FAIR MEASURE: THE LEGAL STATUS OF UNDERENFORCED CONSTITUTIONAL NORMS

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The federal judiciary sometimes declines to uphold constitutionally based claims, not because of any reading of the relevant constitutional clause itself, but rather because of "institutional" concerns such as federalism and judicial competence. Professor Sager argues in this Article that these constitutional norms are nevertheless valid to their full conceptual limits, and that when, in this sense, the constitutional norm is "underenforced," a distinction should be drawn between the extent to which the federal judiciary may enforce the norm and the extent the norm is otherwise valid and enforceable. It follows from Professor Sager's thesis that Congress and state courts must be allowed to enforce such constitutional norms fully despite the federal judiciary's reluctance to do so. In addition, the theory provides the basis of an argument that the Supreme Court, in contrast to the present trend, should refrain from reviewing state court decisions which construe constitutional rights more broadly than corresponding federal interpretations. Professor Sager's theory also provides a new explanation of Justice Brennan's "ratchet" theory of congressional power to define the scope of the fourteenth amendment, and explains why public officials are considered bound by constitutional norms even though institutional concerns may insulate their actions from judicial invalidation.

> But, my friend, I said, a measure of such things which in any degree falls short of the whole truth is not fair measure; for nothing imperfect is the measure of anything, although persons are too apt to be contented and think that they need search no further.[1]

IT would appear to be in the nature of things that there be serious and ongoing debate about the substance and process of constitutional adjudication in the United States. But that debate is typically confined to propositions about what the Supreme Court should decide, has decided, or ought to have decided; it is understood that Supreme Court decisions are the ultimate and authoritative source of federal constitutional interpretation. While I have neither the impulse nor the temerity to

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[1] PLATO, THE REPUBLIC, bk. VI, 504c (3rd rev. ed. B. Jowett trans. 1892), *quoted, in similar prefatory fashion, in* Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925).

quarrel with this root premise of our legal system, I do want to register disagreement with its application to one species of Supreme Court decision. My concern here is with those situations in which the Court, because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries. Modern convention treats the legal scope of a constitutional norm as inevitably coterminous with the scope of its federal judicial enforcement. In contrast, I want to argue that we should treat these "underenforced" constitutional norms as valid to their conceptual limits, and understand the contours of federal judicial doctrine regarding these norms to mark only the boundaries of the federal courts' role of enforcement.

I. The Underenforcement Thesis

A. Judicial Underenforcement of Constitutional Norms

1. Concepts and Conceptions: The Requirement of Exhaustion. — It is part of the intellectual fabric of constitutional law and its jurisprudence that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.[2] This observation is not unique to constitutional law but is applicable to normative systems or propositions in general. It is based upon the difference between the meaning of a normative precept and the application of that precept through the modeling of a theory or structure of analysis, and is sometimes expressed by calling the statement of meaning a *concept* and the statement of application a *conception*.[3]

The distinction between a conception and its parent concept can explain and justify some forms of apparent "slippage" between a constitutional norm and its enforcement. Thus, for example, it is possible for persons to agree as to the abstract meaning — the concept — of a norm, yet disagree markedly over the conception which ought to be adopted to realize that concept. Likewise, it is possible to remain faithful to an historical understanding of the concept embodied in a constitutional

[2] Justice Sutherland was apparently alluding to this distinction in Village of Euclid v. Ambler Realty Co., 272 U.S. 367, 387 (1926), when he contrasted the constancy of the "meaning . . . of constitutional principles, statutes and ordinances" with the "elasticity" of their "application."

[3] The distinction is expressed in these terms and applied to constitutional determinations in R. Dworkin, Taking Rights Seriously 134–35 (1977). *See also* J. Rawls, A Theory of Justice 5 (1971).

norm and, yet, over time, to revise drastically the conception through which it enjoys enforcement.[4] But in any of these circumstances, the concept governs the conception, for the very purpose of the conception is the realization or understanding of the concept. From this observation it follows that a valid conception should "exhaust" its parent concept.

This requirement of exhaustion is best illustrated in the context of a unitary state, for example that governed by an hereditary monarch, Liza. If Liza is limited in her powers by a written constitution, she, like others who assume or have thrust upon them the task of translating normative standards into evaluations of specific acts or courses of conduct, will have the responsibility in each instance of fashioning a conception which is fully exhaustive of its parent concept. By "exhaustive" here I do not mean that on the first occasion Liza becomes aware that official behavior may trench upon a constitutional standard she must fashion a full-blown conception of that standard from which no subsequent deviation will be allowed. Nor must the conception formulated be the only plausible distillate of its supporting concept. Rather, I mean that Liza is responsible for the full reach of the constitutional concepts which constrain her rule. In other words, Liza is surely not justified in deliberately foreshortening the reach of the constitutional ideal when deriving her conception.

2. Federal Judicial Constructs: Truncated Conceptions.— When we think about matters of constitutional interpretation in our own legal system, however, our attention is drawn to the federal judiciary in general and the Supreme Court in particular. In applying the provisions of the Constitution to the challenged behavior of state or federal officials, the federal courts have modeled analytical structures; I will call these models or structures of analysis *constructs*. These resemble conceptions of the various constitutional concepts from which they derive. But the important difference between a true constitutional conception and the judicially formulated construct is that the judicial construct may be truncated for reasons which are based not upon analysis of the constitutional concept but upon various concerns of the Court about its institutional role. These concerns operate to produce some judicial constructs which are not at all exhaustive of the constitutional concepts they reflect. Thus, a federal judicial construct may not be a true constitutional conception because it may not exhaust the concept from which it

[4] *See* R. DWORKIN, *supra* note 3, at 135–36; *cf.* Weems v. United States, 217 U.S. 349, 373 (1910) ("Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore be necessarily confined to the form that evil had theretofore taken.").

derives; when this is the case, the construct will let go unchecked some official behavior which may well be in conflict with the concept itself.

A prominent example of this phenomenon is provided by the equal protection clause of the fourteenth amendment. Views of equal protection may vary, but a reasonable statement of the concept for purposes of this discussion is: "A state may treat persons differently only when it is fair to do so." [5]

In its present incarnation, the federal judicial construct for the application of the equal protection clause appears to comprise three distinct strands. First, there is the permissive strand reflected in the "rational relationship test," which is applied in most situations. Application of this level of review is in fact tantamount to a reflexive validation of the challenged classification, because the "test" incorporates a theory and practice of extreme deference to the judgment of the enacting official or body.[6] A classification qualifies for this judicial deference unless it can be shown to require more demanding review under one of the remaining two strands of doctrine. Second, there is a strand of the doctrine which singles out a few types of classification [7]

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[5] Tussman and tenBroek used a similar formulation as their point of departure:

> The essence of that doctrine [equal protection] can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those that are similarly situated be similarly treated.

Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949). For examples of alternative conceptualizations of a like order of generality, see Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9–12 (1969); Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 106, 108–09 (1976).

[6] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961), contains the following, now classic statement of the test:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

This standard was articulated at least as early as 1911. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911). For examples of particularly extreme deference, see Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[7] Unbenign, explicit racial classifications are of course deemed "suspect" and hence are subject to the strict scrutiny of the compelling state interest test. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964). State laws which explicitly disadvantage aliens were characterized as suspect in *In re* Griffiths, 413 U.S. 717 (1973). *But see* Foley v. Connelie, 98 S. Ct. 1967 (1978) (barring aliens from ranks of state police is not suspect); Mathews v. Diaz, 426 U.S. 67 (1976) (more lenient test when federal government disadvantages aliens). *See also*

for the severe scrutiny of the "compelling state interest test," a test which precious few enactments can survive.[8] And third, there is a highly amorphous intermediate strand of equal protection analysis. Sometimes referred to as a "rational relationship test with bite," this last doctrinal strand has afforded the means by which a few classifications have been subjected to serious review, with some attempt made to measure their basic fairness. Gender-based and illegitimacy-disfavoring classifications aside,[9] it is quite unclear which enactments qualify for this intermediate level of scrutiny. It seems likely, however, that only a very restricted class of cases involving unusual threats to groups or interests of special concern to the Court will enjoy this treatment.

Under this federal judicial construct of the equal protection clause, only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts; the vast majority of such claims are dismissed out of hand. Thus, for example, claims that classifications made in the fashioning of schemes of taxation or business regulation are arbitrary or unfair simply are not congenial to the federal courts, and will occasion in the federal courts only the purely nominal review of the traditional rational

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Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). The compelling state interest test has also been directed at state laws affecting certain "fundamental" interests, like voting, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (property requirement for school district election); Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirement), access to the ballot, Williams v. Rhodes, 393 U.S. 23 (1968), and the "right to travel," Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (one-year residency requirement for indigent medical assistance).

[8] Justice Marshall articulated the requirements of the compelling state interest test in Dunn v. Blumstein, 405 U.S. 330, 342–43 (1972) (citations omitted):

> [T]he state [must] demonstrate that such laws are *"necessary* to promote a *compelling* governmental interest." . . . [A] heavy burden of justification is on the state, and . . . the statute will be closely scrutinized in light of its asserted purposes.
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> . . . [I]f there are other, reasonable ways to achieve those goals . . . it must choose "less drastic means."

Dissenting in the same case, Chief Justice Burger underscored the practical severity of the test: "To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt that one ever will, for it demands nothing less than perfection." *Id.* at 363–64. *But see* American Party v. White, 415 U.S. 767 (1974).

[9] In the illegitimacy area, the Court has announced that it is steering a course between its "most exacting scrutiny" and "toothless" review. Mathews v. Lucas, 427 U.S. 495, 506, 510 (1976). In Craig v. Boren, 429 U.S. 199, 197 (1976), Justice Brennan, writing for the majority, announced that "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

relationship test.[10] There are reasons which explain and to some degree justify federal judicial restraint in the application of the equal protection clause to state regulatory and taxation measures; these reasons have been extensively rehearsed in the literature of judicial restraint.[11] In the most general of terms, the claims for restraint typically turn on the propriety of unelected federal judges' displacing the judgments of elected state officials,[12] or upon the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them.[13]

What these arguments do not typically include are claims to the effect that the very concept of equal protection should be understood to exclude from its boundaries the tax or regulatory measures enacted by state or municipal officials.[14] As an historical matter, it could be argued that racial equality was the exclusive ingredient of the concept of equal protection.[15] But that conceptual check has long since been rejected by the federal judiciary.[16]

What I want to distinguish between here are reasons for limiting a judicial construct of a constitutional concept which are based upon questions of propriety or capacity and those

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[10] After 1937, the only instance of an equal protection or due process invalidation of a straight tax or economic regulatory measure was Morey v. Doud, 354 U.S. 457 (1957). *Morey* involved regulatory legislation in North Dakota which singled out the American Express Company for preferential treatment. *Morey* was overruled in City of New Orleans v. Dukes, 427 U.S. 297, 306 (1975), where the Court upheld a grandfather clause in a New Orleans ordinance restricting street vendors in the city's French Quarter. One year later, the Alaska Supreme Court struck down a grandfather clause in the fishing permit context, finding the clause a violation of equal protection under the state constitution. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

[11] Prominences in this terrain include A. BICKEL, THE LEAST DANGEROUS BRANCH 34–72 (1962); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[12] *See, e.g.*, A. BICKEL, *supra* note 11, at 16–23; L. HAND, THE BILL OF RIGHTS 73–74 (1958); J. THAYER, JOHN MARSHALL 103–04, 106–07 (1901).

[13] *See, e.g.*, Kurland, *supra* note 11, at 592–600; San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 41–43 (1973).

[14] *Cf.* Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85–90 (1938) (Black, J., dissenting) (corporations are not persons within the meaning of the fourteenth amendment).

[15] *See, e.g.*, W. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 110–11 (1898) and cases cited therein; J. tenBROEK, EQUAL UNDER LAW 116–22 (1965).

[16] An appendix to Justice Douglas' opinion in Oregon v. Mitchell, 400 U.S. 112, 150–52 (1970), lists 28 decisions in which the Court has invalidated state statutes on equal protection grounds where race was not an issue.

which are based upon an understanding of the concept itself. The former I will refer to as "institutional," the latter as "analytical." Institutional rather than analytical reasons appear to have prompted the broad exclusion of state tax and regulatory measures from the reach of the equal protection construct fashioned by the federal judiciary. This is what creates the disparity between this construct and a true conception of equal protection, and thus substantiates the claim that equal protection is an underenforced constitutional norm.

It is not only the claims of commercial equity involved in equal protection challenges to schemes of taxation or economic regulation which are rebuffed because of institutional concerns; such concerns have figured in other contexts as well. In *San Antonio Independent School District v. Rodriguez*,[17] for example, Justice Powell, writing for the majority, acknowledged that institutional concerns significantly informed the Court's view that the equal protection clause was not violated by Texas' system of financing public schools largely through local property taxation. Among the concerns voiced by Justice Powell were: (1) the formulation of schemes of taxation requires an "expertise and . . . familiarity with local problems" which the Justices of the Supreme Court lack; [18] (2) school finance and management in particular raise very complicated and controversial questions, and an inexperienced and inexpert Supreme Court ought not to impose "inflexible constitutional restraints" which curtail state experimentation; [19] and (3) substantial federalism concerns are threatened by the prospect of upsetting the "systems of financing public education presently in existence in virtually every State." [20] Whatever view one takes of these concerns, it is difficult to understand them as speaking even indirectly to the scope or content of the concept of equal protection; rather, they are claims which address the question of to what limits the federal judiciary should reach in interpreting and enforcing that concept. They are, in other words, arguments which support the underenforcement of the equal protection clause by the federal courts.

The equal protection clause is offered here as a prominent example of a constitutional norm which is underenforced to a significant degree by the federal judiciary, but there are certainly other norms which are significantly underenforced. While there is no litmus test for distinguishing these norms, there are indicia of underenforcement. These include a disparity between the

[17] 411 U.S. 1 (1973).
[18] *Id.* at 41.
[19] *Id.* at 43.
[20] *Id.* at 44.

scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and other anomalies such as the disparity in thirteenth and fourteenth amendment analysis between the independent reach of the amendments and the scope of congressional authority which they confer.[21] On this basis, the following are among the likely candidates for characterization as underenforced: the fifth amendment's prohibition against takings of property without just compensation,[22] the privileges or immunities clause of

[21] The Supreme Court has recognized in Congress a quite broad power to reach public and private discriminatory conduct in order to eliminate the "badges and incidents of slavery" pursuant to § 2 of the thirteenth amendment. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437–44 (1968). But the Court has never suggested that the direct reach of § 1 of the amendment approaches the scope of this congressional power. The amendment has been found by the Court to apply of its own force, but only to invalidate state "peonage" laws, which made the refusal to work under the terms of a labor contract a crime. *See, e.g.*, Pollock v. Williams, 322 U.S. 4 (1944). The court has betrayed no inclination to extend the independent reach of the amendment. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 226 (1971) (thirteenth amendment claim characterized as "faint and unpersuasive"). One explanation of the great disparty between the scope of § 1 and § 2 of the thirteenth amendment is that the court has confined its enforcement of the amendment to a set of core conditions of slavery, but that the amendment itself reaches much further; in other words, the thirteenth amendment is judicially underenforced.

