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The Pros and Cons of Politically Reversible 'Semisubstantive' Constitutional Rules

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ARTICLES

THE PROS AND CONS OF POLITICALLY REVERSIBLE "SEMISUBSTANTIVE" CONSTITUTIONAL RULES

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Most observers of constitutional adjudication believe that it works in an all-or-nothing way. On this view, the substance of challenged rules is of decisive importance, so that political decision makers may resuscitate invalidated laws only by way of constitutional amendment. This conception of constitutional law is incomplete. In fact, courts often use so-called "semisubstantive" doctrines that focus on the processes that nonjudicial officials have used in adopting constitutionally problematic rules. When a court strikes down a rule by using a motive-centered or legislative-findings doctrine, for example, political decision makers may revive that very rule without need for a constitutional amendment. For such an effort to succeed, however, those decision makers must comply with special, deliberation-enhancing procedural requirements crafted by courts to ensure that constitutional concerns receive fair attention in the lawmaking process.

Is semisubstantive review legitimate and sensible? In this Article, the author disentangles—and then responds to—each of ten critiques that judges and scholars have directed at semisubstantive decision making. While acknowledging that most of these critiques have some merit, the author concludes that courts should continue to deploy semisubstantive doctrines as one, but not the only, tool of constitutional review. This approach, it is argued, serves a worthy aim. It protects constitutional values in a meaningful way, while taking due account of the salience of republican self-rule.

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INTRODUCTION

The "unelected federal judiciary" has taken blows from many critics, including unelected federal judges themselves.[1] Most complaints proceed from the premise that courts make constitutional rulings that "withdraw certain subjects from the vicissitudes of political controversy" by "plac[ing] them beyond the reach of majorities."[2] On this view, the substance of the challenged rule or practice is all-important.[3] Teacher-led prayers in classrooms violate the Establishment Clause.[4] Racially segregated education runs afoul of the equal protection guarantee.[5] And bans on previability abortions offend protections of liberty embodied in the Fifth and Fourteenth Amendments.[6] Judicially recognized limits of this kind are "hard-and-fast" because the only way elected officials may undo them is by amending the U.S. Constitution.[7]

It is not surprising that democracy-minded critics of the courts focus on these substance-centered prohibitions. These prohibitions, after all, block elected decision makers from achieving legal outcomes that even large majorities of their constituents deem important. It is for this reason that American constitutional law has a strong "countermajoritarian" cast.[8]

Many constitutional rulings, however, do not concern only the substantive action the government has taken. Rather, courts sometimes apply so-called "semisubstantive" doctrines, which take account of both the

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1. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring) ("[U]nelected federal judges have been usurping [Congress's] lawmaking power . . . ."); *see also* John Gramm, Letter to the Editor, *We Need to Pray for Our Elected Officials*, THE PANTAGRAPH, Feb. 12, 2004, at A10 ("It's certainly too bad that our nation has degenerated to the point that unelected officials in our government, especially in the judicial department and the higher court federal judge system, usurp authority that is unconstitutional and biased against religion.").

2. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

3. *See id.* (suggesting that the "very purpose" of having constitutional rights is "to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts").

4. Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).

5. Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954).

6. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846–53, 869–70 (1992).

7. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1578–80 (2001) (describing content-centered nature of legislatively nonreversible constitutional rules) (internal quotation marks omitted).

8. The leading treatment of this subject is ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). In it, Professor Alexander Bickel describes the judicial-review-wielding U.S. Supreme Court as a "deviant institution in the American democracy." *Id.* at 18. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) ("The 'countermajoritarian difficulty' has been the central obsession of modern constitutional scholarship."). For two leading efforts to reconcile judicial review with democratic self-governance, see 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

challenged rule's substance and the process that brought the rule into effect. Consider the following examples:

1. In *Board of Trustees of the University of Alabama v. Garrett*,[9] the U.S. Supreme Court overturned Congress's effort to invoke Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity with regard to money-damages claims under the Americans with Disabilities Act. In doing so, however, the Court did not foreclose the possibility that such an abrogation could take place. Instead, it found that Congress had not "documented" constitutional violations that were sufficiently widespread to trigger its remedial Section 5 power.[10] The implication of the Court's analysis was clear: if Congress could and did provide proper documentation, a new law that exactly replicated the one struck down in *Garrett* would survive constitutional attack.[11]
2. In *City of Indianapolis v. Edmond*,[12] the Court invalidated a municipal program under which all passing vehicles were stopped at fixed police checkpoints in an effort to thwart illegal drug use. In distinguishing earlier Fourth Amendment authorities that upheld similar "'special needs'" searches, the Court deemed it determinative that local lawmakers' "primary purpose was to detect evidence of ordinary criminal wrongdoing."[13] Again, the implication of the Court's reasoning was clear: if the city reinstituted an identical checkpoint program, but did so for the proper purpose of getting dangerous drug-using drivers off the road, it would seem that the new program would pass constitutional muster.[14] Indeed, the majority in *Edmond* acknowledged that "a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar."[15]

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9. 531 U.S. 356 (2001).

10. *Id.* at 372.

11. For a more detailed discussion of *Board of Trustees of the University of Alabama v. Garrett*, see for example William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 117–19 (2001); Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1325–26 (2002); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1725–27 (2002).

12. 531 U.S. 32 (2000).

13. *Id.* at 37–38.

14. *See, e.g.*, Thomas K. Clancy, *Introduction: 2006 Fourth Amendment Symposium: Programmatic Purpose, Subjective Intent, and Objective Intent: What Is the Proper Role of "Purpose" Analysis To Measure the Reasonableness of a Search or Seizure?*, 76 MISS. L.J. i, vii n.17 (2006) ("[N]othing in the *Edmond* Court's analysis would prevent Indianapolis from simply re-labeling its program and conducting the same screening for drugs . . . .").

15. *Edmond*, 531 U.S. at 47; *see also id.* at 37–38 (distinguishing early ruling that upheld fixed checkpoints in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), on the ground that that program "aimed at removing drunk drivers from the road");

3. In *Quill Corp. v. North Dakota*,[16] the Court considered whether a state could constitutionally extend sales-tax collection obligations to "a vendor whose only contacts with [it] are by mail or common carrier."[17] The Court overturned the challenged program, but was careful to base its ruling on the dormant Commerce Clause, and not the Due Process Clause of the Fourteenth Amendment.[18] The upshot was that the Court's ruling—like all dormant Commerce Clause rulings—became reversible by way of ordinary congressional legislation, so that joint action by state and federal lawmakers could reinstate exactly the same rule the Court had just struck down.[19] Indeed, the Court trumpeted this feature of its work, proclaiming that "Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes."[20]

In each of these cases, governmental processes had dispositive significance. None of the cases, however, involved the application of traditional procedural due process principles, because those principles focus on process-related requirements in the adjudicative setting. Put another way, the Court in *Garrett*, *Edmond*, and *Quill* did not direct attention to the processes by which discrete disputes were resolved; instead, it directed attention to the processes by which lawmakers promulgated rules of broad application because the substance of those rules raised a constitutional red flag. As a consequence, in each of these cases, the Court made only a provisional move. By focusing on the process that led to the law's enactment, the Court signaled that exactly the same law or practice that the Court had found objectionable would survive constitutional attack if political authorities, in a second go-round, avoided the initial process error. Congress might make the findings deemed essential in *Garrett*; after *Edmond*, the City Council might reinstitute drug checkpoints by acting without an impermissible motive; and Congress might bless state efforts to impose the same nexus-stretching taxing scheme deemed unlawful in *Quill*. In short, process mattered no less than substance in these cases, which is

id. at 47 n.2 ("[W]e need not decide whether the State may establish a checkpoint program with the primary purpose of checking . . . driver sobriety and a secondary purpose of interdicting narcotics."); *id.* at 55–56 (Rehnquist, C.J., dissenting) ("[I]f the Indianapolis police had assigned a different purpose to their activity here, but in no way changed what was done on the ground to individual motorists, it might well be valid.").

16. 504 U.S. 298 (1992).

17. *Id.* at 311.

18. *Id.* at 318.

19. *See, e.g.*, Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985) (noting that combination of state and federal legislation defeated a dormant Commerce Clause challenge to state exclusion of nonresident bank holding companies). *See generally* DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 292–96 (2004); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-35, at 1242–45 (3d ed. 2000) (discussing congressional authorization of otherwise impermissible state regulation).

20. *Quill*, 504 U.S. at 318.

why they involved "semisubstantive," rather than fully substantive, doctrines of constitutional law.[21]

Semisubstantive rules take many forms. Indeed, in an earlier work I catalogued nine separate semisubstantive techniques, each of which has given rise to multiple subdoctrines.[22] All of these rules share a democracy-forcing, dialogic quality.[23] In essence, nonjudicial authorities can dodge the constitutional trap if, but only if, they act in a way that gives focused attention to the important constitutional values raised by the challenged practice.

To be sure, semisubstantive rules do not stand alone in constitutional law because nonsemisubstantive hard-and-fast rules continue to apply in many settings.[24] In addition, semisubstantive review does not rear its head every time parties present constitutional claims; instead, it tends to surface only when particularly significant constitutional values are at play.[25] None of

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21. This type of review has received many names, such as "structural due process," Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); "due process of lawmaking," Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); and "Type III judicial review," Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 83 (1991). I prefer "semisubstantive review" because (1) it directs attention to the substantive constitutional constraints that such review implicates, and (2) other labels—particularly labels that incorporate the term "due process"—improperly imply that this form of review derives exclusively or primarily from the Due Process Clauses of the Fifth and Fourteenth Amendments. *See infra* notes 121–34 and accompanying text (developing the idea that semisubstantive review does not derive solely, or primarily, from the Due Process Clauses).

22. The doctrinal categories are: (1) rules of clarity; (2) form-based deliberation rules; (3) proper-findings-and-study rules; (4) representation-reinforcing structural rules; (5) time-driven second-look rules; (6) thoughtful-treatment-of-the-area rules; (7) constitutional common-law and common-law-like rules; (8) proper-purpose rules; and (9) constitutional "who" rules. *See generally* Coenen, *supra* note 7, at 1587–805 (providing descriptions and examples of each form).

23. *See, e.g.*, Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 82 (1996) (noting that semisubstantive doctrines can "require[] state officials to set out criteria on their own and . . . in that way [be] democracy-forcing"; adding that these rules are "intended to catalyze and improve, rather than to preempt, democratic processes"). It is important to recognize that semisubstantive review involves only one of several ways in which courts involve other arms of government in the elaboration of constitutional law. For a helpful review of different dialogic approaches, see Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109 (2006). For a brief effort to locate semisubstantive decision making in the broader context of constitutional law in general and dialogic techniques in particular, see Coenen, *supra* note 7, at 1579–81.

24. *See* Coenen, *supra* note 7, at 1579; *see also supra* notes 4–6 and accompanying text (discussing school prayer, race-segregation, and abortion cases).

25. *See* Coenen, *supra* note 7, at 1585–86. Some commentators have argued for a more across-the-board approach, at least with respect to certain forms of semisubstantive doctrines. For a recent proposal that would render findings-and-study rules applicable to all federal legislation (not just legislation that raises particularly significant constitutional problems), see Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367 (2004). For an argument that all judicial rulings of constitutional law should be reversible by ordinary legislation, see Kenneth Ward,

this changes the fact, however, that semisubstantive review has deep roots and broad effects within American law.[26]

Given the pervasiveness of semisubstantive decision making, a simple question suggests itself: is this form of judicial intervention legitimate and advisable? No thorough treatment of this issue now exists, although commentators have raised many questions about this style of review. During the 1980s, for example, Professor Mark Tushnet voiced doubts about the semisubstantive methodology.[27] His comments, however, focused on worries that this style of decision making might emerge as a grand theory of constitutional law[28]—a role for such decision making neither claimed by the Court nor advocated in this Article.[29] Other treatments have aimed at smaller targets. Professors Philip Frickey and Steven Smith have suggested, for example, that the sort of findings-related intervention exemplified by *Garrett* reflects an inattentiveness to the practical operation of a 535-member, two-house, committee-driven, logrolling-oriented Congress.[30] These texts and others illuminate particular

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Legislative Overrides as a Check on Judicial Review (2007) (unpublished manuscript), *available at* http://works.bepress.com/kenneth_ward/1/. For one effort to build on the use of semisubstantive review in a particular doctrinal context, see David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1292–99 (2002) (advocating that courts "search for ways" to develop Constitution-based rules of criminal procedure that "minimize the dangers of intruding into decisions normally left to the political branches," including through use of rules "'reversible' by the political branches").

26. This style of decision making also pervades constitutional law on the international stage. In Great Britain, Canada, and New Zealand, for example, "legislatures [possess] the power to have the final word on what the law is," following judicial determinations of unconstitutionality. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 746 (2001).

27. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 201–13 (1988). Professor Mark Tushnet has argued that semisubstantive review is "beset by several difficulties." *Id.* at 206. He has further noted that "proponents of structural review have failed to confine the Court's discretion both in deciding when to invoke structural review and in deciding when its requirements are satisfied." *Id.* at 208. He finally concluded that "[s]tructural review may fail as a theory." *Id.* at 213. In the text, I specifically reference Professor Tushnet's work "[d]uring the 1980s," because in later years he seems to have seen greater value in judicial use of these doctrines. *See* Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1872 (2001) ("Normatively, a combination of full democratic choice coupled with subconstitutional doctrines to ensure that such choice is informed, carefully made, and the like, might be more attractive than a system in which democratic choice is limited substantively by the courts.").

28. *See supra* note 27.

29. Over the years, some commentators have endorsed politically reversible judicial review as a general theory, at least in specified fields, such as substantive due process. *See generally* Calabresi, *supra* note 21; Daniel O. Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9 (1985); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977). For an approach to judicial review that would "allow Congress and the President to override judicial precedents through ordinary legislation," see Ward, *supra* note 25, at 1.

30. *See* Frickey & Smith, *supra* note 11, at 1755 (finding that the Court's approach "lacks an adequate conceptualization of legislative actors, has an excessively narrow definition of the legislative record, and appears to reflect an inaccurate view of deliberation

pathways for challenging semisubstantive decision making. None of them, however, provides anything that approaches a comprehensive catalogue of problems, much less a systematic set of responses.

This Article offers a wide-ranging evaluation of the integrity and wisdom of semisubstantive rules. In Part I, I document the nature and scope of this style of decision making, including by offering a typology of semisubstantive doctrines built around so-called "how," "why," "when," and "who" rules. In Part II, I turn to the merits of the semisubstantive methodology by evaluating ten separate critiques. Although most of these critiques have some force, I conclude that none of them justifies abandonment of this style of constitutional decision making. There is much to be said, both pro and con, about the merits of semisubstantive review. In the end, however, I conclude that nonexclusive use of these rules provides a valuable mechanism for promoting interbranch and federal-state dialogue while giving substantive constitutional values their due.[31]

I. THE FORMS OF SEMISUBSTANTIVE REVIEW

The Supreme Court has never sought to catalogue the many sorts of semisubstantive rules that it uses in constitutional cases. Close analysis reveals, however, that these rules may be gathered into groupings that reflect the how, why, when, and who of the lawmaking process.

"How" rules, such as the rule of *Garrett*, evaluate the manner in which a law came into being, including by looking at whether the lawmaking body made a focused assessment of the constitutional issues at stake. "Why" rules, such as the Fourth Amendment doctrine of *Edmond*, consider whether an impermissible motive tainted the lawmaking process. "When" rules focus on the impact of time in assessing constitutionality; in particular, an encounter with a law promulgated long ago may lead judges to force a legislative reappraisal in the absence of recent efforts at repeal or reform. "Who" rules focus on whether the best decision maker—a nationally-minded Congress, rather than a locally-minded state legislature, as in *Quill*, for example—has signed off on the challenged practice. Judicial use of each of these doctrines leaves the door open for the political branches to put

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and the legislative process"). Other commentators have criticized findings-based rulings as well. *See* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 331 (2001) (stating that the Court's approach "is fundamentally ill advised"); Buzbee & Schapiro, *supra* note 11, at 90–91 (asserting that the Court's approach "demonstrates judicial suspicion of congressional motives" and has "no support in precedent or in constitutional text or structure"); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85 (2001) (raising the concern that the "[Court's] record requirement could not reasonably have been anticipated at the moment of legislative deliberation "); *see also* Goldfeld, *supra* note 25, at 412–20 (describing objections to court-imposed "legislative due process" rules).

31. For a truncated enumeration of arguments for semisubstantive review, see Coenen, *supra* note 7, at 1834–45.

in place legal rules that would not satisfy the courts if enacted by way of ordinary lawmaking processes.

A. *Constitutional "How" Rules*

"How" rules do not deem determinative the "what" of a challenged law—that is, the content of the law's substantive restriction. Rather, they focus on how the law came to be. As a result, as with other semisubstantive doctrines, when a court invalidates a law (or deems it inapplicable to the situation at hand) by using a constitutional "how" rule, the legislature remains free to readopt it (or render it applicable to the situation at hand) if it corrects judicially identified shortcomings in the lawmaking process.[32]

How-based review often entails judicial use of constitutionally inspired "clear statement" rules,[33] as illustrated by *Solid Waste Agency v. United States Army Corps of Engineers*.[34] There, the Court considered whether the Army Corps of Engineers had acted properly when it blocked the filling of a local rain-collecting sand and gravel pit.[35] In taking this action, the Corps relied on its "Migratory Bird Rule," which in essence required federal approval to tamper with any body of water frequented by migrating ducks and geese.[36] The landowners' challenge raised two questions: (1) whether the Corps had exceeded its statutory authority under the Clean Water Act to regulate "'waters of the United States'" by interpreting the Act to cover "isolated, intrastate" ponds, and (2) whether Congress had power under the Commerce Clause to grant the Agency this scope of regulatory jurisdiction.[37]

The Court determined that the Corps's view of its authority reached too far as a matter of statutory law, thereby avoiding the constitutional question.[38] In steering this course, the Court relied on the principle that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[39] The Court also cited a second clear-statement rule that focused on the constitutional importance of state autonomy. According to the Court, judicial concerns are "heightened where the administrative interpretation alters the federal-state framework by permitting federal

32. *See* Coenen, *supra* note 11, at 1287 (describing constitutional "how" rules).

33. *See generally* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 355–82 (2d ed. 2006). The authors discuss substantive canons, including those that "correlate with basic values embedded in the Constitution," *id.* at 357, and consider in detail the preference for avoiding serious constitutional questions, as well as federalism-driven canons, which seem designed to encourage Congress to "deliberate carefully about . . . intrusions upon core state functions." *Id.* at 358.

