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Conceptualizing the Dangers of the “Least Dangerous” Branch: A Typology of Judicial Constitutional Violation

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In the context of discussions about the proper judicial role, constitutional debate has seldom fully engaged the question of whether the U.S. Supreme Court can be thought to violate the Constitution by asserting the judicial power in an overly activist or restrained manner. This Article addresses that question and concludes that the U.S. Supreme Court can indeed violate the Constitution by asserting the judicial power in a fashion inconsistent with the constraints the Constitution places on the judicial authority to interpret the Constitution, constraints which may be thought to prohibit either overly activist or overly restrained uses of the federal judicial power. This Article also outlines the important distinction between judicial decisions best described in the language of “mere” constitutional mistake and judicial decisions best described in the language of judicial constitutional violation.

This Article further develops a detailed typology of judicial constitutional violation, including judicial violation via exceeding the structural authority of the judicial power under the constitutional design; judicial violation via contravening Rule of Law norms such as the faithful judicial administration of the law as published or promulgated; judicial violation via the pretextual or “bad faith” use of judicial review, a special case of the first two forms of judicial violation; and judicial violation via directly or indirectly causing with sufficient judicial responsibility a violation of constitutional norms such as freedom of speech or religion. Finally, the Article sketches some of the implications of the concept of judicial constitutional violations for the doctrines of stare decisis and judicial supremacy, suggesting that judicial violations of the constitutional limits on the judicial branch may be entitled to less deference as a matter of stare decisis and judicial supremacy than mere judicial mistakes about constitutional meaning.

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Conceptualizing the Dangers of the “Least Dangerous” Branch: A Typology of Judicial Constitutional Violation

JACK WADE NOWLIN*

I. INTRODUCTION

The proper exercise of the federal judicial power remains a topic of perennial debate among judges, lawyers, legal scholars, political leaders, and others. The most frequently contested dimensions of this ongoing debate center on the legitimate range of interpretive methodologies courts may deploy to determine constitutional meaning. Debate surrounding the appropriate governmental role of the judicial branch is also inevitably entangled with substantive moral-political debates concerning the controversial issues that arise before courts such as the death penalty and abortion.¹ At a more fundamental level, this debate over the judicial role concerns both the proper scope of the judicial power in the governmental architecture created by the U.S. Constitution and the nature of the Rule of Law as it may be thought to constrain the judiciary and judicial decision-

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¹ For the death penalty, see, for example, *Roper v. Simmons*, 543 U.S. 551 (2005) (invalidating the death penalty as applied to juvenile defendants under the Eighth Amendment as a disproportionate punishment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (invalidating the death penalty as applied to mentally-retarded defendants under the Eighth Amendment as a disproportionate punishment); *Coker v. Georgia*, 433 U.S. 584 (1977) (overturning Georgia’s death penalty for rape under the Eighth Amendment as a disproportionate punishment); and *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating Georgia’s death penalty under the Eighth Amendment because it created a substantial risk of arbitrary and capricious enforcement). For abortion, see, for example, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a ban on partial-birth or dilation and extraction abortion as imposing an “undue burden” pre-viability and for failing to provide a “health exception” post-viability); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833–34 (1992) (reaffirming the “central holding” of *Roe* while shifting from *Roe*’s application of strict scrutiny and a trimester scheme to the “undue burden” test pre-viability and “health exception” requirement post-viability); and *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”).

making as well as non-judicial actors.² Recent decisions of the Supreme Court in such controversial areas as campaign finance reform, sexual privacy, affirmative action, the right to association, and sexual orientation demonstrate the continuing importance of questions concerning the power of the judiciary.³

This Article, as part of a larger project,⁴ concentrates on one aspect of a highly significant but often overlooked sub-question of this field of inquiry into the proper use and scope of the judicial power within the American constitutional design: the question of whether the U.S. Supreme Court can be said to *violate* the Constitution through an improper use of the power of judicial review of constitutional questions to uphold or invalidate a law or other act of government.⁵ More precisely, this Article, as an exercise in conceptual clarification, develops a detailed typology of judicial constitutional violation and through this typology explores the

² *E.g.*, *Mapp v. Ohio*, 367 U.S. 643, 686 (1961) (Harlan, J., dissenting) (observing from a judicial restraint perspective that the Supreme Court “can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon [the Court itself], and respects as well the principles inherent in [the Court’s] own processes”); Jack Wade Nowlin, *Constitutional Violations by the United States Supreme Court: Analytical Foundations*, 2005 U. ILL. L. REV. 1123, 1160 (discussing the analytical foundations of the claim that constitutional structures and Rule of Law norms constrain the U.S. Supreme Court’s exercise of interpretive authority over the Constitution). This Article is chiefly concerned with the “limitations which the Constitution places upon” the Court as a matter of both constitutional structure and Rule of Law norms. For a thoughtful analysis of the “principles inherent” in the Court’s “own processes” as a source of limitation on the exercise of the judicial power, see generally Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545 (2004) (discussing issues surrounding the “constitution” governing judicial decisionmaking, including the holding and dicta distinction, stare decisis, the (non-)publishing of opinions, and judicial voting procedures).

³ See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Romer v. Evans*, 517 U.S. 620 (1996).

⁴ Other works in this project include: Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387 (2000) [hereinafter Nowlin, *Constitutional Illegitimacy*]; 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); 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* (2001).

⁵ The claim that the U.S. Supreme Court can violate the Constitution through an improper exercise of the judicial power raises a number of foundational questions of analytical jurisprudence. These questions include (1) whether a constitution can place meaningful constraints on the interpretive authority of various institutions, such as a supreme court, which may interpret the constitution with authority; (2) whether a constitution can place meaningful constraints on the interpretive methodologies used by interpreters to determine constitutional meaning, such as requiring or prohibiting adherence to original meaning or natural law; and (3) whether a court of last resort can violate a constitution which grants it supreme or ultimate interpretive authority to say what the constitution means, given the possibility that such a court’s decisions are self-validating or self-affirming as interpretations of the court’s power under the constitution. For a detailed discussion of these questions answering each of them in the affirmative as supportive of the vitality of the concept of constitutional violations by courts of last resort, see Nowlin, *supra* note 2, at 1142, 1160.

various forms in which judicial constitutional violations may occur within the American constitutional system.⁶

While articulation of the concept of judicial constitutional violations is by no means wholly absent from the discourse of American constitutional law,⁷ it remains under-explored, under-theorized, and under-utilized.⁸ This Article employs a common "deconstructive" technique, the "inversion of hierarchies," and through it seeks to apply a greater measure of constitutional scrutiny to the acts of the judiciary, scrutiny too often confined to judicial review of political actors and too seldom applied by political actors (or even the courts themselves) to the decisions of the judiciary—in order to determine the conformity of judicial decisions to the constitutional limits on the courts.⁹ In particular, this Article maintains that long-standing debates between the proponents of judicial restraint¹⁰ and

⁶ For an earlier and brief sketch of this typology of judicial constitutional violations, see Nowlin, *supra* note 2, at 1188.

⁷ The widely-recognized constitutional limits on the power of the Supreme Court include limits on its subject-matter jurisdiction, original jurisdiction, power to create federal common law, state sovereign immunity from suit, and the constitutional dimensions of the justiciability doctrines. See *infra* notes 23–27 and accompanying text.

⁸ See Nowlin, *supra* note 2 at 1131–32. A number of scholars have recognized that debates between proponents of judicial activism and restraint may in fact be debates about the constitutional structure and the constitutional scope of the judicial power. 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* 331–32 (Robert P. George ed., 1996). 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*, and *Lochner*, 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); 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"); GEORGE W. CAREY, *IN DEFENSE OF THE CONSTITUTION* 132–38 (rev. and expanded ed. 1995) (drawing on *THE FEDERALIST* NO. 78 (Alexander Hamilton) 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 4, at 450; Nowlin, *Judicial Restraint*, *supra* note 4, at 183–84.

⁹ The "inversion of hierarchies" is an analytical technique which identifies a hierarchical opposition (such as a court's privileged stance, vis-à-vis a legislature, as reviewer of the constitutionality of legislation) and inverts it by imagining a 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. E.g., J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743, 746–47 (1987).

¹⁰ By the term "judicial restraint" the Article intends to signify a conception of the judicial role where the decisions of the judge are tightly linked to traditional legal materials, minimize judicial discretion, generally defer to political actors, and invalidate legislation only in relatively clear cases of unconstitutionality. See Nowlin, *Judicial Restraint*, *supra* note 4, at 189–90; see also RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 137 (1977) (observing that: "[t]he program of judicial restraint

judicial activism¹¹ may be better understood—at least in part and at their core—as debates over the Constitution’s structural and Rule of Law constraints as they limit the power of federal judges.¹² These questions of the proper judicial role are both timely and, relatively speaking, timeless as matters of recurrent debate and inquiry—predating even the ratification of the Constitution.¹³ Thus this Article raises questions of continuing interest to anyone concerned with the proper scope of the federal judicial power and the proper methods of federal constitutional interpretation.

In brief, this Article contends that the Supreme Court can violate the Constitution through its use of judicial review in four ways, which though overlapping in some respects are sufficiently distinct to warrant separate analytical treatment: (1) judicial violation by exceeding structural authority, consisting of an act of the Court in excess of the power conferred on the judicial branch by the governmental design of the Constitution; (2) judicial violation by improper manner or form of decision, consisting of an act of the Court in contravention of the Rule of Law norms of the

. . . 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.”).

¹¹ By the term “judicial activism” this Article intends to signify a conception of the judicial role where judges only loosely link their decisions into traditional legal materials, maximize their discretion, do not defer to political actors, and invalidate legislation in cases where constitutional meaning is sharply contested and highly controversial. See Nowlin, *Judicial Restraint*, *supra* note 4, at 189–90; see also DWORKIN, *supra* note 10, at 137 (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”).

¹² As noted, the chief aim of this Article is conceptual clarification and therefore it takes no position on the question of whether the Constitution, properly interpreted, mandates some form of judicial restraint or judicial activism, a question which continues to divide theorists, citizens, public officials, and judges. For an illustrative example of such division among justices of the Supreme Court, see *infra* note 78.

The author’s own preferred interpretation of the Constitution’s mandate for the proper judicial role is one of judicial restraint. See Nowlin, *Constitutional Illegitimacy*, *supra* note 4, at 394 (arguing that expansive judicial power is constitutionally illegitimate); Nowlin, *Judicial Restraint*, *supra* note 4, at 189 (arguing that in the framework of the Constitution, the proper role for the judiciary is a modest and restrained one).

¹³ Debates over the proper scope of the federal judicial power predate the ratification of the Constitution and, of course, continue today. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (Sanford Levinson ed., 2d ed. 1994); BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* (1993). Indeed, the proper scope of the Court’s authority in constitutional interpretation continues to be debated today. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (opposing judicial supremacy in favor of a form of constitutional “populism”); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 467 (2000) (defending judicial supremacy via the “settlement” thesis); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369–71 (1997) (defending judicial supremacy via the “settlement” thesis); Michael 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).

Constitution limiting the judicial branch such as the requirement of fidelity to law, the faithful administration of the laws in a manner congruent with their promulgation or publication; (3) judicial violation through culpable intent, consisting of an act of the Court that is a pretextual rather than "good faith" invocation of judicial review, a use of the judicial power both unauthorized by the structure of the Constitution and incompatible with the norms of the Rule of Law and thus a special case of the first two forms of violation; and, finally, (4) judicial violation through substantive infringement of other constitutional norms, a residual category, involving either a direct violation of a constitutional norm by the Court, such as freedom of speech or religion, or an indirect violation of such a norm through a judicial mandate of an act prohibited by the Constitution or a judicial prohibition of an act mandated by the Constitution.¹⁴ In sum, these are the four basic forms of judicial constitutional violation over and above that which may be thought already encapsulated in the concept of constitutional mistake.¹⁵

Part II of this Article provides further background on the judicial branch as both the principal institutional vindicator and a potential violator of the Constitution. Part III discusses the proper and properly limited use of political checks on the Court and the importance of conceptual clarity in the description of judicial action to the appropriate use of political checks to protect both the Constitution and the Court. Part IV discusses the conceptual relationship between judicial "mere" mistakes about constitutional meaning and judicial violations of the constitutional limits on the judicial authority, a question of foundational importance to the Article's project. Part V examines the four types of judicial constitutional violations in detail. Part VI briefly explores some implications of the analysis presented here for the doctrines of stare decisis and judicial supremacy.

II. THE U.S. SUPREME COURT AS VINDICATOR AND POTENTIAL VIOLATOR OF THE CONSTITUTION

Under the doctrine of judicial supremacy, the U.S. Supreme Court is the supreme or ultimate institutional expositor of the meaning of the Constitution.¹⁶ The Article does not contest either the core of the doctrine

¹⁴ This broad framework for the analysis of judicial constitutional violations was inspired by John Finnis's analysis of the concept of "injustice in law." See *infra* Part V.A (discussing JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980)).

¹⁵ On the distinction between judicial "mere" mistakes about constitutional meaning and judicial violations of the Constitution, see *infra* Part IV.

¹⁶ On judicial assertions of judicial supremacy, see *United States v. Morrison*, 529 U.S. 598, 616 (2000) (asserting that "[n]o doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text"); *United States v. Nixon*, 418 U.S. 683, 704–05 (1974) (asserting that:

of judicial supremacy¹⁷ or its obvious and well-recognized moral-political value as a means of clarifying, implementing, and protecting the Constitution's basic rights and structures.¹⁸ However, recognition of the benefits of the supremacist conception of the judicial power should not preclude a concomitant recognition of its potential costs. Notably, Alexander Hamilton, in his canonical defense of judicial review in *Federalist No. 78*, also recognized the "danger" that the judicial branch poses to the rights of the American people, even as he pronounced it "the least dangerous" branch of government and sought to justify some power

"[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 . . . [a]ny 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 in this case"); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that the "federal judiciary is supreme in the exposition of the law of the Constitution"); and *McCulloch v. Maryland*, 17 U.S. 316, 400–01 (1819) (contending that in resolving issues related to the Bank of the United States: "[t]he 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 of 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 Supreme Court of the United States has the constitution of our country devolved this important duty.").

¹⁷ The term "judicial supremacy" is often contrasted with such terms as "judicial review" and "departmentalism" but the precise contours of the doctrine of judicial supremacy and thus the precise nature of the distinction between judicial supremacy or supreme judicial review and judicial review within a departmentalist distribution of interpretive authority are often contested or simply left obscure. This Article defines the "core" of judicial supremacy as the view that the constitutional decisions of the courts resolve not only the particular case decided but that the animating legal principles of the case generally govern extra-judicial political institutions, once the decision is properly "settled" as a matter of law. Cf. Abraham Lincoln, Speech at Springfield, Ill. (June 26, 1857), reprinted in 1 ABRAHAM LINCOLN: COMPLETE WORKS 226–28 (John G. Nicolay & John Hay eds., 1894) (stating that "decisions on constitutional questions, when fully settled, should control not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself" (emphasis added)). Some theorists would describe this degree of deference to settled judicial decisions as respect for mere judicial review and, of course, Lincoln is also often identified in the scholarly literature as a departmentalist, given his refusal to treat the Supreme Court's decision in *Dred Scott* as "settled." See Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 593–94 (2003) (identifying Lincoln's position as support for judicial review rather than judicial supremacy). I prefer to view this position as an acceptance of the core of judicial supremacy since the Court's "settled" decisions bind the other branches not only as to the parties to particular decisions but as a matter of "general policy" and thus the Court's "settled" opinions are indeed accorded what amounts to supremacy within the constitutional system. Of course, on this view, the question of what constitutes the "settling" of a decision remains open to question, and it is perhaps here that the real substance of the debate occurs between proponents of greater and lesser degrees of deference to the decisions of the courts who may variously accept, qualify, or reject the label of "judicial supremacist." On the question of whether an affirmative judicial violation of a constitutional constraint on the judiciary should ever be considered sufficiently "settled" for purposes of judicial supremacy to trigger a constitutionally-mandated obligation to obey as a matter of "general policy," see *infra* Part VI.