A similar problem is presented by the view that Congress' power under § 5 of the fourteenth amendment extends beyond the judicially determined reach of the amendment's substantive provisions. *See* pp. 1228–43 *infra*.

[22] The line between those economic injuries inflicted on property owners by government which are compensable and those which are not has been remarkably elusive, and courts have been led to draw distinctions at apparently arbitrary points. For example, a rise in river level that blocks drainage from a rice paddy is compensable, United States v. Lynah, 188 U.S. 445 (1903), but a rise that causes a loss of power-generating potential at the mouth of a tributary is not, United States v. Willow River Power Co., 324 U.S. 499 (1945). Likewise, direct airplane overflights below the 500-foot floor of navigable airspace can result in a compensable loss, United States v. Causby, 328 U.S. 256 (1946), but flights above 500 feet producing the same physical effects cannot, Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963). Though "underenforcement" is not so obvious here as in the equal protection area, Professor Michelman has offered an explanation of the seeming arbitrariness of "takings" law that is consistent with the thesis of this Article. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1246–51 (1967). Michelman argues that the courts are institutionally incapable of making the complex "fairness" determinations required for a satisfactory answer to the question of when compenation should be awarded. Instead, the courts tend to be "attentive only to 'hard core' or 'automatic' cases" — those fitting the paradigm of physical seizure or virtual destruction. *Id.* at 1250. *See also* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Costonis,

the fourteenth amendment,[23] and the due process clause of the fourteenth amendment, particularly in its substantive application.[24]

B. Legal Status of Judicially Underenforced Constitutional Norms

Conventional analysis does not distinguish between fully enforced and underenforced constitutional norms; as a general matter, the scope of a constitutional norm is considered to be coterminous with the scope of its judicial enforcement.[25] Thus, when the Supreme Court declines to inquire seriously into an arguably unjust distinction drawn between classes of persons or enterprises in a state tax or regulatory statute, this decision is generally expressed and understood as an authorative de-

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Development Rights Transfer: An Exploratory Essay, 83 YALE L.J. 75 (1973); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

[23] The privileges or immunities clause was greatly restricted in its infancy by the Supreme Court's holding in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), that the only rights secured therein were those peculiar to national citzenship. Consequently, the clause never lived up to the hopes of its Radical proponents. *See* Kurland, *The Privilege or Immunities Clause: "Its Hour Come Round At Last?"* 1972 WASH. U.L.Q. 405, 414.

The Court has struck down a state statute as violative of the privileges or immunities clause on only one occasion, in Colgate v. Harvey, 296 U.S. 404 (1935) (law taxing state citizens' out-of-state loans only); *Colgate* was overruled in Madden v. Kentucky, 309 U.S. 83 (1940) (affirming differential tax rate on citizens' out-of-state bank deposits). In the latter case, the Court applied a measure of deference reminiscent of that employed in equal protection cases under the "rational relationship" test: "An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them. It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion." *Id.* at 93.

[24] The argument for characterizing substantive due process as a judicially underenforced norm is based on the proposition that only institutional concerns can justify the Court's total retreat from the enforcement of economic due process rights in even quite extreme contexts. The case for this proposition is made convincingly in McCloskey, *supra* note 11, at 40–62. *See also* Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 41–43 (1972). *But see* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 201–235 (1976), where the analytical underpinnings of substantive due process' rationality test are attacked.

[25] There are exceptions to the conventional view. *See* Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Tussman & tenBroek, *supra* note 5, at 365; Fiss, *supra* note 5, at 175–77; Michelman, *supra* note 22, at 1246–51; Linde, *supra* note 24, at 222. The tenor of these works is consistent with the thesis advanced here.

termination that the distinction does not violate the equal protection clause.

Where a federal judicial construct is found not to extend to certain official behavior because of institutional concerns rather than analytical perceptions, it seems strange to regard the resulting decision as a statement about the meaning of the constitutional norm in question. After all, what the members of the federal tribunal have actually determined is that there are good reasons for stopping short of exhausting the content of the constitutional concept with which they are dealing; the limited judicial construct which they have fashioned or accepted is occasioned by this determination and does not derive from a judgment about the scope of the constitutional concept itself.

From this observation flows the thesis which I want to advance here: constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm: By "legally valid," I mean that the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution, save only that the federal judiciary will not enforce these margins. Thus, the legal powers or legal obligations of government officials which are subtended in the unenforced margins of underenforced constitutional norms are to be understood to remain in full force.

What is likely to make this view troubling to the contemporary American lawyer is our tendency, reinforced by the practical dominance of the Supreme Court as the final arbiter of our constitutional affairs,[26] to equate the existence of a constitutional norm with the possibility of its enforcement against an offending official. But the notion that to be legally obligated means to be vulnerable to external enforcement can have only a superficial appeal.[27] Consider the case of the judges of the highest court

[26] For perhaps the most emphatic expression by the Court itself of this view of its role as ultimate constitutional arbiter, see Cooper v. Aaron, 358 U.S. 1, 17–19 (1958) (dictum). *See also* Powell v. McCormack, 395 U.S. 486, 549 (1969) (Court's responsibility "to act as the ultimate interpreter of the Constitution").

[27] Professor H.L.A. Hart recognizes only two conditions as essential to the existence of a legal system, neither of them necessarily involving the availability of enforcement. First, rules of behavior valid under the system's own criteria "must be generally obeyed." Second, those rules specifying the criteria of validity and the system's "rules of change and adjudication" should be "accepted as common public standards of official behavior by its officials." The latter must view these rules "as common standards of official behavior and appraise critically their own and each other's deviations as lapses." H.L.A. HART, THE CONCEPT OF LAW 113 (1961).

of a state when they rule on a matter of state law, or of the Justices of the Supreme Court of the United States when they address matters within the federal sphere. We are quite comfortable, I think, in the belief that these judges are legally obligated to observe the norms of their legal system. It could be argued that there exist exceptional mechanisms like impeachment [28] to enforce compliance with the judicial duty to operate within the norms specifying their own powers and duties and to apply faithfully the appropriate rules of decision to cases before them.[29] Yet surely the presence of such rarely invoked enforcement devices is not essential to our perception that these judges are routinely and consistently bound to legal standards. To suggest that a judge's duty was limited to whatever view he chose to take of his own powers and of the legal norms he was called on to apply would conform neither to the general conception of a judge's responsibility nor to the understanding that judges themselves share of their legal responsibility.[30]

The idea that the judicially enforced scope of a constitutional norm may be narrower than its scope as legal authority in other contexts may be unconventional today, but it enjoys a venerable provenance. James Bradley Thayer's essay on *The Origin and Scope of the American Doctrine of Constitutional Law* [31] is an important intellectual fount of the judicial restraint thesis.[32] Thayer argued for the rule of clear mistake — that is, that " 'an

[28] Cooley repeats the interesting story of two Ohio judges who were impeached in 1808 simply for holding an act of the legisature unconstitutional. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 193 n.3 (6th ed. 1890). In recent years, however, impeachment could not be said to be widely viewed as a remedy for judicial conduct that is merely unpopular or erroneous. Language typically found in impeachment provisions would seem, though, to make judges answerable for decisions rendered in bad faith and for willful misapplication or nonapplication of appropriate rules of decisions. *See, e.g.,* MASS. CONST. pt. 2, ch. 1, § 2, art. 8; MICH. CONST. art. VI, § 25. *See also In re* Tighe, 97 A.D. 28, 89 N.Y.S. 719, 720 (1904) (dictum) (judges removable for "a persistent and apparently intentional disregard of well-known legal rules"); *In re* Quigley, 32 N.Y.S. 828, 829 (Sup. Ct. 1895) (judge removed for "a disregard of the legal rules that amounted to misconduct").

[29] *See* 28 U.S.C. § 453 (1970) (oath required of all federal judges).

[30] *See* H.L.A. HART, *supra* note 27, at 138, 141–42; Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test,* 76 HARV. L. REV. 755, 760 (1963) ("It is altogether fallacious to conclude from the unreviewability of an exercise of judgment that there are no proper limits to confine that judgment, or to conclude from the absence of a remedy for abuse that there can be no abuse.").

[31] Thayer, *supra* note 11.

[32] On the importance of this essay, see A. BICKEL, *supra* note 11, at 35 ("The paper is a singularly important piece of American legal scholarship, if for no other reason than that Holmes and Brandeis, among modern judges, carried its influence

Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.' " [33] The heart of Thayer's argument is that the legislature is charged with the responsibility of measuring its own conduct against the Constitution and that the judiciary should therefore not lightly reach a judgment on the constitutionality of a legislative act contrary to the prior constitutional judgment of the legislature:

> Now, it is the legislature to whom this power is given, — this power, not merely of enacting laws, but of putting an interpretation on the constitution . . . .
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> It is plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is entrusted are entitled to a corresponding respect . . . .[34]

The rule of clear mistake, therefore, is not founded on the idea that only manifestly abusive legislative enactments are unconstitutional, but rather on the idea that only such manifest error entitles a court to displace the prior constitutional ruling of the enacting legislature. It is a rule of judicial behavior — or, in Thayer's words, a "rule of administration." [35] Thayer underscores this proposition with the following paraphrase of Thomas M. Cooley: [36]

> [O]ne who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.[37]

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with them to the Bench, as more recently did Mr. Justice Frankfurter."); FELIX FRANKFURTER REMINISCES 300–01 (H. Phillips ed. 1960); Gabin, *Judicial Review, James Bradley Thayer, and the "Reasonable Doubt" Test*, 3 HASTINGS CONST. L.Q. 961 (1976). Thayer reappears like a Greek chorus at moments of stress in constitutional decisionmaking. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 391 U.S. 624, 667–70 (1943) (Frankfurter, J., dissenting), where quotation becomes encomium. *See also* Katzenbach v. Morgan, 384 U.S. 641, 670 n.10 (1966) (Harlan, J., dissenting); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 354 n.12 (1936) (Brandeis, J., concurring).

[33] Thayer, *supra* note 11, at 140 (quoting Commonwealth v. Smith, 4 Binn. 117 (Pa. 1811)).

[34] Thayer, *supra* note 11, at 136.

[35] *Id.* at 140.

[36] For the original wording, see T. COOLEY, *supra* note 28, at 68. Note as well Cooley's discussion of the legislature's obligation, concomitant with judicial deference, to inquire seriously into the constitutionality of its enactments. *Id.* at 217–18.

[37] Thayer, *supra* note 11, at 144.

Thayer did not invent the rule of clear mistake or devise its rationale; a generation of scholars and state and federal judges before him had accomplished both.[38] Thayer's contribution was to draw together the threads of the rule's articulation and defense from a wide range of sources, and bestow on them his powerful endorsement. The analytical premises of Thayer and the nineteenth century jurists upon whose work he drew should not necessarily govern our thinking about the Constitution and its judicial enforcement today, of course. But what Thayer demonstrates, I believe, is that the distinction between the scope of the norms of the Constitution and the scope of their judicial enforcement is inherent in the doctrine of judicial restraint and played a central role in the early formulation and defense of that doctrine.

The judicial restraint thesis has retained its vitality, and continues to be instrumental in the judicial enforcement of the Constitution, as the federal judicial enforcement of the equal protection clause so clearly indicates. But, under the influence of a vigorous tradition of Supreme Court enforcement of constitutional norms, we have come to lose sight of the fact that some judicial decisions reflect the tradition of judicial restraint and should not be understood to be exhaustive statements of the meaning of the implicated constitutional norms.

Actually, in one contemporary context, we do clearly distinguish between a determination that there exist decisive reasons for the judiciary to decline to apply a norm of the Constitution to a given set of facts and a determination that the norm in question does not reach that set of facts. This distinction, in fact, is the conceptual basis of the political question doctrine.[39] Suppose that a proceeding is brought against the Secretary of the Department of Agriculture, seeking to enjoin him from further engaging in certain conduct which is asserted to be unconstitutional. Imagine now two possible judicial holdings: (1) the Secretary's conduct does not violate the specified norms of the Constitution; (2) it is inappropriate for this court to inquire whether the Secretary's conduct violates the specified norms of the Constitution. The first holding would be a constitutional judgment on the merits; the second, an invocation of the political question doctrine. The second is sensibly distinguished from the first only if we continue to think of the constitutional norms in question as being legally valid, and under-

[38] *See id.* at 138–46 & 142 n.1.

[39] For cases and discussion of basic strands of the political question doctrine, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 472–83, 1617–53 (9th ed. 1975).

stand the court to have determined only that it cannot enforce them. The very existence of the political question doctrine in our constitutional jurisprudence thus reflects a partial recognition of the thesis which I am advancing here.[40]

This view of the meaning of a judicial invocation of the political question doctrine is reinforced by official behavior under circumstances in which the doctrine insulates that behavior from judicial accountability. Two prominent examples of such circumstances are provided by the executive prosecution of the Vietnam War and the legislative activities surrounding the possible impeachment of Richard Nixon. As to the prosecution of hostilities in Indochina, the federal judiciary from the first indicated that it would not intervene.[41] And while there was some scholarly support for judicial intervention in the impeachment process,[42] such intervention was in fact extremely unlikely. Nevertheless, in both contexts, official protagonists devoted a great deal of energy to arguments about the constitutionality of official behavior.[43] There was no suggestion that the improbability or impossibility of judicial intervention mooted the relevant constitutional questions; to the contrary, the behavior

[40] In my view, any invocation of the political question doctrine logically involves the premise that there is a constitutional norm which is applicable to the controversy at hand, but which cannot or should not be enforced by the federal judiciary. This premise is made explicit in those decisions of the Court which specify the constitutional issue to be decided but leave its resolution — if any — to Congress. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 42–43 (1849) (guarantee clause challenge to validity of state government); Pacific States Tel. Co. v. Oregon, 223 U.S. 148, 149–50 (1912); (guarantee clause challenge to use of initiative); Coleman v. Miller, 307 U.S. 433, 545–55 (1939) (reasonable time under article V for ratifying constitutional amendment).

[41] For a thorough collection of cases and materials on the federal judicial response to the Vietnam War litigation, see N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1292–93 (4th ed. 1976).

