Measured Constitntional Steps

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INTRODUCTION

The avoidance doctrine instructs federal judges at all levels to avoid "unnecessary" decisions of constitutional issues.[1] The Supreme Court created this doctrine as part of an ongoing, self-monitoring effort to identify the appropriate scope of the federal judicial power. The doctrine thus reflects the Court's predominant view of its own role in formulating constitutional law: it does so merely as a byproduct of resolving concrete disputes. However, in adopting this view, the Court minimizes its important function of providing guidance on federal constitutional questions.

In this Article, I focus on a component of the avoidance doctrine which instructs federal judges to decide constitutional issues, when necessary, as narrowly as possible.[2] The Supreme Court in 1885 declared that federal courts should "never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[3] I term this component of the avoidance doctrine the "rule of measured steps."[4] This Article assesses what measured constitutional steps might entail and examines the justifications for "narrow" constitutional rulings.

Part I of this Article introduces the complexity of identifying measured steps and applying the rule. The justifications offered by the Supreme Court for measured rulings provide a starting point. A ruling might be classified as measured because it promotes deference to other constitutional interpreters, or because it results in only gradual change in constitutional law, or advances a limited institutional role for the federal courts. But any analysis of the rule of measured steps is incomplete if it ignores the various kinds of measuredness furthered by a court decision. First, a ruling may be measured in that it does not depart significantly from precedent. Second, measured steps might concern the narrowness or breadth of a particular constitutional holding. A third aspect of measured steps is whether a court's decision offers a flexible substantive legal standard which entails discretion in implementation or a more rigid rule. Finally, the scope of relief a court affords a constitutional violation could be measured or broad.

Part II then provides context by assessing the relationship between the rule of measured steps and doctrines based on the case or controversy requirement. The rule of measured steps (the "rule") is closely related to the justiciability requirement of standing. In fact, the rule often serves as a supplement to prudential aspects of standing. The rule is based explicitly on a theory of the federal courts' institutional role and the *judicial* duty to construe narrowly the federal judicial power. I conclude that the best characterization of the rule of measured steps is as a predecessor to the highly developed standing inquiry

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1. In an earlier article, I identified seven components of the avoidance doctrine and then focused primarily on a single component—the "last resort rule"—which obliges federal judges to avoid deciding any federal constitutional question when a case can be resolved on a nonconstitutional basis. Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

2. As Gerald Gunther pointed out, this component of the avoidance doctrine "merely narrows the constitutional ground of decision, but does not even avoid all constitutional decision." Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 16 (1964). In contrast, the last resort rule urges rulings on nonconstitutional grounds whenever possible. *Id.* For a full analysis of the last resort rule, see Kloppenberg, *supra* note 1.

3. Liverpool, N. Y. & Phila. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) (remanding the case for a new trial and further factual development).

4. Justice Ruth Bader Ginsburg, criticizing *Roe v. Wade*'s breadth, recently commended "measured motions" in constitutional and common law adjudication. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

that has emerged in recent decades. It nevertheless retains independent significance for the Court: even when plaintiffs have established standing, the Court uses the rule of measured steps to gauge how broadly or narrowly to frame a constitutional ruling.

Part III establishes the inconsistency in the Supreme Court's use (and neglect) of the rule of measured steps. I found no clear patterus in the Court's application of the rule during the last eentury and little explication of the rule. Part III focuses on *Webster v. Reproductive Health Services* because it represents the case in which the Justices most directly debate the meaning of the rule;[5] five members of the Court claimed to rely on the rule of measured steps to avoid overruling *Roe v. Wade*.[6] The five, however, disagreed among themselves about the appropriate application of the rule and were attacked by other Justices for irresponsible use of the rule. In dissent, Justice Scalia offered a flexible approach for applying the rule of measured steps and argucd that the Court should *not* take a measured step in *Webster*. These varying approaches to the rule adopted by the Justices in *Webster* show the difficulty of determining what constitutes a measured step and the significance of disputes about the rule's application. Although the rule of measured steps is often referred to as a straightforward maxim, *Webster* illustrates why it is more aceurate and useful to think of the rule as a collection of competing factors whieh must be balanced on a case-by-case basis. The remaining sections illuminate these factors by analyzing the costs and benefits of measured constitutional steps.

Part IV explores justifications for measured constitutional rulings and evaluates their implications for the roles of the Supreme Court, lower federal courts, and other constitutional intcrpreters. First, measured constitutional rulings might promote deference to other decisionmakers, thus encouraging them to participate more fully in the development of constitutional law. Seeond, measured rulings might allow for more gradual development in constitutional law by promoting laboratories for decisions in many forums across the country. As an example, Part IV focuses on *Webster* to assess whether it was a measured ruling that promoted deference and gradual development of constitutional law. I conclude that *Webster* was a measured ruling in certain respects and that it promoted a temporary kind of deference to other constitutional interpreters and advanced at least one prineiple of gradualism. However, I also show that some would classify these effects as disadvantages of measured steps and would reject application of measured steps in the abortion eontext.

I argue that use of the rule of measured steps in *Webster* influenced the long-term constitutional "dialogue" about abortion in several ways. First, the majority result in *Webster* showed weak support for *Roe* but did not completely overrule *Roe*. It announced no clear new constitutional principle to replace *Roe*. Rather, it signaled a directional shift in constitutional law without formulating a rigid rule. Some other constitutional actors thus perceived the Court in *Webster* as transferring to or sharing with them the power of constitutional law development. Second, the measured result in *Webster* afforded time for the Court to listen to the reaction to *Webster* before it decided future abortion cases. Between *Webster* and the next landmark abortion ruling—which reaffirmed parts of *Roe*—numerous constitutional actors voiced their views on abortion regulation; the composition of the Justices changed; the vote of one Justice changed; and new litigation provided further factual development of challenges to abortion regulation.

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5. 492 U.S. 490 (1989).
6. 410 U.S. 113 (1973).

But analyzing *Webster* also demonstrates the difficulty of weighing the competing factors. The negative effects of gradualism and deference in the abortion context could lead a jurist to find that the disadvantages of taking a measured step outweigh the justifications for doing so. In *Webster*, the Court provided less clear guidance, leaving the content of federal law ambiguous and less uniform. Justice Scalia argued that the failure to directly overturn *Roe* by departing from the rule of measured steps retained the status quo and did not recognize appropriately the power of the states. Others who disagree with Scalia on the merits of abortion rights might also reject a measured approach for the federal courts in that context. When federal courts are ambiguous, move gradually, and defer too extensively to other constitutional actors, they fail to secure a fundamental individual right. Thus, weighing the costs and benefits of measured steps will depend on the substantive issue and a jurist's view of the merits of that issue.

Part V explores the disadvantages of measured steps, such as the failure of courts to provide guidance when they avoid constitutional decisionmaking, as well as the ambiguity and lack of uniformity in federal law resulting from some measured rulings. In particular, when the Supreme Court refuses to fully address a constitutional issue, the status quo remains intact; change is only incremental under the rule of measured steps. A decision to take a measured step is not neutral—application of the rule is inextricably linked to the substantive constitutional issue at stake. This Part considers harms resulting to individual litigants and others by delayed resolution of constitutional controversies, the instability engendered by certain approaches to the rule, and the inefficiencies the rule poses for the courts and other constitutional actors. Specifically, this Part focuses on recent litigation in the lower federal courts involving gays and lesbians in the military. This litigation is useful to contrast the Supreme Court's use of the rule with that of the lower federal courts, thus advancing consideration of differentiated uses of the rule at various court levels. The Court's pronouncements sometimes serve a symbolic function in our polity, and the effects of Supreme Court rulings can differ from those of other courts. For example, the costs in terms of lessened guidance and uniformity for federal law are sometimes greater when the Supreme Court fails to address an issue because of the rule. Courts should heed those differences in employing the rule of measured steps.

I urge courts to consider explicitly the advantages and costs of taking a measured step in each case. I argue that the Supreme Court (and in some circumstances, other courts) should depart from the rule in certain contexts. This flexible analysis will enable courts to balance their sometimes competing functions of providing guidance on constitutional questions and resolving particular disputes as narrowly as possible.[7] And by explaining the value choices they make in applying the rule, courts will advance a discussion of the appropriate role of the courts in a dialogue about federal constitutional issues.

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7. These two models roughly reflect two different functions of the courts: providing constitutional law guidance and resolving particular disputes. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (describing the norm-articulation function of courts); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 238 (1972) (describing the symbolic role of Court rulings in "shap[ing] people's vision of their Constitution and of themselves"); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1526-28 (1994) (considering tensions between the litigants' interests and the public interest in court decisions); *see also* sources cited *infra* note 249.

I. DEFINING THE RULE OF MEASURED STEPS

Formulating a definition of measured constitutional steps is complex. The justifications occasionally referenced by the Supreme Court in support of measured constitutional rulings provide a starting point.[8] Narrow rulings may give more deference to administrative decisionmakers or other constitutional interpreters, thus promoting a sharing of power.[9] Courts may issue measured rulings when they have insufficient information to consider the broader ramifieations of a ruling. Measured constitutional rulings are sometimes justified because more gradual changes in precedent allow for stability and satisfy reliance expectations.[10] Measured rulings may also insulate the federal judiciary from charges of inappropriate political activism.[11] Thus, the judiciary may use the rule to protect itself, relying on the countermajoritarian diffieulty and institutional competence arguments to transfer the responsibility for struggling with a constitutional problem to the states, another federal branch, or othcr constitutional decisionmakers. A ruling might be considered a measured step to the extent it advances these types of justifications.

But that analysis is insufficient if it does not assess the varied aspects of measuredness. A second axis by which to define measured rulings should include the kind of measuredness furthered by a court decision. For example, a ruling might be elassified as measured if it does not depart significantly from precedent. But is a ruling measured if it departs from eurrent precedent in order to return to a preexisting constitutional ruling—that is, does the *direction* of the change matter? Is a ruling measured if it purports to preserve precedent but signals a large shift in thc direction of constitutional law or the type of protection the Constitution affords?[12]

Whethcr a decision is a measured step also involves how narrowly or broadly a court construes a constitutional provision. For example, a court could issue a ruling that is consistent with precedent, but broad in its holding. *Roe* is often criticized due to its broad holding,[13] although it was consistent with earlier privacy rulings.[14]

A third aspect of measuredness is whether a eourt propounds a flexible legal standard involving discretion in implementation or a more rigid rule requiring automatic application. Thus, some might characterize *Roe* as a nonmeasured ruling both because the Court articulated a broad principle and because the Court set out a relatively rigid trimester scheme to apply that principle. In eontrast, the Court arguably used a flexible standard—the "undue burden" standard—when it announced a new constitutional

8. *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES (1991) (discussing rules as relationships to their underlying justifications or summaries of underlying policy concerns).

9. *See, e.g.*, FCC v. Paeifica Found., 438 U.S. 726, 756 (1978). This case is discussed *infra* part IV.A.

10. Webster v. Reproductive Health Servs., 492 U.S. 490, 535 (1989) (Scalia, J., coneurring in part and concurring in the judgment); Ginsburg, *supra* note 4, at 1198.

11. *Webster*, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment).

12. Parts III and IV consider whether *Webster* was a measured step. Although the plurality claimed to preserve *Roe*, the dissenters accused the majority of eviscerating *Roe* for all practical purposes. *See infra* text accompanying notes 55-56.

13. *See, e.g.*, Ginsburg, *supra* note 4, at 1198 (citing other commentators).

14. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). *But see* Bowers v. Hardwick, 478 U.S. 186 (1986).

interpretation in *Casey*.[15] The lower federal courts and state courts construe the "undue burden" standard as they apply it to new factual situations. In considering whether *Casey*'s flexible standard is a kind of measured step, however, we must also ask how much discretion it affords other constitutional interpreters. The range of discretion may be so limited that the choice left to others is illusory or insignificant.

The scope of relief afforded by a court ruling is another way to gauge measuredness. A remedy may apply to a class of persons or only to an individual litigant. The ruling may have a broad or narrow precedential effect. Implementation of the remedy may be swift or deliberate. All of these factors are relevant to determining whether a ruling is measured in its effect.

Defining measuredness is further complicated by the intersection of these various axes. For example, did the Court take a measured step in *Brown v. Board of Education*?[16] Most people would probably characterize *Brown* as a departure from measured steps because the Court overruled the precedent of *Plessy v. Ferguson*.[17] *Brown*, however, followed a series of Court cases paving the way to its new precedent.[18] Further, while *Brown*'s holding that separate public education facilities were inherently unequal could be characterized as a broad rule, its implementation was narrow. When the Court refused to order a fully effective remedy in the 1955 case, *Brown v. Board of Education* ("*Brown II*"),[19] the outcome of the decision in *Brown* became more measured.[20]

Despite the difficulties in defining the rule of measured steps, the Court has spoken of the general avoidance doctrine as an unquestioned mandate, part of a wise tradition validated by time and experience.[21] In *Webster*, Justice O'Connor termed the rule one of the fundamental rules of judicial restraint.[22] But the Court's own inconsistent approach to the rule during the last century shows that the rule's application is not straightforward. As a prudential technique, the rule is subject to flexible interpretation by each judge in every lawsuit.[23] The rule of measured steps, like other avoidance techniques, appears highly manipulable and sometimes appears to be used when a majority of the Justices find

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15. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); *see* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (describing differences between standards and rules in the Court's recent constitutional adjudication and assessing their implications for the Court's role); *see also* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (discussing the life cycle of a rule over time).

16. 347 U.S. 483 (1954).

17. 163 U.S. 537 (1896).

18. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950).

19. 349 U.S. 294 (1955). For critieism of the Court's gradualist theory in *Brown II*, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1753 (1993). *See also* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §16-20, at 1512 (2d ed. 1988).

20. I draw this example from a letter from Erwin Chemerinsky which greatly assisted me in defining the multiple aspects of measured steps. Letter from Erwin Chemerinsky, Legion Lex Professor of Law, University of Southern California, to Lisa A. Kloppenberg, Assistant Professor of Law, University of Oregon School of Law (Mar. 26, 1995) (on file with Author).

21. *See, e.g.*, Reseue Army v. Municipal Court of L.A., 331 U.S. 549, 572 (1947).

22. *Webster*, 492 U.S. at 526. The Court frequently refers to the general avoidance doctrine as one of the fundamental principles of constitutional adjudication. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudieation, it is that we ought not to pass on questions of constitutionality . . . unless such adjudieation is unavoidable." Specter Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944); *see also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-46 (1936).

23. Kloppenberg, *supra* note 1, at 1027-35 (discussing the flexible implementation of the avoidance doctrine); *see* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 59-73 (1982) (discussing the prudential type of constitutional argumentation, including avoidance techniques). This flexibility is similar to that used for rules of equity. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 134-35 (1991). Laycock warns that the courts' frequent recitations of the irreparable injury rule "help sustain the illusion that it is still a viable part of our law." *Id.* at 99.

the rule convenient to support their end.[24] That result might be a conclusion on the merits of a particular substantive constitutional issue; in contrast, it might be simply the result of avoiding a decision, which retains the status quo and rejects (at least temporarily) further development of constitutional law.[25]

I conclude that the problem with the Court's application of the rule during the past century is that the rule is often referenced as a given—as a rule of mechanical application—without sufficient explanation of (1) whether a court has taken a truly measured step and (2) the costs and benefits of the court's measuredness. I argue instead for a flexible, context-dependent application of the rule of measured steps. For some, flexibility may be valuable because it allows courts to sidestep "political" controversies.[26] In my view, flexibility in applying the rule is valuable because it allows courts to shift between their sometimes competing public guidance and dispute resolution functions.[27] This Article offers no easy solutions to the difficulty of precisely defining what constitutes a measured step, but these axes of measuredness provide a useful basis for discussing what factors should be involved in applying the rule of measured steps. Although the following Parts of this Article develop and examine these axes of measuredness, it is important to remember the underlying definitional difficulty and the multiple aspects of measuredness.

II. PLACING THE RULE OF MEASURED STEPS IN CONTEXT

Before examining the controversy among current Supreme Court Justices over the rule of measured steps, it is helpful to consider the rule's link to the case and controversy requirement and to separate it from similar doctrines of judicial restraint. The avoidance doctrine lists seven ways in which judges should avoid deciding constitutional issues.[28]

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24. Like other self-imposed judicial restraint techniques, use of the rule leaves courts open to the charge that they have implemented the rule in a manipulative, results-oriented manner. *See, e.g.*, Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1142-43 (1977); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229 (1990); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 1, 14-22 (1982); Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 617-18 (1986).

25. *See Webster*, 492 U.S. at 534 (Scalia, J., concurring in part and concurring in the judgment); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 118, 200-01 (1962) (noting the effects of avoidance, including perceived legitimation of status quo); *see also* BOBBITT, *supra* note 23, at 63-69; Kloppenberg, *supra* note 1, at 1050-51. *See generally* Gunther, *supra* note 2. Cass Sunstein has eloquently demonstrated how contemporary constitutional law in many respects treats the status quo as neutral in CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

26. *See* BICKEL, *supra* note 25, at 111-98 (discussing "The Passive Virtues"); BOBBITT, *supra* note 23, at 59-73. *But see generally* Gunther, *supra* note 2.

27. See *infra* part V for a discussion of these two models for adjudication.

28. The avoidance doctrine, as set out by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), consists of seven rules:

> (1) "The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding . . . ." *Id.* at 346.
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> (2) "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Id.* (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Commisioners of Emigration, 113 U.S. 33, 39 (1885)).
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> (3) "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 347 (quoting Liverpool, N.Y. & Phila. S.S. Co., 113 U.S. at 39).
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> (4) "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* at 347.
>
> (5) "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that

As I noted in an earlier article, some of the avoidance rules overlap entirely or in significant measure with doctrines flowing from judicial interpretation of the case or controversy requirement of Article III.[29] These related doctrines include the justiciability doctrines of standing, ripeness, and mootness, the political question doctrine, and the ban on advisory opinions.[30]

For example, the first rule of the avoidance doctrine—which requires an adversarial, noncollusive dispute—overlaps with the ripeness and mootness requirements to ensure that a controversy is "live" and in need of judicial resolution.[31] The second component of the avoidance doctrine mirrors the ripeness requirement by obliging federal courts to refrain from deciding a dispute until it is ready for resolution.[32] The first two rules of the avoidance doctrine are alternative, but not distinctive, types of justiciability limitations on the federal judicial power.[33] They appear to function primarily as supplemental versions of the ripeness and mootness requirements.[34]

The third component of the avoidance doctrine is the rule of measured constitutional steps. It correlates most closely to the justiciability requirement of standing, which obliges a litigant to allege that she has personally suffered or imminently will suffer a concrete injury fairly traceable to the defendant's conduct, and that the court's decision will likely redress her injury.[35] In requiring federal courts to rule no more broadly than the precise facts require when they reach constitntional issues, the rule appears to reflect the fact-specific focus of the standing inquiry.[36] The rule of measured constitutional steps is based on concerns addressed by both the constitutional and prudential limitations of

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he is injured by its operation." *Id.*

(6) "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." *Id.* at 348.

(7) If a "serious doubt" concerning the validity of an act of Congress is raised, the "'Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

29. Kloppenberg, *supra* note 1, at 1011-27; *see also* Rescue Army v. Municipal Court of L.A., 331 U.S. 549, 570-72 (1947); BICKEL, *supra* note 25, at 125; Gunther, *supra* note 2, at 13-17.

30. *Rescue Army*, 331 U.S. at 570. The Court recognized that "often the line between applying the [avoidance] policy or the [case or controversy] rule is very thin." *Id.* at 570-71.

31. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.7, at 110, § 2.4.1, at 113, § 2.5.1, at 125 (2d ed. 1994); Bandes, *supra* note 24; Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

32. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967); *see* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987); Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980).

33. Kloppenberg, *supra* note 1, at 1018-20.

34. *See* Tsen Lee, *supra* note 31, at 654-68.

35. Flast v. Cohen, 392 U.S. 83, 100 (1968). For background on the standing doctrine, see Bandes, *supra* note 24; Gene R. Nichol, *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

36. Moreover, another rule of the avoidance doctrine requires that the plaintiff be injured by the challenged legislation, and thus mirrors the injury and causation components of the standing inquiry. Kloppenberg, *supra* note 1, at 1022. The doctrine of standing, like the avoidance doctrine, reflects "the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" Allen v. Wright, 468 U.S. 737, 752 (1984) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)); *see also* David Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37 (arguing that standing requirements are applied more stringently to constitutional claims).

standing and ripeness.[37] The fifth component of the avoidance doctrine, which requires that the challenged legislation injure the plaintiff,[38] is closely linked to the concrete injury and causation requirements of standing.