¹⁸ See, e.g., FEDERALIST NO. 78 (Alexander Hamilton) (contending that a limited Constitution can be "preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void").

of judicial review.¹⁹ As Hamilton recognized, the Supreme Court, as an institution of government acting under constitutional limits, poses some degree of danger to the structures and rights of the Constitution through its exercise of "the judicial power of the United States"²⁰ even as it may use that power in most of its decisions to vindicate rather than violate the Constitution.

What is the nature of this "danger?" First, the Supreme Court poses some degree of threat to the rights and structures of the Constitution because the Court is not infallible in its exercise of interpretive authority and thus can misinterpret the Constitution, mistakenly upholding unconstitutional legislation and mistakenly invalidating constitutional legislation.²¹ This possibility of judicial error in determining constitutional meaning remains a constant, though unavoidable, threat to the integrity of the Constitution's rights and structures. Secondly, the Court poses an additional substantial danger to the Constitution because the Court in the act of decision can contravene the constitutional limits on the judicial branch itself, violating the Constitution as it places limits on the interpretive authority of the Court.²² Significantly, a number of constitutional limitations on the federal judicial power are uncontested or

¹⁹ *Id.* (observing that: "[w]hoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"); cf. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 62 (3d ed. 1993) (suggesting that the Court, given the growth in its powers over the last two hundred years, is "no longer . . . 'the least dangerous' branch").

²⁰ 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.").

²¹ On the possibility of judicial error and the distinction between judicial finality and judicial fallibility, see H.L.A. HART, *THE CONCEPT OF LAW* 138–44 (1961); Nowlin, *supra* note 2, at 1129. On the relationship between judicial mistakes about constitutional meaning and judicial violations of the Constitution, see *infra* Part IV.

²² This point has been understood since the Founding. For instance, Alexander Hamilton recognized that the Court was confined to the exercise of the judicial power ("judgment") and could not, without usurpation in violation of the separation of powers, exercise the legislative power ("will"). See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossister ed., 1961) (observing that the Supreme Court "may truly be said to have neither FORCE nor WILL but merely judgment"); THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossister ed., 1961) (observing that "[t]here never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted [sic] with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations."); see also CAREY, *supra* note 8, at 135 (building upon Hamilton's argument in *The Federalist No. 78* to argue that a court may not "overstep its bounds or exceed its constitutional authority" by exercising the substance of the legislative authority).

widely-recognized in American constitutional law. These include the limits on the Court's subject-matter jurisdiction,²³ original jurisdiction,²⁴ power to create federal common law,²⁵ state sovereign immunity,²⁶ and the constitutional dimensions of the justiciability doctrines.²⁷ The Supreme Court itself recognizes these constitutional limits on the judicial power and strives to adhere to them in its decisions.²⁸ Additional constitutional limits on the judicial power arguably exist as well in the areas of interpretive methodology and authority implicating traditional debates over the proper judicial role. Indeed, there are good reasons for thinking that structural and Rule of Law constitutional limits constrain important aspects of the judicial role related to interpretive methodology (i.e., how the Court may interpret provisions of the Constitution) and judicial deference (i.e., the clarity of the constitutional violation required for judicial invalidation of legislation) because of the consequences these aspects of the judicial role have for norms of constitutional structure—such as representative democracy, the separation of powers, and federalism—and for the constitutional Rule of Law norm of judicial fidelity to law as promulgated.²⁹

²³ See 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.”).

²⁴ See 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 Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–76 (1803) (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).

²⁵ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (rejecting the view that federal courts have an implied power to create federal civil common law in diversity cases); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (rejecting the view that federal courts have an implied power to create federal criminal common law).

²⁶ 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.”); see also *Alden v. Maine* 527 U.S. 706, 707–08 (1999) (extending sovereign immunity as part of the federal structure of the Constitution to suits against unconsenting states by private citizens in state court); *Hans v. Louisiana*, 134 U.S. 1 (1890) (extending sovereign immunity associated with the Eleventh Amendment to suits between a state and a citizen of the state).

²⁷ See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1983) (observing that “Article III of the Constitution confines the federal courts to adjudicating actual ‘cases’ and ‘controversies’” and that the “case-or-controversy doctrines” of standing, mootness, and ripeness “state fundamental [constitutional] limits on federal judicial power in our system of government”).

²⁸ See *supra* notes 23–27 and accompanying text.

²⁹ See *infra* Part VI; see also Nowlin, *Constitutional Illegitimacy*, *supra* note 4, at 394. For an earlier precursor of this form of analysis of the constitutional limits constraining the interpretive authority of the Court, one from a judicial restraint perspective, see *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Black, J., dissenting). In *Griswold*, Justice Black observed that:

On this point, it is notable that supreme judicial review is itself an *implied*, rather than express, power of the judiciary derived principally from the Constitution's structural principle of the separation of powers and the Rule of Law norm of constitutional supremacy.³⁰ Such an implied constitutional power must have concomitant implied constitutional limits that define its contours.³¹ Not surprisingly, these implied limits derive from the same source as the implied power: the Constitution's structural and Rule of Law norms. In sum, supreme judicial review is an implied constitutional power with implied constitutional limits that delineate the contours of the power and that derive, as one would expect, from the same sources as the power itself. As might also be expected, various Supreme Court justices have recognized limitations of this nature on the power of the judiciary.³² It is with these often-neglected implied constitutional limitations associated with judicial interpretive methodology and judicial deference to political actors as they inform traditional debates over judicial activism and restraint that this Article is most concerned.

[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.

Id. at 520–21 (emphasis added).

³⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (deriving the power of judicial review from the supremacy of the Constitution and the power of the Supreme Court under the separation of powers to "say what the law is").

³¹ *Cf. Furman v. Georgia*, 408 U.S. 238 (1972) (Rehnquist, J., dissenting). Justice Rehnquist, from a judicial restraint perspective, observed that:

While overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial over-reaching may result in sacrifice of the equally important right of the people to govern themselves The very nature of judicial review . . . makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the Framers. It is for this reason that judicial self-restraint is surely an *implied, if not an expressed, condition of the grant of authority of judicial review.*

Id. at 470 (emphasis added).

³² See *supra* notes 29–31 and accompanying text.

III. THE USE OF POLITICAL CHECKS ON THE JUDICIARY AND THE CONCEPT OF JUDICIAL CONSTITUTIONAL VIOLATIONS

Before engaging in a detailed conceptual analysis of a typology of judicial constitutional violation, it is worth taking a moment to sketch the potential value of such analysis in order to demonstrate that it is worthy of systematic consideration. Significantly, the concept of judicial constitutional violations has clear implications for the use of political checks on the judiciary, and those implications reinforce the potential value of the concept in constitutional debate and inquiry. Within the constitutional design, political actors have significant “checking” authority to seek to correct or limit decisions of the courts that are mistaken about constitutional meaning.³³ This authority to check the courts consists principally of the powers to “debate, litigate, and legislate”³⁴ with respect to the legal questions at issue in an effort to persuade the courts to reconsider and overturn their mistaken decisions. This checking authority also encompasses the power to nominate and confirm new justices and federal judges³⁵ and the power to amend the Constitution³⁶ and even call for a constitutional convention in order to propose amendments.³⁷ It should be clear that this authority to seek the correction of judicial mistakes about constitutional meaning extends not only to decisions that are “mere” mistakes about constitutional meaning, but also to those mistakes about constitutional meaning that may affirmatively violate the limits that the Constitution places on the interpretive authority of the courts themselves.³⁸

Obviously, these avenues of judicial limitation by political actors are necessary to protect the Constitution from those decisions of the judiciary

³³ See, e.g., Daniel Patrick Moynihan, *What Do You Do When the Supreme Court is Wrong?*, 57 PUB. INT. 3, 6 (1979) (discussing the range of appropriate political responses to mistaken judicial decisions).

³⁴ See *id.* at 8.

³⁵ See U.S. CONST. art. II, § 2, cl. 2 (The President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”).

³⁶ See U.S. CONST. art V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.”).

³⁷ *Id.*

³⁸ Additionally, the view that a decision of the courts itself violates the Constitution may also have implications for the doctrine of judicial supremacy and thus may be relevant to the range of constitutionally permissible responses by political actors to “check” such judicial decisions. See *infra* Part VI.

that are misguided, as some percentage of the decisions of the courts inevitably will be—whether they are thought of as mere judicial mistakes about constitutional meaning or judicial violations of the Constitution. Thus these avenues of limitation are a basic feature of the Constitution's system of institutional checks and balances, and their use by the political branches is to be encouraged in the interest of preserving the integrity of the Constitution.³⁹ However, the potential for the misuse or abuse of these checking powers is also a continuing threat to the power of the judiciary and to the courts' use of the judicial power to protect the Constitution from political actors.⁴⁰ Therefore the proper and properly limited use of the checking authority by political actors is necessary to strike a balance both protecting the Constitution from the courts and preserving the proper authority of the courts to protect the Constitution from political actors.

For this checking authority to operate in an optimal fashion, the judicial behavior subject to potential "check" must be described as accurately as possible—as a right decision, a wrong decision, or a judicial violation of the constitutional limits on the interpretive authority of the judicial branch. In particular, some decisions of the courts, given their controversiality, will inevitably provoke criticism moving beyond the assertion that the decision is merely "wrong" about constitutional meaning.⁴¹ Criticism of these decisions may move into more searching objections to the decision's legal foundations⁴² or implications for important constitutional values, often sounding in the language of constitutional structure or the Rule of Law.⁴³ Such criticism can easily devolve into overheated political attacks on the courts,⁴⁴ attacks that both threaten the institutional integrity of the judiciary and deprive it of a dispassionate critique of its decisions from the valuably diverse extra-

³⁹ See THE FEDERALIST NO. 51 (James Madison) (Clinton Rossister ed., 1961) ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.")

⁴⁰ See THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossister ed., 1961) (observing that the judiciary is by far the weakest of the three branches of the federal government and thus most vulnerable to encroachment from the other branches).

⁴¹ See, e.g., *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting) (observing that the Court, through its decisions in *Roe v. Wade* and *Doe v. Bolton*, exercised overly expansive judicial power creating a "new constitutional right for pregnant mothers" that strips the states of their ability to determine abortion policy through the democratic process).

⁴² See *id.* at 221 (noting that there is "nothing in the language or history of the Constitution to support the Court's judgment" (emphasis added)).

⁴³ See *id.* at 221–22 (observing that "the upshot" of the Court's holding in *Roe v. Wade* and *Doe v. Bolton* "is that the people and the legislatures of the 50 states are constitutionally disentitled to weigh the relative" interests involved and resolve the question of abortion democratically).

⁴⁴ See, e.g., Charles Krauthammer, *Judicial Insanity*, WASH. POST, April 22, 2005, at A17, available at LEXIS, News Library, WPOST File (discussing judicial overreach and its recent provocation of intemperate statements critical of the judiciary by members of Congress).

judicial political perspectives of other actors or institutions within the constitutional system.

Recognition of formal legal categories of judicial constitutional violations—such as those associated with structural and Rule of Law constitutional norms—can frame, channel, discipline, and constrain the reactions of political actors to the courts through the rigors of traditional legal interpretation, analysis, and argument.⁴⁵ This discipline provided by traditional forms of legal analysis will promote the protection of the courts from intemperate political attack and also encourage greater judicial sensitivity to the constitutional limits on the authority of the federal judiciary by providing extra-judicial political sources of constitutional analysis of the judicial power dimensions of the courts' decisions. Not surprisingly, channeling judicial-power based opposition to the decisions of the courts into traditional forms of constitutional argument and cultivating greater judicial consideration of the views of non-judicial actors will likely operate to diffuse institutional conflict and thereby foster a degree of respect for the judiciary, protecting its institutional integrity and facilitating its ability to interpret the Constitution with authority and credibility.

In sum, then, recognition of formal categories of judicial constitutional violation can guide the use of political checks on the courts and thus serve to promote the protection of both the Constitution's rights and structures from the courts and the courts as an institution for protecting the Constitution from political actors. Conceptual clarity, then, in this area is of crucial importance to the project of preserving constitutional and judicial integrity.

IV. JUDICIAL MISTAKES ABOUT CONSTITUTIONAL MEANING AND JUDICIAL VIOLATIONS OF THE CONSTITUTION

A foundational question of constitutional analysis concerns the distinction between judicial “mere” mistakes about constitutional meaning and judicial violations of the constitutional limits on the interpretive authority of the judicial branch. Conventional discussion of the merits of a constitutional decision typically centers on the question of whether the decision was right or wrong; did the court in question interpret the Constitution correctly or incorrectly? Conventional discussion of mistaken decisions moving beyond the assertion of a “mere” mistake typically moves into a nebulous territory sounding in the language of (il)legitimacy and (im)prudence.⁴⁶ The language of judicial constitutional violation is seldom employed.

⁴⁵ See Nowlin, *supra* note 2, at 1189–91.

⁴⁶ See, e.g., *id.* at 1188–93.

One can, however, characterize any constitutional mistake—any judicial decision misinterpreting the Constitution and (say) mistakenly upholding unconstitutional legislation or invalidating constitutional legislation—as a violation of the Constitution by the courts. One can hold this view because even the reasonable and good faith upholding of unconstitutional legislation can be thought to entail a violation of the judiciary's structural duty under the separation of powers and the Supremacy Clause to invalidate unconstitutional legislation. Additionally, one can assert this position because even the reasonable and good faith invalidation of constitutional legislation by courts can be viewed as entailing a form of constitutional violation because such a decision involves an arrogation (however minimal) of the authority of other political actors (e.g., Congress or the state legislatures) in violation of, say, structural principles of the separation of powers or federalism. Finally, one can say quite accurately that any decision that interprets a constitutional norm incorrectly is "unconstitutional" in a central sense of the word; it is in conflict with the Constitution rightly interpreted. There is, then, an analytical basis for characterizing all judicial decisions that are mistaken about constitutional meaning as violations of the Constitution.

Even so, not every type of mistaken judicial decision raises the same concerns for the integrity of the constitutional system or the same need for description as a judicial constitutional violation. As a matter of foundational conceptual analysis, it is necessary to differentiate within the broad category of mistaken (and thus unconstitutional decisions) and recognize two sub-categories of decisions that are, conceptually, both constitutional mistakes and constitutional violations: what might be best described as (i) judicial "mere" mistakes about constitutional meaning, mistakes that typically entail a form of constitutional violation of comparatively lesser concern largely obviating the need for the use of the language of constitutional violation in describing these cases and (ii) judicial mistakes that typically entail more serious forms of constitutional violation of greater constitutional concern, such as the contravention of constitutional norms that limit the judiciary's authority to interpret the Constitution, thus necessitating the descriptive use of the language of constitutional violation.

