CURBING RAW JUDICIAL POWER: A PROPOSAL FOR A CHECKS AND BALANCES AMENDMENT

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Amendment XXVIII (Proposed)

(1) Any decision of the Supreme Court or any lower federal court bearing upon the interpretation of this Constitution may be vacated, in whole or in part, whenever the Congress of the United States passes legislation vacating such decision. Said legislation shall be adopted by both the House of Representatives and the Senate but does not require approval from the President.

Upon passage of legislation vacating any federal court decision, the status of the law affected by the decision being vacated shall be returned to the status it held immediately prior to the issuance of the court decision in question.

(2) Any decision of the Supreme Court or any lower federal court which renders a state law unconstitutional may be vacated, in whole or in part, when a majority of the states adopt legislation vacating such decision. Such legislation may be adopted through the initiative or referendum process of a state or by a state legislature.

Upon the passage of such legislation by a majority of the states, the status of the law affected by the decision being vacated shall be returned to the status it held immediately prior to the issuance of the court decision in question.

I. INTRODUCTION

The legitimacy and scope of judicial power has been debated since the early days of the Republic. While Chief Justice John Marshall established the principle of judicial review in *Marbury v. Madison*,[1] there still remains the question as to what checks can be placed upon a judiciary which, in effect, becomes a legislative body when exercising judicial review.

The addition of substantive due process to the Court's arsenal in the late 19th century (or perhaps as early as *Dred Scott*[2]) sharpened the Court's tendency to act as a super-legislature and invalidate laws

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

2 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

adopted by the legislative and executive branches of government.[3] When doing so, the authority of the other two co-equal branches of government has been challenged. In such cases, the Supreme Court has exercised superior, as opposed to equal, power over the Legislative and Executive branches of the federal government.

When courts vacate laws adopted by the people's representatives, or by the people themselves, through the state initiative or referendum process, it becomes increasingly apparent that the historical checks on the power of the judiciary have been eroded. The presence of an unrestrained judiciary can mean only one thing—a constitutional crisis is on the horizon if, indeed, it has not already arrived. This problem has not gone unnoticed. In fact, Judge Robert Bork recently gave several examples of the Court's use of its unbridled discretion in substituting its own will for that of the people and their elected representatives:

> Courts have all but banished religion and religious symbolism from our public life, created a wholly spurious right to abortion, made discipline difficult to impossible in public schools, required discrimination by race in public schools, ordered violent felons back on the streets because of what judges perceive as overcrowding in prisons, taken over the hiring and promotion of police and fire departments, required drastic changes in the composition of state legislatures, and transformed the First Amendment from a protector of ideas to a protector of self-gratification, so that obscenity and pornography are rife in our culture. Our courts will continue along these lines indefinitely unless we devise a counter.[4]

When the activities of the courts began to be so stifling and intrusive it is time to ask a very important question: are the present checks and balances within our system of government sufficient to halt the overreaching by the judiciary? I submit that they are not. The continued interference by unelected federal judges into matters more properly addressed by the democratic process has placed our present system of republican government at risk.

I propose that, by the passing the Checks and Balances Amendment, a major step can be taken toward restoring the proper balance of power between the three branches of the federal government, as well as between the states and the federal government. This solution is not novel, though it has not been widely discussed. Indeed, Judge Robert Bork has suggested that a constitutional amendment allowing Congress to overrule federal or state court decisions may be the only means the

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[3] *See* Bernard H. Siegan, *Majorities May Limit The People's Liberties Only When Authorized To Do So By The Constitution*, 27 SAN DIEGO L. REV. 309, 355 (1990).

[4] Robert H. Bork, *The Conservative Case for Amending the Constitution*, THE WEEKLY STANDARD, Mar. 3, 1997, at 21.

"federal courts, including the Supreme Court, can be brought back into constitutional legitimacy."[5]

Every critic of the Court may have his own list of its most egregious errors; I will list two recent ones.

A. City of Boerne v. Flores

In *City of Boerne v. Flores*,[6] the Court rejected the decision by Congress to pass the Religious Freedom Restoration Act of 1993 (RFRA).[7] RFRA was an act of Congress—supported by a majority of both houses—that declared that the Court's ruling in *Employment Division v. Smith*[8] was incorrect and had created a religious liberty crisis. In *Smith*, the Court created a new test for determining whether a governmental regulation violated the Free Exercise Clause of the Constitution.[9] To create this new test, the Court disregarded its own well established precedent in the cases *Sherbert v. Verner*[10] and *Wisconsin v. Yoder*.[11] Under these two cases, before a governmental regulation could interfere with one's exercise of his religion, the government was forced to demonstrate that it had a compelling governmental interest in so doing. If it could not meet the burden of proof, the regulation in question would be rendered unconstitutional.

In *Smith*, however, the Court dramatically altered the balance of power between the individual desiring to practice his religion and the government desiring to interfere with it—in favor of the government. The Court's new test provided that governmental regulations could indeed interfere with one's practice of his religion as long as the interference was indirect and the law was one of general applicability. Moreover, under *Smith*, the governmental body promulgating the intrusive regulation was no longer required to demonstrate that it had a compelling interest in so doing.