34. 531 U.S. 159 (2001).

35. *Id.* at 162–63.

36. *Id.* at 163–65.

37. *Id.* at 163–66, 169 (quoting 33 U.S.C. § 1362(7) (2006)).

38. *Id.* at 162.

39. *Id.* at 172.

encroachment upon a traditional state power."[40] Because "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States' traditional and primary power over land and water use"[41]—and because Congress had not expressed a "clear" desire "to readjust the federal-state balance in this manner"—the Court overturned the Corps's federal licensing scheme.[42]

In relying on Congress's lack of clarity with regard to authorizing the Migratory Bird Rule, the Court protected the constitutional value of federalism. At the same time, the Court did not foreclose the possibility that Congress could reinstate the rule, so long as it abided by the Court's how-based mandate that it speak in unambiguous terms. In this way, the Court protected an important substantive constitutional value while permitting Congress to continue to explore the justifiability of this form of federal regulation.

A different sort of "how" rule proved decisive in *Thompson v. Oklahoma*.[43] That case presented the question whether the execution of murderers who were younger than sixteen at the time of the offense violated the Eighth Amendment.[44] Three members of the Court, led by Justice Scalia, concluded that no constitutional rule barred the death sentence in these circumstances, in part because many states had long authorized the practice.[45] Four members of the Court, led by Justice Stevens, reasoned that "'evolving standards of decency'" rendered this sort of state action unconstitutional.[46] Justice O'Connor supplied the decisive vote to block the execution by relying on a how-based semisubstantive rationale.[47]

Accepting the premise of Justice Stevens's approach, Justice O'Connor first noted that an emerging national consensus might preclude the execution of Thompson and others like him.[48] Unsatisfied with the evidence on that point,[49] however, she took an admittedly "unusual" approach to the case.[50] Justice O'Connor emphasized that the Oklahoma legislature had never directly approved the execution of juvenile offenders in a focused way.[51] Instead, the defendant was death-eligible because of the joint operation of two separate provisions—one that authorized the death penalty for adult offenders, and another that permitted trying juvenile offenders as adults for a variety of crimes.[52] In Justice O'Connor's view,

40. *Id.* at 173.
41. *Id.* at 174.
42. *Id.* at 172, 174.
43. 487 U.S. 815 (1988).
44. *Id.* at 818–19.
45. *Id.* at 859–78 (Scalia, J., dissenting).
46. *Id.* at 821 (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
47. *Id.* at 848–59 (O'Connor, J., concurring). Justice Kennedy did not participate in the *Thompson v. Oklahoma* decision. *Id.* at 838.
48. *Id.* at 848–49.
49. *Id.* at 849.
50. *Id.* at 858.
51. *Id.* at 857.
52. *Id.*

imposing the death sentence in these circumstances offended the Court's "important and consistent" demand "for special care and deliberation in decisions that may lead to the imposition of that sanction."[53] As she explained,

> Because it proceeded in this manner, there is a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.[54]

Put another way, the state could not impose a death sentence in *Thompson* because its legislature had not acted with sufficient particularity and care. For Justice O'Connor (herself a former state senator), *how* the legislature had proceeded was determinative, regardless of whether the execution of youthful murderers was substantively prohibited by the Eighth Amendment in a hard-and-fast way.[55]

Justice Scalia rejected this rationale in no-nonsense terms. He observed that he knew of "no authority whatever for our specifying the precise form that state legislation must take, as opposed to its constitutionally required content."[56] In his view, Justice O'Connor's "brand new principle" was a "loose cannon" that struck at the heart of state sovereignty.[57] But Justice Scalia's critique fell on deaf ears; Justice O'Connor's semisubstantive methodology in fact provided the key fifth vote for overturning Thompson's death sentence.

As *Garrett* illustrates, some "how" rules target statutes put in place without adequate findings or study. In *United States v. Lopez*,[58] for example, the Court invalidated a federal ban on gun possession near schools on the ground that it reached beyond Congress's commerce power.[59] In doing so, the Court noted that the legislative record contained no explanation of the connection between this form of gun possession and the operation of interstate markets.[60] The Court acknowledged that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[61] Yet it also observed that "we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate

53. *Id.* at 856.
54. *Id.* at 857.
55. Notably, Justice O'Connor's opinion in *Thompson* does not stand alone in using this sort of extra-super-clear-statement rule. *See* Coenen, *supra* note 11, at 1308–13 (discussing Justice Thomas's concurring opinion on congressional abrogation of sovereign immunity in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 99–109 (2000), and its similarities to the *Thompson* concurrence).
56. *Thompson*, 487 U.S. at 876–77 (Scalia, J., dissenting).
57. *Id.* at 877.
58. 514 U.S. 549 (1995).
59. *Id.* at 551–52.
60. *Id.* at 562.
61. *Id.*

commerce."[62] Applying these principles, the Court declared, "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[63]

Some findings-or-study rules involve individual rights, rather than federal powers. In *Reno v. ACLU*,[64] for example, the Court considered whether the broad restriction on "indecent" Internet speech imposed by the Communications Decency Act (CDA) ran afoul of the First Amendment.[65] The Court's analysis focused on whether this prohibition was "carefully tailored" with respect to the goal of protecting minors in light of the possible adequacy of less restrictive regulatory approaches.[66] In the end, the Court found a First Amendment violation, emphasizing that "[p]articularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all."[67] This First Amendment findings-or-study rule does not stand alone. In an earlier decision invalidating a broad "dial-a-porn" prohibition, the Court likewise reasoned that "the congressional record contains no legislative findings that would justify us in concluding that

62. *Id.*

63. *Id.* at 563. Building on *United States v. Lopez*, many lower court judges deemed the presence or absence of findings decisive in assessing commerce-power cases. *See, e.g.*, United States v. Rybar, 103 F.3d 273, 292 (3d Cir. 1996) (Alito, J., dissenting) (voting to invalidate federal ban on machine gun possession as exceeding Congress's commerce power, but noting that he "would view this case differently if Congress as a whole or even one of the responsible congressional committees had made a finding that intrastate machine gun possession, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce"); *see also id.* at 279 (majority opinion) (reasoning that, "unlike the situation in *Lopez*, there are legislative findings," although made in connection with earlier firearms legislation). In its post-*Lopez* decision in *United States v. Morrison*, a five-Justice majority of the Court invalidated a law that created a federal action for sex-based violence notwithstanding the existence of extensive congressional findings that such action, in the aggregate, substantially harms interstate commerce. 529 U.S. 598, 601–02, 614 (2000). The four dissenters sought to distinguish *Lopez* on precisely this ground. *Id.* at 628–29 (Souter, J., dissenting). And the majority itself did not foreclose the possibility that congressional findings might prove important in other commerce-power cases, particularly cases not involving violent crime. As the Court noted, "the existence of congressional findings is not sufficient, *by itself*, to sustain the constitutionality of Commerce Clause legislation." *Id.* at 614 (majority opinion) (emphasis added). The majority also declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity" for analysis under the affecting-commerce prong of the commerce-power, *id.* at 613, thereby giving the Court "room to give weight to the presence or absence of legislative findings in some future commerce power cases," Coenen, *supra* note 11, at 1322.

64. 521 U.S. 844 (1997).

65. *See id.* at 870–71.

66. *Id.* at 871.

67. *Id.* at 879.

there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors."[68]

Two other constitutional "how" rules sometimes make an appearance. On occasion, courts apply constitutionally inspired rules that are legislatively reversible because of their "common-law-like" nature. By way of example, rules that limit what instructions and inquiries judges may pose to deadlocked criminal juries appear to meet this description.[69] In other cases, courts deploy so-called "form-based . . . rules."[70] In applying the dormant Commerce Clause, for example, the Court has routinely invalidated tax breaks that favor local businesses without questioning the constitutionality of affirmative subsidies that have identical economic effects.[71] What is more, judicial recognition of this distinction between tax breaks and subsidies has its roots in semisubstantive reasoning. As one court has explained, because an outright subsidy "involves the direct transfer of public monies," it is "subject to heightened political visibility" and resulting incentives for care when the legislature acts.[72]

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68. Sable Commc'ns of Ca., Inc. v. FCC, 492 U.S. 115, 129 (1989). Something like the flipside of this reasoning played a role in Justice Kennedy's concurring opinion in *Ashcroft v. ACLU* (*Ashcroft I*), 535 U.S. 564, 591 (2002) (Kennedy, J., concurring). There, four members of the Court voted to uphold more limited Internet-pornography legislation passed in the wake of *Reno v. ACLU*. *Id.* at 566. In his critical, fifth-vote concurring opinion, Justice Kennedy observed,

> Congress and the President were aware of our decision, and we should assume that in seeking to comply with it they have given careful consideration to the constitutionality of the new enactment. For these reasons, even if this facial challenge appears to have considerable merit, the Judiciary must proceed with caution and identify overbreadth with care before invalidating the Act.

Id. at 591–92 (Kennedy, J., concurring). Notwithstanding its rejection of an overbreadth challenge in *Ashcroft I*, the Court later, in *Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656 (2004), upheld a U.S. district court's preliminary injunction of the Act based on findings that a less restrictive alternative, in the form of parental installation of filtering software, remained available. In dissent, Justice Breyer asked pointedly, "[W]hat has happened to the 'constructive discourse between our courts and our legislatures' that 'is an integral and admirable part of the constitutional design'?" *Id.* at 689 (Breyer, J., dissenting) (quoting Blakely v. Washington, 542 U.S. 296, 326 (2004)). As Justice Breyer elaborated, "Congress read *Reno* with care. It dedicated itself to the task of drafting a statute that would meet each and every criticism of the predecessor statute that this Court set forth in *Reno*. . . . What else was Congress supposed to do?" *Id.* at 690.

69. *See* Coenen, *supra* note 7, at 1738 (discussing cases).

70. *Id.* at 1642. *See generally id.* at 1640–55 (discussing use of form-based rules to foster deliberative policymaking).

71. For some additional rules of this nature, see *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 109–14 (2005) (holding that application of rules designed to protect sovereignty of Native American tribes hinges on whether "legal incidence" of state sales-related fuel tax, as revealed by statutory phrasing, falls on off-reservation distribution, rather than on-reservation purchases), and *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 460 (1995) ("[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence.").

72. Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards, 901 F. Supp. 1125, 1137 (M.D. La. 1995). Another sort of "how" rule is the "thoughtful treatment of the area" rule. Coenen, *supra* note 7, at 1727–34 (discussing thoughtful-treatment rules with regard to death penalty, speech-licensing, vagueness, and punitive-damages law). For one

B. *Constitutional "Why" Rules*

Many doctrines of constitutional law focus on the purpose with which the lawgiver acted. In *Washington v. Davis*,[73] for example, the Court held that even facially neutral laws will trigger heightened scrutiny if they are adopted with the purpose of disadvantaging a racial minority or other protected group.[74] In similar fashion, the Establishment Clause mandates invalidation of laws enacted with a sectarian motive.[75] As illustrated by *Edmond*, the Fourth Amendment has spawned its own semisubstantive "why" rule.[76] Still other motive-centered doctrines lurk in the Court's free speech, free exercise, dormant Commerce Clause, and Bill of Attainder cases,[77] as well as in other constitutional fields.[78]

Rules of this kind are semisubstantive in nature for a simple reason: their logic dictates that exactly the same law will or will not be constitutional depending on the mental *process* that led to its adoption.[79] *Hunter v. Underwood*[80] illustrates the point. There, the Court encountered an Alabama law that disenfranchised any person who had committed a crime involving moral turpitude.[81] The Court struck down this facially neutral exclusion on equal protection grounds because it had been promulgated with the purpose of keeping African Americans off the voting rolls.[82] In invalidating the measure, however, the Court was careful to leave open the question "whether [it] would be valid if enacted today without any impermissible motivation."[83] The Court thus shifted the "burden of inertia"[84] back to state lawmakers who might try to put the provision back in place, but only if they could do so in a process purged of racial bias.

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example, see Sklansky, *supra* note 25, at 1275–76 (noting that "[i]n a few limited areas, the Court has indicated that searches and seizures may satisfy the Fourth Amendment in part because they are carried out pursuant to formal regulations" and discussing inventory and administrative searches as examples).

73. 426 U.S. 229 (1976).

74. *Id.* at 242.

75. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 59–60 (1985) (invalidating required meditation in schools because of improper purpose); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

76. *See supra* notes 12–15 and accompanying text.

77. *See* Coenen, *supra* note 7, at 1759–61.

78. *See id.* at 1761 & nn.786 & 788.

79. *See* Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 115 (noting that purpose-based doctrines permit reenactment of law "in identical form"); J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 1033 (1978) (same).

80. 471 U.S. 222 (1985).

81. *Id.* at 223.

82. *Id.* at 233.

83. *Id.*

84. *See infra* notes 283–84 and accompanying text.

C. *Constitutional "When" Rules*

Thoughtful commentators have raised the question whether courts, at least sometimes, should force legislatures to reconsider long-surviving statutes that appear to have outlived their usefulness.[85] More particularly, if old statutes implicate particularly significant constitutional concerns, courts might invoke semisubstantive "when" rules to force a legislative reappraisal.[86] Are courts open to using this technique? Some cases suggest they may be.

In *Griswold v. Connecticut*,[87] the Court confronted a state ban on contraceptive use, which had been adopted in 1879 based in part on the view that nonreproductive sexual intercourse is morally wrong.[88] This potential justification for the law was brushed aside by the Court in *Griswold* because (according to Justice White's concurrence) counsel in the case offered "no serious contention that Connecticut [thought] the use of . . . contraception [was] immoral."[89] This mode of analysis raises an obvious question: what if, following the Court's invalidation of the Connecticut statute, state legislators reenacted the same law and specifically relied on the immorality of nonprocreative sex? In effect, by dismissing this justification as out-of-date, the Court left open the possibility that the state could reinstate the statute and defend it on this previously unconsidered ground. Put another way, the Court invited the legislature to revive an *old* justification for an *old* statute, but only if a *new* legislature in *new* conditions concluded that the justification had merit.[90]

Related to this type of no-longer-advanced-justification reasoning is the "concept of desuetude,"[91] which courts sometimes use to invalidate laws that have generated few prosecutions over an extended period of time.[92] This doctrine has not taken firm hold in American jurisprudence.[93] Professor Cass Sunstein has suggested, however, that it provides the best way to view the Supreme Court's invalidation of the state sodomy ban at

85. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 135 (photo. reprint 1999) (1982) ("[I]t is possible that a code can become so out of phase with everything else in the law that a forced legislative reconsideration becomes appropriate.").

86. *See* Coenen, *supra* note 7, at 1698–726 (analyzing judicial use of time-driven second-look rules when evaluating regulations that "raise particularly serious constitutional concerns").

87. 381 U.S. 479 (1965).

88. *See* Tribe, *supra* note 21, at 298–303 (discussing this aspect of *Griswold*).

89. *Griswold*, 381 U.S. at 505 (White, J., concurring).

90. For another case of this sort, see *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 641 n.9 (1974) (invalidating ban on teaching by women who were more than four months pregnant where the rule's defenders did not contend that its original purpose of shielding schoolchildren from visibly pregnant women could support the challenged policy in the present day).

91. BICKEL, *supra* note 8, at 148.

92. *See* Coenen, *supra* note 7, at 1704–08.

93. *See, e.g.*, Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126, 1132 n.14 (1982).

issue in *Lawrence v. Texas*.[94] As he put the point in discussing the interpretive philosophy he describes as "minimalism,"

> Minimalists insist that the real problem in *Lawrence*, and in many other cases involving sexual privacy, was *procedural*. In the last decades, sodomy prosecutions have been rare and unpredictable, simply because the public would not stand for many of them. Emphasizing this point, minimalists contend that *Lawrence*, and many of the Court's privacy decisions, should be understood as an American variation on the old English idea of *desuetude*. According to that idea, laws lapse, and can no longer be enforced, when their enforcement has already become exceedingly rare because the principle behind them has become hopelessly out of step with people's convictions.[95]

As Professor Alexander Bickel explained many years earlier, the effect of a ruling based on the doctrine of desuetude is not to foreclose democratic action. Rather, it is "to turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature, where the power of at least initial decision properly belongs in our system."[96] In other words, popular forces—if strong enough—can breathe new life into an old provision by pushing political authorities to return it to active duty.[97]

"When" rules—like "what" and "how" rules—protect fundamental constitutional values because they result in the invalidation of constitutionally troublesome laws. At the same time, this form of invalidation invites a legislative reprise so long as lawmakers act with care. In voting to strike down New York's ban on assisted suicide, for example, Judge Guido Calabresi took precisely this approach. He began by explaining that "[t]he statutes at issue were born in another age" and that "the bases of [them] have been deeply eroded over the last hundred and fifty years."[98] For these reasons, he declared that the assisted suicide ban could not continue to operate. At the same time, he chose to "leave open the question of whether, if the [S]tate of New York were to enact new laws prohibiting assisted suicide (laws that either are less absolute in their

94. 539 U.S. 558 (2003).

95. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 97 (2005) (footnote omitted); *see also* Sunstein, *supra* note 23, at 68 (asserting that the Court's earlier sodomy case, *Bowers v. Hardwick*, 478 U.S. 186 (1986), "should have been decided . . . the other way and very narrowly—as a case involving the old and nicely minimalist idea, with democratic foundations, of desuetude").

96. BICKEL, *supra* note 8, at 148.

97. A related time-tied style of judicial intervention is illustrated by the Court's death penalty decisions. In particular, when the Court invalidated every death penalty statute in the nation in *Furman v. Georgia*, 408 U.S. 238 (1972), it did so in light of "evolving standards of decency" as required by the Eighth Amendment. *Id.* at 242 (Douglas, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). This result, however, triggered a widespread reexamination of the death penalty, culminating in its reenactment in many states and the Court's upholding of that action in *Gregg v. Georgia*, 428 U.S. 153 (1976).

