settlement justification for judicial exclusivity is basically a problem of fit. Although Alexander and Schauer rather weakly argue that their claim is really about what an ideal system should be,[61] they do little to explain why, if their proposal is consistent with our prevailing notion of how justice should function, our current system does not incorporate much of their position.[62] In fact, I think their defense on this ground could be more spirited. For example, to critics who point out that seemingly definitive Supreme Court rulings on issues like abortion and affirmative action hardly seem to have eased societal disagreement,[63] they might respond that this disagreement only illustrates their point. Much of the ongoing debate seems to involve efforts to affect future Supreme Court decisions, by selecting Justices with different points of view.[64]

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58. *Id.* at 482; Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1371-81.

59. Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 467, 469-70; Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1380; *see* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750-51 (1988).

60. Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 470, 475; Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1372-73.

61. Alexander & Schauer, *Defending Supremacy, supra* note 18, at 460-64.

62. *See* Paulsen, *supra* note 17, at 225; *cf.* Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 373 (1997) ("[O]ur current legal regime at times operates other than we would expect if judicial supremacy were an accurate descriptive account."). Alexander and Schauer acknowledge this difficulty but addresses it only indirectly by arguing that their focus on institutional competence adequately accounts for real-world considerations. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 465, 480. They do not, however, get around to explaining their "fit" problem.

63. *See* Devins & Fisher, *supra* note 15, at 84-85; Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 801 (2002).

64. *See* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994); KRAMER, *supra* note 17, at 227-28; *cf.* Monaghan, *supra* note 59, at 750 (explaining that settlement may remove merits of a constitutional judg-

In other words, maybe Supreme Court decisions are not really settling issues the way Alexander and Schauer suggest because the decisions now are not seen as being truly final.

Perhaps an even stronger sense of Supreme Court exclusivity and finality would cut off this debate as well. Suppose it was widely thought that, inasmuch as constitutional deliberation is the Court's task alone, the views of future Justices on constitutional matters are not proper factors for the President or the Senate to consider in selecting Justices. At the very least, if it were clear that Presidents and Senators largely felt this way, whatever the public's view, it might significantly dampen the debate about how to unsettle what the Supreme Court has already settled.[65] And of course, a very powerful rule of stare decisis, adhered to scrupulously by the Justices, might have a similar effect.[66]

Another possible response, this one closer to the surface of Alexander and Schauer's argument, is that although our system values stability, political market failures conceal that preference. Specifically, Alexander and Schauer claim that ordinary politics fails to match the level of stability the judiciary can ideally achieve.[67] But there is a minor puzzle here they do not resolve. If stability is valuable to all of society, why is it not already produced at the optimal level by the political market?

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ment from dispute without necessarily resolving the dispute about the judges who made it); Post & Siegel, *supra* note 21, at 1042 ("Through the appointment and confirmation process . . . the people in the end will have the form of constitutional law that they deem fit.").

65. *But cf.* Post & Siegel, *supra* note 21, at 1030 ("No plausible version of judicial supremacy would prevent citizens from voting for a President because they believe he will appoint Supreme Court Justices who will express the citizens' own view of the Constitution . . . ."). It is, of course, hard to think of a judicial rule that could achieve such an effect. One possible step in that direction would be a conflict of interest rule that required Justices to recuse themselves in any constitutional case on which they have expressed a view that could have been known by the President or the Senate. As for Professors Post and Siegel's complaint, it is unclear from their work why a system that tries in this way to discourage private contemplation of the Constitution is less "plausible" than other forms of settlement. Indeed, the object of settlement generally seems to be to relieve the public and politics of the burdens (along, of course, with the autonomy) that such contemplation entails. Their argument thus seems addressed more to the claims of settlement generally than to any particular instrumental route to closing off the political manipulation of judicial outcomes. I address what I take to be their psychological point about the overall plausibility of settlement later, in Part V.B.

66. *But see* Whittington, *supra* note 63, at 801-04.

67. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 476-77; *see also* Peabody, *supra* note 17, at 73-74 (challenging Alexander and Schauer's hypothesis that the other branches cannot make authoritative decisions that promote stability).

Public choice analysis suggests a possible answer.[68] In a nutshell, public choice predicts that a regulation with obvious substantial impact on a relatively small, well-defined group is likely to face a stiff challenge if its benefits would flow subtly and thinly to a diverse majority.[69] The caveat, however, is that this outcome is only a general tendency, and it may change if the regulators, for whatever reason, are less subject to the intensity, rather than sheer numerosity, of constituent preferences.[70]

However, even with that caution flag raised, public choice still has a lot to offer Alexander and Schauer. Stability seems like a fine example of a public good we would expect to be frequently subdued by more concrete interests. For the most part, the benefits of predictability and repose flow broadly to everyone in society, but their exact measures are hard to quantify. In contrast, the incentives to cheat and to allow debate and deviation are powerful, and stability's power to restrain them is weak. Stability, in short, is the classic "common" so prone to tragedy: with each poaching from the shared grazing land, the poacher benefits much more than the shared land is hurt. In turn there are a lot of poachers. Eventually, there will be no land to graze. The political process will struggle to resist that process because each set of poachers will offer a benefit more tangible than stability to a group far more cohesive than society as a whole.[71]

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68. In brief, public choice theory predicts that the decisions of government officials reflect not only the interests of the officials' constituents, but also the intensity with which those constituents express their interest. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971), *reprinted in* ADMINISTRATIVE LAW ANTHOLOGY, *supra* note 1, at 399, 402. Since voters often have limited information about public policy and limited time in which to gather information and act on it, the average rational voter relies on others to monitor and lobby government officials on her behalf. *Id.* There is obviously a diminishing need to rely on others to garner information as the impact of any given policy becomes more obvious to that hypothetical voter—as the group of other people the voter could rely on to fight on her behalf diminishes, she calculates that she will have to fight more fiercely for herself, so that she is less inclined to "free-ride" on others' lobbying efforts. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 21, 35 (1971); Stigler, *supra*, at 402. If her interest group is fairly small and it is easy for members to recognize what they hold in common with each other, they will have an easier time coming together as an effective lobbying force. Stigler, *supra*, at 402.

69. Stigler, *supra* note 68, at 402.

70. *See* David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 398 (2002).

71. Further, in part because the gain from stability is so unquantifiable, it is very easy for the cheater to paralyze the majority by arguing that most of that value will remain even if we cheat a little here or there. We are still mostly predictable, the cheater argues, even if we make this one exception, and if we *promise* there will be no more exceptions, then we keep *all* of the value of stability in the future and get the benefit of a better rule! Ultimately, of course, the system recognizes the potency that such an argument will have in the future and stops expecting the rule to defy would-be cheaters. Thus, stability collapses. Nonetheless, it is difficult, I submit, to organize a political coalition based on such an abstract claim.

It might be argued that the cheaters also value stability—at least once they have won. It is in the interest of any coalition to lock in its gains—in effect, to make true its claim that its exception will be the only one.[72] Thus many theorists who study deals, both in legislation and in contract, have suggested that powerful deal-making coalitions, even those who at one time were on opposite sides, might fight against future cheaters to freeze the terms of their own deals.[73] If so, then we might actually expect a relatively high level of stability to arise purely out of politics. As I have argued elsewhere, however, I think the theorists I just mentioned have it wrong.[74] Even in a very stable legal system, the world itself changes. The fixed-price requirements contract that looks appealing to the supplier when prices are low looks like an albatross when the market jumps. A powerful central government that is appealing to a mercantile society in a hostile globe full of enemies may be intrusive and too expensive to an agrarian nation in a time of peace. Wise deal-makers recognize not only that future flexibility may be needed, but also that their own capacity to design rules to allow the best choices in the future may be limited at the time of the deal.[75] Thus, whatever the force of the claim that stability is better for society as a whole, actors who are motivated primarily by preserving their one deal are likely at best to be ambivalent about a very rigid system of legal rules.

One other objection to this public-choice-oriented critique of politics as a preserver of stability might be that, as I mentioned at the outset, it is not inevitable that public servants will respond to the expressed intensity of their constituents' preferences. Of course, absent the collective action problems that public choice addresses, it is probably preferable that our government pay attention to how much the populace cares about an issue. Intensity of preference may well be a reasonable stand-in for overall utility, in that weighing the opposing sums of intensity might be a guide for the government in selecting net positive utility outcomes. If possible, then, it might be preferable to design an institution that could filter out the intensity of actual or hypothetical public preferences from the distortions that sometimes arise when communicating them. Failing that, if we could agree on a preeminent public good, we might try to design an institu-

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72. *See* Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 261-64 (1987).

73. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-44 (1983); Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1021 & n.35 (2002).

74. *See* Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 166-67, 171-74 (2004).

75. *See, e.g.*, Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration,* 94 J. POL. ECON. 691, 716 (1986).

tion that would select that good even in defiance of a strongly expressed public preference for the contrary. In his individual writing, Schauer has advanced this second strategy as another justification for assigning judges as guardians of rights.[76] Now that we understand that stability itself can be seen as the same sort of public good as more traditional rights, it is apparent that Schauer's two arguments are closely interrelated. At the same time, they are vulnerable to a single common criticism: that some political (that is, not judicial) institution could conceivably perform the same function, if only there were a realistic way of ensuring that the institution would value the chosen public good over constituents' preferences—or value it at least as much as a court would.

The case for exclusive judicial defense of stability, therefore, must answer the claims of social psychology and its potential implications for the use of institutional ideology to constrain decisionmakers, political or otherwise. Criticism of what was for a time the predominant public choice view of regulation now contends that it is psychologically unrealistic to presume that government decisionmakers will necessarily pursue their own rational self-interest, which in turn generally means adherence to the intensity of their constituents' preferences.[77] Powerful social forces make us want to live up to our expected public role: we may feel that we give our lives meaning by acting out the narrative that defines our culture and the places for us in it. Or we may simply desire approbation and the higher social acceptance and status that may come with fulfilling expectations.[78] Equally powerful forces—shame and shunning, loss of identity and status—may punish us when we fail to act as others expect.[79] Over time, we may come to internalize these role norms.[80] Thus, an insti-

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76. Schauer, *supra* note 56, at 1055-56.

77. *See, e.g.*, Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1288 (2001); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 633-38 (1999); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1910 n.5 (2002) (noting dramatic expansion of psychological analysis of public lawmaking).

78. *See* BERNARD GUERIN, SOCIAL FACILITATION 164 (1993); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354-58 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355-65 (1997).

79. *See* Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 585-86 (1998); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 539-40 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1130 (2000).

80. JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER 131 (1989); GABRIELE TAYLOR, PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT 57-68 (1985); McAdams, *supra* note 78, at 366; Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 915 (1996).

tution that believes its mission—its "ideology"—is to prefer the public good over mere political preferences and is widely expected by the public to meet that task may well succeed.[81]

In consideration of this view it might be said that it is only differences in institutional ideology that distinguish judges from legislators, but that those differences could conceivably be erased. Judges who play an integral role in the administrative process may begin to see themselves more as political players than as "judges." Realistically, it is almost as much in a judge's rational self-interest to pander to strong preferences as it is for a congressman. Judges may desire higher judicial offices with greater prestige and power for which another confirmation hearing will be required. Supreme Court Justices may harbor political ambitions. Dean Kramer theorizes that a significant source of state influence over federal officials is that federal officials feel ties to the local state political parties from whence they sprung.[82] The same is likely true of judges. And judges may rationally calculate, as many agency staff are said to do, that they would be rewarded upon retirement by a grateful favored interest group.[83] That these inducements seem on their faces so weak and implausible is testimony to the powerful expectation that they will largely be looked on with disdain by our judges. But surely the same is possible, at least in theory, for political actors as well. There was a period when thoughtful scholars of administrative law believed that agency personnel could be expected to disregard lobbyists in favor of the public good.[84] The Senate, at least at one time, aspired to be a model of independent deliberation removed from the everyday struggle of politics.[85] What if those norms were considerably more forceful and more durable? Could Alexander and Schauer still argue that the courts are uniquely qualified to preserve stability, or even rights generally?

Proponents of judicial exclusivity now have to argue that these divergent results are not coincidental. Ultimately, institutional ideology looks to be an expectations game with the possibility of circles

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81. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 562, 570 (2000); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 767 (2001); Suchman & Edelman, *supra* note 80, at 919; *cf.* Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 455 (2003) (arguing that "ideological commitments and bureaucratic missions" explain why nonjudicial actors might engage in rigorous constitutional review).

82. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 279-85 (2000).

83. *Cf.* Kevin T. McGuire, *Lobbyists, Revolving Doors and the U.S. Supreme Court*, 16 J.L. & POL. 113, 113-14 (2000) (making this point with regard to the Justices' law clerks).

84. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1049 (1997).

85. *See* JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 28-32 (1986).

both vicious and virtuous. Small failures to live up to an institution's ideology might breed public cynicism, which in turn will lower the psychological pressure on institution members to conform, leading to poorer performance and yet lower expectations. In the opposite direction, very high public expectation might result in self-selection of candidates who believe in the institutional ideology and think they can comply. Clearly, institutional design will matter. We know and expect that elected officials will respond to constituent demands.[86] It will take unusually virtuous behavior, or special internal institutional design, to reverse that expectation. Other institutions, designed and perhaps justified to the public expressly to separate their decisionmakers from elective pressure, begin life with the gift (if defense of second-order public preferences is what we desire) of a concurrent expectation that they will be less attendant to short-term voter demands. In this account, it may be that the Progressives' democratization of the Senate, in conjunction with the rhetoric of direct democracy that they used to mobilize the nation for constitutional amendment,[87] is precisely what undermined the Senate as a useful defender of stability or rights. Courts, designed to be as distant from public demands as we could make them, and which are defended often on just that ground,[88] began with a distinct expectations edge.

I doubt that this account is entirely satisfying. Political ideology, however vicious the circle of cynical expectations, is probably not irreversible. As discussed in much greater length below, I very much doubt that the political virtue of courts is self-sustaining. But the defender of judicial exclusivity at least can claim that the fate of stability is more precarious when it rests in political rather than judicial hands. And there is a good explanation for why we have not seen significant stability emerge from the political marketplace.

2. Normative Challenges

Settlement has at least a plausible excuse for failing to fit our political system. What about on the normative side? In my view, the mainstream critique of Alexander and Schauer's account of exclusivity, although in some senses extremely persuasive, ultimately brings us to a stalemate.

Again, the prevailing criticism of the exclusivity argument is aimed at the premise that settlement is a premium value that only

86. *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285-89 (1988).

87. *See* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1016-21 (1994).

88. *See* KRAMER, *supra* note 17, at 98-105 (setting out early history of judicial explanations for power of judicial review).

courts can adequately preserve.[89] For critics, settling law when the development of the law is ill-informed and autocratic seems, at best, foolish.[90] In contrast, allowing the political branches to consider and to develop constitutional doctrine allows courts to gather practical insight into difficult policy and empirical questions that may underlie their constitutional decisions (especially as those facts change over time).[91] Some of those empirical questions might include popular preference for a particular moral, ethical, or utility outcome.[92]

The settlement proponent, however, can answer that courts are able to obtain largely the same information. To the extent that this critique simply depends on an information shortage, on an absence of practical examples, or on a foreshortened period of ferment before the court must lock in a particular rule, we could simply expand the field of judicial vision. Not all social dispute is wasteful; settlement only aims to cut off debate once it reaches the point at which it becomes wasteful.[93] So the Supreme Court could use avoidance techniques to allow controversies to simmer among lower courts and in the real world until it feels confident it has a good answer, or until it feels that the benefits of a better answer would be outweighed by further divisions. Even at that point, the Court can look to foreign courts and foreign governments to see how they have resolved similar issues. Similarly, state interpretation of state constitutional law might offer opportunities for comparative constitutional law in a population that is even more likely than the international community to reflect overall domestic views.[94] Exclusivist courts also do not have to be closed

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89. *See* Gant, *supra* note 62, at 388; Johnsen, *supra* note 17, at 114. For the antidepartmentalist view, see Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1367-68.

90. *See* Gant, *supra* note 62, at 373, 388; Post & Siegel, *supra* note 13, at 467, 514-15; *see also* Dorf, *supra* note 10, at 67 (judging that risk of getting the law wrong over the long-term is more serious a risk than dangers of disuniformity).

91. *See* Devins & Fisher, *supra* note 15, at 98-99; Dorf, *supra* note 10, at 65; Gant, *supra* note 62, at 388; Monaghan, *supra* note 46, at 28-29; Whittington, *supra* note 63, at 791.

92. *See* Post & Siegel, *supra* note 21, at 1037; Post & Siegel, *supra* note 13, at 515. Courts in this alternative view do not have to cede justice to the ballot booth. Popular preferences are only one input; a wise court can use that information to inform its conception of what is just, what is right, or what are the hypothetical utility preferences of voters (and nonvoters). In turn courts can inform politics, reminding public officials and the public of what they ought to prefer, given a more perfect political system. *See* Devins & Fisher, *supra* note 15, at 104-05; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-71 (1993).

