CONSTITUTIONAL VIOLATIONS BY THE UNITED STATES SUPREME COURT: ANALYTICAL FOUNDATIONS

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Legal scholarship has generally neglected the questions surrounding the analytical foundations of the concept of constitutional violations by courts of last resort and the implications of this concept for traditional debates over the judicial power between proponents of judicial restraint and activism. In this article, Professor Nowlin examines these questions and concludes that constitutions can limit courts of last resort and, thus, that the U.S. Constitution can limit the U.S. Supreme Court. Significantly, the purposes of constitutions include creating and limiting governmental institutions such as courts of last resort, and the U.S. Constitution both created and limits the U.S. Supreme Court. Constitutional limits on the federal judicial power likely extend beyond familiar constraints on federal jurisdiction to the use of interpretive methodologies and thus encompass questions of the proper judicial role as activist or restrained.

Professor Nowlin further concludes that the Court's finality of decision in no sense entails a substantive infallibility, and, therefore, the Court's supreme self-affirmation of the constitutionality of its own decisions does not finally resolve the question of whether the Court has violated the Constitution. Professor Nowlin also elucidates the distinction between extra-constitutional and intra-constitutional interpretive authority, explaining in what manner a constitution may authorize and limit the interpretive authority of institutions internal to a

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constitutional system. Professor Nowlin also outlines a conceptual framework for analyzing judicial constitutional violations, including violations via exceeding structural authority, contravening Rule-of-Law norms, invoking judicial review pretextually, and infringing other substantive constitutional norms. In sum, the concept of (un)constitutionality is as applicable to courts of last resort as it is to other governmental institutions or actors within a constitutional system and has important implications for traditional debates about the judicial power.

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I. INTRODUCTION

Questions relating to the proper use and scope of the judicial power in the American constitutional design remain perennial subjects of inquiry among legal scholars. Typically, the more contentious aspects of these inquiries revolve around questions of federal constitutional interpretation and are driven by debates over rival conceptions of the proper judicial role and rival views of the legitimate range of interpretive methodologies that courts may deploy to ascribe meaning to the Constitution. These debates are often motivated by the desire to shape the decisional

practices of the U.S. Supreme Court and, accordingly, they often intersect with substantive normative debates about controversial moral-political issues with constitutional dimensions such as abortion[1] or the death penalty.[2] Notably, recent decisions of the Supreme Court, such as *Bush v. Gore*,[3] have raised these perennial questions about the judicial power in a starker and more pointed form.[4]

This article will concentrate on a neglected, but highly significant, sub-question of this field of inquiry into the proper use and scope of the judicial power: whether the U.S. Supreme Court can itself be said to *violate* the Constitution via a sufficiently improper use of the power of judicial review of constitutional questions to uphold or invalidate a law or other act of government. This article, as part of a larger project,[5] will approach the concept of constitutional violations by the Supreme Court through a systematic inquiry into the fundamental questions of analytic jurisprudence necessary to develop its theoretical foundations. These jurisprudential questions include inquiries such as whether a court of last resort can be thought to violate the constitution or organic law which creates the court and also grants it ultimate or "supreme" interpretive authority; whether a constitution or organic law can properly be thought

1. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (invalidating a ban on partial birth or dilation and extraction abortion as imposing an "undue burden" previability and for failing to provide a "health exception" post-viability); Planned Parenthood of So. Pa. v. Casey, 505 U.S. 833, 878–79 (1992) (plurality opinion) (reaffirming the "essential holding" of *Roe* while shifting from *Roe*'s application of strict scrutiny and a trimester scheme to the "undue burden" test previability and "health exception" requirement post-viability); Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the constitutional "right of privacy" is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

2. *See*, *e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (invalidating Virginia's death penalty as applied to mentally retarded defendants under the Eighth Amendment as a disproportionate punishment); Coker v. Georgia, 433 U.S. 584, 599 (1977) (plurality opinion) (invalidating Georgia's death penalty for rape under the Eighth Amendment as a disproportionate punishment); Furman v. Georgia, 408 U.S. 238, 256–57, 310, 314 (1972) (plurality opinion) (invalidating Georgia's death penalty under the Eighth Amendment in large part because it created a substantial risk of arbitrary and capricious enforcement).

3. 531 U.S. 98, 110 (2000) (invalidating, under the Equal Protection Clause, the Florida Supreme Court's order of a partial recount of votes in Florida, a decision which foreclosed the possibility that presidential candidate Al Gore might be declared the winner of Florida's electoral votes upon a recount and thus the winner of the electoral college and the presidency of the United States).

4. *See*, *e.g.*, BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 1–2 (E.J. Dionne Jr. & William Kristol eds., 2001); BUSH V. GORE: THE QUESTION OF LEGITIMACY vii–xiii (Bruce Ackerman ed., 2002).

5. The other works in this on-going project include the following: Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387 (2000–2001) [hereinafter Nowlin, *Constitutional Illegitimacy*]; Jack Wade Nowlin, *The Constitutional Limits of Judicial Review: A Structural Interpretive Approach*, 52 OKLA. L. REV. 521 (1999) [hereinafter Nowlin, *Constitutional Limits*]; Jack Wade Nowlin, *Judicial Moral Expertise and Real-World Constraints on Judicial Moral Reasoning*, *in* THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION (Christopher Wolfe ed., 2004) [hereinafter Nowlin, *Judicial Moral Reasoning*]; Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171 (2002) [hereinafter Nowlin, *Judicial Restraint*]; Jack Wade Nowlin, *Natural Law, the Constitution, and Judicial Moral Expertise—An Epistemic Analysis*, VERA LEX: J. INT'L NAT. L. SOC'Y, Winter 2001 [hereinafter Nowlin, *Natural Law*].

to place limits of a constitutional nature on the exercise of interpretive authority by potential interpreters of the constitution, including courts of last resort; and, finally, in what manner, if any, concepts such as "unconstitutionality" or "injustice in law" can be thought to apply to the judicial decisions of courts of last resort acting under some form of supreme constitutional limits. This article ultimately contends that the insights generated by this analytic jurisprudential inquiry strongly support the view that the Supreme Court can violate the Constitution through the use of judicial review of constitutional questions.

While the concept of constitutional violations by the Supreme Court is by no means wholly unfamiliar to scholars of the judicial power, the concept is very seldom expressly recognized and articulated outside of the core of constitutional limits on the Supreme Court's jurisdiction, including federal subject-matter jurisdiction, original jurisdiction, and the constitutional dimension of the justiciability doctrines. This article is intended to contribute to the development of the theoretical framework necessary to support the contention that the range of potential constitutional violations by the Supreme Court is significantly broader than is commonly recognized and that the familiar interpretive debates between the proponents of various forms of "judicial restraint"[6] and "judicial activism"[7] may be better reconceptualized, at least in part, as rival assertions of the contours of the constitutional limits on the judicial power that constrain judicial interpretive authority and methodology.[8] In particular, this article provides a fuller analytical foundation for the view that there may be important constitutional constraints on the Supreme Court governing (1) the degree of deference the judiciary owes to politi-

6. Although this is a contested term with a number of potential definitions, the core conception of the judicial role that this article has in mind in using the term "judicial restraint" is one where judges' decisions are tightly linked to traditional legal materials, minimize judicial discretion, are generally deferential to political actors, and invalidate legislation only in relatively clear cases of unconstitutionality. *See* Nowlin, *Judicial Restraint*, *supra* note 5, at 189–91; *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 137 (1977) [hereinafter DWORKIN, RIGHTS] (observing that "[t]he program of judicial restraint . . . argues that courts should allow the decisions of other branches of government to stand, even when they offend the judges' own sense of the principles required by the broad constitutional doctrines, except when these decisions are so offensive to political morality that they would violate the provisions on any plausible interpretation, or, perhaps, when a contrary decision is required by clear precedent.").

7. This term is also contested and is sometimes considered pejorative, but as used in this article the term "judicial activism" is purely descriptive, is not intended to connote any form of normative disapproval, and generally refers to a conception of the judicial role where judges only loosely link their decisions to traditional legal materials, maximize their discretion, are nondeferential to political actors, and invalidate legislation in cases where constitutional meaning is sharply contested and highly controversial. *See* Nowlin, *Judicial Restraint*, *supra* note 5, at 189–91; *see also* DWORKIN, RIGHTS, *supra* note 6, at 137 (providing a similar definition and observing that "[t]he program of judicial activism holds that courts should accept the directions of the so-called vague constitutional provisions . . . and should work out principles of legality, equality, and the rest, revise these principles from time to time in light of what seems to the Court fresh moral insight, and judge the acts of Congress, the states, and the President accordingly.").

8. *See* Nowlin, *Constitutional Illegitimacy*, *supra* note 5, at 394–99; Nowlin, *Judicial Restraint*, *supra* note 5, at 182–99.

cal actors when using its power of constitutional review (i.e., whether the Court should invalidate legislation only in clear(er) and (more) important cases) and (2) the use of interpretive methodologies the Court may deploy to ascribe meaning to the Constitution (i.e., whether, or the extent to which, the Court may draw on natural law or moral philosophy to resolve constitutional questions).[9]

Indeed, as shall be shown, there is good reason to believe that the Supreme Court can violate the Constitution in four conceptually distinct, though often overlapping, ways: (1) through the use of judicial review exceeding the scope of the Court's constitutional authority as established by Article III and the overarching structure of the constitutional design; (2) through the use of judicial review in a manner inconsistent with the Rule of Law as a constitutional norm reflected in the structure and purpose of the Constitution generally and as part of the content of the Fifth Amendment Due Process Clause specifically; (3) through the use of judicial review pretextually or in bad faith to invalidate or uphold legislation, a special case of use of the judicial power both exceeding the Court's authority under the Constitution and in conflict with the Constitution's requirements of the Rule of Law; and (4) through the use of judicial review responsible for a violation of other constitutional norms not covered in the three categories above, such as freedom of speech and religion. This last category of violation can occur through direct judicial action, such as the issuance of an injunction in violation of free speech, or indirectly, via a judicial mandate of a legislative act prohibited by the Constitution or judicial prohibition of a legislative act mandated by the Constitution. Obviously, the first two categories of judicial constitutional violations have very clear implications for debates between proponents of judicial activism and restraint.

The broad questions this article addresses—concerning the proper use and scope of the judicial power—are matters of long-standing interest in American constitutional law from the founding generation to the present day.[10] Therefore, the issues raised in this article are both timely and, relatively speaking, timeless as matters of recurrent constitutional inquiry and controversy.[11] The primary methodological thrust of this ar-

9. For a discussion of constitutional limits on the U.S. Supreme Court constraining judicial interpretive authority and methodology, see Nowlin, *Judicial Restraint*, *supra* note 5, at 182–99.

10. As any history of the Supreme Court clearly demonstrates. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (2d ed. 1994); BERNARD SCHWARZ, A HISTORY OF THE SUPREME COURT (1993).

11. Indeed, even as basic a constitutional practice as the supremacy of the Supreme Court in constitutional interpretation continues to be debated. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (opposing judicial supremacy on populist grounds); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 459–67 (2000) [hereinafter Alexander & Schauer, *Defending Supremacy*] (defending judicial supremacy via the "settlement" thesis); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation,* 110 HARV. L. REV. 1359, 1369–71 (1997) [hereinafter Alexander & Schauer, *Extrajudicial Interpretation*) (defending judicial supremacy via the "settlement" thesis); Michael

ticle is broadly deconstructive in nature, advocating the application to the actions of the Supreme Court—as an institution limited by the Constitution—the basic methods of constitutional analysis used by the judicial branch itself to scrutinize other actors (such as legislatures) to determine the conformity of their actions to the requirements of the Constitution.[12] As suggested, the primary purpose of this article is analytical in nature and thus largely untethered to any particular normative viewpoint, seeking primarily to achieve greater conceptual clarity in the field of constitutional theory in an underexplored but very important area of the judicial power—the concept of constitutional violations by the Supreme Court. That goal, however, may itself tend in part to advance, however modestly, a number of other salutary or reform goals, including: the improvement of judicial decision making by better sensitizing judges to the constitutional constraints on the judiciary; the promotion of responsible criticism of the judicial branch by judges, elected officials, lawyers, scholars, and citizens more broadly; the encouragement of more active and effective use of checks on the judiciary by elected officials to police constitutional boundaries on courts; and, finally, the provision of better protection for the fundamental rights and structures of the Constitution. Thus, in an important sense, a secondary and underlying concern motivating this article's analysis is the desire to promote reform in the area of the judicial power in order to help the Court better serve the basic norms of the Constitution.[13]

Part II of this article will attempt, albeit briefly, to place its analysis in the context of contemporary debates about the judicial power and sketch a few of its potential implications. Part III will address the foundational questions of analytical jurisprudence posed by the concept of constitutional constraints on courts of last resort, emphasizing in particular (1) the important distinction between judicial finality and judicial infallibility in decision making and the implications of this distinction for the concept of constitutional violations by supreme judicial institutions and (2) the significant ways in which constitutions may constrain the constitutional interpretive authority and methodology of courts and other

Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343–45 (1994) (opposing judicial supremacy).

12. This approach is a form of "inversion of hierarchies," a basic deconstructionist technique in which a hierarchical opposition (such as a court's privileged stance, vis-à-vis a legislature, as reviewer of the constitutionality of legislation) is identified and analytically reversed (i.e., imagining legislative or other political actors reviewing the courts' actions for their conformity to the Constitution) in order to derive new insights into the nature of the hierarchical relationship and the qualities and attributes of the things hierarchically ordered. *See*, *e.g.*, J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 746–51 (1987).

13. While, as noted, this article does not endorse any specific reform perspective (i.e., judicial restraint, judicial activism, or any other conception of the proper judicial role), the author's judicial reform perspective, discussed in previous works, is one grounded in moderate judicial restraint, interpretive pluralism, judicial supremacy for legitimate and constitutional exercises of the judicial power, and an overarching commitment to constitutional populism. *See* Nowlin, *Judicial Restraint*, *supra* note 5.

actors within a constitutional system. Part IV will discuss the basic concept of constitutional violations by the Supreme Court in greater detail, sketching the outlines of the four basic forms or types of judicial constitutional violations derived from the analytic concept of injustice in law. Part V will outline some remaining analytical, interpretive, and prudential questions in this area, which are beyond the scope of this article and in need of further theoretical development.

II. A "DANGEROUS" BRANCH?

The Supreme Court is widely viewed as the principal defender of the norms of the Constitution—as the crucial check on governmental institutions and political actors who pose a threat to constitutional structures and rights.[14] In fact, this view of the Court's role and power is deeply ingrained in American legal and political practice and is widely (though not universally) accepted among constitutional theorists.[15] Notably, the analysis developed in this article in no way disputes the central tenets of this view of the Court's authority, recognizing the clear constitutional legitimacy of the Supreme Court's role as a principal governmental-institutional guardian of the Constitution and the great value of supreme judicial review of constitutional questions as a primary means of protecting constitutional norms.[16] This article's analysis is thus wholly consistent with acceptance of the broad outlines of contemporary constitutional practice, including the doctrine of judicial review,[17] the core of

14. This view is, of course, closely associated with the doctrine of judicial supremacy or finality in constitutional interpretation, which has had significant acceptance in its broad outlines as a constitutional practice in the United States for at least a century, though critics of the doctrine exist, as do periodic reassertions of extrajudicial interpretive authority inconsistent with judicial supremacy. *See*, *e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 259–72 (1962) (discussing rival assertions of judicial supremacy, departmentalism, and interposition in the nineteenth and twentieth centuries); ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 4–5, 253 (1992) (placing the general acceptance of a recognizable form of judicial supremacy in constitutional interpretation in the late nineteenth century); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 90–99 (1996) (discussing analytical and historical dimensions of the judicial power, including judicial review and supremacy).

15. For a significant exception to this pattern, see TUSHNET, *supra* note 11.

16. The Court's principal *institutional* role as constitutional guardian, however, should not be allowed to overshadow the ultimate extra- or supra-institutional responsibility of the sovereign people of the United States to preserve the American constitutional order through the election of democratic representatives who will support and defend the Constitution, select the justices of the Supreme Court, and determine the proposal and ratification of constitutional amendments. *See*, *e.g.*, THE FEDERALIST NO. 84, at 632 (Alexander Hamilton) (John C. Hamilton ed., 1864) (observing that "whatever fine declarations may be inserted in any constitution respecting it [liberty of the press or other civil liberties]," their security "must altogether depend on public opinion, and on the general spirit of the people and of the government."); Nowlin, *Judicial Restraint*, *supra* note 5, at 264–65 ("The sovereign people must retain final interpretive responsibility as part of their civic duty to elect men and women who will defend the integrity of the Constitution . . . . "); *cf.* VA. CONST. art. I, § 15 ("That no free Government, or the blessing of liberty, can be reserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles.").

17. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (invalidating a provision of the Judiciary Act of 1789 for attempting to confer original jurisdiction on the Supreme Court to issue writs of

the doctrine of judicial supremacy in constitutional interpretation,[18] and the legitimacy of the major modalities of constitutional argument.[19]

Consistent, then, with acceptance of the broad outlines of the contemporary constitutional practice, this article seeks to shed light on an underexplored, undertheorized, and underutilized concept in American constitutional law with significant implications for debates about the federal judicial power: the concept of constitutional violations by the Su-

mandamus in violation of Article III); *see also* ROBERT LAWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989) (commenting on *Marbury* and the establishment of judicial review and supremacy); WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000); Sanford Levinson, *Why I Do Not Teach* Marbury (*Except to Eastern Europeans*) *and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003).

18. On judicial assertions of judicial supremacy, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400–01 (1819) (contending that in resolving issues related to the Bank of the United States: "The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be decided, by this tribunal alone can the decision be made. On the [S]upreme [C]ourt of the United States has the [C]onstitution of our country devolved this important duty."). *See also* United States v. Nixon, 418 U.S. 683, 704–05 (1974) (asserting that "[n]otwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the federal courts . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power . . . . Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' [even] with respect to the claim of [executive] privilege presented in this case." (citations omitted)); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting that the "federal judiciary is supreme in its exposition of the law of the Constitution"). Significantly, even if one accepts the core of the doctrine of judicial supremacy, the question remains whether the other branches of the federal government should accord supremacy to judicial decisions that are themselves in violation of the Constitution or illegitimate as assertions of the judicial power rather than mere mistakes by the Court about constitutional meaning. For a more thorough discussion, see Part IV of this Article.

19. *See*, *e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6–8, 93 (1982) [hereinafter BOBBIT, CONSTITUTIONAL FATE] (developing a typology of constitutional arguments, including arguments from text, history, doctrine, prudence, structure, and ethics); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) [hereinafter BOBBIT, CONSTITUTIONAL INTERPRETATION] (discussing the modalities of constitutional interpretation involving text, history, doctrine, prudence, structure, and ethos); *see also* J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1784–86 (1994) (discussing Bobbitt's *Constitutional Interpretation* and suggesting the addition of a purely moral or political normative modality of interpretation unrelated to conventional ethical beliefs). Significantly, one can combine Bobbitt's modalities approach to constitutional argument with the interpretive theories of Ronald Dworkin, which divide the dual aspects of interpretive analysis into arguments of legal fit and arguments of moral-political justification. *See* DWORKIN, RIGHTS, *supra* note 6, at 81–130; RONALD DWORKIN, LAW'S EMPIRE 225–75 (1986) [hereinafter DWORKIN, LAW'S EMPIRE]. This Dworkinian use of Bobbitt's analysis would contend that legitimate legal argument involves a two-step process (1) requiring some form of minimum threshold grounding in one or more of the legal "fit" modalities of text, history, doctrine, and structure, and then (2) allowing for a degree of decisional choice among legal conclusions meeting a threshold legal fit requirement based on additional normative considerations of prudence, conventional ethics, or moral philosophy/natural law. Notably, both Bobbitt's and Dworkin's interpretive theories, as outlined here in combination, can be invoked in forms supportive of either moderate judicial restraint or activism, depending upon such factors as the level of generality at which the modalities are conceived or the firmness of legal fit required to meet the threshold allowing for discretionary decisional choice.

preme Court. Notably, over two centuries ago, Alexander Hamilton, in his canonical defense of judicial review, pronounced the Supreme Court "the least dangerous" branch to the rights of the American people.[20] Even assuming that Hamilton's assessment of comparative danger as between the Court and the political branches remains broadly true today, despite the tremendous growth in the judicial power over the last 200 years,[21] the Court still remains a "dangerous" branch.[22] The conventional view of the judicial power evinced in contemporary constitutional theory and practice fails to account for an important aspect of the interrelationship of the Supreme Court, the Constitution, and judicial review recognized at the Founding by even the strongest defenders of judicial review: the danger the Supreme Court itself, as a governmental actor, poses to the structures and rights of the Constitution through its exercise of "the judicial power of the United States" in constitutional cases.[23]

The absence of serious constitutional analysis of the concept of constitutional violations by the Supreme Court has some serious consequences for the theory and practice of American constitutional law. Indeed, outside the narrow bounds of federal jurisdiction, the very existence of constitutional violations by the Supreme Court remains obscure and in doubt. Thus, the Court's decisions generally remain insulated from serious interpretive analysis as to their constitutionality as exercises of the judicial power—even by dissenting justices, attorneys general, or learned jurists—as opposed to analysis limited to the relative rightness or wrongness of decisions as determinations of constitutional meaning. Therefore, when judicial decisions provoke criticism that goes beyond the assertion that the decision of the Supreme Court in question is merely wrong, as certain controversial decisions inevitably do, that criticism often devolves into political rhetoric, frequently of an undisciplined and overheated nature, instead of being channeled into a careful analysis of constitutional limits constraining the judicial branch—an analysis disciplined by the traditional rigors of legal interpretation, analysis, and argument. As a result, the Court is simultaneously deprived of the value of serious constitutional analysis of the limits on its own power and subjected to intemperate or ill-considered political criticism. At the end of the day, constitutional debate is thus significantly impoverished,

20. THE FEDERALIST NO. 78, at 575 (Alexander Hamilton) (John C. Hamilton ed., 1864).

21. On the growth of judicial power since the Founding, see GRIFFIN, *supra* note 14, at 97–98 (observing that "[t]he power and activity of the Supreme Court as an institution assumed modern proportions only after the Civil War); DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 62–63 (3d ed. 1993) (asserting that "[s]ince the late nineteenth century, the Court has assumed a major role in monitoring the governmental process" and thus the Court is arguably no longer '"the least dangerous' branch" of American government as Hamilton suggested at the Founding).

22. *See* THE FEDERALIST NO. 78, at 575 (Alexander Hamilton) (John C. Hamilton ed., 1864).