98. Quill v. Vacco, 80 F.3d 716, 732, 735 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 521 U.S. 793 (1997).

application or are identical to those before us), such laws would stand or fall."[99]

The Supreme Court ultimately upheld assisted suicide restrictions, with its principal decision coming in a case from Washington State.[100] Even as the Court sustained the Washington statute, however, it made a nod in the direction of constitutional "when" rules. In particular, the Court emphasized that "[t]hough deeply rooted, the States' assisted-suicide bans *have in recent years been reexamined* and, generally, reaffirmed."[101] The Court also catalogued recent developments in Washington itself, noting the state's focused reevaluation of its assisted suicide ban in 1975 and its considered exclusion of the practice from actions authorized by the state's Natural Death Act twenty years later.[102] Given these elements of the Court's reasoning, the question arises whether it would have jettisoned the Washington law had no such recent reappraisals occurred. There is no way to know the answer to this question. Were the Court to give these matters decisive weight, however, it would be applying a semisubstantive "when" rule.[103]

D. *Constitutional "Who" Rules*

Finally, there are constitutional "who" rules, which steer policy choices from one nonjudicial decision maker to another. *Quill* and other dormant Commerce Clause cases illustrate this approach by requiring congressional—rather than merely state—endorsement of laws that threaten the free flow of interstate and international commerce.[104] Another leading who-rule case is *Hampton v. Mow Sun Wong*.[105] There, the Court invalidated a ban on government employment of resident aliens that had been promulgated by the Federal Civil Service Commission.[106] In the course of its decision, the Court first identified the interests advanced in support of the prohibition, which included maximizing the President's power in treaty negotiations and encouraging aliens to become American citizens.[107] According to the Court, these interests might have supported the rule had it come from Congress or the President.[108] The Civil Service Commission, however, was not the proper body to assess these considerations because it had no responsibility for foreign affairs or

99. *Id.* at 732.
100. Washington v. Glucksberg, 521 U.S. 702 (1997).
101. *Id.* at 716 (emphasis added).
102. *Id.* at 716–17.
103. For a twist on the typical application of "when" rules, see Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281 (2003) (arguing that applications of statutes should change as constitutional doctrine changes, without necessitating judicial negation of such statutes).
104. *See supra* notes 16–20 and accompanying text.
105. 426 U.S. 88 (1976).
106. *Id.* at 116–17.
107. *Id.* at 104.
108. *Id.* at 105.

naturalization policies.[109] Put more bluntly, given the important equal protection values at stake in the case, the Court concluded that the Commission was not a proper "who" for the purpose of promulgating the hiring ban.[110]

Justice Powell's decisive opinion in *Regents of the University of California v. Bakke*[111] brought a similar style of analysis to bear. In voting to strike down a state medical school's affirmative-action admissions program, he reasoned in part that nonjudicial efforts aimed at remedying past constitutional wrongs should come from broadly accountable state authorities, rather than "isolated" university officials.[112] This result made sense, according to Justice Powell, because university officials have responsibility for "education, not the formulation of any legislative policy or the adjudication of particular claims of illegality."[113] In his view, "isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria."[114]

As *Mow Sun Wong* and *Bakke* show, "who" rules differ from other semisubstantive doctrines because they do not result in a remand to the same decision maker who propounded the suspect policy in the first place. Instead, they channel authority to a different set of decision makers who are perceived to be more deliberative, more competent, or more accountable. As with other semisubstantive doctrines, however, "who" rules permit political actors to put back in place the identical rule that the Court has struck down. Indeed, with little delay, President Gerald Ford reinstated by executive order the very same alien hiring ban that the Court had invalidated in *Mow Sun Wong*.[115] Subsequent judicial decisions upholding this action powerfully illustrate the self-limiting and dialogic nature of semisubstantive constitutional doctrines.[116]

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109. *Id.* at 114.

110. *Id.* "Who" rules sometimes come to the fore in joint operation with other semisubstantive doctrines. In *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), for example, the Court noted its view that an administrative interpretation of a statute that comes too close to the outer bounds of congressional power would require a clear indication from Congress that such a result was intended. *Id. at* 172; *see supra* notes 33–42 and accompanying text. Although the Court in *Solid Waste Agency* thus protected federalism values by relying on a clear-statement "how" rule, it did so in a way that effectively shifted policymaking authority from one set of decision makers (that is, an executive agency) to another (that is, Congress).

111. 438 U.S. 265 (1978).

112. *Id.* at 307–10.

113. *Id.* at 309.

114. *Id.*

115. Exec. Order No. 11,935, 5 C.F.R. § 7.3 (2008).

116. *See, e.g.*, Mow Sun Wong v. Campbell, 626 F.2d 739, 746 (9th Cir. 1980); Vergara v. Hampton, 581 F.2d 1281, 1287 (7th Cir. 1978).

II. THE MERITS OF SEMISUBSTANTIVE RULES

Legal analysts have not systematically examined the legitimacy and wisdom of semisubstantive rules. Some judicial opinions—such as Justice Scalia's dissent in *Thompson*—suggest lines of criticism,[117] and academic commentators have raised many challenges as well.[118] Different observers are sure to characterize available critiques in different ways. According to my count, however, there are ten key assertions: (1) there is no legitimate constitutional source for semisubstantive rules; (2) at the least, these rules are at odds with an "originalist" methodology; (3) these rules are not confinable because they lack a limiting principle; (4) semisubstantive rules threaten legislative processes in a manner inconsistent with the separation of powers and our legal traditions; (5) such rules encourage judicial overreaching by giving a false impression of judicial restraint; (6) these rules invite judicial corruption of otherwise useful restraints like the vagueness doctrine; (7) the employment of semisubstantive rules is inherently futile; (8) the use of these rules risks underenforcement of constitutional norms; (9) semisubstantive rules reflect unrealistic assumptions about political processes; and (10) semisubstantive rules, in any event, lack a proper precedential pedigree.

In the pages that follow, I elaborate and evaluate each of these lines of challenge.[119] The task is large, and much must go unsaid. In particular, semisubstantive doctrines differ from one another in important ways, and this treatment focuses on relevant differences only in some respects.[120] Even so, what is said here supports the argument that courts should continue to use a wide range of semisubstantive safeguards as one vehicle for vindicating substantive constitutional protections.

I turn now to the ten critiques.

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117. *See supra* notes 45, 56–57 and accompanying text.

118. *See supra* notes 27–30 and accompanying text.

119. In an earlier article, I identified most of these critiques in an abbreviated form. *See* Coenen, *supra* note 7, at 1845–50. In a responsive essay, Professor Tushnet observed that "a more complete understanding of [these] doctrines will require us to grapple with . . . objections that Professor Coenen mentions largely in passing." Tushnet, *supra* note 27, at 1872. Professor Tushnet was right. Hence, this Article.

120. I note, however, that those respects are significant. In particular, I give focused attention to both constitutional "who" rules and semisubstantive findings-and-study rules in assessing Argument 9. *See infra* notes 299–328 and accompanying text. It also bears emphasis that some semisubstantive doctrines cut across different substantive areas of constitutional law. Legislative-findings rules, for example, have surfaced in cases involving the First Amendment, the Equal Protection Clause, the commerce power, and the Fourteenth Amendment enforcement power. *See* Frickey & Smith, *supra* note 11, at 1718–27. It is always open to debate whether such rules should apply in some substantive contexts, but not in others.

A. *Argument 1 (Illegitimacy): Semisubstantive Rules Are Illegitimate Because They Lack a Proper Source in Constitutional Text or Accepted Postulates of Constitutional Decision Making*

Among the many questions raised about semisubstantive rules, the most fundamental is the first. The question is: from where do these rules come? The answer is almost tautological: semisubstantive safeguards emanate from those substantive rights that they seek to safeguard in semisubstantive ways. There is, of course, no "semisubstantive rules" clause in the Constitution, although there are Due *Process* Clauses that might well serve to justify use of these process-centered doctrines.[121] Some cases, however, raise questions about the due-process rationale[122] and—even more important—there is no need to travel the due-process route. The reason why is simple: the *substantive* rights at issue in constitutional cases adequately justify application of semisubstantive constitutional rules.[123]

In all of the cases we have looked at, this connection is self-evident. *Reno v. ACLU*[124] is a free speech case; *Griswold*[125] concerns the right of privacy; *Bakke*[126] involves equal protection; and so on. There is no express reference to semisubstantive rules in the First, Fifth, or Fourteenth Amendments. But so what? There is nothing in the language of those amendments about such settled constitutional concepts as "public

121. It bears emphasis, in this regard, that the courts have invalidated many legislative acts on the ground that those acts do not comport with so-called "substantive due process." *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846–47 (1992) ("'[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.'" (quoting Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring))); Eisenstadt v. Baird, 405 U.S. 438, 467 (1972) (Burger, C.J., dissenting) (disagreeing with the majority's decision as one harkening back to the days of "substantive due process"). Yet, if the Due Process Clauses impose substantive restraints on legislative behavior, should it not follow *a fortiori* that—at least with highly sensitive constitutional settings—they impose process-based limits as well? *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 550 (1980) (Stevens, J., dissenting) ("I see no reason why the character of [congressional] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law."); Goldfeld, *supra* note 25, at 393 (relying on Due Process Clauses for procedural safeguards embedded in study-and-findings rules); *see also* Mich. Cent. R.R. v. Powers, 201 U.S. 245, 294 (1906) (leaving as an open question, with who-rule dimension, whether grant of legislative power to the executive or judiciary would "work . . . a denial of due process").

122. *See, e.g.*, Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (suggesting that due process protections may not apply to legislative actions); *see also* Mark S. Kende, Comment, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U. CHI. L. REV. 581, 607 (1986) (noting the distinction between legislative and adjudicative actions with respect to due process requirements).

123. *But see* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2796 (2003) (questioning the basis for deciding which substantive values are "'distinctively deserving of [the] judicial protection'" of provisional review (quoting Coenen, *supra* note 11, at 1283)).

124. 521 U.S. 844 (1997); *see also supra* notes 64–68 and accompanying text.

125. 381 U.S. 479 (1965); *see also supra* notes 87–90 and accompanying text.

126. 438 U.S. 265 (1978); *see also supra* notes 111–14 and accompanying text.

forums,"[127] multifactor or "total deprivation" regulatory-takings review,[128] or "suspect classifications" and differing tiers of judicial scrutiny.[129] The fact is that the terse texts of the Constitution must be—and thus have been—elaborated through the development of subsidiary doctrines built on the deeper values that underlie those texts. Many of these doctrines have a "prophylactic" quality in the sense that they protect potentially underenforced constitutional values in a practical way.[130] So it is with semisubstantive rules.

Consider the basic notion of "heightened scrutiny" that pervades First Amendment, right-to-privacy, and both classification-based and fundamental-rights-based equal protection jurisprudence.[131] The Constitution itself nowhere refers to heightened scrutiny. Given the settled recognition of this style of review, however, the Court has had no choice but to develop sensible subrules to give the notion meaning and effect. As a result, the Court has created rubrics—focusing on such matters as "important" or "compelling" government interests, "less restrictive alternatives," and "narrowly tailored" laws—that accommodate constitutional doctrine to underlying policy and institutional concerns.[132] In turn, the Court must give content to these subrules, and there is no apparent reason why that content may not take the form of semisubstantive doctrines. If the Court insists, for example, that legislative means must be "carefully tailored" to take account of legislative ends,[133] there is no reason why courts must measure carefulness solely by looking to substantive outcomes, without considering actual procedural carefulness itself.[134] From this

127. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992) (discussing forum-based approach in analyzing speech restrictions).

128. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (discussing total deprivation of economic use as taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–28 (1978) (discussing factors to consider when determining whether just compensation is due for regulatory taking when no per se taking is present).

129. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985) (explaining levels of scrutiny applicable to equal protection challenges).

130. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (discussing use of prophylactic rules in constitutional law, including in First Amendment and equal protection contexts).

131. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1011–15, § 15-9, at 1329–32, §§ 16-5 to 16-13, at 1451–66 (2d ed., 1988) (discussing strict scrutiny as applied to freedom of association, rights of privacy and personhood, and as a tier of equal protection review).

132. Ashcroft v. ACLU, 542 U.S. 656, 661 (2004) (noting that the Court had previously held the Communications Decency Act (CDA) unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997), "because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available").

133. *Reno*, 521 U.S. at 871 (questioning whether CDA had been "carefully tailored to the congressional goal of protecting minors from potentially harmful materials").

134. The rhetoric of several equal-protection cases dovetails with this conclusion. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725–26 (1982) (reasoning that the purpose of heightened scrutiny is to foster "reasoned analysis"); Califano v. Goldfarb, 430 U.S. 199, 214 (1977) (invalidating a law that discriminated on the basis of sex when "nothing . . . suggest[ed] a reasoned congressional judgment" was made).

vantage point, rules that focus on things like legislative thoroughness, legislative purpose, and recent legislative reexaminations make good sense.

A critic of semisubstantive rules might question this logic by pointing to important features of the constitutional text. The objector could note that the Framers endorsed specialized decision-making processes for only certain purposes—for example, by requiring a two-thirds Senate vote to convict in an impeachment proceeding or to bring a treaty into effect.[135] For the skeptic, these provisions create room for a negative-implication argument against semisubstantive rules. After all, if the Constitution's text dictates the use of specialized decision-making structures in impeachment, treaty-ratification, and other distinctive contexts, how can courts demand the use of similarly specialized, but unenumerated, decision-making structures in other settings? *Expressio unius est exclusio alterius*![136]

The *expressio unius* argument has, at first blush, an enticing quality. On close inspection, however, it tells us precious little about semisubstantive judicial review. To begin with, the Constitution's specialized process terms—such as its two-thirds voting requirements—concern the operation of only the national government; thus, even if the argument has merit, it provides no obstacle to identifying semisubstantive rules that apply to the states. Even more important, the *expressio unius* rule does not carry water with regard to the national government itself. To be sure, that principle would present a problem if, for example, the Court tried to say that all exercises of the commerce power must receive a two-thirds Senate vote to safeguard federalism values. The semisubstantive rules the Court has wielded in the past, however, are a distant cry from this sort of jarringly odd, strictly numerical, and obviously countertextual would-be constitutional doctrine.

The Court, for example, has suggested that the presence of legislative studies may prove decisive in cases that present commerce-power-based regulation of highly localized, noncommercial activities.[137] Such a rule of basic attentiveness is far removed from any hypothetical two-thirds Senate vote requirement. Indeed, when Congress makes no effort to tie ostensibly noncommercial, regulatory programs to the vitality of interstate commerce, there is reason to say that this manner of proceeding violates basic dictates of constitutional structure. As the lower court observed in *Lopez*,

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135. *See* U.S. CONST. art. I, § 3, cl. 6 (impeachment); *id.* art. II, § 2, cl. 2 (treaties); *see also* Bryant & Simeone, *supra* note 30, at 380 (suggesting that the Speech or Debate Clause may "preclude judicial supervision of congressional proceedings"); Buzbee & Schapiro, *supra* note 11, at 151 ("Nothing in the Constitution dictates the sources of information that legislators may consider in drafting and voting on legislation."); Frickey & Smith, *supra* note 11, at 1744 (noting that "[t]he Constitution does not . . . specify any process" for legislative decision making).

136. "[T]o express or include one thing implies the exclusion of the other." BLACK'S LAW DICTIONARY 620 (8th ed. 2004); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793 n.9 (1995) (discussing interaction of the *expressio unius* principle and the Qualifications Clause).

137. *See supra* notes 58–63 and accompanying text.

> Courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding [of a substantial effect on interstate commerce] if neither the legislative history nor the statute itself reveals any such relevant finding. And, in such a situation there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states.[138]

The *expressio unius* argument is even more strained in its application to semisubstantive rules derived from the Bill of Rights. The whole point of the constitutional amendments, after all, is to alter the effect of the original Constitution. It follows that semisubstantive rules fairly derived from the Bill of Rights—such as the findings-and-study rule of *Reno v. ACLU*[139]—necessarily supersede whatever inferences one might otherwise draw from Articles I through VI. At the least, the trumping effect of the amendments should not give way to attenuated inferences drawn from sources as far removed in subject matter as the Treaty and Impeachment Clauses.[140]

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138. United States v. Lopez, 2 F.3d 1342, 1363–64 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995); *see also* David S. Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187, 198 (1972) (anticipating and arguing for such a findings requirement "where the relationship of the law to interstate commerce is not readily apparent," and reasoning that this requirement "could assist in focusing Congressional concern on the proper issues"). Indeed, the text of the U.S. Constitution itself provides some basis for reaching the same conclusion. The law in *Lopez*, and others like it, after all, can be constitutional only if they are "necessary and proper for carrying into [e]xecution" the commerce power. U.S. CONST. art. I, § 8, cl. 18. It is not self-evident that a law—and particularly a law that bears no plain relation to commerce—constitutes a "proper" exercise of the commerce power when Congress itself has not identified the connection to commerce on which its assertion of authority purportedly rests.

139. 521 U.S. 844 (1997) (discussed *supra* notes 64–67 and accompanying text).

140. Another text-based critique of subjecting Congress to semisubstantive rules directed at federal lawmakers (or at least to some of these rules) stems from the Constitution's injunction that "Each House may determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2. As Professors Christopher Bryant and Timothy Simeone have written, "[t]he Supreme Court has long read the Rules and Journal Clauses as providing Congress broad discretion to determine how to report and record its consideration of proposed legislation." Bryant & Simeone, *supra* note 30, at 376; *see also* Goldfeld, *supra* note 25, at 417 (noting, but rejecting, this argument); *cf.* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 366 (2004) (describing the Rules of Proceedings Clause as "in effect, a delegation of rule-designing authority from constitutional framers in the initial period to legislators in subsequent periods"). The answer to this suggestion is that Congress's rulemaking powers, like all of its powers, are limited by the Bill of Rights and other applicable constitutional inhibitions. What if, for example, the House issued a "rule" for its "proceedings" that barred speeches from the floor except when made by white, protestant males in support of policies favored by the President? This rule would be invalid because it offends constitutional inhibitions on government conduct that trump the rule-making power. By symmetry of logic, if there are constitutional inhibitions that, in specified areas, mandate semisubstantive doctrines, then those inhibitions must limit the rulemaking power as well. Just as surely as the "plenary" commerce power, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824), is hemmed in by constitutional limitations derived from outside Article I, Section 8, so too the congressional rulemaking power is hemmed in by constitutional limits that spring from sources outside Article I, Section 5.

B. *Argument 2 (Counteroriginalist Nature): Semisubstantive Decision Making Contravenes an "Originalist" Interpretive Approach*

Is judicial recognition of semisubstantive rules consistent with the specialized interpretive philosophy known as "originalism"? The proper meaning of this term, and its rightful role in constitutional discourse, are subjects well beyond the scope of this Article. There is reason to believe, however, that many self-styled originalists might embrace some—if not many—semisubstantive rules.

