

## CONSTITUTIONAL CHANGE AND THE SUPREME COURT: THE ARTICLE V PROBLEM

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How the Supreme Court has interpreted and given meaning to the United States Constitution, and thus created constitutional law, has changed dramatically over time. Major doctrinal shifts have occurred without any change in constitutional text or newly discovered historical evidence about what the Constitution originally meant. To give just a few of many examples, how Congress may regulate commerce,<sup>1</sup> what kind of aid the government may give to religious schools,<sup>2</sup> what right, if any, a woman has to terminate her pregnancy,<sup>3</sup> what the Second Amendment means,<sup>4</sup> and what level of protection

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1 *Compare* *Gonzales v. Raich*, 545 U.S. 1, 22, 32–33 (2005) (holding that the Commerce Clause allows Congress to regulate purely local activities that substantially affect interstate commerce), *with* *United States v. Morrison*, 529 U.S. 598, 608, 613 (2000) (holding that the Commerce Clause does not allow Congress to regulate noneconomic activities with indirect economic effects, because the distinction between “what is national and what is local” would be obliterated (quoting *United States v. Lopez*, 514 U.S. 549, 557 (1995))), *and* *Lopez*, 514 U.S. at 561 (holding that the Commerce Clause does not allow Congress to regulate non-commercial activities).

2 *Compare* *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002) (holding that a government program that gave neutral aid with respect to religion and gave assistance to citizens, who then privately chose to fund religious schools, did not violate the Establishment Clause), *with* *Wolman v. Walter*, 433 U.S. 229, 248–51 (1977) (holding that giving instructional materials other than textbooks to students attending religious schools violated the Establishment Clause).

3 *Compare* *Gonzales v. Carhart*, 550 U.S. 124, 156, 161–64 (2007) (holding that a partial-birth abortion ban was constitutional even without an exception for the health of the mother), *with* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (recognizing “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State,” but confirming a state’s right to restrict abortions after viability), *and* *Roe v. Wade*, 410 U.S. 113, 153, 163 (1973) (holding that a woman has a fundamental right to privacy that enables her to choose to terminate her pregnancy during the first trimester).

4 *Compare* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (holding that the Due Process Clause incorporates the Second Amendment right for an individual to keep and bear arms against state laws), *and* *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects individuals’ right to possess a firearm and

courts should give to commercial speech,<sup>5</sup> are all issues the Court has answered differently at various times in our history. How to account for these constitutional changes is an issue that has vexed scholars and judges for generations. After all, as Judge Posner has observed, “[i]f changing judges changes law, it is not even clear what law is.”<sup>6</sup>

My contribution to this fine symposium on constitutional interpretation addresses one small component of the large and complex question surrounding constitutional change. This Article concerns the interplay between judicial review and Article V of the Constitution, which sets out the procedures for formally amending the Constitution.<sup>7</sup> According to the text, the Constitution can only be amended if two-thirds of both Houses of Congress and three-fourths of the states agree or two-thirds of the states call for a convention.<sup>8</sup> This Article addresses when, if ever, judicial interpretations of the Constitution amount to illegitimate and de facto amendments to the Constitution because they were not implemented through Article V procedures.

Although I believe our country would be better off with a strongly deferential system of judicial review where courts only overturn decisions of other political actors if those decisions are at an “irreconcilable variance” with clear constitutional text,<sup>9</sup> we do not live in that

to use that firearm for lawful self-defense in their homes), *with* *United States v. Miller*, 307 U.S. 174, 178 (1939) (“In the absence of any evidence tending to show that possession or use of a [firearm] . . . at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”).

5 *Compare* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (holding that commercial speech that is misleading or deceptive can be regulated and “therefore justifies less than strict review,” but regulation of truthful speech gives “far less reason to depart from the rigorous review that the First Amendment generally demands”), and *Ohrlik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (holding that commercial speech is afforded “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression”), *with* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (holding that the First and Fourteenth Amendment protects the truthful advertising of “routine” legal services). *Compare* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding that the First Amendment protects speech that does “no more than propose a commercial transaction” (citation omitted)), *with* *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) (holding that the First Amendment was not violated when the defendant was prohibited from distributing business advertising material in the public street).