23. *See* U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

the judiciary is weakened as an institution, and constitutional rights and structures predictably suffer. As will be discussed below, there is substantial reason to think that analytic confusion surrounding the very concept of constitutional violations by courts of last resort is one of the principal obstacles to subjecting the decisions of the judiciary to more robust analysis concerning their compatibility with constitutional limits. Thus, the purpose of this article is to explore the foundational concept of constitutional violations by the Supreme Court in order to promote greater conceptual clarity and understanding with the ultimate goals of enriching constitutional debate and better protecting constitutional norms.

III. THE CONCEPT OF CONSTITUTIONAL VIOLATIONS BY THE SUPREME COURT

A. The Supreme Court and Constitutional Limits

This Part discusses analytical issues surrounding the basic concept of constitutional violations by the Supreme Court. It approaches analysis of this concept by imbrication, proceeding from a number of conceptually distinct but overlapping lines of argument, including: the basic purpose of a constitution to both create and limit governmental institutions such as courts of last resort; the existence of a number of well-recognized constitutional limits on the Supreme Court in the area of federal jurisdiction; the analytical basis for thinking that other, less well-recognized constitutional limits on the Court likely exist as well, particularly in areas of judicial interpretive authority and methodology; the substantive fallibility of supreme courts in constitutional interpretation and the important distinction between substantive fallibility and the procedural finality of supreme courts; and, finally, the significant ways in which constitutions can constrain interpretive authority and methodology of actors within the constitutional order, including courts of last resort.

B. A Basic Purpose of Constitutions: Placing Limits on Governmental Institutions

An analysis of the purposes of constitutional government has clear implications for the concept of constitutional violations by the Supreme Court. Among the most basic purposes of a constitution are: (1) the formation of a political community;[24] (2) the establishment of a government

24. Notably, the Declaration of Independence serves this purpose for the American constitutional order. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) ("We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War,

for the political community in order to resolve authoritatively basic co-ordination problems, such as the protection of human rights from private violence;[25] and (3) the creation of various limits on the power of the government in order to protect individual rights from potential governmental abuse and to promote the common good of the political community more broadly.[26] This last goal may be achieved not only through substantive prohibitions on what the government of the political community may do as a whole (such as are commonly found in bills of rights), but also through the very structure of government created by constitutions, typically involving the creation of multiple and competing governmental institutions and the careful division of power between and among those institutions.[27] Thus, institutions of government in modern constitutional systems routinely operate under an array of broadly structural constitutional limits constraining their power in terms of personnel requirements,[28] proper sphere of authority,[29] operating procedures,[30] and interac-

conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."). *See*, *e.g.*, TUSHNET, *supra* note 11, at 31 (contending that "the Declaration's project is what constitutes us as a people"); J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 168 (1999) (observing that "[t]he Declaration is our constitution. It is our constitution because it constitutes us, constitutes us as a people 'conceived in liberty, and dedicated to a [sic] proposition.'") (quoting Abraham Lincoln, Gettysburg Address, 1862). On the nature and existence of political communities, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 147–53 (1980).

25. *See* Reid v. Covert, 354 U.S. 1, 5–6 (1957) (observing that "[t]he United States [government] is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." (footnotes omitted)); Alexander Hamilton, *Second Letter from Phocion*, *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 83 (Morton J. Frisch ed., 1985) (stating that a "legislature," as an institution of government, is a "creature of the constitution" while a constitution is a "creature of the people"); THOMAS PAINE, THE RIGHTS OF MAN 71 (Penguin Classics ed., 1984) (1971) (stating that "a government is only the creature of a constitution" and that "[a] constitution is a thing antecedent to a government").

On purposes of government in the liberal constitutionalist tradition, see U.S. CONST. pmbl; THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, 70–73 (Thomas P. Peardon ed., 1952) (1690) (contending that the "end[]of political society and government" is the "preservation" of "lives, liberties, and estates," which may be designated by the "general name *property*."). On the concept of the common good, see FINNIS, *supra* note 24, at 154–56. On the concept of political authority and its derivation from governmental ability to settle co-ordination problems and promote the common good, see FINNIS, *supra* note 24, at 245–52.

26. *See*, *e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); THE FEDERALIST (Alexander Hamilton, James Madison, John Jay); GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC (1989); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 288–338 (1996).

27. *See* provisions of the U.S. Constitution cited *infra* notes 28–31.

28. *See*, *e.g.*, U.S. CONST. art. I, § 2, cls. 1–2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. No Person shall be a Representative who shall not have attained to the Age of twenty

tion with other institutions.[31] Indeed, an obvious and uncontested reason for reducing a constitution to writing and for crafting constitutional enforcement mechanisms (such as, but, of course, not limited to, judicial review itself) is precisely to establish, clarify, and maintain limits of both constitutional right and constitutional structure on the exercise of power by the institutions of the limited government.[32]

The implications of the basic purposes of a constitution for the question of constitutional limits on the Supreme Court should be obvious. It is simply indisputable that the Constitution establishes a constitutionally limited government of the sort described above, involving complex interactions of constitutional limits of both right and structure. An observer who knew little or nothing of the Constitution other than its basic purposes *as a constitution* creating a limited government would likely conclude that *all* the institutions of government established by the Constitution are necessarily subject to a wide variety of important constitutional limits of right and structure, including the Supreme Court. A contrary assertion would have to claim that the Court, as an institution of government, is unlimited in its power by the Constitution, an obvious and insupportable constitutional anomaly. Nor is it clear on what basis this latter claim would be made, given that the endorsement of the Supreme Court as some form of constitutionally unlimited Hobbesian sovereign[33] seems to be an indefensible position, given, if nothing else, the liberal and Lockean foundations of the American constitutional order.[34] In fact, it is highly unlikely that any constitutional system resembling the U.S. constitutional order would establish a major governmental institution—such as a supreme court—without placing it under a number of important constitutional limits of right and structure. Thus, one must begin analysis in this area with a strong presumption that the law of the Constitution places limits on the Supreme Court and that action by the Court exceeding those limits violates the Constitution. As shall be shown, this view is established conclusively by an examination of consti-

five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

29. *See*, *e.g.*, *id.* art. I, § 8, cls. 1–18 (enumerating the powers delegated to the U.S. Congress); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

30. *See*, *e.g.*, *id.* art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

31. *See*, *e.g.*, *id.* art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . .").

32. *See*, *e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The government of the United States is of the latter description [i.e., a limited government]. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution [sic] is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?").

33. *See* THOMAS HOBBES, LEVIATHAN (1651).

34. *See supra* note 25 and accompanying text. *But see* Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 11 (endorsing the "settlement" thesis, which has decided Hobbesian undertones).

tutional text, structure, history, and precedent in the area of judicial power commonly known as "federal jurisdiction."

C. Widely Recognized Constitutional Limits on Federal Courts: Federal Jurisdiction

Indeed, as noted above, jurists routinely recognize—expressly and unambiguously—the concept of constitutional limits on the power of the Supreme Court and lower federal courts in the important area of federal jurisdiction.[35] These constitutional limits chiefly involve constraints deriving from both Article III and the broader structures of the Constitution such as the separation of powers and federalism.[36] For instance, Article III, Section 2, Clause 1 expressly delineates the subject-matter jurisdiction of the federal courts[37] and is widely recognized as placing constitutional limits on federal jurisdiction, which if the Court exceeded, would constitute a violation of the Constitution.[38] Additionally, Article III, Section 2, Clause 2 expressly delineates the constitutional limits of the original jurisdiction of the Supreme Court, conferring appellate jurisdiction in "all other Cases."[39] As the Court recognized in *Marbury v. Madison*,[40] the Supreme Court cannot exercise (and therefore Congress cannot authorize via statute) original jurisdiction in cases where Article III confers only appellate jurisdiction.[41] Further, the language in Article III of "cases" and "controversies" has long been interpreted by the Court itself as prohibiting, as a matter of constitutional law, the issuance of advisory opinions.[42] The Supreme Court has also interpreted the language of case and controversy—reading these terms against the background of the constitutional structures of the separation of powers and federal-

35. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 247–51 (2d ed. 1994).

36. *Id.*

37. U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

38. *See*, *e.g.*, CHEMERINSKY, *supra* note 35.

39. U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme [sic] Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme [sic] Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

40. 5 U.S. (1 Cranch) 137 (1803).

41. *See id.* (invalidating a provision of the Judiciary Act of 1789 purporting to confer original jurisdiction on the U.S. Supreme Court to issue writs of mandamus).

42. The Supreme Court as early as the 1790s refused to issue an advisory opinion in response to questions from the Washington administration concerning issues arising from American neutrality in the war between Great Britain and France. *See, e.g.*, PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64–66 (2d ed. 1973).

ism—as mandating a series of constitutional justiciability requirements:[43] standing,[44] mootness,[45] and ripeness.[46] These are also commonly viewed as constitutional limits on the federal judicial power,[47] though additional prudential limits in the area of justiciability exist as well.[48] The political question justiciability doctrine, also arguably mandated by the Constitution, is recognized by the Court as well.[49]

The Eleventh Amendment,[50] proposed and ratified in response to the Supreme Court's decision in *Chisholm v. Georgia*[51] and driven in significant part by concerns about the federal structure of the Constitution,[52] also articulates an additional constitutional limit on the federal judicial power[53] by prohibiting the extension of the federal judicial power to lawsuits against states by citizens of another state or foreign state.[54] Further, the Supreme Court's recent broader sovereign immunity jurisprudence—derived in part from the Eleventh Amendment and more broadly from the Court's view of the original understanding of the federal structure of the Constitution—prohibits Congress from authorizing lawsuits by private parties against states as defendants without state consent[55] unless such suits are within Congress's expressly delegated powers to enforce constitutional rights, such as the power found in section 5 of the Fourteenth Amendment to enforce the constitutional rights found in section 1 of the Fourteenth Amendment.[56] This last limit is not only a

43. *See*, *e.g.*, CHEMERINSKY, *supra* note 35, at 51–53.

44. *See*, *e.g.*, Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 662–69 (1993).

45. *See*, *e.g.*, SEC v. Med. Comm. for Human Rights, 404 U.S. 403, 406 (1972).

46. *See*, *e.g.*, Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 242–46 (1952).

47. *See*, *e.g.*, CHEMERINSKY, *supra* note 35, at 42–47.

48. For instance, the Court has also asserted prudential, nonconstitutional, standing requirements. *See* Warth v. Seldin, 422 U.S. 490, 499–502 (1975).

49. *See*, *e.g.*, Nixon v. United States, 506 U.S. 224, 228 (1993).

50. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

51. 2 U.S. (2 Dall.) 419 (1793); *see*, *e.g.*, SCHWARZ, *supra* note 10, at 21 (stating that the *Chisholm* decision shocked the country so profoundly that it led to the proposal and ultimate adoption of the Eleventh Amendment).

52. *See*, *e.g.*, SCHWARZ, *supra* note 10, at 21.

53. Or, arguably, the Eleventh Amendment clarifies a preexisting constitutional limit on the federal judicial power. On this question see *Alden v. Maine*, 527 U.S. 706, 721–24 (1999), where the Supreme Court stated that its *Chisholm* decision rather than the Eleventh Amendment deviated from the original understanding of the federal structure of the Constitution, which was intended to preserve the States' traditional immunity from suit, and therefore that the Eleventh Amendment was restorative of the meaning of the pre-*Chisholm* Constitution.

54. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

55. *See*, *e.g.*, *Alden*, 527 U.S. at 730–54 (holding that Congress may not abrogate state sovereign immunity in state court under the interstate commerce clause); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59–72 (1996) (holding that Congress may not abrogate state sovereign immunity in federal court under the interstate or Indian commerce clauses).

56. *See*, *e.g.*, Kimel v. Fla. Board of Regents, 528 U.S. 62, 80 (2000) (reaffirming that Congress may abrogate state sovereign immunity via its section 5, Fourteenth Amendment enforcement power);

constitutional limitation on what lawsuits Congress may authorize by statute, but—as with the Eleventh Amendment—is also in part a constitutional limitation restricting the kinds of cases which federal courts (including the Supreme Court[57]) may hear.[58]

The Supreme Court has also recognized constitutional restrictions on the creation of federal common law. The Court, as early as 1812 in *United States v. Hudson & Goodwin*,[59] held that the Constitution did not grant federal courts general authority to punish common law crimes against the United States, a decision deriving, in large part, from the basic constitutional structure of the separation of powers.[60] Additionally, the Court in *Erie Railroad Co. v. Tompkins*[61] also held that creation of a general federal common law in diversity cases, rather than the application of the appropriate state law, was an "unconstitutional assumption of powers by courts of the United States."[62] Again, this decision was also grounded in the constitutional structures of federalism and the separation of powers.[63] Finally, although the Supreme Court apparently views the various judicially created abstention doctrines—limiting in some circumstances federal resolution of cases even where all federal jurisdictional and justiciability requirements are satisfied—as prudential in nature,[64] some scholars view these doctrines as constitutionally required by

Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress may abrogate state sovereign immunity via its section 5, Fourteenth Amendment enforcement power).

57. Notably, Article III's grants of original jurisdiction to the Supreme Court extend to cases in which a state is a party. *See* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction.").

58. *Alden v. Maine* might be thought to cast doubt on this assertion in light of its holding that Congress may not abrogate sovereign immunity under the Commerce Clause authorizing suit in *state* courts, as well as federal courts. *See Alden*, 527 U.S. at 712. The better view here is that the Court understands the federalist doctrine of state sovereign immunity as limiting the power of *both* federal courts in terms of their jurisdiction and Congress in terms of its power to authorize lawsuits in either federal or state court.

59. 11 U.S. (7 Cranch) 32, 34 (1812) (rejecting the view that federal courts have an implied power to create federal criminal common law).

60. The Court in *Hudson & Goodwin* endorsed a separation of powers principle, observing that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence" before the courts may act. *Id.* The Court also stated that it need not inquire into the federalism question of "whether the general Government" possessed "the power of conferring on its Courts a jurisdiction in cases similar to the present" because Congress had not done so. *Id.* at 33.

61. 304 U.S. 64 (1938).

62. *Id.* at 79 (rejecting the view that federal courts have an implied power to create federal civil common law).

63. The Court in *Erie* held that "[t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." *Id.* at 78.

64. *See*, *e.g.*, CHEMERINSKY, *supra* note 35, at 685–87.

the federal structure of the Constitution[65] or as constitutionally prohibited by the separation of powers.[66]

In sum, the Supreme Court has expressly recognized a wide-range of constitutional limits on the Court itself and on the lower federal courts, including limits on subject-matter jurisdiction (including sovereign-immunity-based limits), original jurisdiction, justiciability, and the creation of federal common law. These constitutional limits are grounded in interpretations of the Constitution that draw on a combination of constitutional texts (e.g., Article III, the Eleventh Amendment), constitutional structures apparent on the face of the text (e.g., the separation of powers and federalism), and the history surrounding both text and structures (e.g., ratification debates and evolving constitutional practices). In no sense, then, is the concept of constitutional limits on the Supreme Court—derived from an analysis of constitutional text, structure, and history—a new or unfamiliar concept in American constitutional law. To the contrary, its existence and legitimacy as an analytical concept is plainly accepted and uncontested in American constitutional law by the Court, constitutional lawyers, and scholars generally.[67] Even so, as shall be discussed below, the concept of constitutional limits on the Supreme Court has generally *not* been extended to govern the judicial power more broadly, including areas of judicial interpretive methodology and authority.

D. Additional Constitutional Limits on the Judicial Power: Judicial Interpretive Authority and Methodology

In addition to the widely recognized constitutional limits on the federal judicial power associated with federal jurisdiction, the concept of constitutional violations by the Supreme Court may be readily extended to cover (and thus constitutionally constrain) additional forms of judicial behavior. In fact, the concept of constitutional limits on the Supreme Court deriving from the structure of government can be readily extended from the field of federal jurisdiction to the broader sphere of judicial interpretive authority (involving questions of judicial-political deference such as judicial supremacy and the clear mistake doctrine) and methodology (involving familiar questions of interpretative theory).

For instance, as is widely recognized, the driving force behind the analysis of structural constitutional limits on the Supreme Court in the area of federal jurisdiction is a concern for basic constitutional structures

65. Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811, 813 (1991) (contending that the abstention doctrines, in some form, are "compelled by the Constitution").

66. Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984) (stating that the abstention doctrines are "a judicial usurpation of legislative authority, in violation of the principle of separation of powers").

67. *See* Nowlin, *Judicial Restraint*, *supra* note 5, at 181.

such as the separation of powers and federalism.[68] These constitutional structures are widely viewed as providing the analytical framework for understanding the nature and scope of constitutional limits on the judicial power in the area of federal jurisdiction, including justiciability.[69] Significantly, these same basic constitutional structures—the separation of powers and federalism—also have obvious implications for judicial interpretive authority and methodology.[70] Indeed, contemporary constitutional debate about the proper scope of the judicial power as it relates to judicial interpretive authority and methodology often centers precisely on the implications of various conceptions of the judicial role for these and closely related constitutional structures.[71]

For instance, debates over whether or not the Supreme Court should adhere to some form of a "clear mistake" doctrine or whether or not the Court should emphasize text- and history-centered interpretive methods typically revolve around broader structural issues of separation of powers, federalism, and concomitant structures such as representative democracy.[72] Although it is true that these constitutional structures are often invoked in what appear to be a prudential or legitimacy-based form,[73] it is also clear that these questions relating to the proper judicial role have an obvious, direct, and major impact on the actual meaning and

68. *See* CHEMERINSKY, *supra* note 35, at 42–46.

69. *Id.*

70. *See* Nowlin, *Constitutional Illegitimacy*, *supra* note 5, at 394–99.

71. *Id.*

72. Consider Justice Harlan's dissent in *Oregon v. Mitchell*, where he maintained that insufficiently restrained judicial decisions are inconsistent with the structure of the Constitution. Oregon v. Mitchell, 400 U.S. 112, 203 (1970) (Harlan, J., dissenting) (stating that "[w]hen the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has *violated the constitutional structure* which it is its highest duty to protect." (emphasis added)). One can compare Harlan's judicial restraint view of the constitutional constraints on the exercise of the judicial power with Justice Brennan's structural defense of judicial activism in *McClesky v. Kemp*. *See* McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (stating that "[t]hose whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus *fulfills*, rather than disrupts, *the scheme of the separation of powers*, by closely scrutinizing the imposition of the death penalty . . . ." (emphasis added)).

73. One may consider here Justice White's dissent in *Roe v. Wade*, in which he expressed his substantial concerns about the impact of expansive judicial power on constitutional structures of federalism and representative democracy principally in the sub-constitutional language of *political prudence* rather than in the language of constitutional limits on the Court's authority. Roe v. Wade, 410 U.S. 113, 221–22 (1973) (White, J., dissenting) ("I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court *perhaps* has *authority* to do what it does today; but in my view its judgment is an *improvident* and *extravagant* exercise of the power of judicial review that the Constitution extends to this Court." (emphasis added)).

operation of constitutional structures.[74] Thus, structural constitutional limits may be read as placing constitutional constraints on the interpretive authority of the Supreme Court, including the use of interpretive methodologies.[75] Nor should the potential for implied structural limits on the scope of what is, after all, an implied structural power (supreme judicial review) be at all surprising.[76]

Additionally, as will be discussed in more detail below, constitutional norms grounded in the Rule of Law norms of the Due Process

74. Notably, Justice Black's dissent in *Griswold v. Connecticut* contains one of the most forthright assertions that an improperly expansive use of the judicial power violates the structure of the Constitution. In *Griswold*, Justice Black observed that

> [t]here is no provision of the Constitution which either expressly or impliedly rests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great *unconstitutional* shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, *I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have*."

Griswold v. Connecticut, 381 U.S. 479, 520–21 (1965) (Black, J., dissenting) (emphasis added).

One can compare the largely prudential (non- or sub-constitutional) invocation of structural values in White's *Roe* dissent and the overtly constitutional invocation of such values in Black's *Griswold* dissent with the Supreme Court's familiar parallel distinction between the prudential and constitutional dimensions of standing, dimensions that both involve similar structural concerns (i.e, the proper judicial role in light of the separation of powers, federalism, and representative democracy) at different levels of analysis. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498–502 (1975) (stating that "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society." (internal citations omitted)). Obviously, there is good reason to believe that structural limits on the judicial power derived from principles of the separation of powers and federalism have both a constitutional core and prudential penumbra.

75. This point, of course, has been recognized by scholars as well as by judges. For instance, Robert P. George contends that interpretive debates between originalists such as Robert Bork and proponents of expansive judicial power such as Ronald Dworkin are in fact best conceived of as debates about constitutional design and judicial power as determined by the positive law of the U.S. Constitution. Robert P. George, *Natural Law and Positive Law*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 321 (Robert P. George ed., 1996) [hereinafter George, *Positive Law*]. George also contends that the positive law of the U.S. Constitution does not grant the U.S. Supreme Court the broad power to invalidate legislation on principally moral or "natural law" grounds which theorists such as Ronald Dworkin advocate. George thus contends that expansive decisions such as *Dred Scott*, *Lochner*, *Griswold*, and *Roe*, given their generally exiguous grounding in legal materials, are violations of the positive law of the Constitution by the Court. *See* Robert P. George, *Natural Law and the Constitution Revisited*, 70 FORDHAM L. REV. 273, 274 (2001) [hereinafter George, *Constitution Revisited*]; *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 273–74 (2d ed., 1997) (asserting that the judicial creation of substantive unenumerated rights "violate[s] the injunction of the separation of powers" and "encroache[s] on the sovereignty reserved to the States by the Tenth Amendment"); CAREY, *supra* note 26, at 132–38 (revised and expanded ed., 1995) (drawing on *Federalist No. 78* to argue that the judicial exercise of an activist legislative "will" rather than restrained judicial "judgment" is violative of the republican structures of the Constitution and is therefore an unconstitutional judicial action); Nowlin, *Constitutional Illegitimacy*, *supra* note 5, at 474–76; Nowlin, *Judicial Restraint*, *supra* note 5, at 182–91.

76. Nowlin, *Judicial Restraint*, *supra* note 5, at 191–99; *see infra* Part III.F.4.

Clause also likely place constitutional limits on judicial interpretive authority and methodology.[77] For instance, a widely recognized aspect of the Rule of Law, the requirement that government officials faithfully apply the law in accordance with its meaning "as announced,"[78] might be thought to place implicit limits on the use of interpretive methods by judges, perhaps constitutionally requiring courts to stay within a range of conventionally accepted or normatively justifiable interpretive practices.[79] Other limits, as will be discussed below, likely exist as well.[80]

E. Are Courts of Last Resort Infallible or Merely Final?

1. Judicial Supremacy and the Lawyer's Intuition

Insights derived from analytic jurisprudence strongly support the view that courts of last resort—such as the Supreme Court—are capable of violating the organic law that creates them and grants them supreme interpretive authority. At the outset, it is clear that any argument in favor of a robust embrace of the concept of constitutional violations by the Supreme Court must face a number of analytic questions. The most basic of these is also the most important: is a constitutional violation by a supreme court an analytic or conceptual possibility? In fact, despite significant recognition of constitutional limits of a kind widely thought to constrain the power of the Supreme Court, a major argument exists suggesting that a supreme court cannot violate a constitution under which its interpretations are final. This argument is grounded most fundamentally in the implications of the procedural fact of judicial finality or supremacy in constitutional interpretation[81] for judicial (in)fallibility about constitutional meaning.