In *The Federalist No. 81*, for example, Alexander Hamilton asserted that the Constitution should operate as "the standard of construction for the laws"[141] so as to guard against the operation of "unjust and partial" enactments.[142] These passages give support to constitutionally inspired clear-statement rules of statutory interpretation. Early decision making by the Supreme Court reflects this same process-sensitive approach.[143] Sources from the founding period thus seem to endorse one prominent form of semisubstantive constitutional decision making.

The Federalist does not speak of such phenomena as findings-based review or constitutional "who" rules. It does, however, repeatedly emphasize the centrality of the values that give rise to these doctrines. For Hamilton, Madison, and Jay, a properly functioning republic did not require "an unqualified compliasance to every sudden breese of passion, or to every transient impulse" of popular majorities.[144] To the contrary, "the republican principle" embraced by the Framers "demands[] that the deliberate sense of the community should govern the conduct" of government.[145] For this reason, elected representatives were to give legislative proposals "cool and sedate reflection" so that "temporary delusion"[146] and "momentary inclination"[147]—including those resulting from "cabals of the representative body"[148]—would not find their way into binding enactments. Of particular importance, the judiciary had a key role to play in "guard[ing] the constitution and the rights of individuals from . . . ill humours . . . [of] the people themselves . . . which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party."[149] The overarching message of these materials is loud and clear:

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141. THE FEDERALIST NO. 81, at 543 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
142. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 141, at 528.
143. *See infra* notes 152–54, 191, 333 and accompanying text.
144. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 141, at 482. The words "passion" and "passions" appear in *The Federalist* sixty-six times and never in a complimentary light. THE FEDERALIST CONCORDANCE 390–91 (Thomas S. Engeman et al. eds., 1988).
145. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 141, at 482 .
146. *Id.* at 482–83.
147. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 141, at 527.
148. *Id.*
149. *Id.*

> The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those mis[s]teps which proceed from the contagion of some common passion or interest.[150]

Some originalists might find little support for semisubstantive rules in passages of this ilk. Their point would be that, while deliberation-enhancement was an aim of the Framers, there is no evidence that they intended to promote this goal with semisubstantive judicial interventions. This line of reasoning, however, may give too little weight to the original understanding that courts would extrapolate rules from underlying constitutional premises.[151] In its seminal decision in *McCulloch v. Maryland*,[152] for example, the Court concluded that a state could not tax the National Bank by relying on values of national autonomy "interwoven with [the] web" of the Constitution.[153] Notably, if Congress had clearly authorized state taxation of federal banks in the wake of *McCulloch*, there can be little doubt that the Court would have upheld this act of federal self-abnegation. *McCulloch* itself thus exemplifies semisubstantive decision making in the form of a constitutionally inspired "common-law-like" rule.[154]

There is another reason to question easy assumptions that semisubstantive decision making runs afoul of an originalist outlook. As Professor Sunstein has observed, "The Constitution doesn't set out a theory of interpretation; it doesn't announce that judges must follow the original

150. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 141, at 495. Some commentators have reflected on these passages in ways that lend support to semisubstantive rules. In particular, such rules might well insulate legislators "from popular reaction for a period of time sufficient to change public opinion for the better without denying the public's ultimate right to judge." Sotirios A. Barber, *Judicial Review and* The Federalist, 55 U. CHI. L. REV. 836, 845 (1988); *see also* Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1069 (1974) (describing the Court's role as largely one of "produc[ing] an intermediate stop which would allow an opportunity for reason and justice to reassert themselves," and quoting Judge Charles E. Wyzanski, Jr. to describe judicial review as a "'device to appeal from Philip drunk to Philip sober'" (quoting Charles E. Wyzanski, Jr., Book Review, 57 HARV. L. REV. 389, 393 (1944))). A classic treatment of the centrality of "deliberative democracy," including its roots in the Framers' thinking, is CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993). *See id.* at 21–23 (discussing connection of this outlook to *The Federalist*). For an earlier effort of mine to develop linkages between semisubstantive decision making and "the discernible purposes and aspirations of the Founders themselves," see Coenen, *supra* note 7, at 1867–69.

151. For an early example of this style of extrapolation-based decision making, see *Ex parte* Craig, 6 F. Cas. 710, 710–11 (C.C.E.D. Pa. 1827) (No. 3321) (Washington, Circuit J.) (rejecting governmental power to seize money from accused counterfeiter because of risk that resulting lack of funds would interfere with the accused's ability to exercise Sixth Amendment rights to counsel and to secure witnesses).

152. 17 U.S. (4 Wheat.) 316 (1819).

153. *Id.* at 426.

154. *See supra* note 69 and accompanying text.

understanding."[155] This point raises a profound question: where does originalism itself come from? The answer to this question is complicated, but one element of that answer seems clear: defenders of the originalist methodology argue that it best comports with a proper focus on majoritarian decision making in a self-governing republic. As Robert Bork has articulated the point, a "philosophy of originalism" is defensible because it provides "the only approach that can make judicial review democratically legitimate."[156] In other words, nonoriginalist styles of interpretation are properly rejected because they effectively permit unelected judges to wield nondemocratic judgment in whatever field they choose to occupy.

If the value of preserving democratic self-government is a proper touchstone for evaluating styles of judicial review—as Judge Bork's defense of originalism seems to suggest—the case for semisubstantive review may gain substantial force. The entire thrust of semisubstantive doctrines, after all, is to leave final decision-making authority in the hands of Congress and other democratically accountable institutions.[157] To be sure, these rules call on political decision makers to exercise heightened levels of care when they enter constitutional danger zones. But the essential role of the doctrines is to refine and focus, rather than to frustrate and defeat, democratic decision making.[158]

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155. Cass R. Sunstein, *Fighting for the Supreme Court: How Right-Wing Judges Are Transforming the Constitution*, HARPER'S MAG., Sept. 1, 2005, at 31, 36. Professor Sunstein might add that if originalism itself is not reflected in the Constitution's text, then it has legitimacy only if it can be properly extrapolated from extratextual premises and values. But if originalism is properly extrapolated from extratextual premises and values, then why not semisubstantive doctrines? In particular, why should courts not find merit in such doctrines given the deep original commitment to deliberative republican decision making that these doctrines seek to foster? *See supra* notes 143–50 and accompanying text.

156. Robert H. Bork, *Slouching Towards Miers*, WALL ST. J., Oct. 19, 2005, at A12.

157. *See infra* notes 326–28 and accompanying text.

158. In any event, even if use of semisubstantive rules somehow threatens the value of democratic self-government, it certainly does so no more than the many hard-and-fast rules of constitutional law triggered by the originalist method. This is all the more true because even leading originalists acknowledge that their methodology will not provide clear answers in many cases because judges must inevitably extract from historical materials "the principles the ratifiers understood themselves" and then "apply those principles to unforeseen circumstances." Bork, *supra* note 156. One difficulty is that constitutional "principles" can be identified at many levels of generality. Critics of originalism say, for example, that originalists must reject the Court's canonical decision in *Brown v. Board of Education* because the ratifiers of the Fourteenth Amendment had no intention to end school segregation. *See* SUNSTEIN, *supra* note 95, at 64. Some originalists respond by saying that those ratifiers simultaneously embraced the broader goal of achieving racial equality and that this more general goal should not be defeated by embracing a subprinciple that permits school segregation. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 81–82 (1990). This response, of course, illustrates the need for the exercise of judicial judgment in defining constitutional principles and in determining how clashing principles are to be reconciled. No less important, applying originalist principles to unforeseen conditions is in its nature a judgment-laden business. (If, for example, the Fourteenth Amendment, in keeping with its text, embodies a principle of equality that extends beyond race discrimination, might it not be that that principle should outlaw government discrimination based on sexual orientation if "unforeseen conditions" suggest that sexual orientation, like race, is genetically determined?) In short, originalist decision

The bottom line is that, if one genuinely seeks a constitutional methodology that celebrates democratic decision making, it is hard to see why the semisubstantive approach does not fill the bill.[159] In short, the semisubstantive technique, with its emphasis on facilitating majoritarian involvement in the reification of constitutional values, may be seen as fundamentally compatible with the same goal of democratic self-governance that underlies in large measure the "originalist" stance.

C. *Argument 3 (Unprincipledness): Semisubstantive Rules Are Ill-Advised Because They Are Not Cabined by Principle and Thus Are Subject to Judicial Abuse*

In his opinion in *Thompson*, Justice Scalia suggested that Justice O'Connor's approach to that case, and by implication other semisubstantive approaches as well, are inherently unprincipled.[160] This sort of argument,

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making permits judges to displace many programs implemented by democratically chosen decision makers through the exercise of judicial translation. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that government use of modern heat-sensing to gather information within a home is a search within the meaning of the Fourth Amendment). For this reason, the originalist methodology carries its own threat of judicial innovation and countermajoritarian results. And because originalist rulings are often hard-and-fast, the innovations and results that originalism triggers may well have more antidemocratic effects than outcomes produced by semisubstantive rules.

159. As Professor Burt Neuborne has observed,

> While critics of process-based review have correctly noted that the judiciary, in identifying the required process, makes covert value judgments only slightly less profound than those more openly expressed by substantive-review courts, genuine process-based judicial review nonetheless poses a lesser challenge to democratic political theory. To the extent that process-based review requires normative judgments, they are prior judgments about who should make a choice and how it should be made, rather than the *ad hoc* substitution of a judge's substantive choices for those of the majority. Additionally, in many—perhaps most—settings, the impact of process-based review will be merely to remand an issue to one or another democratic forum for reconsideration in a procedurally correct manner. As such, it casts a suspensive veto that slows, but does not derail, majority will.

Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 366 (1982); *see also* Calabresi, *supra* note 21, at 136 ("Requiring a second look would not . . . amount to imposing the judge's elite moral values on the polity . . . . In reality the only values imposed are constitutionally grounded ones that . . . require the legislature to speak openly and thoughtfully when rights are at stake."); Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 505 (1982) ("Far from foreclosing legislative choices, therefore, these doctrines shape the process by which legislative goals may be achieved.").

160. Thompson v. Oklahoma, 487 U.S. 815, 874–78 (1988) (Scalia, J., dissenting).

long a feature of constitutional discourse,[161] centers on the indeterminacy of legal doctrine[162] and resulting opportunities for judicial excess.[163]

With good reason, rule-of-law concerns sometimes steer courts away from pliable doctrines in favor of "bright line" rules.[164] There is, however, a countertendency in our law. In the service of substantive constitutional values, courts often embrace doctrines that engender uncertainty and require elaboration in later rulings.[165] Our greatest jurists have recognized the need for courts to apply rules driven by "considerations of degree."[166] No less important, the Framers themselves emphasized the inevitability that constitutional doctrine would take shape over time as courts built judicial precedent upon judicial precedent in keeping with the common-law tradition.[167] In short, any "unprincipledness" attack leveled against semisubstantive rules turns on a principle of principledness that itself is marked by significant indeterminacy.

Beyond this, critics may be gazing from the wrong vantage point if they seek to find one clear principle that unifies all of the Court's semisubstantive jurisprudence. After years of looking, most of us would say that there is no grand theory of constitutional law.[168] And if there is no

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161. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 521 (1965) (Black, J., dissenting) ("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.").

162. *See* United States v. Lopez, 514 U.S. 549, 614 (1995) (Souter, J., dissenting) (criticizing the "legislative process requirement" in the Commerce Clause context that "would function . . . under standards never expressed and more or less arbitrarily applied").

163. *See Thompson*, 487 U.S. at 878 (Scalia, J., dissenting) (calling Justice O'Connor's approach a "Solomonic solution" but emphasizing that "Solomon . . . was not subject to the constitutional constraints of the judicial department of a national government in a federal, democratic system"); *see also* Bryant & Simeone, *supra* note 30, at 392 (noting that certain semisubstantive approaches do not offer "judicially manageable standards" and offer "maximum flexibility for the Supreme Court . . . [that] would clearly be subject to judicial abuse").

164. *See, e.g.*, New York v. Belton, 453 U.S. 454, 463 (1981) (Brennan J., dissenting) (claiming the majority is "formulating an arbitrary 'bright-line' rule" to deal with automobile searches); United States v. Chadwick, 433 U.S. 1, 15 (1977) ("[T]he Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority.").

165. *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 273–76 (2002) (rejecting court of appeals' attempts to "'clearly delimit'" officers' consideration of factors in investigatory stop in favor of admittedly "abstract" totality-of-circumstances test (quoting United States v. Arvizu, 232 F.3d 1241, 1248 (9th Cir. 2000))).

166. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

167. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 141, at 529 (describing the "considerable bulk" of judicial precedent that will have to be developed); *see also* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1729 (2003) (asserting that "[t]o a large extent our constitutional law has . . . becom[e] a common law system in which cases are decided on the basis of precedents").

168. *See, e.g.*, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) ("Constitutional law needs no grand theoretical foundation. None is likely ever to be forthcoming, and none is desirable."); Stephen M. Griffin, *Pluralism in*

grand theory of constitutional law, there probably can be no grand theory of semisubstantive constitutional law either. Why should there be? To date, different semisubstantive rules have emerged in different areas of law to address different needs. Federalism-driven clear-statement rules,[169] for example, compensate for the Court's nearly unwavering unwillingness to declare that acts of Congress reach beyond the commerce power.[170] So-called "*Carolene* groups" clear-statement rules respond to the Framers' concerns about factional oppression of vulnerable minorities.[171] And the "why" rule of *Hunter* reflects the fundamental Fourteenth Amendment goal of stemming state-sponsored oppression of racial minorities.[172]

To be sure, a skeptic might cite this clutter of rules as reflecting the very problem Justice Scalia touched on in *Thompson*—namely, that semisubstantive safeguards can become a "loose cannon" in the hands of judges too ready to aim and fire.[173] There are two parts to this worry—first, that courts might profligately erect semisubstantive rules all over the constitutional map,[174] and second, that courts might apply any particular semisubstantive rule in an unpredictable, overreaching way.[175] In *Thompson* itself, for example, Justice Scalia voiced concern that courts might, on Justice O'Connor's rationale, countenance imposition of the death penalty only if it were mandated by public referenda, two-thirds majority legislative votes, or the enactment of "bills printed in 10-point type."[176]

These concerns, though understandable, do not undermine semisubstantive decision making. As to the worry about judicial

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Constitutional Interpretation, 72 TEX. L. REV. 1753, 1766 (1994) ("What theory could possibly provide a persuasive and coherent rationale for the entire body of American constitutional law as well as provide persuasive guidance for all future cases?"); Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1108 (2000) ("Indeed, a rejection of grand constitutional theory can be inferred from aspects of the Constitution's structure and history.").

169. *See supra* notes 34–42 and accompanying text (discussing Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)).

170. *See* Gregory v. Ashcroft, 501 U.S. 452, 463–64 (1991). *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (asserting that primary check on Commerce Clause power should and does lie in the operation of the national political process).

171. *See, e.g.*, ESKRIDGE, JR., ET AL., *supra* note 33, at 352–55 (discussing interpretive canons favoring Native Americans).

172. *See supra* notes 80–84 and accompanying text (discussing Hunter v. Underwood, 471 U.S. 222 (1985)).

173. Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting).

174. *See* Calabresi, *supra* note 21, at 105 n.71 (describing criticism of Professor Bickel for advocating a judicial role that would too often allow judges to use legislative remands).

175. *See* Bryant & Simeone, *supra* note 30, at 392 (stating semisubstantive rules "would clearly be subject to judicial abuse"); Buzbee & Schapiro, *supra* note 11, at 143 (attacking semisubstantive rules as a "mode of review that defies predictability, provides minimal guidance to future courts and litigants, and . . . places judges in the position of second-guessing judgments of the political branches"); Frickey & Smith, *supra* note 11, at 1723–26 (expressing concern about inability of Congress to anticipate the highly exacting findings-based rule of *Garrett*).

176. *Thompson*, 487 U.S. at 875–76.

profligacy, it is no criticism to say that the Court has erected many semisubstantive rules if those rules advance constitutional values in a legitimate way. That structural rules often perform such work is suggested by the fact that the adoption and application of such rules often stir little or no opposition. *Hunter* was the product of a unanimous Court.[177] So was *Reno v. ACLU*[178] and the relevant section of the Court's dial-a-porn decision in *Sable Communications, Inc. v. FCC*.[179] That the rules of these cases are simultaneously semisubstantive and uncontroversial suggests that abandoning them—and especially abandoning them wholesale—might well do more harm than good.

As to concerns about the overreaching character of particular semisubstantive doctrines, claimed reasons for castigation seem even more strained. Justice Scalia's handwringing about the risk of typeface-size and supermajority-voting rules, for example, misses a key point. Not one of the semisubstantive doctrines that the Court actually has recognized imposes any numerically driven procedural requirement of this sort.[180] No less important, to those of us who are looking, such a requirement does not loom on the constitutional horizon. Justice Scalia might respond that this historical pattern is inconsequential. Rather, to borrow from Hamlet, the *principle* is the thing,[181] and the problem is that there is no way to forge a workable doctrine that logically distinguishes permissible from impermissible semisubstantive interventions.

This criticism is itself subject to criticism on the ground that the level of predictability it demands is lacking in many fields of constitutional law.[182] Put another way, if courts are willing to use open-textured approaches in nonsemisubstantive decision making, it is hard to see why a similar play in the joints is intolerable when courts use semisubstantive rules. In *United States v. Lopez*,[183] for example, the Court found that Congress had overreached its commerce power by regulating a "noncommercial" subject,

177. *Hunter*, 471 U.S. 222; *see also supra* notes 80–84 and accompanying text.

178. 521 U.S. 844 (1997); *see also supra* notes 64–67 and accompanying text.

179. 492 U.S. 115 (1989); *see also supra* note 68 and accompanying text. Notably, Justice Scalia wrote separately in *Sable Communications, Inc. v. FCC* to emphasize that "[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote." 492 U.S. at 133 (Scalia, J., concurring). No other member of the Court signed on to this disclaimer.

180. *See* Goldfeld, *supra* note 25, at 381 (conceding that "it would be foolish for a court to tell Congress that it must always hold at least one hour of floor debate for every proposal under consideration").

181. *See* WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK act 2, sc. 2 ("[T]he play's the thing.").

182. Of course, Justice Scalia has been known to lament the lack of predictability in various areas of constitutional law. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring) (collecting opinions criticizing the *Lemon* test). In general, however, his pleas have not carried the day. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (complaining that the Court was improvising "constitutional structure on the basis of currently perceived utility").