[42] *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 103–21 (1973); A. BICKEL, WATERGATE, POLITICS AND THE LEGAL PROCESS 72–89 (1974); Bickel, *Should Rodino Go to Court?*, THE NEW REPUBLIC, June 8, 1974, at 11. For arguments against judicial review, see C. BLACK, IMPEACHMENT: A HANDBOOK 53–63 (1974); Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30 (1974).

[43] For an example of serious consideration of the constitutional aspects of the Vietnam War, see S. REP. No. 797, 90th Cong., 1st Sess. (1967); S. REP. No. 91–129, 91st Cong., 1st Sess. (1969). This discussion contributed to the movement for the War Powers Resolution of 1973. *See War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 485–502 (1971) (Statement of Secretary of State William Rogers); President Nixon's (War Powers Resolution) Veto Message of Oct. 23, 1973, H.R. Doc. No. 93–171, 119 CONG. REC. H34,990 (daily ed. Oct. 25, 1973). For discussions of the constitutionality of all aspects of the proposed impeachment of Richard Nixon, see *Impeachment Inquiry: Hearings Pursuant to H.R. Res. Before the House Comm. on the Judiciary*, 93d Cong., 2nd Sess. (1974).

of the involved officials indicates an implicit understanding that this was not the case.[44]

When institutional concerns result in the invocation of the political question doctrine, we understand the constitutional norm at issue to retain its legal validity. But when institutional concerns lead instead to limited federal enforcement of the constitutional norm in question, we treat the absence of judicial intervention as an authoritative statement about the norm itself. There is thus an inconsistency in the current understanding of federal judicial decisions which withhold full enforcement of constitutional norms in the service of institutional concerns. This is particularly apparent when the absence of "judicially manageable standards" is cited as a reason for the invocation of the political question doctrine.[45] Such an application of the political question doctrine is essentially parallel to the judicial fashioning of a constitutional construct which falls significantly short of its parent concept because the concept at its margins involves the judiciary in decisions of a sort which are perceived as institutionally inappropriate. On some occasions, institutional concerns result in an announcement that the political question doctrine applies; on others, they produce a decision on the merits which does not do full justice to the invoked constitutional concept.[46] The first result, as we have seen, is understood to leave officials still bound by the marginal aspect of the constitutional provision in question; the second is taken to be a judicial determination that the challenged official behavior is fully compatible with the constitutional provision.

In sum, these arguments support the proposition that judicially underenforced constitutional norms should be regarded as legally valid to their conceptual limits. When the federal courts restrain themselves for reasons of competence and institutional propriety rather than reasons of constitutional substance, it is incongruous to treat the products of such restraint as authoritative determinations of constitutional substance. This view is further reinforced by early formulations of the judicial restraint thesis,

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[44] This is not to say that these officials made correct constitutional decisions, or even consistently acted in good faith as regards their constitutional perceptions. But I am aware of no official involved in these events who publicly disavowed his or her obligation to respect the applicable norms of the Constitution or intimated that the absence of judical intervention was equivalent to release from this obligation.

[45] *See, e.g.*, Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); United States v. Sisson, 294 F. Supp. 511, 513 (D. Mass. 1968).

[46] *Compare* Baker v. Carr, 369 U.S. 186, 330 (1962) (Harlan, J., dissenting) (concluding no violation of the equal protection clause shown), *with id.* at 266 (Frankfurter, J., dissenting) (applying the political question doctrine).

to which the idea of the scope of constitutional norms extending beyond the scope of their judicial enforcement is intrinsic. Finally, this view is consistent with our understanding of the political question doctrine, which operates in some contexts that closely parallel those which produce the underenforcement of some constitutional norms.

But the force and meaning of this revised view of the legal status of judicially underenforced constitutional norms can best be assessed by considering what, as a practical matter, will change in our legal system if we adopt it. The most direct consequence of adopting this revised view is the perception that government officials have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies. This obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins. At a minimum, the obligation of public officials in this context, as in any other, is one of "best efforts" to avoid unconstitutional conduct.[47] The observation that public officials have an obligation in some cases to regulate their behavior by standards more severe than those imposed by the federal judiciary constitutes a significant claim on official behavior and, if accepted, should alter discourse among and about officials.[48]

[47] *See* Brest, *supra* note 25.

[48] If the Supreme Court were to decide, for example, that for reasons of institutional competence it would not declare certain legislative enactments unconstitutional, such a decision should not end legislative discourse about the constitutionality of the enactment. The current controversy over federally subsidized abortions may illustrate this situation. In Maher v. Roe, 432 U.S. 464 (1977), the Supreme Court held that certain state regulations denying Medicaid funds for nontherapeutic abortions did not violate the principles of due process or equal protection mandated by the fourteenth amendment. Toward the end of the Court's opinion, Justice Powell quoted from Justice Holmes, a Moses of judicial restraint: "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Id.* at 479–80 (quoting Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904)). Holmes, I think, in the tradition of Thayer and the rule of clear mistake, meant quite literally that the legislatures were to be regarded as guardians of the liberties of the people — including and especially those enshrined in the Constitution — above the power of the Supreme Court to enforce those same liberties. Thus, subsequent to *Maher*, there should have been no cessation of the discussion by members of Congress and others of the constitutionality of federal legislation to deny Medicaid benefits for most abortions. In fact, although constitutional discussion had figured prominently

Beyond its direct consequence that officials are legally obligated to measure their conduct against the full conceptual content of underenforced constitutional norms, the underenforcement thesis has implications for the authority of officials other than federal judges to enforce constitutional norms and in turn, for the role of the Supreme Court in superintending such enforcement activities. It is to these questions that I now turn.

II. Section 5 of the Fourteenth Amendment

Section 5 of the fourteenth amendment provides: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." One perfectly plausible construction of this grant of power is that Congress can do no more than provide the machinery of enforcement for the substantive provisions of the amendment as construed by the federal courts.[49] But this view of section 5 authority has by no means enjoyed universal support. On at least one occasion it has been rejected by the Supreme Court in favor of a more expansive reading of congressional authority,[50] and some number of individual Justices adhere to this broader view,[51] as do a number of contemporary

in the debate over this legislation before the decision in *Maher*, *see, e.g.*, 123 Cong. Rec. E3000 (daily ed. May 13, 1977) (extended remarks of Rep. Streus); *id.* at E3610 (daily ed. June 8, 1977) (extended remarks of Rep. Fraser); *id.* at H5246 (daily ed. June 1, 1977) (remarks of Rep. Preyer), these constitutional issues were taken to be mooted after the decision, *see, e.g.*, *id.* at E3983 (daily ed. June 22, 1977) (extended remarks of Rep. Hyde); N.Y. Times, July 1, 1977, at 24, col. 1, and congressional debate narrowed to the question of which of the several proposals restricting the availability of Medicaid funds for abortions should be adopted, *see id.*, Oct. 16, 1977, § 4, at 2, col. 2. The House and Senate thereafter agreed on a provision to allow Medicaid funding only for victims of rape or incest or in cases of medical necessity, Resolution of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460.

[49] This was the view of the dissenters in Katzenbach v. Morgan, 384 U.S. 641, 666 (1966) (Harlan, J., dissenting). A similarly limited definition — though one not purporting to be exhaustive — is found in United States v. Williams, 341 U.S. 70, 72 (1951), and United States v. Price, 383 U.S. 787, 789 (1966) (quoting *Williams*). An early case, *Ex parte* Virginia, 100 U.S. 339 (1880), appears, however, to have adopted a highly expansive reading of § 5 — at least in comparison with the limited role seen as assigned to the courts by the fourteenth amendment — suggesting at one point that without § 5, § 1 could have plausibly been viewed as nothing more than "declaratory of the moral duty of the state," *id.* at 347. Justice Field's dissent argued, however, that § 5 did "not enlarge [the amendment's] scope nor confer any authority which would not have existed independently of it." *Id.* at 361.

[50] *See* Katzenbach v. Morgan, 384 U.S. 641 (1966).

[51] The broader view was advanced by Justices Brennan, White, and Marshall in Oregon v. Mitchell, 400 U.S. 112, 229-81 (1970). It was rejected by Chief Justice Burger and Justices Stewart and Blackmun in a separate opinion in the same case, *id.* at 281-96.

scholars.[52] These more generous readings of Congress' section 5 authority share the perception that Congress may make unlawful conduct which the Supreme Court would not independently hold to violate the fourteenth amendment.

At least three questions present themselves in this area: (1) can Congress, in the name of enforcement of the fourteenth amendment's substantive provisions, go beyond the judicially established boundaries of these provisions; (2) if so, how far (and in what directions) does this authority to overreach the Court extend; and (3) what is the analytical basis for this apparently anomalous expansion of authority? Coherent analysis of this nest of section 5 issues is very much advanced if one brings to the task the view that judicially underenforced constitutional norms have a legal vitality which extends beyond the scope of their federal judicial enforcement.

A. Prevailing Analyses

1. Katzenbach v. Morgan. — *Katzenbach v. Morgan*[53] was the occasion for what remains the most generous Supreme Court statement of Congress' authority pursuant to section 5 of the fourteenth amendment. There, the Court upheld section 4(e) of the Voting Rights Acts of 1965,[54] which was enacted principally to prevent the states from using English literacy tests to deny the right to vote to natives of Puerto Rico educated in Spanish. Justice Brennan, writing for the majority in *Katzenbach*, set out two rationales for Congress' authority under section 5 to thus restrict the states' capacity to impose literacy requirements, both of which presupposed that such requirements would not be independently found by the Court to be invalid under the equal protection clause. Congress could be acting to remedy unconstitutional discrimination by conferring on groups like the Puerto Ricans of New York "enhanced political power" with which to secure equal treatment at the hands of public officials.[55] Alter-

[52] *See, e.g.*, Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 112–14; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 614 (1975); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 228–29 (1971).

[53] 384 U.S. 641 (1966).

[54] 42 U.S.C. § 1973b(e) (1970).

The preamble to § 4(e) clearly indicates Congress' reliance on § 5 of the fourteenth amendment:

> Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

[55] 384 U.S. at 652.

natively, Justice Brennan argued, Congress could have made its own determination that the literacy requirement itself was a violation of equal protection, and the Court should pay broad deference to such a determination.[56]

The first of these propositions is not, in the abstract, controversial. It merely recognizes that Congress can exercise some choice and sophistication in fashioning the means by which fourteenth amendment violations are to be redressed. The second rationale for the *Katzenbach* holding is at once more controversial and more troubling. One obvious difficulty with this premise of deference is that it is to a large degree inconsistent with the role which the Court has assumed in the sphere of constitutional liberties. The deference of the Court in *Katzenbach* may not be all that incongruent with *Marbury v. Madison*,[57] despite the temptation to raise that banner.[58] After all, it is deference and not capitulation which is espoused in *Katzenbach*.[59] Still, the modern judicial tradition has squarely placed responsibility for interpretation of the personal guarantees of the Constitution in the hands of the Court. This is not to say that the tradition is beyond challenge, but rather that Justice Brennan and the Justices for whom he spoke were obliged to explain what about congressional determinations of constitutional substance pursuant to the exercise of section 5 power makes them the object of such singular deference.

A second prominent problem of the deference theory as modeled by Justice Brennan is the "ratchet" [60] he wished to build into it. Justice Brennan was unwilling to pay what to the dissenters in *Katzenbach* was the inevitable price of deference to Congress, namely the acceptance of future congressional determinations which contracted the scope of fourteenth amendment guarantees and explicitly permitted governmental practices which the Court would otherwise have declared to violate these guarantees.[61] His statement of the ratchet was contained in a footnote: "We emphasize that Congress' power under § 5 is

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[56] *Id.* at 653–56.

[57] 5 U.S. (1 Cranch) 137 (1803).

[58] Professor Burt, for example, thinks that "[t]he Court is suggesting that, to some extent at least, § 5 exempts the Fourteenth Amendment from the principle of Court-Congress relationships expressed by *Marbury v. Madison*, that the judiciary is the final arbiter of the meaning of the Constitution." Burt, *supra* note 52, at 84 (footnote omitted).

[59] Great advocates of judicial deference to legislative judgment have been able to make their peace with *Marbury*. *See, e.g.*, Thayer, *supra* note 11, at 139–40.

[60] The "ratchet," is borrowed from Professor Cohen. Cohen, *supra* note 52, at 606.

[61] *See* 384 U.S. at 667–68 (Harlan, J., dissenting).

limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." [62] The question suggested by this assertion is obvious: if Congress' judgment is to be deferred to above the judicially established floor, why should not judgments below this floor enjoy the same deference? [63]

2. Attempts to Justify the One-Way Deference of Katzenbach v. Morgan. — (*a*) *The Linguistic Defense.* — Justice Brennan, writing in *Katzenbach v. Morgan*, did not offer up an elaborate defense, either of the proposition that the judgment of the legislature was to be deferred to, or of the ratchet which he wished to build into such deference. Implicit in his emphasis on the distinction between the power to "enforce" and the absence of power to "abrogate" or "dilute" the guarantees of the fourteenth amendment, however, is an argument in support of the ratchet, based on the language of section 5. On this view, the power to "enforce" specified in section 5 cannot be subverted by congressional limitations on fourteenth amendment rights because the correction of judicial errors in overextending the fourteenth amendment is not in any sense an enforcement of the amendment. But this argument ignores the very real possibility that in the name of enforcing one fourteenth amendment value Congress might intrude on another. Thus Congress might mandate benign racial preferences, or prohibit "for sale" signs in racially balanced neighborhoods,[64] or endorse state intelligence operations to combat groups like the Ku Klux Klan. Further, Congress could extend statutory rights in the service of equal protection, but in so doing create a new claim of unequal treatment on behalf of a group which did not enjoy these statutory rights.[65] Finally, in the name of articulating uniform and effective standards of

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[62] 384 U.S. at 651 n.10.

[63] The notion that Congress' power is unidirectional is by no means analytically essential to the result in *Katzenbach v. Morgan* or to a judicial deference rationale. An approach modeled after Thayer's, for example, would seem to call for deference to congressional judgments falling above or below the judicially determined floor, *see* Thayer, *supra* note 11, at 144, particularly since Thayer would have had the Court extend less deference to state than to congressional judgments, *id.* at 155. But positing the ratchet effect may have been essential to winning majority support for the result, and, quite possibly, to Justice Brennan's own willingness to advance the judicial deference rationale.

[64] *See* p. 1238 & n.87 *infra*.

[65] This possibility is suggested by § 4(e) itself, which eliminated the English literacy requirement for a narrow range of persons, and thus gives rise to a potential claim on behalf of other persons not literate in English but not eligible to vote under § 4(e). *See* Cohen, *supra* note 52, at 607.

state conduct and remedies for their transgression, Congress could in fact announce dilutions of judicially determined rights.[66]

The linguistic defense of the section 5 ratchet suffers another flaw. It argues for a restraint only when a limitation on fourteenth amendment rights is based on Congress' authority under section 5. Thus, when Congress acts pursuant to another base of authority such as the commerce clause, and in the process authorizes conduct which the Court would otherwise hold to violate the fourteenth amendment, the linguistic claim is of no avail. If Congress' judgment on matters of fourteenth amendment substance merits deference when it acts expansively pursuant to section 5 authority, the argument would run, the same deference is warranted when Congress acts pursuant to another base of authority and in so doing places a narrowing interpretation on some aspect of the amendment.