In brief, the argument is this: if the Supreme Court is viewed as supreme in its exposition of the Constitution, then the Court may be

77. *See infra* Part IV.

78. *See* FINNIS, *supra* note 24, at 270–73 (stating that the Rule of Law requires that officials "actually administer the law consistently and in accordance with its tenor"); LON L. FULLER, THE MORALITY OF LAW 39 (1964) (stating the necessity of "congruence between the rules as announced and their actual administration"); Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997) (observing that "[w]ithin . . . the most familiar understanding of this distinction [between the Rule of Law and the "rule of men"], the law—and its meaning—must be fixed and publicly known in advance of application, so that those applying the law, as much as those to whom it is applied, can be bound by it. If courts (or the officials of any other institution) could make law in the guise of applying it, we would have the very 'rule of men' with which the Rule of Law is supposed to contrast.").

79. *See infra* Part IV.

80. *See infra* Part IV.

81. Finality, here, is defined as the formal and procedural finality which derives from (1) the Supreme Court's position as the highest court (and thus the impossibility of reversal by a higher court) and (2) the supremacy or high degree of deference typically accorded the decisions of the Supreme Court by other institutional actors within the constitutional system as a matter of both constitutional theory and practice. Thus, the assertion of judicial finality in this sense is perfectly compatible with recognition of the use of various political checks on the Court, including the nomination of justices and recourse to constitutional amendments.

thought to affirm with its supreme interpretive authority (at least implicitly) the constitutionality of its own exercise of power, leading to the conclusion that the Supreme Court cannot act in violation of the Constitution. Under this view, for example, the constitutional limits on the Supreme Court found in Article III, while clearly and uncontestedly constitutional constraints of a kind, are not in fact constraints that the Court could be thought to *violate* simply because the Supreme Court itself authoritatively determines the meaning of Article III as a matter of judicial supremacy and will affirm its own use of power as constitutional under those limits.[82] In short, the Court's decisions are expressly or impliedly constitutionally self-affirming in nature as a matter of supreme constitutional interpretation and thus intrinsically nonviolative of the Constitution.

Upon analytical examination, this argument is simply an extension of an argument quite familiar to legal scholars for a century or more—that a *final* court is by its very nature an *infallible* court.[83] As H.L.A. Hart observed more than a generation ago, the finality of a court of last resort in resolving legal questions can create a profound impression of infallibility, suggesting that courts of last resort cannot get the law wrong.[84] This is so for the simple reason that the law—pragmatically defined in light of the exhaustion of the appeals process—is precisely *whatever* the courts of last resort ultimately decide that it is. One may call this view the "lawyer's intuition,"[85] and it is strongly associated with jurispru-

82. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003) (rejecting the dissent's contention that petitioners did not have Article III standing to seek injunctive relief and thus affirming the Court's authority under Article III to reach the merits of the petitioner's claim).

83. On the distinction between judicial finality and infallibility, see H.L.A. HART, THE CONCEPT OF LAW 138–44 (1961).

84. *Id.* An early version of this argument, arguably defining the law as what courts do and thus not as rules courts could be thought to misinterpret or get wrong, appears in O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). An even earlier version of this proto-legal realist argument is found in Bishop Hoadly's well-known statement: "[W]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all Intents and Purposes, and not the person who first wrote or spoke them." Reverend Benjamin Hoadly, The Nature of the Kingdom of Church of Christ, Sermon Before King George I of England (Mar. 31, 1717), *in* JOHN CHIPMAN GRAY, NATURE AND SOURCES OF THE LAW 102, 125, 172 (2d ed. 1921). In the context of American constitutional law, Charles Evans Hughes—the Republican Party nominee for the presidency in 1916 and Chief Justice of the United States in the 1930s—expressed this same view in his well-known statement: "We are under a Constitution, but the Constitution is what the judges say it is." Charles Evans Hughes, Speech Before the Chamber of Commerce of Elmira, New York (May 3, 1907).

85. There is, for instance, good reason to think that this view is fostered by the day-to-day practice of law before courts of appeal and by a pragmatic focus on basic questions of law practice. Notably, Holmes's *Path of the Law*, which embraces this view, also places its principal focus on the ordinary practice of law and the practical questions that confront lawyers: "When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court." Holmes, *supra* note 84, at 457. Hart, in a similar vein, notes that the assertion that "talk of [legal] rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them, can make a powerful appeal to a *lawyer's candour*." HART, *supra* note 83, at 133 (emphasis added).

dential movements such as American legal realism.[86] There is good reason to believe that this lawyer's intuition or legal realist view, that the law is whatever the courts of last resort say that it is,[87] exercises a considerable influence in debates over the judicial power in American constitutional law, significantly obscuring the degree to which the Supreme Court acts in violation of the Constitution. This last point is so because the implications of judicial finality of decision for (in)fallibility of decision address not only the question of whether the Court can get the Constitution wrong (i.e., make a mistake about the meaning of the Constitution),[88] but also the question of whether the Court can further violate the Constitution (i.e., by making a mistake as to the meaning of the Constitution as it relates to the constitutional limits of the judicial power and then acting in contravention of those constitutional limits). Thus, the contention that the Supreme Court can violate the Constitution must confront an important opposing view grounded in the closely related arguments that final courts are in fact infallible courts and that the law, including the law of the Constitution, is whatever the courts say that it is.[89] Insights derived principally from Hartian analytic jurisprudence will help to put this view in proper perspective.[90]

2. Four Views of Judicial Infallibility

In order to determine the validity of the lawyer's intuition, one must unpack its assumptions and explore, more precisely, the true nature of the proper analytic relationship between the finality of a supreme court and the question of its (in)fallibility. Does judicial finality entail any important form of infallibility? Does the supremacy of the Supreme Court in constitutional interpretation render the Supreme Court infallible in its determination of constitutional meaning? More than fifty years ago, Justice Robert Jackson addressed this question in a passing comment concerning the value of the appeals process, remarking of the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final."[91] Justice Jackson's well-known observation plays off precisely a conceptual confusion between finality and at least

86. HART, *supra* note 83, at 141.
87. *Id.*
88. On judicial fallibility, see *id*. at 138–44.
89. *Id.* at 138.
90. *Id.* at 138–44.
91. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). The fuller quotation is as follows:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Id.

four potential understandings of the concept of judicial infallibility, one of them a *procedural* understanding of judicial infallibility and three of them *substantive* understandings: (1) the formal-procedural; (2) the simple substantive; (3) the procedural-as-substantive; and (4) the quasi-legislative-as-substantive. These concepts of judicial infallibility require further exploration in some detail.

a. Formal-Procedural Infallibility

One may first turn to the formal-procedural conception of judicial (in)fallibility.[92] This conception of infallibility is grounded in the procedural fact that the American constitutional system is structured so that the legal decisions of the Supreme Court, as the court of last resort, are *immune* from formal, official, or authoritative challenge within the constitutional system from any other institution or set of actors charged with interpretation of the Constitution.[93] The Supreme Court, then, may be said to be "infallible" in the narrow, formal-procedural sense that there exists no procedural mechanism for an *official declaration* that the Court is wrong about the meaning of the Constitution by, say, a "super-Supreme Court"[94] or other "higher" governmental institution granted authority to interpret the Constitution.

This view of formal-procedural finality is consistent both with the recognition of substantive or real-world limits on the Court's finality (e.g., questions of enforcement, the deference political institutions should accord judicial decisions, and court packing) and with the recognition of the common procedural paths pursued to overrule decisions of the Supreme Court—future litigation in the Supreme Court itself and constitutional amendment. The former, political limits on the power of the Court, involve no formal or official declaration that the Court is mistaken in its interpretation of the Constitution. The latter, overruling by a later Court, is consistent in essence with formal-procedural infallibility because the Court itself is the overruling institution and thus retains procedural finality at any given time.[95] Additionally, constitutional amendment is also consistent with formal-procedural infallibility because a constitutional amendment actually alters the text of the Constitution and is thus (at least arguably) an alteration of the substance of the Constitution rather than a mere reversal of the Court's interpretation.[96] As a general

92. HART, *supra* note 83, at 138–44.

93. *Id.*

94. This is Justice Jackson's term. *See Brown*, 344 U.S. at 540 (1953) (Jackson, J., concurring).

95. In sum, this contingency is consistent with the Supreme Court's formal-procedural finality in constitutional interpretation since it is the Court itself, as an institution, which at any given time retains finality: the Supreme Court may overrule itself, but this simply means that the Supreme Court at "time 2" is declaring that the Supreme Court at "time 1" was in error.

96. In other words, constitutional amendment involves an actual change in the text of the Constitution and is therefore likely to be viewed by the Court, as well as by many others, as an actual substantive change in the Constitution itself rather than a mere overruling of the Court's interpretation of

matter, then, statements that the Supreme Court is wrong—by dissenting justices, presidents, attorneys general, members of Congress, state officials, scholars, public intellectuals, and concerned citizens—remain unofficial and nonauthoritative external or critical statements about legal meaning with no binding effect of any kind within the American legal system.[97]

One can thus conclude that the Court is formally or procedurally infallible if by this one means simply that the Court is immune from official or authoritative challenge or overruling involving an assertion of error on the part of the Court—except, of course, by the Court itself in a later case or by actual alternation of the text of the Constitution via constitutional amendment. The Supreme Court is thus properly viewed as infallible in this limited formal-procedural sense, but this formal infallibility is, as shall be demonstrated, quite consistent with *substantive* fallibility (i.e., the Court can be mistaken about the meaning of the Constitution even though it cannot be authoritatively declared to be in error by any other institutional actor in the constitutional system).

b. Simple Substantive Infallibility

Second, one may turn to the three substantive conceptions of judicial (in)fallibility, which involve an assertion that the Supreme Court cannot be mistaken substantively (as opposed to merely formally or procedurally) about the meaning of the Constitution. As noted, one can further subdivide the substantive conception of judicial (in)fallibility into what may be called (1) the simple substantive conception; (2) the procedural-as-substantive conception; and (3) the quasi-legislative substantive conception. Each of these deserves further examination.

The first of these, the simple substantive conception of judicial infallibility, is easily disposed of as a view no serious person would likely ever hold. The simple substantive view of judicial infallibility, as one may define it here, involves two basic propositions. First, this view would concede the commonsense position that the Constitution has (potential) preexisting meaning apart from the opinions of the Supreme Court. Second, this view would assert that the Supreme Court is simply *incapable of being wrong* substantively about that preexisting meaning. This view is simply untenable. Indeed, among the large array of jurists who believe that the Constitution has meaning independent of the opinions of the majority of the Supreme Court, it is hard to imagine that anyone actually believes the Court to be *incapable* of making a mistake about that meaning, though, of course, many jurists may believe that courts are better

the Constitution. Given this dynamic, constitutional amendment is quite different in nature from, say, a "reversal" by a "super-Supreme Court" asserting authoritatively that the Court's *interpretation* of the Constitution is wrong while leaving the underlying Constitution indisputably unchanged.

97. *See* HART, *supra* note 83, at 138–44.

suited, comparatively speaking, to the task of constitutional interpretation than are, say, the executive or legislative branches.[98] Indeed, one suspects that even the most judicially oriented or "catholic" of constitutional theorists (to use Sanford Levinson's terminology),[99] those who view constitutional meaning as centering around the interpretive authority of the Supreme Court,[100] do not believe the Court is guided by some constitutional equivalent of a divine afflatus or inspiration, assuring the inerrancy of its rulings. To the contrary, the commonsense and consensus view is clearly that the Supreme Court is not substantively infallible in this simple sense, that it can and does make mistakes about constitutional meaning.

Notably, it is the contrast between the formal-procedural conception and the simple substantive conception of (in)fallibility that Justice Jackson very likely had in mind when he said that the Supreme Court is "not final because [it is] infallible, but [it is] infallible only because [it is] final.[101] In other words, in Justice Jackson's view, the Supreme Court is final as a matter of governmental structure *not* because it is believed to be *substantively* infallible (i.e., incapable of making a mistake about constitutional meaning), but rather it is (merely) procedurally infallible (i.e., immune to an official declaration that it is mistaken even on those occasions when it is error) because it has been made final.[102] This is essentially a tautology. Even so, as Justice Jackson's remark also suggests, the *formal-procedural* infallibility of the Court, a consequence (or restatement) of its procedural finality, may tend to promote a perceived *substantive* (rather than merely formal-procedural) infallibility in at least two ways, related to the second and third forms of substantive infallibility discussed below.

c. Procedural-as-Substantive Infallibility

As suggested above, the distinction between formal-procedural and simple substantive judicial (in)fallibility, does not exhaust the range of conceptual possibilities describing the relationship of judicial finality and infallibility. The formal-procedural finality of the Supreme Court may also promote additional conceptions of substantive infallibility.[103] In fact, the procedural fact of judicial finality may tend to promote acceptance of judicial infallibility in both the procedural-as-substantive and quasi-legislative senses of the term.

98. One might think this because of the legal expertise of the justices and the relative political insulation of the Court. *Cf.* Nowlin, *Judicial Moral Reasoning*, *supra* note 5.

99. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 34 (1988).

100. *See id.* at 9–53 (discussing "Catholic" and "Protestant" views of the Constitution).

101. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

102. Nowlin, *Judicial Restraint*, *supra* note 5, at 196.

103. HART, *supra* note 83, at 138–44.

Turning to the procedural-as-substantive conception of judicial infallibility, one may best understand this view as one combining the *procedural* and *simple substantive* conceptions of infallibility.[104] This procedural-as-substantive conception of judicial infallibility, as described here, involves two closely related propositions, the second following from the first. First, the Constitution is understood to have *no* preexisting meaning independent of the Supreme Court's opinions about its meaning, and, thus, second, decisions of the Supreme Court are viewed as fundamentally formative or constitutive of the substance of the Constitution and of constitutional meaning in particular cases.[105] Thus, under this view, the Constitution is defined as whatever the Supreme Court, as final arbiter of its meaning, declares it to be.[106] Under this view, then, there is no analytical basis for positing that the Court—as the institution whose decisions are final and (therefore) constitutive of constitutional meaning—is (or can be) wrong about the meaning of the Constitution.

Experientially, this view is the origin of lawyer's intuition discussed above and is strongly suggested by the day-to-day practice of lawyers who argue before appellate courts.[107] This view represents a litigator's practical perspective on the way the legal system works: when the highest appellate court makes its decision, the law is established and litigation (on that precise issue) is at an end.[108] Moreover, historically speaking, the final interpretive authority of appellate courts has certainly promoted the view that the law simply is whatever the final arbiter of its meaning says it is, leading to the legal realist distinction between *sources* of law (statutes, constitutional provisions, historical context, etc.) and the *actual* law as articulated by appellate courts in their authoritative decisions.[109]

Is procedural-as-substantive fallibility a sound analytical understanding of the relationship of judicial finality to fallibility and the judicial process to constitutional meaning? At the outset, it is worth noting that very likely few, if any, theorists today actually *believe* the heart of this legal realist assertion that the Constitution is simply "what the Court says it is," as opposed to believing that the Constitution has meaning (in some important sense) independent of and apart from the opinions of the justices.[110] In fact, it is not even clear that the best-known exemplars of legal realism of an earlier generation believed the legal realist view to be an *analytic* statement about the nature of law and legal interpretation

104. *See supra* Part III.E.2.a–b.

105. HART, *supra* note 83, at 138.

106. *Id.*

107. *See supra* Part III.E.1.

108. Again, as Hart notes, the view that "law consists simply of the decisions of courts and the prediction of them can make a powerful appeal to a lawyer's candour." HART, *supra* note 83, at 133.

109. *Id.*

110. *Id.* at 133–34.

as opposed to a pragmatic or empirical statement intended to promote a better understanding of the legal process from the lawyer's perspective.[111]

Analytically, the most basic objection to the procedural-as-substantive conception of judicial infallibility is simply that the Constitution *predates* the Court and *created* it as an institution.[112] As Hart has observed, law cannot be simply what the courts say it is since it requires law of some sort in the first place to create courts.[113] Thus, the Constitution is not simply what the Supreme Court says it is because the Supreme Court did not exist until established by Article III of the Constitution;[114] it could be abolished by constitutional amendment;[115] and it exercises the power of judicial review in part on the basis of the Supremacy Clause and other constitutional provisions.[116]

A second, more pointed objection to the legal realist view is rooted in the analysis of the nature of rules and their interpretation. As Hart also argued, the legal realist error can also be seen through an analogy to situations such as the rules of a game and the role of the umpire.[117] Following Hart's analysis, one can expose the flaw in the procedural-as-substantive view.[118] Suppose a given game (baseball) includes a number of rules (such as "three strikes and you're 'out'") and one of them is a rule of "no appeal" about the meaning/application of the rules from the umpire or "scorer."[119] Is it right to think that the rule of no appeal from the umpire/scorer about the meaning/application of the rules (such as the three strikes rule) in fact *obliterates the entire rule book* except for the no appeal rule, and that the game is actually then one of umpire's/scorer's discretion instead of baseball; that the scorer could simply say the rules are anything he wants them to be (only two strikes or five or ten before one is out); and that there would be no basis for saying "that's not how we play baseball," "the umpire/scorer got that rule wrong," or "this

111. Again, it is worth noting here that Holmes's focus in *The Path of the Law* is on instructing lawyers in the practice of their profession, not generalized theorizing or abstract conceptual analysis. *See* Holmes, *supra* note 84. Brian Leiter, for instance, contends that legal realists such as Holmes were not asserting that the "law is what the courts say it is" as a matter of analytic jurisprudence and, in fact, "in *conceptual* matters, [were] tacit legal positivists with respect to the criteria of legality." Brian Leiter, *Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 263 (Dennis Patterson ed., 1999).

112. *See* U.S. CONST. art. III, §§ 1–2.

113. HART, *supra* note 83, at 132–33.

114. *See* U.S. CONST. art. III, §1.

115. Notably, Rep. John Bingham of Ohio, the principal author of the Fourteenth Amendment, concerned about the Supreme Court's possible interference with important Reconstruction measures, proclaimed in 1867:

> The court usurps power to decide political questions and defy a free people's will . . . . It will only remain for a people thus insulted and defied to demonstrate that the servant is not above his lord by procuring a further constitutional amendment . . . which will defy judicial usurpation by annihilating the usurpers in the abolition of the tribunal itself.

BURT, *supra* note 14, at 208.

116. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

117. HART, *supra* note 83, at 138–41.

118. *Id.*

119. *Id.*

scorer doesn't understand the three strikes rule on page 37 of the rulebook?"

The confusion here, as Hart points out, is between the obvious practical consequences of a no appeal rule (i.e., formal-procedural infallibility) and the nature of legal interpretation of rules, where the language of a rule read in light of its context will often provide a "settled core" of meaning as well as an "open texture" of interpretive discretion.[120] Of course, a rule of no appeal means there is no basis for an official or authoritative declaration that the scorer made a mistake in determining the meaning of a rule, and it may also mean there is no effective practical remedy for a misreading of the rules.[121] Still, neither the rule of no appeal nor the limited nature of practical remedies supports the conclusion as an analytical interpretive matter that the *only* rule is scorer's discretion, that the other rules in the rulebook are in fact not rules, that the scorer cannot *mis*interpret the rules, that the rules mean only what the scorer says they do, and thus that a statement by an observer or player asserting a mistake by the scorer is meaningless or wrong.

In fact, from an analytical interpretive standpoint, the rules of the game remain the rules, likely having both a settled core of meaning and an open texture, they are subject to interpretation and misinterpretation, and the umpire has a duty to apply them reasonably and in good faith, even where the umpire is insulated from the great weight of the practical consequences of both honest mistakes and bad faith pretextual rulings by a no appeal rule.[122] In no sense, then, should the combination of a substantive rule such as "three strikes and you're out" and a procedural rule of "no appeal from the umpire as to the meaning and application of the rules" be viewed as an implicit repeal or obliteration of the meaning of the first substantive rule. Indeed, it is worth noting that virtually *any* comprehensive set of rules—such as a rulebook or the Constitution—will need to include provisions for the resolution of disputes about the meaning and application of rules. Yet, if the provision for a final determination of the meaning of the rules by a particular actor/institution was thought to *obliterate* all the other rules in play, replacing them with a single dispute resolver's discretion rule, then it is simply analytically impossible to write anything recognizable in common parlance as a rulebook—or a constitution—with such a provision. Ultimately, that view is simply insupportable.

A (closely related) third and final flaw in the procedural-as-substantive conception of judicial infallibility is simply that it fails to capture the essence of judging and the function of courts from what Hart calls the "internal point of view" of persons operating from within the legal system and recognizing its binding normative force as a legal sys-

120. *Id.* at 120–32.
121. *Id.*
122. *Id.*

tem.[123] Consider Hart's example of a traffic signal: a red light is not simply a sign predictive of the fact that traffic will stop, but it is, from the internal point of view, a signal *for* traffic to stop—a reason or justification for stopping and a ground for criticism for any failure to stop.[124] Similarly, a judge, working from within the legal system, will view the law as a set of rules, standards, and principles which are not merely predictive of the decisions that he or she will make but rather are signals or guides for decision making—as a reason or justification for decision making and a ground for criticism if the wrong decision is made in light of the relevant legal materials.[125] More generally, the efficacy of the judge's decisions ultimately turns on the social fact of recognition of the normativity of the predecisional legal materials as binding law by a critical mass of public officials and citizens.[126] Citizens view the law as a reason or justification for the judge's decision and thus as part of the reason or justification for their own adherence to that decision made under the color of law.[127] Thus, law cannot simply be a prediction of what courts will do.