Even though the Court's new *Smith* test gave Congress substantial new authority with which to regulate, Congress, being a representative body accountable to the people, chose to limit this broad new power created by the Court. Congress enacted RFRA with a stated purpose of restoring the compelling interest test of *Verner* and *Yoder*. The effect of

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5 ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 117-19 (1996).

6 521 U.S. 507 (1997).

7 42 U.S.C. § 2000bb(a)(3) & (4).

8 494 U.S. 872 (1990).

9 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I, cl. 1.

10 374 U.S. 398 (1963).

11 406 U.S. 205 (1972).

RFRA, aside from overruling the Court's *Smith* decision, was that Congress itself—as representatives of the people—restrained the power of government vis-à-vis the people.

In *Boerne,* the Court was faced with a challenge to the constitutionality of RFRA. An archbishop applied for a building permit to enlarge a church in a Texas city but the local zoning authorities denied the application because the church had been declared a historical landmark. The archbishop flied suit against the city alleging the city zoning ordinance was violating his rights under RFRA.

The Supreme Court declared that RFRA was unconstitutional because, according to the Court, it exceeded Congress' power under Section 5 of the Fourteenth Amendment to enact legislation enforcing the Free Exercise Clause of the First Amendment. According to the Court, RFRA contradicted the principles of separation of power between the branches of the federal government. More importantly, however, the Court used this opportunity to again reserve for itself, the exclusive power to define and interpret the substantive provisions of the Constitution. Specifically, the Court stated:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.[12]

It is interesting to note that the criticism the Court directed against Congress is the same criticism that is often directed at the Court. In striking down the RFRA, the Court claimed for itself, an exclusive and final right to determine the content of constitutional guarantees—a power that cannot be found in the Constitution itself.

B. Romer v. Evans

In *Romer v. Evans*[13] the Court overturned a state constitutional amendment in Colorado that prohibited the state, county, and city governments of that state from making homosexuality a basis for protected status under any civil rights statutes. The amendment was democratically adopted by the state referendum process. The Court held that this enactment fails the "rational basis" test—the most lenient level of consti-

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[12] *Boerne,* 117 S.Ct. 2157, 2168 (1997) (citations omitted).

[13] 517 U.S. 620 (1996).

tutional review—simply because the Court discerned "animus"—that is, some motive that a majority of the Court does not like—behind the amendment's supporters.

The amendment to the Colorado state constitution, adopted in a 1992 statewide referendum, forbade the state and its agencies and political subdivisions from enacting, adopting, or enforcing any statute, regulation, ordinance, or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships would constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status, or claim of discrimination. The Court held the law to be unconstitutional because, according to the six justices in the majority, it is in violation of the Equal Protection Clause of the Fourteenth Amendment.

In ruling in this manner, the Court departed from a logical result which would have upheld the law under the traditional analysis of equal protection claims. Such analysis follows a two-part test. First, if a fundamental constitutional right, such as the right to vote, has been denied to a group of people, or if discrimination exists on the basis of a suspect classification of people, such as race, then the state law can be upheld only if the state shows a compelling governmental interest to justify the law. Second, if no fundamental right or suspect classification is involved, then for the Court to uphold the law, the state need only show that the law bears a rational basis to a legitimate governmental purpose. As a practical matter, whenever it can be successfully argued that a fundamental constitutional right is being infringed upon, or that a suspect classification of people has been unequally treated, the state can never show that such treatment is justified because of a compelling interest. The state generally loses in such cases. On the other hand, when the rational basis test is used, the state generally wins because virtually every law adopted can be justified upon some rational basis. At least that was the case until Romer.

In Romer, the Court faced perhaps the hottest political issue being debated today—the issue of homosexual rights. If the Court found that the law was unconstitutional because it discriminated against a group of people based upon a suspect classification, i.e. their sexual preferences, then it would elevate such sexual practices to the same status in the law that race presently holds. The political repercussions of such a ruling would undoubtedly rival the public outcry against *Roe v. Wade*—the Court's infamous 1973 decision which paved the way for abortion on demand. On the other hand, a refusal to so rule would, in most people's minds, require that the law be upheld because there are obvious reasons to justify the actions of the people of Colorado in passing the referendum.

The Court did not find that a fundamental right or suspect classification was involved in this litigation. However, it stated that the law was violative of the equal protection clause because, it bears no rational relationship to any legitimate governmental purpose. The Court substituted its judgment for the judgment of the people of Colorado and rejected the claims of Colorado that the law had a rational basis in that it furthered state interests in respect for other citizens' freedom of association, in particular the liberties of landlords or employers who have personal or religious objections to homosexuality, and conserving resources to fight discrimination against other groups.

While the Court was brash enough to say that the people of Colorado were irrational in passing this law, it arrogantly claimed that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[14] In other words, in the Court's opinion, the people of Colorado acted out of bigotry in adopting this state referendum. Hence, the law bears no rational basis in furtherance of a legitimate governmental purpose.