(*b*) *The Factfinding Defense.* — In *Oregon v. Mitchell*,[67] which was decided four and a half years after *Katzenbach*, Justice Brennan returned to the judicial deference thesis and offered up a more substantial defense on its behalf. *Oregon v. Mitchell* involved original actions in the Supreme Court between the United States and the states of Arizona, Idaho, Texas, and Oregon. At issue was the authority of Congress to enact several enlargements of the state or federal franchise, including the extension of the vote to 18-year-olds.[68] A fragmented Court, betraying a state of analytical disarray occasioned in part by the issue of section 5 authority,[69] upheld the statutorily mandated

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[66] *See* Burt, *supra* note 52, at 123.

[67] 400 U.S. 112 (1970).

[68] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314 (current version at 42 U.S.C. §§ 1973aa to 1973bb-1 (1970 & Supp. V 1975)). The provisions dealing specifically with the 18-year-old vote were partly amended and partly repealed in 1975.

[69] Justice Black wrote an opinion announcing the judgment of the Court and expressing his own view of the cases. 400 U.S. at 117–35. There were four distinct holdings: (1) that the provision lowering the minimum voting age in federal elections was valid; (2) that the same provision as applied to state and local elections was not authorized by the fourteenth amendment and was invalid; (3) that the suspension of literacy tests both for federal and for state and local elections was valid; and (4) that the provisions regarding residency requirements and absentee registration and voting in presidential and vice-presidential elections were valid. Justice Douglas concurred in holdings (1), (3), and (4), dissenting from holding (2). *Id.* at 135–52. Justice Harlan concurred in holdings (2) and (3) but dissented from holdings (1) and (4). *Id.* at 152–229. In a joint opinion, Justices Brennan, White, and Marshall concurred in holdings (1), (3), and (4) but dissented from holding (2). *Id.* at 229–81. Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, concurred in holdings (2), (3), and (4) but dissented from holding (1). *Id.* at 281–96.

18-year-old vote in federal elections, but found its extension to state elections to be unconstitutional.[70]

Writing for himself and Justices White and Marshall, Justice Brennan credited Congress with a special legislative competence to review the factual predicates of state legislative classifications.[71] Under this view, disputed exercises of congressional authority pursuant to section 5 — like those in *Katzenbach v. Morgan* and *Oregon v. Mitchell* — are simply conflicts in the factual judgments of state legislative bodies on the one hand and Congress on the other. In these conflicts, Congress necessarily prevails because of the supremacy clause.[72] Thus, confronted with the judgment of Congress and the judgments of state legislative bodies, the Court must opt for that of Congress. Hence, the claim for "deference." But where the Court would independently find the state conduct to be in violation of the equal protection clause, Congress' judgment had no claim to the Court's deference because:

> a decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature.[73]

This provided for Justices Brennan, White, and Marshall the justification of the "ratchet" governing exercises of the legislative power conferred by section 5.

This argument unrealistically isolates and elevates the fact-finding function from the complex process of constitutional decisionmaking. It further assumes a legislative superiority in factfinding which is not self-evident. And it secures the ratchet against congressional rollbacks of fourteenth amendment rights very imperfectly.[74]

[70] The extension of the vote to 18-year-olds in state elections was subsequently provided by U.S. CONST. amend. XXVI (ratified in 1971).

[71] 400 U.S. at 240, 248–49. The "factfinding" defense articulated by Justice Brennan in *Mitchell* was anticipated by Professor Cox's effort to provide a rationale for *Katzenbach v. Morgan*. *See* Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106–07 (1966).

[72] *Id.* at 249.

[73] *Id.* at 249 n.31.

[74] The ratchet, under this analysis, restrains Congress only when two conditions are met: (1) the judgment of the Court which is being rolled back by Congress is that a given state statute or practice violates the rational relationship test; and (2) Congress has no new evidence on the question. The first of these conditions will almost never be the case, of course, since precious few state enactments are invalidated under the rational relationship test.

But there is a much more basic objection to the factfinding defense. If we adopt the conventional view that the scope of the judicial construct of the equal protection clause is coextensive with the scope of the clause's legal validity, the idea that Congress could have found facts which substantiate findings of unconstitutionality in cases like *Katzenbach v. Morgan* or *Oregon v. Mitchell* is quite implausible. Except for quite rare circumstances, the equal protection clause as enforced by the federal judiciary does not hold out the promise of making the disposition of equal protection claims turn on findings of fact. If the compelling state interest test is evoked by the state conduct in question, that conduct is in severe constitutional jeopardy, and findings of fact by Congress are quite unlikely to make the difference between validity and invalidity pursuant to such a harsh standard.[75] Under the rational relationship test as it is normally applied, only an utterly bizarre and capricious state legislative act will be held unconstitutional; [76] and once again findings of fact are not likely to make the difference: a sufficiently arbitrary enactment is very likely to announce itself, and a reasonable decision will not be undone by a factual finding. As to decisions under the intermediate tier of contemporary judicial enforcement of the equal protection clause, findings of fact might indeed be pertinent. But this tier applies to very few species of state conduct, and even in these rare instances, findings of fact by Congress are as likely to substantiate a state classification as to invalidate it. Hence, even in this narrow range where the factfinding claim does have some force, it cannot explain the one-way deference which Justice Brennan seeks to justify.

Justice Brennan anticipates these difficulties by arguing at the outset that the deferential standards of equal protection generated by the federal courts only represent institutional limitations on the judiciary, and do not bind Congress:

> The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that

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[75] *See* 400 U.S. at 295 (Stewart, J., concurring in part and dissenting in part). If Congress does have any such factfinding power in compelling state interest cases, it is likely to be in a rare instance like "benign" discrimination, where strict scrutiny applies but the result nevertheless hangs in close balance. In such a circumstance, Congress would seem at least as able to tip the scale in favor of the challenged state conduct as against it. *See, e.g.*, United Jewish Organizations v. Carey, 430 U.S. 144, 168–79 (1977) (Brennan, J., concurring).

[76] *See* p. 1215 & note 6 *supra*.

> it may be characterized as "arbitrary," "irrational," or "unreasonable."
>
> Limitations stemming from the nature of the judicial process, however, have no application to Congress.[77]

This explains the remarkably abstract and open-textured statement of the requirements of equal protection with which Justice Brennan opens his discussion of section 5 authority in *Oregon v. Mitchell*: "equal protection requires that all persons 'under like circumstances and conditions' be treated alike." [78] Justice Brennan is in effect confiding to Congress the authority to fashion a conception of the equal protection clause which reaches considerably further than the construct of the clause pursuant to which the federal judiciary acts.

In order to make the factfinding defense work, Justice Brennan thus depends upon the proposition and the principle which lie at the heart of the underenforcement thesis, namely, that there exist constitutional norms which are not enforced to their full conceptual limits (here equal protection), and that such underenforced constitutional norms are legally valid to their conceptual limits (hence Congress' freedom from the bonds of the federal judicial construct). Once one admits the underenforcement thesis into the analytical picture, it is indeed possible to argue for the authority of Congress to prohibit state conduct which the Court would not itself find to be unconstitutional; indeed it is upon just this argument which I rely below.[79]

But the factfinding emphasis of Justice Brennan's opinion in *Oregon v. Mitchell* seems misplaced. Without the underenforcement thesis, the factfinding competence of Congress cannot explain the principle of judicial deference to section 5 exercises of congressional authority or the ratchet which is intended to restrict that authority. And once the underenforcement thesis is invoked, it becomes clear that Congress' role under section 5 extends well beyond the finding of facts.

(*c*) *The Federalism/Personal Liberties Distinction.* — Another means of rehabilitating the one-way deference of *Katzenbach* is advanced in a recent article by Professor William Cohen.[80]

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[77] 400 U.S. at 247–48 (citations omitted).

[78] *Id.* at 246.

[79] *See* pp. 1239–42 *infra*.

[80] Cohen, *supra* note 52. For an anticipation of Professor Cohen's argument, see Brief of the American Civil Liberties Union as Amicus Curiae, Oregon v. Mitchell, 400 U.S. 112 (1970). The brief drew heavily on the federalism/personal liberties distinction and relied on the structural observations of Professor Wechsler, *see* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543

Cohen begins with the observation that when Congress legislates standards of state conduct above the judicially established requirements of the fourteenth amendment, it is federalism concerns which are at stake: the issue is whether "decisions traditionally made at the state level should be supplemented by national solutions." [81] In contrast, when Congress legislates standards below judicially established requirements of the amendment, concerns of personal liberty are at hazard: the issue is that of "the minimal content of liberty reflected in the due process and equal protection clauses." [82]

Congress, the argument continues, is well structured to resist any tendency to exceed the proper scope of federal legislative authority, and judicial deference to congressional decisions about the scope of such authority is appropriate.[83] In ready support of this proposition is the example of the commerce clause, which is treated by the federal judiciary as an extremely elastic source of congressional authority.[84] But when Congress acts to lower the requirements of the fourteenth amendment beneath their judicial benchmarks, the issue ceases to be one of federalism and becomes one of the scope of individual liberties. Here the special claims of congressional competence do not apply; to the contrary, the modern tradition of judicial activism on behalf of personal liberties has been prompted by distrust of the majoritarian legislative process.[85] Thus, Cohen uses the federalism/personal liberties distinction as a justification for both the judicial deference of *Katzenbach v. Morgan* and the ratchet which purportedly restrains the operation of that deference.

The difficulties of the federalism/personal liberties distinction — as an independent explanation for the one-way deference of *Katzenbach* — emerge if we suppose, for the moment, that these two premises are correct: (1) that Congress' section 5

(1974). In the array of opinions generated by the Court in *Mitchell*, there is no sign that this effort at amicus advocacy succeeded.

[81] Cohen, *supra* note 52, at 613.

[82] *Id.* at 614.

[83] *See* Wechsler, *supra* note 80. Wechsler's article provides the starting point for Cohen's analysis. *See* Cohen, *supra* note 52, at 613.

[84] The progressive dissolution of the restraint on the commerce power may be traced through a classic series of commerce clause cases: United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Perez v. United States, 402 U.S. 146 (1971). The first case to limit the commerce power in 40 years was National League of Cities v. Usery, 426 U.S. 833 (1976), in which the Court read the tenth amendment as denying Congress the power to impose a minimum wage on state employees.

[85] See Justice Stone's famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

authority is limited to providing remedies for the substantive provisions of the fourtheenth amendment; and (2) that the Supreme Court's interpretation of the equal protection clause is to be understood as exhausting the legal meaning of the clause. Given these premises, when Congress is acting pursuant to its section 5 authority and has exceeded the Court's interpretation of the equal protection clause, Congress has in effect either misunderstood or chosen to take issue with the Court's judgment about the meaning of the clause and its application to particular state conduct. If this is so, there is no obvious reason why the Court should defer to the contrary interpretation of Congress as to the meaning of the Constitution. Granted that the ultimate issue concerning the action of Congress is one of federal authority, the fact remains that the outcome of the issue depends upon an interpretation of the equal protection clause, not upon a diffuse issue of federalism such as whether "decisions traditionally made at the state level should be supplemented by national solutions." [86] The force of the federalism/personal liberties distinction thus depends upon an adjustment of one of these two assumed premises.

The starting point for most judicial and scholarly discourse about section 5 is that the provision means only what it says, and that Congress' power pursuant to section 5 is restricted to the enforcement of the fourteenth amendment's substantive provisions. It could be argued, in contrast, that section 5 is a grant of plenary legislative authority, much like the commerce clause, and that the substantive provisions of the amendment for this purpose merely point to the general areas in which Congress is entitled to legislate. Under this view, if Congress is acting in a fashion which is germane to a broad concern of the fourteenth amendment, it can impose requirements upon the states which neither the Court nor Congress would consider to be constitutionally required. Thus, for example, Congress could certainly require state motor vehicle departments to hold a hearing before refusing to grant an applicant a license; even assuming it is conceded that no such hearing is required by the due process clause, such legislation is plainly germane to the fourteenth amendment concern with fair procedures.

If we read the grant of legislative power in section 5 in this fashion, the federalism/personal liberties argument has a good deal of force. Congress is given a vast field in which to roam, but its broad authority is in fact constrained by the institutional bias of Congress against central government. The self-interest of the states, given political force through the structure of Congress, will, at least generally, assure that exercises of national

[86] Cohen, *supra* note 52, at 613; *see* p. 1236 *supra*.

legislative authority will be kept within moderate bounds. The analogy to the commerce clause becomes, under this reading, particularly apt, as we have come to accept a model of the commerce clause which stipulates a broad grant of authority and assumes institutional restraint in the exercise of that authority.

But such a reading of section 5 suffers from two prominent defects. First, it is flatly inconsistent with the language and history of the amendment. The phrase, "to enforce . . . the provisions of this article" simply does not intimate a broad grant of plenary power which is only loosely identified by the concerns inherent in the substantive provisions of the amendment. And the history of the amendment's enactment seems to support an obvious and literal reading of section 5 far better than the heroic reworking which this revised interpretation requires.[87]

Second, this revised reading of section 5 proves too much. Behind the majority opinion in *Katzenbach v. Morgan* is a strong impulse that has led to substantial scholarly efforts to find support for the judicial deference rationale. But that impulse, I think, flows from the sense that the Court was correct in welcoming the assistance of Congress in molding the contours of elusive constitutional principles like due process and equal protection. To allow Congress to extend its authority in any legislative context which is arguably germane to state procedure or equity in the substance of state laws is to eliminate any practical vestige of the constitutional limitation on federal legislative authority,[88] while forfeiting the benefit of congressional cooperation in articulating constitutional principles.

These objections to a brute force rereading of section 5 pre-

[87] Professor Bickel concluded:

> Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so to render them equal in accordance with its own notions. Rather the framers chose to write an amendment empowering Congress only to rectify inequalities put into effect by the states. Hence the power of Congress comes into play only when the pre-condition of a denial of equal protection of the laws by a state has been met. Congress' view that the precondition has been met should be persuasive, but it cannot be decisive. That is the history of the matter.

Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 97.