Therefore, the mere fact that there is no official appeal from the Supreme Court about the meaning of the Constitution does not mean that the Court may not get the meaning of the Constitution wrong.[128] As Hart writes, there remains a clear and important "distinction between a constitution which, after setting up a system of courts, provides that the law shall be whatever the supreme court thinks fit, and *the actual constitution of the United States*."[129] In no sense, then, should the flawed concept of procedural-as-substantive infallibility insulate the Court from criticism suggesting that its decisions may themselves violate the Constitution. Given that the Court can be mistaken about constitutional meaning, it can also be mistaken about the constitutional limits on its own power, and thus it can also exceed its own constitutional authority in violation of the structure of the Constitution.

d. "Quasi-Legislative" Substantive Infallibility in the Open Texture

Even if one believes, as one should, that the simple and procedural-as-substantive conceptions of infallibility are not conceptually sound, there still remains a final conception of substantive infallibility to explore: quasi-legislative substantive infallibility. Notably, Hart, while insistent that judicial procedural finality does not entail substantive infallibility as a general matter (i.e., with respect to the settled core of legal

123. *See id.* at 134–35.
124. *Id.* at 87–88.
125. *See id.* at 134.
126. *See id.* at 112–14.
127. *See id.* at 110–11.
128. *See id.* at 140–41.
129. *Id.* at 141 (emphasis added).

meaning at issue in most cases), has suggested that courts of last resort might be viewed as substantively infallible in an important sense regarding their decision making in the open texture of a constitution or rule of recognition.[130] Indeed, Hart contends that a constitution, without paradox, could confer authority on a court to say what the constitution is in the marginal or peripheral areas of law where legal meaning remains uncertain despite examination of legal materials.[131] For instance, a court of last resort might be called upon to resolve the constitutionality of an act of Parliament or Congress in an area where constitutional meaning was unsettled in light of the available legal materials.[132] In such cases, Hart suggests, the statement that the "'constitution is what the judges say it is does *not* mean merely that particular decisions of supreme tribunals cannot be challenged"[133] as a formal-procedural matter, but rather such a statement in this context may also mean that the courts in question may have the general authority under the settled core of a constitution to create constitutional sub-rules in the open-textured areas of that constitution.[134] Additionally, in the context of discussing interpretation, Hart observes that "the open texture of the law leaves a vast field for a creative activity which some call legislative."[135] One could, of course, conclude from this line of analysis that courts of last resort exercise a legislative or quasi-legislative power in the open texture of law and thus, in an important sense, the law in the open texture simply is what the court says it is. Thus, a court might properly be viewed as substantively infallible in the open texture of a constitution.

The basis for this contention deserves a more detailed treatment. The essential argument is this: if the process of rule determination in the open texture is thought of as creative in a truly legislative or quasi-legislative fashion[136] and is thus judicial and interpretive in form and procedure only and not in actual substance,[137] there is, indeed, no sense in which the courts' legislative or quasi-legislative (substantively nonjudicial and noninterpretive) creation of constitutional sub-rules could be thought of as wrong in the strict sense of a misinterpretation of the constitution. On these issues, Hart's analysis suggests that courts can no more be wrong (as a matter of interpretation) about the new rules they create (quasi-)legislatively than a legislature can be wrong (as a matter of

130. *Id.* at 141–47.
131. *Id.* at 152.
132. *Id*. at 150–54.
133. *Id.* at 152.
134. *Id.* at 150–54.
135. *Id.* at 204. Hart also notes that judges, in deciding cases in the open texture, "often display characteristic judicial virtues" which "explains why some feel reluctant to call such judicial activity 'legislative.'" *Id.* at 204–05.
136. *Id*. at 204–05.
137. As discussed below, Hart's actual position on this is somewhat ambiguous, using language suggestive of interpretation (and the special judicial characteristics of judicial rule creation) and legislation at different points. *Id.*

interpretation) about the new rules that it creates legislatively. Indeed, if one believes that these (quasi-)legislative processes do not in fact involve anything properly characterized in substance as actual *interpretation* of preexisting law, there is no sense in which they can involve the *misinterpretation* of preexisting law, and therefore the question of substantive interpretive fallibility of the courts (or legislatures), in an important sense, should not even arise as an issue. One could think that a court created the wrong rules as a matter of substantive normative or prudential judgment, just as one can think that a legislature has created the wrong rule in passing a given piece of legislation, but that normative judgment as to the substantive (de)merits of the rule legislatively created involves no assertion of a misinterpretation of preexisting law and thus involves no (relevant) assertion of interpretive fallibility in rule creation. In short, if the process of judicial decision in the open texture or interstices of law is not truly one of interpretation of law, then it cannot possibly involve misinterpretation of law, so a court engaged in this process cannot be said to be mistaken about a matter of legal interpretation or substantively fallible in the interpretive sense of the term. The latter statement, asserting interpretive fallibility, would make sense only in an interpretive context and would simply be irrelevant to the court's noninterpretive, quasi-legislative creation of new rules. Thus, one could also say, though it would be an odd locution and perhaps potentially misleading, that a court engaged in the (quasi-)legislative creation of new rules is indeed interpretively infallible in the open texture in the sense that (and precisely because) it is not engaged in *actual* law interpretation, as opposed to law creation, and thus cannot make an interpretive mistake.

Are courts of last resort, supreme in constitutional interpretation, interpretively infallible in the quasi-legislative sense described above? Obviously, one's conclusion to this question turns on one's answer to a more fundamental question: is judicial activity in the open texture, interstices, or unsettled areas of constitutional meaning properly thought of as (quasi-)legislative and fundamentally noninterpretive in nature? Significantly, there are good grounds here for the rejection of the description of judicial action in the open texture as (quasi-)legislative rule creation, if by that one indeed means such rule creation is truly noninterpretive in nature. In fact, Hart's own usage in the *Concept of Law* is ambiguous, using both the language of interpretation and judicial legislation,[138] though as noted, Hart's analysis can easily be read to accept some form of what one may call judicial infallibility in the open texture.[139]

Notably, Ronald Dworkin emphatically rejects the contention that judges are properly viewed as simply creating new legal rules or sub-rules in the open texture in a generally unconstrained fashion properly

138. *Id.* at 204.

139. *See supra* text accompanying notes 130–35.

deemed quasi-legislative and noninterpretive.[140] Rather, Dworkin, clearly drawing on the internal perspective of English and American judges, describes this process of rule creation or determination as an interpretive process with dual aspects of legal fit and moral-political justification.[141] In Dworkin's view, judges must fill in the interstices of the law, the open texture, but they do not do so in any fashion properly conceived of as (quasi-)legislative in nature.[142] Rather, judges determine these rules in a distinctively judicial and interpretive fashion: where initial interpretive analysis of legal fit runs out, leaving two or more possible answers to a question of legal interpretation, judges shift to the second aspect of interpretive analysis, moral-political justification, to determine the right answer to the legal question, thus providing a basis for claiming that there is a definitive right or best answer to every legal question, even if the right or best answer turns in part on contested moral-political judgments of justification as a secondary aspect of interpretation in the open texture of the law.[143] Thus, the judicial exercise of decisional discretion in the open texture is not (quasi-)legislative in nature, but rather is properly viewed as a judicial and interpretive enterprise centering around the moral-political justification aspect of interpretation.

There is good reason to believe that Dworkin's description of the interpretive nature of the judicial process in the open texture better captures the self-understanding of Anglo-American judges as a matter of judicial psychology and formal opinion-writing than do those approaches characterizing this activity as legislative.[144] In fact, Anglo-American judges, even when operating in the unsettled areas of the law, routinely view themselves as judicial actors engaged in the enterprise of interpreting the existing law and not as quasi-legislators making new law in an unrestricted legislative fashion.[145] Moreover, Dworkin's characterization of judicial activity in the open texture also avoids, if only in formalistic fashion, some of the troubling normative questions relating to both the ex post facto nature of judicial quasi-legislation and the general authority of courts to engage in such noninterpretive legislative activities under structural norms of separation of powers, federalism, and representative democracy. Indeed, the conceptualization of judicial activity in the interstices as legislative raises serious formal questions of the propriety of such judicial activity on structural and Rule of Law grounds.[146] Notably, Judge Richard Posner concurs with Dworkin's analysis in part, concluding that judicial action in the open texture does not involve stepping outside of legal interpretation into anything properly viewed as nonjudicial and

140. *See* DWORKIN, RIGHTS, *supra* note 6, at 31–39, 68–71, 81.
141. *See id.* at 81–130; DWORKIN, LAW'S EMPIRE, *supra* note 19, at 225–75.
142. *See* DWORKIN, RIGHTS, *supra* note 6, at 31–39, 68–71, 81.
143. *See id*. at 81–130; DWORKIN, LAW'S EMPIRE, *supra* note 19, at 225–75.
144. *See* Nowlin, *Judicial Moral Reasoning*, *supra* note 5.
145. *Id.*
146. *See* DWORKIN, RIGHTS, *supra* note 6, at 84.

noninterpretive legislative activity in the legal system of the United States.[147] In addition to these highly persuasive arguments, one can further add that Dworkin's view is also in line with the Supreme Court's understanding of the differences between judicial and legislative action as seen in both the crafting of their opinions, which studiously avoid suggestions that the Court is legislating,[148] and in several significant areas of constitutional law, where clear distinctions are made between legislative rule creation and judicial interpretation.[149]

Ultimately, it is quite possible that the difference between Hart and Dworkin on the issue of judicial decision in the open texture is largely a semantic one.[150] Both Hart and Dworkin agree that judges engage in a creative form of rule-crafting or determination in the open texture, but disagree to some extent about the appropriate language used to describe that creative action.[151] Hart's descriptive analysis uses both the language of interpretation and of legislation,[152] while Dworkin uses the language of interpretation exclusively and emphatically.[153] As noted, Dworkin's interpretive language better captures the self-understanding of judges and the conventions of opinion writing in Anglo-American law.[154] Thus, there is good reason to reject the counterintuitive legislative characterization or conception of the judicial role in the open texture and to embrace the judicial-interpretive conception of the judicial role.

What, then, of the quasi-legislative substantive conception of judicial infallibility in the open texture? Obviously, a rejection of a quasi-

147. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 96 (1999) (observing that "when judges render political decisions they are still doing law, because law is interpenetrated with politics").

148. *See*, *e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("We do not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").

149. For instance, the retroactive judicial narrowing of the reach of a textually overbroad statute may defeat an overbreadth claim, but the legislative "ex post facto" narrowing of the statute cannot. *See* Osborne v. Ohio, 495 U.S. 103, 115–21 (1990) (holding that a state supreme court's narrowing construction of a statute that is unconstitutionally overbroad as written precludes an assertion of overbreadth even by a defendant whose conduct occurred prior to the narrowing construction as long as such application affords fair warning); Massachusetts v. Oakes, 491 U.S. 576, 584–85 (1989) (holding that a state legislature's amendment narrowing a statute that is unconstitutionally overbroad as written does not preclude an assertion of overbreadth by a defendant whose conduct occurred prior to the narrowing amendment). This distinction is based in part on the Court's view of the difference between judicially interpreting an existing rule and legislatively altering or changing an existing rule, thereby creating a new rule. *See Osborne*, 495 U.S. at 119 (observing that application of the rule in *Oakes* concerning state legislatures to state courts "would require a radical reworking of our law").

150. POSNER, *supra* note 147, at 95–98.

151. Notably, Hart and Dworkin also seem to disagree about the degree of creative authority judges have in practice. This may be, as Richard Posner suggests, a difference arising from Hart's experience with the English system and Dworkin's experience with the American legal system. *Id.* at 97. In any event, neither Hart's nor Dworkin's terminology requires one to subscribe to a more or less activist or restrained conception of the judicial role in the open texture. *See supra* note 19.

152. *See* HART, *supra* note 83, at 204–05.

153. DWORKIN, LAW'S EMPIRE, *supra* note 19, at 225–75; DWORKIN, RIGHTS, *supra* note 6, at 81–130.

154. *See supra* text accompanying notes 144–49.

legislative conception of judicial activity in the open texture necessitates a rejection of quasi-legislative judicial infallibility in the open texture as well. Judicial creativity asserted in the *form* of interpretation of preexisting law is appropriately criticized in the very same form—that of a misinterpretation of the preexisting law. Indeed, if judges are engaged in activity properly viewed as interpretive in the open texture, then they may also be properly viewed as potentially engaging in misinterpretive acts as well, and thus are concomitantly and properly viewed as interpretively fallible in the open texture as well as in the settled core of law. In sum, the rejection of the quasi-legislative conception of the judicial activity in the interstices of the law in favor of a judicial-interpretive view entails recognition of judicial substantive fallibility in constitutional interpretation, even where the law is unsettled and a survey of legal materials alone does not establish one clear answer to a question of constitutional meaning. Because judicial activity in the open texture is interpretive in nature, judges can misinterpret the Constitution in determining constitutional meaning in the interstices, and there is no quasi-legislative substantive form of judicial infallibility in constitutional interpretation even in the open texture. Thus, one may say that even in the open texture of the law, the Supreme Court, analytically, can misinterpret the Constitution and that if the misinterpretation concerns the constitutional limits on the Court's own power, the Court can exceed those constitutional limits and thereby violate the Constitution.

3. Conventional Rejection of Substantive Forms of Infallibility

Further, American legal practices suggest a plain conventional rejection of infallibility in the simple substantive, procedural-as-substantive, and quasi-legislative substantive senses. One cannot, for instance, make sense of the Supreme Court Justices' own venerable practice of writing dissents in constitutional cases without positing their belief that the majority can be wrong about the meaning of the Constitution. If the Constitution is simply the opinion of the majority of the Justices at any one time, then it would be nonsensical to write a dissent—arguing that the majority are wrong about their own opinions. Indeed, the very act of writing a judicial dissent is an implicit assertion that the Constitution has a meaning independent of the Court's present interpretation, that the majority of the Justices have gotten that meaning wrong, and that, in short, the Justices not only interpret, but can *mis*interpret, the Constitution. This view is, of course, held by all the current Justices of the Supreme Court (all of whom routinely write dissents)[155] and virtually everyone else who bothers to write about the decisions of the Court in terms of whether such decisions are right or wrong or are better or worse

155. *See*, *e.g.*, *The Supreme Court, 2002 Term—The Statistics*, 117 HARV. L. REV. 480, 480 (2003) (compiling voting patterns of the Court, including dissenting opinions).

as interpretations of the Constitution. It is widely recognized, then, that the Constitution's meaning exists independently of the Justices' opinions about its substance. As Justice Jackson's remark suggests, the Supreme Court is not substantively infallible in any sense, but rather is, because of its procedural finality, infallible in the limited formal-procedural sense of immune to official challenge, declaration of error, and overruling.[156] The Supreme Court, then, can be mistaken about the substance or meaning of the Constitution, even though the Court's ruling cannot be appealed to a higher Court or other institution for reversal.

4. Predictive and Critical Statements of (Un)Constitutionality

It is also likely that confusion about the meaning of statements such as "Law X is (un)constitutional" help obscure the important sense in which the Supreme Court can be said to be in violation of the Constitution. Analysis of the multiple meaning dimensions of a statement such as "Law X is (un)constitutional" will prove instructive here in (a) distinguishing finality and formal-procedural infallibility from the substantive forms of infallibility and (b) demonstrating the importance of assertions that a court of last resort is wrong about the law. Significantly, legal discussion often involves the use of a single grammatical form ("Law X is unconstitutional") to express a range of meanings from a range of different legal perspectives.[157] For instance, such a statement ("Law X is unconstitutional") could be made by an observer as either (1) a statement expository or predictive of an authoritative interpreter's view of the law (e.g., a lawyer discussing the Supreme Court's rulings or likely future rulings on a question of constitutional law) or (2) a statement asserting the observer's own independent critical interpretive judgment as to a question of constitutional law (e.g., a lawyer or dissenting Justice discussing his view of the meaning of the Constitution independent from the majority of the Supreme Court, perhaps expressing disagreement with a Supreme Court case in point). Thus, the same observer can say, without contradiction, both that "Law X is unconstitutional" and that "Law X is constitutional," if, for instance, the first is an expository or predictive statement (i.e., relating to the Court's opinion on the matter of constitutionality) and the second is a critical or independent statement (i.e., relating to the observer's opinion of constitutionality independent from the Court's and in potential opposition to it).

What one might call here an "S1" expository or predictive statement is court-centered and takes Supreme Court case law—the set of authoritative interpretations of the Constitution under the practice of judi-

156. Again, this formal-procedural infallibility is consistent with overruling by a future Supreme Court or by an amendment altering the text of the Constitution and thus (at least arguably) overturning the Court's decision only in the sense of changing the underlying law of the Constitution.

157. *See*, *e.g.*, *infra* note 204 and accompanying text.

cial supremacy—as determinative of the meaning of the Constitution as a matter of the law of the land. An S1 statement that the Supreme Court is wrong about the Constitution would indeed be meaningless (i.e., a statement that the Supreme Court is mistaken about its own opinion). What one might call an "S2" critical or independent statement is not (necessarily) centered on the Supreme Court's case law and is open to other sources of law aside from Supreme Court case law determining the meaning of the Constitution. An S2 statement that the Supreme Court is wrong about the Constitution is in no sense meaningless (e.g., it is a statement that the speaker's view of the Constitution means X and that that view of constitutional meaning is or can be in conflict with the Court's view of the matter). Similarly, a statement that the Supreme Court is in *violation* of the Constitution is an S2 critical or independent statement asserting the speaker's view of the meaning of the Constitution as it relates to the constitutional limits on the Supreme Court apart from the views of the Supreme Court itself.

Additionally, as noted in passing, while the critical or independent statements about legal meaning as described above remain unofficial or nonauthoritative within the constitutional system, such statements are scarcely meaningless or pointless. To the contrary, unofficial statements of constitutional meaning play a significant and essential role in legal debate, often making a major contribution to the ultimate contours of the official law as determined by a majority of the Supreme Court.[158] Indeed, it is worth noting here that dissenting judicial opinions are critical or independent S2 statements about constitutional meaning expressing disagreement with the Court's official interpretation, and the significant value of dissenting opinions to legal debate is widely recognized.[159] Similarly, broader legal and political debate about judicial decisions routinely involve S2 statements and such statements are crucial to the appropriate exercise of constitutional checks and balances on the Court, including the conventional practice of "debating, litigating, legislating," and nominating Justices in response to decisions thought by the political branches to be incorrect.[160] Thus, unofficial statements about the meaning of the Constitution—about whether the Supreme Court has interpreted the Constitution wrongly and also whether the Court has further violated the Constitution—are very important aspects of constitutional debate in American constitutional law.

158. *See* Daniel Patrick Moynihan, *What Do You Do When the Supreme Court is Wrong?*, PUB. INT., Fall 1979, at 3 (discussing the overturning of mistaken judicial decisions through a strategy of debate, litigation, and legislation).

159. *See*, *e.g.*, William J. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Antonin Scalia, *The Dissenting Opinion*, J. SUP. CT. HIST. 33, 37–42 (1994).

160. *See* Moynihan, *supra* note 158.

5. Some Implications of Substantive Judicial Fallibility for the Concept of Judicial Constitutional Violations

As noted, confusion about the nature of the relationship between the Supreme Court's finality and its infallibility as well as confusion about the different senses in which a governmental act can be said to be (un)constitutional tend to promote a common legal intuition that the Constitution means whatever the Court says it does.[161] Further, the view that the Court cannot be wrong about constitutional meaning or act in violation of the Constitution flows from this confusion. In short, confusion about the nature of these relationships promotes the idea that the Court is *not* a potential violator of the Constitution, placing it in a uniquely privileged position from which it may purport to identify constitutional violators while remaining insulated from claims that it itself has violated the Constitution. It should now be clear that neither the Court's procedural finality nor its implicit self-affirmation of the interpretive soundness and constitutionality of its own actions resolves the question of the existence of constitutional violations by the Supreme Court. If, as noted above, there is no reason to think that the Court is substantively infallible (in the simple, procedural-as-substantive, or quasi-legislative senses), then it is quite possible for the Supreme Court to misinterpret the Constitution and to make a mistake about constitutional meaning. If it is possible for the Court to misinterpret the Constitution generally, then it is also possible for the Court to misinterpret the Constitution as it relates to the constitutional limits on the Court's own powers and then exceed those limits in violation of the Constitution. In sum, neither the Court's finality nor implicit affirmation of the interpretive accuracy and constitutionality of its own exercise of judicial power provides a defense to a claim of a Supreme Court constitutional violation.

As suggested, the concept of constitutional violations by the Supreme Court may be obscured by the lack of a formal procedure, such as an appeal to a "super-Supreme Court," for determining when the Supreme Court has acted in violation of the Constitution. The lack of a specific formal remedy (aside from a later overruling by the Court itself or an amendment to the Constitution) involving an authoritative declaration of unconstitutionality of an act of the Supreme Court by an even higher court or other institution, however, does not in any way justify abandoning the language of unconstitutionality in describing the decisions of the Court. Indeed, it may make the use of the language of unconstitutionality in this context much more important. Significantly, the informal and political nature of the chief measures used to correct both the Court's mistakes and its constitutional violations may in fact make an accurate description of a judicial act as a constitutional violation of crucial importance. Thus, the view that the Supreme Court can violate the

161. *See, e.g.*, HART, *supra* note 83.

Constitution, as well as protect it from other potential violators, is not as widely recognized as it should be.

F. Constitutional Limits on Interpretive Authority and Interpretive Methodology: Special Problems

1. Can a Constitution Restrict Interpretive Authority and Interpretive Methodology over the Constitution?

The insights of analytic jurisprudence in the specific area of the question of constitutional limits on interpretive authority and methodology strongly support the view that courts of last resort can violate the organic law that creates them and that they interpret with supremacy. Such violations can occur when courts of last resort exercise a degree of interpretive authority beyond that which the organic law in fact grants to them.

At the outset, however, one must recognize an additional theoretical barrier to the recognition of important dimensions of the constitutional limits on the judicial power in the highly significant areas of judicial authority, role, and interpretation: confusion about the way in which a constitution can establish constitutional norms (at least partially) determining who has the authority to interpret that constitution and how the constitution is to be interpreted by various interpreters. This question often arises in debates over judicial supremacy,[162] but is also highly relevant to broader debates about the proper judicial role, including debates about the degree of deference supreme courts owe to political actors (e.g., should there be a clear mistake doctrine of some sort) and the use of judicial interpretive methodologies (e.g., may courts make use of natural law or moral philosophy in constitutional interpretation). For instance, as shall be discussed in more detail below, constitutional limits grounded in constitutional structure and Rule of Law norms arguably constrain, as a matter of constitutional law, the interpretive authority of the Supreme Court, including its use of interpretive methodologies as it exercises the power of judicial review.[163]

Although a number of jurists recognize that these questions relating to the proper use of judicial power may in fact pose questions of the interpretation of constitutional constraints on the use of judicial review in many instances,[164] other scholars question whether a constitution can es-

162. *See*, *e.g.*, Alexander & Schauer, *Defending Supremacy, supra* note 11, at 459–67; Alexander & Schauer, *Extrajudicial Interpretation, supra* note 11, at 1369–71.

163. *Cf.* Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (contending that an essential component of the rule of law is establishment of general rules of law limiting judicial discretion in individual cases).