II. HISTORICAL RESISTANCE TO THE COURT FROM THE EXECUTIVE BRANCH

In establishing the key precedent for judicial review in *Marbury v. Madison*,[15] Chief Justice Marshall set forth a constitutional principle that has generally been accepted as a legitimate part of the checks and balances in our constitutional system of government. Despite the widespread acceptance of the basic doctrine, the scope of judicial review has remained controversial. For instance, President Andrew Jackson, upon vetoing a bill to re-charter the Bank of the United States, faced critics who maintained that the constitutionality of legislation had been settled by the Supreme Court in *McCulloch v. Maryland*.[16] Jackson responded by saying:

> Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. . . . It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.[17]

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[14] *Id.* at 634.

[15] 5 U.S. (1 Cranch) 137 (1803).

[16] 17 U.S. (4 Wheat.) 316 (1819).

[17] GERALD GUNTHER & KATHLEEN M. SULIVAN, CONSTITUTIONAL LAW 21 (13th ed. 1997); quoting from 2 MESSAGES AND PAPERS OF THE PRESIDENTS, 576, 581-83 (Richardson ed.

Jackson was not alone in his opposition to an overreaching judiciary. No President was more forceful in opposing a Supreme Court decision than Abraham Lincoln when he expressed his opposition to *Dred Scott v. Sandford.*[18] The *Dred Scott* decision declared that black slaves were not citizens under the United States Constitution, and therefore, had no standing to sue under the Constitution. Lincoln spoke strongly against this decision both in his debates with Stephen Douglas[19] and in his First Inaugural Address, where he stated:

> At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[20]

Lincoln's resistance to a Court decision impressed Franklin D. Roosevelt, who also faced problems with a Supreme Court which seemed intent on rendering decisions fatal to many of his New Deal programs. In fact, Roosevelt planned to deliver a speech attacking the Court and quoting Lincoln if the Court decided against the Government on the constitutionality of abrogating gold clauses in federal obligations.[21] However, there turned out to be no need for such a speech as the Court decided for the Roosevelt administration.[22]

It seems apparent that, when Presidents of the stature of Jefferson, Jackson, Lincoln and Roosevelt have directly challenged the authority of the Supreme Court in exercising judicial review, the scope of the doctrine must be questioned. This is particularly true when one examines the Su-

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1896), from the veto message of President Andrew Jackson delivered July 10, 1832, on a bill to recharter the Bank of the United States.

[18] 60 U.S. (19 How.) 393 (1857).

[19] GUNTHER, *supra* note 11, at 22; quoting 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 255 (Basler ed. 1953) during the Lincoln-Davis senatorial campaign, Lincoln said in regard to the *Dred Scott* decision:

> [W]e nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.

Id.

[20] *Id.*; quoting from 6 MESSAGES AND PAPERS OF THE PRESIDENTS 5, 9-10 (Richardson ed. 1897), from the First Inaugural Address of Abraham Lincoln, March 4, 1861.

[21] Gunther, Op. Cit., p. 29 (quoting F.D.R.—HIS PERSONAL LETTERS, 1928-1945, 459-60 (Elliot Roosevelt ed. 1950).

[22] *See* Perry v. United States, 294 U.S. 330 (1935).

preme Court's historical use of the due process clauses of both the 5th and 14th Amendments to define the substantive body of the law.

III. THE BIRTH, DEATH AND RESURRECTION OF SUBSTANTIVE DUE PROCESS

No doctrine has done more to bootstrap judicial power than that of "substantive due process." Substantive due process is the notion that the due process clauses of the 5th and 14th Amendments not only guarantee fair procedures (as their text would suggest), but also forbid certain types of government action. Substantive due process is an invitation to the Court to create "fundamental rights," and the Court has taken up this invitation in varying ways.

The Supreme Court first used substantive due process as a means to interpret the Constitution as early as the *Dred Scott* decision in 1857. In this case, the Court held that the Missouri Compromise, which restricted the flow of slaves into territories, was unconstitutional because such legislation denied the slave owner of the use of his property without due process of law.[23] By expanding the meaning of due process beyond its procedural aspects, the Court was able to prohibit Congress from dealing with the slavery issue directly through legislation. The Court's decision, which effectively removed the era's preeminent moral issue from the political process, all but guaranteed a bloody civil war and problems in race relations that have plagued this nation for more than a century.

In the early 1900s, the Court began to use substantive due process as a means to strike down economic legislation passed to regulate industry. In a 1905 decision, *Lochner v. New York*,[24] the Court struck down New York's maximum work hours law for bakers, stating that such a law denied bakery owners liberty to contract without due process.

During the "*Lochner* era," the Court rendered decisions striking down as unconstitutional, laws that prohibited employers from requiring that employees agree not to join a labor organization;[25] prescribed mini-

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[23] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). In his decision, Chief Justice Taney states:

> Thus, the rights of property are united with the rights of persons and placed on the same ground by the Fifth Amendment to the Constitution which provides that no person shall be deprived of life, liberty and property, without due process of law. An Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or *brought his property into a particular Territory of the United States, and who had committed no offenses against the laws, could hardly be dignified with the name of due process of law.*

Id. at 450 (emphasis added).