While standing purportedly centers on the qualification of litigants,[39] the rule of measured constitutional steps is more closely linked with third-party standing. The rule sorts out the issues to be determined. The avoidance doctrine is based on separation of powers and federalism principles, as well as on assertions about the delicate and final nature of constitutional review, the judiciary's limitations, and the importance of constitutional adjudication.[40] Thus, the rule of measured steps emphasizes that courts must carefully safeguard their own institutional role. The federal courts' competence is limited in this essentialist view.[41] Indeed, Justice Brandeis familiarized the modern judiciary with the avoidance doctrine in cases in which he was concerned about litigant abuse of the federal courts' limited power, including collusive suits and requests for advisory opinions. In an earlier article, I explored the historical context in which Justices Brandeis and Frankfurter, and then Professor Alexander Bickel, emphasized avoidance techniques.[42] They shared concerns about the countermajoritarian difficulty and advocated a limited role for the federal courts in reviewing the acts of elected officials.[43] Nevertheless, the Supreme Court's recent construction of another component of the avoidance doctrine, the last resort rule, arguably transferred some of this responsibility for safeguarding the courts' power from judges to litigants.[44] In contrast, the rule of measured steps highlights the *judicial* duty to construe narrowly the federal judicial power.

Thus, it is difficult to define precisely the relationship of the rule of measured steps to other aspects of the case or controversy requirement. As mentioned in the Introduction, the rule may be best characterized as a predecessor to the recently emerged, highly

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37. *Flast*, 392 U.S. at 97 (discussing the unavoidable blending of constitutional and prudential considerations underlying the avoidance doctrine). For a discussion of the prudential aspects of standing, see Kloppenberg, *supra* note 1, at 1022-23. Some suggest that the myriad applications of justiciability doctrines may be used to obfuscate decisions on the merits. *See* Albert, *supra* note 24, at 1143 (stating that justiciability determinations reflect substantive decisions about the actionability of claims); Bandes, *supra* note 24, at 229 (arguing that by using a private rights model, the Court fails to sufficiently provide a role for federal courts in "safeguarding evolving constitutional values").

38. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936).

39. "[T]he '"fundamental aspect of standing" is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated."'" *Allen*, 468 U.S. at 791 (Stevens, J., dissenting) (emphasis in original) (quoting United States v. Richardson, 418 U.S. 166, 174 (1974) (quoting Flast, 392 U.S. at 99)); *see* Singleton v. Wulff, 428 U.S. 106, 124 (1976) (Powell, J., concurring in part and dissenting in part).

40. Rescue Army v. Municipal Court of L.A., 331 U.S. 549, 571-75 (1947). In Kloppenberg, *supra* note 1, I argue that the separation of powers and comity concerns are weightier than other justifications for the avoidance doctrine, at least in the context of applying the last resort rule.

41. The theme of institutional competence and its link to legal process scholarship is explored by William N. Eskridge, Jr. and Philip P. Frickey. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

42. Kloppenberg, *supra* note 1. Bobbitt notes that the Justices used the "passive virtues" more frequently once Bickel told them what they were doing. BOBBITT, *supra* note 23, at 232; *see also* Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISCIPLINARY L.J. 809 (tracing the doctrine of judicial restraint from Frankfurter and Bickel to Cover); sources cited *infra* note 88.

43. Kloppenberg, *supra* note 1, at 1011-27.

44. *Id.* at 1027-35 (discussing the Court's First Amendment ruling in Zobrest v. Catalina Foothills School District, 113 S. Ct. 2462 (1993), reached by the Court because parties failed to "press" the nonconstitutional grounds for discussion).

developed standing inquiry.[45] The rule serves as a supplement to prudential aspects of standing, but it focuses on issues rather than parties. Nevertheless, the rule retains some significance independent of the standing inquiry. Through use of the rule, some constitutional issues that form part of a justiciable case or controversy are not decided for prudential reasons. Even if a litigant has standing to bring a constitutional issue to federal court, the rule affords the court discretion to issue a broader or narrower ruling; to rule on one constitutional issue and avoid another; to depart to a greater or lesser extent from precedent; and to issue a broad and speedy remedy or a narrow and gradual remedy. Moreover, the Supreme Court sometimes speaks of the rule of measured steps as a restraining principle that is independent of justiciability requirements. As shown below, for example, the justiciability doctrines were not at issue in *Webster*, yet the Justices fiercely debated the rule of measured steps.

III. DISPUTE OVER THE RULE IN *WEBSTER*

In examining Supreme Court cases invoking the rule of measured steps from 1885 to 1995, I discerned no clear patterns in the Court's application of the rule other than inconsistency. I found surprisingly little discussion of the rule, although dissenting Justices often point out that the majority ignored the rule in order to issue an overly broad decision.[46] In *Webster v. Reproductive Health Services*, Justice Scalia provided the only extensive analysis I found of the Court's prior use of the rule. Citing cases from 1803 to 1989, he argued persuasively that there has been significant inconsistency in the Court's application of the rule and that it should be applied flexibly.

Thus, *Webster* demonstrates the Court's long-term inconsistency toward the rule. This Part also evaluates *Webster* because it highlights, to date, the Justices' most pointed and direct debate on the meaning of the rule of measured steps. Their varying approaches to the rule highlight the difficulty of determining what constitutes a measured step and the importance of disputes about the rule's application. For example, the Justices in the plurality adopted a dispute-specific model which narrowed the value of precedent and allowed easier departure from previous rulings.[47] O'Connor, on the other hand, used the rule to support her refusal to retreat completely from *Roe* or supplant *Roe* with a clear new constitutional principle.[48] Scalia advocated a flexible approach to the rule whereby the Supreme Court could depart from measured steps when certain factors constituting good cause exist.[49]

This disagreement underscores that the rule of measured steps has not and cannot be applied mechanically with a simple reference to its traditional justifications. The Justices fiercely debated the rule in *Webster* because of the rule's potential impact on the Court's

45. Professor Erwin Chemerinsky suggests that Brandeis' *Ashwander* formulation can be viewed as an early statement of the justiciability doctrines. Letter from Erwin Chemerinsky, Legion Lex Professor of Law, University of Southern California, to Lisa A. Kloppenberg, Assistant Professor of Law, University of Oregon School of Law (Feb. 24, 1994) (on file with Author); *see* Albert, *supra* note 24, at 1144 n.21 (noting that the justiciability doctrines were not "explored or elaborated" in 19th-century constitutional adjudication, but citing Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885), an early avoidance doctrine case).

46. Webster v. Reproductive Health Servs., 492 U.S. 490, 533; *see also Zobrest*, 113 S. Ct. at 2469-75 (Blackmun, J., dissenting); Rust v. Sullivan, 500 U.S. 173, 223 (1991) (O'Connor, J., dissenting); Illinois v. Gates, 462 U.S. 213, 246-74 (1983) (White, J., concurring in the judgment). Scalia's measured steps discussion appears at *Webster*, 492 U.S. at 532 (Scalia, J., dissenting).

47. *Webster*, 492 U.S. 490.

48. *Id.* at 525-26 (O'Connor, J., concurring in part and concurring in the judgment).

49. *Id.* at 533-35 (Scalia, J., concurring in part and concurring in the judgment).

role in formulating constitutional law regarding abortion regulation. *Webster* shows why application of the rule of measured steps cannot be separated from the context of the substantive constitutional issue in a given case. It thus illustrates the need to approach the rule as a collection of factors to balance on a case-by-case basis.

The Bush administration and the State of Missouri urged the Court to overrule *Roe v. Wade* in the *Webster* case.[50] A five-member majority of the Court upheld Missouri's abortion statute, including its viability testing provision. Justice O'Connor concurred in the Court's judgment, but refused to join the plurality's opinion to the extent it "reexamine[d] the constitutional validity of *Roe v. Wade*."[51] Apparently, her refusal to join in a draft majority opinion circulated by Chief Justice Rehnquist attacking *Roe* was instrumental in preventing the Court from expressly overturning *Roe* in *Webster*.[52] As explained below, O'Connor relied on the second rule of the avoidance doctrine (mirroring the ripeness inquiry) and the rule of measured constitutional steps to argue that the Court should affirm the constitutionality of the Missouri statute without reaching the broader constitutional issue of *Roe*'s validity.[53]

A. The Plurality's Approach to the Rule in Webster

Both Justice O'Connor and the Justices in the plurality claimed to be abiding by the rule of measured steps in *Webster*, but they disagreed on the methods of doing so. In its cryptic Section III, the plurality applied the rule of measured steps and rejected the invitation from Missouri and the United States to overrule *Roe* because the "facts of the present case . . . differ from those at issue in *Roe*."[54]

> Here, Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. In *Roe*, on the other hand, the Texas statute criminalized the performance of *all* abortions, except when the mother's life was at stake. This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases.[55]

With this emphasis, the plurality appeared to confine *Roe*'s precedential value very narrowly to its facts, claiming an ability to "modify" and "narrow" *Roe* without disturbing its holding.

The plurality's approach to *Roe* and the rule of measured steps drew vehement criticism from many quarters. The dissenters charged that the plurality used the rule to eviscerate *Roe* while claiming to preserve it.[56] The dissenters also accused the plurality of manufacturing a controversy between the Missouri statute and *Roe* in order to needlessly

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50. *Id.* at 521 (plurality opinion); *see* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 665-66 (1993).

51. *Webster*, 492 U.S. at 525 (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted).

52. Benjamin Weiser & Bob Woodward, *The Marshall Files*, WASH. POST, May 23, 1993, at A1.

53. *Webster*, 492 U.S. at 525-26 (O'Connor, J., concurring in part and concurring in the judgment).

54. *Id.* at 521 (plurality opinion).

55. *Id.* (emphasis in original) (citations omitted).

56. *Id.* at 538 (Blackmun, J., concurring in part and dissenting in part). Some commentators agreed. *See* Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat From* Roe v. Wade, 138 U. PA. L. REV. 83 (1989); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2007-09 (1994) (contending that judges can evade precedents not otherwise distinguishable by viewing holdings very narrowly); Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989).

address constitutional questions that were not actually presented.[57] Thus, the dissenters directly contested the proposition that the plurality took a measured step in *Webster*. As shown below, O'Connor and Sealia also disputed the plurality's approach to the rule of measured steps.

B. Justice O'Connor's Approach to the Rule in Webster

Justice O'Connor concurred with the plurality's judgment upholding the statute's viability testing provision as constitutional.[58] She refused to join in the plurality's reasoning, however, arguing that the rule of measured steps did not require the plurality's broad constitutional ruling. Because she found no conflict between the statutory provision and precedent, she found no necessity "to reexamine the constitutional validity of *Roe*."[59] O'Connor did not give any general theory about applying the rule of measured steps, and she rejected Scalia's argument that compelling reasons existed in *Webster* to depart from the rule. Instead, she responded that, although Missouri asked the Court to overrule *Roe*, the Court could uphold the statute as Missouri interpreted it under existing precedent.[60] She did suggest, however, that "[w]hen the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully."[61] Thus, her application of the rule led to a different result than the plurality's narrow confinement of *Roe* to its precise facts.

O'Connor argued that the State has a compelling interest in determining whether if the fetus is viable. By adopting the nonmandatory interpretation of the extremely costly portions of the testing provision urged by Missouri and by emphasizing that plaintiffs did not challenge the twenty-week presumption of viability on appeal, O'Connor confined the potential constitutional dispute.[62] Her narrow interpretation of the meaning of the viability testing provision was crucial to avoiding reconsideration of *Roe* and other

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57. "The conflict between § 188.029 and *Roe*'s trimester framework, which purportedly drives the plurality to reconsider our past decisions, is a contrived conflict: the product of an aggressive misreading of the viability-testing requirement and a needlessly wooden application of the *Roe* framework." *Webster*, 492 U.S. at 542 (Blackmun, J., concurring in part and dissenting in part).

58. The Missouri statute provided that if a physician had reason to believe that a fetus was 20 or more weeks gestational age, viability was to be determined by appropriate tests and exams according to a professional standard of care. This essentially created a presumption of viability at 20 weeks, which the physician must rebut. The lower court construed the testing as mandatory, whereas the plurality in *Webster* found it optional. The testing requirement was intended to require "subsidiary findings as to viability," and therefore was consistent with the state's "important and legitimate" interest in maternal health and potential life after viability. *Webster*, 492 U.S. at 514 (plurality opinion).

59. *Id.* at 525 (O'Connor, J., concurring in part and concurring in the judgment).

60. O'Connor wrote:

> The Court today has accepted the State's every interpretation of its abortion statute and has upheld, under our existing precedents, every provision of that statute which is properly before us. Precisely for this reason reconsideration of *Roe* falls not into any "good-cause exception" to this "fundamental rule of judicial restraint . . . ."

Id. at 526 (quoting Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 467 U.S. 138, 157 (1984)).

61. *Id.*

62. *Id.* at 526-27. The dissenters, while rejecting her interpretation of the provision, agreed that her interpretation of the testing provision could be reconciled with *Roe*. *Id.* at 543-46 (Blackmun, J., concurring in part and dissenting in part).

precedent.[63] She thus preserved some part of *Roe* for reconstruing in a later case and allowed time for further factual development in separate litigation.

C. Justice Scalia's Approach to the Rule in Webster

Justice Scalia urged the Court in *Webster* to reach the validity of *Roe*, and termed O'Connor's reliance on the avoidance doctrine in order to evade reconsideration of *Roe* "irresponsible."[64] He argued that the doctrine did not apply because the Court could not avoid deciding the constitutionality of the Missouri statute.[65] The only dispute, Scalia maintained, was over the breadth of the constitutional ruling once the Court determined it would reach the merits of the constitutional issue.[66] Justice O'Connor, as noted above, agreed that some constitutional ruling was necessary, but urged a narrow ruling, relying in part on the rule of measured steps.

Scalia argued that the rule of measured constitutional steps "is a sound general principle, but one often departed from when good reason exists."[67] He characterized the rule as having a "frequently applicd good-cause exception" and criticized the Court for venerating the rule in *Webster* to avoid overruling *Roe*, which he viewed as a paradigm of broad constitutional decisionmaking.[68] Scalia provided numerous examples of cases in which the Court departed from the rule, spanning from *Marbury v. Madison* to the 1989 term.[69] He noted that "[t]he Court has often spoken more broadly than neededd in precisely the fashion at issue here, announcing a new rule of constitutional law when it

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63. To establish where O'Connor diverged from the plurality on applying the rule of measured steps in *Webster*, it is helpful to separate her discussion of the viability testing provision into two parts. First, she agreed with the plurality's interpretation of the testing requirement: "[I]t does nothing more than delineate means by which the unchallenged 20-week presumption of viability may be overcome if those means are useful in doing so and can be prudently employed." *Id.* at 527 (O'Connor, J., concurring in part and concurring in the judgment). This interpretation differed from how the court of appeals and the dissenting Justices read the testing requirement. Indeed, the dissenters found the interpretation adopted by the plurality and O'Connor was implausible; they simply found no ambiguity in the provision. *Id.* at 542-46 (Blackmun, J., concurring in part and dissenting in part). They read the provision as a mandate to perform tests to find gestational age, fetal weight, and lung maturity, even if a doctor deemed such testing imprudent. Second, although O'Connor and the plurality agreed on a nonmandatory interpretation of the viability testing provision, she could reconcile that interpretation with existing precedent. *Id.* at 526-31 (O'Connor, J., concurring in part and concurring in the judgment). She reasoned that precedent recognized a state's interest in promoting potential life *when* viability is possible. The statute's 20-week presumption of viability was not challenged on appeal. Thus, she concluded that requiring tests "useful to determining whether a fetus is viable, when viability is possible, and when [testing] would not be medieally imprudent" was constitutional. *Id.* at 530.

64. *Id.* at 537 (Sealia, J., concurring in part and concurring in the judgment).

65. As Gerald Gunther explained, when the Court relies on the rule of measured steps, "it merely narrows the constitutional ground of decision, but does not even avoid all constitutional decision." Gunther, *supra* note 2, at 16.

66. "We . . . could not avoid deciding, whether the Missouri statute meets the requirements of the United States Constitution. The only choico available is whether, in deciding the constitutional question, we should use *Roe v. Wade* as the benchmark, or something else." *Webster*, 492 U.S. at 532-33 (Sealia, J., concurring in part and concurring in the judgment).

67. *Id.* at 533.

68. Sealia wrote:

> It would be wrong . . . to ignore the reality that our policy not to "formulate a rule of constitutional law broader than is required by the precise facts" has a frequently applied good-cause exception. But it seems particularly perverse to convert the policy into an absolute in the present case, in order to place beyond reach the inexpressibly "broader-than-was-required-by-the-precise-facts" structure established by *Roe v. Wade*.

Id. at 534.

69. Scalia noted:

> I have not identified with certainty the first instance of our deciding a case on broader constitutional gronnds than absolutely necessary, but it is assuredly no later than *Marbury v. Madison*, 1 Cranch 137 (1803), where we held that mandamus could constitutionally issue against the Secretary of State, although that was unnecessary given our holding that the law authorizing issuance of the mandamus by the Court was unconstitutional.

Webster, 492 U.S. at 533 (Sealia, J., concurring in part and concurring in the judgment).

could have reached the identical result by applying the rule thereby displaced."[70] Scalia continued: "It is rare, of course, that the Court goes out of its way to *acknowledge* that its judgment could have been reached under the old constitutional rule, making its adoption of the new one unnecessary to the decision, but even such explicit acknowledgment is not unheard of."[71] He concluded that it is difficult or impossible to name *all* the cases when the Court has ruled more broadly than necessary.

The task of evaluating the Court's use of the rule of measured steps is complicated because there is likely to be substantial disagreement in coming up with a list of overly broad or "unnecessary" rulings, in part due to the definitional problems discussed in Part I.[72] Scalia demonstrates persuasively, however, that the Supreme Court has not used it in a consistent and coherent manner. The Court, at least in practice, has refused to "*never* . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[73] Instead, there is considerable flexibility in the Court's application of the rule, although standards remain unarticulated. This Article urges courts to develop definitions of measuredness and assess how they apply the rule, balancing its competing concerns, in light of the proper role of the federal courts.

Scalia, in considering whether to apply the rule of measured steps in *Webster*, asked "whether there are valid reasons to go beyond the most stingy possible holding today."[74] He advocated a flexible approach toward the rule which requires jurists to examine whether it is appropriate to issue a broad or measured constitutional ruling on a case-by-case basis. Using specific factors, he concluded that "valid and compelling" reasons for departure from the rule existed in *Webster*.[75] Part IV.B examines the factors offered by Scalia for applying his flexible approach to the rule.

D. Other Avoidance Techniques in Webster

The rule of measured steps was not the only technique used to avoid constitutional adjudication in *Webster*. The Court found nonjusticiable a challenge to the statute's preamble, which provided that life begins at conception.[76] The Court also found moot the

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70. *Id.* At the start of his opinion, Scalia says the viability testing provision cannot be reconciled with *Roe*, *id.* at 532, but later he says that the question whether the provision "contravened this Court's understanding of *Roe*" is arguable. *Id.* at 536 n.1.

71. *Id.* at 534 (emphasis in original) (citations omitted).

72. *See* Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the* Teague *Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1050 (1994) ("Postmodern insights gleaned from philosophical hermeneutics facilitate a deconstruction of the Court's crucial distinction between old and new rules of constitutional law: any constitutional rule can be categorized as *both* old and new." (emphasis in original)); Morton J. Horwitz, *The Supreme Court, 1991 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30 (1993) (assessing the Court's approach to the legitimacy of constitutional change set forth in Planned Parenthood v. Casey, 112 S. Ct. 1791 (1992)).

73. Liverpool, N. Y. & Phila. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) (emphasis added).

74. *Webster*, 492 U.S. at 534 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia's flexible approach to the rule of measured steps is an interesting contrast to his preference for rules instead of flexible standards in other contexts. *See* Sullivan, *supra* note 15.

75. *Webster*, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment).

76. The Court found that, because the preamble had not been applied or threatened to be applied to restrict the activities of the *Webster* plaintiffs in a "concrete" manner, no justiciable case or controversy was presented. The Court reasoned:

> It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way. Until then, this Court "is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

Id. at 506-07 (plurality opinion) (quoting Tyler v. Judges of Court of Registration, 179 U.S. 405, 409 (1900)); *see also*

challenge to the portion of the statute forbidding public employee abortion counseling.[77] Moreover, O'Connor concurred on narrow grounds with the plurality's rejeetion of plaintiffs' facial challenge to the statute's ban on the use of publie facilities and public employees for abortions.[78] She noted that a facial challenge to a statute is the most difficult type, "'since the challenger must establish that no set of eircumstanees exists under which the Act would be valid.'"[79]

Finally, the Justices relied on another component of the avoidance doctrine in interpreting the viability testing provision. In discussing the testing provision's meaning, both O'Connor and the plurality referenced the component of the avoidance doctrine which provides that "'statutes will be interpreted to avoid constitutional difficulties'" when possible.[80] The five Justices construed the testing provision in a way that saved it from constitutional infirmity. The dissenters found application of this rule improper because they found the viability testing provision unambiguously mandatory. They reasoned that the rule of avoiding constitutionally infirm interpretations of statutes only applies when the statute is ambiguous.[81]

E. Conclusion

Webster serves as a good illustration of the need to develop a coherent approach to the rule of measured steps. The debate among theJustices about the rule has important ramifications for the scope of the Court's holding and the development of constitutional law on abortion regulation. Thus, application of the rule is inextricably linked to the direction and development of constitutional law in a given context. *Webster* also demonstrates the complexity of defining measuredness.