The analytical distinction between the two classes of decisions deserves more elaboration. As discussed above, any decision misinterpreting the Constitution and mistakenly upholding unconstitutional legislation or invalidating constitutional legislation can also be characterized as a form of constitutional violation by the courts. Such decisions, however, are not necessarily violations of the Constitution's affirmative grant of interpretive authority to the courts. In fact, if one takes

as a starting point the view that the Constitution grants to the federal courts a supremacy or primacy of interpretive authority over the Constitution,⁴⁷ then an aspect of this constitutional authority to interpret constitutional norms must be the authority to make (at least some class of) mistakes in interpreting the Constitution.

This is so for two related reasons. First, the very concept of authority includes by definition the authority to act incorrectly (in at least some respects) as well as correctly.⁴⁸ Indeed, if a court's decision were followed by political actors only when deemed correct or persuasive, the court would not be exercising true authority over those actors, but rather, at most merely a power of persuasion. Thus the authority of courts to resolve constitutional disputes necessarily includes some authority to resolve them incorrectly as well correctly. Secondly, a view equating mere mistakes about constitutional meaning with affirmative judicial violations of the constitutional grant of primary interpretive authority to the courts must maintain a problematic position: that the Constitution—in establishing an architecture of governmental institutions—both confers principal interpretive authority over the Constitution on the courts as part of the judicial power and also mandates for the exercise of that authority an unreasonable constitutional standard of interpretive “perfection” or complete accuracy, a standard with which the courts could not possibly comply.

Thus in the context of articulating the limits the Constitution places on the federal courts' interpretive authority, the institutions principally charged by the Constitution with its interpretation, there is no reason to read the constitutional design as imposing an unreasonable and unattainable standard of interpretive “perfection” rather than some reasonable and attainable interpretive standard—such as that of proper respect for the Constitution's structural and Rule of Law limits on the judicial power. The sounder view, then, is that the Constitution's grant of interpretive authority to federal courts within the design of government includes the authority to make interpretive mistakes (at least of a kind) and requires only that the courts adhere, say, to a reasonable constitutional standard for interpretive constitutionality—for instance, a standard of

⁴⁷ See, e.g., *United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000) (asserting that “[n]o doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text”).

⁴⁸ On the concept of authority, see FINNIS, *supra* note 14, at 233–34.

A person treats something (e.g. an opinion, a pronouncement, a map, an order, a rule . . .) as authoritative if and only if he treats it as giving him sufficient reason for believing or acting in accordance with it *notwithstanding* that he himself cannot otherwise see good reason for so believing or acting . . . or would himself otherwise (i.e. in the absence of what he is treating as authoritative) have preferred not so to believe or act.

Id.

appropriate respect for the norms of the constitutional structure and the Rule of Law as they constrain the interpretive authority of courts, a standard which the judiciary could be expected to meet routinely even as it inevitably makes some mistakes in interpreting the Constitution. There is, then, a strong conceptual distinction between judicial mistakes that do not violate the constraints of the Constitution's grant of interpretive authority to the judiciary and judicial mistakes that do violate those constraints.

The analytical distinction between the two categories of mistaken decisions also tracks a distinction between the two categories in terms of the typical level of concern they present as constitutional mistakes and constitutional violations. "Mere" constitutional mistakes entail a typically minimal form of constitutional violation because while they misinterpret the Constitution, they involve no exercise of the judicial power in conflict with the structural and Rule of Law constitutional norms that constrain the interpretive authority of the judiciary. As noted, mistaken decisions in this category undeniably do some damage to constitutional rights and structures, but they are still typically of relative lesser concern as constitutional violations for several reasons—these decisions are an inevitable byproduct of the grant of interpretive authority to the courts; they would happen even in a legal system where broad agreement about the proper judicial role exists; and they occur only within the contours of an otherwise constitutional exercise of the interpretive authority of the judiciary.

In contrast to these "merely" mistaken and minimally violative decisions about constitutional meaning are those mistaken judicial decisions that violate the constitutional limits on the interpretive authority of courts. This second category of decisions are also mistakes about constitutional meaning, but they are more than "mere" constitutional mistakes: they are those mistaken decisions that—in addition to misinterpreting the Constitution in some respect—conflict substantially with the structural and Rule of Law constraints the Constitution places on the judicial interpretive authority. These decisions, comparatively speaking, are not inevitable in the same sense as the first category, would *not* occur routinely in a legal system where consensus about the proper judicial role exists, and involve more troubling violations of the Constitution since they combine both a mistake about constitutional meaning with a violation of the constitutional limits of the interpretive authority of the judiciary. In sum, the two sub-categories of mistaken decisions, as constitutional violations, generally present very different levels of concern.

A question arises, then, as to terminology. Contemporary usage tends to describe judicial decisions that misinterpret the Constitution in the language of mistake rather than constitutional violation, but the analysis presented above suggests that such mistaken decisions may also be

properly described in the language of constitutional violation while also recognizing that the category of “mere” mistakes, as inevitable violations of relatively lesser concern, are typically not as troubling as the category of mistakes affirmatively violating the constitutional limits on the judiciary’s interpretive authority. What, then, is the best descriptive language to employ in the analysis of these decisions? Is it the terminology of “mistake” or “constitutional violation” or a mixture of the two? The issue here, first and foremost, is one of maximizing conceptual clarity in the discussion of mistaken judicial decisions while also minimizing, to the extent possible, unnecessary deviation from established legal usage.

Significantly, a rhetorical formulation asserting that *every* mistaken judicial decision is also a violation of the Constitution presents practical problems for the vitality of the concept of judicial constitutional violations in contemporary constitutional debate. If the invocation of the concept of judicial constitutional violation were routinely understood as simply another way of expressing mere disagreement with a court’s constitutional decisions, its utility as a concept clarifying a neglected dimension of the debate about the judicial power would be limited, and constitutional discourse would remain impoverished on crucial questions concerning the judicial power and its constitutional limits. On this understanding, the category of judicial constitutional violations, undifferentiated, might appear simply to replicate the well-known category of constitutional mistake and add little or nothing to contemporary debates about the judicial power. Moreover, the familiar concept of constitutional mistake already captures a central concern discussed above: that a court has misinterpreted the Constitution and thus has (say) mistakenly upheld or invalidated legislation in a manner inconsistent with constitutional norms, rightly interpreted, thereby doing damage of some kind to the integrity of constitutional rights or structures. This point, of course, is well understood in contemporary constitutional debate and needs no special conceptual apparatus or vocabulary—such as that of judicial constitutional violation—to drive it home or draw out its implications.

Thus the policies and internal logic underlying the articulation of a category of cases consisting of judicial violations of the constitutional limits on the courts’ interpretive authority—in favor of preserving the integrity of the judiciary while promoting judicial sensitivity to constitutional limits on its own power—suggest the following: decisions in the first category, judicial “mere” mistakes that minimally violate the Constitution, are best discussed in the traditional language of constitutional mistake, while decisions in the second category, judicial mistakes about constitutional meaning that contravene the limits the Constitution places on the interpretive authority of the courts, are best discussed using the less common but more fully descriptive language of judicial constitutional violation. As suggested above, the first category of mistaken judicial

decision can be thought to entail a kind of minimal constitutional violation, but there is no need with this category to deploy the concept of constitutional violation to capture the concerns these decisions present as mistakes about constitutional meaning and thus no need to deviate from the traditional legal discourse of "mistake" or correct and incorrect decision in describing this class of cases. The second category of mistaken judicial decision involves judicial violations of norms limiting the interpretive authority of the judiciary and the use of the concept of constitutional violation here captures important dimensions of these decisions that may not be fully recognized in the undifferentiated language of mere "mistake" but which may be properly described and driven home by analyzing the decisions as violations of the constitutional constraints on the interpretive authority of the courts. It is this terminology which this Article employs.

One may distinguish, then, between "merely" mistaken judicial decisions best described in the traditional language of mere mistakes about constitutional meaning and mistaken judicial decisions best characterized in the non-standard language of judicial constitutional violations. As noted, this second class of judicial decision can take several forms distinguishing it from the class of judicial "mere" mistakes about constitutional meaning. These forms include judicial violations of constitutional structures, judicial violations of constitutional Rule of Law norms, the pretextual use of judicial review, and judicial violations—directly or indirectly—of other constitutional norms, such as the First Amendment guarantees of freedom of speech and religion, that limit the courts as well as non-judicial actors.⁴⁹ Each of these four categories of judicial constitutional violation will be discussed in more detail below.

V. FOUR FORMS OF JUDICIAL CONSTITUTIONAL VIOLATION: A TYPOLOGY

A. *The Concepts of Injustice in Law and Unconstitutionality*

One can begin an exploration of the concept of judicial constitutional violations by outlining a typology of judicial acts that conflict with the Constitution. John Finnis's analysis of the concept of "injustice in law" can provide a starting point for this typology.⁵⁰ Indeed, the conceptual overlap between the fundamental purpose of a constitution—to secure justice via organic or basic law—and the concept of justice in or under law

⁴⁹ This last category, judicial violation of norms such as freedom of speech or religion, presents a slightly different set of issues surrounding the question of distinguishing decisions that are best described as judicial mistakes and decisions that are best described as judicial constitutional violations. These issues will be addressed in the section discussing this form of violation. See *infra* Part V.E.1.

⁵⁰ FINNIS, *supra* note 14, at 352–54.

suggests that the latter concept can shed considerable light on the concept of judicial constitutional violations.⁵¹

As Finnis has observed, one can identify four basic forms of “injustice in law”: (1) injustice based on lack of structural authority; (2) injustice based on failure of form or procedure associated with the Rule of Law; (3) injustice based on improper or exploitative intent; (4) and injustice based on a substantive violation of a moral norm.⁵² Finnis’s analysis of the concept of “(in)justice in law” has obvious implications for the concept of constitutional violations by courts. Notably, Finnis’s analysis suggests that a court, such as the U.S. Supreme Court, can be thought to act “unjustly in law” through its use of judicial power in each of these four ways, involving 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 contend that the federal courts can potentially violate the Constitution through the use of judicial power in each of these four ways, which though overlapping in some important respects, are sufficiently distinct conceptually to be worthy of separate analysis.

In sum, a court can act unjustly in law and potentially violate the Constitution: (1) by using the judicial power to exceed its authority, a structural deviation from the proper judicial role as established by the Constitution; (2) by using the judicial power in an improper manner or form, a deviation from constitutional norms of the Rule of Law, such as judicial fidelity to law as promulgated or published; (3) by 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) by using the judicial power, directly or indirectly, in a manner causing 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

⁵¹ On purposes of government in the liberal constitutionalist tradition, see JOHN LOCKE, TWO TREATISES OF GOVERNMENT 261 (Legal Classics Library 1994) (1689) (contending that the goal of “political society and government” is the “preservation” of “lives, liberties, and estates,” which may be designated by the “general name *property*”); see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) announcing that:

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.

See also U.S. CONST. pmbl. On the concept of the common good, see FINNIS, *supra* note 14, 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 *id.* at 245–52.

⁵² FINNIS, *supra* note 14, at 352–54.

act required by the Constitution. A more detailed examination of each of these four forms of judicial constitutional violation is presented below.

B. *The Four Forms of Judicial Constitutional Violation*

1. *Violation by Exceeding Structural Authority*

i. Governmental Structure or Design as a Constraint on the Courts

The Constitution both establishes the general framework for the federal judicial power and places it under express and implied constitutional limits as a matter of governmental design. A decision by a federal court can, thus be “unjust in law”—and violative of the Constitution—because the court’s exercise of the power of judicial review is infirm as a matter of constitutional structure: it exceeds the scope of the court’s authority under the design of the Constitution. As discussed, there are well-recognized constitutional limits of this type on the U.S. Supreme Court, including Article III’s provisions (1) establishing the subject-matter jurisdiction of the Supreme Court;⁵³ (2) setting forth the Court’s original and appellate jurisdiction;⁵⁴ and (3) mandating the case or controversy requirement,⁵⁵ thus prohibiting advisory opinions⁵⁶ and judicial resolution of non-justiciable questions.⁵⁷ Other structure-based limits in the areas of state

⁵³ See 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.

Id.

⁵⁴ See 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 party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Id.; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803) (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).

⁵⁵ See *supra* note 54.

⁵⁶ 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 Letter from Chief Justice John Jay to President Washington (August 8, 1793), reprinted in Paul M. Bator et al., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65–67 (3d ed. 1978).

⁵⁷ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992) (observing that the Article III “case” or “controversy” requirement is a constitutional limit on the federal courts mandating the constitutional core of the justiciability doctrines and that the irreducible constitutional minimum of

sovereign immunity⁵⁸ and federal common law⁵⁹ are also widely recognized.

This Article, however, is principally concerned not with these traditional and well-recognized structural constitutional limits on the judicial power, but with the conceptual foundations of less well-recognized limits on the power of the Court which have consequences for familiar interpretive debates over the proper scope of the judicial power between proponents of judicial restraint and judicial activism. As suggested above, there are good reasons for thinking that these less well-recognized limits on the structural authority of the Court—constraining its interpretive authority and use of interpretive methods and thus implicating debates over judicial activism and restraint—do exist.⁶⁰ For instance, the structures of the Constitution—including fundamental constitutional norms such as the separation of powers, representative democracy, and federalism—are properly seen as imposing substantial constitutional limits on the power of the Supreme Court.⁶¹

These constitutional limits constrain not only the Supreme Court's jurisdiction⁶² or power to create federal common law,⁶³ 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 consequences of the degree of judicial deference and the use of interpretive methods for the contours of the constitutional structure as it allocates power between the federal judiciary and other federal and state institutions.⁶⁴ As suggested, the existence of implied

the justiciability doctrine of standing contains three elements—injury in fact, causation, and redressability).

⁵⁸ 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.”); *Alden v. Maine* 527 U.S. 706, 713–16 (1999); *Hans v. Louisiana*, 134 U.S. 1, 17 (1890).

⁵⁹ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) (rejecting the view that federal courts have an implied power to create federal civil common law in diversity cases); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32–34 (1812) (rejecting the view that federal courts have an implied power to create federal criminal common law).

⁶⁰ See *supra* notes 29–31 and accompanying text.

⁶¹ See Nowlin, *Constitutional Illegitimacy*, *supra* note 4, at 389.

⁶² See, e.g., *Lujan*, 504 U.S. at 555 (observing that Article III limits the jurisdiction of federal courts to “Cases” and “Controversies”).

⁶³ See, e.g., *Erie*, 304 U.S. at 79 (1938) (rejecting the view that federal courts have an implied power to create federal civil common law in diversity cases). The Court in *Erie* derived this conclusion from the federal structure of the Constitution, stating 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 of the Constitution purports to confer such a power upon the federal courts.

Id. at 78.