6 RICHARD A. POSNER, *HOW JUDGES THINK* 1 (2008).

7 U.S. CONST. art. V.

8 *Id.*

9 THE FEDERALIST NO. 78, at 578 (Alexander Hamilton) (John C. Hamilton ed., 1885); see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138–39 (1893) (examining Alexander Hamilton’s descriptions of the federal

world. Rather, as David Strauss among others has explained,<sup>10</sup> constitutional law has developed much like the common law, with Court decisions building on and often reversing prior decisions, and the Court has generally not been deferential to other political decision-makers in numerous areas of constitutional law. My thesis about when Court decisions amount to de facto amendments to the Constitution accepts this strong system of judicial review as a *fait accompli*.

In this system, the Court does not improperly contravene Article V when it changes its interpretations of vague constitutional words and phrases such as “due process,” “equal protection,” “unreasonable searches and seizures,” “speech,” “establishment,” and “free exercise.” The shifts back and forth in these areas of law may simply reflect reasonable disagreements over ambiguous text and contested history and amount to nothing more than the Court doing the best it can to interpret our foundational document. Although the meaning and application of the Constitution to hard cases changes regularly because the changing Justices cause shifts in judicial doctrine, the current system anticipates these changes without the need to formally adhere to Article V.

When the Court ignores or distorts clear and unambiguous constitutional text, however, absent such an interpretation leading to an absurd result, the Court is, in effect, amending the Constitution without utilizing Article V procedures. For example, the Constitution requires that the President be thirty-five years old, and if the Court were to sanction a thirty-three-year-old President, then it would effectively and improperly amend the Constitution. Our system of judicial review assumes that judges will take text at least partly seriously; otherwise the Constitution would have little binding force.

The next Part of this Article contends that the Court has improperly amended the Tenth and Eleventh Amendments without going through the required Article V procedures. These sections do not purport to exhaustively review the literature or arguments surrounding the Court’s interpretations of the Tenth and Eleventh Amendments, but rather simply demonstrate how my thesis about proper constitutional change can be used to helpfully analyze Court decisions.

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Constitution in the FEDERALIST NO. 78); *see generally, e.g.*, ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 176–83 (2012).

<sup>10</sup> *E.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

## I. THE ELEVENTH AMENDMENT

The Eleventh Amendment is one of the clearest provisions in the United States Constitution. It provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in *law* or *equity*, commenced or prosecuted against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any Foreign State.”<sup>11</sup> The Amendment quite obviously bars any suit, whether for damages or an injunction, against a state by citizens of “another” state.

In *Hans v. Louisiana*, decided in 1890, a citizen of Louisiana sued Louisiana for unpaid interest on state bonds.<sup>12</sup> His lawyer made the obvious argument, based on clear text, that the Eleventh Amendment could not bar the suit because a citizen of Louisiana was suing his own state, not “another” state.<sup>13</sup> The Court rejected this argument, prohibited the suit, and in effect amended the Constitution without Congress or the states using the procedures set forth in Article V. The gist of the Court’s rationale was the following:

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.<sup>14</sup>

In fact, there is nothing absurd about states being amenable to suits by their own citizens, but not citizens of other states. It is one thing for the citizens of a state to raid their own treasury, but quite another to allow citizens from other states to do so. Moreover, historians agree that the Eleventh Amendment was enacted specifically to reverse the 1793 case of *Chisholm v. Georgia*,<sup>15</sup> where the Court allowed a citizen of South Carolina to sue Georgia, the precise situation barred by the text of the Eleventh Amendment. There is nothing in the text or history of the Eleventh Amendment to suggest it would apply to citizens suing their own states.

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11 U.S. CONST. amend. XI (emphasis added).

12 134 U.S. 1, 1 (1890).

13 *Id.* at 10.

14 *Id.* at 15.

15 2 U.S. (2 Dall.) 419, 419 (1793).

The modern Court has agreed that the text of the Eleventh Amendment does not bar suits by citizens against their own states. The conservative Justices have instead argued that “we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.”<sup>16</sup> Justice David H. Souter has persuasively rebutted this argument by noting that “plain text is the Man of Steel in a confrontation,” with background principles and presuppositions.<sup>17</sup> Unfortunately, Justice Souter’s interpretation of the Amendment is just as counter-textual as the interpretation of the conservatives he is criticizing, as he would allow federal question suits against a state brought by citizens of *another* state. To the best of my knowledge, no Supreme Court Justice has ever advocated that the Eleventh Amendment be interpreted as it is written, although it would make sense to do so. Such a reading might not be the best or most desirable policy result, but it is the only one dictated by clear text. This straying from unambiguous constitutional commands demonstrates how far the Court will go to ignore prior positive law to achieve desired policy goals, even if it means effectively amending the Constitution to do so.