[88] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), strengthens the claim for restricting the scope of § 5 power to the scope of the substantive provisions of the amendment. *Fitzpatrick* held that when Congress acts under § 5, it can strip the states of their eleventh amendment immunity. Too free a construction of § 5 power would thus carry with it serious implications for the federalism concerns embodied in the eleventh amendment. Moreover, the court in *Fitzpatrick* relied heavily on the substantive provisions of the amendment which "by their own terms embody limitations on state authority." 427 U.S. at 436. Thus, it would seem to follow that the scope of § 5 power is defined by the amendment's substantive limitations on state authority.

sumably account for the general reluctance of judicial and scholarly advocates of the judicial deference rationale to take this route of escape from their analytical difficulties, and these objections argue persuasively for a return to the premise that Congress' section 5 authority is limited to the fashioning of remedies for the violation of the substantive provisions of the fourteenth amendment.

Thus, the federalism/personal liberties distinction cannot be rehabilitated by abandoning our assumed premise that section 5 authority is restricted to the substantive scope of the fourteenth amendment. But the possibility remains of abandoning the premise that the Supreme Court's interpretation of the equal protection clause is to be understood as exhausting the legal meaning of the clause. If we scuttle this premise it is possible to adopt a view which limits Congress to the scope of the equal protection clause but permits it to exceed the scope of the Court's construct of the clause. Under these analytical circumstances — essentially those of the underenforcement thesis — the federalism/personal liberties distinction can indeed be salvaged.

B. The Underenforcement Thesis Applied

1. Justification for the Deference Rationale. — The idea that underenforced constitutional norms are legally valid beyond the boundaries of their judicial enforcement is a means for overcoming the analytical difficulties which otherwise inhere in the legislative deference rationale of *Katzenbach v. Morgan*. Perceived through this lens, section 5 of the fourteenth amendment can be understood to give Congress the authority to enact legislation which fills in that body's conception of the equal protection clause. Congress can legislate against a broader swath of state practices than the Court has found or would find to violate the norm of equal protection, because the federal judiciary's enforcement of that norm fails to exhaust its scope. Congress in such a circumstance is enforcing a judicially unenforced margin of the equal protection clause and thereby moving our legal system closer to a full enforcement of an important but elusive constitutional norm.

The difficulties of the deference rationale of *Katzenbach v. Morgan* are dissipated by this analysis. If the federal judiciary is constrained by institutional concerns from exhausting the concept of equal protection, congressional attempts pursuant to section 5 to enlarge upon the judiciary's limited construct do no violence to the general notion that the federal judiciary's readings of the Constitution are dispositive within our system. Congress' section

5 power to prohibit state conduct which the Supreme Court would not find to violate the substantive norms of the fourteenth amendment is limited to those categories of conduct which the Court has condemned to analytical limbo because of its institutional concerns. Where the Court determines that given conduct violates some norm of the Constitution, Congress cannot undo that result. And where, because of analytical rather than institutional concerns, the Court has determined that given conduct does no violence to the substantive norm of the fourteenth amendment, Congress cannot use section 5 as authority to legislate against that conduct. But where the Court has, on institutional grounds, stopped significantly short of full enforcement of a substantive norm of the fourteenth amendment, Congress is empowered by section 5 to address conduct falling within the unenforced margin of the norm.

The expanded view of the legal status of judicially underenforced constitutional norms can thus explain the result in *Katzenbach v. Morgan*, while avoiding the analytical pitfalls which impede other explanatory efforts. But there is an affirmative virtue to this analysis as well. It depicts a vision of judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms like equal protection can come to be applied. The judiciary remains the guardian of fundamental notions of fair process and just treatment at their core, while the legislature is permitted to refine these notions beyond the capacity of the judiciary to do so. This, I believe, is the vision which animates the majority opinion in *Katzenbach v. Morgan*, as well as the scholarly defenses of the result there.

2. The Limits of Section 5 Authority. — The question which remains to be considered in greater detail is the scope of congressional authority which is secured by adoption of the underenforcement thesis. One way of framing this inquiry is to ask under what circumstances the Supreme Court should invalidate a congressional enactment the authority for which is drawn exclusively from section 5 of the fourteenth amendment.

One of these circumstances is reasonably clear: where the Supreme Court would prohibit particular state conduct on any constitutional ground and the congressional enactment in question expressly permits or requires such conduct, that enactment is unconstitutional and should be invalidated by the Court. Suppose, for example, that Congress enacts an antiblockbusting act which proscribes the use of "for sale" signs in certain residential circumstances, and suppose further that the Supreme Court would otherwise find this proscription to violate the first amendment.[89] The

[89] The Court invalidated such an ordinance in Linmark Assocs., Inc. v. Town-

argument for congressional authority to fill in the unenforced margin of underenforced fourteenth amendment norms stops where congressional activity trenches upon constitutional values recognized by the Court, whether those values derive from the fourteenth amendment or other provisions of the Constitution.

A second occasion for federal judicial invalidation is presented when a congressional enactment pursuant to section 5 is based upon a broader reading of a substantive norm of the fourteenth amendment than that which the Court has made and the more limited Supreme Court interpretation of the applicable provision is firmly rooted in analytical rather than institutional perceptions. This would of course be the case where a constitutional norm is fully enforced by the Supreme Court. It may also be the case where a constitutional norm is significantly underenforced in other contexts, but where the particular doctrinal boundary at issue rests on analytical perceptions of the Court. For example, in *Richardson v. Ramirez*,[90] the California Supreme Court held that the state exclusion of felons from the franchise violated the equal protection clause of the fourteenth amendment. On review, the Supreme Court reversed, concluding that section 2 of the fourteenth amendment was persuasive evidence that the equal protection clause was not intended to prohibit the states from disenfranchising felons.[91] Section 2 penalizes states which illegally restrict their franchise by diminishing the offending state's congressional representation, but expressly allows restrictions based upon "participation in rebellion, or other crime." This conclusion fixed a boundary of the Court's equal protection construct on a purely analytical basis. A congressional attempt to prohibit the exclusion of felons from the franchise which depended upon the authority conferred by section 5 of the fourteenth amendment, accordingly, would not be valid.

Finally, it is appropriate for the Supreme Court to overturn a congressional enactment under section 5 if it finds that the enactment cannot be justified by any analytically defensible conception of the relevant constitutional concept. Here the Supreme Court, I think, is on its weakest ground. Having declined, for institutional reasons, to fashion an exhaustive conception of a constitutional norm, it should not lightly reject congressional as-

ship of Willingboro, 431 U.S. 85 (1977). Justice Marshall wrote that the ordinance failed to survive the "means" branch of the "strict scrutiny" test because the town had failed to demonstrate that it was necessary to achieve a governmental objective. *Id.* at 95. More fundamentally, the proscription attempted to keep information of vital interest to citizens unknown to them so that they could not act upon it. *Id.* at 96–97.

[90] 418 U.S. 24 (1974).

[91] *Id.* at 54–55.

sertions about the appropriate scope of such a conception. But this argues for restraint by the Supreme Court, not capitulation. The Supreme Court may fix an analytical limit to the reach of a constitutional concept, much as it did in *Richardson v. Ramirez*; but instead of a crisp finding that "*X* clause stops here," the Court would find that "*X* clause does not extend this far, at any event." [92]

These limitations on section 5 authority can be rephrased in terms of the obligation of federal legislators to determine whether they have constitutional authority to enact proposed legislation. Each member of Congress who is predisposed on political or policy grounds to support legislation for which there is marginal section 5 authority is obligated: (a) to determine that the enactment does not expressly require or permit state conduct which the Supreme Court or the legislator would determine to be unconstitutional, (b) to determine that the enactment is not based upon an interpretation of a norm of the fourteenth amendment with which the Supreme Court is in analytical disagreement, and (c) to determine that the proscribed state conduct is properly considered to be a violation of a norm of the fourteenth amendment under the prevailing federal judicial construct of that norm, or failing this, is properly considered to be such a violation under the legislator's own conception of the norm in question.

III. Supreme Court Review of State Court Decisions Which Sustain Federal Constitutional Claims

In the context of section 5 of the fourteenth amendment, the expanded view of the legal validity of judicially underenforced constitutional norms advanced here explains and supports a legal doctrine that already enjoys substantial judicial and scholarly support, namely, the judicial deference rationale of *Katzenbach v. Morgan*. The same view produces more novel results if applied to the question of Supreme Court review of state court decisions that sustain federal constitutional claims.

The Supreme Court has not always had the authority to review this genre of state court decisions. The Judiciary Act of 1789 [93] conferred authority on the Supreme Court to review the decisions of state courts where state conduct was challenged as violative of the Constitution and where the claim was rejected by

[92] Thus, with respect to congressional judgments recognizing constitutional entitlements above the judicially determined floor, the Court would be applying the same standard of deference advocated by Thayer: "the strict meaning of [the Justices'] words, when they hold an act constitutional is merely this, — not unconstitutional beyond a reasonable doubt," Thayer, *supra* note 11, at 151. *See* pp. 1222–23 *supra*.

[93] Ch. 20, § 5, 1 Stat. 73 (current version at 28 U.S.C. § 1257 (1970)).

the state court, but not where the federal claim of unconstitutionality prevailed. The substantial amendments to the Act in 1867[94] left this distinction intact, as did reenactments in 1874[95] and 1911.[96] In 1914, for the first time, the Supreme Court was given jurisdiction over state court decisions which sustained federal constitutional challenges to state conduct.[97] The Court has retained this authority, which it exercises by writ of certiorari.[98]

A. Conventional Practice and Contemporary Impact

In reviewing state court resolutions of federal constitutional issues, the Supreme Court has not differentiated between those decisions which sustain and those which reject claims of federal constitutional right. In both instances, once having granted review, the Court has simply determined whether the state court's federal constitutional decision is "correct," meaning, in this context, whether it is the decision that the Supreme Court would independently reach.[99]

Since conventional wisdom has it that state courts are somewhat grudging in the enforcement of federal constitutional rights,[100] one might suppose that the correction of those state

[94] Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385.

[95] The distinction was preserved in § 709 of the 1874 Revised Statutes.

[96] The Judicial Code of 1911, ch. 231, § 237, 36 Stat. 1087.

[97] Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. The Act authorized the Supreme Court to entertain "by certiorari or otherwise" any case within § 237 of the 1911 Code, even where the state court decision "may have been in favor of the validity of the treaty or statute or authority exercised under the United States" or "against the validity of the State statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States," or "in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States." *Id. See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 440 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

[98] 28 U.S.C. § 1257(3) (1976).

[99] The only recognized complication flowing from the 1914 extension of Supreme Court jurisdiction has been an added strand of the adequate state grounds doctrine. A state court decision that invalidates state conduct on both federal and independent and adequate state law grounds is immune from Supreme Court review. *See, e.g.*, Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487 (1965); Fox Film Corp. v. Mueller, 296 U.S. 207, 210–11 (1935). *See generally*, HART & WECHSLER, *supra* note 97, at 460–573; C. WRIGHT, FEDERAL COURTS 542–47 (3d ed. 1976). Accordingly, if the existence of such a state ground of decision is unclear, the Supreme Court must either decline to review the state court decision or opt among several possible dispositions intended to secure clarification of that decision, *see, e.g.*, Herb v. Pitcairn, 324 U.S. 117 (1945) (case continued pending state court clarification). *See* HART & WECHSLER, *supra* note 97, at 478–83.

[100] *See, e.g.*, Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977).

court decisions which do subject state conduct to broad readings of federal constitutional norms would not compete well for the scarce resource of appellate scrutiny rationed by the certiorari practice of the Court. Yet in the last nine Terms, the Court — in marked contrast to the preceding decade [101] — has granted certiorari in at least twenty-five such cases.[102] In twenty-four of these cases, the Court reversed on the basis of a more narrow construct of the constitutional norm in question; in only one was the state court decision affirmed.[103]

Though certainly not all of the twenty-four reversals could be so characterized,[104] a significant number appear to have in-

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[101] Between 1960 and 1969, the Court reviewed only eight such decisions, affirming four, vacating one, and reversing three. In one reversal, Ford v. Ford, 371 U.S. 187 (1962), the Court failed to reach the constitutional issue. In each of the other two reversals, the state court decision was in *analytic* disagreement with prior Supreme Court decisions dealing with the commerce clause, *see* State Tax Comm'n v. Pacific Cast Iron Pipe Co., 372 U.S. 605 (1963) (per curiam) (state tax on goods manufactured for interstate sale); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) (state law forbidding discriminatory hiring practices by interstate air carriers). The four affirmances came in Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) (state import duty); Brady v. Maryland, 373 U.S. 83 (1963) (prosecutorial suppression of exculpatory evidence); California v. Stewart, 384 U.S. 436 (1965) (reported *sub nom.* Miranda v. Arizona); Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional amendment permitting racial discrimination in real estate transactions).

[102] *See* notes 104 & 105 *infra*. These cases were identified by scanning all reported decisions during the last nine Terms.

[103] Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish free exercise clause challenge to state compulsory school attendance law).

[104] The cases I consider not to qualify as examples of federal judicial underenforcement are those cases where the Court reversed on analytical grounds or where the constitutional provision in question simply does not lend itself to underenforcement analysis. (One such provision is the search and seizure clause of the fourth amendment, which explicity calls for a case-by-case balancing of state and private interests.) The cases in this category, with state court holdings, include: California v. Green, 399 U.S. 149 (1970) (statute permitting use against defendant of witness' prior inconsistent cross-examined testimony at preliminary hearing invalid under confrontation clause); McDaniel v. Barresi, 402 U.S. 39 (1970) (school busing plan to achieve integration violates equal protection); California v. Byers, 402 U.S. 424 (1970) (4–4–1 decision) (statute requiring drivers involved in accident to stop and identify themselves invalid under self-incrimination clause); Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) (airport enplaning charge held to violate commerce clause); Michigan v. Payne, 412 U.S. 47 (1973) (Supreme Court's due process "prophylactic rule" against heavier sentences on retrial applied retroactively); Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1973) (search and seizure violation); Richardson v. Ramirez, 418 U.S. 24 (1974) (California law disenfranchising felons invalid under equal protection clause); Oregon v. Hass, 420 U.S. 714 (1975) (*Miranda* violation); Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam) (conviction of nonphysician under criminal statute prohibiting abortions over-

volved state judicial enforcement of the unenforced margin of an underenforced constitutional norm.[105] A good example is *City of Pittsburgh v. Alco Parking Corp.*,[106] decided in 1974. The *Alco Parking* case involved a challenge by private parking lot operators to a special twenty-percent gross receipts tax imposed by the City of Pittsburgh. The tax allegedly threatened to drive the private operators out of business because of competition from a municipal parking facility which, as a result of its public financing and tax-exempt status, was able to charge considerably less than the private lots.[107] Undisputed evidence at trial indicated that of the fourteen operators who brought the challenge, nine would sustain net operating losses under the tax,

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turned, in light of *Roe v. Wade*); Texas v. White, 423 U.S. 67 (1975) (per curiam) (search and seizure violation); Michigan v. Mosley, 423 U.S. 96 (1975) (*Miranda* violation); De Canas v. Bica, 424 U.S. 351 (1976) (state law governing employment of aliens void as attempt to regulate immigration); South Dakota v. Opperman, 428 U.S. 364 (1976) (search and seizure violation); Oregon v. Mathiason, 429 U.S. 492 (1977) (*Miranda* violation); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam) (search and seizure violation).