93. *See* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1386.

94. I say "might" because it is uncertain what role a truly "exclusive" Supreme Court would leave for state constitutional interpretation. Obviously, an issue is not really settled if it can still be debated, in only slightly altered form, in fifty different states. Exclusivity thus might push the U.S. Supreme Court to go beyond *Michigan v. Long*, 463 U.S. 1032 (1983), taking a very expansive view of when a state court decision in fact rests on "federal" grounds. The Court might, for example, define federal "law" very broadly, declaring that a decision rests on "federal" grounds whenever it involves the same fundamental

off to new information. Although, as I have mentioned, there will be pressure within an exclusive regime to develop a very strong rule of stare decisis, the courts might still try to strike a balance between convincing the public that an issue is truly settled and reexamining an issue when the underlying circumstances seem genuinely to have changed. Finally, the cardinal characteristic of settlement is that it is autocratic; for the settlement proponent, the fact that the Court takes a decision away from the people is the main *benefit* of judicial decision, not a cost.[95]

Proponents of shared constitutional interpretation (including the author of this Article) have also claimed that overlapping interpretive authority diminishes the Court's "countermajoritarian difficulty."[96] In its classic form, the "difficulty" is that courts cannot act meaningfully unless the political branches are willing to accept their authority.[97] This presents a dilemma when a court can anticipate that its efforts to protect some politically unpopular right will encounter "massive resistance."[98] Professor Bickel famously argued that, as a result, courts must at times be parsimonious with rights, based on the theory that the public will tolerate only so much disturbance before it would simply defy judicial decree, and the courts should do all they can to put off that day.[99] The shared constitutional interpretation theory draws significantly from Bickel's argument, claiming that by allowing other political actors to protect second-order rights when there happens to be a coalition available, ready to stand up for them, the judiciary can save itself from being the sole target of majority discontent.[100]

Again, the exclusivity proponent has some answers. First, exclusivity, too, can conserve scarce judicial authority. In a regime where settlement has truly taken hold, the Supreme Court would only have

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question of justice resolved in the Court's earlier interpretation of the Constitution, even if the state law question involves a very differently worded state proviso.

95. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 467, 470.

96. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1590-92 (2001); Galle, *supra* note 74, at 203-06; Post & Siegel, *supra* note 13, at 467-68; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1239-40 (1978). The phrase "countermajoritarian difficulty" was coined in BICKEL, *supra* note 40, at 16.

97. *See* BICKEL, *supra* note 40, at 16-23.

98. *Id.*

99. *Id.* at 29-33; *see also* CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 34-55 (1960); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60-62 (1965).

100. *See* Post & Siegel, *supra* note 13, at 516-19. Private parties might also feel more "ownership" in a plan that they helped create and thus be less resentful of what they might otherwise have seen as a government imposition.

to decide an issue once (unless it wanted itself to revisit the question).

The stability proponent also doubts that the countermajoritarian difficulty is as serious as Bickel claimed. She believes that the public will recognize that it needs a source of final authority.[101] Thus, the settlement proponent might first argue that the public at least sometimes will see the utility of the rule of law values she espouses, even if public choice analysis suggests that it sometimes will not act on that realization. Further, the settlement proponent can assert that rational actors will recognize, as the drafters of a contract sometimes do, that for a productive deal to move forward they need to agree that any future disagreements will simply be decided by a judge.[102]

Naturally, none of these claims is even nearly universally true. Again, the possibility of principled behavior by public officials may swim against the tide of public cynicism. That cynicism is fed by the inevitable likelihood that sometimes the practical benefits of adhering to judicial decision will be outweighed by the gains from "cheating" on settlement. Surely one deviation will not drive away investment or break the deal. Yet it will produce real gains for the cheater. The more rampant the cheating, the more cynical we become. And so our representatives play more and more often to what we want, and not to what the Court tells us we ought to do. Still, the proponent of stability can argue that its benefits at least slow this progression and offer the possibility, however faint, of a virtuous circle in which the public supports the Court in its efforts to protect stability and other public goods from themselves and other would-be cheaters.

Thus the defender of judicial exclusivity has some fairly strong responses to the normative claims of its critics about the virtues of the opportunities foregone by sticking to settlement above other values. More than that, in the end she can answer them all with a shrug. Yes, she might say, collaborative interpretation gives us "better" answers in some sense. But Alexander and Schauer concede that point almost from the very start.[103] Their claim is that settlement is more valuable than any incremental gains in the "right" answer to a constitutional question that might flow from an alternative methodology.[104] As a result, they make themselves virtually unassailable on

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101. For a similar claim from an author who is not generally a strong proponent of stability, see Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606 (2003).

102. For discussion of the contract perspective, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 96 (6th ed. 2003) and Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 559-65 (2003).

103. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 468-70.

104. *See id.*; *see also* Emily Sherwin, *Ducking* Dred Scott*: A Response to Alexander and Schauer*, 15 CONST. COMMENT. 65-67 (1998). Although Alexander and Schauer say that their argument does not depend on the value of settlement per se, they then contend that

the normative values of settlement, because it is largely incommensurable with the "better" results they waive aside. That is especially true because our preference for more informed or democratic outcomes might vary depending on the underlying right that is to be decided. It may be more fruitful, then, to consider the negative case against settlement. I do that in the next subsection.

3. The Dred Scott *Decision*

So it is difficult to say whether settlement, if it is all that its proponents say, compares favorably to the chance to reach better but less predictable results. On the other hand, it is fairly easy to challenge the merits of settlement itself. Many critics of Alexander and Schauer quickly pointed out that settlement is hardly desirable when the rule that is settled is *Dred Scott* or *Plessy v. Ferguson*.[105] Any system, these commentators say, that expects the political branches to accept *Dred Scott* as binding authority is obviously wrong.[106] That point is fairly trenchant when the question is how the Executive should respond to judicial interpretation—it dramatizes how high the costs of abandoning better constitutional results can be. But it is almost irrelevant to my question, which is how the judiciary should respond to the Executive. We can hardly expect judges to agree that their decisions can be freely disobeyed when "wrong." If judicial decisions are to be anything other than friendly advice, they cannot invite litigants to disregard them when the litigants disagree.[107] To the extent that inviting alternative viewpoints improves inputs into the judicial process or allows an opportunity for judicial reappraisal under changed facts, rules allowing reconsideration or reopening—with the court's consent—would serve the same function better.

Applying the settlement principle to *Dred Scott*, however, does raise a serious weakness of the settlement case for exclusivity. Legal settlement does not necessarily entail societal settlement. Rather, le-

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in fact their claim rests on the "special function" of law, which of course turns out to be that law has a settlement effect. Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 472-73. So, in short, their argument rests on the claim that their notion of what constitutes law's "special function" is better than competing theories. Alexander, writing recently with Professor Solum, seems to abandon this position, arguing instead for an issue-by-issue weighing of settlement values that would account for the benefits of flexibility in particular subject areas. Alexander & Solum, *supra* note 24, at 1632-34.

105. Devins & Fisher, *supra* note 15, at 99-100; *see also* Paulsen, *supra* note 17, at 271.

106. *See* Devins & Fisher, *supra* note 15, at 99-100.

107. Of course, one could imagine a system in which courts are only neutral advisers in a consensual dispute-resolution process. But if that were all that a litigant wanted, it would go to a mediator. Let us, then, define "court" as that institution, among several possible advice-givers, whose decisions are binding. Our question then is: What attitude could we expect the decisionmakers of that institution to take regarding defiance of its judgments? Tolerance is a highly unlikely attitude because then the institution no longer offers anything to distinguish it from merely advisory institutions, among other reasons.

gal settlement only shifts the debate from what the law is to whether the law should be disobeyed.[108] Similarly, a regime in which constitutional law was highly settled might result in a correlative response from political actors, who might (in government) streamline the amendment process or (in the private sector) develop institutions to mobilize affected constituencies for a national effort to change the law.

Alexander and Schauer seem to acknowledge this argument, but claim that settlement at least results in more stability and less debate than we would have otherwise.[109] They assert that because the debate about whether to disobey the law begins with a heavy presumption that the law ought to be obeyed, in most cases legal settlement will substantially end social disagreement as well.[110] That assertion presumes that law exerts some significant psychological force on citizens. For the reasons I have just explained, law's binding psychological force to some extent depends on public perception that defying the law is wrong.[111] Thus, disobedience grows as it goes, so that relatively isolated protests may over time lead to more widespread weakening of law's settling power. Call it the "broken windows" theory of constitutional law.

In short, Alexander and Schauer seem somewhat to overstate the extent to which settlement in fact settles. And, of course, a law that is widely disobeyed is not especially predictable. Again, though, this is not exactly a disqualifying argument. It might be that settlement, however hobbled, is still more valuable than the values of cooperation, but that looks increasingly tenuous.

B. Why Not Settle for Judicial Review?

Suppose now that we continue with the assumption that stability is our premiere value, and we are satisfied that the judiciary is uniquely qualified to promote it. Turn back then to the central question: How should a court respond to an agency that defends its regulation as a product of constitutional reasoning? I would argue that the two premises we have accepted so far (that is, the value of stability and judicial preeminence in defending it) are inadequate to explain why a court would be obligated to invalidate the regulation. In

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108. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 18, at 472 n.50; Devins & Fisher, *supra* note 15, at 91; Whittington, *supra* note 63, at 798-99.

109. *See* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1386; Schauer, *supra* note 56, at 1048-49.

110. Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1386.

111. *See supra* notes 78-81 and accompanying text; *see also* Frank I. Michelman, *Relative Constraint and Public Reason: What Is "The Work We Expect of Law"?*, 67 BROOK. L. REV. 963, 972-73 (2002) (arguing that individuals will accept law when they see that others comply).

other words, for stability at least, it is possible to decouple the justification for judicial review from the presumed rationale for exclusivity. The heart of the problem for exclusivity is a tension between Article III limits on the independent and case-specific nature of federal judicial decision and the policymaking role of an agency.

In brief, judicial exclusivity and modern regulation challenge each other because, for the most part, the agency acts first. It is the agency that formulates policy in advance of any actual controversy; often, no justiciable antagonistic relationship arises until the agency's policy is so far developed that it is clear how private parties will be affected.[112] Indeed, rules of standing aside, Article III arguably limits judicial review of agency policy to "final" agency actions because review before that point might be the equivalent of an advisory opinion.[113] Therefore, when agency regulation involves "novel" constitutional issues, the agency will often need to resolve them in the first instance without the benefit of judicial involvement, or risk developing and implementing its resolution without knowing if its plans will comply with future judge-made constitutional law.

At first glance, it is hard to see why we should prohibit preliminary interpretation by other actors even if we agree that stability is important and judges are best positioned to defend it.[114] The uncertainty and disputatiousness that exclusivity aims at eliminating will persist until the reviewing court issues its decision, whether or not the agency acknowledges and tries to account for the possible constitutional problem. So there is no obvious stability benefit to foreclosing pre-judicial interpretation. And, as other commentators have observed, there are substantial benefits to the Court in having the insights of other branches before rendering its own decision: the Court can learn about a wider range of policy implications, consider popular views of what may be competing notions of justice, and so on.[115] If we are going to lock in a rule, we ought to lock in a good one.

The problem here is that if judicial exclusivity makes such modest claims on agencies, it becomes redundant. Judicial consideration of an agency decision after it has been made, where that consideration accepts the validity of the initial agency analysis but probes its accuracy, is not exclusivity at all. It is judicial review. Exclusivity is only meaningful in an Article III world if it in some way would cause

112. *See* Gant, *supra* note 62, at 394-95; Monaghan, *supra* note 12, at 5.

113. 2 PIERCE, *supra* note 10, § 15.12, at 1052.

114. *See* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1360.

115. *See* Elhauge, *supra* note 1, at 2127-28, 2137; Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003).

courts to reject interpretations that would survive review for *Merryman* and *Klein* supremacy.[116]

But this is not the end of our inquiry; exclusivity likely demands more than judicial review alone. I placed "novel" in quotation marks quite deliberately. There are at least three varieties of novelty to consider. First is the basic blank slate novelty: no court has ruled on the issue before.[117] Next is a situation where the problems of application can be so indeterminate that the novelty is essentially a blank slate: does privacy of the home include privacy in one's infrared emissions?[118] And last, an agency could argue that recent experience in applying the present rule, or other change of circumstances, so throws the Court's premise into question that any reasonable person would assume that the Court would want to revisit its rule.

The challenge for the judicial exclusivity proponent lies in deciding whether to distinguish between these categories, and if so, how.[119] Each additional layer of "novelty," as I have sketched them, extentuates the trade-off between stability and the amount of information a court has available when formulating and enforcing a rule over time. By hypothesis, we assume that judges must prefer consistent answers over "right" answers. But each of the three layers is faithful in its fashion. Must the stability proponent always prefer the *most* stable set of rules? Or can exclusivity be carved so that courts can capture some benefits of joint regulation while striving to stay predictable enough to capture most of the benefits of stability?

If we opt for maximum stability, then it is arguably the case that we would have to prohibit agencies from engaging even in genuine blank slate constitutional consideration. Efforts to distinguish among different forms of "novelty"—some permissible, some not—will be hard to predict, the object of considerable debate, and subject to political gaming by the executive and private parties. Obviously, the lines between these categories or between any one of them and law that is not "novel" at all are not bright. They call up all of the familiar and age-old problems of defining precedent and holding.[120] To

116. In other words, review to ensure that the decision was correct. For my explanation of *Merryman* and *Klein* supremacy, see *supra* text accompanying notes 43-47.

117. *See* Gant, *supra* note 62, at 395.

118. *See* Dorf, *supra* note 10, at 11-12 (observing that because of inherent value judgments in applying constitutional terms, "there is no such thing as 'adhering' to an old meaning in a new context").

119. *Cf.* Paulsen, *supra* note 17, at 272 (arguing that there is no significant difference between executive interpretation when there is a prior judicial decision on point and when there is not); Whittington, *supra* note 63, at 790 (considering trade-offs between different layers of stability and benefits of cooperation).

120. *See, e.g.,* Lawson & Moore, *supra* note 17, at 1296-97 (discussing the "degree to which a content based theory of interpretation . . . can generate clear answers to constitutional questions); Monaghan, *supra* note 59, at 763-67 (analyzing "[t]he meaning of precedent").

those dilemmas we must now add considerations about whether binding precedent for a court should also be binding on an extrajudicial entity. Plainly, some of the debate over how to categorize a new policy will necessarily involve the merits of the underlying set of constitutional values. For example, whether a policy involves a new application of settled precedent may depend on what values underlie the prior holding. For all these reasons, permitting debate about whether an issue is novel, and if so, whether in a permissible or impermissible way, may be the same as allowing debate on the constitutional question itself. Thus, for the defender of settlement as the premiere value, novelty is an all-or-nothing proposition.[121]

Again, if this is the goal of exclusivity, judicial review alone might be sufficient in reaching it. This view of the stability rationale is, in essence, a negative image of one argument in favor of textualist interpretation of statutes.[122] I mention this parallel, however imperfect, because it raises a thorny point for the advocate of exclusivity. The rationale for legislative exclusivity—that is, for textualism—includes an argument that is not really available when we talk about judicial exclusivity. As Judge Calabresi pointed out long ago, what is genuinely at stake in arguments about judicial interpretation of statutes is the burden of inertia.[123] Congress or an agency can always fix judicial "mistakes," but that imposes significant costs not only on the government entity, but also on the enacting coalitions. These costs include the burdens of monitoring judicial decisions, identifying old or new allies, reorganizing, and cranking up the lobbying apparatus for another round.[124] In contrast, judicial review of "wrong" or destabilizing decisions by extrajudicial actors can be had much more read-

121. *See* Sherwin, *supra* note 104, at 68. It is worth mentioning again that my analysis ignores "predictive" interpretation—interpretations in which an agency is simply trying to decide whether it will comply with what a court has held or would hold. Exclusivity has no quarrel with predictive interpretations because they acknowledge, rather than deviate from, judicial control. *Cf.* Monaghan, *supra* note 12, at 26 (noting that we could view agency legal interpretation simply as an announcement to the public of the position the agency will attempt to argue in court).

122. That is, some textualists assert that the political branches are more expert in their policy judgments and more accountable to public preferences. *See, e.g.*, Manning, *supra* note 10, at 625-26. In the starkest versions of the accountability argument, regulation is described as the result of a deal between conflicting interest groups who use the political process to memorialize the outcome of their agreement. *See* Easterbrook, *supra* note 73, at 540-44. In either case, the claim is that judges cannot be trusted to alter the express terms of legislation. Even though later judicial modification might help keep a "deal" consistent with what the parties intended over time, the concurrent danger is that the court will use modified circumstances as a pretext to impose its own preferences or will simply err and unseat what the original enacting coalition might have wanted. Similarly, the rationale for judicial exclusivity just described would place strict limits on extrajudicial interpretation in order to reduce opportunities for agencies to intentionally or inadvertently unsettle what the judiciary has established.

123. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 92 (1982).

124. *Id.* at 92-93.

ily[125]—as illustrated by the traditional resistance to judicial review among those who generally prefer majoritarian decisionmaking.[126] Put another way, why is judicial *exclusivity* necessary if there is already judicial supremacy?[127]

Carefully tailored judicial review could achieve at least some of the same ends as judicial exclusivity. Start with constitutional jurisprudence that leans more to Scalia than O'Connor—that is, that favors bright lines and formalism over nuanced, case-specific balancing of underlying values. That would make it considerably easier to recognize the bounds of a precedent, perhaps to the point where disputes about what is truly novel are unlikely to affect planning. Because there is little underlying content, there is not much danger that in trying to draw new distinctions we will be drawn into a wasteful debate about fundamental values. Another jurisprudential move could be to push the boundaries of what constitutes an advisory opinion, allowing judicial review to slide backward in time into the administrative process. That maneuver at least cuts down on the amount of time that new controversies would remain unresolved. And with rulings issued before the administrative process is final, there is a smaller impact both on private planning (which presumably is unlikely itself to gel before the ultimate shape of the rule is known) and the efforts of the agency to guess what the court might think of its possible outcomes. In addition, courts might adopt doctrines that penalize agencies for changing course—such as adopting a default rule that favors the status quo, giving lower deference or requiring more extensive processes for changes in administrative position, and so forth. Similar rules could heavily penalize regulators if their constitutional judgments are in error—for example, by striking down the entire regulation instead of severing the unconstitutional portions.[128] The result should be a more stable regulatory field, and one where regulators are reluctant to alter constitutional doctrine on their own.[129]

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125. *Id.* at 4-6.

126. Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1342-43 (1994); *see also* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1038 (1968) (describing this view); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1221-22 (1982) (same).

127. *See* Gant, *supra* note 62, at 392.

128. *See* Vermeule, *supra* note 38, at 1962-63.

129. *See* 1 PIERCE, *supra* note 10, § 7.4, at 456-57 (arguing that more vigorous review of rulemaking procedure deters agencies from using the procedure to resolve major political disputes); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387-1436 (1992) (describing how a myriad of agency review techniques discourages agencies from innovation and flexibility); *cf.* Monaghan, *supra* note 59, at 752 (observing that strong precedent is conservative and stabilizing).

Taken severally or as a whole, these jurisprudential tactics may reasonably approximate the level of constitutional predictability that could be achieved by a regime of exclusive judicial interpretation. Like that regime, each jurisprudential tactic seems to achieve stability at the cost of accuracy, or at least better information and accountability. I doubt that the judicial review alternative is one that we would welcome if we were not willing to value stability above all. But the point is that exclusivity may not be necessary, even if stability is our highest value and the judiciary is the institution best able to preserve it.

If the tactics of judicial review have a weak point in this analysis, it is that they do not seem to quite match exclusivity in foreclosing wasteful public debate. Bright doctrinal lines might simply lead to repeated efforts to further the same constitutional values along different paths. Formalism may lead to foment as much as finality. The tactic of weakening the severability doctrine could be undermined if determined proponents of an issue insert a poison pill in a valuable piece of regulation precisely in order to force the Court to strike the whole down so that what seems like a penalty in fact rewards the proponents with a "defeat" that energizes their supporters towards amendment or disobedience. However swiftly judicial review may occur, there will still be a window of time in which some extrajudicial constitutional debate will begin to bubble.

But these weak points are not fatal. For one thing, it is not certain to what extent the argument for stability rests on the claim that issues can and ought to be forever decided, rather than that settlement cuts off at least drawn-out and unresolvable disagreement. Judicial review can accomplish the latter. Further, since what we are considering is a rule for evaluating the validity of a regulation, it must itself be enforced by the judiciary. Thus, wasteful constitutional debate could arise between the time a regulation is contemplated and when it is struck down, regardless of whether we accept exclusivity.

More fundamentally, exclusivity offers no comparative settlement advantage over judicial review, because exclusivity only submerges executive constitutional reasoning. That is, when we speak very broadly of whether judicial exclusivity is a wise principle, as Alexander and Schauer do, we presumably addresses ourselves not only to judges but also to Presidents and administrators. If the President is persuaded, we need not worry whether he or she will try to evade the strictures of exclusivity. But when we speak, as I do here, of exclusivity as a rule for how judges should behave when reviewing executive action, then we have to consider seriously how executive actors are likely to respond.

The likely response to a judicial rule prohibiting constitutional reasoning as a component of rulemaking is almost surely a rhetorical layering of technical or other policy jargon on top of (and as a cover for) what is actually constitutional reasoning. On a psychological level, agency personnel probably will not want to stop thinking about justice, fairness, and individual rights—exactly for the reasons exclusivity relies upon. Questions of justice are too fundamental to relinquish and sometimes too sharply defined to compromise.[130] Indeed, their political intractability is what makes the settlement function so attractive.[131] At the same time, because constituents have similarly deep feelings about rights and may find it easier to identify and organize with others who share their views about a particular right, there is significant political pressure on agencies to account for rights on some level.[132]

To the extent that judicial exclusivity allows "submerged" constitutional reasoning to persist, and policymakers and the public are aware that it persists, judicial exclusivity fails to settle divisive social disagreement. Of course, as *Boerne* itself demonstrates, courts can always respond to this problem by extending the reach of exclusivity to legislation that, in the Court's view, is in some significant sense "really" a constitutional decision.[133] That approach has its own costs. As courts chase constitutional judgments further down the rabbit hole of policy justifications, the real reasons for public enactments grow increasingly opaque. Some court determinations are bound to be wrong, needlessly striking down a pure policy decision. So an aggressive, *Boerne*-like stance on submerged constitutional reasoning is likely significantly to reduce the democratic character of regulation.

There are also practical difficulties. Suppose, for example, a regulation relaxing controls on state ozone emissions that throughout the administrative record seems to rest entirely on an analysis of the effects of ozone transport on human respiration. In fact, however, the agency selected its rule in order to please state lobbyists who believe that a federalist reading of the Constitution made the regulation unconstitutional (although there is no direct proof of this fact). Should a court strike down any regulation that favors an interest group that has taken a controversial constitutional stance?

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130. *See* JOHN RAWLS, A THEORY OF JUSTICE 180-94, 475-80 (rev. ed. 1999).

131. *See* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1375-76.

132. *See* Galle, *supra* note 74, at 198-99. Constitutional reasoning by agencies is also inevitable in another sense. Every act by a governmental actor is a product of a constitutional interpretation—a decision about the scope of the actor's authority. *See* United States v. Nixon, 418 U.S. 683, 703 (1974); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-4 (3d ed. 2000); Lawson & Moore, *supra* note 17, at 1286-87.

133. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

Finally, there is a sizable subset of all executive decisions that are almost completely unreviewable by courts.[134] Among the most prominent decisions are pardons and vetoes, both of which have historically been loci for Presidents' decisions that the Constitution justified or required a particular outcome.[135] Decisions not to prosecute or not to bring a civil enforcement action generally require no public justification and cannot be challenged.[136] Commentators have argued that both decisions offer opportunities for exercise of executive constitutional reasoning—for example, by declining to bring prosecutions where the executive concludes an application of the statute would be unconstitutional.[137] One classic example is the Department of Justice's "Petite Policy," which limits the discretion of prosecutors to bring charges where the Double Jeopardy Clause might be implicated.[138] Obviously, as competing rules for judicial review of executive action, neither exclusivity nor review can do much to affect directly how the executive conducts its affairs in these areas, other than through the hope that by announcing a principle it will persuade the executive to go along, either directly or through popular pressure. The point is that, assuming such persuasive efforts will not be entirely effective, there will remain under either regime a significant amount of extrajudicial constitutional debate. Neither approach can claim to "settle" contentious discussion entirely. The question, therefore, is necessarily one of degrees of partial success.

Taken together, the costs of a vigorous search for pretext and the challenging task of identifying it accurately mean that generally courts will not be able to eliminate submerged constitutional reasoning. Thus, they will be unlikely significantly to curtail social disagreement. It is certainly the case that exclusivity has the capacity to *reduce* wasteful disputation. But so does judicial review generally.

In summary, the "settlement" case for precluding agencies from interpreting the constitution is not persuasive. It is true that the political market is unlikely to be as successful as the judiciary in defending stability. It does not seem to follow, however, that agencies should be prohibited from interpreting the Constitution in the first

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134. *See* Johnsen, *supra* note 17, at 115; Paulsen, *supra* note 17, at 264-65; *see also* Garrett & Vermeule, *supra* note 77, at 1306 (making a similar point about congressional decisionmaking).

135. *See* Lawson & Moore, *supra* note 17, at 1280, 1288-89; Paulsen, *supra* note 17, at 264-65.

136. *See* Johnsen, *supra* note 17, at 115; Paulsen, *supra* note 17, at 267-68. I say "generally" because there are rare situations, such as where a defendant makes out a prima facie case of vindictive or selective prosecution, in which the prosecutor may be obliged to explain why she declined to bring charges against one person but not another who seems similarly situated.

137. *See* Lawson & Moore, *supra* note 17, at 1280.

138. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.031 (2005), *available at* http://www.usdoj.gov/eousa/foia_reading_room/usam.

instance, subject to some form of judicial review. Exclusivity may somewhat settle constitutional law, but so would carefully tailored judicial review. Given the costs of exclusivity—lost information, waste of administrative resources, lack of transparency—it is not obvious why judicial exclusivity is preferable to narrower forms of judicial supremacy, even if it is accepted that the courts' "settlement" function is more important than other values.

IV. INSTITUTIONAL ADVANTAGE PART TWO: GETTING RIGHTS RIGHT?

There is now one remaining loose end. Settlement, as we have seen, is not a persuasive justification for exclusive judicial interpretation of the Constitution. This is so notwithstanding the fact that settlement is a public good and the judiciary, therefore, is more likely to be able to preserve it. But what of other public goods, other second-order preferences, other rights?[139] Is there a credible argument that the judiciary is uniquely capable of preserving certain kinds of rights, so that we should prohibit other actors even from interpreting them?

This terrain is already very well mapped, and the answer is "no." As a wide variety of commentators have pointed out, judicial enforcement of rights—even in a regime where judges are only superior, and not exclusive, interpreters—raises problems of paternalism.[140] That is, there is always risk that the "public good" the court hypothesizes will not match what the public would really prefer, but rather matches the court's own (and perhaps idiosyncratic or ill-informed) values. Exclusivity greatly heightens this risk by reducing opportunities for courts to confront alternatives and to see their consequences played out over time.[141] If our goal is to get "right" answers, we should instead want to minimize such risks.

A small group of writers has recently suggested a related, although more circumscribed, claim. They acknowledge the general virtues of collaborative interpretation, but argue that courts might legitimately be exclusive, or at least have the power of review, in

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139. *See* Friedman, *supra* note 101, at 2601-02 (arguing for role of judicial review in promoting "longstanding and deeply held constitutional views"); Gant, *supra* note 62, at 391 (same). I use "second-order preferences" in Schauer's sense, which is to say a set of preferences that "serve to exclude otherwise good first-order reasons, or to include otherwise bad first-order reasons," for the purpose of protecting long-term values not adequately taken into account in forming the first-order preferences, or in order to exclude short-term preferences that are based on mistaken assumptions. Schauer, *supra* note 56, at 1046 n.2.

140. *See, e.g.,* KRAMER, *supra* note 17, at 236-37; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 389 (1986); Lawson & Moore, *supra* note 17, at 1298; Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 2 (1996); Stewart & Sunstein, *supra* note 126, at 1208-09.

141. *See* Monaghan, *supra* note 46, at 28-29; Post & Siegel, *supra* note 13, at 514-15.

those areas where courts are most "competent" or politics least trustworthy.[142] Evidently, the suggestion is that this allocation of institutional authority is less value-laden, and so less threatened by the problem of paternalism.[143] Yet we must have criteria to evaluate competency. If the judiciary shall claim exclusivity in some areas, it is the judiciary that must determine those criteria and referee them.[144] Thus, there is no reason to believe that dividing exclusive interpretive power by competency results in decisions that are any more objective, uncontroversial, or "right" than other judicial value judgments, which everyone concedes are best made when shared.[145]

I want to highlight two less familiar points. The "countermajoritarian difficulty," as I mentioned, may be a significant limitation on judicial capacity to protect rights. At the very least, judges now seem to see popular dismay as a consideration they should take into account in their rights calculus.[146] If the goal is to protect rights both accurately and thoroughly, we should be interested in opportunities to further them with minimal political resistance. And so, as commentators like Robert Post and Reva Siegel have argued, courts ought to nurture constitutional deliberation by political actors where it sprouts, as long as they can be reasonably sure that the deliberation will generally preserve rights as the court defines them.[147] More than that, the court should try to shift responsibility for making the ultimate constitutional decision to the political actors—let Congress or an agency take the blame.[148] Exclusivity, either literally or through judicial review that limits political invocations of the Constitution strictly to meanings the Court has already elaborated, would (or, depending on how we read *Boerne*, does) make both of these tactics very difficult. Limiting judicial review to ensure that political interpretations remain within a range of possible constitutional meanings, each of which is more or less adequately protective of the rights the Court is interested in, would expand judicial capacity and dis-

142. *See* Alexander & Solum, *supra* note 24, at 1633; Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 679-80; Johnsen, *supra* note 17, at 127-28; Peabody, *supra* note 17, at 72.

143. For example, Professors Alexander and Solum seem to offer institutional competence as a response to Jeremy Waldron's complaint that settlement by courts is inferior to settlement by representative majoritarian bodies. Alexander & Solum, *supra* note 24, at 1631, 1633.

144. *See* Garrett & Vermeule, *supra* note 77, at 1294 (noting that in order to judge Congress's performance as a constitutional interpreter, we must first choose "some particular substantive account of constitutional interpretation").

145. *Cf.* Fallon, *supra* note 41, at 142 ("[T]he Court's definition of its function always remains open to challenge as a matter of first principle.").

146. *See* Devins & Fisher, *supra* note 15, at 91.

147. Post & Siegel, *supra* note 13, at 516-17.

148. *See id.* at 517-18.

tribute credit or blame for the final form of the right between the court and its political partner.[149]

Additionally, exclusivity undermines psychological supports that might otherwise prop up political respect for rights. Again, principled behavior is partly created by societal expectation, which both frames how an individual actor approaches a problem and also puts external pressure on the actor to comply with the expected norm. I argued earlier that our federal judiciary begins with the high expectation that it will resist popular pressure because its institutional design was obviously conceived to achieve that effect and was publicly justified on that basis. Judicial insistence on exclusive judicial interpretation could have the opposite effect on the expectations for nonjudicial interpretation. If the judiciary's view is at all credible, it will lead the public to conclude that political actors should not be expected to interpret the Constitution, and that they are not capable of principled behavior. This prophecy may quickly become self-fulfilling. That in turn puts more and more pressure on the judiciary to reject that which would then become perceived as increasingly unprincipled political products.

In contrast, ordinary judicial review might strengthen nonjudicial policymakers' inclinations to interpret rights. It is possible, as Professor Tushnet writes, that judicial review may create a sort of judicial overhang, in which Congress or an agency does not bother to think about the constitutional consequences of what it does, because it knows a court will.[150] But if that is because regulators prefer to avoid waste, the more rational strategy would often be to avoid the penalties of constitutional invalidity, especially in an initiative with substantial start-up costs.[151]

More importantly, injecting the judiciary into the regulatory process, at least as an arbiter of intractable disputes, may have a salutory effect on the self-image of all of the collaboration partners.

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149. I would add that exclusivity is a particular problem in our federal constitutional system, which limits courts to decide only discrete cases or controversies. Sometimes the best solution to a policy problem that causes the violation of rights may lie outside the grasp of a single court, even a court representing a class of plaintiffs. *Cf.* Monaghan, *supra* note 46, at 29 (noting that Congress has power to analyze problems and remedy the violation of rights not open to courts); Whittington, *supra* note 63, at 821 ("[I]t is possible for extrajudicial institutions to give greater solicitude and to be more capable of responding to individual rights concerns than judicial bodies bound by the limits of legal interpretation and dispute resolution.").

150. TUSHNET, *supra* note 42, at 57-65.

151. I am eliding a number of complications here that have been sketched thoroughly by others. For example, severability doctrine plays a significant role in regulators' incentives. Some regulators might invite invalidation so that they can extract rents twice for enacting the same piece of legislation. Still, I agree the dominant strategy, even under the present, rather forgiving approach to severability, will be to give at least some thought to what a court will do in response to the regulation.