⁶⁴ See generally Nowlin, *Constitutional Illegitimacy*, *supra* note 4 (discussing the “proper scope” of judicial review in American constitutional law).

constitutional limits on the implied constitutional power of supreme judicial review, both deriving from constitutional structure and supremacy, is to be expected.⁶⁵ Thus this line of analysis suggests that debates about the proper judicial role, debates which often sound in constitutional structure, may be better re-conceptualized, 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).⁶⁶

Additionally, it is worth noting here that this structural form of violation as it relates to questions of judicial activism and judicial restraint can involve improperly *upholding* legislation as well as invalidating it. While objections to unconstitutional invalidations in this context are grounded in the contention that the Court has exceeded the scope of its constitutional authority under the structure of the Constitution,⁶⁷ a constitutional violation via improper upholding takes the slightly different form of a contention that the Court has abdicated its constitutional *duty* under the structure of the Constitution and the Supremacy Clause to invalidate unconstitutional legislation.⁶⁸

ii. Determining Structural Constitutionality: Interpreting the American Constitutional Design

A structural interpretation of the American constitutional design is necessary to determine the parameters of a proper exercise of the judicial power as it relates to aspects of the judicial function, such as the use of interpretive methodologies and the degree of deference courts should accord legislatures.⁶⁹ The determination of the precise standard around which the structural constitutionality of judicial action is to be defined requires an interpretation of the structure of the Constitution to determine the allocation of power among the institutions of government and thus the lineaments of the proper judicial role, including both the constitutional limits on the power of the Supreme Court and the Court's constitutional duties to interpret and enforce the Constitution.⁷⁰ This structural interpretation of the proper judicial role can then provide a point of departure for arguments about the structural constitutionality of particular exercises of the judicial power as overly activist or restrained in nature.

⁶⁵ *Supra* note 31; see also Nowlin, *Constitutional Illegitimacy*, *supra* note 4, at 393–94.

⁶⁶ See Nowlin, *Constitutional Illegitimacy*, *supra* note 4, at 392–93.

⁶⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 521 (1965) (Black, J., dissenting).

⁶⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that “it is emphatically the province and the *duty* of the judicial department to say what the law is” (emphasis added)).

⁶⁹ For a structural interpretation of the American constitutional design in favor of judicial restraint, see Nowlin, *Constitutional Illegitimacy*, *supra* note 4, at 462, 466.

⁷⁰ See *id.* at 426.

This structural interpretive project should involve an analysis of the basic logic of judicial review, the multiple variables of the judicial power, and the multiple structural constitutional values—such as representative democracy, the separation of powers, and federalism—implicated by use of the judicial power.⁷¹ As an exercise in interpretation, this structural interpretive project will also likely involve dual aspects of interpretive analysis, including an aspect of legal “fit” with structural norms and an aspect of moral-political “justification,” ultimately selecting the most morally attractive interpretation of the role of the court within the constitutional design from among those interpretations that sufficiently “fit” with the relevant legal materials.⁷² As a prerequisite to this act of interpretation, analysis will also be necessary to determine the more precise nature of the aspect of legal “fit,” concerning questions such as the degree of “fit” required with various, potentially competing, legal materials—such as original understanding, constitutional tradition, and judicial precedent—in order for an interpretive candidate to qualify as an interpretation that sufficiently “fits” the legal materials.⁷³

Obviously, there will likely be substantial disagreement about the precise contours of the structural constitutional limits on the Court’s interpretive role and whether that role is properly understood as, say, fundamentally activist or restrained in nature. Even so, wide-ranging disputes about constitutional meaning are a familiar part of the jural landscape and not themselves reasons for avoiding constitutional analysis. Rather, such disputes are an additional reason for engaging in analysis in the hope of resolving, or at least narrowing, the grounds of disagreement.

iii. The Requirement of Structural Constitutionality

a. “Mere” Judicial Mistakes and Judicial Structural Constitutional Violations

As discussed above, it is important to recognize the difference between the judiciary’s structurally constitutional “mere” mistakes about constitutional meaning and judicial violations of the structural limits the Constitution places on the interpretive authority of the courts. In this context, one can define “mere” constitutional mistakes as those judicial decisions that are mistaken about constitutional meaning, but involve no exercise of the judicial power sufficiently in conflict with the structural constitutional limits of that power to qualify as a judicial structural

⁷¹ See *id.* at 394.

⁷² Ronald Dworkin originated this understanding of interpretive analysis as involving dual aspects of legal “fit” and moral-political “justification.” RONALD DWORIN, *LAW’S EMPIRE* 225–75 (1986); DWORIN, *supra* note 10, at 86–88.

⁷³ See DWORIN, *supra* note 10, at 86–110; Nowlin, *Constitutional Illegitimacy*, *supra* note 4, at 397–98.

constitutional violation.⁷⁴ A “mere” constitutional mistake of this sort can take many forms such as a misreading of legal materials surrounding, for example, the Bill of Rights or the federal structure of the Constitution as it limits the Congress but one involving no significant conflict with the structure of the Constitution as it constrains the judicial branch’s interpretive authority.⁷⁵

In contrast to these “mere” constitutional mistakes are those judicial decisions amounting to actual violations of structural constitutional limits on the courts. Such decisions consist of those that—in addition to misinterpreting the Constitution in some respect—are sufficiently structurally infirm under the constitutional design to warrant the label “structural constitutional violation.”⁷⁶ Judicial constitutional violations of this kind may take many forms, such as the Court mistakenly resolving a constitutionally non-justiciable case⁷⁷ or mistakenly engaging in an overly activist or restrained exercise of the judicial power.⁷⁸ Of course, the understanding of the precise contours of a structurally constitutional exercise of the judicial power may differ dramatically between a proponent of judicial restraint and a proponent of judicial activism,⁷⁹ but, as

⁷⁴ Or as a violation of another constitutional limit.

⁷⁵ For an example of a case arguably falling into this category, see *Bond v. United States*, 529 U.S. 334, 336 (2000) (holding that the “squeeze” of a soft-sided opaque bag in the overhead storage space of a bus by law enforcement constitutes a Fourth Amendment search triggering the procedural requirements of Fourth Amendment reasonableness). Notably, in this case, Justice Breyer, joined by Justice Scalia, dissented, arguing that the “squeeze” of the bag by law enforcement was indistinguishable from the handling such bags routinely receive from other passengers and thus did not constitute a Fourth Amendment search. *Id.* at 339, 342 (Breyer, J., dissenting). One might imagine that such a close case presents a serious question as to whether the majority were right or wrong in their interpretation of the Constitution, but not as to whether the majority complied with structural constitutional limits on the judicial power.

⁷⁶ Nowlin, *supra* note 2, at 1189–90.

⁷⁷ For a case arguably falling into this category, see *Gratz v. Bollinger*, 539 U.S. 244, 290–91 (2003) (Stevens, J., dissenting) (stating that “our precedents leave us no alternative but to dismiss the writ for lack of jurisdiction. Neither petitioner has a personal stake in the outcome of the case, and neither has standing to seek prospective relief on behalf of unidentified class members who may or may not have standing to litigate on behalf of themselves”). Notably, with a violation of this sort involving the threshold question of justiciability, the Court might be right on the actual merits of the case (i.e., the Equal Protection Clause issue in *Gratz*), but be mistaken about the predicate constitutional limit allowing the Court to hear the case and thus in violation of that constitutional limit.

⁷⁸ *Cf.* *McCleskey v. Kemp*, 481 U.S. 279 (1987) (Brennan, J., dissenting) (stating from a judicial activist perspective 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)); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Harlan, J., dissenting) (stating from a judicial restraint perspective 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)).

⁷⁹ See *supra* note 78.

suggested, some disagreement over such complex questions of constitutional law is to be expected.

Thus decisions which occur within the parameters of a structurally constitutional exercise of the judicial power, but which also happen to get the meaning of the Constitution wrong in some respect, should be viewed as “mere” mistakes about constitutional meaning for purposes of structural analysis. Decisions which occur outside the parameters of a structurally constitutional exercise of the judicial power and (therefore) which also get the meaning of the Constitution wrong in some respect are more than “mere” mistakes about constitutional meaning, they are also judicial violations of the structural limits the Constitution places on the interpretive authority of the courts.

b. Structurally Imprudent Exercises of the Judicial Power and Judicial Structural Constitutional Violations

The distinction between structurally constitutional mistakes about constitutional meaning and structurally unconstitutional mistakes (i.e., structural constitutional violations) is an important one, but it does not exhaust the full range of distinctions worth making in this context. An additional and crosscutting issue is the question of the existence of a category of sub-constitutional prudential structural limits on the judicial power. This issue involves what may be called the scope of structural constitutionality: the clarity and degree of conflict with structural constitutional constraints on courts which is required before one can justifiably call a judicial act a violation of the structure of the Constitution as it limits the interpretive authority of the judiciary.

An initial observation worth making is this: one can identify a potential borderline category of mistaken judicial decisions, a category falling somewhere between the judiciary’s structurally constitutional “mere” mistakes about constitutional meaning and judicial violations of the constitutional structure as it constrains the judiciary. This intermediate category consists of decisions imprudently in tension with the constitutional structures limiting the courts but which do not undermine or conflict with those structures substantially or clearly enough to be considered truly unconstitutional in that respect. Thus one might distinguish here between three categories of mistaken decisions: (1) the structurally constitutional and prudent uses of the judicial power; (2) the structurally constitutional but imprudent uses of the judicial power; and (3) structurally unconstitutional uses of the judicial power.

The category of structurally constitutional but structurally imprudent uses of the judicial power would consist (in part) of those decisions implicating structural constitutional limits on the courts, such as the judicial power dimensions of the separation of powers or federalism, but which are insufficiently clear or substantial enough in their conflict with

those structures to warrant the label of judicial constitutional violation. Thus this category of decisions would be viewed as something more than "mere" judicial mistakes about constitutional meaning, (involving a simple misreading of legal materials not specially implicating structural constitutional limits on the judicial power of constitutional interpretation) but something less than actual judicial violations of the structure of the Constitution as it constrains the judicial branch, which by definition might be thought to require a clear and significant conflict with constitutional structures.

Notably, the prudential dimensions of the Supreme Court's justiciability doctrines are a well-recognized example of one form of sub-constitutional prudential limit on the Court's power. For instance, the Court's doctrine of prudential standing, while sub-constitutional in nature, is designed to promote respect for what are indisputably constitutional values—such as federalism, the separation of powers, and representative democracy—from which the constitutional core of standing also principally derives.⁸⁰ Similarly, in debates over judicial activism and restraint, criticism of the exercise of the judicial power as overly activist or restrained often involves the sub-constitutional language of prudential limits, though typically in a much less carefully articulated form.⁸¹

Thus these judicial acts falling in between mere judicial mistakes about constitutional meaning and judicial violations of the structural constitutional constraints on the courts can be considered structurally constitutional as an exercise of the judicial power but also structurally imprudent or borderline exercises of that power and thus subject to a form of prudential structural criticism for their structural unwisdom. Such criticism would typically take the form of a claim that a court in its assertion of the judicial power has imprudently accorded insufficient respect to values such as representative democracy, the separation of powers, and federalism.⁸² Thus this class of decisions would be subject to prudential structural judicial power criticism beyond a claim of a "mere" assertion that the court's reading of the legal materials is mistaken, but criticism falling short of an assertion that the court's decision is a violation of a structural constitutional limit on the courts' interpretive authority.

⁸⁰ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (observing that "[i]n essence 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." (emphasis added) (citations omitted)).

⁸¹ See, e.g., *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) (observing from a judicial restraint perspective that "[a]s an exercise of raw judicial power, the Court perhaps has authority to do what it does today [in *Doe* and *Roe*]; 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)).

⁸² See *Doe*, 410 U.S. at 221–22 (White, J., dissenting).

c. The Scope of Structural Constitutionality

A second inquiry worth making in this context concerns the question of the proper scope of what may be called the “zone” of structural constitutionality in light of continuing debates over the proper exercise of the judicial power. The question one might ask here is this: what degree of deviation from a structurally ideal (i.e., ideally activist or ideally restrained) exercise of the judicial power should one recognize as still constitutionally sound as a structural matter of the scope of the judicial power, as falling short of an actual structural judicial constitutional violation? Or to put it another way: how broad a penumbra of structural constitutionality should surround an ideal exercise of the judicial power fully consistent with and supportive of the American constitutional design in all respects, whether from the standpoint of a judicially activist or restrained view of the proper judicial role? Should the standard of structural constitutionality be very broad, perhaps keyed to the entire mainstream of legal debate, encompassing a sweeping range of views of the appropriate scope of the judicial power from the very activist to the very restrained, a position that suggests most debate about the proper judicial role is in fact a structurally sub-constitutional debate about the structural prudential limits of the judicial power? Or should the scope of structural constitutionality be narrower, keyed much more closely to a given (and likely controversial) understanding of the proper judicial role, encompassing only a part of the range of the views on the judicial power present in constitutional debates today, a position suggesting that a significant part of the debate about the proper judicial role today is actually better re-conceptualized as a debate about structural constitutional limits on the power of the courts?

Notably, while there are significant differences of opinion across the political spectrum on the precise question of the proper judicial role (i.e., whether the proper judicial role is one of activism or restraint), contemporary constitutional debate provides a common, though implicit, answer to this question of the breadth of the zone or “penumbra” of structural constitutionality. The penumbra of constitutional structural soundness in this context covers almost the entire spectrum of opinion on judicial power from the very activist to very restrained. Indeed, the minimal presence of serious analysis concerning the constitutional limits of the judicial power as they relate to debates over judicial activism and restraint reflects a widespread (if unreflective) assumption that almost every exercise of judicial power by the Supreme Court is consistent with the constitutional structure and thus is to be subject only to sub-constitutional prudential objections to its structural effects, even when these objections are clearly rooted in the fundamental structures of the

Constitution.⁸³ In sum, even a judicial decision a critic may (rightly) see as in direct conflict with the separation of powers, federalism, or representative democracy is likely to be subject only to sub-constitutional prudential criticism (as such) and not objected to as a judicial violation of the structure of the Constitution.⁸⁴

This unreflective privileging of the Court should be reconsidered. The origin of this counter-intuitive license granted to the judiciary is likely found in the "common [elite] attitude that the educated are better equipped to govern than the masses," a view which "finds its institutional expression in a disdain for ordinary politics and the legislative process, and a preference for extending the authority of courts, the branch of government to which [elites] have the easiest access."⁸⁵ An important aspect of this privileging of the judicial process over the political process is the systematic insulation of the judiciary from any serious analysis of structural constitutional limits on the judicial power as those limits may be thought to implicate traditional debates between proponents of judicial activism and judicial restraint. Whether one ultimately supports a broad or narrow view of the judicial power, one's position on this question should at least be a reflective and transparent one, which suggests that the question of structural constitutional limits on the judicial power deserves a careful analysis.

In essence, the question presented here is one of striking a prudent balance between deference to the decisions of the courts on the one hand and concern both for the fundamental structures of the Constitution as they limit the judicial branch of the government and for the promotion of long-term respect for the judiciary on the other hand. This question is also intimately connected to the arguments for recognizing the very *existence* of a category of judicial constitutional violations. As discussed above, these benefits include the hope of improving judicial behavior, better protecting constitutional rights and structures, and ultimately promoting greater respect for the judiciary over time by channeling political criticism of the judiciary into traditional forms of legal analysis concerning constitutional constraints on the courts and in turn promoting greater judicial sensitivity to the constitutional limits of the judicial power.

This analysis may be thought to suggest a middle-ground position, one which recognizes a substantial but not unlimited area of structural constitutionality surrounding (whatever is viewed as) a structurally ideal exercise of the judicial power. This area of structural constitutionality thus includes a substantial zone of imprudent but constitutional uses of the

⁸³ *But see* *Griswold v. Connecticut*, 381 U.S. 479, 513 (1965) (Black, J., dissenting).

⁸⁴ *See, e.g., Doe*, 410 U.S. at 221–22 (White, J., dissenting).