164. This position has been taken by both Justice John Marshall Harlan II and Justice Hugo Black. *See supra* notes 72 and 74. Additionally, H.L.A. Hart recognized that courts receive their authority from the positive organic or basic law—law which takes the form of secondary or power-conferring rules concerning the creation and allocation of power to the governmental institutions of

tablish norms constraining interpretive authority and the use of interpretive methodology.[165] These scholars argue that questions of interpretive authority and methodology with respect to a constitution are foundational extra- or preconstitutional questions and are therefore purely moral, political, or prudential-empirical questions for "direct normative inquiry."[166] This view is in part derived from the "Wittgensteinian commonplace that rules do not determine their own application"[167] and thus the contention that it is a "conceptual error" to look conclusively to a "[c]onstitution's text and history to determine what the text and history are to tell us" about constitutional meaning.[168] Under this view, then, one might conclude that questions of judicial authority over a constitution (such as judicial supremacy, judicial deference to nonjudicial interpreters, or the use of various judicial interpretive methodologies) are best understood as essentially noninterpretive moral-political questions concerning the operation of a constitutional system, rather than questions of interpretation of a constitution's judicial power-conferring rules, involving, as questions of interpretation, both aspects of legal-fit analysis

the constitutional system. Thus, Hart maintained that a "constitution [can] confer authority [on a court] to say what the constitution is" and may do so without paradox once one recognizes that the law of the Constitution has both a settled core (conferring authority on a court to interpret the Constitution) and an open texture (in which some constitutional questions remain open or unsettled and thus subject to a judicial resolution involving some degree of judicial discretion in rule creation). HART, *supra* note 83, at 148. Moreover, John Finnis also recognizes that judicial authority within a legal system is derived from the positive law of the constitution. Finnis therefore observes that "[t]hose who doubt or minimize the presence of open-ended principles of justice in professional legal thought will usually be found, on close examination, to be making a *constitutional* claim, viz. that the judiciary ought to leave change and development of law to the legislature." FINNIS, *supra* note 24, at 356 (emphasis added). Finnis, in other words, suggests here that the positive law of a constitution as reflected in a given constitutional structure may be thought in some cases to distribute authority to "change and develop law" (i.e. in light of natural law or principles of justice) as between courts and legislatures in a specific fashion, potentially conferring this power principally on the legislature rather than on the courts or the reverse. As noted above, Robert P. George also contends that interpretive debates between originalists, such as Robert Bork, and proponents of expansive judicial power, such as Ronald Dworkin, are in fact best understood as debates about the constitutional authority of courts as determined by the positive law of the U.S. Constitution. *See* George, *Positive Law*, *supra* note 75, at 320–32; *see also* BERGER, *supra* note 75; CAREY, *supra* note 26; George, *Constitution Revisited*, *supra* note 75.

165. Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 459 (contending that the question of judicial supremacy in constitutional interpretation is a question concerning a "preconstitutional norm," not "a question that can be answered from the Constitution itself" through, say, text-, history-, and structure-based interpretation of the Constitution's allocation of interpretive authority to the Supreme Court); Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 11, at 1369 (contending that the "question of deference" to a given interpreter of the Constitution is "preconstitutional" in "the sense of being logically antecedent to the written constitution").

166. Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 11, at 1370; *see also* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 459; Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 188–90 (1981) (contending that familiar debates about the Supreme Court's interpretive authority and role are in fact debates over "preconstitutional rules" as limits on the Court's power potentially subject to normative or political argument).

167. Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 460.

168. *Id.* at 463.

as well as aspects of moral-political justification analysis.[169] Thus, under this view, traditional legal materials—such as constitutional text, original understanding, judicial precedent, and long-standing legal practices—might be thought largely or wholly irrelevant to the debate over the scope of judicial power, given that that debate is understood as one of unmediated normative inquiry rather than interpretation of constitutional norms.[170] On this view, then, one might criticize an assertion by a court of supreme interpretive authority or resort to particular controversial interpretive methodologies on nonconstitutional normative or prudential grounds (as, say, undemocratic or antifederal or anti-Rule of Law), but one likely would not criticize its acts on constitutional grounds as unauthorized by a constitution, properly interpreted, or, more bluntly, as constitutional violations by the judiciary.

There is good reason to think that this view is flawed to the extent it rejects the possibility of a constitution placing meaningful constitutional constraints on interpretive authority and methodology internal to the constitutional system, though disagreement on these points is understandable given the complexities of the analytic issues in question. Imagine, for instance, that the Constitution of Newgarth[171] contains a provision governing interpretive authority within the constitutional system, stating that the "Federal Supreme Court of Newgarth has the sole authority to determine the meaning of this Constitution and all other government officials must defer to the Supreme Court's interpretation of the Constitution." Suppose the Newgarthian President finds herself confronting the questions of judicial supremacy and her obligation to adhere to a legal principle articulated by the Supreme Court of Newgarth in a decision with which she strongly disagreed. In resolving the question of whether she has a constitutional obligation to defer to the Court, the President must interpret this provision of the Constitution and, in doing so, must assert a certain measure of threshold authority to interpret the Constitution in order to determine her (textually express lack of) authority to interpret the Constitution within the constitutional system. Thus she must assert a measure of interpretive authority in order to determine that (or whether) she lacks interpretive authority. Both the paradox en-

169. *Cf. id.* at 460. Notably, Alexander's and Schauer's position on the (non)interpretive nature of a question such as judicial supremacy is somewhat ambiguous, given that they label the question as a "pre-constitutional" one for direct normative inquiry, while at the same time recognizing that they are in an important sense attributing a meaning to the structure of the Constitution. *Id.* at 462.

170. *Cf. id.* at 459–60 (contending that because the question of judicial supremacy is a question of a "preconstitutional norm" for "direct normative inquiry" the normative assertion of judicial supremacy within the American constitutional system is not precluded by the (arguable) facts that "the Framers did not intend the Supreme Court to be the Constitution's supreme interpreter, that the ratifiers in the states did not understand the Supreme Court to be the Constitution's supreme interpreter, and that the text does not designate the Supreme Court as the Constitution's supreme interpreter" and, further, would not be precluded even if it were true that "the Constitution actually repudiates" judicial supremacy).

171. A hypothetical jurisdiction borrowed from the work of Lon Fuller. *See* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 627 (1949).

gendered by this hypothetical constitution's prohibition of executive interpretive authority and the prohibition's inefficacy are obvious, even though, as shall be shown, the paradox is relatively mild and the inefficacy is only partial.[172] Next, imagine that the Newgarthian Constitution contains a provision governing judicial interpretive methodologies, stating that "Newgarthian judges are to interpret the provisions of this Constitution in light of text, original understanding, legal tradition, judicial precedent, and natural law or moral philosophy." A judge must interpret this provision in order to determine how she is to interpret provisions of the Constitution of Newgarth, presumably including the interpretive provision itself. Again, the paradox and inefficacy of the interpretive directive are clear. The judge must first interpret the provision to determine how she is to interpret that and other provisions of the Newgarthian Constitution.

Thus it is also clear that a constitution—whatever its provisions may say with respect to interpretive authority and methodology—cannot, as a matter of logical necessity, eliminate an important, initial, or threshold exercise of inherent pre- or extra-constitutional interpretive authority and deployment of interpretive methodology in the determination of constitutional meaning. This is so precisely because an exercise of some degree of interpretive authority and use of interpretive methodology necessarily precedes the very determination of the constitutional limits a constitution may purport to impose on their exercise via its provisions governing interpretive matters.[173] Inexorably, those constitutional provisions establishing interpretive limits must themselves be interpreted to determine the precise contours of the interpretive limits established, which necessarily involves an assertion of authority to interpret and the use of interpretive methodologies to do so prior to the determination of the constitutional limits on interpretive authority and methodology.

2. *Extra-Constitutional and Intra-Constitutional Interpretive Authority and Methodology Distinguished*

Even so, it is of crucial importance not to *exaggerate* this intrinsic limit on a constitution's ability to establish governing norms of interpretive authority and methodology. One key distinction here—potentially overlooked or misunderstood in this context—is that between (1) the exercise of interpretive authority *external* to a constitutional system and (2) the exercise of interpretive authority *internal* to a constitutional system as determined via the exercise of inherent, initial, threshold, or extra-constitutional interpretive authority from the "internal point of view" of

172. *See infra* text accompanying notes 252–69.

173. This is the central insight and driving force behind Alexander and Schauer's analysis in this area. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 460 (observing that even an express constitutional provision mandating judicial supremacy would still leave open "the question of who would interpret *this* provision, and whether that interpretation would be binding on others").

actors who accept the constitution in question as authoritative and who seek to adhere to their constitutional obligations reasonably and in good faith.[174] The former is that interpretive authority one may term inherent, initial, threshold, or extra-constitutional, which a constitution, as a matter of simple logic, cannot eliminate or constrain, but rather which must be exercised precisely in order to determine *if* any constitutional constraints on interpretive authority exist within or are internal to the constitutional system. The latter is that interpretive authority one may term noninherent, post-initial, post-threshold, or intra-constitutional, which a constitution can conceivably eliminate or constrain as a matter of constitutional authority.

This claim should be examined in more detail. As stated, the exercise of inherent, threshold, extra-constitutional, or external interpretive authority cannot be limited by a constitution, given that such interpretive authority must be exercised in order to determine what constitutional limits, if any, exist internal to the constitutional system. However, the exercise of this external authority can lead a political actor to conclude that his or her intra-constitutional or internal interpretive authority is limited by a constitution in important ways which she might have rejected as a matter of simple political morality, but that she cannot reject as a matter of good faith constitutional interpretation once she has accepted the authority of the constitution. Thus a president might conclude via her inherent threshold external interpretive authority that she has only very limited intra-constitutional interpretive authority and must defer to the decisions of the supreme court as a matter of constitutional obligation in carrying out her duties as chief executive. Or a supreme court justice might conclude via his exercise of inherent threshold external interpretive authority that he is (un)authorized by a constitution to use certain forms of interpretive methodology to ascribe meaning to the constitution in exercising the power of judicial review as a matter of intra-constitutional or internal interpretative authority. Indeed, this process of using interpretive authority (in the inherent, threshold, or extra-constitutional sense) to determine the limits of interpretive authority (in the post-threshold or intra-constitutional sense) is analogous to the way in which a court exercises jurisdiction to determine its jurisdiction (i.e., exercises an inherent or threshold jurisdiction to determine legal jurisdiction under relevant constitutional and statutory authority).[175] Obviously,

174. On the internal point of view and constitutional obligations, see *infra* note 204 and accompanying text.

175. Even though federal courts are courts of limited jurisdiction, it is widely accepted that they possess some form of inherent or implied "jurisdiction to determine jurisdiction" and that such a form of "threshold" jurisdiction is necessary to both their proper functioning as courts of law and to their proper adherence to the constitutional and statutory limits on their jurisdiction. *See* United States v. United Mine Workers, 330 U.S. 258, 292 n.57 (1947) (holding that "[i]t cannot now be broadly asserted that a judgment is always a nullity if jurisdiction of some sort or other is wanting. It is now held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction" (citations omitted)); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940) (holding that

a court inquiring into its jurisdiction might ultimately conclude via an exercise of inherent threshold jurisdiction that it lacked legal jurisdiction to hear a case under the relevant constitutional and statutory provisions.[176] In a similar fashion, a governmental actor, such as a chief executive, inquiring into her interpretive authority must necessarily exercise inherent threshold interpretive authority to determine her legal or intra-constitutional interpretive authority and could conclude via her exercise of inherent threshold authority that she in fact has no legal or intra-constitutional interpretive authority.

Thus, on the question of interpretive authority, it is indeed true that a constitution cannot eliminate or constrain the inherent, threshold, or extra-constitutional interpretive authority to determine post-threshold or intra-constitutional interpretive authority (analogous to jurisdiction to determine jurisdiction), but that does not mean that a constitution cannot be thought to largely or even definitively settle as a question of intra-constitutional interpretive authority whether departmentalism (as opposed to judicial supremacy), or the reverse, is that constitution's plan for the distribution of interpretive authority within the constitutional system. One might easily imagine a Newgarthian chief executive reading the provision above (exercising his ineradicable inherent, initial, threshold pre- or extra-constitutional interpretive authority to determine his post-threshold intra-constitutional interpretive authority within the constitutional system established by the Newgarthian Constitution) and concluding that however much he desired a departmentalist system, the Constitution's clear command that "The Supreme Court of Newgarth has sole authority to interpret the meaning of this Constitution . . . . " precluded an assertion by the president of coequal departmentalist intra-constitutional interpretive authority.

Similarly, on the question of interpretive methodology, a constitution cannot constrain inherent threshold discretion in determining threshold interpretive methodology, but, again, that does not mean that a constitution might not definitively settle whether, say, an appeal to natural law (as opposed to only positive sources of law) was within that constitution's distribution of intra-constitutional interpretive authority to a particular institution (such as a court) engaged in authoritative constitutional interpretation within the constitutional system. In our Newgarthian example, one might easily imagine a die-hard normative positivist judge (opposed as a matter of political morality to natural law constitutional interpretation) reading the second provision above (exercising his ineradicable inherent threshold discretion to select inherent threshold extra-constitutional interpretive methodologies to determine the contours of his post-threshold intra-constitutional interpretive au-

"[t]he lower federal courts are all courts of limited jurisdiction" but that such limited jurisdiction includes authority "to determine whether or not they have jurisdiction to entertain the cause . . . .").

176. *See supra* note 175 and accompanying text.

thority, including determining the proper use of post-threshold intra-constitutional interpretive methodologies within the constitutional system) and concluding that the Newgarthian Constitution's clear command ("The judges of Newgarth are to interpret the provisions of this Constitution in light of text, original understanding, legal tradition, judicial precedent, and natural law or moral philosophy") authorizes judges, as a matter of Newgarthian constitutional law, to look to natural law or moral philosophy when they interpret the Constitution intra-constitutionally. A Newgarthian judge reading the provision this way would conclude that this provision of the Newgarthian Constitution authorizes recourse by judges to natural law when engaging in intra-constitutional interpretation and thus precludes the claim that such recourse is unconstitutional in Newgarth.

Serious confusion obviously occurs when no distinction is made between (1) inherent, initial, threshold, extra-constitutional, or external interpretive authority and the use of interpretive methodology and (2) noninherent, post-initial, post-threshold, intra-constitutional, or internal interpretive authority and the use of interpretive methodology. Overlooking the difference between the two phases, dimensions, or aspects of interpretive authority and methodology can lead one to assert, mistakenly, that the logical impossibility of constitutional constraint on the first necessitates a parallel logical impossibility of constitutional constraint on the second. The fallaciousness of such a conclusion should now be readily apparent. It would be a similar mistake to argue that there can be no legal constraints on jurisdiction as long as courts possess an initial or threshold jurisdiction to determine legal jurisdiction under the relevant constitutional or statutory provisions.

3. Three Additional Sources of Debate

The failure to distinguish between inherent extra-constitutional authority and noninherent intra-constitutional interpretive authority may be compounded by additional confusion in at least three areas: (1) the failure to recognize the difference between the settled core of law and the open texture of law[177] or "easy" cases and "hard" cases[178]; (2) the failure to recognize that a question such as a constitutional system's distribution of intra-constitutional interpretive authority, as an *interpretive* question of constitutional design, has aspects of both legal fit and moral-

177. The language of the settled core of legal meaning and the open texture is H.L.A. Hart's terminology distinguishing the area where the law is settled or clear from those areas where it is not. *See* HART, *supra* note 130, at 124–41.

178. The language of easy and hard cases is Dworkin's terminology, paralleling Hart's, and is also intended to distinguish the area where the law is settled or clear from those areas where it is not. *See* DWORKIN, RIGHTS, *supra* note 6, at 81–130; *see also* KENT GREENAWALT, LAW AND OBJECTIVITY 227–28 (1992) (discussing the similarities between Hart's and Dworkin's substantive analysis); POSNER, *supra* note 147, at 97.

political justification,[179] and thus that the moral-political justification aspect of an interpretive question should not be confused with a purely moral-political noninterpretive analysis; and (3) the failure to properly understand the implications—for the question of constitutional constraints on constitutional interpretation—of the "social fact" grounding of legal systems, the external and internal points of view, and ways in which a constitution may be said to legally and morally bind its citizens and public officials.[180]

For instance, on one view, questions of institutional interpretive authority—such as whether supreme interpretive authority should be centered in a supreme court (i.e., judicial supremacy) or distributed equally among the three traditional branches of government (i.e., departmentalism)—are understood as wholly pre- or extra-constitutional questions, which a constitution itself cannot substantially resolve or settle as a question of constitutional structure internal to the constitutional system.[181] Someone embracing this view might contend, for example, that even a plain-language endorsement or rejection of judicial supremacy in the text of the Constitution could not resolve or settle the question of judicial supremacy as a question of constitutional law and, therefore, that the question of judicial supremacy would remain open as a preconstitutional question for direct normative inquiry[182] and not as a (partially or wholly) closed interpretive question of the meaning of constitutional structure (with both descriptive-legal fit and prescriptive political-justification aspects). Additionally, there is reason to think that this same line of argument would apply to questions relating to constitutional constraints on other aspects of the judicial role, such as judicial deference to political actors (e.g., questions relating to the clear mistake doctrine) and judicial interpretive theory (e.g., debates about the propriety of various interpretive methods and the exercise of varying degrees of political discretion by judges). A series of issues here is worth unpacking.

a. Easy Cases: Limits on Intra-Constitutional Interpretive Authority in the Settled Core of the Constitution

First, it should be evident that a clear textual statement in a constitution can provide a legal basis for resolution of the core of a structural

179. Again, this is Dworkin's terminology and conceptual analysis of the nature of the interpretive process. DWORKIN, LAW'S EMPIRE, *supra* note 19, at 225–75; DWORKIN, RIGHTS, *supra* note 6, at 81–130.

180. This is in part Hart's terminology and analysis of the sense in which law can be said to bind or obligate citizens and officials. *See* HART, *supra* note 83, at 56–57, 88–91, 102–05.

181. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 459–60.

182. *Cf. id.* at 460 (asserting that an express provision in favor of judicial supremacy would not in fact settle the judicial supremacy question); *id.* at 459 (asserting judicial supremacy as a normative proposition for "acceptance" as authoritative even if "the Constitution actually repudiates such a role" for the Court).

question over judicial authority. Imagine that the Newgarthian Constitution contains the following statement:

> The Federal Republic of Newgarth is founded upon judicial supremacy and hereby rejects departmentalism or co-ordinate review by all three branches of government. The Federal Supreme Court of Newgarth thus has the supreme authority to determine the meaning of this Constitution and all other government officials, including the members of the federal executive and legislative branches, must defer to the Newgarthian Supreme Court's interpretation of the Constitution.

Again, imagine that the Newgarthian President confronts the question of judicial supremacy and exercises her pre-or extra-constitutional inherent threshold interpretive authority, also necessitating the deployment of extra-constitutional or threshold interpretive methodology in order to determine whether or not the Newgarthian Constitution mandates judicial supremacy or departmentalism as its intra-constitutional distribution of interpretive authority. If the president, in exercising her inherent threshold interpretive authority, deploys commonsense interpretive methodologies based on ordinary linguistic usage, context, and purpose, she will very likely adhere to the plain meaning of the provision endorsing judicial supremacy. In fact, it is highly unlikely that the Newgarthian President who accepts the authority of the Newgarthian Constitution (by which presumably she holds her office) and seeks in good faith to understand and adhere to her constitutional obligations could maintain in the face of this provision that the Newgarthian constitutional structure endorses departmentalism and rejects judicial supremacy. In short, a basic understanding of the nature of legal rules as presenting easy cases as well as hard cases (as having both a settled core of meaning, in part based on common linguistic usage and a commonsense appraisal of context and purpose, as well as an open texture) necessitates a recognition that a constitution could, at least in some cases, provide a constitutional basis for resolving, to some significant degree, the distribution of interpretive authority within the constitutional system.[183]

Further, there is no reason to doubt that the provisions of a constitution concerning distribution of intra-constitutional interpretive author-

183. *See also* HART, *supra* note 83, at 148 (noting that the settled core of a constitution may confer authority to "say what the constitution is" in the open texture). The same point is true as it applies to interpretive methodology. Thus, for instance, the "Wittgensteinian commonplace that rules do not determine their own application," Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 460, 463, in no way eliminates the interpretive value of "rules" that guide the application of other rules—such as statutory definitions, interpretive default rules, or codified canons of construction where they are recognized as authoritative. While such provisions cannot eliminate interpretive uncertainty, their "settled core" of meaning can certainly narrow it in an important range of cases. *See*, *e.g.*, MODEL PENAL CODE § 2.02(2) (1962) (defining with precision culpable mental states of purpose, knowledge, recklessness, and negligence as used within the code); MODEL PENAL CODE § 2.02(4) (1962) (providing that "[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears").

ity can have a substantial settled core of meaning as well as an open texture. This is so because of the likely existence of meaningful constraints on the forms of legal interpretation, even in the absence of constitutional constraints, shaping the exercise of inherent threshold interpretive authority and, thus, ultimately governing the determination of limits on intra-constitutional interpretive authority.[184] Such constraints on inherent interpretive authority tend to channel interpretation at this phase into particular stable and predictable forms and methods, establishing a clear settled core of meaning for the legal provisions at issue.[185] For instance, while it is true that the exercise of an inherent or threshold authority to interpret a constitution cannot (as a matter of logical necessity) be constrained by the constitution or objected to as unconstitutional, such an exercise of interpretive authority could be constrained by recognized legal or political norms and thus could be objected to as lacking various forms of legal or political legitimacy. Such legitimacy-based forms of argument are familiar to judges, lawyers, and legal scholars and are grounded in claims that an exercise of interpretive power deviates from widely accepted norms of legal reasoning within that legal culture (thus lacking a form of legal legitimacy)[186] or from accepted norms of political principle within that political culture (thus lacking a form of political legitimacy).[187] In addition to these forms of legitimacy claims, interpreters of a constitution are likely to feel the need to harmonize their extra-constitutional interpretation of a provision with their intra-constitutional interpretive methods, so that an extra- and intra-constitutional interpretation of a provision would not lead to divergent results. One could think of this as a form of "reflective equilibrium" between extra- and intra-constitutional interpretation of a constitution, involving a back-and-forth shifting between the two perspectives until interpretive equilibrium or harmony is achieved.[188] In short, the need for various forms of legal legitimacy, political legitimacy, and interpretive equilibrium will likely constrain constitutional interpretation even at this extra- or preconstitutional stage. Thus, it is very likely that a clear statement of constitutional limits on intra-constitutional interpretive authority, including the use of interpretive methodologies, would settle the core of any dispute involving that question.

184. *See, e.g.*, BOBBITT, CONSTITUTIONAL FATE, *supra* note 19, at 7 (listing five types of arguments that frame constitutional interpretations).

185. *Cf.* HART, *supra* note 130, at 124–41.

186. *See* BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 19, at 6–10.