Now that the stakes of the debate are set out, the next Part of this Article uses *Webster* to assess the rule's justifications. It examines whether *Webster* can be classified as a measured step and evaluates the rule's impact on the constitutional dialogue about abortion.

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id. at 523 (O'Connor, J., concurring in part and concurring in the judgment).

The plurality also cited a major standing case. *Id.* at 507 (plurality opinion) (citing Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 473 (1982)). Additionally, the Court refused to entertain a claim that the preamble violates the Missouri constitution, finding it "inappropriate for a federal court to pass upon this claim before the state courts have interpreted the statute." *Id.* at 507 n.6.

77. *Id.* at 512; *see also id.* at 523 (O'Connor, J., concurring in part and concurring in the judgment).

78. Acknowledging that some potential applications of the ban on the use of public facilities might be unconstitutional, she fonnd it unnecessary to address those questions in *Webster*. Under precedent, some applications of the ban were constitutional, and that was sufficient to defeat the facial challenge. *Id.* at 523 (O'Connor, J., concurring in part and concurring in the judgment); *see* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (providing an extensive and insightful treatment of facial challenge doctrines).

79. *Webster*, 495 U.S. at 524 (O'Connor, J., concurring in part and concurring in the judgment) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

80. *Id.* at 514 (plurality opinion) (quoting Frisby v. Schultz, 487 U.S. 474, 483 (1988)); *see* Kloppenberg, *supra* note 1, at 1024 nn.106-09 (discussing the seventh rule of the avoidance doctrine); *see also* Rust v. Sullivan, 500 U.S. 173, 223 (1991) (O'Connor, J., dissenting).

81. *Webster*, 495 U.S. at 562 n.4 (Stevens, J., concurring in part and dissenting in part). Justice Blackmnn called this a "disingennous" scolding of the lower court. The problem "is not that it raised a constitutional difficulty, but that it raised the wrong constitutional difficulty—one not inplicating *Roe*." *Id.* at 546 (Blackmnn, J., concurring in part and dissenting in part); *see* Dorf, *supra* note 78.

IV. ADVANTAGES OF MEASURED CONSTITUTIONAL RULINGS

This Part explores the two primary policies underlying the rule of measured steps, which overlap with justifications for the broader avoidance doctrine.[82] First, measured constitutional rulings by courts might promote deference to other constitutional decisionmakers, thus encouraging them to participate more fully in the development of constitutional law. Second, measured rulings might allow for more gradual development in constitutional law by promoting laboratories for decisions in many forums across the country. I consider whether and how measured rulings promote a long-term dialogue about constitutional issues among multiple participants. Do measured steps by the Court increase the deference afforded other participants? If so, what type of deference is afforded? Do measured steps by the Court increase gradualism in development of constitutional law?

Although I reference other cases involving the rule of measured steps, I focus primarily on *Webster* for the reasons explained in Part III. I conclude that the necessary inquiries are complex, and suggest some ways in which *Webster* was a measured step, although I dispute the plurality's claim that it took a measured step. The majority result in *Webster* was measured in that it signaled that other constitutional actors shared with the Court the responsibility for determining the scope of abortion rights and restrictions. The majority's approach also allowed time for new developments and fervent political response while preserving some core of *Roe*.

Part V uses the current litigation in the lower federal courts regarding gays in the military to consider further the costs and benefits of measured rulings. Taken together, Parts IV and V argue that courts employing the rule of measured steps must undertake a multifactored analysis. Courts should determine in what way their rulings are measured before invoking the rule. The courts should consider both how their rulings promote the justifications for measured steps and at what cost. Both Parts IV and V demonstrate that the effects of avoidance can differ depending on the level of the court using the rule. Finally, these Parts show that the rule is not neutral and that the substantive context of decision cannot be divorced from application of the procedural rule.

A. Deference to Other Decisionmakers

The Supreme Court's primary justification for the rule is that narrower decisions on constitutional issues promote deference to other decisionmakers. For example, in *FCC v. Pacifica Foundation*, the Court found constitutional the Federal Communication Commission's regulation of a broadcaster for airing George Carlin's "Filthy Words" monologue.[83] A father who heard the broadcast with his young son complained to the

82. Six justifications support the avoidance doctrine. I have previously argued that four of these justifications, including concerns for the Court's credibility, the final and delicate nature of constitutional adjudication, and the importance of constitutional adjudication, should be given less weight. Instead, respecting prudential concerns for federalism and separation of powers are more appropriate considerations in employing the doctrine. Kloppenberg, *supra* note 1, at 1035-65; *see also* James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 833-46 (1993) (grouping the justifications somewhat differently and arguing that such doctrines of judicial restraint are essential strategies for social inclusion).

83. FCC v. Pacifica Found., 438 U.S. 726, 751 (1978).

FCC. The FCC found the broadcast indecent but not obscene, and imposed a penalty on the broadcaster. The Court's decision is a measured step in the sense that the ruling extended only to the FCC's regulation of that particular monologue via radio at a time when children were likely to be present. The Court did not consider whether the content of the broadcast would be unprotected at other times or through another medium. The two concurring Justices relied explicitly on the rule of measured steps in emphasizing the narrowness of the 5-4 ruling in the FCC's favor.[84] They reasoned that their narrow ruling allowed for deference to administrative decisionmakers and Congress in a developing field of law, reflecting regard for separation of powers by affording other actors the opportunity to develop law concurrently with the Supreme Court in this area.[85]

Earlier, in *Ashwander v. Tennessee Valley Authority*,[86] Justice Brandeis similarly relied on the rule of measured steps and other portions of the avoidance doctrine in his famous concurrence. In *Ashwander*, the Court considered a federal constitutional challenge to an important New Deal program, the Tennessee Valley Authority ("TVA").[87] The plaintiffs essentially claimed that the federal government had exceeded its powers at the expense of state power. The Court affirmed the validity of some contracts the TVA had entered into and refused to reach the broader challenge to the TVA program. By avoiding the broader challenge, the Court allowed Congress and the TVA to retain control over the program, at least pending further legal challenges. This use of the rule demonstrates Brandeis' concern with the countermajoritarian difficulty and his desire to defer frequently to the legislative branch, partieularly when reviewing the constitutionality of statutes. He joined the Court at the end of the economically libertarian *Lochner* era, and as a strong supporter of progressive legislation, he urged the Court to play a more restrainced, self-censoring role in reviewing the acts of legislatures for constitutional compliance.[88]

Later, Justice Frankfurter and Professor Bickel often advocated a similar role for the Court, relying heavily on Brandeis' views of the federal courts' institutional competence.[89] During the last fifty years, the Court has often used the deference rationale when it applies the rule.[90] In *Staub v. City of Baxley*, for example, the Warren Court

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84. *Id.* at 756 (Powell, J., concurring in part and concurring in the judgment).

85. *Id.* See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992), for discussion of the rule created in *Chevron* "that federal courts defer to any reasonable interpretation by an ageucy charged with administration of a statute, provided Congress has not clearly specified a contrary answer," and its "draconian" balance-of-power implications which have resulted in policy-driven inconsistent application by the Court. *Id.* at 969, 970-71. In contrast, Merrill suggests a model which employs varying degrees of deference based on multiple contextual factors. *Id.* at 971.

86. 297 U.S. 288 (1936).

87. *Id.* at 347.

88. BOBBITT, *supra* note 23, at 61-65, 68-71 (discussing the political background and jurisprudential approaches of Brandeis); Horwitz, *supra* note 72, at 52, 53 & n.99 (characterizing Brandeis' approach as centered in his Progressive politics and pragmatism); *see also* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1994); PHILLIPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM (Wilson C. McWilliams & Lanee Banning eds., 1993); SUNSTEIN, *supra* note 25, at 41-53; LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 58 (1994).

89. BOBBITT, *supra* note 23, at 61-73 (describing views of Brandeis, Frankfurter, and Bickel); Stolzenberg, *supra* note 42 (describing views of Frankfurter, Bickel, and Robert Cover); Judith Resnik, *The Brandeis/Frankfurter Connection*, 71 CAL. L. REV. 776 (1983) (reviewing BRUCE A. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 1982). For an excellent grounding in legal process scholarship, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973). *See also* William N. Eskridge & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

90. *See, e.g.*, United States v. NTEU, 115 S. Ct. 1003 (1995) (refusing to reach question of constitutionality of honoraria ban as applied to senior federal government officials); FCC v. Pacifica Found., 438 U.S. 726, 750 (1978); Staub v. City of Baxley, 355 U.S. 313, 325-26 (1958) (Frankfurter, J., dissenting); *Ashwander*, 297 U.S. at 347.

struck down a municipal ordinance in Georgia as violative of the First Amendment.[91] Justice Frankfurter dissented:

> This is one of those small cases that carry large issues, for it concerns the essence of our federalism—due regard for the constitutional distribution of power as between the Nation and the States, and more particularly the distribution of judicial power as between this Court and the judiciaries of the States.[92]

He accused the Court of ignoring a Georgia procedural rule requiring explicit particularity in pleadings in order to raise constitutional issues. The state courts relied on this rule to reject the litigant's general challenge to the ordinance's constitutionality.[93] Frankfurter insisted that this was an adequate and independent state ground for the decision, which the Georgia courts had not adopted merely to evade the federal constitutional issue, and that therefore the Supreme Court had no jurisdiction to consider the federal issue.[94] Frankfurter argued that the Georgia rule was consistent with the Court's own practices of "keeping constitutional adjudication, when unavoidable, as narrow as circumstances will permit."[95]

In Frankfurter's view, deference to state procedural rules, including state techniques for avoiding decision of constitutional issues, not only respected federalism concerns, but also permitted the Court to "protect itself from the necessity—sometimes even the temptation—of adjudicating overly broad claims of unconstitutionality."[96] He deemed this critical because "declar[ing] a law unconstitutional is 'the most important and delicate duty of this Court'" and because the Court does not sit to render advisory opinions over the action of Congress and the states.[97]

The deference rationale supporting measured steps, however, does not completely transfer the judgment of constitutionality to another branch of government or to the states, as the use of the political question doctrine does. *Instead, reliance on the rule postpones a court judgment of constitutionality to a later lawsuit.* Thus, other decisionmakers act knowing that the constitutional issue can and often will return to the courts. In the meantime, the courts leave room for change and gradual development of law concerning constitutional issues. On the other hand, some measured steps can result in ambiguity or uncertainty in the content of constitutional law. Similarly, measured steps may produce less uniform application of constitutional law. The costs of measured steps will be explored as the disadvantages are assessed more fully in Part V.

I. A Description of Constitutional Dialogue

When the federal courts defer by use of the rule, other constitutional actors can participate more fully with the Court in interpreting the Constitution over time. This type of deference encourages others to lead in developing constitutional law, or at least be more active partners with the Court in doing so. Justice Ginsburg, while an intermediate appellate judge, similarly urged federal courts to engage primarily in measured decisionmaking—advocating small, incremental steps in constitutional law—in part

91. 355 U.S. at 325 (Frankfurter, J., dissenting).
92. *Id.* at 325-26.
93. *Id.* at 327.
94. *See* Kloppenberg, *supra* note 1, at 1061-65.
95. *Staub*, 355 U.S. at 330 (Frankfurter, J., dissenting).
96. *Id.* at 331.
97. *Id.* at 330-31 (quoting Muskrat v. United States, 219 U.S. 346, 361 (1957)).

because such steps afford the opportunity for more constitutional "dialogue."[98] For example, after the Court issued its *Pacifica* ruling, broadcasters could still air the Carlin monologue in different circumstances, and the FCC could draw lines about what conduct was punishable. Similarly, *Webster* left ambiguities for abortion regulation and created a vacuum to be filled by the reaction of other constitutional actors. Before studying that reaction, this Part sets forth an initial definition of constitutional dialogue as a process with multiple facets.

Potential dialogic participants from outside the federal judiciary include the President, Congress, administrative agencies and executive officers, state courts, state executive and legislative officials, police officers, attorueys general, academics, the media, lobbyists, interest groups, and the general public.[99] Whcn the Supreme Court defers, it also affords other courts a more significant role in the dialogue. The back-and-forth among the federal courts and these other actors is part of a complex, *long-term* process of constitutional conversation or colloquy.[100]

For example, while a judicial decree binds the litigants in the case, it is not necessarily the last word on the constitutional issues decided in the case.[101] Law-trained judges and scholars focus too much attention on the Supreme Court's role as principal and final—almost sole—arbiter of constitutional values.[102] Instead, we need to understand the process of constitutional interpretation from a broader perspective and assess the development of constitutional law "over the long haul."[103]

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98. Ginsburg, *supra* note 4. Ginsburg describes the appropriate substance of federal court decisions in a section entitled "Measured Motions in Third Branch Decisionmaking." Ginsburg cites Justice Holmes for his caution that federal judges legislate "only interstitially; they are confined from molar to molecular motions." *Id.* at 1198.

99. LOUIS FISHER, CONSTITUTIONAL DIALOGUES 5, 8 (1988).

100. Scholars are providiug more descriptions and analyses of this process. *See* BICKEL, *supra* note 25; BOBBITT, *supra* note 23; Fisher, *supra* note 99; SUNSTEIN, *supra* note 25; Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (suggesting that federal habeas corpus may be viewed as constitutional dialogue between the state and federal courts about the nature and content of federal constitutional rights); Friedman, *supra* note 50; Robert A. Katzmann, *The Underlying Concerns*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 14 (Robert A. Katzmann ed., 1988); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988). Dialogue is a theme present in pragmatism, feminism, communitarian theory, and other aspects of what has been termed the "New Public Law Movement." *See* Eskridge & Peller, *supra* note 89.

101. Friedman, *supra* note 50, at 644; *see* BICKEL, *supra* note 25, at 203, 247-48; BOBBITT, *supra* note 23, at 237; Ann Althouse, *Standing, in Fluffy Slippers*, 77 VA. L. REV. 1177 (1991). Louis Fisher states that the lower federal courts and other actors must translate the Court's rulings into action. Ambiguities in the Court's opinions affect the translation, as does the authority of the other actors to interpret and implement the constitutional principles. FISHER, *supra* note 99, at 7-8; *see also* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 15-17, 91 (1991) (citing vague appellate court orders and power of lowcr courts to delay change or filter higher court commands through their own discretionary powers).

102. Fisher gives examples of constitutional dialogue and describes a "complicated, subtle process—far removed from the simple and beguiling model of the Supreme Court issuiug the 'final word.'" FISHER, *supra* note 99, at 3; *see id.* at 8 (discussing misperception of the Court as the principal and final arbiter of the Constitution); *see also* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 353 (1992) ("The Court's chronic conceit, that its constitutional command should be the last word on fundamentally disputed issues, thus recurrently stumbles over the order implicitly established by the Constitution itself."); ROSENBERG, *supra* note 101, at 338-43 (positing that by focusing primarily on courts for social reform, people risk weakening more effective political reform efforts); SUNSTEIN, *supra* note 25, at 9 (noting that people too closely identify the meaning of the Constitution with the Supreme Court's interpretations of it); *cf.* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 807-08 (1995) (discussing how heavy reliance on courts in the development of civil rights, particularly the language and form of legal pleadings, constrains the civil rights movement).

103. Abram Chayes has described this "plastic and fluid" process of "making, implementing and modifying law in a public law system":

> Popular participation in it is not alone through the vote or by representation in the legislature. And judicial participation is not by way of sweeping and immutable statements of *the* law, but in the form of a contiuuous and rather tentative dialogue with other political elements—Congress and the executive, administrative ageucies, the profession and the academics, the press and wider publics. Bentham's "judge and company" has become a conglomerate. In such a setting, the ability of a judicial pronouncement to sustain itself in the dialogue and the

In every constitutional ruling, the Court announces principles of constitutional law. But those principles are developed as they are applied in subsequent litigation involving different factual or legal arguments.[104] The Court has revised its own pronouncements on constitutional principles over time—it regularly distinguishes precedent and occasionally makes a significant alteration in its former interpretation of a constitutional principle.[105] Moreover, in response to constitutional rulings, legislatures may enact slightly different laws and executive officials may promulgate new regulations which pose new challenges to those principles in the state and federal courts.[106]

Congress occasionally may need to address a constitutional ruling through the more cumbersome, "super majoritarian" process of amending the Constitution. But frequently Congress can respond to the Court's constitutional decisions without amending the Constitution. If the Court implies a private cause of action for damages in the Constitution, Congress might be able to provide a meaningful alternative and preclude such relief.[107] Congress can provide greater rights by statute and has substantial power to enact legislation to implement equal protection guarantees.[108] The President's

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power of judicial action to generate assent over the long haul become the ultimate touchstones of legitimacy. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976) (emphasis in original). Louis Fisher also characterizes the process:

> Judges act within an environment that constantly tests the reasonableness and acceptability of their rulings. Courts hand down the "last word" only for an instant, for after the release of an opinion the process of interaction begins: with Congress, the President, executive agencies, states, professional associations, law journals, and the public at large.

FISHER, *supra* note 99, at 200; *see also* BURT, *supra* note 102, at 68-69 (describing the Madisonian view that for long-term development of constitutional law, courts and other constitutional actors are interdependent).

104. BOBBITT, *supra* note 23, at 224-25; Friedman, *supra* note 50, at 652; Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

105. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812-15 (1992) (describing the overruling of Lochner v. New York, 198 U.S. 45 (1905), by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and the rejection of the constitutional ruling in Plessy v. Ferguson, 163 U.S. 537 (1896), by Brown v. Board of Education, 347 U.S. 483 (1954)); *accord* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (explicitly overruling National League of Cities v. Usery, 426 U.S. 833 (1976), and extending the application of federal regulation under the Commerce Clause to state functions, regardless of the nature of those functions). *But see* New York v. United States, 505 U.S. 144 (1992) (weakening *Garcia* significantly without expressly overruling it).

106. Fisher cites numerous examples of such interaction from the mid-1900's to the present, including interaction between the federal branches on legislation and regulation concerning pregnancy discrimination, Title IX, the fairness doctrine, and labor legislation. FISHER, *supra* note 99, at 207-09, 249-51, 257-60; *see also* BURT, *supra* note 102, at 306-09 (discussing Congressional authority to enact legislation implementing the Fourteenth Amendment); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (arguing that the President's constitutional interpretive authority is co-equal with that of the courts and Congress, and independent of their pronouncements). *But see* Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L. REV. 653 (1992) (discussing the findings of a Governance Institute project suggesting that Congress and the federal courts are largely unaware of the other branches' activities which relate to their own work).

107. Bivens v. Six Unknown Federal Bureau of Narcotics Agents, 403 U.S. 388, 402 n.7 (Harlan, J., concurring in the judgment) (refusing to take a stand and reading the majority as not taking a stand on whether Congress could alter the implied cause of action recognized in *Bivens*). Note that Congress' ability to reverse Supreme Court decisions may be limited to issues of statutory construction and may exclude some "constitutional" determinations. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Justice Kennedy, speaking for the Court in *Patterson*, stated: "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Id.* at 172-73. *But see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 579-81 (1992). Justices Kennedy and Souter, in their concurring opinion, note that Congress may be able to redefine what constitutes a new ease or controversy by providing definitions of injury and causation. *Id.* at 580 (Kennedy, J., concurring); *see also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163, 201-02 (1992).

108. *See, e.g.*, Pregnancy Discrimination Act, 42 U.S.C. §§ 2000e. (Supp. 1993) (countering Supreme Court rulings countenancing discrimination against preguant employees). Recent legislation proposed in the U.S. Senate authorizes the U.S. Attorney General to act immediately to protect reproductive health care clinics from violence. S. Res. 31, 104th Cong., 1st Sess. (1995).

enforcemcnt, criticism of, or inattention to a Court decision can also be important.[109] Moreover, the interaction between the Court and executive branch members may also influence the development of constitutional law.[110]

The public may play a critical role in bringing about significant constitutional change, whether through the formal amendment process or through informal alterations of constitutional meaning.[111] Those dissatisfied with a court's rulings can often take a constitutional issue to a different forum in new litigation. For example, when a Supreme Court decision concerns the meaning of a right guarantee, citizens of states with the same or similar state guarantees can respond at a state constitutional level.[112] Nonjudicial actors sometimes respond via nonenforcement or deliberate resistance to judicial decisions.[113] There is also a more diffused public role in the process of developing constitutional law, which surely includes press and public reception to a court's rulings on specific issues.[114] At another level, justices and scholars have recognized that, to some extent, the federal courts are dependent upon the public and nonjudicial political actors to make their constitutional rulings effective.[115].

This description contains several facets of long-term interaction between the federal courts and other actors on constitutional issues. One aspect of this long-term dialogue about a constitutional issue is how others respond to a court decision—from heightened public awareness of an issue to formulation of specific responses by concerned groups or individuals through lobbying, new litigation, and other political acts. A second facet involves legislative or executive action specifically addressing a court decision. A third is an exchange of views over time between courts and other governmental actors on an

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109. FISHER, *supra* note 99, at 61, 244. For example, Fisher cites President Carter's decision to abide by the Court's abortion rulings despite his personal opposition to abortion. Carter, however, actively supported legislation reversing the Court's rulings in the free speech area. *Id.* at 27. Gerald Rosenberg concludes that civil rights reform was primarily influenced by executive and legislative action rather than the Court's decision in *Brown*. ROSENBERG, *supra* note 101, at 70-71.