Again, institutional behavior is to some extent a self-fulfilling prophecy. Sometimes regulators are public-minded because they are conditioned to believe that is the socially appropriate behavior, and it is painful for human beings to violate social norms, especially those norms that are role-related.[152] Judges too can have institutional ideals, which, again, may include a belief that their duty is to protect "rights."[153] The same ideals may filter down to other participants in the legal system. These ideals may also be reinforced by ritualized role-definition, such as in the attorney's oath. Perhaps collaborative regulation participants, if made to feel that what they are participating in is truly "law" rather than just another deal, will be more inclined to think of themselves as legal actors bound to respect established rule and principle. And judicial review, like other features of divided government, dampens the rate of policymaking reaction, assuring that there is time for republican deliberation about the direction of reform.[154]

Thus, exclusivity may unnecessarily place a heavy burden on judges by closing off the possibility of principled second-order decisionmaking by political institutions. And it may place courts in the position of seeking remedies the Constitution, as it is presently written, puts beyond their reach. If our primary objective is to maximize protection for rights and realize the best possible solution to rights dilemmas, then exclusivity is an unattractive strategy.

V. THE VIEW FROM THE BENCH: RHETORIC AND THE INSTITUTIONAL IDEOLOGY OF JUDGING

In the preceding Parts, I have focused on what we might call the exterior view of judicial functioning. That is, I have largely asked what allocation of powers an objective designer—a constitutional framer, perhaps—would want to set. In this, I have followed the prevailing literature, which has considered these questions almost exclusively from that perspective.[155] But by standing behind a veil of objectivity, we may have missed how exclusivity looks from behind the bench. The judiciary may have its own unique institutional needs for claiming interpretive exclusivity when it reviews the decisions of other branches.

I argue in this Part that the very assertion of exclusivity, even if it proves not entirely effective, may serve an important role in the judi-

152. *See* Suchman & Edelman, *supra* note 80, at 919-20.

153. *See id.* at 926-27.

154. *See* KRAMER, *supra* note 17, at 112-14.

155. *See, e.g.*, Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1363; Johnsen, *supra* note 17, at 113; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44 (1993); Paulsen, *supra* note 17, at 286-87; Whittington, *supra* note 63, at 797.

ciary's overall operation. In Part V.A. I consider first the place of exclusivity in what I describe as the traditional account of judicial rhetoric, which posits that judicial rhetoric is generally aimed at disarming public resistance to unpopular defenses of minority rights or other second-order preferences. My view is that, as in Part IV, a court that invokes exclusivity likely undermines its ultimate ability to set policy independent of the political branches.

Part V.B. discusses what I believe is a more novel explanation for the rhetoric of exclusivity: it is aimed within, at the Justices themselves, their successors, and the lower courts they supervise. The language of exclusivity, I argue, may be part of the Court's way of creating and reinforcing an institutional ideology, carving a public ideal to which Justices and judges will aspire and sometimes adhere. I conclude that although this social psychological perspective has considerable explanatory power, it does not quite justify exclusivity in all aspects of constitutional reasoning and predicts only weakly, if at all, the aspects of constitutional reasoning in which exclusivity must be had.

A. The Balance Pole: Exclusivity as Mollifying Rhetoric

If our project in this Part is to justify exclusivity to judges, let us begin with the assumption that courts want to be effective at what they do. Public interest minded judges want to defend the populace against ill-advised efforts to disregard minority rights or erode other collective goods. Majoritarian judges want to marshall popular attention against regional defiance. Even rationally self-interested judges with future gains on their minds will want to maximize the power of their decisions, so that their influence merits larger rewards.

Not surprisingly, some accounts of federal judging suggest that the operation of judicial review and the judicial language that accompanies it are designed to make it easier for federal courts to make policy.[156] Again, the conventional story begins with the claim that federal courts must overcome the countermajoritarian difficulty in order to have any long-term efficacy.[157] That is, when courts make decisions contrary to short-term political preferences, or at least contrary to what elected officials would choose, they generate resent-

156. *See, e.g.*, KRAMER, *supra* note 17, at 237; Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 LAW & SOC'Y REV. 385, 409 (1974) (arguing that "mythology" of neutral and objective judicial decisionmaking creates public support); Devins & Fisher, *supra* note 15, at 93-94; Gant, *supra* note 62, at 401-02 (claiming that "myth" of judicial finality and authoritativeness promotes public support for courts).

157. *See* Devins & Fisher, *supra* note 15, at 96-97.

ment.[158] Over time, resentment becomes resistance.[159] Yet, the judiciary is not truly final; it depends on the political branches, perhaps the very branches it is defying, to enforce its decrees and to grant it jurisdiction to continue supervision of any particular controversy.[160]

Judicial rhetoric then becomes a balancing pole courts can use to negotiate the tightrope between countermajoritarian action and public acceptance. One of the major sources of public resistance, it is said, is that the general public may perceive judicial action as a simple substitution of the court's own value or policy preference for the public's own.[161] This perception is aggravating not only because the public does not get what it wants but also because it may seem as though the judges are engaging in self-dealing, making decisions that further their own interests or elitist moral code over that of the rest of the community.[162] Judicial rhetoric may aim to defuse at least the suspicion of self-dealing by attributing decisions to something other than what the judges themselves want—to precedent, to "the Framers," to "strict construction" of the Constitution, or something similar.[163] Consider *Bush v. Gore*, where the Court framed its discussion with a reminder that voting rights routinely are limited by "properly established legal requirements."[164] Justice Stevens, in the powerful conclusion to his dissent, warned that despite such efforts, the Court's reason for its decision,[165] distrust of the principled reasoning offered by the Florida Supreme Court, would undermine public confidence in the objectivity of judicial decisions.[166]

There are several other points here as well. First, referring to widely shared collective public decisions of the past helps a court to claim that its audience shared in some part in the creation of the

158. *See id.* at 91; Friedman, *supra* note 50, at 349-50; Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85-129 (1994); Monaghan, *supra* note 59, at 753.

159. *See* Devins & Fisher, *supra* note 15, at 91; Klarman, *supra* note 158, at 85-129; Monaghan, *supra* note 59, at 753.

160. *See* Paulsen, *supra* note 17, at 223.

161. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1448-54 (2001).

162. *See id.*; Friedman, *supra* note 50, at 351; Keith J. Bybee, *Legal Realism, Common Courtesy, and Hypocrisy*, 1 LAW, CULTURE & HUMAN. 75, 81 (2005).

163. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 999-1001 (1992) (Scalia, J., dissenting); Bybee, *supra* note 162, *passim*; Monaghan, *supra* note 59, at 752 (citing Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970)); Whittington, *supra* note 63, at 809 (discussing Marshall's view of distinction between law and politics); *cf.* KRAMER, *supra* note 17, at 98, 103 (noting that early judges staked claims to power of judicial review by asserting that they were acting as faithful agents for the people who had ratified the Constitution); ERIC A. POSNER, LAW AND SOCIAL NORMS 19-22 (2000) (arguing that groups develop norms against self-dealing in order to signal that they are trustworthy bargaining partners for future deals).

164. 531 U.S. 98, 103 (2000).

165. And, impliedly, its decision generally.

166. *Bush*, 531 U.S. at 128-29 (Stevens, J., dissenting).

outcome, which tends to reduce resentment and resistance.[167] Further, the language of "principle" might also appeal to our intuitive sense that in a republic we ought to accept principled applications of common basic ideals, even if we disagree with the outcome of a particular application.[168] Even if this is not a feature of a basic understanding of what it means to live in a modern Western republic,[169] grounding judicial decision in the vocabulary of principle may at least suggest to the disagreeing public that their views, too, if permissible principled interpretations, may prevail in the future.

Of course, judicial rhetoric can also be a more straightforward effort to persuade. The Court might overturn the popular preference of the moment but argue that having an institution that defends rights is in the long-term interests of everyone: it protects public goods, offers some long-term settlement of political disagreement, and provides all the other benefits that have already been seen. The Court may also try to use language not simply to persuade but to battle collective action problems that might have produced a temporary preference contrary to the Court's position.[170] The public might not have learned all it could about an issue or thought all it could about the justice of a policy, because individuals assumed that if learning and pondering were worthwhile someone else would do it and act on it. A slumbering national majority that might not have taken action to correct localized injustice might be mobilized by a judicial call to arms.

Finally, when courts speak and write using the vocabulary of fundamental rights and constitutional command, they may be appealing to the special moral commitments of citizens. Consider, for example, a possible communitarian claim.[171] Invoking the Constitution, the Framers, precedent, and principle may be a way of arguing that the Court's decision is implied or required by common American ideals. That gives the opinion not only unique moral weight but also at least implicitly makes a claim on the community's common commitment to what it means to be a member of that community. Or, as I have suggested elsewhere, the language of constitutional interpretation, especially historically grounded interpretations, may imply a duty to obey

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167. *See* Devins & Fisher, *supra* note 15, at 90-98.

168. *See* Michelman, *supra* note 111, at 975-76; Monaghan, *supra* note 59, at 748-49.

169. *See* RONALD DWORKIN, LAW'S EMPIRE 189-90, 198-99 (1986).

170. *See* Dorf, *supra* note 10, at 78; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

171. Communitarians, although widely varied in their methods and conclusions, generally agree that justice arises out of shared definitions of what it means to be a proper member of a given community. *See, e.g.*, DWORKIN, *supra* note 169, at 19-215; MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 329-51 (1996).

out of Lockean obligation or a sense of fair play.[172] The Court frames its decision as a necessary incident of rules that existed before its decision, while the audience was enjoying the benefits of living in a society bounded by those rules. The implication is that it is now not fair for the public to object to a rule it has benefited from or could have avoided by exiting.[173]

On a superficial level, exclusivity seems a reasonable tool for achieving these goals. By appearing to divide legal reasoning into two spheres—one constitutional and exclusive to judges, the other political and open to all—courts can emphasize the unique and distinctive status of constitutional reasoning. That status reinforces judicial claims that countermajoritarian outcomes are not simply substitutions of judicial policy preference, but products of an entirely different mode of reasoning, one that produces "right" answers to interpretations of constitutional text.[174] Exclusivity might highlight for a doubting populace the unique value of an apolitical institution capable of resisting momentary pressures to preserve stability or other second-order preferences. With only one voice speaking, it is easier for the Court to persuade or lead opinion; uniqueness focuses attention on the solitary speaker and, obviously, makes dissenting positions more difficult to elaborate. This last point is especially important if the Court wants to rely on claims of moral obligation to comply with its views. In the modern era, rights regularly come into conflict, and the most controversial judicial decisions balance conflicting claims of right or justice.[175] Consider the abortion debate or claims of individual freedom from putatively intrusive law enforcement efforts said to protect the community as a whole. If the Court concedes that other political actors also have legitimate roles in constitutional interpretation, then the moral force of the Court's interpretation is greatly diminished when its view is contrary to the balance struck, or said to be struck, by another branch.[176]

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172. Galle, *supra* note 74, at 217-18.

173. I am not endorsing contractual theories of social obligation, but rather only observing that they may be one form of obligation a court asserts against citizens.

174. *See* Whittington, *supra* note 63, at 809-11.

175. *See* Galle, *supra* note 74, at 218-19.

176. *Id.* This point, if one accepts it, suggests that Paulsen would probably have to accept my view if he gave his attention to the rule the judiciary should adopt for the scope of its own power. He argues that independent executive interpretation is constrained by the "formidable moral and political power" of judicial interpretations on overlapping subjects. Paulsen, *supra* note 17, at 301-02. Indeed, this constraint is central to his argument, for he concedes that without his version of interpretive checks and balances his extreme departmentalism would be difficult to square with the Founders' notions of limited government. *Id*. at 322-32. But independent judicial interpretations could hardly be meaningful constraints on contrary executive action if judges conceded that their views were simply kindly words of advice. As Paulsen acknowledges, the political pressure on the executive to comply with the judiciary's judgment is keenest in an instance in which a court declares that the executive is bound to obey—when it issues a judgment against an executive offi-

These justifications ultimately fail for largely the same reasons exclusivity fails as an objective means of getting rights right. Countermajoritarian courts should want to move to some degree toward minimalism, economizing on exercises of their own power and leveraging the potential for constitutional reasoning by other branches.[177] But an exclusive court is a maximalist court;[178] not only must it carry the burden of constitutional interpretation alone, but it must also reach out to strike down lawmaking that infringes on its prerogative. Indeed, it may need to overreach even further; if the perception of exclusivity is important, the Court must also police policies by other actors that might be perceived by the populace as a challenge to its uniqueness.

That problem becomes large if we also consider all of the ways that the underlying values of any particular right may inform other legal decisions. For any given right, there are a host of questions—what remedies for violating the right are available, who can obtain them, when the interests of repose become more compelling than vindication of the right, how to forestall possible but hard to detect or punish violations of the right, to take just a few—whose answers all depend to one extent or another on the meaning and purpose of the underlying constitutional right and on how to balance that right against competing interests. We commonly think of all or most of those questions as matters of "enforcement" and not constitutional interpretation per se. Sooner or later, people will start wondering how "exclusive" the courts really are if they allow other actors to make what surely amount to fundamental decisions about the meaning and scope of the constitutional rights courts supposedly are solely qualified to interpret.[179] Courts will have to either expand their oversight to meet that expectation or acknowledge that constitutional reasoning can be shared. Ultimately, exclusivity becomes imperial overstretch, which collapses the very project the court is engaged in.

It is also likely, as discussed above, that cooperative interpretation is a better means to the same end. As Professor Waldron has argued, moral claims about the collective social meaning of community membership are more compelling when they arise out of the community as a whole or from diverse and deliberative bodies drawn from

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cer. *Id.* at 301. It follows that a court's broader claim of power to bind other actors with its declarations increases the pressure on those actors to obey and thus more effectively checks their behavior, even if they do not themselves regard those declarations as strictly binding. *But see* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1365 (claiming that other branches pay a political price for defying judgments but not for enacting unconstitutional laws).

177. *See* Post & Siegel, *supra* note 13, at 516-19.

178. *See* Whittington, *supra* note 63, at 796.

179. *Cf.* Dorf, *supra* note 10, at 53 (noting that the processes of determining the meaning of a legal rule and deciding how far it should extend are very similar).

the community and not from a narrow group of elites.[180] Additionally, the public will become more informed and activated by a project it shares in than by a result that is announced by a distant herald.[181] And for obvious reasons, outcomes that are more sensitive to prevailing norms are less likely to generate resistance than those that are merely hypothesized by judges.[182]

It could be argued, though, that a judicial rhetoritician can reduce these costs by identifying subsidiary "rights" questions and other cooperative opportunities as something other than "constitutional," so that allowing agencies or Congress to participate does not interfere with the Court's rhetorical stance.[183] Indeed, *Boerne* arguably adopts this approach; as I have argued elsewhere, the *Boerne* rule does not appear to extend to congressional enactments that, while probably enacted in order to effect a constitutional ideal, are formally justified as an exercise of ordinary policymaking under the Commerce Clause, not as interpretations of the Constitution.[184] I still think that is basically right. If a court is not obliged in the course of reviewing or enforcing a regulation to acknowledge the legitimacy of the other branch's constitutional reasoning, it can cling to its exclusive rhetorical posture. Even for legislation that is plainly constitutionally inspired, a court can essentially take the attitude, "well, sure, that is what they say the Constitution means, but we do not have to determine whether that is right or even a proper ground for their consideration, since the regulation can be sustained or applied on other grounds."[185]

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180. JEREMY WALDRON, LAW AND DISAGREEMENT 79-80, 105-18, 136-38, 141 (1999).

181. *See* Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 412 (2000); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 721 & n.389 (1993).

182. That is not to say that cooperation means deference to popular pressure. My claim is that cooperation gives us better insight not only into actual preferences but also into hypothetical or ideal preferences. We can guess about how people would behave in some unreal state, but the best tests of our suppositions will often come from real-world situations that may reflect one or more features of the ideal. Thus, the political market's shadows, although distorted, may give us some sense of the shape between the fire and the wall.

183. *See* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 18, at 1385; Dorf, *supra* note 10, at 73 (proposing that courts might designate some portion of an announced legal norm as experimental). Professor Waldron argues, though, that these types of rhetorical maneuvers tend to reduce the quality of a court's moral judgments. *See* Waldron, *supra* note 42, at 140, 142.

184. Galle, *supra* note 74, at 219. Except in the minimal sense, discussed earlier, in which all statutes begin with a constitutional decision about the scope of the lawmakers' appropriate power.

185. It is worth noting that this approach puts substantial theoretical pressure on the lines a court draws around its zone of exclusivity. If exclusivity is said to be justified because courts are uniquely suited to resolving questions of fundamental justice, then many statutes not formally grounded in the Constitution will nonetheless appear to require judicial exclusivity.

The utility of this sleight is fairly limited. The Court still must deal with regulation that would look to the public like an effort to evade its exclusivity requirement, because to be seen to tolerate transparent subterfuge would be the equivalent of ceding its unique authority. There is a similar problem with granting a blanket exemption to regulation that only "enforce" or "implement" constitutionally guaranteed rights, rather than interpret them.[186] The actual scope and effectiveness of a rule depend upon how it is implemented. Exclusivity will seem a fairly thin rhetorical straw on which to rest judicial authority if courts let other political actors decide the extent to which considerations of a constitutional right displace private ordering or ordinary government policy decisions. And, as I have just mentioned, actually deciding problems of enforcement will usually involve analyzing the meaning of the underlying right and its importance relative to other policy considerations, as in the trade-off between repose and vindicating the right offered by statute of limitations questions. However these issues are labeled, it will be clear at least to close observers that they involve constitutional reasoning.