[105] Among the nine cases I consider possible instances of federal judicial underenforcement of applicable constitutional norms are four equal protection cases: Gordon v. Lance, 403 U.S. 1 (1971) (West Virginia statute and constitutional provision requiring 60% referendum approval of state subdivision's plans to float bonds); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (Illinois constitutional amendment exempting individual, but not corporate, personalty from ad valorem tax); County Board v. Richards, 434 U.S. 5 (1977) (local Virginia ordinance limiting parking in certain residential areas to residents and their guests); Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977) (state statute allowing unemployed status to night school students for purposes of unemployment benefits but denying it to day student whose attendance of early morning classes did not limit her availability for employment in her occupation).

Three of the nine cases raised substantive due process claims: Dean v. Gadsen Times Publishing Corp., 412 U.S. 543 (1973) (state law requiring employers to pay employees on jury duty full salary less jury compensation); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) (state law requiring majority of the owners of a pharmacy to be registered pharmacists); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (city charter provision requiring referendum approval for all zoning changes). One invoked procedural due process: Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976) (striking teachers fired by school board).

One case, City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974), involved a claim that a 20% gross receipts tax constituted a "taking" of property without just compensation.

[106] 417 U.S. 369 (1974).

[107] Alco Parking Corp. v. City of Pittsburgh, 453 Pa. 245, 266, 307 A.2d 851, 862 (1973). Justice Roberts, writing for the Pennsylvania Supreme Court, observed that "the combination of these factors," produced an "extraordinary competitive advantage which the Public Parking Authority is able to exert over the nongovernmental parking lot owners and operators." *Id.*, 307 A.2d at 862.

and the remaining five would operate at profits ranging from .2% to 2.9% of revenue.[108]

A closely divided Pennsylvania Supreme Court [109] held that the tax was confiscatory and, as a taking of property without just compensation, violated the due process clause of the fourteenth amendment.[110] The court's opinion paid detailed attention to the particular facts surrounding the imposition and impact of the tax, and to the theoretical basis of a finding that such a measure is a "taking." [111] The court acknowledged the federal — and indeed, state — rule that taxes can be characterized as a taking of property only in "rare and special instance[s]," [112] but concluded that the case before it presented just such exceptional circumstances.[113]

The United States Supreme Court unanimously reversed the state court decision in *Alco*. The Court's opinion typifies the rhetoric of judicial restraint which is standard fare in federal cases involving frontal challenges to taxation measures: [114]

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[108] *Id.* at 259, 307 A.2d at 859. The percentage of parking lots projected to operate at a loss was twice as great as under the previous gross receipts tax rate of 10%. The projections were based on the assumption that the private lots would be unable to pass on the higher tax because of competition from the municipal facility. This assumption was apparently rejected by the trial judge. *See id.* at 260 n.7, 307 A.2d at 859 n.7. The Commonwealth Court, however, was convinced by the private operators' argument that they were unable to pass on the tax increase. Alco Parking Corp. v. City of Pittsburgh, 6 Pa. Commw. Ct. 433, 441, 291 A.2d 556, 561 (1972). The Pennsylvania Supreme Court majority never passed on the question. 453 Pa. at 267, 307 A.2d at 863. Dissenters argued that the private operators' factual case remained unproven, in view of the trial judge's findings, *id.* at 271, 307 A.2d at 865 (Eagan, J., dissenting), and in view of the facts that the demand for parking spaces substantially exceeded the supply and the municipal facility was able to serve only a fraction of the demand, *id.* at 284–88, 307 A.2d at 872–74 (Pomeroy, J., dissenting).

[109] Three of the court's seven judges dissented.

[110] 453 Pa. at 269–70, 307 A.2d at 864. The author of the court's opinion, Justice Roberts, is probably best known outside Pennsylvania for his landmark exclusionary zoning opinions, *e.g.*, *In re* Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

[111] Justice Roberts invoked, for example, the distinction between mediative and proprietary activities by government which is introduced by Professor Sax in Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61–67 (1964), *see* 453 Pa. at 267 n.14, 307 A.2d at 863 n.14. Difficulties with this distinction appear to have induced Professor Sax to modify his own views. *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). It is, however, peculiarly apt in the context of the *Alco* case.

[112] 453 Pa. at 265, 307 A.2d at 862 (quoting A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1933)).

[113] 453 Pa. at 267, 307 A.2d at 863.

[114] *See, e.g.*, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) (10% federal tax on state bank notes not a "direct" tax requiring apportionment); McCray v. United States, 195 U.S. 27 (1904) (excise tax on margarine but not

> The [Pennsylvania] court did not hold a parking tax, as such, to be beyond the power of the city but it appeared to hold that a bona fide tax, if sufficiently burdensome, could be held invalid under the Fourteenth Amendment. This approach is contrary . . . to the oft-repeated principle that the judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business.
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> . . . .
>
> Nor are we convinced that the ordinance loses its character as a tax and may be stricken down as too burdensome under the Due Process Clause if the taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with the taxpayer in a manner thought to be unfair by the judiciary. This approach would demand not only that the judiciary undertake to separate those taxes that are too burdensome from those that are not, but also would require judicial oversight of the terms and circumstances under which the government or its tax-exempt instrumentalities may undertake to compete with the private sector. The clear teaching of prior cases is that this is not a task that the Due Process Clause demands of or permits to the judiciary. We are not now inclined to chart a different course.[115]

B. The Underenforcement Thesis Applied

1. The Claim for State Judicial Authority to Enforce the Unenforced Margins of Underenforced Federal Constitutional Norms. — I do not intend here to criticize *Alco* as a federal judicial decision on the merits of the Pittsburgh tax; [116] it is entirely consistent with a tradition of judicial restraint with which the federal judiciary has lived comfortably for decades. Nor do I intend to laud the result reached by the Pennsylvania Supreme Court; the Pennsylvania state judiciary was badly split by the *Alco* case,[117] and I suspect that the merits of judicial intervention

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butter will be upheld even if margarine business threatened); Fox v. Standard Oil Co., 294 U.S. 87 (1935) (state tax imposed on chain gas stations but not independents does not violate equal protection).

For a thorough discussion of the post-1937 economic substantive due process cases, see McCloskey, *supra* note 11. *See also* p. 1217 *supra*.

[115] 417 U.S. at 376.

[116] For critical observations on the wholesale retreat of the Court from substantive review of state regulatory legislation, see Gunther, *supra* note 24, at 20–24 (1972); McCloskey, *supra* note 11, at 50–54.

[117] The trial court dismissed the complaint. Alco appealed to the Commonwealth Court, which also dismissed, 4–3. 6 Pa. Commw. Ct. 433, 291 A.2d 556 (1972). On rehearing, the Commonwealth Court again split 4–3. *Id.*, 295 A.2d 349 (1972).

here are in fact open to question. What I do want to address is the propriety of the Supreme Court's accepting a case like *Alco* on certiorari and, having accepted such a case, imposing its perceptions of institutional propriety upon the highest court of a state.

Where, as in *Alco*, a state court has invalidated state conduct on the basis of its interpretation of a federal constitutional norm which is underenforced by the federal judiciary, the situation is analogous in some respects to an exercise of congressional authority pursuant to section 5 of the fourteenth amendment. If an underenforced constitutional norm is valid to its conceptual boundaries, the decision of the state court can be understood as the enforcement of the unenforced margin of a constitutional norm, that is, as the assumption of an important constitutional role which the federal courts perceive themselves constrained to avoid because of institutional concerns. On this basis, state court decisions which voluntarily extend the application of such norms should be left intact.

From the underenforcement thesis there thus flows the proposition that there are occasions on which the Supreme Court, having undertaken to review the federal constitutional decision of a state court, should decline to vacate that decision, notwithstanding the fact that it is based upon a broader reading of the pertinent federal constitutional norm than that which the Court would itself adopt. Where the norm in question is underenforced by the federal courts and where the state court is enforcing it at its federally unenforced margin, it is, as a general matter, improper for the federal court to interfere.

The same analysis, of course, argues for a revision of the certiorari policy of the Court. As noted above,[118] state decisions which sustain federal constitutional challenges to state conduct come to the Supreme Court exclusively in the certiorari mode of review. In recent years, the Court has shown a marked interest in these state decisions favorable to federal challenges, granting certiorari at a disproportionately high rate.[119] This plainly seems to be a misallocation of the Court's attention.

The Supreme Court of Pennsylvania voted 4–3 to overturn the judgment of the Commonwealth Court.

[118] *See* p. 1243 *supra*.

[119] The certiorari policy of the Burger Court distinctly appears to favor the review of state court decisions which invalidate state conduct on federal constitutional grounds and, in this regard, to differ from the certiorari policy of the Warren Court. Although we did not look at the certiorari petitions of enough Terms of the Court to establish these propositions conclusively, we did examine the petitions for the 1965 and 1975 Terms. The contrast was striking and probably fairly represents the posture of the Court in each epoch.

In 1965, there were nine petitions for certiorari seeking review of state decisions

Unless competing constitutional concerns are at stake, there would seem to be no occasion for an abiding federal judicial role in policing state courts against overly generous interpretations of federal constitutional values.[120] After all, Congress was persuaded for more than a century to avoid burdening the Court with jurisdiction over such cases. This general proposition acquires special force in cases where it is reasonably clear that the state court was dealing with an underenforced federal constitutional norm at its margin. Absent special circumstances,[121] these cases would seem

which invalidated state conduct on federal constitutional grounds. Only one was accepted, California v. Stewart, 382 U.S. 937 (1965). This lack of interest is consistent with the general performance of the Court in the 1960's. *See* note 101 *supra*. In 1975, the picture was quite different. Thirty-nine petitions for certiorari review in this sort of case were filed and eight were granted. This means that review in these cases was being granted at about twice the overall review rate, which was about one in ten, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 279 (1976). The *Harvard Law Review*'s statistics lump together grants of review on appeal and on certiorari. Presumably, the disproportion between the rate of review in these state cases and the Court's overall *certiorari* rate is even greater.

[120] The argument has begun to be made in dissent to Supreme Court decisions summarily reversing expansive state court readings of the federal Constitution:

> In defining the jurisdiction of this Court to review the final judgments rendered by the highest court of a State, Congress has sharply differentiated between cases in which the state court has rejected a federal claim and those in which the federal claim has been vindicated. In the former category our jurisdiction is mandatory; in the latter, it is discretionary.
>
> Our jurisdiction in this case is in the discretionary category. . . . Since this decision does not create a conflict and does not involve a question of national importance, it is inappropriate to grant certiorari and order full briefing and oral argument.
>
> Even though there was error in the Idaho Supreme Court's use of the Fourteenth Amendment . . . I do not believe that error is sufficient justification for the exercise of this Court's discretionary jurisdiction. We are much too busy to correct every error that is called to our attention in the thousands of certiorari petitions that are filed each year. . . . Moreover, this Court's random and spasmodic efforts to correct errors summarily may create the unfortunate impression that the Court is more interested in upholding the power of the state than in vindicating individual rights.

Idaho Dep't of Employment v. Smith, 434 U.S. 100, 103–05 (1977) (Stevens, J., dissenting in part). In a separate dissent in the same case, Justice Brennan, joined by Justice Marshall, expressed his agreement with Justice Stevens "that there is no basis for granting certiorari in this case." *Id.* at 102. *See also* Pennsylvania v. Mimms, 434 U.S. 106, 117, 123–24 (1977) (Stevens, J., dissenting).

[121] McDaniel v. Barresi, 402 U.S. 39 (1971), is an example of a case which well justified certiorari review. In 1969, the Board of Education of Clarke County, Georgia, which had a white/black elementary school pupil ratio of two to one, adopted an elementary school desegregation plan based on geographic attendance zones, with special provisions to transfer students from five heavily black pockets to schools in other zones. White parents sued to enjoin the plan, but the trial court denied an injunction. The Georgia Supreme Court reversed, on the grounds that the plan violated equal protection because it treated students differently on account of their race, and that the busing provision violated Title IV of the 1964 Civil Rights Act. The Supreme Court of the United States granted certiorari and reversed. The Court concluded, in a unanimous opinion, that the school board was properly fulfilling its affirmative duty to desegregate its school system, inasmuch

to present ideal opportunities to conserve Supreme Court resources.

2. Objections to This Claim for State Court Authority. — Apart from a possible charge of heresy, there are important objections to the view that state courts should be allowed to expand the application of federally underenforced constitutional norms. These objections need to be canvassed before the force of this proposition can be assessed.

(*a*) *Uniformity.* — The most obvious of these is that the Supreme Court's capacity to secure a uniform body of federal constitutional law will be undone, and that great nonuniformity in the state application of underenforced constitutional norms may well result. It must be observed, however, that state courts already can and do produce similar nonuniformity when they determine that a given state statute or exercise of authority violates both the federal Constitution and some provision of state law — perhaps a parallel provision of the state constitution. In such a case, the adequate state grounds doctrine operates to insulate the state court's federal constitutional decision from review.[122]

But this is far from a complete answer to the nonuniformity objection. Under present circumstances state court decisions which are favorable to federal constitutional claims and which are insulated from review by a parallel state law determination can at least be indirectly harmonized by Supreme Court decisions in other cases. Thus, the decision by the Supreme Court of California, in *Serrano v. Priest*,[123] that California's regime of school finance violated the equal protection clause was immune from Supreme Court review because of the alternative holding that the state constitution was violated as well. But the subsequent contrary decision by the United States Supreme Court in *San Antonio*

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as treating students differently because of race is a necessary remedial step towards eliminating the dual school system.

Barresi is a clear example of an *analytical* disagreement between the Supreme Court and the state court which rendered the decision being reviewed. This alone would justify reversal by the Court; without more, however, it would not particularly commend the case for certiorari review. What made the case especially worthy of such review is that a very important constitutionally based federal policy of desegregation would have been frustrated by the state decision if the latter were allowed to stand.

The renowned case of Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978), *aff'g in part and rev'g in part* 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), presented a somewhat different claim for Supreme Court review. Even if the result in *Bakke* had not placed the Supreme Court in partial analytical disagreement with the California court, the national prominence of the issues of constitutional interpretation and enforcement in *Bakke* justified review of the California decision.

[122] *See* note 99 *supra*.