110. *See, e.g.*, FISHER, *supra* note 99, at 24-27 (citing interaction between the executive and courts); ROSENBERG, *supra* note 101, at 14 (discussiug the Solicitor General's relationship to the Supreme Court).

111. BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 459 (1989) (arguing that "the New Deal Democrats amended the Constitution by provoking a complex constitutional dialogue between the voters at large and the institutions of the national government").

112. The Supreme Court has explicitly stated that a state may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (citing Cooper v. California, 386 U.S. 58, 62 (1967)). In contrast to the Court's interpretation of the Federal Constitution in Bowers v. Hardwick, 478 U.S. 186 (1986), several state courts have found private consensual same-sex sexual activity protected by state constitutions. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Michigan Org. for Human Rights v. Kelley, No. 88-815820 CZ (Mich. Cir. Ct. July 9, 1990); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980).

113. BICKEL, *supra* note 25, at 254-72 (discussing public and governmental reaction to school desegregation decisions of the Court); BOBBITT, *supra* note 23, at 196-211 (citing resistance to the Court's school prayer rulings); Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMMENTARY 19 (1993) (describing southern resistance to integration of public schools after *Brown v. Board of Education*); Friedman, *supra* note 50, at 608, 644-52; Dee Lane, *Suicide: Status Quo Likely, Law or Not*, OREGONIAN, Dec. 29, 1994, at A1 ("Doctors will keep helpiug people commit suicide in spite of a federal judge's ruling that Oregon's physician-assisted suicide law must wait for legal review....").

114. BOBBITT, *supra* note 23, at 234-49 (describing participation by observers in the process of developing constitutional meaning). Bobbitt concludes his work by writing that, "[o]ur teachers were wrong, captivated by a picture of a dancing class, ignoring the inseparable unribboning relationship between the motion that law must be and the participant-spectators whose presence makes the motion meaningful." *Id.* at 249; *see* Chayes, *supra* note 103, at 1316.

115. ALEXANDER M. BICKEL, MORALITY OF CONSENT 101-02, 111 (1975); BICKEL, *supra* note 25, at 235; FISHER, *supra* note 99, at 12; Friedman, *supra* note 50, at 682 ("The problem with the countermajoritarian difficulty is that it *overstates* the role of courts and thus understates society's respousibility." (emphasis in original)); David B. Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 OR. L. REV. 211 (1973); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

issue via enforcement efforts and funding decisions. This Part and Part V examine some problems with a dialogic vision of constitutional law development, but they do not fully explore the many forms of dialogue or assess the conditions necessary for a fair and meaningful long-term dialogue.[116] However, I am convinced that some kind of dialogue, exchange, or long-term interaction occurs between these various actors on constitutional issues. The description should help us consider *whether and how the rule of measured steps influences or advances that process.*

For example, some measured rulings by the Supreme Court promote deference by simply allowing time for others to respond to the ruling. During that time, new factual patterns may develop to challenge application of the Court's earlier holding. Underlying social beliefs, conditions, or moral consensus may change. Some Justices and/or the views of some Justices may change. A measured ruling could invite new challenges on other grounds, leaving ambiguity in some aspects of constitutional law but creating the perception that the Court makes room for the participation of others or will be cognizant of the reactions of other constitutional interpreters. Although *Webster* was not measured in all its aspects, this Article contends below that it used the rule of measured steps to influence the constitutional conversation about abortion in several ways.

2. Use of the Rule in *Webster* and Its Impact on the Abortion Debate

The *Webster* decision appears to have generated substantial reaction. This Part of the Article considers whether *Webster* was a measured ruling which provided deference to other constitutional actors, and whether the use of the rule influenced the constitutional conversation about abortion. I argue that *Webster* was a measured ruling in certain respects. The plurality's approach was not a measured step because it treated precedent extremely narrowly. However, O'Connor's approach to precedent and her construction of the Missouri statute made the majority result in *Webster* more measured. The majority result in *Webster* was measured in that it did not completely overrule *Roe*, nor did it announce a clear new principle to replace *Roe*. Instead, it signaled a directional shift in constitutional law without formulating a rigid rule. Some other constitutional actors thus perceived the Court as transferring to or sharing with them the power of developing the constitutional law regulating abortion. The decision sparked intense reaction which forced some formerly neutral politicians to make their positions clear on abortion regulation.

This sharing of power was not a complete abdication of the federal courts' role in addressing the abortion issue. The measured result in *Webster* afforded time for the Court to listen to the reaction to *Webster* before it decided another major abortion challenge. Between *Webster* and the next major ruling[117]—which affirmed parts of *Roe*—numerous constitutional actors voiced their views on the abortion issue, the composition of the Justices changed, one Justice altered his position, and new legislation provided further factual development of issues and new legal challenges. This Part evaluates whether these effects are desirable.

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116. I hope to develop a more thorough assessment of constitutional dialogue conditions and pursue further examples of constitutional dialogue in my future work.

117. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); *see infra* part IV.A.2.c.3.

a. Response by the Public to *Webster*

After the *Webster* decision, individuals and organizations engaged in a spirited debate with public officials and political candidates about the constitutionality of abortion restrictions. Pro-choice advocates strenuously lobbied to foree politicians to protect a woman's choice.[118] Pro-choice advocates who had entrusted this "choice" to the Supreme Court realized it was not secure and began demanding that their representatives protect their right to choose.[119] Pro-life advocates engaged in similar activities, and the National Right-to-Life Committee proposed model legislation.[120]

Joining the dialogue, the press was also active in reporting on the abortion issue, predieting what was likely to happen in the states regarding abortion after *Webster*.[121] Likewise, academic writers heavily critiqued the Court's decision.[122]

b. Suddenly the Big Issue in Electoral Politics at Federal and State Levels

Politicians immediately felt pressure to formulate positions on the abortion issue.[123] For example, David Frohnmayer, former attorney general of Oregon and Republican candidate for governor, had been involved in state politics for twelve years prior to the *Webster* decision. Although he strongly supported choice, he did not consider abortion a significant political issue in Oregon prior to *Webster* because of the perception that the

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118. For example, Kate Michelman, the Executive Director of the National Abortion Rights Action League ("NARAL"), stated: "To politicians who oppose choice, we say, 'Read our lips. Take our rights. Lose your jobs.'" Margaret Carlson, *The Battle over Abortion*, TIME, July 17, 1989, at 62, 63.

119. NARAL, Planned Parenthood, NOW, ACLU, and the Fund for the Feminist Majority were among many pro-choice groups that met only a few days after *Webster* to determine how best to oppose the pro-life movement in state legislatures and Congress. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 178 (1990).

120. A National Right-to-Life Committee spokeswoman said, "*Webster* really did change everything, by saying for the first time that limits on abortion would be allowed. So we have been drafting and working for legislation that we feel would be upheld under the *Webster* standards." Tamar Lewin, *States Testing the Limits on Abortion*, N.Y. TIMES, Apr. 2, 1990, at A14. Provisions of the proposed model legislation include: forbidding abortion as means of birth control and for sex selection, requiring informed consent and parental consent, establishing a father's right in choosing whether to abort, and preventing public hospitals from performing abortions. *Id.*

121. For example, *Newsweek* predicted that 10 states were likely to keep abortion legal, 19 were likely to restrict abortion, and 22 states were battlegrounds. *Countdown: The Wars Within the States*, NEWSWEEK, Jnly 17, 1989, at 24. *U.S. News & World Report* gave somewhat different numbers. It predicted that 14 states were likely to keep their present laws allowing abortion, 27 states were likely to restrict abortion more, and nine were battlegrounds. Ted Gest et al., *The Abortion Furor*, U.S. NEWS & WORLD REP., July 17, 1989, at 18, 20-21.

122. *See* Dellinger & Sperling, *supra* note 56, at 83 (stating that the "plurality's backdoor approach allowed it to eviscerate *Roe* without explicitly overruling the case"); Estrich & Sullivan, *supra* note 56, at 123-24 (calling the plurality's use of a low standard of review "hypocritical").

123. For example, only hours after the *Webster* decision, Congressman James Florio, who was running for governor of New Jersey, announced that he, if elected, would veto legislation restricting access to abortion. His opponent, Jim Courter, first supported the right to life. Later, Florio decreased his support by saying he would not oppose such legislation, but he would not lobby for it. NARAL Executive Director Kate Michelman said, "the New Jersey gubernatorial race is the first example of what we are going to do around the country." The pro-choice group contributed as much as $500,000 to the race and Florio, the pro-choice candidate, prevailed. TRIBE, *supra* note 119, at 189. Courter's opposition to abortion was a major factor in his defeat. R.W. Apple, Jr., *The Abortion Question: Backlash at the Polls*, N.Y. TIMES, Nov. 9, 1989, at B14.

David Frohnmayer, Oregon's attorney general at the time of *Webster*, attended a conference of other attorneys general and candidates for elective office shortly after the Court released *Webster*. He recalled that many of those politicians who had been reluctant to declare their position on legal access to abortion, or who did not feel compelled to state a position due to *Roe*, felt pressure after *Webster* to take a position. In particular, three Catholic attorneys general who were running for gubernatorial positions in major states issued strong pro-choice statements shortly after *Webster*. Interview with David B. Frohnmayer, President of the University of Oregon, in Eugene, Or. (May 13, 1994).

Court had essentially foreclosed state legislative and executive action in the area with *Roe*. After the Court's display of weak support for *Roe* in *Webster*, abortion suddenly became a dominant and defining issue for local politicians in Oregon.[124] Two restrictive initiatives went on the next Oregon ballot, and the issue was critical to the next governor's race.[125]

Significant time and money were devoted to the issue of abortion in other state electoral races in the aftermath of *Webster*.[126] Candidates' decisions on their political stances may have affected decisions to pursue, or not pursue, litigation challenging abortion regulation.[127] Pro-choice Republicans argued that the party's pro-life stance would prove to be "political suicide."[128] Professor Laurence Tribe characterizes this as a change from the past, when pro-life advocates had held politicians accountable for their votes in a way that pro-choice voters did not.[129] Perhaps this is because pro-choice advocates had previously relied primarily or exclusively on the Supreme Court to guard the right of choice.[130]

c. State Responses to *Webster*

1. Executive Branch Response

Incumbent governors responded quickly to *Webster* by fighting attempts to ban abortions from public hospitals[131] and promising to veto any restrictions on Medicaid funding.[132] Several governors refused to allow their legislatures to take up the abortion

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124. Interview with David B. Frohnmayer, President of the University of Oregon, in Eugene, Or. (Aug. 22, 1995); Interview with David B. Frohmayer, *supra* note 123. Political scientists would classify this as a "salient" issue. Frohnmayer noted that the issue was salient to the electoral race in Oregon in several ways. It led to the formation of an independent political party, backed by evangelical Christian groups, which sponsored a pro-life gubernatorial candidate. The Republican vote was thus split between pro-choice and pro-life male candidates, and the pro-choice female Democratic candidate won the election.

125. *See* THE OREGON BLUE BOOK 353 (1995) (summarizing contents of restrictive abortiou measures on the November 1990 ballot).

126. In a special election for a California state legislative seat the California Abortion Rights Action League ("CARAL") "poured time and resources" into supporting the pro-choice Republican candidate; the candidate won. TRIBE, *supra* note 119, at 179. In Virginia, L. Douglas Wilder, the Democratic nominee for governor, was pro-choice but had supported parental consent laws. The executive director of Virginia League for Planned Parenthood warned Wilder that if he remained vague on the abortion issue, it would cost him the election. *Id.* at 185. Wilder beat his Republican opponent who opposed abortion. Apple, *supra* note 123, at B14. In South Carolina, another pro-choice Republican (the only pro-choice candidate of eight), won a special election for a seat in the House of Representatives of the South Carolina General Assembly. TRIBE, *supra* note 119, at 179-80.

127. In Illinois, the potential democratic nominee for governor, Neil Hartigan (who was the attorney general of Illinois at the time of *Webster*), had announced his personal opposition to abortion. After pressure from pro-choicers, he switched to the pro-choice side: "I support the woman's freedom of choice." George J. Church, *Five Political Hot Spots In Some States the Abortion Battle Is Already near Boiling Point*, TIME, July 17, 1989, at 64. Hartigan's switch is best identified by his choice to settle an abortion case two weeks prior to oral arguments before the Supreme Court. The case involved regulations that would have closed 80% of Illinois' abortion clinics. The settlement suggested that Hartigan knew continued prosecution of the case would be politically fatal; as Kate Michelman said, Hartigan had learned that "you can't travel the road to public office by forcing women to detour to the back alleys for health care." TRIBE, *supra* note 119, at 190-91.

128. TRIBE, *supra* note 119, at 189.

129. *Id.* at 179.

130. Antiabortion advocates were more successful in state legislatures before *Webster* because pro-choice voters "iguored [pro-life] bills, comfortable that the fundamental right to abortion was already protected by the courts." David Whitman et al., *The Abortion Hype*, U.S. NEWS & WORLD REP., Apr. 2, 1990, at 20, 21.

131. Eloise Salholz et al., *Voting in Curbs and Confusion*, NEWSWEEK, July 17, 1989, at 16 (discussing efforts of Mario Cuomo in New York).

132. Dan Balz, *Legislatures Set to Struggle with Abortion*, WASH. POST, Sept. 24, 1989, at A4.

issue in fall special sessions,[133] and another governor promised to veto any antiabortion law.[134] In some states, governors tried to use their veto power to prevent pro-life legislation from becoming law.[135] Other executive officials who presided over legislative bodies blocked consideration of antiabortion bills.[136] In sum, the gubernatorial demographics regarding the abortion issue appeared to change considerably during the two years after *Webster*. In 1989, only sixteen governors were openly pro-choice. Two years later, twenty-six governors supported choice, while the number advocating restrictions on abortion remained constant at twenty-three.[137] Thus, some formerly "neutral" governors seemed to "get off the fence," at least in part in reaction to *Webster*.

2. The Response of State Legislatures

After *Webster*, state legislatures debated the abortion issue extensively.[138] Within six months of *Webster*, only Pennsylvania had passed a statute restricting access to abortion, resulting in the Court's undue burden formulation in *Casey*.[139] One year after *Webster*, South Carolina[140] and Guam[141] enacted statutes restricting abortions. Within the next year, Utah,[142] Louisiana,[143] and Ohio[144] passed restrictive statutes.[145]

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133. Don J. DeBenedictis, *Abortion Battles: State Legislatures Wrestle with Proposed Restrictions*, A.B.A. J., Feb. 1990, at 30, 30-31.

134. *Countdown: The Wars Within the States*, *supra* note 121, at 24.

135. For example, in Michigan, Mississippi, and Idaho, governors vetoed legislation. In Mississippi, however, the Governor's veto was overridden. *Legislation: Abortion Bills Nationwide*, ABORTION REP., July 17, 1990, *available in* LEXIS, Nexis Library, ARCNWS File.

136. *Id.* (discussing actions in the Texas and Georgia legislatures).

137. Michael J. Malinowski, *"Hello Dad. This Is Your Daughter. Can I Get An Abortion?": An Essay on the Minor's Right to a Confidential Abortion*, *in* ABORTION, MEDICINE, AND THE LAW 182, 198 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992) (citing NATIONAL ABORTION RIGHTS ACTION LEAGUE, WHO DECIDES?: A STATE-BY-STATE REVIEW OF ABORTION RIGHTS iv (1991)).

138. Fourteen state legislatures conducted floor votes by April, 1990. Lewin, *supra* note 120. By July, 1990, over 300 abortion-related bills were considered by state legislatures in at least 40 states. Dan Balz & Ruth Marcus, *In Year Since* Webster, *Abortion Debate Defies Predictions*, WASH. POST, July 3, 1990, at A1.

139. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

140. South Carolina passed a law requiring parental consent for minors seeking abortions. S.C. CODE ANN. § 44-41-36 (Law. Co-op. Supp. 1994).

141. In 1990, the governor of Guam signed a bill that banned virtually all abortions. *See* Guam Pub. L. No. 20-134 (1990), *permanently enjoined by* Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

142. In 1990, the Utah legislature introduced several abortion bills, but none were formally considered. Instead, they adopted a resolution stating that the legislature favored childbirth and should conduct investigations in order to have abortion legislation the next session. In 1991, the Legislature passed a bill and the Governor signed it. The statute placed a number of restrictions on abortion, including a provision restricting abortion only to cases of incest, rape, grave damage to the woman's health, or grave defects to the fetus. UTAH CODE ANN. § 76-7-302(2) (1995).

143. Balz & Marcus, *supra* note 138, at A1. After the Supreme Court's decision in *Webster*, the Louisiana state legislature passed a resolution calling on district attorneys to enforce 19th-century criminal abortion statutes that were still on the books. DeBenedictis, *supra* note 133, at 30. The resolution stated, "Therefore, be it resolved that it is the intent of the Legislature of Louisiana that the district attorneys of this state shall enforce the criminal statutes pertaining to abortion . . . to the fullest extent." LA. REV. STAT. ANN. § 14:87 (West Supp. 1995) (historical and statutory notes). This resolution passed over the Governor's veto. *Abortion Test Cases*, TIME, July 1, 1991, at 22.

144. In Ohio, a statute restricting abortion passed and was signed by the Governor. *See* OHIO REV. CODE ANN. § 2317.56(B) (Anderson 1995); *see also* Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993) (discussing the constitutionality of Ohio's consent requirements).

145. *See* Malinowski, *supra* note 137, at 199 n.73.

Two years after *Webster*, two states had passed pro-choice legislation: Maryland[146] and Connecticut.[147] In addition, some choice advocates reported that the demographics of state legislatures had made a pro-choice swing in the *Webster* aftermath.[148]

The legislative response, in turn, spurred response by executive officials and courts, with mixed results. In Idaho, the legislature passed a statute that almost totally banned abortion, but the Governor vetoed the bill.[149] In Mississippi, the legislature overrode the Governor's veto and passed a statute requiring informed consent and imposing a twenty-four hour waiting period.[150]

3. Judicial Review of Abortion Regulation

The next major Supreme Court abortion decision after *Webster* concerned a challenge to Pennsylvania's restrictive abortion statute.[151] The Court in *Casey* upheld most of the provisions of the statute, finding that it did not place an undue burden on a woman's right to have a pre-viability abortion. The Court found only the spousal consent provision unconstitutional. The Court formulated a new due process standard and specifically reaffirmed parts of *Roe*.[152]

After *Webster*, Louisiana passed a statute that criminalized abortion unless the pregnancy resulted from rape or incest, the abortion was necessary to save the life of the mother, or termination of the pregnancy was necessary to "preserve the life or helath of the unborn baby or to remove a dead unborn child." Louisiana defended the statute by arguing that *Webster* overruled *Roe* sub silentio. After the Supreme Court decided *Casey*, the federal appellate court deemed Louisiana's law unconstitutional.[153] Thus, the dialogue did not end with *Webster*. The federal and state courts, including the Supreme Court, remained active in construing the Constitution.

Other antiabortion statutes were invalidated, both before and after *Casey*. A federal trial court invalidated parts of the Utah statute restricting abortion, including (1) its wide prohibition against abortions except under certain circumstances, and (2) its spousal

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146. In 1991, Maryland passed a pro-choice statute that respected the woman's right to choose. The statute prohibited the state from interfering with a woman's choice before the fetus is viable and at any time when abortion is necessary to protect the life of the woman or when the fetus is affected by a genetic defect or serious deformity. Before this statute passed, the state had a much stricter statute that only allowed abortions in cases of incest, rape, grave endangennent to the mother, or grave defect of the fetus. This statute was repealed at the same time the new statute was passed. MD. CODE ANN., HEALTH-GEN. § 20-209 (Supp. 1994).

147. Connecticut was the first state to pass a pro-choice bill. *Connecticut: Gov. Signs—Pro-Choice Bill Becomes Law*, ABORTION REP., May 2, 1990, *available in* LEXIS, Nexis Library, ARCNWS File. The statute allows a woman to terminate pregnancy prior to viability. However, the only abortions allowed post-viability are those that will preserve the mother's life or health. CONN. GEN. STAT. § 19a-602 (Supp. 1995).

148. Pro-choice advocates considered 34 state legislative bodies more pro-choice than they were before *Webster* and only three were considered opposed to choice. Malinowski, *supra* note 137, at 197 (citing NATIONAL ABORTION RIGHTS ACTION LEAGUE, *supra* note 137, at vi-vii).

149. Dan Balz, *Idaho Republicans Feeling Fallout from Battle over Abortion*, WASH. POST, May 4, 1990, at A4.

150. MISS. CODE ANN. § 41-41-33 (1993). After Mississippi began enforcing its 24-hour waiting period, abortions performed in the state decreased by almost 50%. Linda Greenhouse, *Justices Decline to Hear Mississippi Abortion Case*, N.Y. TIMES, Dec. 8, 1992, at A22.