⁸⁵ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 178 (1991).

judicial power, a zone in which judicial decisions implicate and undermine structural constitutional principles limiting the judicial power to some sub-constitutional prudential degree and which are therefore subject to criticism on sub-constitutional prudential judicial power grounds. This substantial area of structural constitutionality, however, should not be thought to sweep so broadly as to include all or virtually all assertions of power by the Supreme Court or other federal courts. To the contrary, this middle-ground position requires the recognition of a substantial area of the use of the judicial power representing sufficiently clear and substantial deviations from the proper structural judicial role to warrant the express denomination of structural judicial constitutional violation. Thus, on this view, some significant part of the spectrum of opinion from extreme judicial activism to extreme judicial restraint is likely to be considered structurally unconstitutional and criticized as such.

One may conclude, then, that in the context of constitutional structure the category of judicial mistakes about constitutional meaning include three sub-categories: (1) structurally constitutional “mere” mistakes about constitutional meaning, decisions misreading legal materials but generally consistent with and supportive of the design of the Constitution as it constrains the judicial power; (2) mistakes about constitutional meaning that are structurally constitutional but structurally imprudent exercises of the judicial power, decisions in tension to a limited and sub-constitutional prudential degree with structural constitutional principles as they constrain the judicial power; and (3) mistakes about constitutional meaning that are judicial structural constitutional violations, decisions undermining structural constitutional constraints on the judicial power clearly and substantially enough to warrant the label “judicial constitutional violation.”

iv. Judicial Structural Constitutional Violations: Rare or Routine?

In the context of traditional debates over activism and restraint, one may ask whether judicial structural constitutional violations by the Supreme Court are rare or routine or somewhere in between? The answer to this question depends in part upon two overlapping issues: (1) the answer to the precise question of the proper or ideal judicial role within the American constitutional design mandated by the Constitution and (2) the answer to the question of the proper scope of the zone or penumbra of structural constitutionality surrounding an ideal exercise of the judicial power.

First, on the question of the proper or ideal judicial role, one might simplify a much more complex reality and imagine that conventional assertions of the judicial power fall across a spectrum of judicial restraint and judicial activism in a bell curve, with a lesser frequency of both highly restrained and highly active usage by the Court. On this assumption,

where along this simplified spectrum of restraint/activism one locates the proper exercise of judicial power—in light of one's structural interpretation of the American constitutional design—determines the base frequency of potential structural constitutional violations by the judiciary. Obviously, those proponents of substantial restraint and activism would be more troubled by the Court's routine assertions of judicial power along the center and opposite end of the spectrum. A judicial power "centrist," on the other hand, would be less troubled by the bulk of the Court's decisions falling along the center of the curve, but more troubled by the smaller number of "outlier" decisions at each end of the spectrum.

Second, one's answer to this question of the frequency of judicial constitutional violations would also be dependent on one's view of the breadth of the zone of structural constitutionality surrounding one's understanding of the ideal judicial role. When does an exercise of the judicial power deviate clearly and substantially enough from the ideal judicial role to be considered a structural constitutional violation as opposed to a merely imprudent use of the judicial power subject to sub-constitutional prudential criticism? As noted above, the answer to this question of deference to the judiciary rests upon an analysis of the value of articulating in the language of constitutional violations one's objections to those judicial decisions that significantly threaten constitutional structures constraining the judicial power. As discussed, there are sound reasons for *not* extending total deference to the Supreme Court, but rather endorsing a middle-ground approach which recognizes a substantial zone of structural constitutionality in the exercise of the judicial power, including imprudent uses of the judicial power subject to sub-constitutional prudential structural criticism, and a substantial zone of structurally unconstitutional assertions of the judicial power, recognized expressly as judicial violations of the structure of the Constitution because of their clear and substantial conflict with constitutional structures constraining the courts. Thus whatever structural role along a restraint/activist spectrum one concludes is the proper baseline for an exercise of the judicial power fully supportive of the constitutional structure, the better (that is, narrower) understanding of the scope of structural constitutionality, suggests that structural constitutional violations by the Supreme Court are unlikely to be terribly rare, though they may not be routine.

2. *Violation by Contravention of Rule of Law Norms*

i. The Rule of Law as a Constitutional Constraint on the Courts

In addition to the category of structural judicial violations of the Constitution, discussed at length above, the Supreme Court can also violate the Constitution by contravening the Constitution's Rule of Law requirements as they limit the federal judiciary. The Rule of Law is a set

of norms which may be thought of as implicit in the very structure of judicial decision making as authorized by the Constitution⁸⁶ or, alternatively, as a constitutional requirement binding on the U.S. Supreme Court as part of the meaning of the Fifth Amendment Due Process Clause⁸⁷ or perhaps even as unenumerated norms under the Ninth Amendment.⁸⁸

The Rule of Law is a multi-faceted concept, and the status and more precise meaning of various strands of the Rule of Law as a concept in legal and political discourse remain contested and debated among theorists.⁸⁹ A detailed discussion of the implications of each of these various strands of the Rule of Law for the concept of judicial constitutional violations is well beyond the scope of this Article. Thus the presentation of issues in this section shall be illustrative rather than exhaustive of potential Rule of Law constitutional constraints on the courts. Additionally, primary emphasis here will be placed on the strand of Rule of Law discourse of most interest to this Article's central project—the concept of judicial constitutional violations and their relation to traditional debates about judicial activism and restraint—namely, the requirement of judicial fidelity to law, the faithful administration of legal provisions as promulgated or published, a strand of the concept of the Rule of Law raising the question of the bounds of legitimate legal interpretation.

To illustrate potential constitutional limits on courts in this area of the Rule of Law, one can turn to Lon Fuller's authoritative explication of the requirements of the Rule of Law as the "inner morality" of law, a view which understands law as the purposive enterprise of guiding human behavior through the use of legal rules.⁹⁰ Fuller contends that the Rule of Law requires: (1) that legal rules be created; (2) that they be effectively published; (3) that they be prospective or non-retroactive; (4) that they be understandable; (5) that they be non-contradictory; (6) that they be capable of compliance; (7) that they be stable or change with relative infrequency; and (8) that there be a congruence between the rules "as announced" and

⁸⁶ This form of the argument would derive the Rule of Law norms from the inherent structure of judicial decision making and thus track substantially the structural arguments concerning the allocation of governmental power to the judiciary discussed above. One can see this structural version argument on display in THE FEDERALIST NO. 78 (Alexander Hamilton), and THE FEDERALIST NO. 81 (Alexander Hamilton) where Hamilton distinguishes between the judicial power ("judgment") and the legislative power ("will") and suggests that the exercise of the latter in the guise of the form is a usurpation of legislative authority potentially justifying impeachment.

⁸⁷ U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.")

⁸⁸ U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). On the potential Ninth Amendment basis for a "right to judicial restraint," see Nowlin, *Judicial Restraint*, *supra* note 4, at 237.

⁸⁹ See generally Richard H. Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

⁹⁰ LON L. FULLER, THE MORALITY OF LAW (1964).

their actual administration.⁹¹ These eight requirements of the Rule of Law may be thought to govern not only legislatures and executives, but also the judiciary.⁹² Moreover, as noted, various provisions of the Constitution such as the Fifth Amendment Due Process Clause could be thought to incorporate some or all of these requirements of the Rule of Law in some form—as well as potential additional rules of a procedural nature required in the special context of the judicial process.

For instance, one fairly “thin” aspect of the Rule of Law would require the establishment of and adherence to a standard set of procedures governing the judiciary’s operation and resolution of cases.⁹³ One might think this required by the Fifth Amendment Due Process Clause because part of the process that is “due” is simply the establishment of some set of basic procedures and adherence to those procedures as established.⁹⁴ Another, somewhat “thicker,” aspect of a due process Rule of Law norm

⁹¹ *Id.* at 39.

⁹² There is no reason to suppose that courts are not bound by some form of Rule of Law norms similar to those that govern executives and legislatures, and the Fifth Amendment Due Process Clause, associated with the concept of the Rule of Law, limits federal courts as well as the executive and legislative branches. *See, e.g.,* *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) (observing that the Fifth Amendment Due Process Clause is a “limitation upon the executive, legislative, and judicial powers of the federal government”).

⁹³ Notably, the various rules governing the U.S. Supreme Court’s operation and decision making are a complex mixture of constitutional law, federal statutory law, rules formally adopted by the Court, and traditional norms of judicial decision making. *See, e.g.,* U.S. CONST. art III (defining in detail the contours of the federal judicial power); 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.”); 28 U.S.C. § 1251 (2000) (providing for the original jurisdiction of the Supreme Court); *id.* § 1254 (providing for writ of certiorari from federal courts of appeals); *id.* § 1257 (providing for writ of certiorari from state supreme courts); RULES OF THE SUPREME COURT OF THE UNITED STATES (2005) (prescribing rules for conducting the business of the Court concerning issues such as admission to the Supreme Court bar, review of certiorari, procedure in original action, motions to the court, stays, brief writing, and disposition of cases); *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (“[T]he organization of the judicial power, definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their actions and authority, have been, and of right must be, the work of the legislature.”); HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 218–27 (7th ed. 1998) (discussing traditional decision making norms concerning assignment and drafting of opinions); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 264 (1987) (discussing the Court’s traditional and self-imposed “rule of four” for the grant of a writ of certiorari); BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 14 (1993); (observing that “[t]he Constitution’s Judiciary Article was . . . not self-executing” and thus that “[b]efore the federal courts, including the Supreme Court, could come into existence, they had to be provided for by statute”); Steinman, *supra* note 3 (discussing some of the Court’s traditional decision making norms such as the dicta-holding distinction and stare decisis).

⁹⁴ This requirement would combine Fuller’s first requirement, that legal rules, including procedural rules, be established, and his last requirement, that there be congruence between the rules “as announced” and their actual administration. *See* FULLER, *supra* note 90, at 39. Of course, one might also consult historical standards in determining what procedures have been “established”; *cf.* *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) (observing that the Court in determining the requirements of due process “must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country”).

would require certain additional “substantive” procedures necessary for the fair or accurate resolution of cases. Examples of this form of due process may be found in the requirement that the state may convict an individual of a crime only upon proving beyond a reasonable doubt every element of the crime⁹⁵ or the requirement of notice and an opportunity for a hearing before certain adjudicative deprivations of life, liberty, or property.⁹⁶

Additionally, another aspect of a “thicker” conception of Rule of Law norms might view the Due Process Clause as instantiating Fuller’s third requirement: prospectively or non-retroactivity in legal rules. The U.S. Constitution, of course, in accordance with this widely-recognized requirement of the Rule of Law, contains provisions expressly prohibiting ex post facto laws by both the federal⁹⁷ and state governments.⁹⁸ The U.S. Supreme Court has further held that a decision of a state supreme court interpreting a criminal statute in an unforeseeably broad fashion and applying it retroactively is the functional equivalent of an ex post facto law and is (therefore) a violation of the Fourteenth Amendment Due Process Clause.⁹⁹ Notably, then, the U.S. Supreme Court views the Fourteenth Amendment Due Process Clause as containing a form of Rule of Law prohibition of the judicial equivalent of an ex post facto law, even when the prohibited judicial act takes the form of the interpretation of a state law by the state court of last resort, which, as the state court of last resort, is entitled to deference on the question of the meaning of a state law.¹⁰⁰ Thus the reasoning of the Court also suggests that if the U.S. Supreme Court itself takes a similarly unforeseeably broad reading of a federal criminal statute and applies it retroactively, the U.S. Supreme Court thereby violates the Fifth Amendment Due Process Clause.¹⁰¹ The Supreme Court, then, has recognized that the Fourteenth Amendment Due Process Clause

⁹⁵ See *In Re Winship*, 397 U.S. 358, 364 (1970) (holding that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

⁹⁶ See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (discussing the Due Process Clause of the Fifth Amendment and its requirement of an evidentiary hearing prior to termination of welfare benefits).

⁹⁷ U.S. CONST. art. I, § 9, cl. 3 (“No . . . ex post facto law shall be passed.”).

⁹⁸ *Id.* art. I, § 10, cl. 1 (“No state shall . . . pass any . . . ex post facto Law.”).

⁹⁹ See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964) (invalidating under the Fourteenth Amendment Due Process Clause as impermissibly retroactive the South Carolina Supreme Court’s unforeseeable interpretive enlargement of the reach of a criminal statute applied retroactively).

¹⁰⁰ See, e.g., *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (stating that deference to state courts on questions of state law “reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns”).

¹⁰¹ There is no reason to believe that the Fifth and Fourteenth Amendment Due Process Clauses contain different legal norms except for those anomalous differences required by Fourteenth Amendment “incorporation” of provisions of the Bill of Rights and Fifth Amendment “reverse incorporation” of a Fourteenth Amendment Equal Protection Clause component. If, however, the Due Process Clauses were thought to contain a Rule of Law interpretive norm requiring a form of judicial restraint, the federal judicial enforcement of this Fourteenth Amendment judicial restraint norm on the state judiciaries would entail a certain paradox under the Fifth Amendment judicial restraint norm.

prohibits state courts from certain kinds of deviations from Rule of Law norms. And, presumably, both state and federal courts, including the U.S. Supreme Court, could violate other basic requirements of the Rule of Law—and likely thereby violate norms of the U.S. Constitution. In sum, these examples illustrate the clear application of Rule of Law norms to the federal judiciary through provisions of the Constitution.

However, as suggested above, this Article is principally concerned with the value of the concept of judicial constitutional violations for illuminating aspects of the traditional debates between proponents of judicial restraint and judicial activism. Of particular interest in the context of these debates are the broader implications of the requirements of the Rule of Law for the scope and methodology of constitutional interpretation, a major subject of contention between advocates of activism and restraint. Notably, Lon Fuller's final requirement of the Rule of Law is "congruence between the rules as announced and their actual administration," including (presumably) their application by courts in judicial decisions.¹⁰² John Finnis similarly formulates this requirement of the Rule of Law as the requirement that "those people who have authority to make, administer, and apply the rules in an official capacity . . . do actually administer the law consistently and in accordance with its tenor."¹⁰³ Both Fuller's and Finnis's formulation suggest that judges in applying law in particular cases must apply that law in fidelity to or conformity with its "tenor" as an "announced" law.

Indeed, what may be called the "fidelity" requirement of the Rule of Law is often seen as the distinguishing feature between the ideal of the Rule of Law and the unhappy alternative of the "rule of men" unconstrained (or at least insufficiently constrained) by law.¹⁰⁴ As Richard Fallon writes:

[w]ithin perhaps 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.¹⁰⁵

¹⁰² FULLER, *supra* note 90, at 39.

¹⁰³ FINNIS, *supra* note 14, at 270–71.

¹⁰⁴ Fallon, *supra* note 89, at 2–3.

¹⁰⁵ *Id.* at 3.

In short, then, the “fidelity” requirement of the Rule of Law requires that judges actually apply constitutional provisions “as announced” according to their “tenor” and decide cases faithfully in conformity to relevant legal rules rather than simply creating new rules and (in substance if not form) “re-writing” the constitutional provision and deciding the case in accordance with the new judge-made rule. Only when this “fidelity” between the tenor of announced rules and the law as applied by the courts properly occurs is the Rule of Law preserved and the Rule of Law norms of the Constitution complied with. As suggested, this legal fidelity norm, as a constitutional norm, might be thought to be derived chiefly from the structure of the Constitution, or, alternatively, derived from the Fifth Amendment Due Process Clause or the Ninth Amendment.¹⁰⁶ Additionally, as with structural violations, this form of violation can take the form of either an invalidation or an upholding, when the meaning the Court ascribes to the law is unfaithful to the tenor of the law as promulgated.

ii. Determining Rule of Law Constitutionality: Interpreting the Rule of Law’s “Fidelity to Law” Norm

Obviously, the line between “faithful” application of law “as announced” or “in accordance with its tenor” and non-application-cum-rewriting of the law is unclear and highly contested, requiring a discussion of the process of legal interpretation and argument. What does judicial decision in fidelity to or conformity with the tenor of an “announced” legal provision actually mean in practice?