[24] 198 U.S. 45 (1905).

[25] Coppage v. Kansas, 236 U.S. 1 (1915).

mum wages for women;[26] fixed gasoline prices;[27] limited the resale price of theater tickets;[28] regulated employment agency fees;[29] and restrained competition that restricted entry into a particular line of business.[30] The Court based its decisions on its desire to protect the liberty to contract. By ruling in such a manner, however, the Court inadvertently exposed its own biases and leanings as it implied that its own judgment was superior to that of the various legislative bodies whose enactments were nullified.

In the mid 1930s, the Court began to curtail its use of substantive due process as a tool for invalidating economic legislation. In *Nebbia v. New York*,[31] the Court upheld a New York law that established a "Milk Control Board" vested with the power to fix minimum and maximum milk prices.

In 1937, the Court continued along the course it began in *Nebbia* and upheld a law establishing minimum wages for women in the State of Washington.[32] The Court continued to reject economic *substantive due process* in a line of cases that upheld a federal prohibition of interstate shipment of skimmed milk mixed with non-milk fats;[33] upheld a state law fixing maximum employment agency fees;[34] upheld state right to work laws;[35] and sustained a Kansas law prohibiting "the business of debt adjusting."[36]

Substantive due process was expressly rejected by the Court during this time period, and in no stronger terms than those stated by Justice William Douglas:

> The liberty of contract argument pressed on us is reminiscent of the philosophy of Lochner . . . and others of that vintage. Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power his limits . . . [b]ut the state legislatures have constitutional authority to experiment with new techniques; . . . so long as specific constitutional prohibitions

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26 Adkins v. Children's Hosp., 261 U.S. 525 (1923).

27 Williams v. Standard Oil Co., 278 U.S. 235 (1929).

28 Tyson & Brother v. Banton, 273 U.S. 418 (1927).

29 Ribnik v. McBride, 277 U.S. 350 (1928).

30 New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

31 291 U.S. 502 (1934).

32 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

33 U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

34 Olsen v. Nebraska, 313 U.S. 236 (1941).

35 Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

36 Ferguson v. Skrupa, 372 U.S. 726 (1963).

> are not violated and so long as conflicts with valid and controlling federal laws are avoided.[37]

Justice Douglas concluded his denunciation of substantive due process by explaining that, even though the propriety of the issue before the Court may have been questionable, the Court's role is not to decide such issues. Specifically, Justice Douglas stated: "The judgment of the legislature . . . may be a debatable one . . . . But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision."[38]

The Court's rejection of substantive due process seemed complete. It certainly appeared that legislative enactments would no longer be voided because the Court, through its construction of the due process clause, deemed itself wiser in protecting liberty under the Constitution than the Legislative branch of government. However, as it has turned out, such a belief was not well founded.

In 1965, the Supreme Court was faced with *Griswold v. Connecticut*, [39] a case in which the executive director of the Planned Parenthood League of Connecticut challenged a Connecticut law which made it a crime for one to use "any drug, medicinal article or instrument for the purpose of preventing conception."[40] The appellants in *Griswold* were charged with aiding in the commission of a crime for giving information and medical advice to married persons as to contraceptive methods.[41] Justice Douglas, delivering the majority opinion of the Court, expressly rejected the substantive due process doctrine of *Lochner*: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[42] However, in the next few paragraphs of the decision, Douglas rendered an opinion that leaves one wondering if he really believed what he was saying.[43]

The *Griswold* opinion talks of the various "penumbras" of the Bill of Rights which flow from the guarantees of liberty found in the Constitution.[44] Justice Douglas concluded that these "penumbras" create zones of privacy of which the Connecticut law violated.[45] Thus, while not explicitly tying his decision to the due process clause of the 14th Amendment,

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37 Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (citations omitted).

38 *Id.* at 425.

39 Griswold v. Connecticut, 381 U.S. 479 (1965).

40 *Id.* at 480.

41 *Id.*

42 *Id.* at 482.

43 *See id.* at 482-86.

44 *Id.*

45 *Id.*

Justice Douglas achieved the same result as the *Lochner* era Court did in scrutinizing and voiding economic legislation. Hence, the state law was invalidated and the wisdom of the Supreme Court was substituted for that of the Connecticut legislature.

In his dissent, Justice Hugo Black, joined by Justice Stewart, issued a strongly worded and prophetic warning:

> The adoption of a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is achieved will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers.[46]

Justices Black and Stewart were exactly right. *Griswold* laid the groundwork for what clearly appears to be the resurrection of substantive due process in areas of personal liberties. In *Eisenstadt v. Baird*, [47] the Court continued along this course by invalidating a Massachusetts law that prohibited the distribution of contraceptive devices to unmarried people. In finding this law violative of the 14th Amendment's Equal Protection Clause,[48] the Court relied on *Griswold*, stating that a state could not discriminate against single persons by outlawing distribution of contraceptive devices to them while allowing such distribution to married persons.[49]

The return to substantive due process as a tool for invalidating legislation became complete in 1973. In *Roe v. Wade*,[50] and its companion case, *Doe v. Bolton*,[51] the Court heard challenges to the abortion laws of the states of Texas and Georgia. No other decisions, except possibly *Dred Scott v. Sandford*,[52] have had such a profound impact on the political, social and moral spheres of American society.