151. Between *Webster* and *Casey*, the Supreme Court ruled on another significant abortion case. Rust v. Sullivan, 500 U.S. 173 (1991). The Department of Health and Human Serviees prohibited Title X projects from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. The Court upheld this prohibition, holding that it did not violate the First Amendment. *Id.*

152. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

153. Sojourner T. v. Edwards, 974 F.2d 27, 29 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1414 (1993).

consent requirement.[154] Before *Casey*, a federal appellate court invalidated Guam's statute, which prohibited abortions except when the mother's life was in danger.[155] Although the Supreme Court had not yet decided *Casey*, the court invalidated the Guam statute, rejecting Guam's contention that *Webster* overruled *Roe*.[156]

State courts also reviewed legislative responses to *Webster*.[157] After *Casey*, the Ohio Court of Appeals upheld the constitutionality of the Ohio statute.[158] Pro-life groups in Oklahoma tried to bypass the state legislature and pass a restrictive abortion statute by initiative. Before the voters voted on the initiative and after the Supreme Court's decision in *Casey*, the Supreme Court of Oklahoma declared the initiative unconstitutional and prohibited its submission to the voters.[159] The court implicitly noted that its outcome under *Webster* might have been different.[160]

4. State Constitutional Provisions

Amending state constitutions to protect a woman's choice is an alternative to pro-choice legislation.[161] No state has an amendment explicitly acknowledging a right to abortion. At least ten state constitutions, however, contain explicit textual privacy provisions.[162] Of these ten states, two state supreme courts have explicitly held that those provisions protect abortion rights. The California Supreme Court (pre-*Webster*) held that it was unconstitutional to withhold Medi-Cal benefits from poor women who seek to obtain an abortion.[163] The Florida Supreme Court recognized a fundamental right to an abortion after *Webster*.[164] The timing of this case was particularly interesting. In response to *Webster*, Florida's Governor Bob Martinez was the first to call a special session of the

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154. Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992), *rev'd on other grounds*, 61 F.3d 1493 (10th Cir. 1995) (declaring § 76-7-302(2) and § 76-7-304(2) of the Utah Code unconstitutional). This case was decided after *Casey*.

155. Even the maternal health exception was very narrow, requiring two independent physicians to approve and a committee to review each termination of pregnancy. Guam Soc'y of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

156. The Ninth Circuit refused to "presum[e] . . . that *Roe v. Wade* [was] dead." *Id.* at 1373.

157. An antiabortion statute restricting public funding was passed by initiative in Michigan and was upheld by the Supreme Court of Michigan. Doe v. Department of Social Servs., 487 N.W.2d 166 (Mich. 1992).

158. Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993) (reviewing a statute which required physicians to provide women seeking abortions with certain information and to obtain signed consent forms from the women).

159. *In re* Initiative Petition No. 349, 838 P.2d 1 (Okla. 1992), *cert. denied*, 113 S. Ct. 1028 (1993).

160. The court discussed the *Webster* decision as beginning "a major re-examination of the law in relation to a woman's right to obtain a nontherapeutic abortion." *Id.* at 4. Before *Casey* was decided, the Supreme Court of Oklahoma intended to evaluate the initiative under the Supreme Court's holding in *Webster*. After *Casey*, the Oklahoma Supreme Court said "the submission [of the initiative] could not go forward." *Id.* at 5. This implies that the decision of the Oklahoma court would have been different solely under the holding of *Webster*.

161. Jeff Rosen argues that since the population of many states supports the woman's right to choose, women could protect their right by amending state constitutions. State constitutional amendments are more protective for three reasons: (1) they reflect the will of the voters more accurately (since they vote on the amendment); (2) they generally last longer than the average statute; and (3) they allow the pro-choice advocates to move from the defensive to the offensive. Jeff Rosen, *Altered States: Liberals and Forgotten Constitutions*, NEW REPUBLIC, July 1, 1991, at 19.

162. Natalie Wright, Note, *State Abortion Law After Casey: Finding "Adequate and Independent" Grounds for Choice in Ohio*, 54 OHIO ST. L.J. 891, 903 (1993). The states include Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. *See also* Kimberley A. Chaput, Note, *Abortion Rights Under State Constitutions: Fighting the Abortion War in the State Courts*, 70 OR. L. REV. 593 (1991) (arguing that pro-choice litigants should protect abortion rights by expanding individual rights under state constitutions).

163. Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981).

164. In *In re T.W.*, the Florida Supreme Court held that the Florida Constitution required every restriction of abortion rights to further a compelling interest in order to be lawful; therefore, under the Florida Constitution, the right to an abortion is a fundamental one. 551 So. 2d 1186, 1192 (Fla. 1989).

legislature to consider enacting measures restricting access to abortion.[165] Only a few days before the special session, the state court interpreted the state constitution to provide women with the fundamental right to an abortion. The court thus blocked any legislative attempt to pass restrictive abortion regulation.[166] An Ohio court, in contrast, refused to find that the Ohio Constitution provided broader protection than the Federal Constitution provides for a woman's right to choose.[167]

d. The Federal Response

For the remainder of President Bush's administration after *Webster*, he and Congress battled over the abortion issue. One important change, potentially attributable to public response to *Webster*, was that twenty-three House members, who supported banning both federal and local funds just one year earlier, switched sides and voted not to ban local funding in the *Webster* aftermath.[168] Similarly, both houses of Congress passed a Health and Human Services appropriations bill in the same year which allowed Medicaid funding for abortions in cases of rape and incest. Historically, Medicaid funding for abortions was limited to instances when the mother's life was in danger.[169] However, when Bush vetoed both the District of Columbia appropriations bill and the Medicaid funding bill, there was not enough support for either bill to override his veto.

The abortion issue was also prominent in Bush's unsuccessful campaign for reelection.[170] Within days of entering office, President Clinton—an open advocate of choice—issued three memoranda to the Secretary of Health and Human Services regarding abortion rights, providing for fewer restrictions on abortions and fetal tissue

165. Church, *supra* note 127, at 64.

166. States could extend more protection through their constitutions not only through explicit privacy clauses as in Florida and California, but could also extend more privacy rights by interpreting a particular provision of the state constitution more broadly than the Federal Constitution and/or interpreting similar language (of state and federal) in the state more broadly because of a history of broader interpretation. *See generally* Wright, *supra* note 162 (discussing how state courts can interpret their state constitutions to protect more abortion rights).

167. *See* Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993).

168. While pro-choice political response was evident in Congress after *Webster*, President Bush's pro-life stance prevented any changes in federal funding of abortions. After *Webster*, Congress defeated a bill that would restrict the District of Columbia's budget for abortion for the first time since Ronald Reagan was president. TRIBE, *supra* note 119, at 180. In the past, Congress limited both local and federal funds that supported abortion in the District of Columbia; however, the proposed appropriations bill for 1990 did not put a limit on local funding. Sharon Block, *Congressional Action on Abortion: 1984-1991*, *in* ABORTION, MEDICINE, AND THE LAW, *supra* note 137, at 648, 657-58.

169. *Id.* at 649-52.

170. *See, e.g.*, Laurence I. Barrett, *Abortion: The Issue Bush Hopes Will Go Away*, TIME, July 13, 1992, at 28; Linda Greenhouse, *Abortion Rights Strategy: All or Nothing*, N.Y. TIMES, Apr. 24, 1992, at A1; Anne Groer, *Abortion Ruling Could Cause Trouble for Bush in '92*, PHILA. INQUIRER, Nov. 21, 1991, at A6; Ruth Marcus, *On Support for Choice and Limits, Bush-Clinton Contrasts Are Sharp*, WASH. POST, Aug. 16, 1992, at A21; Andrew Rosenthal, *President and GOP Take Aim at Abortion on* Roe *Anniversary*, N.Y. TIMES, Jan. 23, 1992, at A1; *see also* Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About Politics*, 94 COLUM. L. REV. 293 (1994) (book review).

research.[171] However, the issue remains politically volatile and unresolved, as demonstrated by various forms of noncompliance with Clinton's pro-choice decisions.[172]

3. Assessing the Response to *Webster*

The substantial response to *Webster* extended to lobbying, declarations of politicians' positions, legislative proposals, enactment of statutes, and further court challenges, including the Court's elucidation of the undue burden test in *Casey*. Thus, *Webster* involved constitutional actors other than the Court in a continuing process of constitutional interpretation. Did the Court's approach to the rule of measured steps contribute to this reaction? Did it promote deference to others, at least for a temporary period?

Five members of the Court claimed to apply the rule of measured steps in *Webster*. The plurality's approach, standing alone, demonstrated the Court's weak support for *Roe*—it rendered precedent unstable. This approach was not a measured step because it signaled that a large change from precedent or directional shift in the law had occurred or was imminent. What if the Court had overruled *Roe* completely in *Webster* rather than just coming close to doing so? Justice Scalia urged a broad ruling which would take away federal constitutional protection for abortion rights and transfer the abortion issue entirely to the States. The plurality's approach is fairly equivalent in its result to Scalia's desired result because it severely narrows *Roe*. The primary difference is that Scalia wanted the federal courts completely out of the abortion dialogue. But the plurality did not provide a new rule, and so failed to get courts out of the abortion debate. Just as the plurality confined *Roe* to its exact facts, future courts would have to confine *Webster* to its exact facts under the plurality's "dispute resolution" approach to the rule of measured steps.

If instead we focus on the majority *result* in *Webster*, then *Webster* appears closer to a measured step. That is, Justice O'Connor's refusal to fully retreat from *Roe* because she wanted to take a measured step meant that the Court announced no clear new constitutional principle. Her vote thus prevented a complete retreat from federal constitutional protection for abortion rights. The resulting ambiguity in federal constitutional law may have generated the substantial public response described above. The decision invigorated pro-choice voters and spurred some formerly neutral politicians to make clear their positions on abortion regulation.

Moreover, the ambiguous state of constitutional law produced by *Webster* allowed *time* for gradual development of the law. Over time, the Court could listen to the response *Webster* generated. Other courts could consider new legislation and new fact patterns

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171. President's Memorandum on Fetal Tissue Transplantation Research, 29 WEEKLY COMP. PRES. DOC. 87 (Jan. 22, 1993); President's Memorandum on the Title X "Gag Rule," 29 WEEKLY COMP. PRES. DOC. 87-88 (Jan. 22, 1993); President's Memorandum on Importation of RU-486, 29 WEEKLY COMP. PRES. DOC. 89 (JAN. 22, 1993); *see also Clinton Lifts Anti-Abortion Measures*, LEGAL INTELLINGENCER, Jan. 25, 1993, at 5 (reporting that Clinton fulfilled campaign promise by lifting the Bush administration ban on abortion counseling at federally funded clinics); Karen Tumulty & Marlene Cimons, *Clinton Revokes Abortion Curbs*, L.A. TIMES, Jan. 23, 1993, at A1 (reporting that Clinton lifted abortion counseling ban on his third day in office); *cf.* Helen Dewar, *Bush's Veto Power Stalled the Abortion-Rights Push in Congress*, WASH. POST, Nov. 30, 1991, at A6 (explaining that although the abortion-rights advocates made unprecedented gains in Congress in 1991, they were often stopped short of victory because they were unable to muster the two-thirds majority necessary to override President Bush's veto).

172. *See, e.g.*, *Ohio Ignores Abortion Policy*, CLEVELAND PLAIN DEALER, Apr. 7, 1994, at 7B; Karen Tumulty, *11 States to Defy Clinton Abortion Funding Rules*, L.A. TIMES, Mar. 31, 1994, at A1.

before the Court had to resolve the next major abortion challenge. During that time, Justice Kennedy's vote changed and Justice Souter joined the Court. The Court then reaffirmed the core of *Roe* in *Casey*.

Thus, one critical effect of *Webster* was that it was perceived by some as signaling a transfer or sharing of power on an important and sensitive constitutional issue from the Court to others, although not signaling a complete abdication of the Court's role in the debate. The participation of these others had not previously been completely foreclosed by *Roe*. Active pro-choice and pro-life forces existed before *Webster*. But the perception of who held significant power in the debate and who could influence constitutional law development appears to have shifted as a result of *Webster*.[173] For example, at the annual summer meeting of the National Conference of State Legislatures in 1990, abortion legislation and the recent *Webster* decision were a significant issue. Many legislators, however, did not want to deal with the issue. One official said, "I really resent the fact that the Supreme Court dumped this whole issue back on the states."[174] Another legislator said: "The vast majority of legislators don't want to deal with the issue. They want to stay away from it. That's a political fact."[175] Prior to *Webster*, elected officials could more credibly tell their constituents that the Court's ruling in *Roe* foreclosed other possibilities, thereby evading shared responsibility for debating the constitutional issue with the Court. Thus, nonjudicial political capacity for response may not have been as dwarfed by *Roe* as some claim.[176]

The rule of measured steps aims to avoid broad rulings which might foreclose dialogue or at least make the responses of others less authoritative.[177] Justice Ginsburg recently advocated a judicial approach closely resembling the rule of measured constitutional steps.[178] She critiqued the Court's decision in *Roe* in part because a more "moderate and

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173. Cass Sunstein calls the public reaction to *Webster* "extraordinary" and suggests that the Court's "partial retreat [from *Roe*] may well have galvanized the women's movement in a way that will have more favorable and fundamental long-term consequences for sexual equality than anything that could have come from the Supreme Court." SUNSTEIN, *supra* note 25, at 147.

174. *State Legislatures: Abortion a Focus of Annual Meeting*, ABORTION REP., Aug. 9, 1990, *available in* LEXIS, Nexis Library, ARCNWS File (quoting Representative Kelly Shockman of North Dakota).

175. *Id.* (quoting Senator John Schneider of Missouri). Thus, court rulings may sometimes serve as political cover for politicians who can implement legal rulings under protest, or use court rulings to pressure other actors. ROSENBERG, *supra* note 101, at 34.

176. Cass Sunstein says *Roe*

> probably contributed to the creation of the "moral majority"; helped defeat the Equal Rights Amendment; prevented the eventual achievement of consensual solutions to the abortion problem; and severely undermined the women's movement, by defining that movement in terms of the single issue of abortion, by spurring and organizing opposition, and by demobilizing potential adherents.

SUNSTEIN, *supra* note 25, at 147. Gerald Rosenberg argues for the importance of economic and other factors in bringing about abortion reform and other significant social reform. The Court, through its rulings, merely recognizes social revolution already in progress. ROSENBERG, *supra* note 101, at 179-80. Regarding the legality of abortion access, he describes as important the role of Presidents Johnson, Carter, and Reagan, positions taken by the American Law Institute and American Medical Association, and the growth of private reproductive health care clinics. *Id.* at 176-234.

177. Professor Thayer warned that frequent resort to courts could "dwarf the political capacity of the people." JAMES B. THAYER, JOHN MARSHALL 107 (1901); *see also* SUNSTEIN, *supra* note 25, at 145 (overreliance on courts can foreclose response of other actors and allow others not to take their constitutional responsibilities seriously).

178. She does not directly discuss the avoidance doctrine and the only reference to the rule found in her New York University lecture is an indirect one. Ginsburg urges the Justices to speak in more collegial and unified terms. She cites as an example of a less than collegial remark Justice Scalia's condemnation of Justice O'Connor's reliance on the rule of measured steps when she urged the Court in *Webster* to avoid reconsideration of *Roe*. Justice Scalia asserted that O'Connor's assertion "cannot be taken seriously." Ginsburg, *supra* note 4, at 1195 n.51.

restrained" approach would have afforded more deference to other constitutional actors.[179] She characterized the federal courts as participating "in a dialogue with other organs of government, and with the people as well."[180] But Ginsburg viewed *Roe* as "invit[ing] no dialogue with legislators,"[181] contrasting the *Roe* ruling with "the Court's more cautious dispositions, contemporaneous with *Roe*, in cases involving explicitly sex-based classifications."[182] In *Roe*, as in the *Lochner* era, she saw the Court as stepping "boldly in front of the political process," resulting in outcries against the judiciary and exposing its "precarious position as final arbiter of constitutional questions."[183] Thus, Ginsburg relies in part on deference to others and in part on the Court's fragile political viability as an institutional justification for measured constitutional steps.

Frankfurter and Bickel shared her concern for preservation of the Court's political credibility and used that concern as a primary justification for narrow constitutional rulings. They warned that the Court should wait until a decision is more politically acceptable and should allow some issues to simmer so that gradual acceptance can be built;[184] conceivably Bickel and Frankfurter extended or at least magnified the importance of that justification for constitutional avoidance. Brandeis, for example, advocated the most caution when a federal court was considering invalidating legislation, hoping to avoid direct collisions with the more political branches.[185] He demonstrated less hesitancy in deciding broader constitutional issues when the Court was not reviewing legislation.[186]

Ginsburg recognizes some drawbacks in deferring too extensively to the more political branches and thus makes an exception to her measured judicial approach. She would sometimes find it acceptable for the Supreme Court to "step ahead of the political branches in pursuit of a constitutional precept," citing *Brown* as the paradigmatic example.[187] Her other example is the legislative reapportionment cases of the early 1960's when the "Court confront[ed] blocked political processes."[188] She reasons that those

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179. The effective jurist "speaks in a 'moderate and restrained' voice, engaging in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues." *Id.* at 1186 (footnote omitted) (quoting Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963)).

For *Roe*, she maintains that the Court could have declared the "extreme" Texas criminal statute in *Roe* unconstitutional without proceeding to "fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force." *Id.* at 1199. For example, in the sex-based classification cases, the Court "did not utterly condemn the legislature's product. Instead, the Court, in effect, opened a dialogue with the political branches of government. In essence, the Court instructed Congress and state legislatures: rethink ancient positions on these questions." *Id.* at 1204.

180. *Id.* at 1198.

181. *Id.* at 1205; *see also* BURT, *supra* note 102, at 357-62 (stating that *Roe* directed pro-choice advocates away from legislative reform efforts, imposed silence and allowed dialogue only in the shadow of the Justices); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 42-43 (1987) (arguing that the Supreme Court "could have authorized the states, within broad limits, to work out legislation which would have treated the abortion question in all its complexity and with the gravity it deserves").

182. Ginsburg, *supra* note 4, at 1198; *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985) (stating that while the "Court's gender classification decision overturning state and federal legislation, in the main, have not provoked large controversy," *Roe* "became and remains a storm center"). She reasons that those gender-based classification cases, many of which she litigated, extended benefits already authorized by Congress to others. Thus, the Court in a sense allowed Congress to lead. The Court "wrote modestly, it put forward no grand philosophy" but "the Court helped to ensure that laws and regulations would 'catch up with a changed world.'" Ginsburg, *supra* note 4, at 1204-05 (quoting Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, *in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986, at 109, 123 (Herman Schwartz ed., 1987)).

183. Ginsburg, *supra* note 4, at 1206; *see also* SUNSTEIN, *supra* note 25, at 147 (calling the effectiveness of *Roe* "limited, largely because of its judicial source").

184. Kloppenberg, *supra* note 1, at 1036-42.

185. *Id.* at 1049-53.

186. *Id.* at 1050-52.

187. Ginsburg, *supra* note 4, at 1206.

188. *Id.* at 1207 n.143 (referring to Baker v. Carr, 369 U.S. 186 (1962)).

situations presented the Court with constitutional protections for nonmajoritarian concerns, where prospects for political change were slow or perhaps impossible.[189] In general, however, she urges the Supreme Court to follow, not lead, in societal changes.[190]

Webster demonstrates why any analysis of the impact of measured steps must be context-specific. In the abortion context, it is likely that both broad and narrow constitutional rulings lead to intense response. Regardless of the rule of measured steps, *Webster* might have generated substantial response due to the nature of the issue rather than to Justice O'Connor's confining the majority to a measured step. Abortion is both particularly important for women's self-determination and morally charged.[191] Similarly, one could view the abortion dialogue from a more long-term perspective, beginning the story with *Roe* or even with earlier privacy rulings.[192] In this view, *Roe* animated the antiabortion movement. Since *Roe*, antiabortion forces successfully secured restrictive waiting periods and consent requirements, as well as limitations on public funding for abortion.

Justice Ginsburg posits that a narrower ruling might have prevented or lessened the twenty-year controversy ensuing from *Roe*.[193] If the Court had not intervened in such a heavy-handed manner, progressive legislative efforts liberalizing abortion statutes might have continued.[194] Instead, "[t]he sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state

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189. "'[W]hen political avenues for redressing political problems become dead-end streets, some judicial intervention . . . may be essential in order to *have* any effective politics.'" *Id.* at 1207-08 n.143 (quoting ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 8 (1968) (emphasis in original)).

190. O'Connor states:

> With prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not "a bevy of Platonic Guardians," the Justices generally follow, they do not lead, changes taking place elsewhere in society. But without taking giant strides and thereby risking a backlash too forceful to contain, the court, through constitutional adjudication, can reinforce or signal a green light for a social change.

Id. at 1208 (quoting LEARNED HAND, THE BILL OF RIGHTS 73 (1958)).

In conclusion Ginsburg quotes Gerald Gunther where he says that the "'need to act only interstitially does not mean relegation of judges to a trivial or mechanical role, but rather affords the most responsible room for creative, important judicial contributions.'" *Id.* at 1209 (quoting from the address of Professor Gerald Gunther at Judge Ginsburg's investiture as a Court of Appeals judge).