The name game also would not likely save two important tools of cooperative interpretation: avoidance and prophylaxis. Avoidance is the canon of statutory interpretation in which a court will select a permissible but syntactically less-favored reading of a statute where the more favored reading would raise serious constitutional questions.[187] Prophylaxis is the use of preventative or preemptive rules—classically bright-line, judge-made rules—that aim to deter or otherwise foreclose potential constitutional violations.[188] The *Miranda* rule is the prototypical example.[189] Avoidance and prophylaxis are cooperative because they invite, or at least permit, responses by the political branches.[190] Congress or an agency can respond to an avoidance interpretation by asserting that it in fact intended to press close against the line of unconstitutional conduct.[191] Likewise, because prophylactic rules are said to be a sort of constitutional common law, they are at least in theory defeasible by statute.[192] I have summarized elsewhere the considerable virtues of avoidance as a technique for enforcing constitutional rights. Among others, the technique permits a court to further the values underlying a particular constitutional rule without ruling out political responses that might contrib-

186. *See* Dorf, *supra* note 10, at 73.
187. *See* Schauer, *supra* note 38, at 1949.
188. *See* Monaghan, *supra* note 46, at 21-22.
189. *Id*.
190. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1005 (1994); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 88 (1996).
191. ELY, *supra* note 55, at 4-5.
192. Monaghan, *supra* note 46, at 23, 29-30.

ute to the court's understanding of what the rule means and how it should be implemented.[193] Prophylaxis can function similarly.[194] Under both of these methods, the constitutional right in essence unfolds into two parts, one exclusively judge-made, the other initially judge-made but open to political development.[195]

This close relationship between core rights and cooperative applications of rights, however, is precisely the problem for the traditional, rhetorical basis for exclusivity. Once it is recognized that avoidance and prophylaxis are both really forms of constitutional elaboration, they come into obvious tension with the idea of judicial exclusivity.[196] This would be true regardless of whether as a semantic matter we called one half of the right "constitutional" interpretation and the other half "statutory" interpretation or judicial common law. It is still obvious that cooperation is cooperation and not exclusivity. Courts will have a tough time selling the idea that only they are competent or trustworthy enough to craft constitutional policy, but that Congress and agencies can, ahem, also craft constitutional policy.

In sum, what I have called the traditional account of judicial rhetoric posits that judges use the language of rights in order to stir political support for or pacify opposition to their positions, or to lay claim to moral obligations to obey the law. This rhetorical posture is superficially stronger when judges can say that they, and they alone, are the authoritative interpreters and elaborators of rights. But in practice exclusivity undermines judicial effectiveness by overextending it, and it compares unfavorably to shared interpretation in achieving the same ends.

B. Exclusivity as an Element of the Constitutive Rhetoric of Judging

We saw earlier that institutional ideology can be a significant influence on how policymakers behave. In this Part, I suggest that traditional analysis of judicial rhetoric overlooks the significance that judicial language may play in constructing and reinforcing an ideology of judging. It is true, I argue, that such rhetoric is a tool for facilitating principled judicial decisionmaking, but it acts in the main

193. Galle, *supra* note 74, at 205.

194. *See* Dorf, *supra* note 10, at 71.

195. *See* Coenen, *supra* note 96, at 1862-66; Galle, *supra* note 74, at 205-06; Levinson, *supra* note 23, at 885; Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 694-95 (2001); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1551-52, 1594-99 (2000); c*f.* Monaghan, *supra* note 46, at 21-22 (arguing that constitutional rights may include a judge-made "common law" that is based on the Constitution but is open to experiment by other actors).

196. *Cf.* Dorf, *supra* note 10, at 66 (stating that judicial rules sometimes have to be uniform in order for the court to be a credible enforcer, as in the case of individual rights).

not on the public, which may be relatively indifferent to judicial language, but rather on the judges themselves.

Let us begin again with the modest assumption that judges want to realize their own goals. For some judges, that may include a commitment to principled defense of constitutional rights, second-order preferences, and so on. Even self-dealing judges will want to encourage other judges, especially subsequent judges on the same court, to be principled in the sense that they will attempt to decide based on reasoned elaboration of established constitutional and other judicial norms rather than current political preferences.[197] That behavior will make it more likely that the gains secured by the self-dealing judges will remain in place.[198] Both sets of judges likely recognize that there are strong temptations away from the type of principled decisions just mentioned. I catalogued those temptations earlier: they include the possibility of reward from outsiders and ideological, practical, or political sympathy with political actors.

Again, institutional ideology is potentially a powerful remedy for the temptations of rational self-interest. By institutional ideology, I mean a kind of secular dharma, a code of behavior for individuals in particular roles within the institution.[199] The ideology works from both within and without. Social psychology demonstrates it is shameful and painful for human beings to disappoint behavioral expectations, as anyone who has shown up underdressed for a popular social event can likely attest.[200] Similarly, a widely shared view about how Regulator X should behave creates social pressure on X to conform.[201] Role norms have a sort of momentum; observing repeated behavior builds expectations that it will continue, which in turn strengthens pressure on the observed to keep doing what he or she was doing.[202]

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197. In using the term "principled," I have in mind something akin to Dworkin's notion of principled interpretation. DWORKIN, *supra* note 169, at 219-24. But my argument is also open to the possibility that courts will frame "principled" interpretations more loosely. As I will explain in some detail a bit later, my argument here depends only minimally on any particular notion of "principle." For a discussion of the limits on principle my argument implies, see *infra* note 287.

198. That is, even if later judges feel no moral constraint to be consistent with earlier decisions, the rhetorical burden of explaining their own exercise of authority within the context of a system that demands reasoned elaboration from precedent will impose significant constraints on the available realm of outcomes. *See* Alexander & Solum, *supra* note 24, at 1627-28; Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 240-41, 251-52 (1983); *cf.* Michelman, *supra* note 111, at 984-85 (arguing that public expectations for judicial modes of reasoning will lead to a relatively constrained range of possible outomes).

199. *See* Freeman, *supra* note 81, at 562, 570; Rubin, *supra* note 81, at 767 (describing the institutional ideology of an elected representative).

200. *See* sources cited *supra* note 81. The author has no comment about whether this example derives from personal experience.

201. *See* Suchman & Edelman, *supra* note 80, at 919-20.

202. DAVID I. KERTZER, RITUAL, POLITICS, AND POWER 83 (1988) (arguing that existing cultural models form the basis for how we learn to shape future norms); Robert Cooter,

Several studies also show that how behavior is observed and repeated also matters. For example, "rituals" are especially powerful ways of reinforcing role expectations, perhaps because they are understood as defining features of a given role.[203] Thus, ceremonies of manhood have real impact on altering the behavior of adolescent boys, and the "trappings" and ceremony of government power reinforce typical behavior by the governors.[204] Over time, role-appropriate behavior becomes not only a response to outside stimuli but also an internalized norm, as Regulator X comes to share public expectations, practices them, and desires to conform.[205] Thus, taking the oath of office not only exposes her to outside pressure that she will fulfill the norms of her office, but also makes her want to fulfill them.

We therefore can see judicial rhetoric as an implement for shaping and reinforcing an ideology of judging.[206] The ethos emerges most explicitly when the role of judges is most directly at issue. Begin with the master craftsman, Chief Justice Marshall. He proclaims not only that judges can and should interpret the Constitution, but also, "It is emphatically the province *and duty* of the judicial department to say what the law is."[207] Another fine example is Justice Harlan's famous opinion in *Sparf v. United States,* a case in which the petitioners had challenged the rule that they could not argue the lawfulness of their conduct to the jury.[208] The Court rejected their claim, holding that lawmaking is the province of the court alone:

Expressive Law and Economics, 27 J. LEGAL STUD. 585, 587 (1998) (noting that norms develop through an evolving consensus about correct behavior combined with active group sanctions against those who do not comply); Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 954-55 (1997) (same).

203. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 112 (1973); Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389, 392 (2003); Suchman & Edelman, *supra* note 80, at 921.

204. *See* E.R. LEACH, POLITICAL SYSTEMS OF HIGHLAND BURMA 10-16 (1954); James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 543 (2003). *See generally* KERTZER, *supra* note 202, at 102-24.

205. *See* ELSTER, *supra* note 80, at 131; TAYLOR, *supra* note 80, at 57-68; Cappel, *supra* note 203, at 430; Suchman & Edelman, *supra* note 80, at 919-20.

206. *Cf.* Bybee, *supra* note 162, at 81, 84 (discussing judicial efforts to claim that decisions are principled and not political); Suchman & Edelman, *supra* note 80 (noting that "institutionalists would predict that the structuration of a legal field will generate a stabilizing framework of norms and assumptions regarding what counts as a good, wise or subtle interpretation—and what is seen, instead, as a crass, mercenary, or overreaching political maneuver").

207. Marbury v. Madison, 5 U.S. 137, 177 (1803) (emphasis added). As Paulsen points out, Justice Marshall also places substantial rhetorical weight on the fact that a judge "swear[s] to discharge his duties agreeably to the constitution of the United States." Paulsen, *supra* note 17, at 257-58 (quoting Marbury v. Madison 5 U.S. (1 Cranch) 137, 180 (1803)).

208. 156 U.S. 51, 62-64 (1895).

> Upon the Court rests the responsibility of declaring the law . . . Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.[209]

Again, Harlan explicitly identifies the rule of law and defiance of self-dealing as a "responsibility" of judging. He raises the stakes even higher by implying that if judges fail in that responsibility, ordered society itself would collapse.

Framed by these direct explanations and call to arms, the rhetoric of principled decisionmaking stakes out a similar claim, although typically far more implicitly. By justifying case after case based not upon the personal preference of the judge, but rather by reference to reasoned elaboration of constitutional principle and existing precedent, judicial rhetoric builds a norm of judicial operation, an expected mode of functioning that other judges should not shirk.[210] That becomes "what courts do."[211] The language of legal reasoning generally, with its arcane terms of art, gratuitous Latin, and generally alien structure to popular thinking, constructs itself as a "science" suitable only for specialists.[212] That distinctive language and process helps to sharpen the definition of the judicial role as something "other," as requiring a mode of thinking and behaving distinct from ordinary political thought. All of these features help to reinforce our baseline expectation, set up by the structure of the Article III judiciary, that federal judges will be less receptive to political influence. In fact, as early as 1834, James Madison argued that the tone of judicial opinions—the "gravity and deliberations of their proceedings," as well as the "qualities implied in [the Court's] members" by its structure—was a significant factor underlying the Court's authority.[213]

And so Supreme Court rhetoric can operate in several different ways to constrain the behavior of the Justices. The first is somewhat

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209. *Id.* at 102-03.

210. *Cf.* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1969-70 (2001) (describing possibility for crafting judicial norms as part of "constructive moral argument").

211. Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting); Monaghan, *supra* note 12, at 14; *see also* Dan Simon, *Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology*, 67 BROOK. L. REV. 1097, 1135-37 (2002) (observing that judicial reinforcement of the expected mode of legal reasoning has shaped public expectations that "closed" or logically determinate conclusions are what constitute acceptable legal argument).

212. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (Garland Publ'g, Inc. 1978) (1783).

213. *See* KRAMER, *supra* note 17, at 145-46.

outward looking; it sets up popular opinion, which creates social pressure.[214] Judicial rhetoric may also raise the pressure the members of the Supreme Court community place on each other to live up to the norms of their words. Finally, the rhetoric of principle may have an effect similar to Aristotle's notion of the practice of virtue: over time, even pretending to be virtuous may lead us to become what we pretend.[215] Aristotle would have said the transformation arises out of habit; a modern psychologist might say the transformation would reduce cognitive dissonance.[216]

Another important audience for judicial rhetoric is other judicial actors. Consider the difficulty of controlling doctrinal developments in a system with sixty-three intermediate courts (or more, depending on whether one wants to count state intermediate courts) authorized to interpret federal law.[217] Given the practical difficulties of direct supervision and the considerable lag time that attends even direct error correction, the most useful limitation on lower courts is probably the lower courts' sense of obligation to follow existing precedent. Rhetoric thus becomes an important control method in encouraging lower courts interpreting federal law to abide by principles laid down by the Supreme Court. Superior courts can also use shame to make lower courts' desire to avoid reversal more intense—for example, by not only reversing but also castigating the lower court for being unprincipled or failing to follow clear precedent. Similarly, rhetoric might also be aimed at future Supreme Court Justices, in the hopes that they will come to the Court already having internalized the norms laid down by their predecessors, or, in joining the Court, aspire to achieve the norm of their new community. That would, again, likely lead to a more robust sense of precedent, which would allow present Justices to have longer-lasting impact on the law.

Claims of judicial exclusivity might play a substantial role in reinforcing the psychological impact of judicial rhetoric. Social psychology

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214. Admittedly, popular pressure may be a relatively weak constraint on contemporary Justices. For one thing, the general public is probably relatively inattentive to judicial language, so they may form only very weak impressions about what the Court does and why. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1829-32 (2005). Part of the rhetoric is that the Court is to be oblivious to public opinion, so that there is something of a paradox in relying on public opinion alone to constrain how Justices behave. Thus, I suspect by far the more important set of social expectations is among the Justices themselves and other close observers of the Court. *See* Tushnet, *supra* note 81, at 454 & n.11.

215. ARISTOTLE, NICOMACHEAN ETHICS 22 (Roger Crisp trans. & ed., 2000).

216. "Cognitive dissonance" is the experience of mismatches between an individual's knowledge, opinions, and beliefs. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1-3, 9-15 (1957). The theory is that individuals are motivated by the negative sensation of dissonance to reduce these disuniformities. *Id.* at 29-31, 263-66.

217. *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 917-18 (1990); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 383 (1994).

tells us that roles, and the norms that accompany them, are often defined by contrast.[218] Role definition is especially powerful when membership is highlighted by comparison to an "other," especially an inferior other.[219] Because most people desire superior status, generally, people prefer to act in the way that defines the higher role rather than the lower.[220] Thus, a perception of membership in an "elite" class strengthens feelings of cohesion and increases the likelihood of compliance with the norms of the "elite" group.[221]

Rhetorical claims of exclusive judicial authority to interpret the Constitution can function in this way. The Court defines its decisions as special or principled, and popular or political determinations as a lesser mode, unprincipled, amoral, untrustworthy, dangerous, and destabilizing.[222] Take the Court's opinion in *Boerne* itself.[223] In rejecting Congress's efforts to control the level of scrutiny state courts accorded burdens on religious freedom, the Court invoked *Marbury* to suggest that such power would be the equivalent of letting Congress amend the Constitution. The Court explained: "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.' "[224] Consider the Court's use of the *Marbury* language here. Constitutional law is "superior" and "paramount," and not, as the Court tells us twice, "ordinary" in the way that everyday lawmaking is ordinary. Implicitly, then, constitutional interpretation is different, higher, and better than politics.[225] The body that has exclusive power to make this "superior" kind of law must itself be elite, and we should aspire to emulate its norms.

Exclusivity might also be required by a self-conscious use of rhetoric to elevate the importance of judicial constitutional interpretation at the expense of "ordinary" politics. The self-conscious rhetoritician

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218. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 211 (1991); SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750-1900, at 98-99 (1991); CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 46-47 (1991); McAdams, *supra* note 78, at 357.

219. *See* Bybee, *supra* note 162, at 33; McAdams, *supra* note 78, at 357.

220. *See* Kahan, *supra* note 78, at 354-58; McAdams, *supra* note 78, at 355-65; Julian Pitt-Rivers, *Honour and Social Status, in* HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY 19, 22 (J. G. Peristiany ed., 1966).

221. *See* James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, L. & CONTEMP. PROBS., Summer 1985, at 99.

222. *See* Tushnet, *supra* note 81, at 453.

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

224. *Id*. at 529 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

225. *Cf*. Bybee, *supra* note 162, at 85 (discussing scholarly claims that there is a divide between "high politics" of judging and "low politics" of "mere partisan favoritism").

should recognize that building the status of courts diminishes the status of other policymaking institutions. One consequence may therefore be less principled behavior in those institutions. Thus, if the Court wants to prevent unprincipled constitutional interpretation, it may well want to prohibit such interpretation by the branches whose capacity it has undercut.

This last point implies one significant problem with rhetorical claims of exclusivity. Critics of exclusivity argue that one of its most significant costs is that it may degrade the quality of constitutional deliberation by nonjudicial actors.[226] As I have just described, rhetorical justifications of exclusivity is an important mechanism for how that might occur; rhetorical exclusivity lowers public and internal expectations of the political branches' capacity for principled interpretation, including in their purely internal deliberations. That should be a concern at least for public-minded courts.