The Court, through Justice Harry Blackmun, acknowledged that the Constitution does not explicitly mention a right to privacy, but stated that such a right does exist in the "penumbras" of the Bill of Rights, as stated in *Griswold*, and could also be found in other parts of the Constitution.[53] Such a right of personal liberty under the 14th Amendment, according to the Court, "is broad enough to encompass a woman's deci-

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46 *Id.* at 521.

47 405 U.S. 438 (1972).

48 U.S. CONST. Amend. XIV, § 1, cl. 2.

49 *Eisenstadt*, 405 U.S. at 453.

50 410 U.S. 113 (1973).

51 410 U.S. 179 (1973).

52 60 U.S. 393 (1856).

53 Roe v. Wade, 410 U.S. 113, 151 (1973).

sion whether or not to terminate her pregnancy."[54] From this apparent revival of substantive due process, the Court went on to invalidate the anti-abortion statutes of Texas and Georgia and, in effect, the anti-abortion laws of all 50 states. The Court's sweeping decision essentially allows for abortion-on-demand through all nine months of pregnancy.[55]

More than any other Supreme Court decision, *Roe v. Wade* illustrates a clear attempt by the Court to legislate its own biases into the Constitution. Perhaps the best illustration of the Justices' transformation from judges to legislators can be found in *The Brethren*,[56] where authors Bob Woodward and Scott Armstrong describe the political maneuvering between the Justices on the abortion issue:

> The clerks in most chambers were surprised to see the Justices, particularly Blackmun, so openly brokering their decision like a group of legislators. There was a certain reasonableness to the draft, some of them thought, but it derived more from medical and social policy than from constitutional law. There was something embarrassing and dishonest about the whole process. It left the Court claiming that the Constitution drew certain lines at trimesters and viability. The court was going to make a medical policy and force it on the states. As a practical matter, it was not a bad solution, as a constitutional matter, it was, absurd. The draft was referred to by some clerks as "Harry's abortion."[57]

Not only does *Roe* demonstrate the awkwardness of Justices acting as though they were legislators, it also provides a poignant example of just how easily Justices can make law based upon their own personal beliefs and biases—with no quantifiable guiding principles. Professor Lillian BeVier has written a convincing and succinct explanation for how Justice Powell's personal beliefs influenced his decision in *Roe v. Wade*:

> [J]ustice Powell found the decision easy: "He would vote to strike the abortion laws because he thought it intolerable that the law should interfere with a woman" right to control her own body during early

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[54] *Id.* at 155.

[55] The Court reached such a result by allowing abortions for health reasons after viability, or after the stage when the unborn child can live independently outside the womb, albeit with artificial means. *Id.* at 463. Acceptable health reasons for an abortion, according to the Court in the companion case of *Doe*, are factors not merely limited to the absence of illness but also include factors relating to the complete socio-economic, psychological and familial well being of the mother. *See Doe*, 410 U.S. at 192. Thus, through this broad interpretation of the term "health", which includes basically any stressful factor on the mother, an abortion can occur in the third trimester as long as the reasons for it are tied to the health of the mother, as broadly defined.

[56] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

[57] *Id.* at 233.

> pregnancy."[58] Justice Powell was personally opposed to antiabortion laws because of his background (white, upper-middle-class, well-educated), his respect for his father-in-law (an obstetrician whose judgment the Justice trusted implicitly), his searing experience helping a mailroom clerk at his law firm (whose girlfriend had died from a botched abortion), and the persuasive powers of his daughter Molly (a staunch supporter of a woman's right to choose).[59]

The illegitimacy of the Court's new role as policy-maker was obvious to many. Justice Byron White, in dissent, called *Roe* "an exercise of raw judicial power." Years of political controversy and unrest, brought about by the *Roe* decision, came to a head in *Planned Parenthood v. Casey*.[60] In *Casey*, the Court backed slightly away from the scope of *Roe* but reaffirmed the "central holding:" that there is a constitutional liberty to terminate a pregnancy.[61] This further reaffirmed the doctrine of substantive due process as a vehicle to void legislative enactments with which the Court finds some disagreement. In *Casey* the Court stated:

> Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the case before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since *Mugler v. Kansas*, the Clause has been understood to contain a substantive component, as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal constitution from invasion by the States.[62]

The Court went on to announce:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of

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[58] Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 289 (1996) (quoting JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994).

[59] *Id.* at 289-90 (citing JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994).

[60] 505 U.S. 833 (1992).

[61] *Id.* at 836.

[62] *Id.* at 846-47 (citations omitted).

> existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[63]

If we take the Court at its word, then it would appear that now virtually any state regulation which infringes upon a person's ability to define his "concept of existence" and of "meaning" can be found unconstitutional. Under this new enlightened understanding of substantive due process, virtually any state law now can be rendered constitutionally void if the judiciary is persuaded that the law in question hinders an individual's understanding of "the universe, and of the mystery of human life."[64]

What, then, about physician-assisted suicide and euthanasia? In *Compassion In Dying v. Washington*,[65] the Ninth Circuit Court of Appeals was forced to venture down the substantive due process course that the Supreme Court had previously charted. The Ninth Circuit, following in the tradition of the Supreme Court, voided a Washington statute that prohibited giving assistance to one who wanted to commit suicide. In rendering its decision, the court relied upon this language in *Casey*, stating: "Like the decision of whether or not to have an abortion, the decision how and when to die is one of "the most intimate and personal choices a person may make in a lifetime," a choice "central to personal dignity and autonomy."[66] Thus, according to the court, constitutionally protected liberty under the Fourteenth Amendment as defined by *Casey* means the right to have assistance in one's own suicide.[67] Any law to the contrary denies a person the ability to define his "concept of existence." Indeed, if one takes the Supreme Court at its word in *Casey*, then such a conclusion is not illogical.

Fortunately, the Supreme Court reversed the Ninth Circuit's ruling, rejecting its conclusion that constitutional liberty requires that laws prohibiting assistance in a person's suicide be voided.[68] However, in doing so, the Court did not actually retreat from its broad language defining liberty in *Casey*. Rather, it refused to apply such language to the issue of assisted suicide. The Court stated "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all impor-

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63 *Id.* at 851.

64 *Id.*

65 79 F.3d 790 (9th Cir. 1996).

66 *Id.* at 813-14 (quoting *Casey*, 505 U.S. at 851).

67 *Id.*

68 Washington v. Glucksberg, 117 S.Ct. 2258 (1997).

tant, intimate, and personal decisions are so protected—and *Casey* did not suggest otherwise."[69]

So the Court has turned aside an opportunity to create yet another novel constitutional right. But for how long? History does not allow us to assume that the Court will refrain for long from substituting its views for democratic outcomes.

IV. Is The Supreme Court The Exclusive Interpreter Of The Constitution?

Many in the legal profession and even in Congress claim that the U.S. Supreme Court has the final word on the meaning of the Constitution. In support of this position, Chief Justice John Marshall's famous statement in *Marbury* is quoted: It is emphatically the province and duty of the judicial department to say what the law is."[70]

The Court itself has cited *Marbury* as evidence that it is the final authority on interpreting the Constitution. Moreover, in *Cooper v. Aaron*, [71] the Court stated that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[72] In *Baker v. Carr*, [73] the Court stated: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and a responsibility of this Court as ultimate interpreter of the Constitution."[74] The Court further referred to itself as the "ultimate interpreter" of the Constitution in *Powell v. McCormack*.[75]

I suggest we are indeed in a constitutional crisis if we accept the idea that the U.S. Supreme Court is the final and exclusive interpreter of the Constitution. As the Court stated in *Casey*, it will use "reasoned judgment" to determine the scope of its decisions under the doctrine of substantive due process.[76] However, nowhere in the Constitution is it acknowledged that the "reasoned judgment" of the Supreme Court is superior to the "reasoned judgment" of the elected officials of the people or of the people themselves.[77]

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69 *Id.* at 2271 (citations omitted).

70 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

71 358 U.S. 1 (1958).

72 *Id.* at 18.

73 Baker v. Carr, 369 U.S. 186 (1962).

74 *Id.* at 211.

75 395 U.S. 486, 549 (1969).

76 *Casey*, 505 U.S. at 834.

77 *Id.*

Why should our system of government assume the "reasoned judgment" of the judiciary is superior to that of our elected officials or the electorate? Human beings are imperfect and flawed in their reasoning. Sometimes decision-makers—whether they be the electorate, the Congress, the Executive, or the Judiciary—may be in error in their "reasoned judgment."

Our constitutional system of checks and balances was developed by those who believed in the depravity of man. "The Framers of the Constitution . . . . 'realized that rulers . . . have sinful natures, and if given too much power, will use it to advance themselves at the expense of their subjects.'"[78] In fact, their "belief that man 'is a fallen, sinful, and depraved creature' was an impetus for our constitutional safeguards."[79] This Judeo-Christian concept mandates that neither an individual decision-maker nor group of decision-makers should be given absolute power.[80] The Framers understood this and "'devised a system of civil government committed to the diffusion and separation of powers, checks and balances, and limited, enumerated, and strictly delegated powers only.'"[81] They clearly understood that "'[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'"[82]

The checks on the power of the judiciary have become ineffective—leaving us with single branch of the government that is capable of completely subverting the political process—making law without being held accountable to the electorate. This weakening of the separation of powers safeguard means that the only restraint on the judiciary is its own self-restraint—its "reasoned judgment." No decision-maker should be allowed such unrestrained power as we know that they, like the rest of us, are imperfect and flawed.