191. As Ginsburg recognized when critiquing *Roe*: "I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious. I appreciate the intense divisions of opinion on the moral question . . . ." Ginsburg, *supra* note 182, at 383; *see also* BOBBITT, *supra* note 23, at 164-65, 221 (discussing ethical arguments underlying many abortion decisions); SUNSTEIN, *supra* note 25, at 273-74. Sunstein also suggests that the reaction to *Webster* may differ from reaction to other Court decisions because abortion rights could be viewed as an existing endowment threatened by *Webster*. *Id.* at 171.

192. The earlier privacy cases might be a better place to start. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). Even on the issue of abortion, the Court used the avoidance doctrine to affirm the constitutionality of an abortion statute prior to its ruling in *Roe*. United States v. Vuitch, 402 U.S. 62 (1971); *see* BURT, *supra* note 102, at 344-45.

193. *See* Ginsburg, *supra* note 182, at 376 ("*Roe v. Wade* sparked public opposition and academic criticism . . . ."); *id.* at 379 (noting "searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun . . . , annual proposals for overruling *Roe* by constitutional amendment, and a variety of measures in Congress and state legislatures to contain or curtail the decision"); *id.* at 381 (noting "legislatures adopted measures aimed at minimizing the impact of the 1973 rulings, including notification and consent requirements"); *see also* Ginsburg, *supra* note 4, at 1206. For another critique of *Roe* reflecting another aspect of the avoidance principle, see Richard A. Posner, *What Has Pragmatism to Offer Law?*, *in* PRAGMATISM IN LAW AND SOCIETY 29, 29 (Michael Brint & William Weaver eds., 1991).

194. Ginsburg, *supra* note 182, at 379-80. "The political process was moving in the early 1970's, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." *Id.* at 385-86; *see also* Ginsburg, *supra* note 4, at 1205-06.

legislatures."[195] Again, *Roe* did *not* foreclose dialogue completely. However, one central difference between *Roe* and *Webster* is that the majority in *Webster* used the rule of measured steps to signal that the Court intended to limit its role in the abortion dialogue. Although the majority did not remove the federal courts from reviewing abortion legislation, the majority indicated that it would be more deferential to legislators than the *Roe* scheme envisioned. And O'Connor used the rule to proceed slowly. Rather than pronouncing a clear principle with which to review abortion legislation, the Court left the law in a state of ambiguity. Use of the rule of measured steps in *Webster* thus forced other constitutional actors to be more active participants in the development of abortion law.

Each person's analysis of *Webster*'s promotion of deference and gradualism will be influenced by whether she likes its outcome on the merits. The dissenters argued in *Webster* that the plurality opinion decimated *Roe* by transferring or sharing with the political branches responsibility for determining protection for abortion rights. The political branches are sometimes deficient in protecting liberty interests, particularly when those who need the protection are not adequately represented in the political process.[196] For example, Ginsburg acknowledged that (due to Court interpretations upholding public funding restrictions on abortion) for poor women, "a group in which minorities are disproportionately represented, access to abortion is not markedly different from what it was in pre-*Roe* days."[197] Even if women as a monolithic group are politically well-represented, a smaller subset of women is capable of becoming pregnant and desiring access to abortion at any given time. Professors Susan Estrich and Kathleen Sullivan argue that abortion is a fundamental right which should not be left to the political process.[198] Moreover, abortion is an intimate right—indeed, a privacy right—and one filled with moral difficulty for some individuals.[199] It may be difficult, even for some who support the right, to champion the right in public, political activity. One disadvantage of measured rulings—the resultant lack of national uniformity when the Supreme Court fails to give broad protection for a constitutional right or provide a clear statement on a constitutional issue—thus seems particularly problematic for abortion rights.

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195. Ginsburg, *supra* note 182, at 381. "Both the pro-life and anti-busing movements began in reaction to decisions of the Supreme Court. Both activated many people who previously had been at the periphery of . . . politics." *Id.* at 386 n.82. Burt describes how *Roe* provoked the Catholic Church to intervene aggressively in the debate. BURT, *supra* note 102, at 344-47.

196. Estrich & Sullivan, *supra* note 56; *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 75 (1980) (discussing stricter judicial scrutiny for enactments that adversely affect groups lacking political strength); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135 (1980) (stating that the Court's role in protecting minorities should extend beyond removing barriers to participation in the political process). Thus, Professor West argues that the undue burden test adopted by the Court in Planned Parenthood v. Casey, 112 S. Court. 2791 (1992), is unjust at this juncture, when social conditions for motherhood are not just. Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of* Casey, 45 HASTINGS L.J. 961, 966-67 (1994).

197. Ginsburg, *supra* note 182, at 377; *see* SUNSTEIN, *supra* note 25, at 147, 278.

198. Writing before *Casey*, they reasoned that "[t]he very essence of a fundamental right is that it 'depend[s] on the outcome of no elections.'" Estrich & Sullivan, *supra* note 56, at 151 (second alteration in original) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). Chief Justice Rehnquist in *Webster* indicates that people should rely on state legislatures to protect themselves from restrictions on abortion. Estrich and Sullivan, however, point out that he ignores that an overwhelming majority of those in state legislatures are "biologically exempt from the penalties they are imposing." *Id.* at 152.

199. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355, 371-74 (1989) (calling the discourse on abortion incomplete, both because of Roe's medical-legal framework and because the pro-choice movement has failed to recognize the violence incident to abortion).

Another disadvantage in allowing legislators to dominate the constitutional debate about abortion is that the political branches sometimes provide a cumbersome, impeded, ineffective process for resolving constitutional issues. Note that the vast majority of legislation proposed after *Webster*, both pro-choice and pro-life, was not enacted.[200] Moreover, to the extent that the abortion issue dominated electoral politics after *Webster*, politicians, candidates, organizations, and individuals may have been distracted from effeetively dealing with, or even debating, other important issues.[201] Abortion positions became a litmus test for many political candidates; those positions were used as short-hand politieal indicators of a candidate's vicws on multiple issues, regardless of accuracy.[202]

Applying Justice Ginsburg's approach to broad rulings is helpful but remains complex. In my estimation, *Roe* presented an instance in which the Court justifiably took the lead in developing constitutional protection for abortion rights. Because it was the Court's first enunciation of this fundamental right, a strong statement of federal protection was necessary for symbolic import. It servcd a signaling function and promoted quick and nationally uniform protection of a fcderal right. *Roe* was effective in quickly protecting constitutional rights and can be seen as a desirable contrast to the Court's more measured, gradual approach to providing a dcsegregation remedy in *Brown II*.[203]

In many contexts, agreement on what issues are truly nonmajoritarian and when the political process is failing will not be easy to reaeh. Courts must draw those difficult distinctions as they apply the rule of measured steps. Gradualism and respect for maximizing deference to other decisionmakers is not appropriate when other decisionmakers will not allow full participation in constitutional dialogue or have blocked aceess to the dialogue. In each context, courts should considcr whether they must address constitutional issues to providc guidance, promote uniform and speedy federal protection of rights, and advance more effective remedies.

4. Conclusion

Determining whether the rule of measured steps promotes deference and gradualism in the abortion context depends on the definition of measuredness chosen or emphasized. The plurality approach to the rule in *Webster* was not a measured step to the extent that it severely limited precedent. The majority result advanced gradualism in that some part of *Roe* was preserved in *Webster* and then reaffirmed in *Casey* due to O'Connor's reliance on the rule of measured steps. And *Webster* promoted a temporary kind of deference in which other potential participants perceived that they could influence the constitutional dialogue on abortion.

In sum, *Webster* was significant because interested observers and potential dialogic participants saw it as an indieation that the Supreme Court was stepping away from having the last word on abortion rights.[204] The responsibility for construing how much

200. *See supra* part IV.A.2.c.

201. Interview with David B. Frohnmayer (May 13, 1994), *supra* note 123.

202. Interview with David B. Frohnmayer (Aug. 22, 1995), *supra* note 124.

203. See Harris, *supra* note 19, and sources cited *supra* note 19 on the ineffectiveness of the remedies in *Brown II*.

204. *See* FISHER, *supra* note 99, at 275. Fisher writes:

> Each decision by a court is subject to scrutiny and rejection by private citizens and public officials. What is "final" at one stage of our political development may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Court doctrines. Through this process of interaction among the branches, all three institutions are able to expose weaknesses, hold excesses in check, and

protection the Constitution affords for abortion was shared with others. It bears emphasis that the courts did not abdicate their future role in the dialogic process on the abortion issue after *Webster*. The lower federal and state courts were still involved in reviewing aspects of the legislation passed in response to *Webster*. And within three years of *Webster*, the Supreme Conrt issued *Casey*, with its new undue burden test.[205]

But measuredness is not a prerequisite for dialogue and participation by actors outside the federal judiciary in constitutional development in every context. Even broad rulings such as *Roe* can yield significant opportunities for dialogue. The dialogue was different after *Roe* than after *Webster*—the loudest voices, participation of formerly neutral politicians, and the extent to which the dialogue was conducted "in the shadow of the Justices" all differed. Even if the Court had overruled *Roe* in *Webster*, it is likely that significant dialogue would have ensued. Pro-choice voters would focus their efforts on persuading legislators not to enact restrictive legislation; the battle would shift to fronts other than the courts. I eonclude that, at least in the abortion context, dialogue is not dependent on the Supreme Court consistently taking measured steps. Although some types of measured rulings might elicit more participation in dialogue, other factors are eritical for promoting dialogue—including the nature of the substantive constitutional issue. It is not axiomatic that measured steps produce deference and nonmeasured steps foreclose others' participation in dialogue. Courts should not equate departure from the rule of measured steps with a total rejection of deference. Instead, they should consider their rulings—broad or measured—as a single step in a long-term dialogue on a given eonstitutional issue. Both when courts temporarily avoid constitutional issues and when they address them, multiple, long-term opportunities for participation exist as long as the Court and other actors do not perceive that only the Court has the last word on a given constitutional issue.

In some circumstances, it is appropriate for the Supreme Court to dominate the dialogue by announcing a less deferential role for the eourts in a particular substantive context. Justice Ginsburg approves of the Court having done so in *Brown*. Similarly, I view the Court's broad statement in *Roe* as appropriate to protect a newly recognized fundamental right. Yet, even those bold steps did not completely foreelose long-term dialogue on racial classifications and abortion regulation. This Artiele revisits these conclusions after examining the other primary advantage supporting measured constitutional rulings: the promotion of gradualism in constitutional law.

B. Gradualism in Developing Constitutional Law

In addition to justifying the rule of measured steps because it may promote deference to other constitutional interpreters, Supreme Court Justices have claimed that the rule promotes more gradual development of, and stability in, constitutional law. This Artiele contends, however, that sometimes the opposite is true—measured steps can result in less stability in eonstitutional law.

> gradually forge a consensus on constitutional issues. Also through that process, the public has an opportunity to add a legitimacy and a meaning to what might otherwise be an alien and short-lived document.

Id.

205. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). In *Casey*, gender equality issues surfaced for the first time as a significant concern for several Justices. Thus, maybe the terms of the debate are evolving. *See* SUNSTEIN, *supra* note 25, at 283-84.

The gradualism justification for the rule of measured steps is predicated on several principles. First, measured steps promote "orderly development" of the law's content and keep constitutional law from being "confuscd."[206] Second, measured steps may make federal courts' decisions more palatable because the pace of change in constitutional law will be controlled.[207] I arguc, however, that this type of eoncern for the courts' political viability is misplaced; it is less significant than the first principle of gradualism. Specifically, when fedcral courts focus excessively on political viability concerns, they neglect their role in protecting constitutional values. Because Justice Scalia's factors address both aspeets of gradualism, in this Part I will critique the factors hc decms important in applying the rule of measured steps.

The several components of gradualism will be in tension at times. When the Supreme Court chooscs to move gradually and deferentially in an area of law, there is likely to be less uniformity because many issues are not "resolved" by the Court. For cxample, in an effort to move at a measured pace, the Court in *Webster* left significant ambiguity in the content of constitutional law, thereby undercutting stability. The varied aspects of measuredness must be considered when the gradualism justification is invoked. For example, I argue that the *Webster* plurality did not promote gradualism. Instead, it uscd a "dispute resolution" approach to the rule of measured steps which greatly devalued precedent. Only O'Connor's attempt to retain some precedential value for *Roe* by rclying on the rulc of measured steps made the majority result measured in this respect, and thereby advanced gradualism.

1. Elements of Gradualism

In *Webster*, Justice Scalia set forth a five-factored approach to measured steps which encourages the Supreme Court to depart from the rule when "good cause" exists. First, Scalia noted that the rule normally "avoids throwing settled law into confusion."[208] If the content of constitutional law changes in a gradual manner, constitutional law is more stable and uniform.[209] The eoncern for promoting uniformity in federal constitutional law is groundcd on a fairness principle: like cases should be decided alike.[210] Uniformity also promotes people's reliance interests—people can gauge their conduct by past

206. The concurring justices in FCC v. Pacifica Foundation, 438 U.S. 726, 756 (1978), deemed "orderly development" of the law important, and Justice Scalia recognized in *Webster* that the rule "avoids throwing settled law into confusion," 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment).

207. For example, Justice Ginsburg criticizes *Roe* as resting on "[d]octrinal limbs too swiftly shaped." Ginsburg, *supra* note 4, at 1198; *see* ROSENBERG, *supra* note 101, at 11-12.

208. *Webster*, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment).

209. *See* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 72-74 (citing potential problems with proliferation of differing trial court opinions and weakened appellate review); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1292-94 (1986) (critiquing the adequate and independent state grounds doctrine).

210. The Court has emphasized the value in creating a uniform body of federal law in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 631-32 (1874), and Michigan v. Long, 463 U.S. 1032, 1040 (1983). *See also* MARY ANN GLENDON, A NATION UNDER LAWYERS 167 (1994) (attributing current uniformity problems in part to legislatures and administrators who "leave it up to judges to make some sense of a welter of federal, state, and local enactments that are often conflicting or overlapping—some overly detailed, others airily vague"). Indeed, the Federal Judicial Conference's Committee on Long Range Planning has proposed new limits on access to federal courts, citing in part the need to maintain coherence and consistency in federal court decisions and to prevent federal law from becoming "Babel." Robert Pear, *Judges Proposing to Narrow Access to Federal Court*, N.Y. TIMES, Dec. 5, 1994, at A1, B9 (citing report of Committee on Long Range Planning).

constitutional rulings.[211] In contrast, Scalia argued that using the rule to preserve *Roe* would not promote stability, but would preserve only "chaos" in the area of abortion regulation. If measured rulings truly promote stability in the content of constitutional law, how does a judge determine when preserving the status quo constitutes preserving only chaos, as Scalia concluded in *Webster*? A sufficient number of Justices could agree that a given constitutional rule is confusing or chaotic. Then they could develop a standard allowing them to issue a changed constitutional framework or principle when the prior constitutional rule becomes "unworkable" or "unsound."[212] Using any such flexible measure, however, presents a "five-vote problem" at the Supreme Court. Five jurists' votes on the merits of the current constitutional rule will direetly influence whether the old rule is "unsound."[213]

Thinking about stare decisis and its close link to the rule of measured steps can certainly inform this inquiry.[214] The plurality in *Webster* recognized that the Supreme Court is less bound by stare decisis in constitutional adjudication because the Court leads in making constitutional changes.[215] This principle directly undercuts the stability the rule of measured steps seeks to promote. Only three years after *Webster*, the Justices engaged in an intensive debate about stare deeisis in another major abortion ruling, *Planned Parenthood v. Casey*.[216] Indeed, Scalia's flexible approach to the rule of measured steps in *Webster* was a prelude to the elaboration of his views on stare decisis in *Casey*, where he showed more willingness than other Justices to depart from constitutional precedent.[217]

Scalia's "chaos" standard would present a magnified problem if it were to be adopted by the lower federal courts or state courts, whieh issue most constitutional rulings today.[218] If each trial judge and appellate tribunal were to determine when a current constitutional rule is "unsound" or the current framework has become "chaotic," stability in federal constitutional law might decrease. In a related context, Professor Evan

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211. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."); *Murdock*, 87 U.S. (20 Wall.) at 632 (giving as a justification for appellate review of federal questions the reliance interests of citizens); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (citing the "importance, and even necessity of *uniformity*" in federal constitutional interpretation (emphasis in original)); *see also* BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 29-30 (1928) ("The weights are constantly shifted to restore the equilibrium between precedent and justice.").

212. The plurality in *Webster* was willing to depart from the *Roe* trimester framework because it had proved "'unsound in principle and unworkable in practice.'" *Webster*, 492 U.S. at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

213. In choosing which issues *must* be decided to resolve the case and which issues may be avoided, jurists must often peek ahead and assess the merits of the constitutional challenge. *Id.* at 535 (Scalia, J., concurring in part and concurring in the judgment).

214. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) [hereinafter Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*]. In addition to Caminker's articles, see Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (citing Lawson's earlier works); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

215. *Webster*, 492 U.S. at 518. Stare decisis has less force in constitutional cases, "where, save for constitutional amendments, this Court is the only body able to make needed changes." *Id.*

216. 112 S. Ct. 2791 (1992); *see* GLENDON, *supra* note 210, at 113 (referring to the Kennedy, O'Connor, and Souter plurality opinion as a "grandiose portrayal of the role of the Supreme Court in American society").

217. For commentary on the Justices' perceptions of stare decisis in *Casey*, see GLENDON, *supra* note 210, at 158; Horwitz, *supra* note 72, at 71-92.

218. Justice Scalia did not propose this in *Webster*. He only discussed the rule of measured steps in connection with the Supreme Court's role. Alexander Bickel addressed only the Supreme Court when extolling the passive virtues of avoidance, noting: "[o]f course, the lower courts can act in constitutional matters as stop-gap or relatively ministerial decisionmakers only." BICKEL, *supra* note 25, at 198.

Caminker suggests that we consider different rulcs about adhering to precedent for courts at different levels.[219] Similarly, the Supreme Court should use a flexible approach in determining whether departure from the rule of measured steps is appropriate, weighing competing considerations. Generally, I view departures from the rule as more appropriate for the Supreme Court than for lower federal courts, because of the Court's unique role in promoting uniformity and providing guidance on constitutional issues. Part V therefore explores the symbolic funetion of the Court in our polity. The Court provides standards and recognizes areas of constitutional proteetion. In some contexts, a broad statement (like the one in *Roe*) is important to ensure uniform protection of federal rights and interests, or to ensure access to the politieal process for nonmajority interests. Lower federal courts, state courts, and other actors more appropriately implement the Court's broad statements and standards, using measured steps to apply them to new fact situations.

The Justices and commentators have not reached any clear consensus as to the force of stare decisis in constitutional adjudication or the conditions for appropriate departure from precedent.[220] In considering justifications for the rule of measured steps, however, it is important to note that many agree that the principle of stare decisis is of lesser force in the constitutional context *because* one of the fedcral courts' important functions is the development and redircction of constitutional law, sometimes at the expense of stability in the law.[221] Development of the law is valuable in constitutional interpretation because it can make the Constitution's values meaningful and effective over time.[222]

Justice Scalia relied upon a second factor for departing from the rule in *Webster*: to the extent the Court avoided reconsidering *Roe*, it would retain some of *Roe* in its constitutional interpretation.[223] He noted that the majority's decision to avoid dispensing completely with *Roe* in *Webster* was itself a significant eonstitutional deeision.[224] While

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219. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, *supra* note 214. Martha Field, in a related context, argues that judges should determine abstention at the trial court, not the Supreme Court, level. *See, e.g.*, Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

220. *Casey*, 112 S. Ct. at 2808. The dissenters in *Webster* also urged a stronger role for stare decisis, quoting Brandeis: "The careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Webster*, 492 U.S. at 558 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). For a variety of commentators' views and further source references, see Symposium, *Judicial Decisionmaking: Stare Decisis and Constitutional Meaning*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

221. *See Casey*, 112 S. Ct. at 2808-09. *But see* Staub v. City of Baxley, 355 U.S. 313 (1958) (Frankfurter, J., dissenting) (coneluding that safeguarding the limited role of the federal courts vis-a-vis the majoritarian branehes was more important than giving guidance on constitutional issues in some cireumstances).

222. *See, e.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 66-69 (1987); SUNSTEIN, *supra* note 25, at 354. *See generally* ELY, *supra* note 196.

223. As Scalia stated:

> The result of our vote today is that we will not reconsider that prior opinion, even if most of the Justices think it is wrong, unless we have before us a statute that in fact contradicts it—and even then (under our newly discovered "no-broader-than-necessary" requirement) only minor problematical aspects of *Roe* will be reconsidered, unless one expects state legislatures to adopt provisions whose complianee with *Roe* cannot even be argued with a straight face.

Webster, 492 U.S. at 537 (Scalia, J., concurring in part and concurring in the judgment).