A likely answer is this: the “fidelity” norm of the Rule of Law requires that a court’s exercise of the judicial power adhere to the reasonable range of meanings that could be ascribed to the provision in question through legitimate or normatively justifiable legal argument. A substantial deviation from this standard should be considered a violation of the Constitution’s fidelity norm. The baseline, then, for determining whether a court has violated this fidelity norm of the Rule of Law will depend upon one’s view of the scope of legitimate and/or normatively justifiable legal interpretation. If a court has ascribed meaning to a legal provision through an interpretation of the provision in accordance with proper legal analysis, then the court has “applied” the provision in conformity with the provision “as announced” or “in accordance with its tenor” simply because the court has remained within the bounds of the range of meanings that could reasonably be attributed to the provision through legitimate or normatively justifiable forms of legal interpretation.

¹⁰⁶ See *supra* notes 86–88 and accompanying text.

While a detailed discussion of resolution of the baseline question (what are the proper methods of legitimate and/or normatively justifiable legal argument?) is beyond the scope of this Article, a few points are worth noting about its potential resolution. First, a question such as the "proper methods of legal argument," derived from the "fidelity" norm contained in the U.S. Constitution, will likely require analysis or interpretation of the historical practice of constitutional law in the American legal system.¹⁰⁷ As an essentially interpretive question, this question also likely has both a descriptive or legal "fit" aspect (with the historical practice of American legal argument) and a prescriptive or moral "justification" aspect (which view or strand of American legal argument is most attractive morally).¹⁰⁸ Therefore, this is, in a sense, a double (or triple) question of interpretation: the interpretation of the fidelity norm of the Constitution may require an interpretation of the historical practice of constitutional interpretation. And its resolution may turn on questions such as the historical pedigree or conventional acceptance of the use of interpretive methods by the judiciary and on their moral-political appeal. Second, obviously, there is likely to be substantial disagreement over the precise contours of the ideal form of legal interpretation as determined by way of a "fit" and "justification" interpretive analysis of the historical practice of constitutional interpretation in the American legal community. In particular, proponents of judicial activism and judicial restraint are likely to have very different conceptions of the boundaries of legitimate and justifiable legal argument and thus also very different conceptions of the requirements of the Constitution's fidelity Rule of Law norm.

iii. "Mere" Mistakes, Imprudent Exercises, and Rule of Law Constitutional Violations

As with structural constitutional violations, it is important in the context of discussing the "fidelity" to law requirement of the Constitution's Rule of Law norms to distinguish between: (1) mere mistakes about constitutional meaning which, while wrong about the meaning of the Constitution, are well within the bounds of proper legal argument and thus which are consistent with the Rule of Law norm of faithful application of the law; (2) imprudent exercises of the judicial power which approach too close to the outer bounds of proper legal argument but which do not actually violate the legal fidelity requirement of the Constitution; and (3) actual judicial violations of the Constitution's Rule of Law fidelity norm,

¹⁰⁷ For analyses of American constitutional interpretation, see generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); DWORKIN, *supra* note 72.

¹⁰⁸ This theory of the nature of interpretation was first articulated by Ronald Dworkin. See generally DWORKIN, *supra* note 10, at 81–130.

decisions which involve interpretations of the law outside the bounds of proper legal argument and which thereby violate the Constitution's requirement of fidelity to law as promulgated. These categories deserve further explanation.

Their principal basis is founded upon a simple point: even assuming (the contested point) that legal questions always or often have a single right answer,¹⁰⁹ one would not want to assert that a deviation from that single right answer necessarily constitutes a violation of the Rule of Law norms of the U.S. Constitution. Rather, a violation of the Constitution's Rule of Law norms should be seen as requiring something beyond a mere "mistake" about legal meaning. This is so for the same basic reasons discussed above in the general context of distinguishing judicial mere mistakes about constitutional meaning from judicial constitutional violations.¹¹⁰ First, there is no reason to view the Rule of Law as a normative concept as requiring absolute accuracy in legal decision rather than (say) reasonable respect for historically accepted or normatively justifiable methods of legal analysis in attributing meaning to legal rules. As Lon Fuller recognizes, the Rule of Law requirements of the "inner morality of law" are aspirational in nature and their achievement is a question of degree.¹¹¹ Interpretive perfection is not a realistic standard and courts could not hope to comply with it even in a legal system where there was consensus on the proper contours of legal argument. And, second, more pragmatically, the concept of judicial constitutional violations through deviation from the requirements of the Rule of Law would be of little value as an analytical tool if it simply became another way to express mere disagreement with a judicial decision's interpretation of the law rather than a more fundamental objection to the courts' interpretive methods and their constitutionality.

What, then, beyond a "mere" misreading of legal materials is required for a constitutional violation of the fidelity Rule of Law norm? As discussed, a legal fidelity constitutional violation involves a deviation from the bounds of legitimate or justifiable legal argument, a standard the definition of which is likely to reflect traditional divisions between proponents of judicial restraint and activism. However, distinguishing between Rule of Law constitutional violations and non-violations requires more than an analysis to determine the precise implications of Rule of Law norms for the ideal forms of judicial interpretation of the Constitution. It further requires that one determine the degree of deviation from these ideal

¹⁰⁹ See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 119, 144-45 (1985) (arguing in favor of the right answer thesis); H.L.A. HART, THE CONCEPT OF LAW 123 (2d ed. 1994) (arguing against the existence of right answers in cases occurring outside the "settled core" of law and in the "open texture").

¹¹⁰ See *supra* Part IV.

¹¹¹ See FULLER, *supra* note 90, at 42-43.

forms necessary to find an actual violation of the Constitution. Significantly, even where there is agreement over the ideal forms of legal interpretation fully consistent with the fidelity requirement of the Rule of Law, there is likely to be disagreement over this second question, over the degree of deviation from that ideal allowable before there is an actual violation of the Rule of Law norms of the Constitution—as opposed to an imprudent exercise of the judicial power in light of Rule of Law concerns which would be subject, as such, to only sub-constitutional prudential objections.

iv. The Scope of Rule of Law Constitutionality and the Fidelity Norm

Thus a central question here is the scope of constitutionality under the legal fidelity norm: what degree of deviation from the ideally “faithful” exercise of judicial review is required to warrant finding a constitutional violation? Or, in other words, how broad of a zone or penumbra of Rule of Law constitutionality surrounds an ideally “faithful” exercise of judicial review? Is this zone broad or narrow in scope? Should one endorse a wide range of interpretive positions, covering the entire sweep of interpretive debate and practice from the most highly restrained to the most highly activist conceptions of interpretation, a position suggesting that almost all debate over judicial interpretive methodology is about sub-constitutional prudential Rule of Law limits on the judicial power? Or should one endorse a narrower range of interpretive positions, covering only a portion of the spectrum of opinion on interpretive methods, a position suggesting that a significant part of the debate over judicial interpretive methodology is better re-conceptualized as a debate about the Constitution’s “fidelity” to law requirements as constitutional limits on the judicial power?

As with the category of structural constitutional violations, the implicit answer to this question one finds in most contemporary constitutional discourse is that the zone or penumbra of Rule of Law constitutionality sweeps through virtually the entire spectrum of opinions on the use of interpretive methods. Thus, criticism of judicial decisions on Rule of Law fidelity grounds seldom rises above the sub-constitutional prudential dimension on display in contemporary debates, and this is so even when a critic of a decision may (rightly) see that decision as in direct conflict with the legal fidelity requirement of the Rule of Law as reflected in the norms of the Constitution.

There is a parallel here with the category of structural constitutional violations: this view unreflectively privileges the federal judiciary and should be carefully reconsidered. In particular, the balance of concerns here—between deference to the judiciary on the one hand and concern for the Rule of Law as a constitutional norm and the long-term integrity of the judiciary on the other—suggests rather that one endorse a middle-ground

position recognizing both a substantial category of imprudent exercises of the judicial power subject to sub-constitutional prudential criticism on Rule of Law grounds and a substantial category of unconstitutional exercises of the judicial power subject to Rule of Law criticism as actual violations of the Constitution's Rule of Law norms. On this view, then, some significant portion of the debate over judicial interpretive methods reflects views of judicial constitutional interpretation in conflict with the Constitution's Rule of Law fidelity norm.

v. Judicial Fidelity Rule of Law Constitutional Violations:
Rare or Routine?

Additionally, one can raise the same question here discussed in the context of structural constitutional violations: the likely frequency of this form of judicial violation of the Constitution in the context of familiar debates over judicial restraint and activism. As with structural constitutional violations, one's answer depends principally upon (1) one's view of the ideal exercise of the judicial power in light of the Rule of Law norm of fidelity to law and (2) one's view of the scope of constitutionality surrounding this ideal exercise, including the degree to which there is a broad or narrow category of imprudent deviations from the ideal use of the judicial power subject to sub-constitutional prudential criticism on Rule of Law grounds. For instance, if one's view of the Rule of Law ideal is (say) a judicial restraint ideal and one's conception of the scope of the "prudential" zone of constitutionality is a moderate or narrow one, one may well conclude that a number of highly activist judicial decisions are violations of the Constitution's fidelity to law requirement because these decisions deviate from an ideal exercise of interpretive authority and also occur outside the zone of constitutional but imprudent exercises of the judicial power. A similar analysis from a judicial activist ideal also suggests that a number of highly restrained judicial decisions are in fact violations of the Constitution's fidelity requirement. In sum, then, given a narrower view of the scope of Rule of Law constitutionality, violations of the Constitution's legal fidelity norm, while perhaps not routine, are also not likely to be all that rare.

3. *Violation by Pretextual Use of the Judicial Power*

i. Pretextual Use of Judicial Review as a Constitutional Violation

A third way in which courts can violate the Constitution is by pretextual use of judicial review. Indeed, one might well suppose that a minimum requirement for a constitutional exercise of judicial review is its "good faith" or non-pretextual use by the judiciary. This is supportable on two independent grounds related to the first two forms of judicial constitutional violations discussed above. First, there is no reason to

interpret the structure of the Constitution as authorizing the judicial branch to exercise the power of judicial review pretextually. Rather the proper scope of the courts' authority is to effectuate the Supremacy Clause and the judicial role under the separation of powers by (say) declaring invalid legislation in conflict with the Constitution and by upholding legislation that does not conflict with the Constitution. For instance, if a court does not believe that legislation is properly subject to invalidation because the court finds no conflict between the legislation and the Constitution, the invalidation of that act is *ultra vires* as a matter of the proper judicial role within the constitutional structure and thus is itself unconstitutional. Second, there is, similarly, no reason to interpret the constitutional norms of the Rule of Law, particularly the requirement of judicial fidelity to law, to allow the courts to "interpret" the Constitution in bad faith, claiming that the law means something they do not in fact believe that it means. Rather judicial action that is faithful to the Constitution invalidates legislation in conflict with the Constitution and upholds legislation not in conflict with the Constitution. If a court does not believe that fidelity to the law of the Constitution requires its decision, that decision is unfaithful to the Constitution and is itself unconstitutional as a violation of a Constitution's Rule of Law fidelity norm.

Thus, for example, if the justices of the Supreme Court believe that a law before them is in fact constitutional, they may not invalidate it for (merely) political reasons, pretextually invoking the power of judicial review in bad faith, without violating both the Constitution's structural and Rule of Law norms. Similarly, if the justices of the Supreme Court believe a certain law is *unconstitutional*, they may not uphold it for (merely) political reasons, exercising the power of judicial review pretextually, without violating these constitutional norms. In short, the constitutional prohibition of pretextual use of judicial review is best seen as a "special" case of the first two forms of constitutional violation—structural authority and Rule of Law—but, as shall be shown, it is a form of violation conceptually distinct from the most common forms of the first two violations and therefore warrants a separate analysis. Moreover, as will be discussed, there are reasons of both prudence and constitutional principle for thinking that the utility of this category of judicial constitutional violation is extremely limited and its actual deployment in constitutional debate should be extremely rare.

ii. "Mere" Mistakes, Imprudent Exercises, and Pretextual Use of Judicial Review in Violation of the Constitution

As with structural and Rule of Law violations, it is important to distinguish sharply between mere mistakes about constitutional meaning, mistakes that are imprudent exercises of the judicial power, and mistakes that are judicial constitutional violations of the limits on the interpretive

authority of the courts. In this context, these categories of cases can be formulated as follows: (1) “mere” mistakes about constitutional meaning reflecting a reasonable and good faith interpretation of the Constitution; (2) imprudent, unprofessional, or unethical exercises of the judicial power subject to criticism as such on sub-constitutional grounds; and (3) actual pretextual or “bad faith” decisions which are judicial violations of the Constitution. Thus one must distinguish between the (merely) mistaken reasonable and “good faith” use of judicial review, the actual pretextual or bad faith invocations of judicial review violating the Constitution, and the decisions that fall somewhere between the two. These distinctions deserve further elaboration.

First, as discussed above in the context of structural and Rule of Law violations, there are good reasons of constitutional principle and prudence for not classifying every mistake about constitutional meaning as a judicial constitutional violation. Therefore, in the context of culpable intent or exploitation of authority, subjective good faith should satisfy the requirements of the Constitution and thus “good faith” mistakes about constitutional meaning should *not* be viewed as a judicial constitutional violation,¹¹² even as “bad faith” invocations of judicial review (e.g., those where the justices do not believe the law they are invalidating is unconstitutional) are viewed as violations. Moreover, a *reasonable* good faith “mistake” about constitutional meaning is obviously subject to only very limited criticism as a mistaken decision in light of both its reasonableness and good faith as a decision. Therefore, there is little to say, by way of criticism, about a reasonable and “good faith” mistaken decision about constitutional meaning aside from stating that the decision is in fact mistaken and describing the ways in which this is so.

Second, the simplest definitions of the terms “reasonable good faith” and “bad faith” do not exhaust the range of possible mental states judicial actors might have with respect to the (un)constitutionality of a particular law, suggesting the possibility of a middle category of imprudent, unprofessional, or unethical uses of the judicial power, which, while culpable in some important sense, might be thought to fall short of an actual judicial constitutional violation through the pretextual or “bad faith” use of judicial review. Judicial actors can have a wide range of culpable or questionable mental states that do not rise to the level of the clearest examples of a pretextual use of judicial review: the pretextual invalidation of a law the judicial actor *believes* to be constitutional or a pretextual upholding of a law the judicial actor *believes* to be unconstitutional. To use common mental state terminology associated with criminal and tort law, the judicial actor could act with “willful blindness,” recklessness,

¹¹² Though, of course, good faith mistakes may still constitute ordinary structural or Rule of Law violations as discussed above.

gross negligence, or simple negligence in determining the question of the constitutionality of legislation in order, say, to achieve (consciously or not) a certain politically desired result of invalidation or upholding.¹¹³ While each of these mental states falls short of reasonable (i.e., non-negligent) "good" faith, they may not all be properly viewed as evincing a pretextual motive or "bad faith."