183. 514 U.S. 549 (1995).

notwithstanding four dissenters' insistence that this governing principle was too opaque.[184] The majority, in an opinion joined by Justice Scalia, responded that,

> Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." . . . The Constitution mandates this uncertainty . . . .[185]

Indeterminacy, in short, is rampant in constitutional law. Given this reality, it hardly seems right to single out semisubstantive rules for critique on indeterminacy grounds.

In any event, the field of semisubstantive rules is not devoid of limiting principles—and this is true whether one looks at those rules in joint or several fashion. In many semisubstantive decisions, the Court has worked hard to identify confining elements of decision. In *Gregory v. Ashcroft*,[186] for example, the Court deemed the Federal Age Discrimination in Employment Act inapplicable to state judges by applying a semisubstantive federalism-driven super-clear-statement rule of statutory interpretation; in doing so, however, the Court took pains to link that rule to those state "political functions" already made the subject of special judicial deference in preexisting alienage-discrimination rulings.[187] In *Mow Sun Wong*[188] the Court again drew on this "political functions" principle—normally of significance in evaluating state alienage-based discrimination—in applying a constitutional "who" rule to a federal ban on hiring noncitizens.[189] One might decry the "political functions" principle applied in these cases as unduly loosey-goosey. Such an attack, however, does not target semisubstantive rules; instead it takes aim at a principle developed long ago as the Court forged constitutional doctrine to deal with alienage-based discrimination.[190] To say that semisubstantive rules are unprincipled because preexisting doctrinal categories are unprincipled is to offer no criticism properly directed at semisubstantive rules themselves.

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184. *Id.* at 551; *id.* at 627–29 (Breyer, J., dissenting).

185. *Id.* at 566 (majority opinion).

186. 501 U.S. 452 (1991).

187. *Id.* at 461–63 ("This plain statement rule is . . . an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme. . . . These [alienage-discrimination] cases stand in recognition of the authority . . . of the States to determine qualifications of their most important government officials.").

188. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

189. *Id.* at 102–03 & 102 n.22.

190. *See* Ambach v. Norwick, 441 U.S. 68, 73–74 (1979) (permitting exclusion of aliens from position of public school teacher on political function grounds); Foley v. Connelie, 435 U.S. 291, 298–99 (1978) (permitting exclusion of aliens from state police force under this same principle).

Other limiting principles operate in this field. One is that legislative ambiguity properly justifies the use of constitutionally driven clear-statement rules, just as surely as it brings into play any number of other rules of statutory interpretation.[191] In recent years, leading scholars have shown that many rules of statutory construction advance "public values."[192] Against this backdrop, it seems entirely sensible that the Court has forged interpretive rules distinctively responsive to those public values that are *constitutional* in character.

Apart from clear-statement rules, the Court has brought semisubstantive analysis to bear primarily in cases that involve fundamental rights or suspect classifications.[193] A quick protest might be lodged that these terms are so amorphous that they do not supply a meaningful constraint. These terms, however, have preexisting meanings in our law, even if those meanings may be shadowy at the edges.[194] Again, the key point is that any challenge to a fundamental-rights/suspect-classification limit on semisubstantive rules is not an attack on semisubstantive rules themselves; instead, it is an attack on doctrinal concepts long recognized outside the semisubstantive-safeguards realm.[195]

What is more, the Court has signaled that this fundamental-rights/suspect-classification limitation does have a confining effect. In *United States Railroad Retirement Board v. Fritz*,[196] the Court refused to endorse a strong semisubstantive challenge directed at a fluky federal statute that resulted from congressional misunderstandings triggered by self-serving interest group misrepresentations.[197] The Court took a hands-off approach to the case, even in the face of severe process problems, because the challenge was mounted under only the minimal-scrutiny prong of equal-protection analysis.[198] In other words, the Court forewent a semisubstantive invalidation—despite powerful pleas for a process-

191. *See, e.g.*, Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384–85 (2003) (discussing and applying *noscitur a sociis* and *ejusdem generis*); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793 n.9 (1995) (discussing maxim of *expressio unius*); United States v. Freeman, 44 U.S. (3 How.) 556, 564–65 (1845) (stating rule of *in pari materia* and explaining its use where legislative language is unclear).

192. *See generally* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (exploring the role public values play in statutory interpretation); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 921 n.1 (1992) (collecting literature); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (proposing a set of interpretive norms designed to promote goals of deliberative government).

193. *See supra* notes 129–34 and accompanying text.

194. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (describing intermediate scrutiny for gender classifications).

195. *See supra* notes 124–34 and accompanying text.

196. 449 U.S. 166 (1980).

197. *See id.* at 189–93 (Brennan, J., dissenting) (positing that challenged legislation was, among other things, supported by misstatements that were "frequent and unrebutted").

198. *Id.* at 175 (majority opinion) ("[T]he Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn.").

remedying intervention—because no "fundamental constitutional right" or "suspect" classification was in view.[199]

The Court not only has developed principles that limit the settings in which semisubstantive rules operate; it also has suggested principles that restrict the permissible nature of procedural requirements imposed by these doctrines. To return to Justice Scalia's dissent in *Thompson*, all of the semisubstantive safeguards the Court has recognized to date are far removed from the imposition of a two-thirds-vote requirement (an approach that would undermine, rather than reinforce, the basic principle of majority rule); a popular-referendum requirement (an approach that would engender both disruptive delay and heightened cost in violation of the Madisonian emphasis on representative government);[200] or a ten-point-type requirement for proposed bills (an approach that smacks of hypertechnicality and inattention to actual levels of legislative care). In essence, the semisubstantive rules actually fashioned by the Court focus on forcing policymakers to use decision-making procedures (like preenactment study, sunset-like requirements, or budgeted spending) (1) that *policymakers frequently utilize anyway*, (2) that are *widely recognized as playing a valuable deliberation-enhancing role*, and (3) that operate within the overarching context of *representative and majoritarian decision making*. In addition, the Court has required special procedures, primarily (if not only) in instances where they operate to serve a particular constitutional end in a plainly logical way.[201]

Finally, semisubstantive invalidations do not tie the policymaker's hands forever, or even for a single day. Rather, these doctrines in their nature invite an override by the political branches of what is, by definition, only a provisional judicial ruling.[202] Those who attack semisubstantive rules as unprincipled must recognize and respond to their self-limiting character. The key point is clear: constitutional doctrines that give political officials—rather than judicial officials—the last word on how to resolve hotly contested constitutional questions seem distinctly undeserving of labels such as unconstrained, uncontrollable, and overreaching.[203]

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199. *Id.* at 174–75.

200. THE FEDERALIST No. 10 (James Madison), *supra* note 141, at 62–65.

201. *See, e.g.*, *supra* notes 39–42, 141–42, 169–70, 186–87 and accompanying text (discussing clear-statement rule designed to protect federalism values that otherwise might receive too little judicial protection).

202. *See, e.g.*, *supra* notes 97, 115 and accompanying text (describing reactions to *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), and *Furman v. Georgia*, 408 U.S. 238 (1972)).

203. *See, e.g.*, Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CANADIAN B. REV. 481, 532 (2001) (suggesting that a "dialogic approach" to constitutional decision making "diminishes perhaps to the point of evaporation" the tension between democracy and judicial review). Indeed, there is much to be said for just the opposite idea—namely, that semisubstantive rules serve a critical purpose by summoning political decision makers, and the people themselves, to participate actively in the elaboration of constitutional restraints. *See, e.g.*, NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 229 (2004) (arguing against judicial

D. *Argument 4 (Intrusiveness): Semisubstantive Rules—As Both a Practical and an Historical Matter—Are Unduly Invasive and Disdainful of Legislative Autonomy Because They Interfere Directly with Legislative Processes*

Justice Scalia attacked Justice O'Connor's opinion in *Thompson* not only because he saw it as inviting an unpredictable variety of judicial interventions, but also because he feared it would promote judicial "interference in the States' legislative processes, the heart of their sovereignty."[204] The Oklahoma legislature, he reasoned, "must in the future legislate in the manner that we say."[205] In his view, this process-centered approach was "more disdainful" of "States' rights" than even the hard-and-fast substantive-result-centered approach of the *Thompson* plurality.[206] Others have voiced similar concerns.[207] In his dissent in the *Lopez* case,[208] for example, Justice Souter wrote that "review [of congressional enactments] for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court."[209]

There is something to these concerns. As early as 1810, in *Fletcher v. Peck*,[210] the Supreme Court declared that "the invalidity of a law cannot be questioned because undue influence may have been used in obtaining it."[211]

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monopoly in constitutional interpretation on the ground that, under such a system, the people will not accept the authority of the Constitution or of judicial interpretations of it); *id.* at 237–38 (emphasizing value of colloquies with regard to constitutional meaning); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 926 (1987) ("'[D]ue process of lawmaking' has the potential to strengthen the democratic process.").

204. Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting).

205. *Id.*

206. *Id.*

207. *See, e.g.*, Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 848 (4th Cir. 1999), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000) ("[A] judicial mandate that Congress construct a proper paper trail . . . [would] ill befit the dignity of the Legislature."); Bryant & Simeone, *supra* note 30, at 382 (noting that the "Court has held that judicial intrusion into congressional procedures is inconsistent with the constitutional commitment to legislative independence" even when faced with credible evidence of legislative abuse); *see also* Colker & Brudney, *supra* note 30, at 142 (arguing that new legislative record rules will create "combative relationship between Congress and the States"); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1153 (1978) ("[T]he constitutional common law might well precipitate a clash of will between Congress and the Court. Far from reducing friction, the proposal seems calculated to increase it.").

208. *See supra* note 162 and accompanying text.

209. United States v. Lopez, 514 U.S. 549, 614 (1995) (Souter, J., dissenting); *see also* Goldfeld, *supra* note 25, at 370 (identifying "significant separation-of-powers concerns, as well as practical concerns about the consequences of subjecting the flexible lawmaking process to the rigid judicial process").

210. 10 U.S. (6 Cranch) 87 (1810).

211. *Id.* at 123. *See generally* 16A AM. JUR. 2D *Constitutional Law* § 194 (1998) ("[I]f a statute appears on its face to be constitutional and valid, courts will not inquire into the motives of the legislature, or influence brought to bear to secure enactment of a statute." (footnote omitted)).

Building on this notion, American courts generally have eschewed the invalidation of legislative actions on the process-based grounds that they resulted from "fraud, bribery and corruption."[212] In a like vein, following the lead of *Field v. Clark*,[213] many courts have shied away from policing legislative adherence to internal procedures through use of the so-called "enrolled-bill rule."[214] The thrust of these doctrines is to immunize statutes from invalidation on the ground that they spring from tainted legislative processes. Arguing by analogy, Justice Scalia and analysts like him might well assert that semisubstantive doctrines violate a strong tradition of judicial noninterference in the internal operations of political decision makers.

Advocates of this position, however, must confront a difficulty that Justice Scalia himself has highlighted in other settings—namely, the difficulty of identifying the proper level of generality at which to describe the relevant tradition. In *Michael H. v. Gerald D.*,[215] Justice Scalia staked the claim that, at least in some contexts, traditions are best characterized at their greatest level of specificity.[216] Building on this thinking, the tradition reflected in the fraud-and-bribery principle and the enrolled-bill rule does not extend to semisubstantive doctrines for at least two reasons. First, semisubstantive doctrines—in contrast to the rules of *Fletcher* and *Field*—focus on vindicating particular text-based substantive constitutional guaranties.[217] Second, semisubstantive rules seek to vindicate these guarantees in ways distinctively responsive to the particular constitutional values at stake.[218] For these reasons, semisubstantive rules do not involve a

212. Lynn v. Polk, 76 Tenn. 121, 293 (1881).

213. 143 U.S. 649 (1892).

214. The enrolled-bill rule,

> provides that an act ratified by the presiding officers of the legislature, approved by the [executive], and enrolled in the proper . . . office is conclusively presumed to have been properly passed, and such an act is not subject to impeachment by evidence outside the act as enrolled to show it was not passed in compliance with law.

73 AM. JUR. 2D *Statutes* § 44 (2001); *see Field*, 143 U.S. at 668–73 (holding that even if an enrolled bill omits portions of legislation actually passed by both houses of Congress, signature by the President and leaders of both houses renders the statute unimpeachable); Williams v. MacFeeley, 197 S.E. 225, 228–29 (Ga. 1938) (applying rule); Commonwealth v. Ill. Cent. R.R. Co., 170 S.W. 171, 172 (Ky. 1914) (same). Some jurisdictions follow a less restrictive but still deferential approach known as the "journal entry rule." Under this view the enrolled bill acts as prima facie evidence of the regular enactment, but the courts are permitted to have recourse to the legislative journals in order to ascertain whether the law has been passed in accordance with constitutional requirements. 73 AM. JUR. 2D *Statutes* § 43 (2001); *see also, e.g.*, Amos v. Moseley, 77 So. 619, 621 (Fla. 1917) (applying rule).

215. 491 U.S. 110 (1989).

216. *Id.* at 127 n.6 (plurality opinion) (Scalia, J., joined by Rehnquist, C.J.).

217. In contrast, more general procedural requirements apply to *all* legislation. *See* United States v. Ballin, 144 U.S. 1, 4 (1892) (refusing to look behind legislative journals to determine whether speaker had properly counted quorum as reflected in journals); Field v. Clark, 143 U.S. 649, 669 (1892) (rejecting, on enrolled-bill principles, argument that statute that omitted a section actually passed by both houses of Congress did not become law by the President's signature).

218. *See supra* notes 32–116, 123 and accompanying text.

license for courts to police the honesty, integrity, and professionalism of legislatures in a free-form, across-the-board way.[219] The principles of *Fletcher* and *Field* thus bear in only the most generalized manner on the normative claims of semisubstantive constitutional rules.

In addition, while the fraud-or-bribery and enrolled-bill-rule decisions represent a tradition of judicial noninterference with legislative processes,[220] there is a deep-rooted countertradition in our law. The case for motive-based analysis, for example, reaches as far back as *McCulloch v. Maryland*.[221] So too with "constitutional . . . common-law-like rules"[222] that find expression not only in *McCulloch*[223] but in well-aged dormant Commerce Clause decisions as well.[224] Clear statement rules were invoked during the era of Chief Justice Marshall,[225] and constitutional sunset doctrines surfaced as early as the 1930s.[226] More fundamentally, the entire theory of representation-reinforcement review, which has long pervaded our constitutional discourse, focuses on "the process by which the laws that govern society are made."[227] And, both the Supreme Court and other courts have found constitutional violations based on the process, rather than the content, of legislative action on many occasions.[228]

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219. *See* Brest, *supra* note 79, at 101 ("In *Fletcher* the question that the Court refused to ask was: what did the decisionmakers desire to achieve in terms of personal benefits (for example, lining their pockets) by the act of voting? The inquiry [in "why" rule cases] bears closer resemblance to the traditional search for legislative purpose as an aid to statutory interpretation: what effects did the decisionmakers desire to achieve by the operation of their decision? These inquiries differ functionally as well as formally, for the methods for proving corruption entail a judicial intrusion into the political processes that is largely absent in the latter inquiry.").

220. *See, e.g.*, Bryant & Simeone, *supra* note 30, at 376–78 (pointing to *Field* as evidence that the Court has traditionally stayed clear of intruding into Congress's legislative process).

221. 17 U.S. (4 Wheat.) 316, 387 (1819) (suggesting recognition of a judicial duty to intervene when Congress invokes an enumerated power as a "pretext" to regulate local matters); *see also* Guinn v. United States, 238 U.S. 347, 367–68 (1915) (invalidating facially neutral law with regard to literacy tests on the ground that its purpose was to disenfranchise African Americans).

222. Coenen, *supra* note 7, at 1735–55; *see also* Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

223. *See supra* notes 152–54 and accompanying text.

224. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851) (overturning pilotage penalty for foreign vessels). *See generally supra* notes 16–20.

225. *See* United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1805) (Marshall, C.J.) ("[W]here fundamental principles are overthrown . . . the legislative intention must be expressed with irresistible clearness . . . .").

226. *See* Coenen, *supra* note 7, at 1709, 1721–26 (discussing time-tied second-look doctrines and constitutional sunset rules, including those discussed in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934)).

227. ELY, *supra* note 8, at 74.

228. *See* INS v. Chadha, 462 U.S. 919, 954–55 (1983) (invalidating one-House congressional veto as noncompliant with Article I bicameralism and presentment requirements); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189–91 (1978) (refusing to find repeal of substantive legislation by subsequent appropriations legislation, and considering House and Senate rules declaring out of order any provision of appropriations legislation that changes existing law); Powell v. McCormack, 395 U.S. 486, 550 (1969) (holding that Congress used improper procedures to exclude a representative); Gojack v. United States,

If the tradition-based attack on semisubstantive rules is subject to serious criticism, so too is the companion pragmatic argument that these rules intrude in an undue and disrespectful way on legislative autonomy. Intrusiveness, of course, is in the eye of the beholder. To many beholders, however, Justice Scalia was surely wrong to say that the structural approach taken by Justice O'Connor in *Thompson* was more invasive with regard to legislative integrity than the substantive approach taken by the Court's plurality.[229] Under the plurality's analysis, after all, Oklahoma had no choice whatsoever. It could not—no matter what steps it took—choose to execute fifteen-year-old offenders.[230] Justice O'Connor, in contrast, gave the state an option. To be sure, it was an unpleasant option from the perspective of both the state and Justice Scalia. But it *was* an option.[231] After *Thompson*, Oklahoma did not have to legislate in "the precise form" spelled out by Justice O'Connor.[232] It did not have to do anything. But if the state wanted to reinstate capital punishment for fifteen-year-olds, Justice O'Connor's approach permitted it to try to do so, while the plurality's approach flatly foreclosed the effort. In these circumstances, there is every reason to say that Justice O'Connor—contrary to Justice Scalia's objection—was following "an approach more respectful of States' rights than the plurality."[233]

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384 U.S. 702, 706–12 (1966) (finding that subcommittee conducted a legislative investigation unauthorized by congressional rules); Christoffel v. United States, 338 U.S. 84, 87–88 (1949) (holding, in prosecution for perjury before House committee, that defendant could raise lack of quorum as a defense); *see also* Linde, *supra* note 21, at 248 ("The Supreme Court holds Congress to its own rules in the case of investigations."). State courts sometimes intervene on process-centered grounds as well—for example, by enforcing constitutional provisions that require laws to deal with only one subject. *See, e.g.*, Dep't of Educ. v. Lewis, 416 So. 2d 455, 459 (Fla. 1982) (describing state constitutional requirement that certain appropriations laws contain provisions on no other subject). *See generally* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 722 n.144 (1996) ("The single-subject rule might seem mere formalism, but it could well have the useful effects of forcing the legislature to place unrelated issues in separate bills, rather than combine them for logrolling purposes."); Millard H. Ruud, *"No Law Shall Embrace More than One Subject,"* 42 MINN. L. REV. 389 (1958) (examining the single-subject rule).

229. Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting).

230. *Id.* at 838 (plurality opinion).

231. *See id.* at 857–59 (O'Connor, J., concurring) (stating that this issue should be left to the legislature).

232. *Id.* at 876. (Scalia, J., dissenting).

233. *Id.* at 877; *see* Fullilove v. Klutznick, 448 U.S. 448, 551 (1980) (Stevens, J., dissenting) ("A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not 'narrowly tailored to the achievement of that goal.'"); *id.* at 552 ("[T]here can be no separation-of-powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits."); BICKEL, *supra* note 8, at 206 (describing semisubstantive interventions and other "passive devices . . . as lesser rational alternatives to an otherwise unavoidable principled judgment . . . because they work relatively no binding interference with the democratic process"); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1109 (1998) (deeming motive-based semisubstantive review "'intrinsically *less*

More than six decades ago, Professors Alexander M. Bickel and Harry H. Wellington made this same point, observing that "[a] candid avowal that a matter . . . is being sent back for a second reading, so to speak, is much more compatible with due respect for the peculiar powers and competencies of both [legislative and judicial] institutions,"[234] than an irreversible, hard-and-fast invalidation of the challenged law. The key point is that semisubstantive decision making has a built-in self-limiting quality. As we have seen, the Court often employs rules that conclusively foreclose results that elected policymakers want to reach.[235] It seems strange to say that these "look never again" rules interfere less with legislative integrity than do "look again" rules that specifically invite legislative majorities to overturn the judiciary's action.

E. *Argument 5 (Manipulability): Semisubstantive Rules Are Distinctively Abusable Because Courts Can Manipulate Them to Achieve Substantive Outcomes Without Seeming to Do So*

A fifth argument against semisubstantive rules stems from concerns about judicial opportunism. The fear is that these rules, when placed in the hands of tactically-minded judges, "can sometimes be used as a subterfuge to 'rig' a desired substantive outcome."[236] Professor Mark Tushnet has expressed this worry in the following terms:

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intrusive than substantive judicial review'" (quoting Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1143 (1978))); Linde, *supra* note 21, at 243 ("It is far more cause for resentment to invalidate the substance of a policy that the politically accountable branches and their constituents support than to invalidate a lawmaking procedure that can be repeated correctly, yet we take substantive judicial review for granted."); *see also* Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (skipping "substantive" equal protection inquiry because a "narrower inquiry discloses that essential procedures have not been followed").

234. Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 34–35 (1957).

235. *See supra* notes 7, 24 and accompanying text.

236. TRIBE, *supra* note 131, § 17-3, at 1686; *see also* Bryant & Simeone, *supra* note 30, at 391–92 (expressing concern over obviously value-laden judgments hidden behind so-called procedural semisubstantive rulings); Buzbee & Schapiro, *supra* note 11, at 153 ("[J]udicial weighing of the adequacy of . . . legislative record . . . is vulnerable to politicized application."); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 636–37 (1992) (noting "concern that the Court's new canons represent a form of judicial activism that is particularly questionable because it is backdoor" and that the Court may not have "avoided the countermajoritarian difficulty . . . [but] only deepened it by engaging in under-the-table constitutional lawmaking"); *id.* at 646 (fearing that "a lack of recognition and candor about what the Court has done recently with quasi-constitutional law has submerged a variety of hotly contestable normative and empirical issues" and expressing concern about "judicial modesty cloaking judicial activism"); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 449 (2005) ("[T]he use of the [avoidance] canon seems ripe for strategic judicial behavior based on the political environment at the time the Court is deciding."); *id*. at 446 (arguing that avoidance canon "does not promote judicial restraint"); Richard Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV.

> In the real world of politics we can predict with great accuracy what the effect of suspensory decisions will be. . . . Sometimes we can predict that the statute will not be reenacted, in which case structural review has given the reality of constraint on legislatures and the illusion of freedom for legislatures to do what they want. Clever judges will invoke structural review when they predict that the legislature will be unable to enact legislation that contravenes the judges' personal preferences; they will invoke other modes of review in other cases.[237]

On its face, this passage suggests that semisubstantive rules may encourage judicial mendacity—a serious problem in its own right. An even graver problem involves the abuse of judicial power that this prevarication will facilitate. If in fact "clever judges" often look to use constitutional law to advance "personal preferences," we may assume they are inhibited from doing so primarily because the outright invalidation of laws risks intense clashes with policy-making authorities.[238] On Professor Tushnet's analysis,

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271, 281 (1982) (reviewing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)) ("The primary objection then to a 'structural due process' review power is that the power will be used in an unprincipled way, by power-hungry judges, increasing in effect the junta-like component of American government."); Tushnet, *supra* note 123, at 2792 (noting that provisional review may "degenerate into—or may be disguises for—strong-form review").

Related to concerns about judicial subterfuge is an argument that attacks the lack of fair notice offered by semisubstantive rules. Professors Philip P. Frickey and Steven S. Smith argue that "[t]he Court imposed these requirements retroactively . . . when Congress had no notice of the necessity of generating a carefully crafted legislative history." Frickey & Smith, *supra* note 11, at 1723. Focusing on *Garrett*, they note that, even though "the Court faced congressional findings of pervasive discrimination against the disabled and an elaborate legislative history recounting instances of such discrimination," it "applied to the legislative history a . . . shredding technique, . . . in which the evidence was examined in segmented fashion rather than for its cumulative impact." *Id.* at 1725–26. Worse yet, the Court would only accept evidence set forth in the official legislative history, *id.* at 1726, while declining to look at even a highly informative task force report that was drafted at the request of a House subcommittee, *id.* at 1735. In the same vein, Professors Ruth Colker and James Brudney fault the Court for requiring Congress to effectively use a "crystal ball." Colker & Brudney, *supra* note 30, at 85. The Justices' approach, they say, "effectively penalizes the enacting Congress for failing to create a detailed legislative record, even though such a record requirement could not reasonably have been anticipated at the moment of legislative deliberation and enactment." *Id.*; *see also* Buzbee & Schapiro, *supra* note 11, at 133 (arguing that the Court's second-guessing of legislative procedural choices is "particularly pernicious due to its failure to provide guidance on what legislative modes would be found adequate"). At least three responses to these commentators are available: (1) they seem to overlook the fact that judicial invalidation of legislation often occurs pursuant to newly articulated constitutional rules, including when hard-and-fast judicial decision making occurs; (2) they may overstate fair notice concerns because Congress can always "play it safe" by anticipating serious process-based review (which, Congress—in light of *Garrett*—surely should and will do in the future when acting pursuant to its Fourteenth Amendment Section 5 power); and (3) these arguments do not seem to be directed at semisubstantive rules in general (or not even at legislative findings rules in general), but instead at only special applications of those rules, particularly in the *Garrett* case.

237. TUSHNET, *supra* note 27, at 211.

238. *See* ELY, *supra* note 8, at 47 ("Thus we are told that the Court's 'essentially anti-democratic character keeps it constantly in jeopardy of destruction': it knows 'that frequent

judges might well sidestep this deterrent—while nonetheless achieving "the reality of constraint"—by using semisubstantive rules to create "the illusion of freedom for legislatures to do what they want."[239] These rules, in short, threaten to operate as a sort of stealth bomber in the service of a powerful, but otherwise pent-up, tendency toward judicial overreaching.[240]

Professor Tushnet's stated concerns about judicial dissembling, and expanded opportunities for judicial overreaching, are subject to challenge on a variety of grounds. First, the argument seems to assume that judges often misrepresent the actual reasoning behind their decisions. Many of us will be skeptical of this view, for we believe that judges, by and large, are both honest and committed to the essential features of the rule of law.[241] To embrace this sanguine outlook is not to say that judges never act strategically. It is only to say that most judges, most of the time, state their reasons accurately in the written opinions on which they place their names. And if this is so, there is limited cause for concern about "subterfuge" and "illusion" effectuated by way of semisubstantive doctrines.

It is also doubtful, as the subterfuge argument seems to posit, that semisubstantive doctrines are distinctively subject to judicial misuse.[242] In

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judicial intervention in the political process would generate such widespread political reaction that the Court would be destroyed in its wake.'" (footnote omitted)).

239. TUSHNET, *supra* note 27, at 211; *see* Schrock & Welsh, *supra* note 207, at 1125 ("It is thus possible for a Court, animated by realism, to be constitutionally cautious but subconstitutionally activist, even adventurist."). Professors William Eskridge and Philip Frickey have made a related point in discussing clear-statement rules of statutory interpretation:

> Because the Court sees itself as using up political capital every time it invalidates a statute, it thinks twice about exercising judicial review. To the extent the Court does not see itself as being "on the spot" when it interprets statutes, it may believe it has more freedom to interpret statutes to thwart legislative expectations than it does to strike them down.

Eskridge & Frickey, *supra* note 236, at 637.

240. *See* United States v. Lopez, 514 U.S. 549, 613–14 (1995) (Souter, J., dissenting) (identifying risk that findings requirements may be used as a "covert" form of merits-based review). Christine Bateup makes a related argument. She says that, even if judges act without manipulative intent, legislatures will often be unable to reinstate semisubstantively invalidated rules "in practice" because of intervening changes in "political equilibrium" or the "salience" of the issue presented. Bateup, *supra* note 23, at 1131; *accord infra* notes 249–51 and accompanying text. For this reason, she worries that these rules "entail unseen democratic costs." Bateup, *supra* note 23, at 1131. This argument, however, raises no appreciable cause for worry. After all, it seems erroneous to say that the judiciary's scuttling of a law raises a "countermajoritarian difficulty" when a *current* legislative majority in fact sees no need to reinstate it.

241. *See, e.g.*, ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE A-3 (3d ed. 1997) ("We believe nearly all judges try to give their 'real' reasons when writing opinions."); Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 397 (1984) (deeming it "an unestablished proposition" that "judges employed institutional considerations cynically" in *Mow Sun Wong* and other cases).

242. At the least, it is open to question that they are uniquely or distinctively subject to use in devious fashion to expand judicial power. *See, e.g.*, Tribe, *supra* 21, at 284 n.47 ("It is worth noting that even rules mechanically applicable carry their own risks for concealing illegitimate bases for decision.").

particular, why should we expect potential critics to roll over if courts make a manipulative mockery of these tools of decision? Indeed, those who watch for overreaching by judges can decry not only judicial activism, but the combination of judicial activism and judicial deception, if and when judges pretend to pursue "the reality of constraint" in the sheep's clothing of semisubstantive decision making. Perhaps this is why there is no strong evidence that courts in the past have used semisubstantive rules in manipulative ways.

This absence of evidence may also reflect the powerful practical disincentive for using semisubstantive rules if the real goal is to achieve preferred substantive outcomes. The problem is that—despite Professor Tushnet's prognostications to the contrary—the strategic use of semisubstantive doctrines "lacks reliability."[243] At the time of *Furman v. Georgia*,[244] for example, many thought that that decision, despite its semisubstantive bent, spelled the end of the death penalty in this country.[245] Their predictions, to put it mildly, proved inaccurate. Only four years after *Furman*, the Court rejected Eighth Amendment attacks on the death penalty after many state legislatures made careful reappraisals of their capital sentencing schemes and reasserted the importance of this form of punishment.[246]

Difficulties in predicting legislative reactions to provisional rulings are heightened by the fact that the very cases in which courts employ semisubstantive techniques—typically those cases that involve "suspect classifications" or "fundamental rights"—often spark the highest levels of political passion.[247] Moreover, no one can suggest that semisubstantive

243. Tribe, *supra* note 131, § 17-3, at 1686; *see also* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 8 (1964) ("[I]t is easy to misjudge or distort the impact of a Court pronouncement, and guesses about that impact are treacherous sources of precepts for Court behavior.").

244. 408 U.S. 238 (1972).

245. *See, e.g.*, CALABRESI, *supra* note 85, at 201 n.41 ("The *Furman* decision was perceived by many to mean that no capital punishment statute . . . would be constitutionally acceptable.").

246. *See* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). *See generally* BICKEL, *supra* note 8, at 206 ("[T]here are dozens of instances, in the federal context, of congressional reversal of the Court, and many more instances of the most fruitful interplay between the Court and the legislature or the executive, following colloquies initiated by the Justices.").

247. For example, recent partial-birth-abortion litigation has involved hotly contested issues regarding the constitutional right-to-choose principle first embraced in *Roe v. Wade*, 410 U.S. 113 (1973). In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court invalidated Nebraska's partial-birth abortion law. *Id.* at 936–38. In a concurring opinion, Justice O'Connor anticipated that legislatures could and would attempt to correct the deficiencies in the Nebraska statute, and there was no suggestion that she was engaging in any subterfuge when she made these remarks. *See id.* at 950–51 (O'Connor, J., concurring). In fact, Congress quickly responded to *Stenberg* by enacting a national partial-birth-abortion law, and the Court upheld this new legislation in part because Congress made new and explicit findings about whether there was any medical need for the outlawed procedure. *See*

rulings always lead to de facto invalidations; the near-immediate resuscitation of the alien-hiring ban struck down in *Mow Sun Wong* (no less than the aftermath of *Furman*) puts the lie to any such claim.[248]

Perhaps the greatest difficulty with the strategic-manipulability objection is that it pays no heed to the passage of time. It may be—as Professor Tushnet has claimed—that courts often can predict how a then-sitting legislature will react to any particular semisubstantive invalidation. Even if they can, however, political tides ebb and flow. As a result, any semisubstantive invalidation is likely to achieve the desired substantive outcome only if the composition of the then-sitting political body remains unchanged. For this reason, a court interested in advancing its own substantive agenda for anything more than the short term is likely to eschew a semisubstantive approach.

The critic might respond to these observations by noting that political-agenda-pursuing judges will use semisubstantive rulings because, even if their prognostications of legislative acquiescence prove misplaced, they can jump back in and knock out the reenacted program with an outright substantive invalidation. There are too many practical difficulties with this chain of reasoning, however, to believe that judges often use it. A program reenacted after a semisubstantive invalidation, for example, may not become the subject of a legal challenge for some time. If the strategically-minded court is the Supreme Court, for example, any such challenge will come before it (at least as an ordinary matter) only after years of processing in subordinate tribunals. Whether the strategically-minded court is the Supreme Court or a lower court, the passage of time often will generate new judicial appointees (or a new set of panel members in the case of intermediate appellate courts), who may well not share their predecessors' substantive agendas.[249] And even if a reenacted statute quickly finds its way back to the same court that earlier had undone it on semisubstantive grounds, a recent legislative endorsement undertaken in response to an express judicial invitation hardly provides the ideal condition for an outright judicial invalidation.[250] Put another way, if a court (and particularly, the Supreme Court) invites a dialogue with the political branches, it had better be prepared to listen to the response it receives;

Gonzales v. Carhart, 550 U.S. 124, 165–66 (2007) (noting that Congress found medical consensus that the procedure was never medically necessary).

248. *See supra* note 115 and accompanying text.

249. *See, e.g.*, Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 814 (1983) ("The Supreme Court is an enduring institution with a regularly changing membership."). The recent partial-birth-abortion decision, handed down after Justice Alito replaced Justice O'Connor, helps to illustrate the point. *See supra* note 247.

250. *See* Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 610 (1983) ("[T]he courts need to remember that confrontation with the policy-makers puts the delicate nature of the separation of powers to great stress.").

otherwise, it risks endangering the goodwill on which all of its authority ultimately depends.[251]

F. *Argument 6 (Doctrinal Distortion): Semisubstantive Decision Making Has the "Vice" of the "Passive Virtues" Because It Invites Distortion of Otherwise-Useful Substantive Constitutional Doctrines*

During the early 1960s, Professor Bickel made the case that the Supreme Court should cleave to the "[p]assive [v]irtues,"[252] working hard to avoid head-on conflicts with the political branches over the constitutionality of government programs.[253] Methods for averting confrontation included broad use of discretionary justiciability rules,[254] an open-stanced willingness to decline statutory jurisdiction,[255] increased deployment of the nondelegation principle,[256] and (of particular importance for present purposes) ready invocation of the vagueness and desuetude-statute rules.[257]

In a famous article, Professor Gerald Gunther responded that these "passive virtues" were fraught with "subtle vices."[258] The Gunther critique had three main parts. First, he argued that Professor Bickel had tossed aside a "principled concern with threshold questions"[259] in favor of an expediency-driven "free-wheeling" style of inviting legislative second looks.[260] Next, Professor Gunther urged that this "'passive virtues'" approach did not so much encourage judicial restraint as foster judicial dishonesty and abdication.[261] Finally, Professor Gunther blasted Professor Bickel for advocating the payment of these costs to gain only a paltry benefit: the sometime avoidance of a supposed judicial "legitimation" of troubling government programs not subject to principled invalidation.[262] In short, according to Professor Gunther, Professor Bickel offered the Court too much discretion to take too little action to secure no meaningful advantage.

The full force of Professor Gunther's argument cannot be captured in one paragraph. But precisely because it is so powerful, that critique provides the platform for an argument against semisubstantive rules under reasoning that goes something like this: semisubstantive rules, by definition, involve second-look remands to government policymakers, and the encouragement

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251. *See id.* ("[The] independent judiciary can remain that way only if the other branches accept the importance of its independence.").
252. BICKEL, *supra* note 8, at 111.
253. *See id.* at 112.
254. *Id.* at 183.
255. *Id.* at 127.
256. *Id.* at 159–61.
257. *Id.* at 147–56.
258. *See generally* Gunther, *supra* note 243.
259. *Id.* at 17.
260. *Id.* at 25; *see id.* at 21 ("Bickel invites . . . risks by viewing narrow constitutional doctrines such as vagueness as essentially unprincipled means to avoid premature hardening of substantive constitutional limitations.").
261. *Id.* at 22–24.
262. *Id.* at 5–9.

of such remands was at the heart of Professor Bickel's agenda; Professor Gunther challenged the Bickel program with a ravaging brilliance; thus semisubstantive rules must go.