224. As Justiee Scalia noted:

> Perhaps [certain] abortions cannot constitutionally be proscribed. That is surely an arguable question, the question that reconsideration of *Roe v. Wade* entails. But what is not at all arguable, it seems to me, is that we should decide now and not insist that we be run into a corner before we grudgingly yield up our judgment. The only sound reason for the latter course is to prevent a change in the law—but to think that desirable begs the question to be decided.

Id. at 535.

Brandeis would have welcomed avoidance because he believed that one of the most important functions of the Court is avoiding "unnecessary" constitutional questions, Scalia concluded that avoidance was the least responsible course in *Webster*.[225] With his second factor, Scalia makes a critical point: the choice to use the rule to avoid a broader issue is itself an exercise of power and a form of constitutional interpretation.[226] It retains the Court's prior ruling as the status quo.

Justice Scalia's first two factors for applying a flexible rule of measured steps correlate with the first principle of gradualism, which is concerned with changing the status quo slowly so as to preserve a stable content in constitutional law. His other three factors correlate more closely with the second principle of gradualism, which is concerned with maintaining a slow pace of change in constitutional law in order to make changes more palatable. Measured changes purportedly will find the widespread public acceptance which does not attach to sudden or haphazard shifts in constitutional law. When the groundwork has been carefully laid in prior decisions for redirection or development of the law, the Supreme Court's credibility arguably is preserved.[227]

These arguments about the federal courts' political viability are not espoused only by the politically "conservative" Justices. Brandeis, Frankfurter, and Ginsburg—the more politically "liberal" Justices—have also emphasized avoiding constitutional rulings in order to escape political entanglements. As noted earlier, they applauded avoidance and measured rulings because they worried about the countermajoritarian difficulty and believed that one of the primary functions for the federal courts was to safeguard their limited judicial power. By doing so, federal courts preserved their politieal viability and respected the powers of other federal branches as well as the states.[228] Similarly, Scalia advocated a broader ruling in *Webster* to remove the courts from the political arena of abortion decisions. This second principle of gradualism is based on federalism and separation of powers concerns. When the federal courts protect the spheres of the other branches and the states, they also protect their own political capital.

Thus, Justice Scalia's other factors ask whether an issue can be classified as a political issue that is best handled by the majoritarian branches.[229] Scalia classified abortion as a political issue which distorted the public perception of the Supreme Court's role. With a broad ruling, he sought to ensure that federal courts would in the future avoid the abortion issue entirely. Consideration of "political" questions do "great damage" to the Court by "mak[ing] it the object of the sort of organized public pressure that political

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225. Justice Scalia concluded his opinion in *Webster*:

> Of the four courses we might have chosen today—to reaffirm *Roe*, to overrule it explicitly, to overrule it *sub silentio*, or to avoid the question—the last is the least responsible. . . . I concur in the judgment of the Court and strongly dissent from the manner in which it has been reached.

Id. at 537.

226. *See* Ginsburg, *supra* note 182, at 385 n.81 ("'These people would never understand that if we held the law constitutional, we would not be finding it good.'" (quoting Judge Henry J. Friendly, Address at New York University School of Law, Some Equal Protection Problems of the 1970's 14-15 (on file with the North Carolina Law Review))); Gunther, *supra* note 2, at 7-8.

227. Bickel praised techniques such as the avoidance doctrine precisely because they allow the Court to control the timing and circumstances of its ultimate coustitutional pronouncements. To borrow Bickel's phrase, the Court might "reflect out loud . . . without as yet assuming responsibility" for the constitutional pronouncement. BICKEL, *supra* note 25, at 176, 240.

228. Kloppenberg, *supra* note 1, at 1012-17, 1035-65; *see supra* text accompanying notes 178-90 (discussing Justice Ginsburg's views on the issue of the federal court's political viability and respect for other branches).

229. "*Alone* sufficient to justify a broad holding is the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court." *Webster*, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

institutions in a demoeracy ought to receive."[230] Scalia also voiced a federalism concern, which is linked to his view of the merits of the abortion issue. He argued that a broader ruling in *Webster* would signal to the states that, in his opinion, they have constitutional power to restrict abortion beyond that previously recognized by the Court.[231]

Despite these rcservations, there is less justification for using the rule of measured steps as a separate barrier to constitutional rulings based on political classifications of issues, because the political question doctrine and other highly developed justiciability doctrines sufficiently address Scalia's concerns.[232] Additionally, the political viability arguments are not as weighty as other justifications for avoidance of constitutional issues. I have previously argued that concern for federal courts' credibility is a less weighty justification than promotion of deference because courts are not extremely fragile, they are not clearly exposed to greater danger by constitutional adjudication than by other types of adjudication, and they should not be concerned with their own credibility at the expense of protecting certain constitutional rights.[233] The federal courts, as well as other constitutional actors, have a duty to be involved in deciding constitutional issues and developing constitutional law.[234]

Justicc Scalia's factors highlight both principles of the gradualism justification. Although I have noted where I disagree with some of his reasoning, I agree that the rule of measured steps must be applied in a flexible, context-based manner. The next subsection explores the tensions between the several elements of gradualism.

2. Tensions in Preserving Gradualism

In considering whether it is taking a measured step, a court must examine the competing principles of gradualism. When the Supreme Court chooses to move gradually and deferentially in an area of law, there could be multiplc, inconsistent applications of constitutional law among other constitutional interpreters such as legislators, lower federal and state courts, and executive officers enforcing laws. Even if those other interpreters take incremental steps in applying the Court's interpretation of the Constitution, there is likely to be less uniformity because the Court leaves many issues unresolved. This problem may be compounded when the Supreme Court issues an ambiguous measured ruling.

For example, the majority in *Webster* could not reach consensus on a clear principle of constitutional law to replace existing law. In an effort to move at a measured pace, the Court left significant ambiguity in the content of constitutional law, thereby undercutting one form of stability. Moreover, the approach of the *Webster* plurality toward the rule of measured steps meant that precedent only applied to the extent later challenges reflected

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230. *Id.* at 532.

> The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical . . . .

Id.

231. *Id.* at 535.

232. Kloppenberg, *supra* note 1, at 1036-46.

233. *Id.* at 1042-46.

234. As Justice Blackmun asserted in his *Webster* dissent: "This Court stands as the ultimate guarantor of that zone of privacy, regardless of the bitter disputes to which our decisions may give rise. In *Roe*, and our numerous cases reaffirming *Roe*, we did no more than discharge our constitutional duty." *Webster*, 492 U.S. at 557 n.11 (Blackmun, J., concurring in part and dissenting in part). *See generally* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER (1991).

something close to the precedent's exact facts and an almost identical statute or regulation. The dissent accused the *Webster* plurality of evading *Roe* on untenable fact-based differentiations between the two cases.[235] The dissenters charged that the plurality pretended to preserve *Roe*, citing the rule of measured steps, but in fact overruled *Roe*. That is, the plurality "modified" and "narrowed" the old rule so drastically that it created a new rule.[236] In this sense, as argued earlier, the plurality's approach in *Webster* was not measured.[237] In a related approach, some argue that a decision of the Court imposes no legal duties except on the parties to that case.[238] By confining the precedent to its exact facts, courts use measured steps to lessen the force of precedent and thus undercut stability and predictability in the content of constitutional law.

Although I classify the plurality's "dispute resolution" approach to the rule as *not* measured, it is useful to compare it to the approach in *Pacifica*.[239] The Court's ruling in *Pacifica* prohibited future airings of George Carlin's monologue only at the same or closely similar times, in the same media and under similar circumstances.[240] While it left issues unresolved, *Pacifica* did not narrow precedent as the *Webster* plurality did. It dealt with a novel situation and took a measured step to resolve only the facts presented and allow the FCC to take the initial step in resolving the next challenge. Like the *Webster* plurality, some Justices have recently construed precedent narrowly or revised precedent in a manner that shifts protection for federal rights "backward" in several areas of racial classification law.[241] These significant shifts undercut stability and may be best classified as nonmeasured movements.

At the other extreme from such a specific "dispute resolution" approach, broad constitutional decisions likewise could fail to secure some legal rights by undermining gradualism and adherence to precedent.[242] Courts should consider different types of broad and measured rulings. For example, Justice Ginsburg has distinguished *Roe* from the more open-ended *Griswold* ruling because the latter left more ability for others to respond and fill in the details.[243] Measured rulings by the Court could also promote uniformity in federal law when the rulings are clear and the Justices are largely in consensus. Those

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235. As Justice Blackmun states:

> The plurality pretends that *Roe* survives, explaining that the facts of this case differ from those in *Roe* .... The plurality repudiates every principle for which *Roe* stands; in good conscience, it cannot possibly believe that *Roe* lies "undisturbed" merely because this case does not call upon the Court to reconsider the Texas statute, or one like it.

Webster, 492 U.S. at 556 (Blackmun, J., concurring in part and dissenting in part); *see supra* part II.

236. "With feigned restraint, the plurality announces that its analysis leaves *Roe* 'undisturbed,' albeit 'modif[ied] and narrow[ed].'" *Webster*, 492 U.S. at 538 (Blackmun, J., concurring in part and dissenting in part) (alterations in original) (quoting plurality opinion).

237. *See id.* at 542; *supra* part IV.A.3. Critics charge that the plurality in *Webster* read *Roe* so narrowly in order to revise abortion law. *See also* Estrich & Sullivan, *supra* note 56; Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 923-24.

238. For example, Bickel argued that the Court imposes legal duties only on the parties in his defense of Southern resistance to the "School Segregation Cases." BICKEL, *supra* note 25, at 263-64. Daniel Farber thoroughly critiqued Bickel's treatment of Supreme Court decisions in Daniel Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387.

239. FCC v. Pacifica Found., 438 U.S. 726 (1978).

240. *Id.* at 750.

241. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (finding that federal affirmative action set-asides must be narrowly tailored to fulfill a compelling interest); Miller v. Johnson, 115 S. Ct. 2475 (1995) (rejecting the Justice Department's interpretation of the Voting Rights Act and finding a redistricting scheme unconstitutionally race conscious).

242. *See* Rescue Army v. Municipal Court of L.A., 331 U.S. 549 (1947).

243. "Unlike *Roe*, *Griswold* did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply." *Webster*, 492 U.S. at 494.

rulings could signal a stability in the direction of the law. Alternatively, the Court's rulings could also promote uniformity by closely adhering to precedent. Although the status quo preservation inherent in this molecular movement can be a significant problem in some substantive areas, a measured ruling which greatly respects precedent advances the gradualism justification for the rule.

The Supreme Court could also achieve uniformity in the content of federal law by addressing constitutional issues broadly and by using a flexible approach to the rule of measured steps, but urging the lower federal courts and state courts to use only measured steps in constitutional adjudication. The state and lower federal courts could then serve as laboratories, experimenting with implementation of the Court's broad rulings and flexible standards in limited factual circumstances. The next Part emphasizes a heightened role for the Supreme Court in ensuring uniformity through broader statements which provide guidance on constitutional issues.

Although I argue that heightened guidance and promotion of uniformity through a flexible approach to broad rulings is most appropriate for the Supreme Court, it may sometimes be important for other courts to employ a similar contextual approach to the rule. The bulk of federal constitutional decisions are currently made by the lower federal and state courts. Additionally, the Supreme Court, with its discretionary certiorari policies and limited resources, faces only a small portion of the constitutional questions raised in litigation. Indeed, the Court has heard a declining number of cases in recent years. Federal circuits may have differing constitutional pronouncements on the same issue for a considerable period of time without Supreme Court intervention.[244] State rulings on federal constitutional issues may conflict with federal pronouncements on the same issues.[245] Lack of uniformity in constitutional decisions may be beneficial because more measured rulings encourage experimentation with constitutional interpretation in many forums.[246] To the extent uniformity is important to secure fairness and promote reliance, however, a federal appellate court may need to address the lack of uniformity in its own circuit by issuing a broader constitutional ruling which provides guidance and advances uniformity. The Supreme Court could still address intercircuit conflicts under this approach. And, in some circumstances, trial courts and state courts should depart from the rule when there is a great need for speedy and uniform protection of a federal right. Part V develops this suggestion by exploring lower court rulings challenging the military's ban on gay and lesbian service members.

3. Conclusion

Measured steps do not guarantee stability in constitutional law. Both measured and broad rulings can cause upheavals in constitutional law when they signal significant departure from precedent and generate less uniformity. Specifically, the "dispute resolution" approach to the rule used by the *Webster* plurality undermines stability because it lessens the value attached to precedent. Even if this approach to the rule promotes some elements of gradualism, it undercuts uniformity. To balance the tensions

244. Chemerinsky & Kramer, *supra* note 209, at 83-85 (citing current reliance on federal courts of appeals to settle most federal law issues).

245. CHEMERINSKY, *supra* note 31, § 2.6, at 142; Chemerinsky & Kramer, *supra* note 209, at 84.

246. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Chemerinsky & Kramer, *supra* note 209, at 79; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1161 (1993).

identified above, we need to consider seriously differing roles for different courts at different levels in terms of applying the rule and advancing its justifications. Thus, the Supreme Court should adopt a flexible approach to the rule, balancing its justifications in each context. In contrast, the lower federal courts and state courts should depart from the rule more cautiously because of the potential for disrupting stability. Part V focuses on the disadvantages of measured rulings in order to develop criteria for applying a flexible rule of measured steps and suggests why lower level courts should sometimes use a flexible, context-dependent approach to the rule.

V. DISADVANTAGES OF MEASURED CONSTITUTIONAL RULINGS

The potential disadvantages of measured constitutional steps include: (1) slowness in changing the status quo; (2) less uniformity in the content of federal constitutional law; (3) lessened judicial guidance on constitutional issues; (4) failure to secure rights; and (5) inefficiencies for courts, litigants, and other actors. In discussing the advantages of measured steps in the context of abortion rights, Part IV considered many of these items. For example, lessened judicial guidance is a tradeoff which sometimes results from courts deferring so that other constitutional actors can lead in developing an area of law. Part IV additionally showed how some measured rulings may advance one principle of gradualism but produce ambiguity and weaken the uniformity of law. The slow pace of change offered by some measured rulings can be viewed as an advantage or disadvantage, depending on the substantive constitutional issue and depending on the viewer. This Part first identifies the potential disadvantages which have not yet been fully described. It then analyzes the effectiveness of measured rulings in the series of cases involving gay and lesbian service members. As a contrast to the *Webster* analysis, this Part uses a series of lower court rulings to highlight the differing ramifications of measured steps at various court levels.

A. Canvassing the Disadvantages

Providing guidance on constitutional issues is a preeminent function of the federal courts, particularly the Supreme Court.[247] The "lawsaying" function of the Supreme Court dates at least back to *Marbury*.[248] Bickel described the Court as being "engaged in an endlessly renewed educational conversation" with other institutions as it decides constitutional issues.[249] When a court focuses on one constitutional issue, and deems

247. Bobbitt calls this the Court's function in expressing values. BOBBITT, *supra* note 23, at 189, 192-93, 211, 235-36; *see also* ROSENBERG, *supra* note 101, at 7-8, 25-26 (arguing that Court decisions are sometimes viewed as powerful symbols which can place items on the political agenda and make it difficult for other actors to avoid constitutional responsibility); Fiss, *supra* note 7 (describing Court's norm-articulation function); Linde, *supra* note 7, at 238 (describing the symbolic role of Court rulings in "shap[ing] people's vision of their Constitution and of themselves"); Resnik, *supra* note 7, at 1526-28.

248. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see* Althouse, *supra* note 101, at 1182 n.22 (explaining that the word "lawsaying" is derived from *Marbury*).

249. BICKEL, *supra* note 115, at 111. Bickel writes:

> The Court thus interacts with other institutions, with whom it is engaged in an endlessly renewed educational conversation. It is a conversation that takes place when statutes are construed, when jurisdiction is defined and perhaps declined, when the lower federal courts are addressed by the Supreme Court as their "administrative head," and also when large "constitutional issues" are decided. And it is a conversation, not a monologue.

Id.; *see also* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (calling

others unnecessary to reach, it fails to give guidance on those other issues. If a hierarchy or ranking in significance is possible for constitutional issues, a measured ruling can neglect more important constitutional issues.[250] The *Webster* dissenters complained that the plurality did not even mention, let alone reach, the more important constitutional issue of "whether the Constitution includes an 'unenumerated' general right to privacy."[251]

Some dispute that a primary mission for the courts is giving guidance. Justice Stevens has stated that the Justices "do not sit to expound our understanding of the Constitution to interested listeners in the legal community; we sit to resolve disputes."[252] The avoidance doctrine, based in part on the prohibition against rendering advisory opinions, is grounded on this dispute resolution emphasis.[253] Similarly, the strengthening in recent decades of judicial management techniques, judicial encouragement of settlement, and alternatives to litigation demonstrates the judiciary's heightened concern with its role in providing efficient dispute resolution services.[254] A rich literature explores the tension between these functions of resolving private disputes and providing public guidance by articulating constitutional values.[255]

A court does not have to issue a broad holding to provide guidance. Courts can provide guidance in measured rulings with clear, incremental holdings. They can provide guidance by consistently respecting precedent, by speaking with less ambiguity, and by issuing measured rulings which employ flexible standards for later courts to develop. Again, the perception that others are able to respond to court rulings is critical. What the federal courts say is not necessarily the last word on a constitutional issue: their statements can generate further interaction.

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the Supreme Court "an educational body, and the Justices are inevitably teachers in a vital national seminar").

250. Similarly, Justice Scalia urged departure from the rule in *Webster* because a broad ruling would give guidance by signaling to the states that they have constitutional power in the abortion regulation field which they could exercise.

> In most cases, we do no harm by not speaking more broadly than the decision requires. Anyone affected by the conduct that the avoided holding would have prohibited will be able to challenge it himself and have his day in court to make the argument. Not so with respect to the harm that many States believed, pre-*Roe*, and many may continue to believe, is caused by largely unrestricted abortion. That will continue to occur if the States have the constitutional power to prohibit it, and would do so, but we skillfully avoid telling them so.

Webster v. Reproductive Health Servs., 492 U.S. 490, 535 (1988) (Scalia, J., concurring in part and concurring in the judgment).

251. *Id.* at 546-47 (Blackmun, J., concurring in part and dissenting in part).

252. Michigan v. Long, 463 U.S. 1032, 1071 (1983) (Stevens, J., dissenting). Moreover, the public may be unaware of many Supreme Court decisions, or only aware in a "sound bite" level of sophistication. ROSENBERG, *supra* note 101, at 16, 111.

253. Kloppenberg, *supra* note 1, at 1009-11.

254. *See, e.g.*, Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991) [hereinafter Resnik, *From "Cases" to "Litigation"*]; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Erik K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

255. *See, e.g.*, Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990); Resnik, *From "Cases" to "Litigation,"* *supra* note 254; Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43.

Although it is difficult to measure the impact of constitutional rulings,[256] they are important in two senses: both because of their effect on the litigants and their potential national import. At a minimum, constitutional rulings by the Supreme Court serve a practical function of providing guidance to the extent other courts and constitutional actors closely adhere to those precedents. The importance of constitutional issues therefore argues for a heightened duty of the Supreme Court to decide—not avoid—significant constitutional challenges which have ramifications beyond the immediate dispute.[257] As noted earlier, Justice Scalia argued in *Webster* that the Court should provide more guidance by clarifying the chaos of *Roe*, and he indicated that states could exercise more power through a nonmeasured ruling. In contrast, Justice Stevens has argued that the rule of measured steps should be followed most closely when courts are asked to decide "problematic" (*i.e.*, controversial and important) constitutional questions.[258] Justice Ginsburg appears to advocate a position between those poles. Although Justice Ginsburg praises measured motions for the federal courts, she argues that the Supreme Court should lead when minority rights are not adequately protected by majoritarian branches.[259]

The Court has recently declined to provide constitutional law guidance in several ways. In addition to using avoidance techniques, the current Court has almost complete discretion in selecting which issues to hear. And the Court has used the discretionary certiorari policy to decide a declining number of cases in recent terms.[260] Further, the

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256. Justice Frankfurter argued:

> It is because the exercise of the right to declare a law unconstitutional is "the most important and delicate duty of this [C]ourt," and because that right "is not given to [the Court] . . . as a body with revisory power over the action of Congress," nor, it may be added, over the action of the forty-eight States, that this Court has from the beginning demanded of litigants that they show in precisely what way and to what extent incursions have been made into their federally protected rights and rules have been designed to narrow as closely as possible the issues presented by such claims.

Staub v. City of Baxley, 355 U.S. 313, 335 (1958) (Frankfurter, J., dissenting) (alteration in original) (citation omitted) (quoting Muskrat v. United States, 219 U.S. 346, 361 (1911)). I have questioned whether constitutional decisions are necessarily more important than other decisions. Kloppenberg, *supra* note 1, at 1036-42.

257. In *Poe v. Ullman*, Justice Douglas, dissenting from the Court's refusal to find the dispute regarding Connecticut's law banning contraceptive use ripe, argued that "a sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them. . . . They are entitled to an answer to their predicament here and now." 367 U.S. 497, 513 (1961) (Douglas, J., dissenting); *see* BICKEL, *supra* note 25, at 127. Scholars have debated extensively the problem of reconciling the duty of federal courts to decide cases properly before them with techniques such as the abstention doctrines. *See, e.g.*, REDISH, *supra* note 234; Bandes, *supra* note 24.