[123] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

Independent School District v. Rodriguez [124] — a case before the Court on appeal from a three-judge federal district court — leaves little doubt about the status of the federal constitutional holding in *Serrano v. Priest*. No state Court after *Rodriguez* has had the temerity to declare a system of school finance in violation of the federal equal protection clause, and presumably the California courts themselves will treat the federal side of *Serrano* as a dead letter.

The problem of uniformity thus has to be dealt with more frontally. It is first necessary, though, to identify with some particularity just what the nature of the complaint about nonuniform federal constitutional standards is. It can not be based merely on the fact that in some states a given official practice will be tolerated by the state courts while in others it will be condemned and subject to state judicial sanction. This would produce nonuniform substantive rules of law, but of a kind which we expect and comfortably tolerate as the inevitable result of a federal system in which each state has retained broad and independent legal authority. As a result of state legislation and state judicial decisions — common law, statutory, or constitutional — the applicable legal standard on a given question can vary widely from state to state.

Indeed, we more than tolerate this diversity; we often consider it a virtue. We have traditionally lauded the states as laboratories in which structures for the effectuation of social goals can be devised and tested.[125] A number of the "reforms" in criminal procedure imposed as a matter of federal constitutional law by the Warren Court were already well established as a matter of state law in a significant number of states.[126] The experimentation of state courts with the enforcement of federal constitutional norms at a margin regarded by the federal courts as institutionally

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[124] 411 U.S. 1 (1973).

[125] Mr. Justice Brandeis gave this idea its classic formulation: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also Justice Powell's argument to similar effect in the criminal law sphere in Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring).

[126] A particularly impressive example is Mapp v. Ohio, 367 U.S. 643 (1961). Wolf v. Colorado, 338 U.S. 25 (1949), had held that the exclusionary rule was not applicable to the states through the due process clause of the fourteenth amendment. Despite this result, more than half the states that acted on the question between 1949 and 1961 adopted some form of the exclusionary rule. *See* Elkins v. United States, 364 U.S. 206, 224–32 (1960). When the Supreme Court held in *Mapp* that the exclusionary rule did apply to the states it was adopting a procedure firmly established in the law of many states.

inappropriate should be welcomed as an exercise which can richly inform future federal judicial enforcement decisions.[127]

The nonuniformity objection is thus unpersuasive when directed at nonuniform standards of governmental conduct per se. But a person advancing the objection could respond that the vice of nonuniform state enlargement of federal constitutional enforcement lies in the fact that there would be differing judicial interpretations of the same legal document, the Constitution, without the possibility of ultimate resolution of the differences by a decision of the Supreme Court. In such a circumstance, it could be argued, public respect for the rule of law will be jeopardized, and jeopardized at precisely the level of our legal system at which it needs to be strongest: the articulation and enforcement of federal constitutional values. But this is an empirically weak claim; it assumes a populace which is simultaneously well informed about nationwide adjudication of constitutional issues yet sufficiently naive to think that the decisions of the Supreme Court are "correct" in a way differing decisions by other courts are not. Indeed, what relevant experience we have would not seem to support this view of the effects of nonuniformity. The lower federal courts have been seriously divided on some issues without early Supreme Court resolution; [128] yet I know of no such constitutional issue which excited public attention for this reason. And state courts, applying state constitutional provisions which closely parallel the federal provisions or those of other states have often gone beyond the federal courts or the courts of their sister states,

[127] It is important in this regard to distinguish the need for uniformity from the obvious need for a secured floor of federal constitutional rights, which may in some contexts be expressed as the need for uniform recognition of a given constitutional principle. In the latter situation, there can be no objection to an enlargement of that principle by the states, even if that enlargement is quite uneven among the states.

[128] One example of this situation is the regulation by schools of student hair length. Four circuits have upheld the right of students to wear their hair as they choose: Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). Four circuits have upheld school codes regulating hair length: Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600 (3d Cir. 1975) (en banc), *cert. denied*, 409 U.S. 989 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir.), *cert. denied*, 404 U.S. 979 (1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); in Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972), the Tenth Circuit refused to intervene, finding it a matter appropriately left to the school board.

The only Supreme Court action on hair length has been to uphold certain police grooming regulations. Kelley v. Johnson, 425 U.S. 238 (1976).

even in areas of rather high public sensitivity, like the church-school finance issues.[129]

To be sure, it will be harder for a state court to announce and enforce a federal constitutional principle which the Supreme Court has stated it is unwilling to embrace. The public pressure which will be directed at such decisions in sensitive areas may discourage such judicial conduct, or at least encourage the articulation of the value at stake as a state rather than a federal constitutional proposition. This, among other factors, makes it unlikely that there will be an epidemic of state judicial enlargements of federal constitutional norms. But that is certainly no argument for preventing those state courts which are prepared to enlarge upon the enforcement of underenforced constitutional norms from doing so.[130]

(*b*) *Forum-Shopping.* — An objection could be raised to the view advanced here upon intrastate rather than interstate disparities of result. The outcome of a given constitutional controversy within a state might well depend on whether it is resolved in the state or federal courts. This possibility is quite likely to invite forum-shopping by constitutional plaintiffs, who will opt for state forums whenever more expansive readings of the constitutional norms which they seek to invoke are likely to be available there. But this likelihood hardly represents a serious demerit of the underenforcement thesis.[131] If there are constitutional norms

[129] Thus, for example, in Everson v. Board of Educ., 330 U.S. 1 (1946), the Court affirmed a New Jersey court determination that state and federal establishment clauses permitted school boards to reimburse the transportation costs of parents whose children attended parochial schools, but the Supreme Court of Idaho reached the opposite conclusion when testing a similar program against that state's constitution's more strictly worded equivalent of the establishment clause. Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957 (1972).

[130] In fact, assuming that the public will be aware of the disparity between the federal constitutional decisions of the Supreme Court and those of some state courts, the effect could well be beneficial. I have suggested above, *see* p. 1227 *supra*, that a direct, affirmative consequence of the perception that judicially underenforced constitutional norms are valid to their conceptual limits is that as a society we would retain the capacity for discourse about the constitutionality of actual or proposed official conduct, even after the federal courts had declined on institutional grounds to declare such conduct unconstitutional. For such a capacity to be realized, it is of course necessary that there be a general understanding among both officials and nonofficials that some Supreme Court decisions should not properly be understood to delineate the full legal scope of the constitutional norms with which they deal. The toleration of state court decisions which enlarge upon the enforcement of federal constitutional norms should serve to increase public understanding of this proposition.

[131] It is true, of course, that traditional choice-of-law thinking, *see* RESTATEMENT OF CONFLICT OF LAWS (1934), rested on the assumption that uniformity and predictability were the virtues to be sought and forum-shopping the evil to be avoided. *See, e.g.*, D. CAVERS THE CHOICE-OF-LAW PROCESS 22–23 (1965);

which are underenforced because of institutional limitations upon the federal courts, it would seem a virtue that constitutional plaintiffs can turn elsewhere for full vindication of their constitutional claims. In any event, forum-shopping of this sort is standard fare in constitutional litigation today. As a general matter, federal constitutional claimants are prepared to go to great procedural lengths in order to enjoy federal court adjudication of their federal claims because of the perception that the federal courts are more hospitable forums.[132] On the other hand, constitutional protagonists whose cases have rested on claims of takings without compensation, or substantive due process, may have an understandable preference for state courts.

There may also be forum-shopping by the defendant in the form of removal. A defendant in a federal constitutional case brought in state court can remove to the corresponding federal court.[133] This option will presumably be exercised whenever the defendant anticipates an enlarged state court construction of the pertinent federal constitutional norms. This broad right of defendant's removal, if left intact, would substantially diminish the practical importance of the application of the underenforcement thesis to state court decisions. Still, it would by no means eliminate it. Criminal actions or civil enforcement actions by the

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Goodrich, *Public Policy in the Laws of Conflicts*, 36 W. VA. L.Q. 156 (1930); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4 (1944). Likewise, the rejection of general federal common law in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), is also attributable in part to the supposed evils of forum-shopping. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

Modern theories of conflict of laws, however, recognize that uniformity and the attendant discouragement of forum-shopping, while a legitimate concern, must often yield to stronger considerations. *See* Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 26 U. CHI. L. REV. 227 (1958); Currie, *Notes on Methods and Objectives in the Conflict of Law*, 1959 DUKE L.J. 171. Professor Currie's suggestion that courts resolve "true" conflicts by applying forum law, even though such a result would lead to forum-shopping, has been accepted by a number of courts. *See, e.g.*, Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964); Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, Comment i (1971):

> *Predictability and uniformity of result.* These are important values in all areas of the law. To the extent that they are attained in choice of law, forum-shopping will be discouraged. These values can, however, be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules.

Similarly, in the federal-state context, the disadvantages of forum-shopping are often perceived to be outweighed by countervailing considerations. *See* Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 537–40 (1958); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 449–56 (1958).

[132] *See* Neuborne, *supra* note 100.

[133] 28 U.S.C. § 1441 (1970).

state will necessarily be brought in state court. Federal constitutional defenses to such actions will be heard and determined in state court, and if a generous tradition of federal constitutional interpretation has developed there, the state will be bound by it. In any event, the observation that the present right of defendant's removal would substantially diminish the practical importance of the underenforcement thesis is not so much an argument against the thesis, as it is a good reason for contracting the right of removal if the thesis is accepted.[134]

(*c*) *State Court Institutional Limitations.* — The idea that state courts should be entitled to apply enlarged interpretations of underenforced federal constitutional norms to state behavior can be objected to on a third ground. The institutional restraints which bind the federal courts in the application of the norms of the Constitution,[135] it may be argued, should in like fashion bind the state courts.

In considering this objection, it should be noted that there are important reasons for distinguishing between the institutional postures of the state and federal judiciaries as regards the review of state governmental conduct. First, one substantial reason for judicial restraint at the federal level in the enforcement of constitutional provisions like the equal protection clause has been the difficulty or undesirability of fashioning uniform, national

[134] It has been suggested in other contexts that the right of removal conferred by § 1441 should be constricted. Since the prime object of permitting the removal of federal question cases to federal court is the assurance that claims of federal right will be adjudicated in a sympathetic forum, it has been argued that only the party who advances a claim of federal right should be permitted to remove. *See, e.g.*, Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 233–34 (1948). Under this view, the party defending a federal constitutional challenge to a state statute or exercise of authority would not be permitted to remove (unless, of course, such a party advanced his own claim of federal right.) In AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969), this possible contraction of federal question removal was considered and rejected. The Institute's rationale was that the "defendant should be permitted to remove to guard against the danger that the state Court, through lack of familiarity with the federal law or otherwise, will give an unduly expansive construction to the plaintiff's claim." *Id.* at 192.

But if there is a category of cases in which state courts quite justifiably might choose to give a more expensive reading to federal constitutional claims than would the federal courts, then there is a powerful additional reason for limiting removal to the party who is advancing a claim of federal right. In particular, the claim of a state body or official to be able to opt out of the courts of one's own state in order to avoid those courts' more expansive readings of federal constitutional norms seems a weak one; if the state courts can and will more nearly exhaust the meaning of some constitutional limitations on state conduct, federal claimants ought to be able to remain in state court if they so choose.

[135] *See* p. 1217 & notes 11–13 *supra*.

standards of governmental conduct to be applied to the complex and divergent conditions which obtain in the various states.[136] The vigorous application of federal constitutional norms by state courts can not be resisted on this basis. A state court fashioning federal constitutional standards need not make allowance for factual variations in other states, and in many substantive areas the state courts may have had substantial exposure to the details of the state experience. Second, some state courts may well perceive themselves as occupying constitutional roles vis-a-vis state and local legislative and administrative bodies within their jurisdictions quite different than that accepted by the federal courts. Contrary to the limited, interstitial role played by the federal courts, many state courts were once the principal law-givers within their jurisdictions through the evolution and application of the common law. And, in many states, the state constitutional tradition includes ingredients which place the courts in a more active posture of reviewing legislative and administrative judgments than is presently acceptable to the federal judiciary.[137]

This superior state court competence in applying federal constitutional norms to particular state circumstances is underscored by two recent decisions overturned by the Supreme Court. In *Hortonville Joint School District No. 1 v. Hortonville Education Association*,[138] a group of teachers whose contract negotiations with the school board had broken down went on strike in violation of Wisconsin law. The board initiated disciplinary hearings and dismissed the striking teachers, who then challenged the dismissals in state court as a violation of due process. The Wisconsin Supreme Court held that the hearing afforded by the school board was inadequately impartial to comport with federal due process [139] and provided that any teacher dissatisfied with the Board's action could secure a de novo hearing of all the issues.[140] In *City of Eastlake v. Forest City Enterprises, Inc.*,[141] a real estate developer challenged a city charter provision requiring that all proposed land use changes be approved by fifty-five percent of

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[136] *See* pp. 1218–19 & notes 17–21 *supra*.

[137] *See* Mosk, *The Law of the Next Century: The State Courts*, in AMERICAN LAW: THE THIRD CENTURY 213, 220–25 (B. Schwartz ed. 1976); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

[138] 426 U.S. 482 (1976).

[139] The court was impressed by the fact that the same board had the sole authority to hire, negotiate with, discipline, and dismiss teachers. Hortonville Educ. Ass'n v. Hortonville Joint School Dist. No. 1, 66 Wis. 2d 469, 493–94, 225 N.W.2d 658, 671 (1975).

[140] *Id.* at 498, 225 N.W.2d at 673.

[141] 426 U.S. 668 (1976).

the voters at a referendum. The Ohio Supreme Court sustained the claim, reasoning that such a referendum provided no standards to guide voters, permitting the police power to be exercised in a standardless, arbitrary, and capricious manner. This potential for arbitrariness, the court held, violated due process.[142] In each case the Supreme Court reversed, without close reference to the specific factual circumstances that had led the state court to find a constitutional violation, and without any apparent deference to the state court's appraisal of those circumstances. In short, both decisions seem to typify the malaise that federal judicial restraint in other contexts is meant to avoid — the blind application of constitutional generalities to widely varying local fact situations.

The force of the judicial restraint objection to an active state court application of underenforced constitutional norms, however, does not depend on whether state courts should, as a matter of sound judicial policy or coherent political theory, accept the same restraints which limit the federal judiciary. The issue for our purposes, rather, is whether the Supreme Court is justified in imposing these restraints by "correcting" state court enlargements of underenforced constitutional norms where a state court does not voluntarily adopt such restraints. This imposition would seem to be justified only if the claims for state judicial restraint could be elevated into principles of federal constitutional law, for *ex hypothesis* the underenforcement is not otherwise of constitutional stature. There would in fact appear to be no plausible constitutional basis for holding state courts to the same standards of restraint as those which prevail in the federal courts.