This line of logic, while superficially appealing, fails because there is a broken link in its chain of inferences. The problem is that Professor Gunther went after Professor Bickel's larger project; he did not go after semisubstantive rules.[263] In mounting his critique, for example, Professor Gunther voiced no objection to the vagueness doctrine or its "instrumental[ist] purposes."[264] Rather, he challenged Professor Bickel's enthusiasm for using this doctrine and others as mere "devices"[265] and "unprincipled means"[266] to "avoid legitimation at all costs."[267] To criticize the unprincipled use of a rule is not to criticize *the rule itself*. In other words, Professor Gunther's critique casts no doubt on any semisubstantive doctrine (including the vagueness rule) that is applied in a properly principled manner.

Building on the work of Professor Gunther, then-Professor (and now-Judge) Calabresi raised a related set of questions about constitutionally inspired semisubstantive doctrines.[268] In doing so, he wrote,

> Vagueness, delegation of authority, desuetude, yes, even 'interpretation of statutes,' are doctrines and notions that have a meaning and function of their own. Vagueness and desuetude, for example, are designed to require that actors be warned of the possible consequences of their actions before they act. . . . When such doctrines and notions are used not to achieve these tasks but rather to require or induce legislatures to take a second look, they are altered and become incapable of achieving their original functions. . . . Gunther was worried about such false use of doctrines, even in paraconstitutional cases. His worry [was] that this would lead to a 'virulent variety of free-wheeling interventionism' and involve the courts in dangerous subterfuges . . . .[269]

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263. Another, separate problem is that the great bulk of Professor Gerald Gunther's treatment of Bickelian doctrines dealt with matters of jurisdiction and justiciability. That treatment may well have merit. But it possesses not a molehill of relevance with regard to the separate subject of whether courts should use semisubstantive rules.

264. Gunther, *supra* note 243, at 21. For a discussion of the semisubstantive, attention-focusing role of the vagueness rule, see Coenen, *supra* note 7, at 1629–30, 1795–800.

265. Gunther, *supra* note 243, at 20.

266. *Id.* at 21.

267. *Id.* at 15. In like fashion, Professor Gunther had no problem with clear-statement-based semisubstantive rules despite their remand-to-the-legislature qualities. After all, political leaders have traditionally legislated against the backdrop of constitutionally driven clear-statement rules, including the substantial-constitutional-question avoidance rule. In these circumstances, legislators were (and still are) on fair notice that statutes that approach the limits of constitutionality will receive a thorough judicial going-over. For this reason, according to Professor Gunther, so long as courts tie second-look rules to the genuine presence of ambiguity, critics cannot fault courts for engaging in "dangerous subterfuges," CALABRESI, *supra* note 85, at 20 (discussing Gunther's view), or "free-wheeling interventionism," Gunther, *supra* note 243, at 25.

268. CALABRESI, *supra* note 85, at 20.

269. *Id.* at 19–20 (quoting Gunther, *supra* note 243, at 25).

Judge Calabresi rightly noted that the "false use" of doctrine is not a good thing. But any "false use" criticism requires a clear understanding of what a "true use" is. The Court, for example, has made it clear that the vagueness rule involves far more than ensuring "that actors be warned of the possible consequences of their actions."[270] Indeed, Judge Calabresi himself went on to recognize that it is "correct and uncontroversial" to view the doctrine as "a temporizing device" that pushes political actors to take a "second look" at policies that are both ambiguously articulated and constitutionally problematic.[271] If this is true, inclusion of the vagueness doctrine in the semisubstantive-rule tool kit poses no difficulty. After all, if the vagueness doctrine has a process-tied purpose, its use for process-tied reasons cannot be decried as using "'tricks.'"[272]

There is a broader point to make about Judge Calabresi's expression of concern about constitutionally driven semisubstantive rules. The point is that he considered these rules from the distinctive perspective of exploring the specialized subject of his provocative book—that is, the subject of how to deal with the continued operation of numerous unrepealed statutes long since made antiquated by changed conditions.[273] The core of Judge Calabresi's argument was that the use of constitutionally driven semisubstantive rules provides a crudely underinclusive way to deal with this problem, especially because many outdated statutes do not present serious substantive constitutional difficulties.[274] Judge Calabresi's "underinclusiveness" argument may make sense, but it does not undermine the argument for constitutionally driven semisubstantive rules. The reason why is that the unifying purpose of these rules is *not* to get rid of archaic statutes.[275] If there is a need for a legal tool to clear away a sprawling underbrush of outdated enactments, such a tool should be forged. But the creation or noncreation of such a rule does not bear on the legitimacy of semisubstantive doctrines that have an independently valuable role to play as a specialized part of our *constitutional* law. Indeed, as we have seen in examining assisted suicide laws, Judge Calabresi himself embraced with enthusiasm constitutionally driven semisubstantive decision making.[276]

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270. *Id.* at 19.

271. *Id.* at 17.

272. *Id.* at 20.

273. *See generally id.* at 1–3 (outlining overarching concerns that gave rise to the book).

274. *Id.* at 20.

275. *Id.* at 22–23. Indeed, eight of the nine doctrines of semisubstantive constitutional law have *nothing* to do with a statute's outdatedness. *See supra* note 22 (itemizing nine doctrines).

276. *See supra* notes 98–99 and accompanying text (discussing Quill v. Vacco, 80 F.3d 716, 732–35 (2d Cir. 1996) (Calabresi, J., concurring)). In particular, he warmly embraced constitutionally driven semisubstantive reasoning in voting to invalidate an assisted suicide ban enacted in "another age," long before the development of modern medicine and moral outlooks that bear upon the subject. *Id.* at 732. As he explained,

> When legislation comes close to violating *fundamental substantive constitutional rights* or to running counter to the requirements of *Equal Protection*, . . . there is . . . a long tradition of constitutional holdings that inertia will not do. In such instances, courts have asserted the right to strike down statutes

In sum, the Gunther and Calabresi analyses provide no problem for semisubstantive rules. The probing work of these analysts hits around our subject. In the end, however, that work exposes semisubstantive doctrines only to smoke, not to fire.

G. *Argument 7 (Futility): Structural Rules Are Rules of Futility—And Not Legitimate Constitutional Rules at All—Because Policymakers Are Free Simply To Readopt Any Program Invalidated Pursuant to Such a Rule*

Arguments 1 through 6 proceed from the premise that structural rules empower courts to do too much. Argument 7, in contrast, posits that these rules empower courts to do too little. In particular, it has been said that "structural review is not constitutional review at all" because "it imposes no substantive limitations on legislative activity."[277] This critique begs the question. Nothing in the Constitution says that that document imposes only "substantive limitations on legislative activity." Indeed, two key provisions speak of "due *process* of law,"[278] while other guarantees that are typically seen as substantive in nature have spawned all sorts of process-centered doctrines.[279] Against this doctrinal backdrop, it rings hollow to assert that structural review in its nature "conflicts with the premises of constitutional theory."[280]

It is particularly inaccurate—indeed, inaccurate in the extreme—to describe semisubstantive review as entailing "futility."[281] As Professor Theodore Eisenberg has observed in discussing constitutional "why" rules,

> Some [lawmakers], after being informed that they initially acted unconstitutionally, may refuse to vote for reenactment. [And] if a statute

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> and, before ruling on the ultimate validity of that legislation, to demand a present and positive acknowledgment of the values that the legislators wish to further through the legislation in issue.

Id. at 735 (emphasis added). In short, Judge Guido Calabresi himself came to embrace the use of time-tied rules, at least in this instance, as a vehicle for protecting substantive constitutional values.

277. TUSHNET, *supra* note 27, at 211; *see also* Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949) ("[A] judiciary must judge by results, not by the varied factors which may have determined legislators' votes.").

278. U.S. CONST. amend. V; *id.* amend. XIV, § 1 (emphasis added); *see also supra* note 21.

279. In public official defamation cases, for example, many procedural rules serve to protect First Amendment values. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (holding that on motion for summary judgment, lower courts must inquire into convincing clarity of actual malice); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) (noting plaintiff has burden of proof in cases governed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500–03 (1984) (requiring appellate courts to review de novo whether evidence of actual malice was clear and convincing); *N.Y. Times Co.*, 376 U.S. at 279–80 (evidence must show statement was made with actual malice).

280. TUSHNET, *supra* note 27, at 211.

281. Palmer v. Thompson, 403 U.S. 217, 225 (1971) (noting that there exists an "element of futility" in a motive based invalidation of a law).

> is invalidated on judicial review, the legislature often will decline or fail to consider a new law. In many situations, therefore, judicial action on the basis of motive results in an effective, not a futile, invalidation.[282]

At a minimum, remands to the legislature have the powerful effect of shifting the "burden of inertia."[283] They also have practical impacts because (as we have seen) members of legislative bodies come and go over time.[284] What is more, these rules always carry with them judicial instructions that may focus, deepen, or otherwise reshape political-branch decision making.[285] Indeed, some semisubstantive rulings create very high odds of enduring practical consequences; rules focused on forcing reassessments of statutes that appear to have outlived their usefulness illustrate the point.[286]

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282. Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 116 (1977).

283. Farber & Frickey, *supra* note 203, at 918 n.253 (arguing that "merely shifting the burden of inertia in the policymaking process itself can be significant" because proponents of the invalidated law must bear the burden of lobbying Congress; because it is easier to defeat legislation than obtain its passage, a remand to Congress "may as a practical matter result in a policy's ultimate demise"); *see also* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 365 (1992) ("Legislation is always easier to block than to enact. . . . [T]his provides significant added protection to the party who stands to gain from legislative inaction.").

284. This point seems to answer any argument that interest group pressures all but ensure that "remanding an issue to the legislature . . . is futile because the mechanistic process of legislation eliminates the possibility of a thoughtful legislative response." Farber & Frickey, *supra* note 203, at 876. What is more, this is the case even if one deems interest-group pressures as decisive in the lawmaking process. Due to time's passage, a judicially ordered second look may protect constitutional values by mandating an affirmative override of them by a legislature whose members represent interests quite different from the interests represented by the members of the initially enacting legislature. Professors Daniel Farber and Philip P. Frickey make this point in forceful terms:

> To be sure, judicial invalidation under this approach constitutes only a suspensive veto. Yet even that shifts the burden of inertia to those seeking to reimpose the invalidated decision, highlights the perceived unfairness of the decision, and, because of the passage of time, often presents the issue to a legislature constituted somewhat differently from the one that made the original decision. Considering the ease of killing legislation and the difficulty of passing it, these consequences of a suspensive veto are significant.

Id. at 923.

285. *See, e.g.*, Ward, *supra* note 25, at 17–18 (arguing that political allies of the Court "will often have sufficient strength to deter elected officials from reversing a judicial decision that vindicates the Constitution, especially after a judicial decision signals a conflict of constitutional magnitude"). Judge Calabresi has expressed worry that second-look rulings may shape legislative behavior in negative ways. He supposes, for example, that some state legislators made post-*Furman* votes for the death penalty on the ground of political expediency because they assumed the courts would strike down any newly enacted law. CALABRESI, *supra* note 85, at 26–27. This concern, however, is speculative and probably overdrawn. In any event, the proper solution to this problem, if it exists, is not for judges to scrap semisubstantive rules altogether, but for legislators to act responsibly. If judges want a sober second look, they should tell legislators exactly that, and legislators in turn should not assume that judges do not mean what they say.

286. TUSHNET, *supra* note 27, at 1874 (noting strong possibility of law-reform effects worked by time-tied "when" rules).

All of these observations show why lawmakers often will not automatically respond to suspensive interventions with program reenactments.[287] But even if the futility argument did have empirical validity, that argument would be open to serious challenge on the ground that there is value in proper process itself. Do we really want courts to turn a blind eye when they learn that a state's facially neutral voter-disenfranchisement rule was the product of rank racist hatred?[288] Do we really want courts to stand idly by when they discover that a sloppily slapped-together affirmative action program came about due to a spoils system based on skin color?[289] In cases of this nature, even if reenactment of the program is predictable, concerns about the integrity and legitimacy of government behavior push hard for at least a thoughtful reconsideration. Just as rules of procedural due process in the adjudicative context have an "intrinsic value" apart from "the right to secure a different outcome,"[290] semisubstantive safeguards have a role to play in "'generating the feeling, so important to a popular government, that justice has been done.'"[291]

H. *Argument 8 (Constitutional Underenforcement): Semisubstantive Rules Will Induce Courts To Underenforce Constitutional Norms*

The futile-gesture argument suggests that judges who wield semisubstantive doctrines do too little because they do nothing at all. As we have seen, this logic is faulty.[292] There is, however, a related argument that raises a greater concern. That argument posits that semisubstantive safeguards may cause courts to under-judge.[293] The idea is that the

287. *See, e.g.*, BICKEL, *supra* note 8, at 166 ("The Court's action in remanding the issue to Congress [in *Kent v. Dulles*, 357 U.S. 116 (1958),] bore some fruit. Hearings and quite extensive consideration followed, and a relatively moderate and well-drawn bill passed the House. In the Senate there were hearings and a number of bills, but in the end no legislation, at least not yet."); Farber & Frickey, *supra* note 203, at 923–24 (noting President Eisenhower's failure to secure congressional reinstatement of travel ban struck down in *Kent*); *cf.* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 337, 377–78, 416 (1991) (noting the infrequency with which judicial interpretations of statutes are overridden by Congress). If further evidence of nonfutility is needed, it is supplied by the experience of other nations. *See* Bateup, *supra* note 23, at 1120 (suggesting that override power available to the legislative branch, under the Canadian Constitution, "has rarely been employed"); Ward, *supra* note 25, at 20 n.61 (agreeing that the legislative override in Canada "has not played a significant role" and collecting authorities).

288. *See* Hunter v. Underwood, 471 U.S. 222 (1985); *supra* notes 80–84 and accompanying text.

289. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989), the Court detected just such a risk, although three dissenters argued vigorously that they were wrong.

290. TRIBE, *supra* note 131, § 10-7, at 666.

291. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

292. *See supra* notes 281–87 and accompanying text.

293. *See* Calabresi, *supra* note 21, at 104 n.71 ("When he first described such a scheme of judicial review, Bickel was criticized for providing too narrow and conservative a role for the judiciary."); Goldfeld, *supra* note 25, at 391–92 ("[I]f due process of lawmaking was employed only where strict scrutiny otherwise applied, it might end up displacing

availability of semisubstantive rules will lead judicial authorities to use these rules to the exclusion of hard-and-fast substantive doctrines that form the proper core of constitutional law. In other words, because semisubstantive doctrines are available, judges will use them too much, use substantive rules too little, and thus underenforce important constitutional norms.[294]

This argument has force if its basic premise is true, for constitutional rules should be suspect if in fact they lead to an unwarranted dilution of constitutional rights. There is, however, a difficulty with the argument because its underlying premise is doubtful. To begin with, the underenforcement argument seems to posit—contrary to the history most of us remember—that judges have a disinclination to use hard-and-fast rules of constitutional decision making.[295] In fact, the present-day Court uses hard-and-fast rules with regularity despite the ready availability of semisubstantive doctrinal alternatives.[296] No less important, the availability of semisubstantive rules may well cause courts to vindicate constitutional norms by way of a second-look approach when those norms would

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substantive judicial review altogether."); Schrock & Welsh, *supra* note 207, at 1149 (noting "scruples about . . . possible devaluation of the Constitution" inherent in constitutional common law); *cf.* Bateup, *supra* note 23, at 1130 (expressing worry about the way in which semisubstantive rules and substantive rules of judicial decision making interact, particularly as to when courts should use one technique or the other).

294. *See, e.g.*, Schrock & Welsh, *supra* note 207, at 1165 ("[S]ubconstitutionalizing rights places them on a less firm foundation, since a common law rule is reversible by Congress while a constitutional right is not."); *see also* Calabresi, *supra* note 21, at 135–36 ("I would avoid the application of [hard-and-fast] protections to even such popular, open-ended concepts as the 'right to privacy.'"); Sandalow, *supra* note 29, at 1190 (arguing that the perceived need to use judicial review to protect minorities should be tempered with an understanding that "the political process leading to [legislative] decisions contains prodigious internal safeguards for [minorities'] interests," particularly in the "effect upon the political process of the extraordinary variety of interest groups . . . and the crosscutting loyalties and identifications that exist among the members of such groups"). Professors William Buzbee and Robert Schapiro argue that the Court "should take responsibility for the decision and not attempt to shift the blame to Congress" by using semisubstantive rules. Buzbee & Schapiro, *supra* note 11, at 143; *see also* Bryant & Simeone, *supra* note 30, at 375 (arguing that the Court has a duty to strike an unconstitutional statute and "may not properly avoid this responsibility by conditioning its adherence to the statute on congressional compliance with procedural requirements beyond those set forth in Article I, Section 7").

295. *See, e.g.*, Calabresi, *supra* note 21, at 135 (noting that there is "consensus over the propriety of [hard-and-fast] protection for certain categories of rights," including "at least . . . most of the enumerated rights").

296. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (striking down Texas sodomy law on substantive due process grounds); United States v. Morrison, 529 U.S. 598, 609–19 (2000) (invalidating federal sex-based violence law on federalism grounds even though states widely supported it and Congress made extensive findings designed to show effects on interstate commerce); New York v. United States, 505 U.S. 144, 180–83 (1992) (rejecting defense of federal legislation that "commandeered" regulatory processes of New York, despite the involvement and support of state officials in the act's passage); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (asserting, in striking down restrictions on speech not justified by a compelling state interest, that "we do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution").

otherwise go wholly unprotected.[297] Put another way, the use of semisubstantive review may induce courts to give constitutional rights a measure of protection they would not receive if only hard-and-fast rules were on the scene. Indeed, for this reason, the availability of semisubstantive rules may well cause courts to avoid underenforcing constitutional protections.

How all of this comes out in the wash is not apparent. But there is little reason to suppose that, all things considered, judicial use of semisubstantive doctrines will lead to an underenforcement of constitutional rights.[298]

I. *Argument 9 (Flawed Premises): Semisubstantive Rules—Or at Least Many of Them—Rest on Simplistic or Contrived Notions About the Nature of Lawmaking Processes*

Rules that target political processes should reflect political realities. Do semisubstantive doctrines comport with this notion? Some commentators have claimed they do not. Professor Tushnet, for example, has asserted that the Court ignored political realities in issuing such structural decisions as *Bakke* and *Mow Sun Wong*.[299] In the latter case, he says, the Court erred in assuming that the Federal Civil Service Commission myopically focused on employment-efficiency issues, while paying no attention whatsoever to foreign policy concerns. The problem with this reasoning, Professor Tushnet says, is that the outlawed rule was "undoubtedly produced after a study by members of the Commission's *staff*, who most certainly consulted both formally and informally *with members of other staffs knowledgeable*

297. *See, e.g.*, Sunstein, *supra* note 192, at 468 (reasoning that courts may underenforce constitutional rights if only hard-and-fast review is available, but that courts can close the gap by engaging in aggressive statutory construction that vindicates constitutional norms); *see also* Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 89 (2005) (noting in his discussion on the significance of constitutional amendment processes that "[j]ust as dogs bark more ferociously when they are behind a fence, judges indulge their personal views more blatantly when they know they don't have the last word").