More problematic still, neither of the above uses justify exclusive judicial authority over *all* of constitutional law. Contrasting constitutional interpretation with ordinary politics does strengthen the role-defining force of judicial rhetoric, but so, presumably, would contrasting a subset of constitutional law. Why couldn't the Court highlight a handful of rights, or portions of rights, that involve fundamental and compelling moral judgments, or highly elusive second-order preferences, and contrast only those select handful with everyday policy? Indeed, the Court's rhetorical claim that its exclusive constitutional realm is "superior" and "paramount" would seem a little ridiculous when that realm includes age limitations for federal officials, procedures for filling a vacant Vice Presidency, Congress's power to establish post roads, and other similarly quotidian constitutional subjects.[227] Of course, one might argue that what makes constitutional law so unique is the special processes for its enactment, the wide, popular agreement it requires, the corresponding likelihood that it represents deep public commitments, and so on.[228] My point, though, is that we could plausibly offer similar unifying stories for less comprehensive subsets of the Constitution, or even for groupings of legal interpretation that span constitutional and statutory interpretation. If that is the case, given the costs of exclusivity, including its effect on internal deliberation by other branches, why not choose an exclusive sphere that also allows some room for nonjudicial interpreters, and that credits politics with some ability to make principled choices?

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226. TUSHNET, *supra* note 42, at 169-72, 181-82, 194; Post & Siegel, *supra* note 21, at 1037.

227. *See* TUSHNET, *supra* note 42, at 9-12 (distinguishing between constitutional topics that bear on important questions of justice and national identity and other, more technical provisions).

228. *See* Schauer, *supra* note 56, at 1061.

Then the realms drawn out for shared interpretation would mitigate the risk that judges would contribute to a downward spiral of both internal and external expectations for political reasoning in those areas.

This examination of the particular institutional needs of the judiciary therefore seems to turn up at least a partial justification for a rule of exclusivity. Although what I have called "traditional" justifications for claims of judicial authority do not support exclusivity, it is possible that exclusivity could be a strong component in constituting an ideology of principled judging. But even there the argument for exclusivity is incomplete; it suggests that although we might want some field of the law to be exclusive to judges, that field would not have to encompass all of constitutional law. Nor does the notion of an ideology-reinforcing rhetorical claim of exclusivity by itself seem to explain how or where the line of exclusivity should be drawn. Whether such a line can be drawn, and if so how, is the main subject of the next Part.

VI. *VIVE LE BOERNE*?

It now seems that there is no compelling justification for exclusive judicial authority over constitutional meaning and no rationale for judicial review that cannot be distinguished when is it applied to exclusivity. Perhaps then we could say that *Boerne* simply mistakes *Klein* supremacy for an antidepartmentalism principle.[229] But in fairness to exclusivists, exclusive judicial control of the whole of the Constitution may be something of a straw man position. *Boerne*, after all, does allow Congress to "enforce" the Constitution.[230] As I have argued, that power sweeps in much that in a realist sense *is* constitutional interpretation. If a present Supreme Court is to give *Boerne* the respect it can claim as extant precedent, and our argument is directed to that Court, we likely must also explore the possibility that there is a principled account of *Boerne* that explains its actual effect—a regime that, while nominally entirely exclusive, in fact excludes Congress only from portions of the task of constitutional interpretation.

We have to make this inquiry not only out of deference to the stare decisis value of *Boerne*, but also because of the significance of the psychological rhetorical aspect of exclusivity. Recall that one of the framing questions at the outset of this Article was whether there

229. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 173-74 (1997) (arguing that the Court appears to have mistaken independent congressional interpretation for an attempt to redefine the Fourteenth Amendment). Professor Tribe accuses Kramer of the same error. Laurence H. Tribe, *The People's Court*, N.Y. TIMES, Oct. 24, 2004, § 7, at 32.

230. City of Boerne v. Flores, 521 U.S. 507, 518-19 (1997).

were any aspects of *Merryman* and *Klein* supremacy (which we accepted as highly entrenched) that we would have difficulty disentangling from an antidepartmentalist principle. Rhetorical demands, we just saw, do seem important to the operation of judicial review, if not essential components of it. While rhetoric does not require complete exclusivity, it implies a significant role for at least partial exclusivity. The question now seems to be whether the competing concerns that support departmentalism can allow occasional exceptions, or if they would outweigh the benefits rhetoric may offer judicial review. In the remainder of this Part, I consider whether partial exclusivity can withstand the difficulties I have already outlined.

First, partial judicial exclusivity seems to resist the criticisms of collaborative interpretation.[231] Although partial exclusivity is distinct from most notions of collaboration, it nonetheless could accrue many of the same benefits. Leaving at least a portion of a right open to political development can give the court an opportunity to gather information about how the right works in different settings and observe innovative approaches to balancing and securing the right over time and in various communities. To take a very simple example, suppose a court reserved for itself the meaning of discrimination based on race but allowed political development of the time period for filing complaints. The ways that different jurisdictions choose to balance vindication of the right with interests of notice and repose for defendants could give that court insight into how it might balance the right against more significant interests of greater constitutional dimension, as well as a measure of the current moral status of the antidiscrimination right in each jurisdiction over time. Even that minor experiment can give the judiciary data on important questions, such as whether the affected communities slowly accept the right and elevate it over other factors or whether they find that there is dwindling need for its enforcement. Partial exclusivity similarly leaves in place another advantage collaboration offers for "getting rights right" that we thought would be lost with total exclusivity. If agencies can elaborate on some rights some of the time, they would allow courts to utilize remedial measures ordinarily unavailable to them, and more generally to extend at least in part the courts' capac-

231. For the most part, collaborative theorists make no exception to their argument that exclusivity is inconsistent with the benefits of collaboration. *See supra* note 22. One notable exception may be Professor Dorf, who does argue for allowing courts to designate part of their opinions "not experimental" and therefore off limits to deviation by politics or lower courts. I discuss what appears to be his rationale for roping off some portion of rights *infra* text accompanying notes 233-34.

ity to protect rights by piggy backing on the agency's rights interpretation and enforcement.[232]

Settlement, too, may have some value if enforced only in a few constitutional areas. In fact, settlement seems somewhat more coherent as a judicial strategy when it is invoked selectively. Although settlement obviously represents an important set of values, it is hard to accept why it should be the single preeminent value.[233] A partial exclusivity could be modulated to preserve finality of judicial decisions in those areas where settlement seems to outweigh other considerations, as where the underlying right is very controversial, so that further "percolation" would be more divisive and wasteful than useful, or where those who are protected by the right are very dependent on its predictability. For example, as others have observed, criminal defendants (and potential defendants) are especially vulnerable to weakening of the rule of law, so that perhaps criminal trial rights and the like should have some zone that is not prone to evolution.[234]

Remember also that I argued earlier that allowing agencies to interpret on a "blank slate," or in areas of novel application, could combine some of the merits of experimentation with some incremental legal stability. In the end I rejected that possibility as inconsistent with a commitment to maximal stability. But if we viewed settlement as one among several values, whose importance varied depending upon the context of the right being stabilized, we might in many instances be willing to accept the difficulties of distinguishing between different acceptable modes in exchange for the greater flexibility they offer.

For similar reasons, criticism of the settlement function is less biting once there is no need to establish that settlement is superior to any other value. Exclusivity, as discussed above, may not actually be that settling, because relatively small amounts of disobedience can snowball, and in many cases exclusivity will only submerge debate about values under a layer of technobabble. These are serious concerns for an absolute claim of exclusivity, which has to establish the preeminence of stability over all conditions despite obvious rigidity costs. But they are easier to accommodate when settlement is only a factor to be balanced in deciding whether to make a particular right or portion of a right exclusive to the judiciary; in some instances the

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232. *See* Galle, *supra* note 74, at 227-28; Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983? A Theoretical Approach*, 69 BROOK. L. REV. 163, 217-18 (2003).

233. *See* Alexander & Solum, *supra* note 24, at 1632-34; Peabody, *supra* note 17, at 75-76.

234. *See* Dorf, *supra* note 10, at 66-67; *cf.* Neuborne, *supra* note 18, at 1000 (arguing that exclusive judicial interpretation of the Constitution protects the politically powerless).

lessened settlement will still be enough (perhaps along with other considerations) to merit exclusivity, but in many other instances it will not. It may be that settlement will offer a justification for exclusivity, even in combination with other factors, only when it appears that ordinary judicial review will not adequately settle the law.

On the other hand, the relative malleability of partial exclusivity may be a problem for the rhetorical-psychological uses of exclusivity. In order for exclusivity to function as a rhetorical tool for defining judicial ideology, it must define that ideology relatively coherently. In the abstract, one supposes, it might be possible for strongly embedded and reinforced but illogical traditions to persist over time. Maybe for a time some cultures could accept judicial claims that interpretation from 9:15 to 11:15 a.m. each morning is special, or that arguments considered after inhaling the smoke billowing from a hot spring on an Aegean isle are of particular status that demand a particular mode of behavior. But role definition is an accumulation of expectations. We frame our expectations with what we already know.[235] A tradition that explains itself coherently and convincingly, that accords with an existing sense of the world, of logic, and of justice, is more likely to ring true with its audience, and in turn more likely to take root and remain persuasive over time.[236] Certainly at least in a modern, Western, post-Enlightenment culture there is an expectation that justifications for public policy must be grounded in reason.[237] And, for the most part, Dworkin is right when he says that our expectation of reason also entails an expectation of consistency and a hostility to what he calls "checkerboard" solutions—in my example, the illogic of 9:15 a.m.[238]

Further, the fact that the goal of establishing a judicial ideology is to instill a desire for principled decisionmaking may demand a principled definition of the scope of that ideology. An act of principled interpretation often begins not with the four corners of the individual question presented, but with an analysis of the role of the interpreter within his interpretive community.[239] In other words, in the ideology we are hoping will arise, judges will begin their task by asking, "Am I

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235. *See* J. M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 303 n.32 (1998); DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE 342-52 (1995); DAN SPERBER, EXPLAINING CULTURE: A NATURALISTIC APPROACH 58-59 (1996).

236. *Cf.* KERTZER, *supra* note 202, at 83 (arguing that existing cultural referrants in our minds dictate how we will accept new possibilities); CLAUDIA STRAUSS & NAOMI QUINN, A COGNITIVE THEORY OF CULTURAL MEANING 93-96 (1997) (same); Wendel, *supra* note 210, at 1969-70 (claiming that notions of honor and shame are better constructed through a system of reasoned moral consideration).

237. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 331-33 (1980); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 24 (1993).

238. DWORKIN, *supra* note 169, at 178-84.

239. *See* Fallon, *supra* note 41, at 147-48.

the kind of person who is bound by the kinds of obligations that judges have, and what does that set of obligations require of me in this case?" If that task is fouled up at its outset by problems of incoherent or unprincipled dividing lines between what is or is not privileged and principled, then judges' confidence in the definition and in their mission will weaken. That may make the whole endeavor impossible in the long run.

So the question for partial exclusivity becomes whether it is possible to draw a principled or coherent line other than by declaring that "it is a *constitution* we are expounding."[240] That line, I have said, has some weaknesses, but also has the considerable strength that it appeals to the notion of courts as the faithful agents of the ancient authors of a uniquely authoritative text. At the same time, a workable partial exclusivity could be sustained with another line, perhaps one that begins by asserting that there is a divide between ordinary differences of opinion and disputes about fundamental matters of value. We might offer any one of several fairly coherent distinctions between the two, as perhaps a libertarian ideal of individual autonomy,[241] Rawls's suggestion that a fundamental value is one that should not be subject to majority preference,[242] or Dworkin's somewhat correlative claim that fundamental rights are in the main those required by equal regard for all individuals.[243] The problem with these examples is that taken alone they would also extend to many statutes. That produces a logical difficulty: How can a court claim that it alone can interpret the proper scope of a right when that right is embedded within a policy that was initially established by the very body the court will claim is not an authoritative interpreter of the right? Would the entire enactment be void?

Partial exclusivity might avoid this dilemma by combining the two rationales: courts should preserve those fundamental principles established by a diverse, numerous, and highly activated past body politic. For example, we could say that "what courts do" uniquely is to elaborate the "thin" Constitution.[244] We could further claim that it

240. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

241. *See, e.g.*, DAVID BOAZ, LIBERTARIANISM: A PRIMER 16-19 (1997).

242. *See* RAWLS, *supra* note 130, at 180-94, 475-80.

243. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 122-23 (1994).

244. That result would be the negative image of Professor Tushnet's postulate that "thin" constitutional reasoning is best suited for popular constitutionalism. TUSHNET, *supra* note 42, at 185-87. Tushnet describes the "thin" constitution as that portion most important to our sense of justice and national identity. *Id.* at 11. He remains skeptical, though, that courts should have interpretive supremacy (in either the *Klein* or anti-departmentalist sense) over even those areas. *Id.* at 9-12, 163. Alexander and Solum appear to agree somewhat, at one point suggesting that settlement is a more compelling value when the issue at stake is simply one of those "provisions that organize the federal

is the definition of these rights that is most fundamental. As the interpreter moves from considering the "core" rights to evaluating how the right relates to real-world policies, her decision departs from the unique authority of the judiciary and becomes more like "thick" constitutional choices about more quotidian policy decisions.[245]

Many might object that this resolution is unsatisfying because it seems arbitrarily to omit some portions of the Constitution. The choices of which values are "higher" and worthy of special protection might seem arbitrary, or at least subjective.[246] The same would be true of claims about what decisions courts are most "competent" to make—again, competency can not be defined in the abstract, detached from subjective measures of good or effective outcomes.[247] In contrast, faithful agency to the whole of the document offers a straightforward rhetorical claim to producing "right" answers, in the sense that the question of the document's meaning is basically an objective historical question.[248] But, *pace* Scalia and St. Augustine, historical interpretations of texts *are* subjective encounters between the interpreter's values and the semantic possibilities of the text and meta-text.[249] In any event, partial exclusivity does not need to conclusively reject originalism or faith in constitutional "right" answers. It need only show that either view—originalist or deconstructionist—is internally consistent and therefore capable of sustaining a principled judicial ideology. There is nothing in this critique that would suggest otherwise.

Another possible objection is that the dividing line between what is exclusive and what is not, under any proposed subset of the Constitution, will rarely be bright. Perhaps, this argument goes, that un-

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government" rather than, presumably, more value-laden choices. Alexander & Solum, *supra* note 24, at 1632.

245. Professor Monaghan urges essentially this same approach to *Klein* supremacy. Monaghan, *supra* note 46, at 33-34.

246. *See* TUSHNET, *supra* note 42, at 186.

247. A similar objection could be made to the suggestion by Professors Alexander and Solum that only those parts of the Constitution wherein "a court will be superior to other institutions in reaching the right answer" should be settled. Alexander & Solum, *supra* note 24, at 1633.

248. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3, 10 (1971); Monaghan, *supra* note 59, at 723; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854-55, 863 (1989). *But see* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 99-100 (1993) (describing originalist arguments as misguided searches for objectivity).

249. *See, e.g.,* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 9-10 (1996); J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 744-46, 761-64 (1987). In fairness to Justice Scalia, he seems perfectly aware of this counterargument, but prefers his own view because it tends to limit the discretion of judges. *See* Scalia, *supra* note 248, at 862-63. This illustrates nicely the point that the choice of interpretive method itself is contingent to some degree on the interpreter's value preferences.

certainty will weaken or even fatally undermine the definition of the judicial role. It is important to recognize, though, that the possibility of principled disagreement at the margins of judicial authority is not the same as incoherence in the definition itself. Principled interpretation can survive disagreement about difficult cases without undermining the force of the underlying principles.[250] In most cases, the lines will be clear, and in those where it is not, judges will still be able to recognize the liminal decision they are making as one that is consistent with the overall project of the judicial ideology. Furthermore, the line between "constitutional" cases and all others is not necessarily that bright either.[251] Recall again our discussion of new applications, modes of enforcement, and so on. Are these "constitutional" questions? Probably so, but sometimes it will not be easy to say for sure.

In addition, there are significant advantages to having a line that is not terribly clear. Having a bright line would make more work for the Court in striking down efforts to evade its exclusivity requirements. The brightness of the line would make it more likely that evasions would be recognizable as evasions and, for the sake of judicial credibility, demand judicial response. Economizing on judicial invalidation might extend judicial capacity to do other countermajoritarian work.[252] Blurry lines also probably have a stronger deterrent effect, because an agency that does not want to waste its efforts will not want to venture into the "DMZ" on the borders of exclusivity unless it is strongly committed to an outcome that requires the trip.[253] That, too, economizes the Court's efforts. Leaving a bit of uncertainty also reduces the amount of dirt that the Court, by elevating its own status in the privileged area, throws on the capacity of other branches to engage in that form of constitutional reasoning. Since such reasoning is probably inevitable in some internal, largely unreviewable decisions by the political branches, it would be better to leave open as much ground as is consistent with the Court's obligation to itself.[254]

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250. *See* Monaghan, *supra* note 59, at 748-49.

251. *See* Monaghan, *supra* note 46, at 33.