Thus one may ask the following question: what is the constitutional status of a judicial "mistake" about constitutional meaning rooted in a culpable mental state such as "negligence" or simple "recklessness?" In answering this question, one can begin by noting that there is likely good reason to limit the language of unconstitutionality in this context (and the definition of "bad faith" and the pretextual use of judicial review) to a knowing or subjectively conscious misuse of the judicial power rather than to mere "negligence" or carelessness rooted (perhaps) in an unconscious desire to rationalize a particular outcome for political or partisan reasons. While it should be clear that the Constitution does not authorize the judiciary to invalidate pretextually laws they actually *believe* to be constitutional, and while it should also be clear that the Supremacy Clause and the broader constitutional structure prohibit the upholding of legislation the judiciary *believes* to be unconstitutional, it is far from clear that the structure of the Constitution or the Rule of Law should be thought to prohibit mere judicial negligence.¹¹⁴

Thus it is unlikely that a simple negligent deviation from, say, the "standard of care" of a "reasonably" competent and fair-minded judge in violation of what might be broadly called "judicial ethics"¹¹⁵ can fairly be called a constitutional violation. Whether a judicial mental state of recklessness or deliberate indifference to the proper legal outcome of a case—thus evincing forms of subjective fault short of actual knowledge—should be considered a "bad faith" and pretextual violation of the Constitution, at least in some cases, is a closer question.¹¹⁶ Perhaps the best answer is that a mental state equivalent to willful blindness¹¹⁷ or

¹¹³ See, e.g., MODEL PENAL CODE § 2.02 (1985) (defining with precision a hierarchy of culpability descending from purpose to knowledge, recklessness, and negligence).

¹¹⁴ Cf. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (observing that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process" (internal citations omitted)); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (observing that "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property").

¹¹⁵ See MODEL CODE OF JUDICIAL CONDUCT, c.3B(2) (1999) ("A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.").

¹¹⁶ Cf. *Lewis*, 523 U.S. at 850 (observing that "deliberately indifferent conduct [can] satisfy the fault requirement for [some] due process claims" (internal citations omitted)).

¹¹⁷ See MODEL PENAL CODE § 2.02(7) (1985) (stating that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist").

extreme recklessness¹¹⁸ should be considered a sufficiently subjective degree of fault and thus a sufficiently conscious misuse of the judicial power to qualify as “bad faith,” and, therefore, a judicial decision predicated upon such mental states should be considered a pretextual judicial violation of the Constitution.

In any event, whatever its precise parameters, the middle category of decisions encompassing cases that fall between reasonable good faith exercises of the judicial power and bad faith or pretextual exercises of the judicial power should be recognized and the decisions occurring within this middle category should be criticized as such. Clearly serious deviations from the proper standard of judicial behavior—though falling short of subjective “bad faith”—pose a greater threat to constitutional values than mere reasonable (i.e. non-negligent) “good faith” mistakes. Therefore such decisions—though they do not rise to the level of actual pretextual violations of the Constitution—should be subjected to serious criticism as imprudent, unreasonable, unprofessional, or unethical exercises of the judicial power. As suggested, this category of imprudent mistakes is likely best reserved for judicial decisions involving a culpable judicial mental state, such as negligence or simple recklessness, but falling short of, say, an actual pretextual invalidation of a law the judicial actor actually believes or strongly suspects is constitutional.

In sum, one might distinguish within this form of judicial constitutional violation between (1) decisions that are “mere” mistakes about constitutional meaning reflecting a reasonable and good faith interpretation of the Constitution; (2) decisions that are imprudent or unprofessional exercises of the judicial power evincing negligence or simple recklessness in decision-making and therefore subject to criticism as such on sub-constitutional prudential or professional grounds; and (3) decisions that are actual pretextual or “bad faith” exercises of the judicial power evincing a knowing or extremely reckless misuse of the judicial authority and thereby violating the Constitution.

iii. Allegations of Pretext: Limits of Principle and Prudence

There are a number of important limits which should be placed on constitutional objections to judicial review grounded in its “bad faith” usage as a matter of both prudence and constitutional principle. As the Court stated in *United States v. O’Brien*, “[i]nquiries into congressional

¹¹⁸ Obviously, the distinction between “extreme” recklessness and “simple” recklessness is one of degree and, as the authors of the Model Penal Code recognize, likely “not a question . . . that can be further clarified” beyond the simple language communicating the concept of “extremity.” MODEL PENAL CODE § 210.2, cmt. (1980) (discussing the distinction in mental state between recklessness manifesting extreme indifference to human life, justifying a murder conviction, and simple recklessness, justifying a manslaughter conviction).

motives or purposes are a hazardous matter.”¹¹⁹ The same principle applies to inquiries into judicial motives or purposes. In fact, in those areas of American constitutional law where purpose or motivation analysis is used—such as Equal Protection Clause, Dormant Commerce Clause, Establishment Clause, and Free Speech jurisprudence—recurrent problems have been encountered, as shall be discussed below.¹²⁰ Thus application of constitutional review to the Court by other actors (including dissenting justices) must proceed with caution in the deployment of purpose or motivation analysis to establish a pretextual use of judicial review. These points deserve elaboration.

a. The Separation of Powers and Demonstrations of Bad Faith

First, as a matter of prudential and constitutional respect for the Supreme Court as both the supreme judicial institution and as a co-equal branch of the federal government under the separation of powers, there is no reason to doubt the good faith of the justices of the Supreme Court, their sincere desire to interpret the Constitution fairly and accurately, and thus there should be a very strong (if not conclusive and irrebuttable) *presumption* that the Court’s exercises of the judicial power are in good faith.¹²¹ Lower federal courts are also entitled to substantial deference.

A related set of questions in the area of pretextual or “bad faith” exercises of the judicial power are those concerning burdens, standards, and methods of proof.¹²² As a practical matter, a subjective mental state such as “bad faith” must be inferred from the subject’s actions in the absence of an actual admission of wrongdoing. In the criminal and tort law context, such proof of a subjective mental state in practice often involves attributing to the actor the perspective of a hypothetical “reasonable person” and then allowing for arguments showing that the actor in fact

¹¹⁹ *United States v. O’Brien*, 391 U.S. 367, 383 (1968).

¹²⁰ See *infra* notes 124–28 and accompanying text.

¹²¹ This is in essence a form of the presumption of constitutionality which the Court has often stated that it extends to Congress. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (stating that the Court “afford[s]” congressional enactments a “presumption of validity”); *United States v. Harris*, 106 U.S. 629, 635 (1884) (stating that “[p]roper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass the act in question is clearly demonstrated.”).

¹²² Cf. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (discussing questions surrounding proof of discriminatory purpose and stating that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available”), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, 96 Stat. 131 (declaring that violations of the Act are established when under a “totality of the circumstances” it is shown that a protected class is prevented from open participation in the political process).

deviates from this standard subjectively.¹²³ Thus a subjective “intent to kill” is often inferred from an individual’s pointing a loaded gun at someone and pulling the trigger, but the individual can argue that he or she was in fact less than reasonable on that occasion and thus not subjectively culpable.

Similarly, subjective bad faith in the exercise of judicial review might be shown in two ways. The first way subjective bad faith could be demonstrated is through plausible inference from a decision *so objectionably unsound or unreasonable* as to be unsustainable as a good faith exercise of judicial review by any actor across the spectrum of various views of the judicial power. Notably, in this sort of case, the question of “bad faith” becomes simply a “make weight” argument, a mere garnish to the primary argument citing the extreme “unreasonableness” of the decision as a matter of, say, constitutional structure or the Rule of Law as a basis for a constitutional objection. Thus, constitutional objections premised upon “bad faith” would have little or no practical value in such cases, since an “objective” (i.e., non-pretextual structural or Rule of Law) form of violation would already be present.

A second and more important manner in which subjective “bad faith” could be demonstrated is by inference from a judge’s anomalous decision, a decision deviating substantially from the judge’s predominant judicial philosophy. For instance, a judge who routinely invokes principles of judicial restraint might deviate substantially from these principles in a particular case where (s)he appears to have a political or partisan stake in the outcome. In such a case, an inference of bad faith might well be plausible. Even so, the aforementioned caution, rooted in prudential and constitutional concerns suggesting respect for the courts and a presumption in favor of the good faith of the judges, must be kept in mind. There is, for instance, likely to be a wide range of disagreement among reasonable persons as to the presence or absence of internal tensions, contradictions, and inconsistencies in any given judicial philosophy and its particular applications. Therefore one should exercise substantial caution before attributing subjective “bad faith” to a judicial actor simply because one sees a contradiction in the application of his/her judicial philosophy. The internal inconsistencies should be obvious and blatant enough to warrant a sound conclusion of *actual* bad faith, not simply culpable self-deception or

¹²³ See, e.g., *State v. Beale*, 299 A.2d 921, 925 (Me. 1973) (observing that [w]hile the objective test of what an ordinary intelligent man would have believed cannot serve as the absolute standard which determines the defendant’s guilt or innocence [under a statute requiring actual, subjective knowledge], the jury, in making its determination as to the state of the defendant’s belief, may properly take into consideration, among other things, the belief which the jury concludes a person of ordinary intellectual capacity would have formed from such facts and circumstances,” considering “this in light of its evaluation of a defendant as an intelligent person, based upon what the jury has learned about the defendant from testimony and observation.” (citation omitted)).

rationalization, much less simple mistake or mere disagreement about whether such inconsistencies actually exist. These limitations, then, suggest that reasonable and fair-minded assertions of judicial constitutional violations grounded in the conscious bad faith or the pretextual use of the judicial power will in fact be few and far between.

b. Additional Difficulties with Purpose Analysis

Additional theoretical difficulties are also presented by this category of constitutional violation. These are grounded in some of the more specific concerns surrounding limitations on purpose analysis as applied to multi-member decision-making bodies. Purpose analysis is not only problematic because of concerns, discussed above, about questions of proof and the need to show proper respect to institutions (such as the Supreme Court) the members of which may have their motives subject to question, but for a number of other reasons. In particular, there is the concern of applying impermissible motivation analysis to multi-member institutions because of the nature of such decision-making. What if a five-justice majority of the Supreme Court invalidating a statute consists of four justices clearly acting in good faith but also one justice whose anomalous vote is strongly suggestive of a pretextual use of the judicial power? Does it make sense to charge the Court, as an institution, with the violation, because of that one vote? What if, due to personnel changes on the court, the justice who voted pretextually is replaced by a new justice who could vote to invalidate the statute in good faith? Does it make sense to assert that a decision by the court is unconstitutional if could be "re-decided" with a proper motivation by the same or different justices?¹²⁴ Obviously, these concerns are not unique to the question of pretextual use of judicial review but rather are common to impermissible motive analysis of any multi-member decision-making body, such as a legislature.¹²⁵ Therefore use of "purpose"

¹²⁴ See *Dickerson v. United States*, 530 U.S. 428, 445–46 (2000) (Scalia, J., dissenting). Notably, Justice Scalia in *Dickerson* charges the Court with violating the Constitution because he believes the majority of justices did not actually think the statutory provision invalidated in *Dickerson* conflicted with a constitutional right, as opposed to conflicting with a mere judge-made rule. *Id.* at 446. Even if one agrees with Justice Scalia's characterization of the *Dickerson* majority, one may question the utility of charging the Court with a constitutional violation when the same decision could be made by a different set of justices who actually do believe the statutory provision in question violates a constitutional right.

¹²⁵ See *United States v. O'Brien*, 391 U.S. 367, 384 (1968) (stating that "[w]e decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it"). For an example of some of the difficulties inherent in purpose or motivation analysis, see *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; Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1972 SUP. CT. REV. 95, 99, 111, 115.

analysis—in areas such as Equal Protection,¹²⁶ the Establishment Clause,¹²⁷ and Free Speech law¹²⁸—presents certain recurrent problems of application. While these problems are not necessarily insurmountable obstacles to constitutional analysis of the motive or purpose of multi-member institutions, they reinforce the view that pretextual violations, as a category of judicial constitutional violations, need to be approached with extreme caution.

4. *Violation of Other Constitutional Norms: A Residual Category*

i. Additional Constitutional Constraints on the Courts

The Supreme Court and other federal courts can violate the Constitution when their decisions cause with sufficient institutional responsibility a violation of a constitutional norm. In the interest of conceptual clarity and utility, it is important both to distinguish this fourth category of judicial constitutional violation from the preceding categories discussed above and carefully to delineate its contours in order to distinguish it from less culpable acts such as “mere” judicial mistake about constitutional meaning entailing a minimal form of constitutional violation. Thus two points are worth making at the outset.

First, this category is best thought of as a residual category, covering violations not properly accounted for by the first three categories of judicial constitutional violation: structural authority, the Rule of Law, and pretextual use of the judicial power. Therefore, this category, as a residual category, does not cover judicial violations of norms of constitutional structure or the Rule of Law as captured by the first three categories, though these forms of violation may be accurately described as involving direct judicial violations of constitutional norms that limit the judiciary. Violations in this residual category concern other constitutional norms, including familiar individual rights to freedom of speech, non-establishment of religion, equal protection, and search a seizure.

Second, in the interest of carefully describing the contours of this category and distinguishing it from mere judicial mistakes about constitutional meaning entailing a minimal form of constitutional violation, this category is best described as encompassing those acts by the courts which cause a substantive violation of a constitutional norm with a

¹²⁶ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (requiring racially discriminatory purpose as well as effect before applying strict scrutiny under the Equal Protection Clause to a facially race-neutral statute or policy).

¹²⁷ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (stating that to comply with the Establishment Clause government action must have a secular purpose).

¹²⁸ See, e.g., *Hill v. Colorado*, 530 U.S. 703 (2000) (declaring a speech regulation content-neutral rather than content-based in part because the speech regulation was not adopted because of governmental disagreement with the message of any speech).

sufficient degree of institutional responsibility on the part of the courts to justify attribution of the constitutional violation to the judiciary itself. This "sufficient" degree of responsibility involves more than a "mere" judicial failure to invalidate unconstitutional legislation or the "mere" judicial invalidation of constitutional legislation. This requirement of substantial institutional responsibility avoids the problematic view, discussed earlier, which would characterize every mistaken judicial decision as a violation of the Constitution.

Thus, this form of judicial constitutional violation occurs only in the following instances: (1) where an act of a court itself directly violates a norm of the Constitution constraining the courts, such as may happen when, say, a court issues an injunction in violation of freedom of speech or endorses religion in violation of the freedom of religion; or (2) where a decision of a court indirectly results in a violation of the Constitution, which may happen through a judicial mandate of an act prohibited by the Constitution or a judicial prohibition of an act mandated by the Constitution. This latter form of violation may arise when competing interpretations of constitutional norms place those norms in conflict, as, for example, when one interpretation of the requirements of freedom of speech may mandate a violation of a rival interpretive view of the non-establishment of religion.