## II. THE TENTH AMENDMENT

The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>18</sup> Along with the Supremacy Clause in Article VI,<sup>19</sup> the balance between federal and state power could not be clearer: Congress only has those powers enumerated in the Constitution (all other powers are reserved to the states or the people), but when Congress validly exercises its powers, federal law trumps state law. The Tenth Amendment and the Supremacy Clause do not tell us when Congress is properly exercising its enumerated powers, but when Congress does so, state law must give way.

In *New York v. United States*,<sup>20</sup> the Court effectively amended the Constitution by creating a non-textual exception to the constitutionally required federalism structure outlined above. The issue in *New*

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16 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

17 *Id.* at 116 n.13 (Souter, J., dissenting).

18 U.S. CONST. amend. X.

19 *Id.* art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

20 505 U.S. 144 (1992).

*York* was whether Congress could require the states to either clean up low-level radioactive waste or assume responsibility for any damages caused by the waste.<sup>21</sup> Justice Sandra Day O'Connor's majority opinion specifically conceded that the "[r]egulation of the . . . interstate market in waste disposal is . . . well within Congress' authority under the Commerce Clause."<sup>22</sup> Justice O'Connor also said, "The States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution *has not* divested them of their original powers *and transferred* those powers to the Federal Government."<sup>23</sup> Because the Court in *New York* conceded that Congress has the power to regulate low-level radioactive waste, and because doing so does not violate any other provision of the Constitution, New York's challenge to Congress's authority should have been rejected.

Instead of following the clear text and structure of the Constitution, however, the Court made up a new rule of constitutional law (which it conceded did not derive from the text of the Tenth Amendment),<sup>24</sup> that Congress is not allowed to direct the states to take certain actions, unless it does so through a generally applicable law. This anti-commandeering principle (as it has come to be called) cannot be found anywhere in the text of the Constitution. It is also inconsistent with the idea that congressionally created federal law is supreme, if it is authorized by an enumerated power and does not violate specific constitutional limitations on that power. As Justice John Paul Stevens said in dissent,

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21 *Id.* at 149, 152–53. In 1979, only three sites were open to properly dispose of low-level radioactive waste; two were forced to shut down that year because they reached maximum capacity. *Id.* at 150. The United States was faced with the possibility of not having any disposal sites for low-level radioactive waste. *Id.* In 1985, Congress enacted the Low-Level Radioactive Waste Policy Act, which provided a compromise for states with and without sites. *Id.* at 151. The Act would allow unsited states to use the facilities of sited states for seven years, if the unsited states agreed to end their external reliance by 1992. *Id.* The Act provided three incentives for a sited state to provide proper disposal of the waste generated inside and outside their borders. *Id.* at 152. First, a state could impose a surcharge on waste collected from other states; the surcharges would be given to the government to redistribute to cooperating states. *Id.* Second, states could raise those surcharges to non-complying states and eventually deny them access altogether. *Id.* at 153. Third, states that did not set up their own disposal sites before a mandatory deadline would either have to take title to their waste or be liable for all damages caused by the waste. *Id.* at 153–54. New York, "a State whose residents generate a relatively large share of the Nation's low level radioactive waste . . . complied with the Act's requirements," then ceased to comply and sued the government, arguing the Act was inconsistent with the Tenth and Eleventh Amendments. *Id.* at 154.

22 *Id.* at 160.

23 *Id.* at 156 (emphasis added) (internal quotation marks omitted) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)).

24 *New York*, 505 U.S. at 156.

The notion that Congress does not have the power to issue a simple command to state governments to implement legislation enacted by Congress, is incorrect and unsound. There is no such limitation in the Constitution. The Tenth Amendment surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I. Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions. Similarly, there can be no doubt that, in time of war, Congress could either draft soldiers itself or command the States to supply their quotas of troops. I see no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive wastes.<sup>25</sup>

The unexpected rule the Court devised in *New York*, that Congress is not allowed to require state legislatures to help implement federal law, as Justice Stevens noted, is nowhere in the text of the Constitution and was not supported by any history cited in Justice O'Connor's opinion. The next time the Court returned to this issue was in *Printz v. United States*.<sup>26</sup> The issue was whether the federal government could require state law enforcement officers to provide background checks on gun purchasers prior to the creation of a national database.<sup>27</sup>

This time, the parties fully briefed the issue of whether Congress could commandeer state governments (here, state executive officers) to help implement federal law.<sup>28</sup> Once again, the five conservatives held the answer was "no," despite clear historical evidence to the contrary.<sup>29</sup> As Alexander Hamilton wrote in the Federalist Papers, "[T]he legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be *rendered auxiliary to the enforcement of its laws*."<sup>30</sup>

As Justice Stevens pointed out, "It is hard to imagine a more unequivocal statement that state judicial and executive branch officials may be required to implement federal law where the National Gov-

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25 *Id.* at 211 (Stevens, J., dissenting) (footnotes omitted) (citation omitted) (internal quotation marks omitted).