252. *See* Post & Siegel, *supra* note 13, at 517.

253. Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 137.

254. This last point also raises another possible objection, albeit from the opposite direction from those we have previously considered. It might be said that partial exclusivity, like exclusivity generally, is inferior to full cooperation in that it may tend to reduce public expectations for the capacity of Congress and the executive for constitutional reasoning. But partial exclusivity does acknowledge that the political branches may be capable of considering implications or applications of a fundamental right in a principled way. And judicial review might be designed in such a way so as to help agency action revitalize its self-image as a principled decisionmaker generally, and that methodology might benefit the agency's unreviewable consideration even of core rights. I leave explication of that design for later work.

Finally, partial exclusivity can likely also claim to make a portion of the traditional Bickelian understanding of exclusivist judicial rhetoric more persuasive. Recall that the basic problem with that view was that in entailing a very extensive zone of exclusivity, it called for an overextension of the judicial efforts it aimed at economizing, and left judges with no effective way to resolve some of the rights dilemmas it was aimed at resolving. Certainly to the extent that exclusivity was a component of a judicial claim that courts reach "right" answers or can alone find the one meaning the authors of the Constitution intended, partial exclusivity is no help. That claim is not really consistent with judicial tolerance for experimentation with the scope or implementation of the underlying right.[255] But even partial exclusivity could still buttress the Court that says that its balancing on some particularly fundamental constitutional rights has a special claim of moral authority. Exclusivity even in select aspects of certain rights would provide the Court an *a cappella* voice to lead or persuade in that area.

In sum, partial exclusivity, at least in the abstract, looks fairly resistant to the criticisms aimed at exclusivity generally. It is reasonably consistent with *Boerne*'s doctrinal line—"enforcement" or "prophylactic remedies" might describe the margins of where a fundamental rights definition begins to drift into rights instantiation.[256] And it actually seems to support some of the goals of judicial review: strengthening the judiciary's institutional commitment to preserving rights; preserving a powerful moral voice for the Court in resolving difficult questions of justice in balance; and helping the Court to get some fundamental questions right and settle them rightly. Still, there are two important questions remaining. How does executive involvement affect this analysis? And can the vague concept of principled partial exclusivity work in practice? The next two Parts hash these questions out.

VII. AGENCIES, BUT NOT CONGRESS?

Until now, although I have mostly discussed executive action, many of my points seemingly could apply equally well to Congress as they do to interpretations issued by an agency. The reader may reasonably wonder why, then, I chose at the outset to frame my discussion in terms of a rule of administrative law rather than more generally addressing the question of extrajudicial interpretation. The answer, as I explain in this Part, is that there are in fact some significant differences between how courts relate to agencies and how courts relate to Congress. Probably the largest difference appears in

255. *See* Monaghan, *supra* note 46, at 27.
256. *See* Gant, *supra* note 62, at 375.

an explanation for exclusivity we have not yet considered. I describe it here as "agenda limitation." Courts may restrict the authority of other entities to interpret the Constitution so that courts alone have control over some aspects of the national agenda, or over with what issues the courts will be forced to grapple. As I argued in an earlier work, the argument for excluding agencies on these bases is much weaker than the argument for excluding Congress.[257] Because these points have been discussed at length elsewhere, my treatment of them here is fairly cursory. In Part VII.B., I try to explain what may at first seem an oddity: that agencies, which supposedly exercise power delegated to them by Congress, should at times be able to interpret the Constitution when the legislature cannot.

A. Agenda Limitation

The Court's opinion in *Boerne* devotes exactly one sentence to the issue of federalism.[258] Plainly, though, the Court's ruling has important implications for the federal government's ability to displace state or private ordering with national norms.[259] That suspicion was confirmed in a number of cases following *Boerne*, where *Boerne*'s limitations on Congress's power to "enforce" the Fourteenth Amendment proved the final line of defense against congressional efforts to remove state sovereign immunity[260] or expand entitlements for the disempowered.[261] By reserving for itself exclusive power to control the scope of the Fourteenth Amendment, the Court was able to reduce Congress's ability to nationalize its policy goals.[262] Put another way, judicial enforcement of federalism values may be a justification for exclusivity at least over rights that might tend to expand the power of the federal government at the expense of states.

In another work I have argued that judges generally do not need to prevent agencies from trammeling on the values of federalism.[263] Judicially enforced federalism is not aimed simply at constraining national lawmaking. If it were, then one would expect identical limitations on legislation under both Section 5 and the Necessary and Proper Clause. Instead, the Court's concern is mainly with legislation where it perceives some flaw in the political process that would interfere with the accountability of federal and state officials for their re-

257. Galle, *supra* note 74, at 222, 227-28.
258. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
259. *See* McConnell, *supra* note 229, at 192-94.
260. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-83 (2000).
261. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).
262. Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1187 (2001); Post & Siegel, *supra* note 13, at 508.
263. Galle, *supra* note 74, at 193-96, 222.

spective decisions over time.[264] I contend, however, that the nature of the relationship between regulated states and regulating agencies is such that there is not much danger that the state will lose autonomy or that its voters will be unable to hold the correct officeholder responsible for bad or undesirable outcomes.[265] States, especially states holding a national minority position, are especially powerful administrative lobbyists.[266] Voters correctly hold both state and national policymakers to account when a cooperative venture goes sour.[267] And crucially, relationships between agencies and states can be designed in ways that enhance transparency, activate voters, and give states a powerful voice in both the goals and implementation of national programs.[268]

It might be argued that (somewhat paradoxically for a proponent of unalloyed exclusivity) exclusive agenda control is a necessary incident of a more generally experimentalist regime of constitutional interpretation. For example, Professor Dorf has suggested that the Supreme Court could use federalism in the Brandeisian sense, prohibiting national legislative solutions so that states can experiment with a variety of alternative approaches to the same sets of rights questions.[269] One weakness of this proposal is that the judiciary alone is unlikely to be able to sort out the varying results in a way that produces genuinely better outcomes. Indeed, in his other writings Dorf prefers a refereed experimentalism, in which some central political authority can collate all the data that the various experimenters produce, analyze it, offer benchmarks for comparison, suggest best practices for emulation, help to develop incentives for the participants to achieve yet better outcomes, and provide overall policy guidance about the goals of the experiment.[270] In correspondence with this author, Professor Dorf agreed that he would qualify his exclusivity argument with the addition that, if either Congress or an agency were going to serve this centralizing function, the Court should not prohibit its interpretations.[271]

But it seems far more likely that agencies, not Congress (and certainly not courts) are best equipped to carry out that function. Agencies already have the diversified national bureaucracy, experience in continually revising standards to match rules (and vice versa), con-

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264. *Id*. at 220-22.
265. *Id*. at 222.
266. *Id.* at 194-95, 222.
267. *Id.* at 200-02.
268. *Id.* at 196.
269. Dorf, *supra* note 10, at 9, 60-61, 64-65.
270. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314, 321 (1998).
271. Email from Michael Dorf, Professor of Law, Columbia Law School, to author (Oct. 26, 2004, 22:06:04 EST) (on file with author).

trol over sources of state revenue, and other tools that would be useful for the task.[272] Agencies deal with day-to-day problems of administration; therefore, their information is current and closer to "the ground."[273] Of course, over time Congress might (if it had the inclination) develop some similar skills and attributes. But the more fundamental point is that in the end Congress's binding authority issues only through legislation, which is difficult to enact, whereas agencies have a choice of many more nuanced tools for furthering their goals.[274] That characteristic produces a large difference in inertia and attentiveness to ongoing concerns.[275] Congress is often slack and slow to respond, while agencies are more nimble.[276]

There is a similar explanation for why agencies are also considerably less affected by another form of agenda control. One explanation for *Boerne* and other complementary Court decisions is that the Court is sometimes reluctant to assume authority over highly controversial or factually difficult litigation.[277] By limiting the extent to which other actors can define legal rights, the Court can shortcut efforts to force it to confront constitutional dilemmas it would rather avoid. These concerns seem fairly reasonable for rights-defining legislation. Legislative inertia might often leave the Court to resolve the most difficult technical problems or impose on the Court the burden of taking responsibility for a controversial outcome. In contrast, "[t]he day-to-day involvement of federal agencies in overseeing [rights-defining regulation] gives courts the benefit of the agency's technical expertise, and assures that the courts will have a politically accountable partner in elaborating the meaning of statutes that further constitutional values."[278]

Thus, even in a regime that for the most part did not accept exclusivity on other bases, the judiciary might be reluctant to allow some forms of constitutional interpretation and definition by Congress that it would not prohibit to an agency. Likewise, within a partially exclusive system, the judiciary might allow agencies more leeway to ponder and define rights than it would permit Congress.

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272. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1126-27 (1987) (arguing that agencies are the best institutions to coordinate central meaning among diverse national approaches).

273. *See* Dorf & Sabel, *supra* note 270, at 313-14.

274. *See* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 967 (1999); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2153-54 (2004).

275. *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 43-45 (1988); Elhauge, *supra* note 1, at 2127-28.

276. *See* Epstein & O'Halloran, *supra* note 274, at 967.

277. *See* Galle, *supra* note 74, at 222-24.

278. *Id.* at 227.

B. Non-Nondelegation?

If we accept these sets of arguments, we may be left with what may seem like an odd result. With the exception perhaps of a handful of special presidential powers, the Executive typically operates only within the scope of a statutory delegation of power from Congress.[279] In effect, though, I have argued that the Executive should be able to exercise some authority that Congress cannot. How can Congress give someone else power it does not have itself? One correspondent colorfully described this view of my argument as the "non-nondelegation doctrine."

The problem of non-nondelegation (to adopt a felicitous phrase) is an illusion brought on by the linguistic habits of formalism. Congress does not really grant power to the executive. Instead, administrative law limits each branch's exercise of power according to a set of policy judgments about which allocation of those powers would best accord with the design of the Constitution. When we say that an agency acts ultra vires if it goes beyond what Congress could reasonably have contemplated in its grant of authority,[280] we actually are making a judgment that allowing the agency to act more freely would threaten to unleash executive power from the constraints imposed by having also to satisfy the choices of a more diversely and locally selected governmental body (that is, Congress). To say that Congress granted or gave the agency its power is just a shorthand way of saying that agency action in that particular instance comports with our notion of how divided government should function. Perhaps the issue would be clearer if the resulting arrangement was called "reallocation" instead of delegation.

Thus, it is irrelevant whether Congress could itself exercise a power that it "delegates" to another body. The real question is whether exercise of the power by the delegate is consistent with the competing interests demanded by separation of powers theory. If these practical reasons suggest that it would be unwise for Congress

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279. *See, e.g.*, Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971); Am. Bus Ass'n v. Slater, 231 F.3d 1, 6-8 (D.C. Cir. 2000) (citing 5 U.S.C. § 558(b) (1994)); Sea-Land Serv., Inc. v. Interstate Commerce Comm'n, 738 F.2d 1311, 1314 (D.C. Cir. 1984) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring)).

280. *See, e.g.*, Transohio Sav. Bank v. Dir., Office of Thrift Supervision, 967 F.2d 598, 620-21 (D.C. Cir. 1992) (citing Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 402 (1989)). I should mention for clarity's sake that there are really two distinct concerns in most ultra vires questions: a constitutional separation of powers component and an additional inquiry under the APA whether the agency has acted "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C) (2000). I limit my discussion in the main text only to the constitutional aspects. I assume that any particular executive constitutional interpretation would be pursuant to some general congressional delegation. The nondelegation question I address is whether the Constitution can permit such transferences of authority.

to utilize a power, but that with Congress's consent the Executive can safely do so, what is the problem with "delegation"? To see a plain example of this phenomenon, consider the Ex Post Facto Clause.[281] Congress cannot constitutionally impose liability or increase punishment for an offense after it has been committed.[282] Courts, however, in interpreting a congressional statute, can read the law in a way that results in new liabilities or increased after-the-fact exposure.[283] Yet we could easily say that the power to interpret a statute is a form of delegation.[284] Nonetheless, judicial interpretation does not contravene the Ex Post Facto Clause, largely because it is not thought to threaten the kind of vindictive or abusive majoritarianism that legislative enactments would, and because the judicial system would have difficulty functioning otherwise.[285] No one complains that Congress has given courts a power it cannot itself utilize. This Article, I submit, engages in the same form of functional analysis.

In short, there is nothing about agencies that would support a presumption that Congress would not wish to delegate to them constitutional interpretive authority. Furthermore, interpretation by agencies offers courts several advantages generally not available when the interpretive partner is Congress.

VIII. A METHOD AND TWO EXAMPLES

At this stage, two things seem clear—and, I fear, several other things may appear anything but. The points of clarity are these: there seem to be good arguments in favor of a modest zone of exclusive judicial interpretation, but there is no real case for a blanket presumption that agencies have not been "delegated" the power to interpret the Constitution generally. Even if the strength of the partial exclusivity position is accepted, it is not obvious (to say the least) where to draw the borders of exclusivity. I do not propose an answer to that problem here. This Part, however, lays out, based on what I have discussed so far, how a court might conduct the exclusivity analysis in any particular instance. In other words, this Part tries to reformulate the *Boerne* rule and the meaning of "arbitrary and capricious" for use in the review of agency action. Because any rule of this complexity will be hard to grasp in the abstract, I then apply the proposed rule to two doctrinal areas of particular interest to me: fed-

281. U.S. CONST. art. I, § 9, cl. 3.
282. Dobbert v. Florida, 432 U.S. 282, 292-94 (1977).
283. Marks v. United States, 430 U.S. 188, 191 (1977).
284. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 288 (1985); *see* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 107-08 (2001).
285. Rogers v. Tennessee, 532 U.S. 451, 460-62 (2001).

eral "disparate impact" regulations under Title VI of the Civil Rights Act of 1964 and IRS regulation of the political activities of nonprofits.

A. The Method

As the psychology of regulation suggests, there may be an important role for partial judicial exclusivity. By itself, though, social psychological analysis tells us little about which areas of constitutional doctrine should be exclusive to the judiciary. It is also hard to predict in advance just how large a zone of exclusivity courts will need to proclaim. As with more traditional theories of rhetoric, the force and frequency of rhetorical claims might be lowered if the public prominence of the declarations is higher. Exclusivity might end up being a matter of a gestalt intuition, managed by the Court across many doctrinal lines. Powerful claims of exclusivity in some prominent cases might reduce the need for exclusivity in others. Under this view, any effort to systematize exclusivity or reduce it to meaningful doctrine looks difficult and perhaps inconsistent with an optimal balancing of exclusivity with other desirable judicial goals.

This dilemma is a familiar one. In any given case that comes before a court, techniques such as avoidance and minimalist interpretation present the court with a difficult choice between doing its perceived duty in the individual case and preserving its future capacity for later cases.[286] Since this calculus might depend on existing, and even remotely anticipated, conditions in other doctrinal areas, it would be almost impossible to formulate in a principled way the conditions under which a court will actually confront an issue and when it will avoid or minimize it. The court will have a further choice about how candid it should be about its reasons for the resulting decision.

The social-psychological explanation for exclusivity may avoid this set of problems. Psychological exclusivity depends on a claim that judges interpret in a "principled" way. It, therefore, demands that the limits of where the obligations of principle attach themselves be defined consistently with the interpreter's interior values, whatever their precise content.[287] Thus, a judge following that philosophy

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286. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtue"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10-13, 20-22 (1964).

287. Again, I am using "principled" in the limited sense of reasoned elaboration of authoritative text according to a coherent set of values. Of course, one could imagine some sets of interpretive values that would impose relatively little constraint on the definition of the judicial role. For example, one might claim that judges are put into place to make law as they individually please. But there is a limited universe of interpretive methods that would be consistent with the goals and methods of psychological exclusivity. Psychological exclusivity is aimed at making it more difficult for other judges to deviate from the rule set

would have to choose those cases in which she was obliged to apply or defend her underlying values (that is, obligated not to avoid or share interpretation) according to reasoned elaboration from those values. Reasoned elaboration of determinate problems produces "right" answers—a range of possible results that can logically be inferred from a particular set of premises.[288] Of course, not all exclusivity questions will be determinate, but at least in some cases, reasoned elaboration of the competing arguments for and against judicial exclusivity over a particular legal issue will yield an answer. In those cases, it will be difficult for the judge to set aside the principled answer in favor of other considerations. She has to have rules and to follow them.[289]

In short, the social-psychological exclusivist judge must establish a rule for selecting when to invoke exclusivity and instruct that the Court follow that rule faithfully. The exact content of any set of rules will vary depending on the court's choice of values. But we have already seen in Part VI the framework for laying out those values.