187. *See* KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW (1999) (discussing the relationship of a moral norm such as popular sovereignty to interpretative theories such as originalism).

188. For instance, it is very likely that an interpretive methodology provision textually privileging originalism or nonoriginalism as an interpretive method would influence how that provision itself was ultimately interpreted. On the concept of reflective equilibrium, see JOHN RAWLS, A THEORY OF JUSTICE 48 (1971).

b. Hard Cases: Limits on Intra-Constitutional Interpretive Authority in the Open Texture of the Constitution

Second, even if a legal fit aspect of interpretive analysis of a constitution (drawing not just on the constitutional text but on multiple modalities of constitutional interpretation such as history, structure, judicial precedent, or social ethos)[189] did not establish a definitive answer to the question of whether a constitution's plan for the distribution of intra-constitutional interpretive authority is one of judicial supremacy or departmentalism in a given constitutional system, and thus in some sense the question were to remain in that system an open and/or disputed question, one would not be justified in concluding that the question was non- or preconstitutional in nature and therefore a purely moral-political, noninterpretive question for direct normative argument. It is widely recognized that open, unsettled, or disputed constitutional questions retain their status as constitutional questions, and thus hard constitutional cases (where legal materials leave open two or more possible answers requiring resolution through some form of moral-political justification) are still a species of constitutional cases.[190] In short, a constitutional question does not have to be closed, settled, or easy to qualify as a true constitutional question as opposed to an extra-constitutional, moral-political, or prudential question.

This point is made even clearer if one recognizes that moral-political concerns only apply once a threshold of legal fit has been met. Thus, while it is true that the legal fit aspect of interpretive analysis may not settle the meaning of a legal system's constitutional structure as between judicial supremacy and departmentalism in a given constitutional system at a given time, it still might preclude other candidates from interpretive consideration.[191] This point becomes clearer still if one envisages an absurd example, such as a statement by a particular individual (John Smith) or state (Massachusetts) that he/it and he/it alone is the U.S. Constitution's sole choice for final arbiter of the meaning of the Constitution. Surely a legal fit analysis of the Constitution precludes any interpretation making John Smith or Massachusetts the final arbiter of constitutional meaning, even if a moral-political analysis were to suggest that John Smith, perhaps a noted liberal philosopher or professor of constitutional law, surpasses the Court in the quality of his moral insight and legal decision making or that Massachusetts, as a political community,

189. BOBBITT, CONSTITUTIONAL FATE, *supra* note 19, at 7.

190. *See* DWORKIN, LAW'S EMPIRE, *supra* note 19, at 225–75; DWORKIN, RIGHTS, *supra* note 6, at 81–130. Thus, for instance, Alexander and Schauer's endorsement of judicial supremacy as a matter of "normative institutional design," grounded in the Court's asserted capacity to provide an optimal settlement function, is highly relevant to the interpretive question, occurring in the Constitution's structural open texture (if this issue is properly viewed as occurring in the open texture), of whether the American constitutional design is best understood as incorporating judicial supremacy or departmentalism. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 473–78.

191. *Cf.* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 459–60.

also has a proven track-record of heightened moral insight and legal decision making vis-à-vis the Supreme Court. Thus, even if the legal fit aspect of interpretive analysis does not entirely resolve the interpretive question justifying recourse to the moral justification aspect of interpretive analysis, the question remains a question of legal interpretation of the meaning of the structure of the Constitution, not a purely moral-political extra-constitutional question.

c. Questions of Constitutional Obligation

i. The Social Fact Basis of Internal Legal Authority

Third, another potential source of confusion on this question may involve a failure to understand the implications of the social fact basis of legal systems,[192] to distinguish between the internal point of view and the external point of view,[193] and a concomitant confusion about the way in which a constitution can be said to bind its citizens and public officials, legally and morally, to adhere to the constitution's resolution of issues.[194] For instance, on one view, one might contend that since a constitution cannot answer the question of whether the constitution itself is authoritative or supreme, a constitution is also incapable of answering the question of its authoritative or supreme interpreter, at least with authority or supremacy.[195]

One may begin to unravel this line of thought by starting with basic Hartian analysis: a constitution's status as authoritative or supreme law (i.e., a "rule of recognition" or ultimate criterion of legal validity) in a given jurisdiction ultimately turns on the social fact of its acceptance as authoritative within that jurisdiction by some critical mass of public officials and citizens.[196] In turn, the question of the degree of acceptance a constitution receives will depend in part, as a practical matter, on various normative and prudential concerns that weigh in favor of or against such acceptance of the constitution.[197] Therefore, the authoritative status of a constitution rests not (merely) upon the constitution's assertion of its su-

192. The terminology of social fact is Hart's. *See* HART, *supra* note 130, at 110 (contending that the assertion that a rule of recognition "exists can only be an external statement of fact").

193. The terminology of internal and external points of view is Hart's. *See id.* at 56–57, 88–91, 102–05.

194. *See id.* at 116 (The "rule of recognition," "if it is to exist at all, must be regarded from the internal point of a view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only.").

195. *Cf.* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 461 (contending that "because the text [of a constitution] cannot answer the question of whether the text is authoritative, neither can it answer the question of whether someone's interpretation of that text, including that part of the text that purports to designate an authoritative interpreter, is authoritative").

196. HART, *supra* note 130, at 114–23. For an exploration of the complexities surrounding viewing the U.S. Constitution as a Hartian rule of recognition, see Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987).

197. HART, *supra* note 130, at 107.

premacy in its text, but rather, ultimately, on the social fact of its acceptance as authoritative, among a significant mass of officials and citizens, which in turn rests partly on normative and prudential considerations affecting their (non)acceptance.[198] This analysis is certainly accurate as an empirical or descriptive matter. Obviously, writing on a tablecloth that "this tablecloth is the supreme law of the land in the United States" does not make that tablecloth the supreme law of the land or any kind of legal authority for anyone.[199] Nor, for instance, does the Supremacy Clause of the Confederate Constitution establish it as supreme law within the territory of the old Confederate states.[200] The long-standing rejection of the authority of the Confederate Constitution as a matter of social fact renders that constitution a legal nullity of merely historical interest, not the rule of recognition of an existing legal system. In short, the status of the U.S. Constitution as in fact authoritative depends not on a mere textual assertion of its supremacy in the Constitution itself, but rather on the social fact of its acceptance as authoritative by the public officials and ordinary citizens of the United States. The question that arises here is this: what are the implications of this line of analysis for the issue of whether there can be a constitutional resolution of intra-constitutional interpretive authority as well as constitutional resolution of other questions of structure and rights more broadly?

As noted, under one view, the following implications flow from the recognition of the Hartian social fact thesis: precisely because a constitution cannot ultimately answer the question of whether it is authoritative or supreme (i.e., that is determined by the social fact of official and citizen acceptance of the constitution as authoritative), neither can a constitution ultimately answer the particular question of its authoritative or supreme interpreter with authority or supremacy.[201] In short, the authority of a constitution depends upon the extra-constitutional fact of its acceptance as authoritative, which is a question for direct normative discourse and argument. Therefore, the constitution's potential distribution of interpretive authority and authorization of interpretive methodologies also depends for its authority on the extra-constitutional grounds of its acceptance as authoritative, grounds which in turn, again, pivot on nor-

198. *Id*. at 117 ("The assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour.").

199. *See also* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 465 (distinguishing between the internal validity of a constitution and the social fact of its acceptance as authoritative by a political community).

200. *See* CONST. OF THE CONFEDERATE STATES OF AM. art. VI, § 3 (1861) ("This Constitution, and the laws of the Confederate States, made in pursuance thereof, and all treaties made, or which shall be made under the authority of the Confederate States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.").

201. *Cf.* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 461.

mative and prudential concerns.[202] Under this view, the questions of interpretive authority and methodology internal to a constitutional system are not principally interpretive questions concerning the constitution's authoritative resolution of these questions, but rather are extra- or preconstitutional questions of social fact (i.e., questions concerning what norms governing interpretive theory are accepted as authoritative by the political community in question) and thus questions for direct normative argument (i.e., questions as to what norms *should* be accepted or rejected by the members of the political community).[203] There is good reason to think the analysis outlined here suffers from significant flaws.

At the outset, one should note the implications of this argument for constitutional law generally. The analysis above cannot be confined to the context of constitutional supremacy, interpretive authority, and interpretive methodology, but rather clearly extends to all questions commonly understood to be constitutional questions, such as freedom of speech, fundamental rights, and equal protection, all of which, under this view, are ultimately extra- and/or preconstitutional questions of social fact subject to direct normative argument. This is so because all such putative constitutional questions depend upon the social fact of acceptance of the authority of the constitutional norm in question in order to even arise as live constitutional questions. Plainly, the Constitution and each of its norms or provisions—like the tablecloth in the example above—is not (and cannot be) self-authorizing, but rather depends for its authority on its acceptance as authoritative by a sufficient number of the public officials and citizens of the United States. But what conclusion, then, are we to draw from this line of analysis? That the meaning of, say, the Equal Protection Clause is *not* a constitutional question (i.e., an interpretive question about the meaning of the Equal Protection Clause as a provision of the Constitution), but rather an extra- or preconstitutional empirical-normative question, for which interpretive analysis—with its potential reliance on text, original meaning, and evolving legal traditions—is inappropriate or unnecessary? And, further, that *all* questions commonly understood as constitutional and interpretive in nature (such as the meaning of the First Amendment's free speech provision, the

202. *Cf. id.* (contending that "[i]f the original Constitution lacks the *Cooper* [judicial supremacy] rule, then our claim is that the original Constitution is normatively inferior to a constitution that contains the *Cooper* rule" and that "we [should] obtain the *Cooper* rule (or recognize the existence and validity of the *Cooper* rule) in the same way that we have obtained the original Constitution itself, namely, *by accepting it as authoritative*"); Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 160–61 (Sanford Levinson ed., 1995) (contending that constitutional change can occur outside of recognized internal processes of change such as constitutional amendment and constitutional interpretation and that "whether these changes have occurred will be a question of social and political fact and not a question of law, constitutional or other wise" and that "whether these changes should occur will be the necessarily political and moral question of what status a constitution should have, and what status its particular provisions should have.").

203. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 459–67.

Eighth Amendment's "cruel or unusual punishments" provision, the Fourteenth Amendment's due process provision, etc.) are in fact preconstitutional, noninterpretive questions, for direct normative rather than interpretive argument? Such contentions are obviously untenable.

ii. Four Senses of the Term "Obligation"

It may be obvious that any analysis rejecting the constitutional and interpretive status of what are universally viewed as questions of constitutional interpretation is mistaken or overstated in some important respect, but the precise nature of the mistake may be harder to pin down. The central issue here is the nature of the obligation(s) one may have to adhere to a constitution and thus the way in which a constitution may be thought to bind public officials and citizens, precluding direct normative analysis of issues settled authoritatively by the constitution and therefore canalizing moral argument into discussions of formal constitutional change (i.e., amendment, convention, etc.) or into the "indirectly" moral justification aspect of interpretive arguments occurring within the open texture of the constitution (i.e., those areas where legal materials, such as constitutional text, do not provide a single authoritative answer to a legal question but rather leave open two or more such answers subject to interpretive selection through a moral-political analysis).

One can begin this analysis by distinguishing the various senses in which one can be said to have an obligation to obey the law. As analyzed by John Finnis, these include the following: (1) sanction-based obligation, (2) internal legal obligation, (3) primary moral obligation to obey one's legal obligations, and (4) secondary or collateral moral obligation to obey one's legal obligations.[204] These each deserve discussion in more detail. First, one can be said to have an obligation—or, rather, be obliged—to adhere to a constitution's directives of right and structure in an operational constitutional system in the simple form of being subject to coercion or sanction for nonadherence, such as civil and criminal penalties.[205] This is the most basic form of obligation and the inspiration behind early positivist command theories of the law.[206] Second, one can have an obligation to adhere to a constitution's directives in a functioning legal system in the sense of an *internal* legal obligation, which is to say that the extant legal system recognizes, internal to that system, that a legal obligation exists under its ultimate criterion of validity or rule of

204. *See* FINNIS, *supra* note 24, at 233–37, 354–66 (discussing four distinct senses of obligation that may be reflected in a single grammatical statement such as X has obligation Y, including the Austinian sanction sense, the Hartian "internal" sense of legal obligation, the moral obligation to obey just laws, and the potential collateral moral obligation to obey some unjust laws passed by a generally just government).

205. *See id.* at 355; HART, *supra* note 83, at 20–25.

206. *See* HART, *supra* note 83, at 20–25.

recognition.[207] This is a second basic understanding of obligation and is the central insight of modern Hartian positivist approaches to legal obligation.[208]

Significantly, for purposes of analysis here, the very viability, as a matter of social fact, of a legal system ultimately depends upon the social fact of adoption by sufficient numbers of public officials and citizens of what Hart has famously called the "internal point of view"—the recognition of the internal legal obligations of a legal system as normatively binding, not simply as threats or coercive commands that must, as a practical matter, be obeyed in order to avoid some form of sanction or punishment (i.e., the first form of obligation or being obliged).[209] Or, in other words, one cannot actually operationalize a legal system without widespread recognition of the normativity of its internal legal obligations, which cannot occur without widespread adoption of the internal point of view among public officials and citizens recognizing internal legal obligations as obligatory.[210] Thus, a primary sense in which operational legal systems can be said to bind their public officials and citizens more broadly is through internal legal obligations that public officials and citizens recognize, from the internal point of view, as normatively authoritative or binding within their legal system.[211]

A key distinction, then, in analysis of obligation is that between questions of obligation asked from the internal point of view (i.e., What are my rights and duties, powers and liabilities under this constitution which I recognize as authoritative or binding?)[212] and questions asked from what one may call the "external point of view" concerning adoption of the internal point of view (i.e., Should I accept or not accept this constitution or a part of it as authoritative or binding?).[213] Questions such as the latter, from the external point of view, are clearly questions for direct or unmediated normative argument, since they involve the question of *whether* to accept a constitution as authoritative or binding, a question that is fundamentally moral-political in nature rather than interpretive. However, once one adopts the internal point of view, one, by definition, accepts a constitution as authoritative and thereby commits oneself to a good faith effort to understand and adhere to its internal legal obligations of rights and structures as determined by the rule of recognition or ultimate criteria for legal validity within the constitutional system.[214]

In the context of U.S. constitutional law, the social fact of very widespread public official and citizen acceptance of the Constitution as

207. *See* FINNIS, *supra* note 24, at 355–57; HART, *supra* note 83, at 88–91.
208. *See* HART, *supra* note 83, at 88–91, 100–10.
209. HART, *supra* note 130, at 85–91, 100–10.
210. *Id.* at 114–17.
211. *Id.*
212. *Id*.
213. *See id*. at 56–57, 88–91, 102–05.
214. *Id.*

authoritative, as a functional rule of recognition or criterion for ultimate legal validity, ensures that the constitutional system remains an operative legal system. One may note, then, that public officials and citizens operating within the constitutional system do so overwhelmingly from the internal point of view, accepting the authority of the Constitution as legally binding and therefore recognizing the Constitution's resolution of questions of constitutional structure and rights internal to the system as obligatory, precluding direct normative analysis of legal questions addressed, expressly or impliedly, by the Constitution, except as a matter of constitutional reform such as constitutional amendment.[215] Therefore, one may conclude that the *central debate* over the proper scope of judicial power in American constitutional law properly occurs from within the internal point of view, which recognizes that the Constitution's directives (i.e., internal legal obligations) are authoritative, obligatory, or binding. Obviously, this fact should immediately lead us to question the relevance of *direct* normative discourse to the central debate over the judicial power, given that the Constitution may be thought to resolve in binding fashion many questions in that area.[216]

Another distinction in the analysis of obligation involves the difference between the internal point of view (i.e., the social fact of obligation that a public official or citizen may experience in a functioning legal system with respect to its internal legal obligations) and the normative reasons that might be adduced in support of the adoption of the internal point of view or obligation to obey internal legal obligations.[217] In other words, one may ask *why* public officials and citizens adopt the internal point of view, accepting their constitution as legally binding or authoritative. The answer is very likely that they adopt the internal point of view for any number of reasons individually or in combination: the unreflective allegiance to the status quo, the legitimacy of a constitution's mode of inception in the higher will of the people, the perceived justice of the constitutional order, or the sense that fidelity to the constitution is a moral obligation because of benefits the constitutional system is able to confer on the citizenry in general in terms of the common good.[218]

Indeed, the question of normative bases for adoption of the internal point of view raises the question of the potential moral obligations—primary and/or secondary—one may have to obey one's internal legal obligations in an operational or viable legal system. For instance, the very fact of widespread social acceptance of a constitutional system as authoritative by public officials and citizens may be thought to create a significant form of *moral or political obligation* to adhere to a constitution's directives: a moral obligation to adhere to the constitutional sys-

215. *See id.* at 113–17.
216. *See, e.g.*, Nowlin, *Constitutional Illegitimacy*, *supra* note 5.
217. *See* FINNIS, *supra* note 24, at 354–66.
218. *Id.*

tem's authoritative legal obligations.[219] This primary moral obligation—the third form of obligation listed above—is rooted in the imperative of resolution of pressing problems of social coordination that must be resolved in order to serve the common good of the members of the political community.[220] Obviously, the social fact of widespread acceptance of a constitutional system generally places the government established by that constitutional system in a position to resolve problems of social coordination authoritatively.[221] Thus, the social fact that the existing government can resolve coordination problems that must be resolved as a matter of moral necessity creates a (defeasible)[222] moral obligation to recognize, rather than challenge, that government's exercise of authority.[223] This primary moral obligation to obey one's legal obligations is a third primary sense in which constitutions, under certain conditions, can be said to bind public officials and citizens more broadly.[224] Additionally, a secondary or collateral moral obligation—the fourth form listed above—may be thought to exist in instances where rejection of the binding authority of particular laws (or constitutional provisions) in a generally just and prudent legal system or constitutional order as unjust or imprudent could undermine that legal system or constitutional order.[225] Plainly, the selective assertion that certain constitutional provisions lack binding authority might be thought in many instances to undermine the authority of the constitution more generally, creating a potential collateral obligation to obey even unjust or imprudent provisions of a given constitution if the constitution as a whole is worthy of moral recognition as legally binding.[226]

Clearly, the primary moral obligation to obey one's legal obligations applies to the U.S. Constitution, given the U.S. government's amply demonstrated ability to resolve the problems of social coordination existing in the territory of the United States and to promote the common good in a reasonably just fashion. Additionally, the secondary or collateral moral obligation to obey legal obligations also is suggestive of the likely impropriety of selective repudiation of individual provisions or norms of the Constitution in favor of putatively more normatively attractive alternatives, at least without recourse to the proper avenues of constitutional change recognized within the constitutional system—such as constitutional amendment. This observation also suggests that the central debate in American constitutional law on the proper scope and exer-

219. *Id.* at 233–37, 354–66.
220. *Id.* at 245–52.
221. *Id.* at 246.
222. *Id*. at 250.
223. *Id.* at 245–52.
224. *Id.* at 357–61.
225. *Id.* at 361–62. As Finnis observes, this form of obligation may entail "only such degree of compliance as is necessary to avoid bringing 'the law' (as a whole) 'into contempt.'" *Id.* at 361.
226. *Id.* at 361–62.

cise of judicial power must recognize the Constitution's potential resolution of interpretive authority as binding, both legally and morally, raising questions as to the relevance of direct normative argument to this central debate.

iii. Implications of Legal and Moral Obligations to Adhere to a Constitution's Resolution of Intra-Constitutional Interpretive Authority

What, then, does this analysis of constitutional obligation tell us about the authority of a just and operational constitution to resolve questions of right and structure, including questions of interpretive authority and methodology within the constitutional system? Obviously, if one is operating from the internal point of view (i.e., recognition of a constitution as authoritative and therefore legally binding), then one will view the constitution and its directives as legally obligatory in nature. The recognized binding quality of these constitutional directives precludes recourse to direct normative argument, except from the perspective of constitutional reform within the system.[227] Additionally, if the constitutional system is just and is properly serving the common good, one is likely morally bound to adhere to its legal directives, and one may also have a further collateral moral obligation to adhere to particular outlier constitutional norms that may be thought unjust or imprudent in the interest of preserving the just constitutional order as a whole.[228]

Thus, whether the text of a just and operational constitution in fact states that the constitution is "supreme" or, on the other hand, states that the constitution is subordinate to another legal system (i.e., the way a state or provincial constitution may expressly or impliedly recognize its subordination to the federal constitution of a federal republic),[229] the constitution's resolution of the issue is properly seen as legally and morally authoritative, precluding direct normative argument on the question of constitutional supremacy.[230] Similarly, whether the text of a just constitution clearly states that the judicial branch is to have the final say on the meaning of the constitution or, on the other hand, states that the supreme interpretive authority is distributed equally across the three branches of the national government, the constitution's resolution of the issue is properly seen as legally and morally authoritative. The same is also true of interpretive methodology—whether the text of the just con-

227. *See id.* at 354–66; HART, *supra* note 83, at 88–91, 100–10.

228. *See* FINNIS, *supra* note 24, at 233–37, 354–66.

229. *See*, *e.g.*, MISS. CONST. art. III, § 7 ("The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be assumed by this state, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this state to the government of the United States.").

230. Though if the constitution in question established its subordination to a larger federal constitution, one's inquiry would have to extend to the normative questions surrounding the federal constitution.

stitution states that the judiciary may or may not draw on natural law or moral philosophy in its authoritative resolution of constitutional questions, this resolution is also properly viewed as morally and legally authoritative. And the same may be said for other constitutional resolutions of questions of structure and right, such as provisions mandating respect for the separation of powers, federalism, freedom of speech, freedom of religion, fundamental rights, and basic equality. Constitutional resolution of these issues in a just and operational constitutional system is properly seen as precluding recourse to direct normative argument by citizens and public officials of the political community, except, again, in the context of constitutional reform. It should be clear, then, that questions of constitutional supremacy, interpretive authority, and interpretive methodology can be the subject of constitutional directives or commands that should and will be understood as binding both legally and morally. These binding directives or commands in turn will give rise to questions of interpretation of the constitution in order to determine their more precise meanings as a necessary precondition for good faith compliance by public officials and citizens.