(*d*) *The Constitutional Amendment Objection.* — There is a hybrid version of the judicial restraint and uniformity objections which at first glance seems more troubling than either alone. Imagine a situation in which the highest court of State *X* has applied the federal equal protection clause in a fashion which is very unpopular in the state, and that this result is rejected by the United States Supreme Court (on review of a case arising in the federal courts) and by all the other state courts which have had the occasion to consider the issue. The argument which can be drawn from it is that the judges of the supreme court of State *X* have acquired an unreviewable authority which smacks of judicial tyranny. When the highest court of a state interprets the state constitution, or when the Supreme Court interprets the Federal Constitution, there is at least the possibility that deep and wide-

[142] Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975). For criticism of the Supreme Court's decision in *Eastlake*, see Sager, *Insular Majorities Unabated*: Warth v. Seldin *and* Forest City Enterprises, Inc. v. City of Eastlake, forthcoming in the *Harvard Law Review*.

spread public dissatisfaction with the ruling can be given force by constitutional amendment. But the citizens of State *X*, even if unanimous in their dissatisfaction with the state court ruling, cannot, without mustering substantial national support from people utterly untouched by the court's ruling, secure release from it through the amendment process.

Several circumstances combine to reduce greatly the force of this objection. First, the underenforcement thesis provides a curb on extreme interpretations of the federal Constitution since the Supreme Court has the authority to reverse state court decisions which rest on indefensible constitutional conceptions.[143] Second, the totality of our experience under the Constitution strongly suggests that the remote possibility of its amendment counts little in the balance against the great and ongoing authority of the Supreme Court to strike down unconstitutional practices.[144] Yet we have been more or less at peace with that authority. By comparison, the marginal authority of the state courts to enlarge upon judicially underenforced federal constitutional norms seems a minor incursion on the majoritarian processes of state government. Finally, the hybrid objection turns on the prospect of an active and tyrannical state judiciary, which prospect history has not realized; if anything, the vice of the state judiciaries has been an undue sensitivity to majority will.

(*e*) *Importance.* — A final objection to this view of state court authority is simply that, even if theoretically correct, the view has no real practical importance. To some degree statistics alone rebut this assertion. Twenty-four reversals of state court judgments in nine Terms of the Supreme Court[145] cannot be dismissed as trivial. To be sure, it could be argued that these statistics are temporarily swollen by the emergence of the Burger Court, which may have left some state courts out of phase with Supreme Court inclinations. But if state courts are released from their present obligation to conform all their decisions to the judgment of the Supreme Court there might well be a considerable

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[143] *See* p. 1242 *supra* & p. 1259 *infra*.

[144] Despite great public opposition to some decisons of the Supreme Court which have invalidated state conduct on the basis of federal constitutional norms, every attempt to secure an amendment to the Constitution to undo the effect of such a decision has failed. For a good discussion of the problems with the amendment process, see Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963); Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAW. 659 (1964); Dodd, *Amending the Constitution*, 30 YALE L.J. 321 (1921); Comment, *Amendment by Convention: Our Next Constitutional Crisis?*, 53 N.C.L. REV. 491 (1975).

[145] *See* pp. 1244–45 & notes 104 & 105 *supra*.

rise in the number of nonconforming extensions of the enforcement of federal constitutional norms by those courts. And the present, surprising, twenty-four-case figure does not include those cases in which direct Supreme Court review of state court decision was precluded by the reliance of the state court upon an alternative state ground of decision.[146]

This last observation suggests a second basis for the claim that the theory of state judicial authority set forth here is without practical importance. State courts, it could be argued, have state constitutional provisions upon which to draw. If a state court is moved to give broader scope to a particular constitutional value, why not simply do so through the exclusive or concurrent medium of the state constitution, and thus avoid Supreme Court review? Justice Brennan has invited the state judiciaries to act in this fashion,[147] and Justice Stanley Mosk of the California Supreme Court has expanded on this theme.[148] If this course can be and is pursued, the thesis expressed here apparently would be mooted. But, while state constitutions are fertile sources of important governmental values, and are quite likely to figure with increasing prominence in state court decisions,[149] their availability does not in fact moot the importance of the authority of the state courts to enlarge upon federal constitutional norms. This is so for several reasons.

In some cases, the state constitution is simply unavailable as a surrogate for federal constitutional values. The most decisive form of this unavailability is presented when the state conduct which is being challenged is specifically permitted or required by a provision of the state constitution. The chances of such an awkward occasion's presenting itself are very much increased by the nature of state constitutions; these tend to be much more prolix and catholic in scope than the federal Constitution. In *Gordon v. Lance*,[150] for example, the West Virginia Constitution included the requirement that political subdivisions secure approval of sixty percent of the voters in a referendum before incurring bonded indebtedness. So too, in *Lehnhausen v. Lake Shore Auto Parts Co.*,[151] the ad valorem tax exemption of personal property owned by individuals — as distinguished from that owned by corporations — was enshrined in the Illinois Constitution. And the disenfranchisement of felons in California, which became the

[146] *See* note 99 *supra*.

[147] Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[148] *See* Mosk, *supra* note 137.

[149] *See generally* Howard, *supra* note 137, at 874–79.

[150] 403 U.S. 1 (1971).

[151] 410 U.S. 356 (1973).

subject of dispute in *Richardson v. Ramirez*,[152] was effectuated by that state's constitution. In each of these cases the state supreme court declared a provision of its own constitution to be in violation of the equal protection clause of the fourteenth amendment[153] and in turn was reversed by the United States Supreme Court.

Other, less formidable, obstacles to the use of state constitutional provisions exist. Some state constitutions may not faithfully track the federal constitutional provision upon which a state court is dependent for its decision invalidating state conduct. Further, state constitutional doctrine may have atrophied during the Warren Court years, leaving a state court seriously constricted by anomalies within its own constitutional tradition.

Even when a state constitutional ground of decision is available, state courts may find it desirable to speak in a federal constitutional tongue. A state court might well wish to articulate a constitutional decision in terms which directly address the courts of other states, that is, which in effect constitute a claim that its given determination of constitutional substance is a correct determination for not just State *X*, but other states as well. Such an impulse towards a constitutional *lingua franca* seems entirely appropriate. It suggests the possibility of the generation of dialogue and consensus among state courts as to the appropriate enforcement of the unenforced margins of underenforced federal constitutional norms. Further, a state court might wish to speak in federal constitutional terms in order to command the attention of the Supreme Court itself and to participate in the process of advance consideration and persuasion as do federal courts of appeals. Again, such an impulse seems entirely appropriate, and ought to be welcomed in our federal system.

3. The Limits of State Court Authority. — The question of how far state courts are entitled to go in enlarging the enforcement of underenforced federal constitutional norms is resolvable along the same lines sketched above to delineate the boundaries of congressional authority under section 5 of the fourteenth amendment.[154] In summary form, the circumstances which would make it appropriate under this analysis for the Supreme Court to overturn a state court decision which enlarges upon the enforcement of a federally underenforced constitutional norm are these: (1)

[152] 418 U.S. 24 (1974); *see* p. 1241 *supra*.

[153] In the course of the state court adjudication in *Gordon v. Lance*, the President of the Supreme Court of Appeals of West Virginia, in dissent, professed to be "amazed, shocked and deeply distressed" at the idea of state judges, sworn to uphold their constitution, undertaking to invalidate it. Lance v. Board of Educ., 153 W. Va. 559, 574, 170 S.E.2d 783, 791 (1969) (Haymond, P.J., dissenting).

[154] *See* pp. 1238–42 *supra*.

the state decision expressly requires or permits conduct which the Supreme Court judges to be unconstitutional; (2) the state decision is inconsistent with an analytical — as opposed to an institutional — judgment of the Supreme Court; or (3) the state decision, in the judgment of the Supreme Court, cannot be justified by any analytically defensible conception of the relevant constitutional concept.

4. A Practical Postscript. — There are several practical questions which remain concerning Supreme Court tolerance of state court decisions which enlarge the enforcement of federal constitutional norms. One of these is simply how the Court should effectuate this tolerance. The easiest means of implementing the principles argued for here is for the Court to decline to review these cases on certiorari. Where it is reasonably clear on the face of a petition for certiorari that the state court decision rested on an enlarged interpretation of a norm which is underenforced by the federal judiciary, and where no special circumstances urge review, the Court should deny the petition. Indeed, as suggested above,[155] even where it is far from clear that it is the scope of an underenforced constitutional norm which is at issue, the Court should incline against committing its resources to the review and correction of decisions by state courts which invalidate state conduct on federal constitutional grounds.

Once the Court does undertake to review a case involving state court enlargement of an underenforced constitutional norm, the question becomes how the Supreme Court should express its tolerance of such an enlargement in its opinion. The functions of such an opinion should be: (1) to announce the limits of Supreme Court doctrine in the area, (2) to observe that the decision of the state court lies without these limits, and (3) to recognize the authority of the state court to extend beyond these limits. These purposes should by no means elude direct expression in an opinion. Consider the *Alco* case, discussed above.[156] After an exposition of the traditional posture of restraint which the Court assumes in such challenges to tax measures and an analysis leading to the conclusion that the Pittsburgh parking lot tax would not be invalidated under the federal judicial construct of the just compensation requirement, one could imagine the insertion of a paragraph to this effect:

> But our decisions in this area should not be understood to exhaust the constitutional requirement of just compensation. By its nature the institution of taxation raises close questions

[155] *See* pp. 1247–50 *supra.*

[156] *See* pp. 1245–47 *supra.*

> of equity and propriety which this Court has deemed better left to the legislative bodies with which the power to tax is lodged. But these institutional perceptions are in large measure specific to the federal courts in general and this Court in particular, with its peculiar responsibility to fix a national constitutional standard to be applied to the complex and divergent conditions which obtain throughout the fifty states of our Union. And where, as here, the high court of one of these states has chosen to scrutinize more closely the behavior of a local legislature in the imposition of a taxation measure, and has found that imposition to violate the fundamental requirement of just compensation, we are unwilling to demand of such a court that it accept the institutional limitations which restrain us. Only where the state court determination is in conflict with other constitutional values, plainly at odds with an analytical judgment of this Court, or based upon a patently unreasonable application of the federal Constitution, will we invalidate that determination. Here, in the factually detailed and closely reasoned opinion and judgment of the Pennsylvania Supreme Court, we find no such occasion.

A second question which will present itself if the Supreme Court undertakes to review a decision by a state court which involves the enlarged enforcement of an underenforced federal constitutional norm is a variation on the traditional adequate state grounds inquiry. Here, the issue will be whether the state court intended to go beyond the scope of the Supreme Court's enforcement of the norm in question or merely acted under a misapprehension of that scope. At the extremes of possibility, it is clear how the Supreme Court should respond. Some cases will come bearing the unmistakable impress of a state court which is grudgingly acquiescing in what it regards as a too generous reading of a constitutional norm by the Supreme Court. In such a case, the appropriate disposition by the Court will simply be a decision correcting the state court's misapprehension of the scope of its federal constitutional obligations. At the other extreme, if the view of state court authority which I have advanced here were to be adopted by the Court, there will be some cases in which the state court will make quite clear its intention to enlarge upon the enforced scope of a federal constitutional norm, notwithstanding the Supreme Court's unwillingness to do so. In such a case, if the Supreme Court does extend review — which ordinarily it should not — it should affirm the authority of the state court to act as it did.

But most state opinions will not approach either of these extremes. Most are likely to consist of an amalgam of federal con-

stitutional precedent and reflective discourse which fails to clarify the extent to which the result depends on independent judgment rather than deference to federal judicial authority. The problem is not just one of judicial expression. It is in the very nature of judicial reasoning that in difficult cases there exists a complex relationship of these elements which makes the task of saying which of them moved the court intellectually impossible. In these typical, ambiguous cases, the most sensible response by the Supreme Court would be an opinion affirming the authority of the state court to enforce the Constitution as it did but indicating that the state court is not obliged to exercise that authority, and then remanding to the state court. This would leave to the state court the option of consciously exceeding the specific boundaries of federally mandated enforcement delineated in the Supreme Court's opinion, or of revising its judgment to conform to those boundaries.

IV. Conclusion

The richness and durability of our constitutional tradition depends in great measure on the role that the Supreme Court and the federal judiciary which it supervises have come to play in our constitutional affairs. But we should not allow the prominence of the federal judiciary's part in the enforcement of the Constitution to obscure the importance of other governmental officials and bodies in that process. The federal courts comprise a crucial bulwark against evulsive depredations of constitutional values; but against scattered erosion they are relatively powerless. Even quite generous readings of federal judicial competence are likely to stop short of advocating that the federal courts measure every variety of governmental conduct against the broad values of liberty and fairness embodied in constitutional provisions like the due process and equal protection clauses of the fourteenth amendment. The constricted reach of the federal judicial doctrines which govern the enforcement of constitutional norms of this sort is, I strongly suspect, a more or less permanent feature of the landscape, and was essentially as secure under the Warren Court as it is today. We thus depend heavily upon other governmental actors for the preservation of the principles embodied in these constitutional provisions.

This vision of shared responsibility for the safeguarding of constitutional values encourages close scholarly and judicial attention to the principles which govern or ought to govern the collaboration. In the course of this Article, I have argued that we have accepted a view of the meaning of constitutional decisions by the Supreme Court and the lower federal courts — namely, that the

legal scope of constitutional norms is coterminous with the scope of federal judicial enforcement — which fails to take account of the institutional restraints which prevent these courts from fully enforcing some constitutional norms. I have offered, in contrast, the view that constitutional norms which are significantly underenforced by the federal judiciary nevertheless ought to be regarded as legally valid to their conceptual boundaries.

From this theoretical predicate, I have attempted here to derive three propositions: first, that governmental officials are legally obligated to obey the full scope of constitutional norms which are underenforced by the federal courts and thus, these officials are not released from their obligation by a favorable decision of even the Supreme Court; second, that Congress is empowered by section 5 of the fourteenth amendment to enforce the equal protection clause at those margins which are unenforced by the federal courts; and third, that it is inappropriate for the Supreme Court to require that state courts restrain themselves from the full enforcement of underenforced constitutional norms. Accordingly, state court decisions which may apply more generous readings of the federal constitution to state conduct than would the Supreme Court ought to be highly disfavored candidates for certiorari review, and it is inappropriate for the Court to reverse such state court decisions if they are instances of state judicial enforcement of the unenforced margins of federal constitutional norms.

In combination, these propositions sustain a view of a cooperative effort in the enforcement of the federal constitution. Under this view, the Supreme Court would remain the highest, and the ultimately authoritative, arbiter of our constitutional affairs. But the Court would welcome the efforts of Congress and the state courts to shape elusive constitutional norms at their margins, and all governmental officials would regard themselves as bound by the full reach of all constitutional norms, including those which partially elude federal judicial enforcement.