298. *See, e.g.*, Conkle, *supra* note 29, at 52 ("[T]he Court would remain the 'ultimate interpreter of the Constitution'—indeed, a more powerful and effective interpreter, given the addition of a new and important jurisprudential tool that would supplement, not replace, the Court's traditional practice of final judicial review." (footnote omitted) (quoting Powell v. McCormack, 395 U.S. 486, 549 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962))); *see also* Calabresi, *supra* note 21, at 103 (noting that even "Bickel did not, of course, believe in courts having *only* [a semisubstantive] function" but that he supported use of traditional hard-and-fast judicial review as well); *cf.* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985) (arguing that the "original constitutional framework was based on an understanding that national representatives should be largely insulated from constituent pressures," and that, with the decline of that system, "it is neither surprising nor inappropriate that the judicial role has expanded [so] that some of the deliberative tasks no longer performed by national representatives have been transferred to the courts").

299. TUSHNET, *supra* note 27, at 207; *see also supra* notes 105–14 and accompanying text (discussing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)).

about foreign policy."[300] Likewise, he asserts that Justice Powell erred in assuming in *Bakke* that the University of California, Davis, admissions program "was paid not the slightest bit of attention" by the politically accountable California legislature when that legislature had an obvious interest in overseeing key affirmative-action decisions made by college administrators.[301] Thus, each of these rulings, he concludes, "is predicated on a vision of an imaginary policymaking process."[302]

At the outset, it bears noting that Professor Tushnet's comments are directed only at "who" rules and, for that matter, at only two who-rule cases; those comments thus cast no shadow over other semisubstantive doctrines. No less important, Professor Tushnet's critique of *Mow Sun Wong* and *Bakke* is itself overdrawn. For example, in pooh-poohing the up-the-chain-of-command "who" rule of *Bakke*, Professor Tushnet asserts that state legislators—no less than university officials—"are insulated from political accountability" because "incumbents have an automatic electoral advantage against opponents."[303] But state legislators (unlike university officials) *are* subject to election, and their "electoral advantage" is not an electoral lock (particularly if they take unpopular positions on the concededly "sensitive" and "controversial" issues raised by affirmative action programs).[304] Even more important, Professor Tushnet's minimization of the differing levels of accountability of agencies and legislatures ignores elementary principles of political science. Those principles, after all, leave no doubt that "constituent and contributor interests [do] influence legislators" in a way they do not influence appointed officials because "reelection is an important motive."[305]

In any event, one can embrace Professor Tushnet's premises without endorsing his conclusions. It is true that policymaking systems are "complex"[306] and that different decision-making units—for example, the Civil Service Commission and the President in one instance, or the California legislature and the state Board of Regents in another—are not sealed off from one another with hermetic neatness. It is also the case, however, that different decision-making bodies do have different competencies, different constituencies, and different capacities for deliberation, representation, and accountability. With regard to *Mow Sun Wong*, for example, even Professor Tushnet concedes that "the Commission's staff process would probably give more weight to personnel considerations and less to foreign policy [considerations] than the President's staff process would."[307] But if that is true, the Court's who-based reasoning in the case is defensible for that very reason.

300. TUSHNET, *supra* note 27, at 206 (emphasis added).
301. *Id.* at 207.
302. *Id.*
303. *Id.*
304. *Id.* at 207–08.
305. Farber & Frickey, *supra* note 203, at 900.
306. TUSHNET, *supra* note 27, at 207.
307. *Id.* at 207 n.48.

Finally, it is important not to throw out the baby with the bathwater.[308] Proper development of semisubstantive safeguards—like proper development of all constitutional rules—necessarily will turn on contextual decisions made by conscientious judges confronted with an unfolding series of cases. If, in this process, it appears that a particular semisubstantive "who" rule "misconceives the policymaking process,"[309] the proper response is not to junk "who" rules altogether. Instead, the proper response is to reshape those rules to bring them more in line with policymaking realities.

This same point helps to diminish the force of attacks on findings-and-study-based "how" rules, such as the rule deployed in *Garrett*.[310] In recent years, a cottage industry of criticism directed at these rules has sprung up in the academic community.[311] One complaint is that findings-and-study rules mistakenly equate legislatures with administrative agencies.[312] The overarching point is that so-called "hard-look" rules have long and properly been directed at administrative agencies in light of their distinctive characteristics—such as a lack of electoral accountability and a duty to implement statutory mandates—that legislative bodies do not share.[313]

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308. *See* Coenen, *supra* note 11, at 1371–75 (discussing frequency with which the Rehnquist Court has shown openness to applying "'who'" rules).

309. TUSHNET, *supra* note 27, at 206.

310. *See supra* notes 9–11 and accompanying text.

311. *See, e.g.*, Bryant & Simeone, *supra* note 30, at 332–39, 383–86 (noting that formal legislative record does not reveal proper reliance upon informal and extrarecord sources such as views of constituents, ex parte communications with interest groups, and information gathered by congressional agencies); Buzbee & Schapiro, *supra* note 11, at 96 ("No set of compiled written materials will provide a comprehensive record of what influenced legislative action."); Colker & Brudney, *supra* note 30, at 117 (asserting that semisubstantive rules "[fail] to appreciate the skill and sophistication that Congress brings" in legislation "through a range of informal contacts"). Of particular significance, Professor Frickey—who serves as something of a jedi-master in this field—has stepped back from his earlier optimism about findings-and-study rules to take a far more skeptical stance. *Compare* Frickey & Smith, *supra* note 11, at 1733–36 (listing a myriad of problems with findings-and-study rules), *with* Farber & Frickey, *supra* note 203, at 926 ("'[D]ue process of lawmaking' has the potential to strengthen the democratic process."); Frickey, *supra* note 228, at 697–98. For some less critical appraisals, see Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 760 (1996) (suggesting that findings-and-study rules may "facilitate the exercise of judicial review and improve interbranch communication"); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 733–34 (1996) (noting the rule's potential to increase accountability and help in vindicating otherwise underenforced constitutional norms).

312. *See* Krent, *supra* note 311, at 746 ("Treating Congress as a glorified administrative agency cuts against our system of government, which embraces the norm of majoritarian rule through the democratic process."); *see also* Bryant & Simeone, *supra* note 30, at 331 ("[T]he reasons that justify 'on-the-record' review in the administrative [agency] context . . . do not apply to the legislative branch."); Buzbee & Schapiro, *supra* note 11, at 120 (arguing that legislative record review is similar to administrative action review, but even "more probing").

313. *See* Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1187 (1997) (noting necessity of external monitoring, in light of bureaucrats' "lack of political accountability").

These reasons for applying hard-look rules to agencies do not apply to legislatures. Thus (so the argument goes) it makes no sense to apply these sorts of rules in policing the enactment of a statute.

Semisubstantive findings-and-study rules, however, may benefit lawmaking processes even if the challenges faced by legislatures differ greatly from the challenges faced by agencies.[314] Heart disease and headaches are very different things. This fact does not mean, however, that aspirin cannot work effectively against both conditions. Put another way, the question is not whether agencies and legislatures are different. The question is whether, even though they are different, findings-and-study rules (that target legislatures only when specialized constitutional dangers are present) have a useful role to play in safeguarding constitutional values. And there are a variety of reasons to conclude they do.[315]

Critics of findings-and-study rules also focus on the many impediments that get in the way of legislative consideration of constitutional concerns. In their view, it makes little sense to remand matters to legislatures so that they can reconsider constitutional difficulties when legislatures by nature lack adeptness in processing constitutional arguments.[316] No one contends, however, that findings-and-study rules are a lawmaking panacea. Rather, their function is to poke and nudge.[317] It may be—as critics assert—that most legislative findings concerning constitutional matters end up being

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314. *See, e.g.*, Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 97 (1977) (Stevens, J., dissenting) (justifying findings-and-study approach in part based on "the unfortunate fact that Congress is too busy to do all of its work as carefully as it should"); Goldfeld, *supra* note 25, at 370 (suggesting value of findings-based rule when "a particular policy did not receive even minimal deliberation," which can happen in legislative process, in part because of floor amendments).

315. *See supra* notes 58–68 and accompanying text. An ancillary argument in this context is that forcing Congress to create a substantive legislative record overlooks resulting opportunity costs; put another way, legislatures may have to forego valuable alternative activities because they have to adhere to the Court's findings-and-study rules. Bryant & Simeone, *supra* note 30, at 384 (asserting that "[b]y imposing on Congress the duty to create a record . . . the Court threatens to limit the other legitimate purposes served by congressional proceedings" and that the Court's approach "will likely have the undesirable consequence of diverting scarce congressional resources"); Colker & Brudney, *supra* note 30, at 120 (arguing that "[r]edirecting Congress's way of doing business . . . imposes substantial opportunity costs"); *see also* Buzbee & Schapiro, *supra* note 11, at 135 (stating that, while the Court does "not prohibit . . . informal modes of communication and access, . . . by creating a requirement that the legislature establish a recorded factual basis for a legislative action, the Court has created incentives for a shift in emphasis . . . to more formal modes of deliberation"). One answer to this critique is that it seems unduly alarmist. The Court has not signaled that findings-centered review techniques will apply large numbers of legislative undertakings. Rather, all signs indicate that the Court has reserved this style of review only for cases that involve particularly sensitive constitutional issues. *See supra* notes 25, 123 and accompanying text.

316. *See, e.g.*, Frickey & Smith, *supra* note 11, at 1745 (asserting that "when conflict of interests is present and when policy is therefore constructed through a competitive process of coalition building, bargaining, and voting, the Court is asking too much" when it requires agency-like behavior of Congress).

317. *See* Sunstein, *supra* note 23, at 37 ("[C]ourts should provide spurs and prods when . . . deliberation is absent.").

written by committee personnel who are excessively responsive to interest group demands.[318] Even if this is the case, however, at least some people at some level in the lawmaking process are giving some attention to constitutional values.[319] Critics also argue that most representatives couldn't care less about findings and studies because ensuring reelection, fundraising, and vote-trading dominate their thoughts.[320] Even so, shining a light on enduring principles may influence at least some legislators' thinking. It also will send a proper message to lawmakers that, in all their work, they must keep the Constitution in view.[321]

Finally, it may be that legislative findings have a busy-work quality.[322] At the least, however, findings-and-study rules often generate the practical consequence of triggering the remand of a previously enacted law to the legislature for a second look. When semisubstantive rules have this effect, they couple bi-temporalism with bicameralism in a way that impedes precisely the sort of "rash and hasty" decision making that most concerned the Framers.[323] What is more, in the face of a judicial remand, elected officials cannot simply ignore what the court has done. Proponents of the scuttled legislation will have to consider why the court demanded further action; otherwise they can have no assurance that their efforts at reinstating the law will prove effective.[324] Political-branch adversaries of the

318. *See* Goldfeld, *supra* note 25, at 418 (noting that some groups question the use of legislative history in statutory interpretation "in part to minimize the influence of interest groups—because such groups are able to get language into legislative history that they are unable to get into statutory language").

319. *Cf.* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 610–12 (2002) (suggesting that "lobbyist involvement [may] actually [be] a form of deliberation and participation").

320. *See, e.g.*, Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9–10 (1979) (emphasizing that legislatures "see their primary function in terms of registering the actual, occurrent preferences of the people—what they want and what they believe should be done"); Mikva, *supra* note 250, at 606 ("[F]or the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment."); *id.* at 588 (adding that legislatures are not "'institutionally suited to search for the meaning of constitutional values'" (quoting Fiss, *supra*, at 10)).

321. Findings-and-study rules may serve other purposes as well. *See, e.g.*, Goldfeld, *supra* note 25, at 369 ("[P]lacing a floor on the level of deliberation required to enact a law could help improve the quality of . . . political accountability."); *see also supra* note 203 (noting possible benefits of diminishing tensions between Congress and the courts and of enhancing the quality of judicial review by supplying useful information).

322. Sunstein, *supra* note 298, at 76 (claiming that, if representatives were forced to act in Madisonian mold, they would, at most, produce "'boilerplate'—rationalizations designed to placate the courts—rather than a genuine critical inquiry into issues of value and fact").

323. 1 THE COMPLETE ANTI-FEDERALIST 61 (Herbert J. Storing ed., 1981) (quoting *A Citizen*, CARLISLE GAZETTE & WESTERN REPOSITORY OF KNOWLEDGE, Oct. 24, 1787); *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 HARV. L. REV. 2180, 2240 n.261 (1998) (noting that requiring Congress to gather facts, even absent a remand, "may lengthen time for deliberation"). *See generally supra* notes 143–50 and accompanying text (discussing concerns about passionate, short-sighted action of political decision makers expressed in *The Federalist*).

324. *See supra* notes 11, 14–15, 19–20 and accompanying text.

legislation are also sure to take heed of the court's directives. Those directives after all, will point out difficulties with the provisionally invalidated measure (as well as potential obstacles to its successful reenactment), thus "call[ing] forth . . . opposition" and providing that opposition with useful tools of argument.[325] In short, a judicial remand inevitably requires reconsideration after the passage of time, while creating some measure of heightened focus on constitutional complications as that reconsideration occurs. It seems plausible to conclude that, at least sometimes, these conditions will cause legislatures to resurrect provisionally invalidated laws only if especially powerful justifications for reviving them exist.[326]

Legislative findings-and-study rules cannot purge passions and raw politics from all instances of legislative behavior. At the same time, it is hard to see what better tools courts can use to push along the sort of meaningful deliberation the Framers envisioned when pressing risks to basic rights or constitutional structures appear.[327] In the end, critiques of findings-and-study rules both ask too much of, and fear too much from, this form of semisubstantive review. Legislative findings-and-study rules do not seek to move the earth. Rather, they operate in modest fashion, in a limited number of settings, to tilt lawmaking processes in such a direction that they will take some account of important constitutional values.[328] In this way, findings-and-study rules promote—in a distinctively self-limiting and minimally disruptive way—the most salient purposes of our constitutional plan.

J. *Argument 10 (Novelty): Structural Rules Should Be Viewed as Suspect and Unstable Because They Depart from the Path Ordinarily Traveled in the Formulation of Constitutional Law*

If this Article has accomplished nothing else, it has dismantled any challenge to semisubstantive rules based on the notion that they are new and exotic.[329] In fact, semisubstantive rules draw strong support from

325. This point was highlighted to me in informal communication with Professor (and former Oregon Supreme Court Justice) Hans Linde.

326. It is true, of course, that in some circumstances, "especially powerful justifications" will not exist, but that instead, reenactment of the same or a similar law will result from the exertion of raw political power of self-interest groups. Even in these cases, however, shifting the burden of inertia onto the backs of those groups will at least ensure that the law is reenacted in response to distinctively powerful democratic forces. And if no genuinely public-regarding justification for the law is identifiable, it remains open to courts to invalidate the law pursuant to due-process or equal-protection rationality review. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 29 (3d ed. 1997) (describing rationality review as a requirement that "public measures must be a minimally reasonable effort to promote some public value").

327. *See supra* notes 143–50 and accompanying text (collecting passages on this point from *The Federalist*).

328. *See supra* notes 317–19 and accompanying text.

329. This Article does not stand alone in pointing out the deep historical tradition of semisubstantive rules. *See* BICKEL, *supra* note 8, at 70–71 (stating that "over the years, [the

related principles—like First Amendment procedural rules[330] and means-driven doctrines[331]—that are settled features of the constitutional landscape. Even more important, many semisubstantive tools of decision making—such as motive-based doctrines,[332] clear statement rules,[333] and constitutional common law[334]—have roots that reach back to the earliest days of the Republic.

Most important of all, semisubstantive interventions are both numerous and increasingly common in the Supreme Court's modern-day work.[335] The Court's many structural decisions thus work hand in hand to lend precedential support to one another. That there are four major strains of semisubstantive decision making, each of which has multiple subcomponents, explodes the notion that this style of review is nothing more than a party-crashing interloper at the table of constitutional law.

CONCLUSION

Semisubstantive reasoning pervades constitutional law. Given this reality, analysts must begin to give these doctrines more systematic attention than they have received in the past. In this Article, I have tried to push this process forward by exploring the many normative questions to which these rules give rise. In the future, much debate about the wisdom, legitimacy, and proper shape of semisubstantive doctrines is certain to occur. But if moderation is a virtue, as our greatest philosophers have taught,[336] there is at least something to be said for the provisional, politically reversible style of decision making represented by this body of doctrine.

What I have written about semisubstantive rules I offer in the spirit of tentativeness that a still-unfolding evaluation of a still-unfolding phenomenon deserves. But about one thing my conclusions are not

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Court has] developed an almost inexhaustible arsenal of techniques and devices" that "engage the Court in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure, for this or that compromise"). *But see* Bryant & Simeone, *supra* note 30, at 331, 369 (arguing that the Court's approach "is simply inconsistent with [its] own precedents" that have not been overruled).

330. *See supra* note 279.

331. *See* Coenen, *supra* note 7, at 1823–28 (developing this argument).

332. *See supra* notes 73–79 and accompanying text.

333. *See* United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1805) ("[W]here fundamental principles are overthrown . . . the legislative intention must be expressed with irresistible clearness . . . .").

334. *See supra* notes 152–54, 224 and accompanying text (discussing Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

335. *See generally* Coenen, *supra* note 11 (describing the Rehnquist Court's widespread use of semisubstantive review).

336. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 111 (H. Rackham trans., 1968) (stating "that moral virtue is a mean, and in what sense this is so, namely that it is a mean between two vices, one of excess and the other of defect; and that it is such a mean because it aims at hitting the middle point in feelings and in actions").

tentative at all: courts will continue to encounter invitations to take semisubstantive approaches to cases that come in many forms. As judges grapple with these cases, they can only profit from what this Article invites others to help elaborate—a systematic evaluation of semisubstantive safeguards of constitutional limits on government power.