If one assumes, as is indeed the case, that the United States possesses an operational and just constitutional system, then the Constitution's resolution of questions of intra-constitutional interpretive authority is morally and legally binding. In fact, the main line of debate over the proper scope of judicial power within the American constitutional system should be understood as recognizing this fact and thus as taking place from the internal point of view. This central debate therefore rightly seeks to answer questions of judicial power as potential *interpretive* questions concerning the Constitution's resolution of issues of distribution of interpretive authority, generally precluding any recourse to direct (i.e., noninterpretive) normative argument except as a matter of constitutional reform. Thus, there is no conceptual error or analytic confusion of any kind on the part of American scholars who properly recognize the binding force of the U.S. Constitution and therefore seek to determine—through an interpretive process—what the Constitution may require as a matter of law in the area of distribution of intra-constitutional interpretive authority and methodology.[231] Nor, of course, is there any confusion or conceptual error in seeking to answer these questions of constitutional design by deploying interpretive methods that emphasize legal fit arguments of text, history, and tradition, though one can, of course, disagree with that particular approach.[232] In fact, as should now be clear, the more likely candidate for error would be any

231. *Cf.* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 463 ("Questions of how we are to read the constitutional text loom outside of and are therefore logically antecedent to the constitutional text, for these are questions that in the final analysis determine what the text is to mean.").

232. On the modalities of constitutional interpretation, see BOBBIT, CONSTITUTIONAL FATE, *supra* note 19, at 3–8.

reverse contention—that intra-constitutional questions of interpretive authority are properly subject to direct normative, rather than interpretive, analysis.[233]

Even so, the assertion that questions of intra-constitutional interpretive authority and methodology are questions for direct moral-political inquiry is understandable given the analytic complexities involved and the different levels or dimensions of analysis required in this area. For instance, as suggested and as will be discussed in more detail below, direct normative analysis is involved in determining whether a constitutional norm is obligatory, how to interpret a constitutional provision as a matter of external interpretation, and who is to interpret a constitutional provision authoritatively as a matter of external interpretation if an authoritative external interpreter is needed.[234] Additionally, indirect normative analysis also plays a role in even an interpretive context as moral-political interpretive analysis occurring after a threshold of legal fit has been met.[235] One would be right to suggest that a set of processes which one may variously call moral-political interpretive, quasi-legislative, or political—driven in significant part by nonlegal normative and prudential concerns—will likely resolve many questions of interpretive authority and methodology within a constitutional system as a matter of "social fact," at the very least where the constitution leaves significant ambiguity or open texture.[236] Indeed, H.L.A. Hart raised precisely this issue in his discussion of open texture in the rule of recognition, with its clear implication of a creative interpretive or quasi-legislative judicial or more broadly political resolution of issues in the open texture of the rule of recognition through a process of assertions of interpretive authority by courts and potential ultimate agreement or at least acquiescence in those assertions.[237] Further, in American constitutional law, the slow rise

233. As noted and as will be discussed in more detail below, direct normative analysis is the basis on which any resolution of questions of extra-constitutional interpretive authority would be resolved.

234. *See* discussion *infra* Part III.F.3.d.

235. *See* discussion *infra* Part III.F.3.d.

236. Thus, again, Alexander and Schauer's normative structural argument in favor of judicial supremacy is scarcely irrelevant to the interpretive project of discerning the best understanding of the Constitution's allocation of interpretive authority among the branches of government. This issue can be viewed as within the Constitution's "open texture" and therefore to be resolved through an interpretive process with an important moral-political aspect within the constraints set by traditional legal materials. Additionally, the Court could be viewed as a "supreme" extra-constitutional interpretive authority and therefore its assertion of the *Cooper* rule could be viewed as a supreme extra-constitutional resolution of the disputed question of the Court's intra-constitutional interpretive authority.

237. HART, *supra* note 83, at 121, 144–50. Hart observes "[o]ne form of 'formalist' error may perhaps just be that of thinking that every step taken by a court is covered by some general rule conferring in advance the authority to take it, so that its creative powers are *always* a form of delegated legislative power. The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success." *Id.* at 149. One may note here that the Supreme Court's assertion of judicial supremacy in a series of cases beginning with *McCulloch* involved precisely this sort of process of assertion of interpretive authority in the open texture of the Constitution and its eventual significant acceptance in general out-

and general establishment of a significant form of judicial supremacy in constitutional interpretation in the late nineteenth and early twentieth centuries demonstrates a process of this gradual resolution of the core of a contested constitutional question in the open texture of the structure of the Constitution.[238] What must be recognized, however, is that such a politically driven resolution of a question in no way conflicts with that question's ultimate status as a matter of interpretation of a constitutional norm understood as legally and morally binding on its interpreters.

d. The Limited Role of Direct Normative Argument in Determining Intra-Constitutional Interpretive Authority

As suggested, noninterpretive direct normative argument (i.e., moral-political analysis asserted *outside* of an interpretive process involving aspects of both legal-fit analysis and moral-political justification analysis) plays a role in the process of determining questions of interpretive authority within a constitutional system. In fact, as sketched above, there are three aspects of the interpretive process where direct normative argument may play an important role in the ultimate resolution of questions of intra-constitutional interpretive authority and methodology: (1) the recognition of a constitution or its interpretive provisions as binding or nonbinding;[239] (2) the selection of interpretive methods at the inherent or threshold stage of constitutional interpretation;[240] and (3) the possible selection of an interpretive authority at the inherent or threshold stage of constitutional interpretation.[241] Each of these aspects deserves further elaboration.

First, as discussed, there is a noninterpretive moral-political question of recognition of a constitution or its interpretive provisions as binding or obligatory.[242] For instance, whatever the Constitution of Newgarth, properly interpreted, may require as to its distribution of intra-constitutional interpretive authority, if the Constitution of Newgarth itself is rejected or if its particular directives on interpretive authority are viewed as nonbinding by its political community, then its purported resolution of interpretive authority becomes moot. Obviously, the acceptance or rejection of the Constitution of Newgarth or its interpretive provisions as binding is ultimately a question for moral-political argument, turning, as discussed earlier, on questions of its mode of inception,

line by the other branches of government. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) (contending that "by this tribunal alone can the decision [on the constitutionality of the Bank of the United States] be made" and that "[o]n the Supreme Court of the United States has the constitution of our country devolved this important duty").

238. *See supra* note 14.

239. *See* Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 461, 465; FINNIS, *supra* note 24, at 245–52; HART, *supra* note 83, at 107–08.

240. Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 463.

241. *Id*. at 459–67.

242. *See supra* text accompanying notes 211–14.

(in)justice, ability to secure the common good, and so on.[243] Thus normative analysis in direct form (i.e., not as part of an interpretive process in association with legal-fit analysis) can play an important role at this foundational level if the question of whether a constitution or its particular provisions should be viewed as binding is actually an issue. However, as noted, this moral analysis must include a recognition of the potential primary and secondary moral obligations to obey existing legal obligations under an operative constitution.

Second, there is the question of the selection and use of interpretive methodologies at the inherent, threshold, extra-constitutional interpretive stage. As discussed, debate over *how* to interpret a constitution at this threshold stage cannot be constrained by the constitution itself, and, therefore, as noted above, any debate at this stage over interpretive methodologies is essentially a moral-political debate centering around questions of legal and political legitimacy of various interpretive methods.[244] This debate is a directly normative one and fundamentally noninterpretive in the sense that there is no constitutional provision, which if correctly interpreted, could hope to govern inherent, threshold, extra-constitutional interpretive authority or recourse to interpretive methodologies without simply creating a problem of infinite regress.[245] For instance, if the Constitution of Newgarth had a provision which was originally understood to endorse original understanding as the constitutionally mandated interpretive methodology, one would still confront the normative question of whether the provision was to be interpreted in light of its original understanding or through rival interpretive methods that might lead to a different conclusion as to its meaning.[246] Thus, for instance, whatever the provisions of the Constitution of Newgarth may read on the question of constitutional constraints on the use of intra-constitutional interpretive methodologies, direct normative argument clearly governs the selection of interpretive approaches to determine what that provision actually means as the text is interpreted.[247] As noted, such direct normative argument might turn on questions of an interpretive approach's adherence to accepted legal conventions, its political attractiveness in promoting popular sovereignty or constitutional flexibility, and, perhaps, even in part in its ability to achieve reflective equilibrium or interpretive harmony as between extra-constitutional and

243. *See supra* text accompanying notes 211–18.

244. *See supra* text accompanying notes 173–76, 211–18.

245. *See, e.g.*, Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 463. Notably, though, an express constitutional privileging of an interpretive approach may significantly affect even external interpretive methods through a gravitation pull in favor of reflective equilibrium or interpretive harmony as between internal and external methods. *See supra* text accompanying note 188.

246. *See, e.g.*, Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 460–63.

247. *Id.*

intra-constitutional interpretive methods.[248] A form of direct normative analysis thus plays a potentially important role here as well.

Third, there is a potential question of the selection of an interpretive authority at the inherent, threshold, extra-constitutional stage. As discussed, debate over *who*, if anyone, should have primacy in the interpretation of a constitution at the inherent or threshold stage cannot be constrained by the constitution without infinite regress, and, therefore, any debate at this stage over interpretive authority is essentially a moral-political debate.[249] Thus, while the hypothetical Constitution of Newgarth, containing a provision expressly resolving the basic question of intra-constitutional final or supreme interpretive authority, might not engender major conflict on the issue, one can easily imagine instances where a constitutional system without an express provision governing intra-constitutional authority—and with multiple institutions with facially plausible claims to such authority—might face a standoff over the question of proper resolution of intra-constitutional interpretive authority, perhaps with all three branches of a tripartite government claiming supreme or final interpretive authority.[250] In such a deadlocked situation, one can imagine a role for noninterpretive moral-political argument in favor of deference to the judgment of one of the three branches, a position not asserted as an interpretation of the constitution's distribution of intra-constitutional interpretive authority to that branch, but rather simply as a pure political argument designed, perhaps, to secure constitutional stability.[251]

In sum, direct normative argument *can* play a significant role in the ultimate resolution of a constitution's distribution of intra-constitutional interpretive authority. Recognition of this fact is, of course, wholly consistent with the claim that, first and foremost, the central debate in American constitutional law over the proper scope and exercise of the judicial power is an *interpretive* debate about the Constitution's distribution of intra-constitutional interpretive authority among the governmental actors within the system, a debate involving questions such as whether the Constitution devolves supreme interpretive authority upon the Supreme Court. Moreover, as this article has shown, this debate should also include questions such as whether the structural or Rule of Law norms of the Constitution mandate a particularized judicial role (such as

248. *See supra* text accompanying notes 186–88.

249. Alexander & Schauer, *Defending Supremacy*, *supra* note 11, at 460–63.

250. *Id.*

251. *Cf. id.* at 459–67 (defending judicial supremacy via the "settlement" thesis). Using the terminology developed in this article, one can observe here that Alexander and Schauer are plainly right that questions of *external* constitutional interpretive authority are "pre or extra-constitutional questions" and, as such, are questions to be resolved through direct normative inquiry. However, there should be no question but that vitally important questions of *internal* or intra-constitutional interpretive authority—such as whether the Constitution confers supreme interpretive authority within the constitutional system on the Supreme Court—remain to be resolved through interpretive argument rather than direct normative argument.

judicial activism or restraint) or prohibit recourse to particular interpretive methods (such as natural law/moral philosophy).

The role of direct normative inquiry on predicate or collateral issues such as the obligation to obey the directives of the Constitution, the selection of interpretive methods at the inherent extra-constitutional stage of interpretation, and the potential selection of an authoritative interpreter at this same stage of interpretation in no way alters this conclusion. As demonstrated, the first, concerning the obligation to adhere to a constitution, is unlikely to be viewed as a serious issue in American constitutional law, given the justice and efficacy of the American constitutional system; the second, of course, is direct normative argument concerning *how* to interpret the Constitution, including its intra-constitutional limits on interpretive authority and thus supports the conclusion that the central debate concerns interpretation of internal constitutional limits; and the third, if it arises, is parallel to the second, concerning normative argument about *who* should interpret authoritatively the Constitution's intra-constitutional limits on interpretive authority and thus further supports the characterization here of the central debate as one of interpretation of intra-constitutional interpretive limits. In the final analysis, then, these questions of judicial power remain fundamentally questions of interpretation of the Constitution's resolution of interpretive authority and methodology internal to the constitutional system.

4. Constitutional Limits on the Supreme Court's Interpretive Authority and Use of Interpretive Methodologies

The preceding discussion establishes that a constitution may place significant constitutional constraints on intra-constitutional interpretive authority and the use of intra-constitutional interpretive methodology internal to a constitutional system. Thus, internal to a constitutional system, a constitution may authorize certain institutions (such as a supreme court or legislative body) to interpret the constitution authoritatively in light of certain authorized constitutional interpretive methodologies (such as textualism, originalism, doctrinalism, or natural law approaches). Therefore, questions of interpretive authority *over* a constitution—such as whether a supreme court is supreme in constitutional interpretation, whether a court should invalidate legislation only in cases of a clear mistake, and whether certain interpretive approaches are authorized by a constitution or prohibited by it—can themselves be constitutional questions *under* a constitution concerning the constitution's conferral of governmental power to interpret on various institutions. As internal constitutional questions of a constitution's distribution of interpretive authority, they must be resolved, as interpretive questions, by an exercise of extra-constitutional interpretive authority and methodology.

Turning to the U.S. Constitution, one may ask whether it places constitutional limits on the Supreme Court's interpretive authority and

use of interpretive methodologies. As discussed, there are only a handful of constitutional provisions directly addressing the Constitution's grant of authority to the Supreme Court, principally those provisions governing the Court's original jurisdiction, subject-matter jurisdiction, and the case or controversy requirement—the last of these commonly read as prohibiting advisory opinions and imposing certain justiciability requirements.[252] Significantly, there are no *express* provisions distributing interpretive authority in terms of judicial deference (i.e., constitutionalizing judicial supremacy or departmentalism, or mandating a clear mistake doctrine for judicial enforcement of constitutional norms) or specifying interpretive methodologies (i.e., prohibiting or endorsing judicial recourse to natural law or moral philosophy).[253]

Even so, it should be clear that the mere absence of express constitutional provisions specifically addressing these questions in no way conclusively suggests the absence of any constitutional conferral of interpretive authority on the judiciary or the absence of constitutional limits on any interpretive authority that may be conferred.[254] Even in the absence of express provisions, these questions could be impliedly resolved by the Constitution. And, in fact, the Court itself has treated central questions of judicial interpretive authority as precisely that—as questions resolved impliedly by the Constitution.[255] Significantly, the Court's establishment of judicial review in *Marbury v. Madison* was an assertion by the Court of an implied grant of power (i.e., judicial review) grounded in significant part in the Constitution's structural feature of the separation of powers and the concomitant essential function of the judicial branch, within the separation of powers, "to say what the law is."[256] Additionally, the Court's first assertion of something approaching judicial supremacy or supreme judicial review in *McCulloch v. Maryland*[257] likely rested on the same structural foundations as *Marbury,*[258] and the Court in *McCulloch* expressly claimed that its supreme interpretive authority derives from the Constitution itself rather than from an extra-constitutional moral-political source.[259] Obviously, this grant of authority must be implied, if it exists at all, given that it is not expressly conferred by the Constitution.[260]

252. *See supra* Part III.C.

253. *See supra* Part III.D.

254. *See supra* Part III.D.

255. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

256. *See Marbury*, 5 U.S. (1 Cranch) at 177 (contending that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is.").

257. 17 U.S. (4 Wheat.) 316 (1819).

258. It is worth noting here that *McCulloch* does not support its assertion of supreme judicial review with a citation to *Marbury*.

259. *See McCulloch*, 17 U.S. (4 Wheat.) at 401 (contending that "[o]n the supreme court [sic] of the United States has the constitution of our country devolved this important duty" of resolving constitutional questions such as the constitutionality of the Bank of the United States).

260. Notably, the Court in *Nixon* derives judicial supremacy as an implied power precisely from the Constitution's structural separation of powers. *See* United States v. Nixon, 418 U.S. 683, 704–05

Thus, the powers of judicial review and judicial supremacy are viewed by the Court as *implied* grants of power to the Court by the Constitution, and, further, these implied powers are derived, as a matter of interpretation, from the structure of the Constitution, even in the absence of express provisions in the constitutional text purporting specifically to grant these powers. It is not surprising, then, that the constitutional limits on (or, alternatively, the delineation of the contours of) these powers are also *implied* and potentially derived in part from constitutional structures rather than from specific textual provisions addressing the judicial power.[261] In short, there is every reason to suppose that implied structural constitutional powers, such as judicial review, have concomitant implied structural constitutional limits establishing the contours of the powers. Thus, questions of interpretive authority and methodology remain (at least in part) constitutional questions impliedly addressed and resolved by the Constitution.

This view is further reinforced by the simple fact that the scope of judicial power has very significant implications for fundamental architectural features of the Constitution as well as for constitutional values or norms such as the Rule of Law.[262] Indeed, given the judicial branch's interactions with the other federal branches and the states, the actual operation of constitutional structures such as the separation of powers and federalism depends, in significant part, on the scope of the federal judicial power.[263] The same is true of the Rule of Law.[264] Thus, the resolution of debates over whether the Constitution requires judicial supremacy (as opposed to departmentalism) or judicial activism (as opposed to judicial restraint) determines crucial dimensions of the Constitution's separation of powers, federal structure, and Rule of Law norms. It should be clear, then, that the structural and Rule of Law features of the Constitution provide important interpretive resources for the resolution of questions concerning the proper scope of judicial power.

Questions of the interpretation of the Constitution's conferral of power on the Court, as questions of interpretation, turn in part on legal-fit analysis (of, say, constitutional structures and the Constitution's Rule of Law principles) and in part on the moral-political justification aspect of interpretative analysis (of these same norms as moral-political princi-

(1974) (asserting that "[n]otwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the federal courts . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' [even] with respect to the claim of [executive] privilege presented in this case." (citations omitted)).

261. *See* Nowlin, *Judicial Restraint*, *supra* note 5, at 191–99; *supra* Part III.D.

262. *See* Nowlin, *Judicial Restraint*, *supra* note 5, at 197–98.

263. *See id.*

264. *See infra* Part IV.B.2.

ples or values).[265] Constitutional structures and Rule of Law principles can thus provide an obvious set of constitutional standards for determining the proper scope of the judicial power at both the legal-fit and moral-political justification aspects of interpretation.[266] These interpretive questions concerning the Constitution's allocation of internal interpretive authority may be resolved through a process of extra-constitutional interpretation of the Constitution. Such external interpretation can derive legitimacy in legal form from adherence to widely recognized interpretive methods,[267] and it can derive legitimacy in political form from adherence to populist sources of law such as text, original understanding, and evolving legal traditions.[268] To a significant degree, then, questions of judicial deference to political actors (e.g., judicial supremacy and the clear mistake doctrine) and judicial interpretive methods (e.g., intra-constitutional interpretive methods involving reliance on text, original understanding, precedent, and natural law) are themselves questions of constitutional interpretation that potentially can be answered by interpreting (extra-constitutionally) the structural and Rule of Law norms of the Constitution.[269] Thus, one may conclude that the Constitution confers interpretive authority on the Supreme Court and constitutionally constrains that conferral of interpretive authority—and that judicial action exceeding those constitutional constraints is necessarily a violation of the Constitution by the Court.

G. Constitutional Limits on the Supreme Court

As this Part demonstrates, there is good reason to think that the Constitution places constitutional limits on the Supreme Court, which the Court violates in instances where its actions contravene those limits. As shown, this view derives in part from the basic function of constitutions to limit the institutions of government (including courts), from the express recognition in the text of the Constitution of constitutional limits on the Court in the area of federal jurisdiction, and from the likelihood that additional implied constitutional limits on the implied constitutional power of judicial review exist as well. Additionally, although the Supreme Court, as a court of last resort, is immune from reversal (except by a later Court), this formal-procedural infallibility in no way suggests that the Court is substantively infallible in its determination of constitutional meaning, a point which the venerable tradition of Supreme Court dissents reinforces. Thus, the Court can misinterpret the Constitution

265. *See* Nowlin, *Constitutional Illegitimacy*, *supra* note 5, at 392.

266. *See supra* Part III.D.

267. *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 19, at 7–8; Nowlin, *Constitutional Illegitimacy*, *supra* note 5, at 399–401.

268. *See* WHITTINGTON, *supra* note 187; Nowlin, *Constitutional Illegitimacy*, *supra* note 5, at 401–04.

269. *See supra* Part III.E.1; *infra* Part IV.B.1–B.2.

and—by misinterpreting those aspects of the Constitution concerning the constitutional limits on judicial power—can violate the Constitution. Finally, the Constitution is properly viewed as placing constitutional limits on the interpretive authority of the Supreme Court, constitutional limits that restrict the Court's interpretive authority internal to the constitutional system. Therefore, there is no analytic or conceptual basis for rejecting the view that the Constitution constrains the Supreme Court and that the Court, when it exceeds those constraints, violates the Constitution.

IV. CONSTITUTIONAL VIOLATIONS BY THE SUPREME COURT: A TYPOLOGY

A. The Concept of "Injustice in Law" and Judicial Constitutional Limits

As demonstrated, there is significant reason to believe that the Supreme Court's exercise of the judicial power in constitutional cases can itself violate the Constitution. Thus, the concept of constitutional violations by the Supreme Court deserves further conceptual analysis in order to determine with more precision the way in which judicial acts might be thought to violate the Constitution. One can begin to elucidate this concept in greater detail by attempting to outline a typology of judicial acts which might be thought to conflict with the Constitution in various ways. A potential starting point for this project is the concept of "injustice in law," as explored by legal theorists such as John Finnis.[270] Given the conceptual overlap between a constitution's basic purpose—to secure justice via organic or basic law—and the concept of justice in or under law, the latter concept will likely shed considerable light on the concept of supreme judicial constitutional violations.[271]

As John Finnis has observed, one can identify four basic kinds of injustice in law: (1) injustice based on the lack of structural authority; (2) injustice based on the failure of form or procedure; (3) injustice based on improper intent; (4) and injustice based on a substantive violation of a moral norm.[272] Finnis's analysis of the concept of (in)justice in law has obvious implications for the concept of constitutional violations by courts of last resort. Indeed, Finnis's analysis suggests that a court of last resort, such as the Supreme Court, can be thought to act unjustly in law through its use of judicial power in each of these four ways: authority, procedure, intent, and substantive norm violation.

Using Finnis's analysis of injustice in law as a starting point for a typology of judicial constitutional violations, one may argue that the Supreme Court can potentially violate the Constitution through its use of

270. FINNIS, *supra* note 24, at 352–54.
271. On the purpose of constitutions, see *supra* note 24 and accompanying text.
272. FINNIS, *supra* note 24, at 352–53.

judicial power in each of these four ways, which, though overlapping in some important respects in this context, are sufficiently distinct conceptually to be worth analyzing separately. In sum, the Court can act unjustly in law and potentially violate the Constitution by: (1) using the judicial power to exceed its authority, involving a structural deviation from the proper judicial role as established by the Constitution; (2) using the judicial power in an improper manner or form, involving a deviation from constitutional norms of the Rule of Law, such as judicial fidelity to the law; (3) using the judicial power with an improper motivation or intent, such as a pretextual rather than good faith invocation of judicial review to invalidate or uphold legislation; and (4) using the judicial power, directly or indirectly, in a manner entailing a substantive violation of constitutional norms not covered by the first three categories, involving, for example, a judicial mandate of an unconstitutional act or a judicial prohibition of an act required by the Constitution. While a detailed examination of each of these four forms of judicial constitutional violation is beyond the scope of this article, a fuller sketch of each is presented below.