The Framers warned against this and tried to protect us from such dangers. Unfortunately, that was not enough. According to the Court, it is supreme in interpreting the Constitution; consequently, it decides for

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[78] Shawn E. Tuma, Comment, *Preserving Liberty: United States v. Printz and the Vigilant Defense of Federalism*, 10 REGENT U. L. REV. 193, 213 (1998) (quoting Senator Dan Coats, *From Liberty to Dependence: Public Policy and the American Family*, 69 NOTRE DAME L. REV. 1027, 1032 (1994)).

[79] *Id.* at 214 (quoting John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution To American Constitutionalism*, 39 EMORY L.J. 41, 58 (1990)).

[80] *See Id.*

[81] *Id.* (quoting Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 994 (1996)).

[82] *Id.* at 214-15 (quoting THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed., 1961)).

itself, the limits upon its own power and authority and is limited only by its "reasoned judgment." The lack of sufficient checks in our constitutional system to correct errors in the Court's "reasoned judgment" clearly indicates that a constitutional crisis is on the horizon if, indeed, it has not already emerged.

While many believe that the *Marbury* declaration established the supremacy of judicial review over other branches of government, their interpretation of the declaration is probably over broad. To be consistent with the Framers' plan for a government consisting of three co-equal branches, Chief Justice Marshall's declaration must be interpreted more narrowly. While Marshall did proclaim that it is "emphatically the province and duty of the judicial department to say what the law is,"[83] he did not declare that it was the exclusive role of the judiciary to "say what the law is."[84] Marshall never said the Court was "supreme"[85] in interpreting the Constitution nor did he say it was the "ultimate interpreter"[86] of the Constitution—the modern Court declared that for itself. A proper understanding of the Constitution, consistent with that of the Framers, demonstrates that the President[87] and Congress[88] also have a role, indeed a constitutional duty, to also use their "reasoned judgment" and "say what the law is."

A constitutional system, such as ours, which in theory acknowledges three co-equal branches of government, must surely give the "reasoned judgment" of the Congress on any matter the same weight as that given to the Supreme Court. In fact, since the Legislative branch of government represents the people, and can be held accountable to them for errors in judgment, then the "reasoned judgment" of Congress should be given more weight than that from unelected federal judges who are appointed for life and have no accountability to the electorate. Accordingly, when the branches are in conflict with each other over an interpretation of the Constitution, a proper system of constitutional checks and balances requires that the ultimate issue be decided by the people themselves through their elected officials. This would give a deeper meaning

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83 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

84 *Id.*

85 *Cooper*, 358 U.S. at 18.

86 *Powell*, 395 U.S. at 549.

87 The President must take an oath to uphold the Constitution before entering office. "I do solemnly swear (or affirm) that I . . . will to the best of my ability, preserve, protect and defend the Constitution of the United States." U.S. CONST. art. 2, § 1, cl. 8.

88 Members of Congress must take an oath to uphold the Constitution before entering office. "The Senators and Representatives . . . shall be bound by oath or affirmation, to support this Constitution . . . ." U.S. CONST. art. 6, § 3.

and understanding to the Preamble of the Constitution, which begins with the phrase, "We the People of the United States."[89]

V. ATTEMPTED CHECKS ON THE JUDICARY

The Constitution itself allows for certain checks on judicial power. However, none of these methods have proven to be effective against an increasingly powerful judiciary, which views its "reasoned judgment" as superior to that of other branches of government.

One such check is the amendment process set forth in Article V. This process, however, is somewhat ineffective since the Framers, made this procedure difficult. Since they did not necessarily foresee the expansion of judicial power, the result has been that the legitimate amendment power in the hands of the electorate has not kept pace with the illegitimate amendment power in the hands of the judiciary.

Another check on the judiciary is the impeachment process.[90] However, ever since Congress's failed attempt to impeach Justice Samuel Chase in 1804, it has generally not been deemed possible to impeach a federal judge "merely" for issuing opinions that violate constitutional parameters.

A third check is the power of Congress under Article III to make "exceptions" to the jurisdiction of the federal courts.[91] In *Ex Parte McCardle*,[92] the Court upheld an act of Congress that banned appeals to the Supreme Court from denials of habeas corpus. The Court, however, has not given Congress an unchecked power to withdraw jurisdiction. During the post-Civil War period, Congress also attempted to nullify the President's power to pardon. In *United States v. Klein*,[93] the Court stated that such an effort was unconstitutional in that Congress had exceeded its authority. According to the Court, while the Exceptions Clauses gives Congress the power to deny the right of appeal in certain specified cases, Congress cannot withhold appellate jurisdiction "as a means to an end" if the end itself is forbidden under the Constitution.[94] Since the Court has managed to retain the final say over Congress's exceptions power it is not an effective restraint on the Court.

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89 U.S. CONST. preamble.

90 *See generally*, Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111 (1998) (Mr. Fitschen argues that Congress should be more willing to "hold federal judges accountable through . . . the Constitutional device of impeachment." *Id.*).

91 Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1866).

92 74 U.S. (7 Wall.) 506 (1869).

93 80 U.S. (13 Wall.) 128 (1872).