To summarize, the court's choice works out to a balancing between the benefits of shared interpretation and exclusivity. Shared interpretation is often better informed, generates more public good will, may encourage nonjudicial constitutional deliberation, and is more likely to reflect current preferences. These are formidable advantages, especially when supplemented with carefully designed, but nonexclusive, judicial review. But for some issues public consideration may not be very useful, as where honest public deliberation is unlikely or distorted. Exclusivity might help to clear the field for ju-

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out by the Supreme Court. It proceeds by claiming that judges engage in a unique form of reasoning that sets them apart from other political discourse. That necessarily requires a methodology that is distinct from popular perceptions of how politics work, so that "do what ordinary politics does" cannot be one of the principled interpretive methods that the exclusivist court could select. In addition, the method of interpretation would have to supply some reason why other judges would be obliged to give some weight to the earlier opinion. That will tend to exclude value sets, such as many "critical" approaches to law, that view law as radically indeterminate except in the eyes of the present interpreter.

288. Keeping in mind that a principled interpreter can accept that there may be alternative sets of "right" answers given a slightly different set of values premises, each of which may be equally principled.

289. This obligation to establish a rule of exclusivity consistent with interior norms likely holds even if one competing consideration is the opportunity to further reinforce the desired public perception of the judiciary. Asking a judge to trade principle now for the possibility of more principle later seems most likely to result only in cognitive dissonance. That would hamper, rather than facilitate, the process of internalization the exclusivist was aiming for in the first place. Further, the judge's reasons for refusing or demanding exclusivity in this hypothetical would be inconsistent with the values she claims justify judicial intervention. That means if she were to explain her actual basis for the exclusivity decision, she would be announcing a decision that on its face is unprincipled. Her choice is to undermine for the public the judicial norm of principled behavior, or to be disingenuous about the real reasons for her decision, which would weaken, in the judge's mind, the notion that she is acting consistent with principle. Either way, the norm of principle is undermined.

dicial moral leadership or to strengthen judicial appeals to substratum moral commitments that run contrary to the results of political contests. Settlement might be appealing enough in some cases to merit some exclusive judicial role, especially if the usual downside of exclusivity is mitigated by a region of shared interpretation on related issues, so that the court can distribute responsibility and receive ongoing feedback about its choices. Finally, we should give some heed whether the court needs to use exclusivity for agenda-limitation, although that consideration is not very important when it is an agency that is responsible for the interpretation.

Judicial role definition is also putatively an important benefit of partial exclusivity. In a sense, social-psychological considerations are a component of any consistently applied balancing test, because absent the demands of role definition we might be tempted to abandon consistent application in favor of a more flexible Bickelian model. But, to the extent that principled balancing alone does not adequately weigh judicial rolebuilding, that factor could be used as a tie-breaker. Ad hoc judgments about the need for more, or more visible, claims of exclusivity could not fit comfortably in an ostensibly principled balancing. But where there are relatively evenly balanced questions of exclusivity, the judge's principled test is indeterminate. Thus, it would still be consistent with the goals of exclusivity to tip one way or the other depending on the court's gestalt sense of whether more or less exclusivity was needed to firm up its image.

There are two other significant considerations that the test would likely have to account for. First, we would have to ask whether any of the purposes of exclusivity could be fulfilled more effectively with the tools of judicial review. For example, *Boerne*'s "congruence and proportionality" requirement[290] may at times accomplish some of the goals of exclusivity, even where the Court ultimately decides that Congress was acting within its Section 5 power. A congressional or agency obligation to analyze in detail the history of the "unconstitutional" practices it is targeting can serve the same moral leadership function as an exclusive judicial declaration of principle, in that it too would focus public attention on a problem and encourage informed deliberation about the problem's content. Agency deliberation also gives a reviewing court the advantage of the executive's fact-finding power in deciding whether an issue should be settled by the judiciary, or, contrarily, should be kept off the judicial agenda altogether. Or it can mitigate the Court's agenda-limitation concerns, allowing the Court to send a question back to another branch when it wants to make sure—and make clear to the public—that the other branch really supports a particular outcome, much like Judge Calabresi's

290. City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).

concept of the "constitutional remand."[291] These factors should not weigh in favor of exclusivity when cooperative techniques, such as a deliberation requirement, can handle them at least as well.

Finally, the Court will have to weigh whether to announce in advance that a particular point of doctrine is part of the indefeasible core of a constitutional right exclusive to the Court. Professor Monaghan observes that clear demarcations between constitutional requirements and defeasible "constitutional common law" invite more vigorous experimentation from Congress, which can feel more confident that its efforts will not be laid to waste by a later judicial decision.[292] But it may be that the Court will want to be chary about what is or is not exclusive exactly in order to cut back on experiments that might wander close to the line. Thus, the decision whether to announce in advance will present a balance of values akin to the longstanding trade-offs in avoidance generally: planning and certainty for the public versus defense of the underlying legal right. As with questions of avoidance, I suspect that decision will vary in each case.

But all of this is terribly abstract. Can it actually work in real controversies? In Parts VIII.A. and VIII.B., I try to show that it can.

B. Disparate Impact Regulations: An Example of Cooperation

Title VI of the Civil Rights Act of 1964[293] makes it illegal for state actors intentionally and invidiously to discriminate based on race.[294] Title VI further authorizes federal agencies to enact regulations to ensure that state entities doing business with the federal government do not discriminate.[295] Many of these regulations additionally provide that those who receive federal funds from a given agency cannot enact or maintain policies having a "disparate impact" on racial minorities.[296] The Supreme Court's 2001 opinion in *Alexander v. Sandoval*, though, suggested strongly that these regulations might be invalid as beyond an agency's power reasonably to interpret the mandate of Title VI,[297] which resembles in form Congress's power to enforce the Fourteenth Amendment. I have argued elsewhere that this aspect of *Sandoval* is difficult to understand.[298] The best explanation seems to be that the Court read the scope of Congress's dele-

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291. *See* Quill v. Vacco, 80 F.3d 716, 738-43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 521 U.S. 793 (1997).

292. Monaghan, *supra* note 46, at 31.

293. 42 U.S.C. § 2000d (2000).

294. *See* Alexander v. Choate, 469 U.S. 287, 292-93 (1985).

295. *Id*. at 293; *see* 42 U.S.C. § 2000d-1.

296. Mank, *supra* note 7, at 518-19, 532-35.

297. 532 U.S. 275, 281-82 (2001); *see* Mank, *supra* note 7, at 519-20; John Arthur Laufer, Note, Alexander v. Sandoval *and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1614-15 (2002).

298. Galle, *supra* note 74, at 174-75 n.60.

gation to the agencies narrowly in order to avoid the question whether the prohibition on disparate impact would be within Congress's Section 5 power.[299] Thus, *Sandoval* is an application of the canon discussed throughout this Article—whether a court should assume that an agency does not have the ability to interpret the Constitution in parallel with the court.

As I have argued, rather than a blanket presumption against an agency's power to interpret the Constitution, courts should instead attempt a nuanced balancing to determine whether judicial exclusivity in a particular case is actually necessary. Here, beginning with the values evident in the Court's existing antidiscrimination decisions, it seems fairly clear that exclusivity is inappropriate.

First, it is apparent that the Court does not see disparate impact discrimination as the central aspect of some right that it is the duty of the judiciary to protect. When faced with calls to defend minority plaintiffs against "unintentional," unequal outcomes that seem to depend in part on the plaintiffs' race, the Court has deferred, citing institutional limitations that would make its protection less than fully effective.[300] While the obligations of duty must to some extent be responsive to those concerns, the fact that the Court was willing to confront them in other areas, such as in many First Amendment cases,[301] and not here suggests that disparate impact does not have the same appeal to the Court's sense of core rights-protection obligations. Nor is the question of disparate impact quite so central to the fundamental definitions of equality and distributive justice the Fourteenth Amendment demands as, say, intentional discrimination. To be sure, disparate impact could be framed as a question of equality—equality of results rather than equality of treatment. But the Court seems to see it instead as more of a question of remedy for the core problems of intentional discrimination. In the Court's view, prohibiting disparate impact is a fallback method for preventing hidden or unconscious racism, or a tool for realigning the embedded social results of past deliberate inequities.[302] That looks more like the sort of

299. *Id*. Similarly, Justice O'Connor has argued that an agency's authority to interpret and enforce civil rights legislation is narrower than Congress's Section 5 enforcement power. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 613-14 (1983) (O'Connor, J., concurring). As Justice Stevens pointed out, this view is contrary to general principles of administrative law. *Id*. at 644-45 (Stevens, J., dissenting). But it is intelligible, albeit mistaken, if it is understood as a Bickelian narrowing of the scope of a delegation to avoid constitutional limits on Congress's authority.

300. *See* McCleskey v. Kemp, 481 U.S. 279, 297-99 (1987); Washington v. Davis, 426 U.S. 229, 239-42, 248 & n.14 (1976).

301. *See* McConnell, *supra* note 229, at 191-92.

302. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 498-99 (2003).

policy question that principiled interpretation allows a court to share with other actors.

Most other factors also point against exclusivity. There is no strong interest in settlement. Indeed, the Court has expressly said that it wants to allow society to continue to evolve and develop before it establishes a lasting rule for how best to correct discrimination.[303] Furthermore, agency administration mitigates any agenda-limitation concerns the Court might have.

On the other hand, it is true that unintentional discrimination seems the sort of problem where the Court's rhetorical and moral leadership could be especially powerful. Arguably, exclusivity would help the Court to command the rhetorical field, focusing more attention on its admonishments. But simply requiring agencies to examine facts and make findings on the scope of disparate impact discrimination in their field, as well as the appropriate remedies, could have the same benefit. That, too, would lead to public deliberation and would establish a set of conclusions from an entity with social prominence, with the added benefit that it would more directly involve the affected stakeholders. The Court's supervision of the process could make all the participants more principled and could lend the outcome some portion of the judicial reputation for moral leadership.

Therefore, contrary to the suggestion in *Sandoval*, disparate impact regulations look like an area where exclusivity is not justified. That implies, in turn, that the Court should permit agencies to regulate disparate impact discrimination. As we just saw however, the Court might prudently demand that agencies deliberate regularly on how their various antidiscrimination policies actually function.

C. Tax Exemptions for Religious Organizations Acting Contrary to Public Policy: An Example of Exclusivity

For the most part, the federal government does not tax the income of religious organizations or other charities.[304] One important exception to this general rule of exemption is that "an institution seeking tax-exempt status must serve a public purpose and not [act] contrary to established public policy."[305] Thus, some advocates of campaign finance reform have suggested that the IRS might use its powers to revoke and otherwise regulate the charitable tax-exempt status as a tool to discourage what these advocates see as behavior contrary to public policy, such as various forms of lobbying or other political activity.[306]

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303. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).
304. *See* 26 U.S.C. § 501(c)(3) (2000).
305. Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).
306. *See* sources cited *supra* note 5.

The IRS's power to declare activities "contrary to established public policy" may be constrained by the Supreme Court's presumption against allowing agencies to consider constitutional questions. In *Bob Jones University v. United States*, the Court upheld the IRS's determination that a pair of private religious schools were not entitled to exempt status because they discriminated on the basis of race.[307] Significantly, though, the Court warned that the IRS could make such a finding "only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[308] In response to the petitioners' arguments that the IRS had not been delegated authority to make such a determination, the Court remarked that the IRS could properly find a charity contrary to fundamental public policy at least where "the position of all three branches of the Federal Government was unmistakably clear."[309] In answer to Justice Powell's similar complaint, the Court responded, in effect, that the delegation to the IRS here was acceptable because Congress had clearly endorsed the delegation.[310] In essence, the question was the same one as the one we have grappled with throughout this Article: can the IRS be presumed to wield power to make fundamental decisions of justice, especially those turning on interpretation of the Constitution, absent Congressional authority? The answer, it seemed, was no.[311]

My analysis thus far shows that the rule of *Bob Jones University*, read broadly in this way, is probably wrong. It should not be presumed generally that the IRS, absent a clear delegation, lacks authority to contemplate constitutional questions. Nor should we universally limit the IRS's understanding of those questions strictly to what courts have previously held.

At the same time, a more methodical analysis suggests that the Court was likely right that exclusivity is the right rule on the facts of *Bob Jones University*. We could begin, as some of the amici did, by framing the case as another application of the disparate impact regulations question: shouldn't the IRS have been free to take the view that its de facto support for a discriminatory institution infringed on equal protection values?[312] But an important distinction between the *Bob Jones University* situation and disparate impact is that *Bob*

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307. *Bob Jones*, 461 U.S. at 579-85.

308. *Id.* at 592.

309. *Id.* at 598.

310. *Id.* at 598 n.23; *see id.* at 610-11 (Powell, J., concurring) ("[T]he balancing of these substantial interests is for *Congress* to perform.").

311. It is not entirely clear, though, what the result would have been if only one other branch, be it legislative or judicial, had previously agreed with the IRS's view.

312. *Bob Jones*, 461 U.S. at 599 n.24 (noting that amici had urged the Court to find that a grant of the exemption would itself have been a violation of equal protection); *id.* at 622 n.4 (Rehnquist, J., dissenting) (arguing that exemption was not unconstitutional because it was merely a "facially neutral" statute).

Jones University involved a direct conflict between two constitutional rights. At the tail end of its opinion, the Court also held that the government's "overriding" interest in remedying discrimination outweighed the school's asserted free exercise right to set admissions and interracial dating policies based on the religious convictions of its members.[313] As a result, the IRS's decision was not only a decision about equal protection, but also a decision about how to accommodate competing claims of racial justice and religious liberty (albeit liberty exercised in a rather loathsome fashion). The Court's need to preserve for itself sole authority to resolve claims of competing rights seems one of the strongest justifications for exclusivity.

Furthermore, claims like those put forward by *Bob Jones University* seem, for this Court, to command a place closer to its notion of apolitical rights not to be shared with the other branches. It is true that, since the time of *Bob Jones University*, the Court has largely gotten out of the business of balancing religious liberty against the government's interest in enforcing facially neutral laws of general application, and expressly relegated the complaints of those burdened to the political process.[314] But that is in part because the Court would like to distance religion from official government consideration of the importance of any particular religious obligation, especially since it is likely that the practices of unpopular or obscure religious organizations will be given scanter weight.[315] The University's claims also to the modern eye could have a strong *Boy Scouts of America* flavor of "intimate association" on top of the pure free exercise right it argued in 1983.[316]

Putting all these considerations together, I think the Court would probably (under this Article's method) invoke exclusivity on a similar set of facts today. Unless the IRS's reading of the Fourteenth Amendment was the same as the Court's, it would be invalid, despite Congress's authorization. It is not at all clear, though, that this same conclusion would apply to IRS regulation of the political activities of exempt entities.[317] It would depend on how strong the entities' free exercise and free association arguments were and how directly, if at all, they would conflict with whatever view of constitutionally-inspired "public policy" the IRS offered. I leave that difficult question for future development.

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313. *Id*. at 602-04 (majority opinion).

314. Employment Div. v. Smith, 494 U.S. 872, 884-90 (1990).

315. *See id.* at 886-87.

316. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

317. For an example of one such balancing, see Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972). The *Christian Echoes* court upheld the Service's revocation of a politically active church's 501(c) status because, among other reasons, it held that the resulting First Amendment burdens could be outweighed by the IRS's interest in avoiding potential Establishment Clause problems. *Id.* at 857.

IX. CONCLUSION

Judicial exclusivity, I have argued, can coexist with cooperative constitutional interpretation between courts and the Executive. By invoking exclusivity selectively, the judiciary can protect its own institutional interests while at the same time garnering many of the benefits cooperation offers. It therefore would be a mistake for administrative law to adopt a rule, as the tax law arguably has, that would presumptively reject independent executive interpretations of the Constitution as a legitimate basis for an agency's decision. I have proposed instead a more nuanced balancing test, which courts could use to channel the competing considerations for and against exclusivity. I believe the test can offer powerful insights into a number of difficult dilemmas, as with its relatively easy resolution of the recently vexing question of the validity of disparate impact regulations.

At the same time, this Article is just a first step. I have suggested an answer only to the liminal question of whether an agency should have any independent interpretive authority. Once we agree that such authority sometimes exists, there is the secondary, and probably more important, question of how to review the resulting interpretation. That debate has traditionally been framed as a matter of "deference." But as I have suggested here at times, there are many other factors at work besides simply the degree to which one institution should acknowledge the policy insights of another. When should judicial interpretation happen? How can the judicial end of a shared interpretation be structured to achieve judicial goals? What should judges say about deference in light of their self-perceived need to claim some ultimate authority?

My work here also suggests an interesting line of inquiry about the role of other interpreters. State governments sometimes defend state activity that infringes on one constitutional right by arguing that their action is necessary to preserve another constitutional right. Virginia, for example, barred funding for a religious publication at a public college on the ground that funding the organization would have been an establishment of religion.[318] The State of Washington denied some scholarships to students pursuing a degree in theology for the same reason.[319] In reality, resolution of both disputes might turn on the extent to which the state's proffered constitutional justification is compelling enough to survive First Amendment scrutiny, despite the fact that it might describe or view "establishment" differently than the Supreme Court would. Should the Court permit independent constitutional interpretation by states, as well as by the Executive branch? Again, I leave that difficult question for future work.

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318. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).
319. Locke v. Davey, 540 U.S. 712, 716 (2004).