B. Four Forms of Constitutional Violations by the Supreme Court

1. Violation by Exceeding Structural Authority

First, a decision by the Supreme Court can be unjust in law—and violative of the Constitution—because the Justices' exercise of the power of judicial review is infirm as a matter of constitutional structure (i.e., it exceeds the scope of the Court's authority under the design of the Constitution).[273] As noted above,[274] there are well-recognized constitutional limits of this type on the Supreme Court, including Article III's provisions (1) establishing the subject matter jurisdiction of the Supreme Court; (2) setting forth the Court's original and appellate jurisdiction; and (3) mandating the case or controversy requirement, thus prohibiting advisory opinions and judicial resolution of nonjusticiable questions. Other structure-based limits in the areas of state sovereign immunity and federal common law are also widely recognized.

Significantly, as suggested above, less well-recognized limits on the structural authority of the Court—constraining its interpretive authority and use of interpretive methods—likely exist as well.[275] For instance, the structures of the Constitution—including the logic of judicial review and such basic constitutional norms as the separation of powers, representative democracy, and federalism—are properly seen as imposing substantial constitutional limits on the power of the Supreme Court.[276] These

273. *See supra* Part III.C.
274. *See supra* Part III.C.
275. *See* Nowlin, *Constitutional Illegitimacy*, *supra* note 5; *supra* Part III.D.
276. *See* Nowlin, *Constitutional Illegitimacy*, *supra* note 5; *supra* Part III.D.

constitutional limits not only constrain the Supreme Court's jurisdiction, but also may find expression in various other aspects of the judicial role, such as the degree of deference the Court must show various political actors and the nature of the interpretive theories Justices may use to determine constitutional meaning, given the implications of the degree of judicial deference and the use of interpretive methods for the contours of the constitutional structure.[277] Additionally, it is worth noting that this structural authority form of violation could involve improperly *upholding* legislation as well as invalidating it. While objections to unconstitutional invalidations would involve a contention that the Court has exceeded the scope of its constitutional authority, a constitutional violation via improper upholding would take the slightly different form of the contention that the Court has abdicated its constitutional *duties* under the Supremacy Clause and the constitutional structure to invalidate unconstitutional legislation.

Finally, this line of analysis also suggests that debates about the proper judicial role, debates which often sound in constitutional structure, may be better reconceptualized, at least at their core, as debates about structural constitutional constraints on the proper judicial role (i.e., whether the structure of the Constitution mandates adherence to some form of judicial restraint or judicial activism). It is with the analytical foundations of these less well-recognized limits on interpretive authority and methodology that this article has been principally concerned.

2. Violation of Rule of Law Norms

Second, a decision by the Supreme Court can be unjust in law—and potentially violate the Constitution—because the Justices' exercise of power is inconsistent with the requirements of the Rule of Law. These norms are not only requirements of justice in law, but also are implicit in the structure and purpose of the Constitution or, alternatively, are part of the meaning of the Due Process Clause of the Fifth Amendment, as that clause constrains the federal judiciary.[278] Most narrowly conceived, the principles of the Rule of Law or judicial due process would require the Court to adhere to its procedures as promulgated and would prohibit acts such as the judicial equivalent of an ex post facto violation (the unforeseeable judicial enlargement of a criminal statute applied retroactively).[279]

277. *See* Nowlin, *Constitutional Illegitimacy*, *supra* note 5; *supra* Part III.D.

278. *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 332 (1921) (observing that the Due Process Clause of the Fifth Amendment is a "limitation upon the executive, legislative and judicial powers of the federal government").

279. Bouie v. City of Columbia, 378 U.S. 347, 362 (1964) (invalidating, as impermissibly retroactive under the Due Process Clause of the Fourteenth Amendment, the South Carolina Supreme Court's unforeseeable interpretive enlargement of the reach of a criminal statute applied retroactively).

More broadly conceived, the principle of the Rule of Law mandating judicial fidelity to law and interpretive conformity of application of law with the tenor of the law as announced in the constitutional text[280] could be viewed as placing federal constitutional limits on the use of judicial interpretive methodologies, requiring, as a matter of federal constitutional law limiting courts, that judges stay within widely accepted or normatively justifiable bounds of legal argument.[281] Thus, debates about the proper range of interpretive methodologies courts may deploy to determine the meaning of constitutional provisions at issue before them could be reconceptualized in part as debates over the Court's adherence to constitutional norms of the Rule of Law and judicial due process. As with structural violations, a judicial Rule of Law violation of the Constitution could occur either via an invalidation or an upholding of a state action, where the meaning the Court attributes to the constitutional norm in question strays outside the bounds of legitimate disagreement about legal meaning. Notably, this analysis would not classify every judicial mistake about legal meaning as a constitutional violation, but only those mistakes about legal meaning where the courts exceed the bounds of legitimate legal analysis.

3. Violation by Prextextual or Bad Faith Use of Judicial Review

Third, a decision by the Supreme Court could be thought to be unjust in law and thus violative of the Constitution because the Justices exercised the power of judicial review pretextually or in bad faith. Notably, a pretextual invocation of judicial review is not only unjust in law, but also likely a use of judicial review properly viewed as unauthorized by Article III as a matter of constitutional structure and inconsistent with the Constitution's Rule of Law norms mandating judicial fidelity to law.[282] Thus, it may be thought of as a special case of these first two forms of judicial constitutional violation. Significantly, a pretextual use of the judicial power could involve either an invalidation or an upholding. The Court could violate the Constitution not only by invalidating legislation it believed to be constitutional, but also by *failing* to invalidate legislation before the Court that the Justices believe is unconstitutional. In the latter type of case, the Court could well be thought to violate the Supremacy Clause and the structure of the Constitution by refusing in bad faith to invalidate legislation that the Court believes is in conflict with the Constitution. In both cases, the core of the violation is based on

280. *See supra* note 78 and accompanying text.

281. On legal legitimacy and political authority of interpretive theories, see BOBBITT, CONSTITUTIONAL FATE, *supra* note 19 (discussing legitimacy and the modalities of legal arguments); WHITTINGTON, *supra* note 187, at 110–59 (discussing the relationship of a moral norm such as popular sovereignty to interpretative theories such as originalism).

282. *See supra* Parts IV.B.1, IV.B2.

the *subjective* views of the Justices as to the (un)constitutionality of the legislation before them.

Notably, the practical utility of this category is limited by important concerns rooted in both political prudence and constitutional principle that suggest it should be invoked in only a very limited set of circumstances. For instance, adherence to the presumption in favor of the constitutionality of governmental action,[283] which includes, of course, the acts of courts, is an initial obstacle to the invocation of this form of violation and one that is substantially reinforced by the exercise of the appropriate degree of respect for the judiciary's role as principal expounder of the Constitution.[284] One could add to these two significant constraints on deployment of this form of violation several more limitations associated with the inherent difficulties in any form of purpose analysis: the obvious difficulties of proof involved in actually demonstrating bad faith on the part of governmental actors;[285] the problems with determining the collective or institutional intent or mental state of a multimember decision-making body, the members of which may actually have varying mental states or none at all on the particular issue in question;[286] and, finally, the arguable dubiety of declaring any act of government unconstitutional if it could in fact be reenacted by the same governmental actors with better or purer motives.[287]

4. Violation of Other Substantive Constitutional Norms

Fourth, a decision by the Supreme Court could be thought unjust in law and violative of the Constitution because the Justices' exercise of power entails, with sufficient institutional responsibility, a violation of a constitutional norm. This is best thought of as a residual category covering violations of constitutional norms not fully captured by the other three forms of judicial constitutional violation. Thus, this category of judicial violation of the Constitution would include, among others, constitutional norms of individual rights such as freedom of speech, establish-

283. *See, e.g.*, United States v. Harris, 106 U.S. 629, 635 (1883) (stating that "[p]roper respect for a co-ordinate branch of the government [Congress] requires the courts of the United States to give effect to the presumption that congress [sic] will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated.").

284. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3–4, at 35 (2d ed. 1988).

285. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968); *cf.* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977) (discussing proof of motive in the context of racial discrimination).

286. *O'Brien*, 391 U.S. at 383–86.

287. *Id.* On some of the difficulties inherent in purpose or motivation analysis, see also Edwards v. Aguillard, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting) (discussing the problems associated with invalidating legislation on the basis of impermissible subjective purposes); Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 27–38; Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

ment of religion, equal protection, substantive due process, and search and seizure.

Notably, this category is best thought of as requiring more than mere judicial complicity in an extrajudicial (i.e., legislative or executive) constitutional violation via a simple failure to invalidate unconstitutional legislation, a view, which if not rejected, would characterize *every* such mistake about constitutional meaning as a judicial constitutional violation. Similarly, this category is also best thought of as requiring more than the indirect dilution effect on participatory rights and structures that follows from a judicial invalidation of constitutional legislation, a view which would, again, classify every judicial mistake of this kind as a judicial violation. Obviously, declaring every judicial mistake (involving either an upholding or invalidation of an extrajudicial act of government) a constitutional violation would add little to our present constitutional discourse while also obscuring the core of the concept of supreme judicial constitutional violations. Instead, this category of supreme judicial violation is properly viewed as requiring a closer, firmer, sufficiently proximate connection between a judicial decision and an actual violation of a substantive constitutional provision: either an act by the Court directly violative of the Constitution or, in the alternative, a judicial decision mandating an act prohibited by the Constitution or prohibiting an act mandated by the Constitution. The first of these, the direct violation, could occur through judicial action such as the issuance of an injunction in violation of the First Amendment rights of freedom of speech and the press.[288] The second of these, the indirect violation, could occur through judicial action such as the invocation of the Free Exercise Clause to mandate what is actually a violation of the Establishment Clause[289] or invocation of the Equal Protection Clause to mandate what is actually a violation of the Due Process Clause.[290] In such cases, the Court will have violated the Constitution.

C. Implications of the Typology for the Concept of Constitutional Violations by the Supreme Court

In sum, the concept of unconstitutionality, closely related to the concept of injustice in law, applies to the governmental acts of courts as well as to the acts of nonjudicial governmental actors. While a more detailed exposition of these four forms of supreme judicial constitutional

288. *Cf.* N.Y. Times Co. v. United States, 403 U.S. 713, 715 (1971) (Black, J., concurring) (contending that every "moment's continuance of the [judicial] injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment").

289. *Cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 837, 864 (1995) (invalidating Virginia's exclusion of an evangelical magazine from receiving student activities funds despite the four dissenting Justices' contentions that such a funding violates the Establishment Clause).

290. One could imagine here a court invoking the Equal Protection Clause to mandate a pro-life constitutional norm (equal protection of the homicide laws for unborn persons) in violation of substantive due process pro-choice norm. Or, of course, the reverse.

violation is beyond the scope of this article, this brief analysis establishes the basic analytic contours of the concept of constitutional violations by supreme judicial institutions. Moreover, the conceptual ease with which the intertwined concepts of injustice in law and (un)constitutionality are applied to the decisional acts of supreme judicial institutions further reinforces the central thesis of this work: courts of last resort, such as the Supreme Court, can and do act in violation of the constitutions that establish them even when those constitutions grant them ultimate interpretive authority. Obviously, significant theoretical work in the area remains to be done.

V. SOME REMAINING QUESTIONS

This article has principally concerned itself with the analytic dimensions of the concept of constitutional violations by supreme judicial actors, and, therefore, it is worth outlining some of the important issues related to this concept that this article has not addressed and that are in need of further theoretical development. These fall into three principal areas: (1) interpretive questions concerning the proper judicial role; (2) collateral legal implications of the concept for legal doctrines such as stare decisis and judicial supremacy; and (3) the moral-political value of the concept itself as an addition to contemporary constitutional discourse.

First, this article has not directly addressed the interpretive questions related to the (more) concrete nature of the constitutional limits the Constitution places on the Supreme Court. Thus, for instance, this article has not addressed in any detail whether the nature of the constitutional limits on the Supreme Court in the areas of constitutional structure and the Rule of Law reflect a judicial restraint perspective or a judicial activist perspective.[291] Does, for instance, the Constitution mandate judicial restraint (as the second Justice Harlan appears to have believed)[292] or judicial activism (as Justice William Brennan may have thought)?[293] Obviously, additional work is required here in order to implement the concept of supreme judicial constitutional violations and to attempt to address specific cases in which the Court might be thought to have violated the Constitution.[294]

Second, this article has not addressed the question of the legal implications of this line of analysis for collateral issues of judicial suprem-

291. For an analysis in favor a judicial restraint perspective, see Nowlin, *Constitutional Illegitimacy*, *supra* note 5, at 394.

292. *See supra* note 72.

293. *See supra* note 72.

294. Some of the more obvious potential candidates include *Bush v. Gore*, 531 U.S. 98 (2000); *Roe v. Wade*, 410 U.S. 113 (1973); *Korematsu v. United States*, 323 U.S. 214 (1944); *Lochner v. New York*, 198 U.S. 45 (1905); *Plessy v. Ferguson*, 163 U.S. 537 (1896); and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

acy or stare decisis, where it might be argued, for instance, that less deference should be accorded to judicial constitutional violations than to mere judicial mistakes about constitutional meaning that are consistent with the structural and Rule of Law constitutional constraints on the Court.[295] The Supreme Court, for instance, has itself suggested that decisions amounting to constitutional violations by the federal judiciary are subject to limited precedential respect.[296] The Court observed in *Erie*[297] that the doctrine of *Swift v. Tyson*[298] was "an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[299] A similar argument can be made in the area of judicial supremacy, where one can argue that the President and Congress have an attenuated obligation to adhere to judicial decisions that themselves violate the Constitution.[300] These questions also deserve additional theoretical development.

Third, this article has not addressed the question of the moral-political value of the concept of supreme judicial constitutional violations in American constitutional law. One might ask here whether the potential benefits of a more robust deployment of this concept in constitutional analysis outweigh its potential costs. Clearly, some jurists might echo the concerns that underlie support for vigorous suppression of dissenting opinions early in the twentieth century,[301] suggesting that raising the question of whether the Supreme Court has itself violated the Constitution could unduly damage the institutional integrity of the Court and

295. *See* BERGER, *supra* note 75, at 409–10.

296. *See* Erie R. R., Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

297. *Id.* at 64 (rejecting the view that federal courts have an implied power to create federal civil common law).

298. 41 U.S. (16 Pet.) 1 (1842) (embracing the view that federal courts have an implied power to create a federal civil common law).

299. *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Transfer Co., 276 U.S. 518 (1928) (Holmes, J., dissenting). On the question of the precedential weight of judicial constitutional violations, see also BERGER, *supra* note 75, at 393 (citing *Erie* and rejecting the claim that long-standing judicial usurpations of political authority allocated by the constitution to Congress or the states should be allowed to stand out of respect for precedent or the principle of stare decisis).

300. *See also* CAREY, *supra* note 26, at 135 (asserting that when the U.S. Supreme Court engages in an improper exercise of the judicial power in violation of the Constitution, "our obligation to respect or obey its power of judicial review is severed, and the other branches of government, principally the Congress, are entitled, nay *obliged*, to use the constitutional means at their disposal to curb, regulate, and control the Court in such a manner as to compel" the Court's adherence to the constitutional limits on its power); George, *Positive Law*, *supra* note 75, at 330–32 (rejecting a conception of judicial supremacy that requires the President and Congress to submit to unconstitutional exercises of judicial power by the Supreme Court that are destructive of the constitutional order); Nowlin, *Judicial Restraint*, *supra* note 5, at 262–64.

301. *See*., *e.g*., David J. Danelski, *The Influence of the Chief Justice in the Decision Process of the Supreme Court*, *in* AMERICAN COURT SYSTEMS 506 (Sheldon Goldman & Austin Sarat eds., 1978) (discussing William Howard Taft's suppression of more than 200 of his own dissents during his ten years as Chief Justice of the United States); ALPHEUS T. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 223 (1964).

the Rule of Law.[302] Other jurists might echo the praise for the development of the routine publication of dissenting judicial opinions,[303] suggesting that a similarly forthright discussion of the constitutional limits on the Supreme Court can only benefit the judiciary and the constitutional order in the long run.[304] These questions also deserve theoretical development.

VI. CONCLUSION

The concept of supreme judicial constitutional violations is an underexplored, undertheorized, and underutilized analytical construct in our perennial debates over the proper judicial role. Indeed, the concept of constitutional violations by courts of last resort remains obscure and much in doubt despite its potentially significant implications for debates in American constitutional law surrounding the scope of federal judicial power. Thus, important questions—such as whether the Supreme Court can itself violate the Constitution via an overly active or restrained use of judicial power—are seldom asked and are only very rarely subjected to serious analysis. The aim of this article has been to clear away some of this obscurity, display the analytical soundness of the concept, sketch a few of its implications, and suggest some directions for future research.

As this article has demonstrated at length, the concept of constitutional violations by the Supreme Court has significant support as a matter of analytic jurisprudence and constitutional analysis. First, the very nature and purpose of a constitutional system—to establish and limit the institutions of government—is indicative of the existence of constitutional limits on all institutions of government, including courts of law. Indeed, in the U.S. constitutional system, the Supreme Court was established by Article III of the Constitution, derives its powers solely from the Constitution, and may no more validly claim authority beyond what the Constitution grants to it than may the President or Congress. There is, of course, no serious basis for the anomalous assertion that the Court is constitutionally unlimited.

Second, this point is conclusively established by the uncontested recognition of a number of constitutional limits on the Court in the broad area of federal jurisdiction, such as those associated with the Court's original and appellate jurisdiction, justiciability, federal common law,

302. *See*., *e.g*., William A. Bowen, *Dissenting Opinions*, 17 GREEN BAG 690, 693 (1905)(asserting that "the Dissenting Opinion is of all judicial mistakes the most injurious" because its harmful "effect on the pubic respect for courts is difficult to exaggerate"); R. Walton Moore, *The Habit of Dissent*, 8 VA. L. REG. 338, 341 (1922) (asserting that "[t]he outstanding objection to the habit of dissent is that it weakens and injures the Court with the public. It makes the impression that the Court is not as able as it should be; not as learned, not as wise, not as harmonious, and, therefore, not entitled to the full confidence which it should have . . . .").

303. *See supra* note 159.

304. *See supra* note 159; *see also supra* Part II.

and sovereign immunity. The recognition of these uncontested constitutional limits indicates conventional acceptance of the basic concept of constitutional violations by the Supreme Court in American constitutional law. Thus, the very fact that Article III and the broader constitutional design place undisputed constitutional limits on the Court, which the Court itself recognizes and to which it strives to adhere, suggests strongly that constitutional limits on the Court are an appropriate category of constitutional analysis and indicates that there may be additional less well-recognized constitutional limits on the Supreme Court. In particular, given the implications of the use of various interpretive methodologies by the Court for basic structural constitutional values (such as the separation of powers and federalism) and Rule of Law norms (such as faithful application of a legal provision in accordance with its meaning as indicated by its text), there is no reason to assume that judicial interpretive authority and methodology are unconstrained by structural and Rule of Law norms of a constitutional dimension. Thus, the implied constitutional power of supreme judicial review may be subject to concomitant implied constitutional limits.

Third, as the venerable practice of writing dissents on the Supreme Court attests, the finality or supremacy of the Supreme Court in constitutional interpretation is perfectly consistent with the Court's substantive fallibility in determining constitutional meaning. Few, if any, scholars today actually believe that the Constitution means "whatever the Court says it does" as a statement of analytic jurisprudence, and thus few, if any, scholars believe that the Court is substantively infallible in constitutional interpretation. Given that the Court can be mistaken about the meaning of the Constitution, the Court can be mistaken about constitutional meaning as it relates to the constitutional limits on the Court's own power, and therefore the Court can violate the Constitution by exceeding those limits. There is no reason, then, to believe that the Court's own supreme self-affirmation of the constitutionality of its own use of judicial power finally resolves the substantive legal question of whether the Court is actually in violation of the Constitution. Such judicial decisions are always subject to unofficial but highly important constitutional criticism by political actors and dissenting Justices, which often shapes the ultimate meaning of the law, leading to the legitimate use of various political checks on the judicial power, to overruling by a future Court, or, in rare instances, even to constitutional amendment.

Fourth, a constitution can place meaningful limits on the intra-constitutional interpretive authority and use of intra-constitutional interpretive methodologies by the governmental actors/institutions the Constitution creates and limits. For example, there should be no doubt that express constitutional provisions mandating judicial supremacy or authorizing judicial recourse to certain interpretive methods can provide a solid basis for resolution of questions of judicial authority and interpre-

tive methodology as matters of interpretation of internal constitutional limits rather than as purely extra-constitutional normative political debate. Therefore, given the implications of constitutional norms of structure and the Rule of Law for judicial interpretive authority and methodology, there is good reason to think that the Constitution places implicit (as well as explicit) limits of this nature on the Supreme Court, constraining the Court's intra-constitutional interpretive authority and use of intra-constitutional interpretive methods as a matter of structural and Rule of Law-based constitutional law.

Moreover, even a brief analysis of the concept of supreme judicial constitutional violations, one inspired by the concept of injustice in law, suggests that there are four basic types or forms of constitutional violations by the Supreme Court: (1) violation by the use of judicial review exceeding the scope of the Court's constitutional authority as established by Article III and the structure of the Constitution; (2) violation by the use of judicial review in a manner inconsistent with the Rule of Law norms of the Constitution; (3) violation by the use of judicial review pretextually or in bad faith; and (4) violation by the use of judicial review directly or indirectly entailing a substantive constitutional violation of a kind not covered by the first three categories. That this form of legal justice analysis applies with such ease to various uses of the judicial power further suggests that there is no significant conceptual obstacle to the application of the concept of (un)constitutionality to the decisions of supreme courts.

As discussed, further conceptual development and implementation of the concept of supreme judicial constitutional violations requires additional work. Three principal areas stand out as in need of theoretical development: (1) analysis of interpretive questions determining with greater specificity the constitutional constraints on the Court; (2) analysis of potential implications of the concept for collateral legal doctrines such as judicial supremacy and stare decisis; and (3) analysis of the moral-political value of the concept in terms of its costs and benefits as an approach to the question of the proper scope of the judicial power. In sum, the concept of constitutional violations by courts of last resort, including the Supreme Court, is very well-grounded analytically, and it is likely to prove a very fruitful area of future constitutional theorizing. Both respect for the Constitution and respect for the Court demand that this analysis be pursued.