26 521 U.S. 898, 935 (1997) (holding that Congress cannot compel States to enact or enforce a federal regulatory program by directly conscripting states' officers).

27 *Id.* at 902.

28 See Brief for Petitioner at i, *Printz*, 521 U.S. 898 (No. 95-1478); Brief for United States at i, *Printz*, 521 U.S. 898 (No. 95-1478).

29 *Id.* at 935.

30 THE FEDERALIST NO. 27, at 223 (Alexander Hamilton) (John C. Hamilton ed., 1885) (second emphasis added).

ernment acts within the scope of its affirmative powers.”<sup>31</sup> In direct contradiction to the clear text of the Tenth Amendment, and the best historical evidence available, the Supreme Court has decided for its own policy purposes that Congress is not allowed to commandeer state legislatures and state executives (for a bizarre and never adequately explained reason, state courts fall outside this rule) when it exercises its enumerated powers.

Conservative Justices have long argued that the structure of the Constitution requires the rejection of a rule that would effectively allow the federal government to destroy state sovereignty.<sup>32</sup> Requiring states to help implement valid federal laws (passed pursuant to an enumerated power), however, does no such thing. Moreover, the anti-commandeering principle allows the Court to overturn the exercise of concededly valid congressional exercises of enumerated powers based solely on the Justices’ idiosyncratic and shifting ideas of appropriate federalism values. That is not the scheme that the Constitution sets forth in the Tenth Amendment and the Supremacy Clause. If the Justices are concerned that the exercise of an enumerated power (such as the Commerce Clause) violates important state sovereignty values, the Court should interpret the enumerated power differently to give Congress less power, not concoct a non-textual limitation on federal power found nowhere in the Constitution and inapposite to the clear text. In other words, structural concerns certainly can help inform interpretation, but they should not give birth to judicially constructed rules that effectively amend the balance of power set forth in the Constitution.

This criticism of *New York* and *Printz* does not rest solely on semantic concerns (because the same result could arguably be reached by narrowing the interpretation of the Commerce Clause). Where text is truly ambiguous, judges in a system of strong judicial review have no choice but to turn to background and structural principles to apply that vague norm to difficult problems. But, where text is clear

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<sup>31</sup> *Printz*, 521 U.S. at 947–48 (Stevens, J., dissenting).

<sup>32</sup> *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (holding that the Commerce Clause did not grant Congress the authority to enact the Gun Free School Zone Act, because it “forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term”); *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding that the Commerce Clause did not grant Congress the power to apply the Fair Labor Standards Act to state governments because it would “impair the States’ ‘ability to function effectively in a federal system’”), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

and there is one meaning that is more persuasive than the rest, giving Justices carte blanche to change that meaning to suit their policy preferences gives them, in effect, the power to amend the document. That is not the system of constitutional change embodied in the text of the Constitution.

The decisions in *New York* and *Printz* may or may not be good policy, but they are inconsistent with the Constitution as written and, therefore, amount to de facto amendments to that document without using the procedures set forth in Article V. The rules the plaintiffs wanted in these cases do not represent good faith disagreement with ambiguous text and contested history, but rather, complete rejection of what the Framers of the Constitution wrote and thought. The Supreme Court should not have embraced those rules because they represent illegitimate constitutional change.

#### CONCLUSION

The Supreme Court has gone back and forth over the years on many issues involving vague constitutional text and contested history. These flip-flops on questions like abortion, gun rights, affirmative action, speech, and religion may or may not represent the most persuasive interpretations of the Constitution (if such a thing exists), but there is nothing inherently illegitimate about differing constructions of ambiguous constitutional language and unclear historical understandings. Where, however, the text is perfectly clear, and undeniable history does not undermine that clarity, the Supreme Court effectively amends the Constitution when it ignores or distorts such text to achieve its own policy objectives. That is exactly what has happened with the Tenth and Eleventh Amendments. The judicial interpretations of those provisions demonstrate that the Court has, from time to time, amended the United States Constitution without implementing the procedures required by Article V.