In such cases, the courts are more than merely wrong about constitutional meaning, more than merely complicit in the constitutional violation through a failure to invalidate unconstitutional legislation, more than merely responsible for indirectly diluting constitutional norms of political participation or constitutional structure via a mistaken invalidation of constitutional legislation. Rather, in such cases the court is sufficiently responsible for the substantive constitutional violation to justify attribution of the violation to the court. Let us examine these claims in greater detail.

ii. Direct Violation by the Courts

Courts can, conceivably, violate constitutional norms in this residual category through direct judicial action. Suppose, for instance, that a court issues an injunction restricting speech which might be thought (by, say, a dissenting judge among others) in violation of the First Amendment's Free Speech provision.¹²⁹ In such a case, it would be difficult to avoid the conclusion that the court in question had directly violated the Constitution through its issuance of the injunction, if the injunction did indeed restrict protected speech in violation of the First Amendment. Or, suppose, for instance, that the Supreme Court adopts strict scrutiny for free exercise of

¹²⁹ See *New York 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").

religion claims, a position which might be thought by some to violate the First Amendment's Establishment Clause by giving preferential treatment for religious claims of conscience over non-religious claims.¹³⁰ It would also be difficult here to avoid the conclusion that the Supreme Court had itself directly violated the Constitution through its decision, if such a decision did indeed prefer religion over non-religion in contravention of the Establishment Clause. In sum, one should not hesitate to recognize that a judicial mistake about constitutional meaning that involves a judicial act in direct violation of a norm of the Constitution that limits courts is a violation of the Constitution.

iii. Indirect Violations by the Courts via Mandating an Act Prohibited by the Constitution or Prohibiting an Act Mandated by the Constitution

Courts can also indirectly violate the Constitution by mandating an act prohibited by the Constitution or prohibiting an act mandated by the Constitution. This form of violation can occur where constitutional norms subject to judicial enforcement are in tension (at least in certain factual contexts) and thus where a "mere" judicial misreading or misapplication of one norm may ultimately entail violation of another. An example or two may help clarify this form of judicial constitutional violation.

First, take the contemporary case of abortion and the Constitution. Suppose one believes that the Constitution, properly interpreted, protects a broad right to abortion as a matter of substantive due process and also (concomitantly) that a fetal right to equal protection of the homicide laws in the abortion context is not protected by the Constitution.¹³¹ Suppose also that the Supreme Court fails to recognize the right to abortion and is

¹³⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (contending that the Religious Freedom Restoration Act of 1993 (RFRA), which adopted the same strict scrutiny balancing test once used by the Supreme Court as the general test for claims under the Free Exercise Clause "is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution. If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.").

Notably, the Court recently unanimously upheld the Religious Land Use and Institutionalized Persons Act of 2000 against an Establishment Clause challenge as a permissible governmental accommodation of religion. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

¹³¹ See, e.g., *Roe v. Wade*, 410 U.S. 113, 153, 158 (1973) (holding that the constitutional "right of privacy" is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" and that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn").

thus in a sense complicit in any legislative violation via the Court's upholding of anti-abortion legislation. But then further suppose the Supreme Court not only fails to invalidate anti-abortion legislation, but in fact recognizes a right directly conflicting with abortion: a fetal right to the equal protection of the homicide laws in effect mandating broad state prohibition of abortion under the states' homicide laws.¹³² Here the Court has—through, as stipulated for the sake of argument, a mistaken exercise of judicial review—mandated a state legislative violation of (from this perspective) a constitutional right to abortion. The Court, by mandating state action prohibited by the Constitution, can be seen as the institution ultimately responsible for the subsequent violation of the constitutional right to choose abortion.

One can also construct this form of violation from the opposite perspective. Suppose one firmly believes that the Constitution, properly interpreted, protects a broad fetal right to the equal protection of the homicide laws and thus mandates state extension of homicide protections to the unborn. And suppose one further believes that the Due Process Clause does not protect a right to abortion. Suppose also that the Supreme Court fails to recognize this fetal right to equal protection of the homicide laws and is thus complicit in potential legislative violations via upholding those violations. But also suppose the Court recognizes a right directly conflicting with the fetal right to life: the right to abortion, prohibiting most state legislative efforts to protect the unborn. Here, again, the Court has, through a mistaken exercise of judicial review, prohibited state action necessary to comply with (from this perspective) an actual constitutional right: the fetal right to equal protection of the homicide laws. By directly prohibiting action of the state governments necessary for those states to conform to the requirements of the Constitution, the Court can be seen as institutionally responsible for the constitutional violation consisting of the failure to extend to the unborn the equal protection of the homicide laws.

Notably, in some cases of potentially conflicting constitutional norms, one might find the link between the judicial act and the resulting constitutional violation too tenuous to be attributable to the Court as a judicial constitutional violation rather than a mere mistake. For instance, consider the Supreme Court's decisions in *Rosenberger v. Rector and Visitors of University of Virginia*, a case involving the tension between (1) freedom of speech in the area of the public forum doctrine and (2) the non-establishment of religion in the context of public funding of religious speech.¹³³ In *Rosenberger*, the majority of the Supreme Court held that the

¹³² In effect, because the legislature would face (from a pro-choice perspective) the Hobson's choice of extending their homicide laws to protect fetuses or repealing the homicide laws generally.

¹³³ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (invalidating Virginia's exclusion of an evangelical magazine from receiving student activities funds under the Free Speech

University of Virginia could not exclude the evangelical Christian publication *Wide Awake* from its “metaphysical” forum of a student activities fund.¹³⁴ This was so, the majority reasoned, because, first, exclusion of the publication constituted viewpoint discrimination prohibited by the Free Speech Clause and, second, inclusion of the publication did not constitute a violation of the Establishment Clause.¹³⁵ The four dissenting justices held just the opposite view: inclusion constituted a violation of the Establishment Clause and exclusion of the publication did not violate the Free Speech Clause.¹³⁶ Thus the majority’s mandate of inclusion under its understanding of free speech in fact directly conflicts with the dissenting justices’ understanding of the non-establishment norm, which on their view required exclusion.

Still, assuming *arguendo* that the dissent has the better argument and thus that inclusion of the publication is in fact violative of the Constitution’s Establishment Clause, one may hesitate to declare this decision a judicial constitutional violation for the simple reason that the state of Virginia could still avoid the Establishment Clause violation by shutting down its forum and refusing to fund publications or student activities more generally. In short, the Court’s mandate is conditioned upon Virginia’s maintenance of the forum, which Virginia is not required to do. Thus the connection between the judicial ruling and a resulting constitutional violation¹³⁷ could be viewed as insufficiently proximate to attribute the violation to the Supreme Court, given the State’s ability to avoid the violation while still fully complying with the Court’s ruling. In short, in these circumstances, the Court has not in fact mandated a legislative constitutional violation but rather a legislative *choice* between a constitutional violation and the closing down of a forum. If the choice the Court mandates is sufficiently an actual choice, rather than a Hobson’s choice, which is to say, if the legislature has reasonable alternatives it can take to avoid the constitutional violation, then the Court’s decision may be viewed as “merely” complicit in the violation. Of course, one could question whether the University of Virginia had a reasonable option in closing down its forum.

Clause despite the four dissenting justices contention that such funding of religious speech violates the Establishment Clause.).

¹³⁴ *Id.*

¹³⁵ *Id.* at 845–46.

¹³⁶ *Id.* at 863–64, 892 (Souter, J., dissenting).

¹³⁷ For example, the inclusion of the student publication in the student activities fund in contravention of the Establishment Clause.

VI. SOME ADDITIONAL IMPLICATIONS:
STARE DECISIS AND JUDICIAL SUPREMACY

This Article has concerned itself with the one of the basic analytic dimensions of the concept of constitutional violations by judicial actors, and, therefore, it is worth sketching some of the collateral legal implications of the concept.

First, this Article has not addressed the question of the legal implications of this line of analysis for the collateral issue of stare decisis. It might be argued, for instance, that less precedential weight should be accorded to judicial constitutional violations than to mere judicial mistakes about constitutional meaning that are consistent, for example, with the structural and Rule of Law constitutional constraints on the courts. The Supreme Court itself has suggested that decisions amounting to constitutional violations by the federal judiciary are subject to limited precedential respect, observing in *Erie Railroad Co. v. Tompkins*¹³⁸ that the doctrine of *Swift v. Tyson*¹³⁹ 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.”¹⁴⁰

The argument, stated most simply, might take this form: the Supreme Court is the supreme institutional expositor¹⁴¹ of the Constitution and is subject to only a very limited array of checks when it violates the Constitution.¹⁴² Notably, when the Court’s decisions conflict with the Constitution there is no appeal to the authority of a “super-Supreme Court” to remedy the violation,¹⁴³ placing the Court in an institutional position unique within the constitutional system: as the ultimate institutional interpreter its own decisions remain unreviewed and unreviewable by any

¹³⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (rejecting the view that federal courts have an implied power to create federal civil common law).

¹³⁹ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (embracing the view that federal courts have an implied power to create a federal civil common law).

¹⁴⁰ *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). On the question of the precedential weight of judicial violations of the Constitution, see also BERGER, *supra* note 8, at 393 (citing *Erie* and rejecting the claim that long-standing judicial usurpations of political authority allocated by the Constitution to Congress or to the states should be allowed to stand out of respect for precedent or the principle of stare decisis).

¹⁴¹ See *United States v. Morrison*, 529 U.S. 598, 616–17 n.7 (2000) (asserting that “[n]o doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text”).

¹⁴² See *supra* Part III.

¹⁴³ The term “super-Supreme Court” is Justice Jackson’s. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“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.”).

other institution.¹⁴⁴ Thus with this supreme interpretive authority and unique institutional position there comes heightened responsibilities, one of which is the special obligation of the Court to police with extreme care the constitutional limits on its own powers. Part of this special obligation is the Court's duty to place respect for the constitutional limits on its own power well above familiar prudential stare decisis policy concerns of legal stability, continuity, and predictability.¹⁴⁵ On this view, then, while constitutional stare decisis is already widely viewed as a "weak" form of stare decisis,¹⁴⁶ the precedential weight of decisions that are affirmative judicial violations of the constitutional limits on the interpretive authority of the courts may properly be viewed as even weaker still. Moreover, the fact that such decisions violate the Constitution might be viewed as a sufficient justification for overruling them even if they were accorded the precedential weight they ordinarily would merit as constitutional cases.¹⁴⁷ This issue, while beyond the scope of this Article, is in need of further theoretical development.

Second, this Article has not addressed the legal implications of its analysis for the doctrine of judicial supremacy, where it might be argued that the President and Congress have an attenuated obligation to adhere to judicial decisions that themselves violate the Constitution's limits on the judicial authority to interpret the Constitution.¹⁴⁸ This argument, in brief, might suggest that the Supreme Court's constitutional authority to interpret

¹⁴⁴ Such decisions are final subject only to reconsideration by the Court or amendment to the Constitution.

¹⁴⁵ On the policy basis of stare decisis, see *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (observing that "[t]he doctrine [of stare decisis] exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules").

¹⁴⁶ On constitutional stare decisis as weak stare decisis, see, for example, *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (stating that stare decisis "reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right' and '[t]hat policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions'" (internal citations omitted)).

¹⁴⁷ The Supreme Court in *Casey* articulated a number of grounds for overruling mistaken decisions accorded weight as precedents under the doctrine of stare decisis. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992). These grounds included the unworkability of the decision, doctrinal erosion, and changes over time in the underlying factual situation. *Id.* Obviously, a decision's violation of the constitutional limits constraining the judicial branch of government could be viewed as ground for overruling the decision even if the Court regarded the decision as a precedent entitled to respect as a matter of stare decisis.

¹⁴⁸ See CAREY, *supra* note 8, 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); Robert P. George, *The Supreme Court 2000*, FIRST THINGS, Oct. 2000, at 34, available at <http://www.firstthings.com/ftissues/ft0010/articles/symposium-george.html> (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 4, at 262-64.

the Constitution with supremacy extends only to decisions that actually remain within the interpretive authority of the Court—decisions, that is, that do not involve a kind of violation by the Court of the constitutional limits on its interpretive power.

These arguments, in brief, might take this form: under the separation of powers, the Supreme Court may be viewed as the principal institutional interpreter of the Constitution,¹⁴⁹ and thus the interpretive primacy or supremacy of the Court's decisions may be seen as one facet of the federal judicial authority conferred on the Court by the structure of the Constitution.¹⁵⁰ However, when, for example, the Court exceeds the judicial interpretive authority in contravention of the constitutional structure of the separation of powers and exercises the substance of the legislative authority—authority conferred by the Constitution on the U.S. Congress—the Court, as a matter of constitutional structure, cannot claim supremacist judicial interpretive authority for its substantively legislative (and unconstitutional) action. On this view, the constitutional doctrine of judicial supremacy, as an aspect of judicial interpretive authority, extends only as far as the judicial interpretive authority itself, and no further. Decisions outside of the judicial interpretive authority thus cannot claim this aspect of the judicial authority, the force of constitutional judicial supremacy.

Significantly, however, the President and Congress may have sub-constitutional prudential or moral-political reasons for according a form of sub-constitutional prudential or political deference or "supremacy" to the Supreme Court's constitutional violations on a general or case-by-case basis in the interest of preserving the interpretive authority of the Court for its constitutional exercises of the judicial power. In other words, prudential or political supremacy might be accorded judicial decisions on sub-constitutional grounds even when the decision cannot claim constitutional supremacy. These questions also deserve additional theoretical development beyond the scope of this Article.

VII. CONCLUSION

In the interest of promoting constitutional and judicial integrity, this Article has sought to bring greater conceptual clarity to the neglected

¹⁴⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that "[i]t is emphatically the province and the duty of the judicial department to say what the law is").

¹⁵⁰ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400–01 (1819) (contending that, in resolving issues related to the constitutionality of the Bank of the United States and state taxation of the bank, "[n]o 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 Supreme Court of the United States has the constitution of our country devolved this important duty.*" (emphasis added)).

question of whether the U.S. Supreme Court can be said to violate the Constitution through an improper use of the power of judicial review, a question that has significant implications for traditional debates over the judicial power between proponents of judicial activism and judicial restraint. In particular, this Article has developed a detailed typology of judicial constitutional violation and explored some of the various forms in which judicial constitutional violations may occur within the constitutional system.

As demonstrated, the Supreme Court can violate the Constitution through its use of judicial review in four ways: (1) violation via exceeding structural authority, consisting of an act of the Court in excess of the power conferred on the judicial branch by the governmental design of the Constitution and thus one that is *ultra vires* in nature; (2) violation via improper manner or form of decision, consisting of an act of the Court in contravention of the Rule of Law norms of the Constitution such as the requirement of fidelity to law, the faithful administration of the laws in a manner congruent with their promulgation or publication; (3) violation via culpable intent, consisting of an act of the Court that is a pretextual rather than “good faith” invocation of judicial review, a use of the judicial power both unauthorized by the structure of the Constitution and incompatible with the norms of the Rule of Law and thus a special case of the first two forms of violation; and, finally, (4) violation via substantive infringement of other constitutional norms, a residual category, involving either a direct violation of a constitutional norm by the Court, such as freedom of speech or religion, or an indirect violation of such a norm through a judicial mandate of an act prohibited by the Constitution or a judicial prohibition of an act mandated by the Constitution. These are the four basic types of judicial constitutional violation beyond that which may be thought encompassed within the familiar concept of constitutional mistake.

The conceptual clarity this analysis brings to constitutional discourse has the potential to canalize opposition to judicial decisions on judicial power grounds into the familiar disciplining grooves of constitutional argument and further to promote greater judicial consideration of the constitutional limits on the power of the courts. These developments in turn have the potential to diminish judicial-political conflict and to promote both the protection of the Constitution from the courts and the protection of the courts from political actors, thus preserving the authority of the courts in turn to protect the Constitution. Obviously, further analysis remains to be done, particularly on the question of the implications of the concept of judicial constitutional violations for legal doctrines such as *stare decisis* and judicial supremacy. Concern both for the Constitution and for the federal courts suggests such analysis is worthwhile.