94 *Id.* at 146.

VI. THE CHECKS AND BALANCES AMENDMENT

There are two parts to the Checks and Balances Amendment that I am proposing. The first part would give Congress an alternative way to overturn an errant federal court decision directly. The second section gives the states a vehicle to do so.

The procedure applies only to decisions "bearing on the interpretation" of the Constitution. Thus, court decisions that deal only with interpretation of statutory matters or bureaucratic regulations are not subject to this procedure. However, as a practical matter, this is a distinction without a difference because Congress always can revise a statute in response to a judicial interpretation of the statute.

The operation of this amendment is not complicated. As with any piece of legislation, any member of Congress may introduce a bill that specifically vacates, in whole or in part, a decision of a federal court or the Supreme Court. After committee hearings are held, the bill would be sent to the full floor of the House or Senate for debate and a vote. Upon passage by majority vote in one chamber, the bill would be sent to the other chamber for consideration. As with any piece of legislation, differences in the bill passed by both Houses would require that a conference committee be appointed to make necessary changes before a final vote on the completed legislation is undertaken.

Since the amendment allows for a decision to be vacated "in whole or in part," the legislation would need to specify what part of the decision is being vacated. By allowing the Congress to vacate only part of a decision, Congress is given flexibility to exercise its political judgment as to how sweeping it wants the legislation to be. For example, under this amendment, Congress could determine that it does not want abortion-on-demand to be the law of the land, but still wants to preserve the right of privacy the Court found in *Griswold*. Accordingly, Congress could vacate *Roe* in part to achieve this result. To do this, the legislation need reference only the parts of the *Roe* decision which are being vacated and those parts that are being preserved. A Congressional determination of whether a court decision should be vacated "in whole or in part" would be a political decision, made by the elected representatives of the people, and made only after thorough and exhaustive debates in the legislative halls of Congress.

The second section of this amendment allows for the states to vacate a court decision that is adverse to their interests. One state can initiate the process by passing legislation in the same manner as section one of the Amendment allows Congress to do. However, one state alone cannot vacate a court decision. The amendment requires that a majority of states pass legislation that vacates "in whole or in part" the decision in question. Thus, a political grass roots movement on a national scale

must take place to garner the necessary support in a majority of states. Colorado could not vacate *Romer v. Evans*[95] by itself: it would need help from 25 other states. Such a requirement acts as a check, and ensures that actions taken by the states to vacate any judicial ruling are supported by a majority of the electorate.

States are allowed to adopt legislation vacating a court decision through their legislatures or through the state initiative and referendum process. This allows for a true grass roots movement of the electorate to voice their own opposition to court rulings. Thus, the people of Colorado, themselves, would be allowed to collect signatures and place on the ballot for a vote on the issue of whether *Romer* should be vacated. By allowing for such a procedure, the electorate can bypass its locally elected legislators when they are not responding to the expressed call for action.

The amendment is clear that when the states or Congress vote to vacate a decision, the status of the law is returned to the status it held prior to the court decision in question. Thus, for example, if Congress voted to vacate *Roe* in its entirety, then such a decision would restore the status of all the state laws rendered unconstitutional by the *Roe* decision on January 22, 1973. One need look only at what the status of the law was on January 21, 1973, to determine the result of legislation vacating *Roe*.

The overturning of any Supreme Court decision under this amendment would also vacate any lower court ruling that relied upon the decision in question. Again, the status of the law would be restored to the position it held prior to the issuance of the court ruling being vacated. As an example, if *Roe* were to be vacated in whole, then all lower court decisions relying upon *Roe* would also be vacated.

VII. CONCLUSION

The adoption of the proposed Checks and Balances Amendment would allow a shorter route to be taken in order to check the judiciary and thus, would fully restore equality between the branches of government. The overall effect of the Checks and Balances Amendment would be to restore the Constitutional balance between the Legislative and Judicial branches of government which was envisioned at the time the Constitution was adopted. In addition, a proper balance between the states and the federal government—federalism—would be enhanced. Further, participatory democracy would be strengthened in that the citizenry of the states would be directly involved in working towards a political goal shared with citizens of other states. Since this amendment allows for an immediate check upon the judiciary, and allows the Con-

[95] 517 U.S. 620 (1996).

gress to bypass the time-consuming amendment process it presently faces, political grass roots movements would be energized. Grass roots participation in the democratic process would be enhanced, as the fruits of one's individual political labors would be more readily foreseeable. This would be a healthy result in a representative democracy ruled by a Constitution that insures the right of the people "to petition the Government for a redress of grievances."[96]

If the experiment in representative democracy in the United States is truly by and for the people, then the people must have direct and immediate access to the ruling institutions that control their lives. Clearly, an uncontrolled judiciary made up of non-elected judges who serve for life will result in tyranny, as James Madison warned,[97] unless proper checks on its power are developed and effectively implemented. The adoption of the Checks and Balances Amendment would be a major step in providing such a check.

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[96] U.S. CONST. amend. I.

[97] Tuma, *supra* note 76, at 214-15 (quoting THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed., 1961)).