258. In *Berkemer v. McCarty*, Justice Stevens argued:

> Lamentably, this Court fails to follow the course of judicial restraint that we have set for the entire federal judiciary. In this case, it appears the reason for reaching out to decide a question not passed upon below and unnecessary to the judgment is that the answer to the question upon which we granted review is so clear under our settled precedents that the majority—*its appetite for deciding constitutional questions only whetted*—is driven to serve up a more delectable issue to satiate it. I had thought it clear, however, that no matter how interesting or potentially important a determination on a question of constitutional law may be, "broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." Indeed, this principle of restraint grows in importance the more problematic the constitutional issue is.

468 U.S. 420, 445-46 (1984) (emphasis added) (citation omitted) (quoting Barr v. Mateo, 355 U.S. 171, 172 (1957)).

259. *See supra* text accompanying notes 187-90.

260. *See, e.g.*, Richard Carelli, *High Court Decisions Shrinking*, CLEVELAND PLAIN DEALER, Dec. 14, 1994, at 22A ("The Supreme Court's shrinking decision docket, a puzzling phenomenon of recent years, appears headed for a new low. . . . This term, the court is on a sub-84 pace."); Alan M. Dershowitz, *The High Court Shuts Out the Lowly*, L.A. TIMES, Oct. 6, 1994, at B7 (noting that, out of more than 1600 petitions for review, "the justices found not a single one worthy of their review[,] . . . includ[ing] hundreds of criminal convictions involving defendants too poor to afford a lawyer[,] . . . a number of medical-ethics cases . . . and numerous other controversies that concern all Americans"); Linda Greenhouse, *U.S. Justices Open Their New Session by Refusing Cases*, N.Y. TIMES, Oct. 4, 1994, at A4 (stating that of 1600 petitions, 44 were accepted, indicating that fewer cases may be decided this session than in the record low 1993-94 term, in which only 84 cases were decided).

problem of lessened guidance is exacerbated by the splintered opinions and close votes among the Justices in recent terms.[261]

The Court could provide increased guidance in several ways. Congress, of course, could require it to hear certain federal issues rather than allowing the Court great discretion in choosing the cases it hears. Second, the Court can provide its analysis of a constitutional challenge more quickly when a speedy resolution would be beneficial. For example, the Court heard the term limits challenge on an expedited basis during the 1994-95 term.[262] Additionally, Congress can control the timing of Supreme Court review by providing for early resolution of a constitutional challenge to a statute, as it did with the flag burning statute.[263] Alternatively, the Court itself could speak in a more uniform voice and work hard to build consensus and speak in clear majorities. However, that may not be feasible because of disagreements among the Justices on the merits of some constitutional issues, and open disagreements may be valuable to the extent the Justices' differing perspectives inform the constitutional debate. Finally, Congress and the federal judiciary could explore the Article III constraints on the Supreme Court issuing some form of advisory opinions.[264]

However, there is danger in seeking guidance too readily from the Supreme Court.[265] When one constantly looks to the Supreme Court to have the last word on a constitutional issue, other constitutional actors can more plausibly avoid participating in the constitutional dialogue. When the Court offers limited guidance—as in *Webster*—others may be forced to participate more actively in debating a constitutional issue.

Additionally, measured constitutional rulings may pose harms because they leave some claims of federal rights unresolved. Justice Frankfurter once recognized that the Court's avoidance techniques "may result in the disadvantages and embarrassments of keeping open doubtful questions of constitutionality."[266] These disadvantages constitute more than just lack of guidance. Many measured rulings allow unconstitutional conduct to continue and thus leave some constitutional rights less secure.[267] This harm can extend beyond the

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261. Ginsburg, *supra* note 4, at 1189-91. In a practice established by Chief Justice Marshall, the Court previously spoke in a more uniform voice, both for guidance and to lend greater credibility. Presently, the "overindulgence in separate opinion writing may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions. Rule of law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body." *Id.*; *see also* BOBBITT, *supra* note 23, at 187 (describing Marshall Court); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 12-13 (1993) (citing historical sources on English and American practices). Professors Kornhauser and Sager offer a thoughtful evaluation of problems of generating guidance via collegiality among differing levels of courts. *Id.* at 42-47.

262. Linda Greenhouse, *High Court to Rule on Term Limits*, EUGENE REG. GUARD, June 21, 1994, at 1A. The Supreme Court took a term limits case at the first opportunity (Arkansas' appeal), whereas, at times, the Court awaits circuit conflict before granting certiorari. This can be taken as a signal that a decision of the Supreme Court sooner rather than later may be beneficial. In this expedited review, the Court held that the Arkansas term limits amendment violated the Constitution. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

263. 18 U.S.C. § 700(d) (1994) (providing for direct appeal to the Supreme Court of judgments issued by a District Court on the constitutionality of flag burning prohibition).

264. Some state courts issue advisory opinions. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2, at 43 (1989) (discussing the Massachusetts courts' practices in a flag burning case). Although Article III as construed by the Court prohibits "advisory opinions," it is not clear and immutable what specifically constitutes an impermissible advisory opinion. For example, we regard certain portions of opinions as dicta and afford those portions less precedential effect. *See generally* Dorf, *supra* note 56.

265. BURT, *supra* note 102, at 353; FISHER, *supra* note 99, at 8; ROSENBERG, *supra* note 101, at 338-43; SUNSTEIN, *supra* note 25, at 9.

266. Staub v. City of Baxley, 355 U.S. 313, 330 (1958) (Frankfurter, J., dissenting).

267. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 1, 1 n.2 (1980); Bandes, *supra* note 24, at 319 ("[T]he most important goal of [A]rticle III is to preserve the Court as the primary guardian of the Constitution."); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 42-44 (1979); Louis L. Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV.

immcdiate litigants because of the precedential effect of rulings.[268] In contrast, a measured ruling leaves the status quo in place.

Others argue that federal courts have a special duty to protect the fcderal rights of individuals and minorities from majoritarian resolutions of rights debates.[269] Justice Ginsburg's approach to measured decisionmaking reflects this vision of the federal courts' role. Similarly, this Article urges federal courts to depart from the rule of measured steps when nccessary to protect such interests. And, as noted above, some measured rulings may generate nonuniform protection of federal rights. Like cases, even if decided simultaneously, may be treated differently by various courts.[270] In addition to causing instability, this generates unfairness.

Finally, some types of narrow rulings increase the amount of litigation and delay the securing of rights by forcing each person to litigate individually. In contrast, broader rulings or remedies that pertain to a larger segment of people similarly situated resolve questions for more potential litigants. From an individual autonomy perspective, it may be beneficial to afford each person a day in court and to increase the opportunities for participation and response between courts and other actors.[271] But participation rights may not be so valuable to all litigants because participation comcs with costs. The litigant and her story are deemphasized as the law is applied and developed by lawyers and judges in an adversarial and hierarchical system based on rationality and abstract reasoning.[272] Multiple, duplicative litigation poses costs and risks not only for litigants but for the judicial system as a whole.

This canvassing of potential harms was designcd to introduce multiple effects of measured steps without unduly repeating harms previously addressed in Part IV's analysis of the benefits of mcasured steps. The remainder of this Part is more concrete, evaluating potential problems of measured rulings through a series of cases in the lower federal courts involving the constitutionality of the military's policy concerning sexual orientation.

B. Effects of Measured Rulings in Litigation Involving Gay and Lesbian Service Members

Recent litigation involving gay and lesbian military service members presents the federal courts with a choice between fashioning narrow injunctions affecting only individual litigants or broad injunctions concerning the constitutionality of the military's ban as applied to all service members. The scope of injunctive relief in this context is thus similar to the scope of precedent discussed earlier—an injunction applying only to an individual service member is like the *Webster* plurality's "dispute resolution" approach to Supreme Court precedent. We cannot evaluate whether measured injunctive rclief is bcneficial without considering the potential harms of such rulings.

1265, 1265 (1961).

268. *See Staub*, 355 U.S. 313; Rescue Army v. Municipal Court of L.A., 331 U.S. 549 (1947).

269. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 402-03 (1971) (Harlan, J., concurring); CHEMERINSKY, *supra* note 31, § 9.1.2, at 527-29.

270. *See* CARDOZO, *supra* note 211.

271. *See* sources cited *supra* note 252.

272. *See, e.g.*, Minow, *supra* note 104; Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021 (1994).

1. *Meinhold v. United States Department of Defense*

One of the early cases which has commanded significant attention was brought by V. Keith Meinhold.[273] Meinhold publicly declared his homosexuality in May 1992 and the Navy immediately began discharge proceedings against him.[274] The trial judge initially granted a preliminary injunction for Meinhold upon finding that the Navy had failed to follow its own procedural regulations and that the Navy's regulations violated the equal protection component of the Fifth Amendment.[275] Meinhold was reinstated pending resolution of the case.[276] The trial judge then issued a preliminary injunction forbidding the Department of Defense ("DOD") from "discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States."[277]

The Ninth Circuit upheld the preliminary injunction upon appeal by the DOD.[278] The trial judge then issued a permanent injunction barring the DOD from taking any action against a homosexual service member based on sexual orientation, effectively nullifying the Department's regulations in this area.[279] The government appealed the judge's ruling on the scope of the injunction immediately; the Supreme Court granted an emergency stay of the injunction as it pertained to anyone other than Meinhold.[280] Later, when the Ninth Circuit considered the merits of Meinhold's challenge, the court significantly narrowed the trial court's ruling and held that the injunction was proper only to the extent it enjoined the Navy from discharging Meinhold based on his declaration that he is a homosexual.[281] Thus, the constitutional ruling was limited to benefit only Meinhold due to the measured form of relief employed.

The proper scope of injunctive relief against government actors is a complicated and unsettled area, partly because of the equitable foundations underlying injunctive relief. As the Ninth Circuit noted when it overturned Judge Hatter's nationwide injunction in

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273. The military policy which gave rise to these cases was instituted in 1981 and has forced over 16,000 armed forces members out of service. The policy states that a homosexual may be discharged if he makes statements which indicate a propensity to engage in homosexual behavior. Prior to the 1981 policy, a service member could be discharged only for engaging in such conduct. Under the 1981 policy, merely being homosexual was cause enough for discharge. Katrina M. Dewey, *Conduct Unconstitutional*, CAL. LAW., July 1993, at 36, 38.

274. Meinhold, one of the Navy's most talented airborne sonar analysts, was widely respected by both peers and superior officers and was ranked among the top 10% of all Navy instructors. Meinhold's sexual orientation was widely known and accepted in his unit. The Navy never formally advised Meinhold that his homosexuality alone was cause for discharge until after he had declared his orientation on a nationally televised news program. Meinhold v. United States Dep't of Defense, 808 F. Supp. 1453, 1454 (C.D. Cal. 1992), *aff'd in part, vacated in part*, 34 F.3d 1469 (9th Cir. 1994).

275. *Id.* at 1454-55.

276. *Id.* at 1455.

277. *Id.* at 1458. Judge Hatter's ruling presented a compelling and succinct argument for ending the ban on homosexuals in the military. The judge discussed the initial Crittenden report which found "no empirical proof" that sexual orientation affected the ability to fulfill the military's mission; he then cited a 1988 DOD Report which found that sexual orientation was as relevant to suitability to serve as right- or left-handedness and that homosexuals in the military were more likely to adjust to military life successfully than heterosexuals. Additional evidence that female homosexuals were "among the command's top professionals" supported Judge Hatter's finding that there was no rational basis for the regulations. Finally, the judge discussed recent abdications of such bans in Canada and Australia. *Id.* at 1457-58.

278. The court held that the injunction would not harm the DOD because the Clinton administration had recently issued a new directive, effective prior to the Ninth Circuit's ruling, calling for an end to the policy which the district court had declared unconstitutional, and which had served as the basis for the injunction itself. Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994).

279. *Meinhold*, 808 F. Supp. at 1458.

280. Meinhold v. United States Dep't of Defense, 114 S. Ct. 374 (1993).

281. *Meinhold*, 34 F.3d at 1472.

Meinhold, courts must balance an injunction's burden on the defendant against the effectiveness of the relief it awards the plaintiff.[282] Because Mr. Meinhold sought relief only on his own behalf, the court reasoned that effective relief was obtained by upholding the injunction as to him.[283] The appropriate scope of injunctive relief against a governmental defendant thus overlaps with other considerations, including whether relief is pursued on behalf of a class, whether other aggregation techniques are available, whether future litigants will be able to use nonmutual offensive issue preclusion to bind the government defendant, and how future courts will respect an earlier injunction as a matter of precedent. Because traditional equity concerns may not adequately reflect all the considerations important when courts issue injunctions against governmental actors involved in public law litigation,[284] this Article argues that the scope of injunctive relief is a critical factor in assuring or rejecting measuredness in constitutional rulings. Thus, this Article considers whether courts hearing challenges to the federal government's bans against homosexual service members are able to effectively assure adequate relief by analyzing the effects of measured injunctive relief.

2. Other Contemporaneous Litigation

Numerous other individual challenges to the military's policy were simultaneously pending in federal courts while the government appealed *Meinhold* to the Ninth Circuit. Consideration of these other rulings is necessary to evaluate the effectiveness of the narrow injunction in *Meinhold*. In the District of Columbia Circuit, the beleaguered case of Joseph Steffan wound its way up and down the system for six years.[285] In reasoning similar to that in *Meinhold*, the Court of Appeals reversed the district court's decision in favor of the government, ordering that Steffan be reinstated with his diploma and commission. In a rehearing en banc, a fragmented court affirmed the district court decision, holding that Steffan's discharge and denial of his academic degree for merely admitting his homosexuality was not unconstitutional.[286] This ruling directly contradicted the Ninth Circuit's constitutional ruling in *Meinhold*.[287]

In April, 1994, a district court in New York issued a preliminary injunction for six plaintiffs challenging the new "don't ask, don't tell" policy put in place by the Clinton

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282. "An injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Meinhold*, 34 F.3d at 1480 (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

283. *Id.*

284. *See, e.g.*, Michael D. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 HARV. ENVTL. REV. 1 (1988) (critiquing use of the traditional balancing of harms test for awarding equitable relief in environmental citizen suits against federal agencies).

285. Steffan v. Cheney, 733 F. Supp. 121 (D.D.C. 1989), *rev'd and remanded*, 920 F.2d 74 (D.C. Cir. 1990), *on remand*, 780 F. Supp. 1 (D.D.C. 1991), *rev'd sub nom.* Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *vacated and rehearing en banc granted*, No. 91-5409, 1994 U.S. App. LEXIS 9977 (D.C. Cir. Jan. 7, 1994), *aff'd sub nom.* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994). See Judge Wald's dissent, 41 F.3d at 697 (Wald, J., dissenting), for a lucid analysis of the issues and procedural history.

286. *Steffan*, 41 F.3d 677 (one judge concurring, two concurring in part, one concurring in part and dissenting in part, and three dissenting). The majority focused on whether banning those who admit homosexuality has a "rational relation to the legitimate goals" of banning homosexuals from the military. Not questioning the legitimacy of those goals, the court treated this as a question of whether conduct can be inferred from thoughts or desires, when conduct or specific intent is not explicitly denied. Finding this inference, the court held that Steffan failed to show that the directives were unconstitutional *as applied to him*.

287. *Meinhold*, 34 F.3d 1469. The Ninth Circuit held that the DOD's regulation was constitutional only if it applied to statements that actually indicated a desire or propensity to engage in homosexual conduct. The court held that in Meinhold's case the mere statement that he was homosexual was insufficient evidence that he would in fact engage in the prohibited conduct. *But see Steffan*, 41 F.3d 677.

administration while Meinhold's challenge to the old policy was pending.[288] In analyzing the new rule, the New York court found it similar in application to the old one and therefore likely to be an unconstitutional violation of the plaintiffs' Fifth and First Amendment rights.[289] The judge declined to enjoin the application of the regulation to other service members, stating that "[w]ere this a class action affecting all homosexuals in the Services the balance of hardship analysis might be different."[290] The ultimate resolution of *Able* on the merits bore out the court's judgment. In a decision similar in tone and force to that of Judge Hatter in *Meinhold*, the trial court held two provisions of the new rule unconstitutional, but enjoined enforcement only against the plaintiffs.[291] Thus, the ruling was consistent with part of the trial court's ruling and with the Ninth Circuit's ruling in *Meinhold*, and the injunction was of similar scope.

Another service member, Margarethe Cammermeyer, was discharged for admitting her homosexuality in 1989.[292] The trial judge ruled in Cammermeyer's favor and reinstated her as a National Guard Colonel in June 1994.[293] On appeal, the Ninth Circuit put her case on hold pending the outcome of appeals in *Meinhold*.[294]

Much related litigation is still pending, and the Supreme Court has not yet considered either ban. However, what has transpired so far demonstrates that, with the measured scope of injunctive relief ordered by the Supreme Court and the Ninth Circuit in *Meinhold*, numerous lower federal courts continued to participate in determining whether the policies violate the Constitution. While the government appealed *Meinhold*, the courts considered other factual situations and challenges to both policies on a variety of constitutional grounds. The courts issued opinions both consistent with and contrary to portions of *Meinhold*. Additionally, the courts appear to be adopting several different standards in reviewing the military's actions concerning homosexual service members in this litigation.[295]

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288. Able v. United States, 847 F. Supp. 1038, 1045 (E.D.N.Y. 1994); see *infra* notes 297-303 for details of the new policy.

289. *Able*, 847 F. Supp. at 1041-43.

290. *Id.* at 1045.

291. Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995).

292. Cammermeyer was a highly respected member of the armed forces. In her nearly 30 years of service she earned advanced degrees in nursing, was appointed to the University of San Francisco School of Nursing faculty, and received the Bronze Star for distinguished service and other awards and distinctions for outstanding service. Prior to her discharge, Washington Governor Booth Gardner wrote to Secretary Cheney asking that she be retained, or it "would be both a significant loss to the State of Washington and a senseless end to the career of a distinguished, long-time member of the armed services." Cammermeyer v. Aspin, 850 F. Supp. 910, 912-13 (W.D. Wash. 1994).

293. *Id.* at 929. The trial judge granted Cammermeyer's motion for summary judgment on both the equal protection and substantive due process grounds, but did not grant a summary judgment on First Amendment grounds. The judge stated that, notwithstanding the deference given to the military and the mere rationality standard under which these types of claims are reviewed, there is no "military exception" to the Constitution. *Id.* at 915 (deferring to the judgment of other branches in the area of military affairs does not require abdication of "ultimate responsibility to decide constitutional questions") (citing Rotsker v. Goldberg, 453 U.S. 57, 67, 69 (1981)). Applying rationality review, in light of *Rotsker*, the court concluded that Cammermeyer's mere acknowledgment of her sexual orientation was unreliable evidence of a "desire or propensity" to engage in homosexual behavior. *Id.* at 920.

294. *Government Won't Appeal Gay Sailor's Reinstatement*, L.A. TIMES, Nov. 29, 1994, at A17.

295. Although the courts applied rational basis review to the military's policies on homosexuals prior to the 1990's, the military's justifications were usually "rubber stamped" by the courts. A Ninth Circuit decision in 1991 changed this outcome. In *High Tech Gays v. Defense Industry Security Clearance Office*, the court invoked active rational basis review requiring the military to prove *on the record* that a rational relationship existed between the means of the policy and the end goal. 895 F.2d 563 (9th Cir. 1990); *see* Spiro P. Fotopoulos, Note, *The Beginning of the End for the Military's Traditional Policy on Homosexuals:* Steffan v. Aspin, 29 WAKE FOREST L. REV. 611, 636-37 (1994); *see also* Selland v. Aspin, 832 F. Supp. 12 (D.D.C. 1993); Elzie v. Aspin, 841 F. Supp. 439 (D.D.C. 1993). *But see* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994), in which the military was given a presumption in favor of a rational relationship, and was viewed with special deference.

3. Reaction of Other Constitutional Actors

Judge Hatter's broad injunction encouraged the new Clinton administration to study the ban on homosexual service members. The administration then recommended a new policy while freezing all activity on discharge cases involving homosexuals except the *Meinhold* litigation. President Clinton had promoted an end to the ban during his campaign.[296] Clinton said that Judge Hatter's ruling in *Meinhold* "draws the distinction that I seek to draw between status and conduct."[297] Shortly thereafter, however, under pressure from Congress and the Pentagon, Clinton determined that an outright end to the ban was politically impossible to achieve. The administration, faced with increasing public pressure, sought to find a way to eliminate unconstitutional elements of the rule while satisfying the Pentagon's concern for military order.[298] Clinton also had to contend with the efforts of a gay rights coalition which urged the administration to construct a new policy that targeted misconduct, not private behavior.[299]

In negotiations with the DOD and the Senate Armed Services Committee, the Clinton administration did not bring the Justice Department into the dialogue until very late in the process. The Administration made an agreement with the DOD to freeze enforcement of the "old" ban—the one found unconstitutional by Judge Hatter and the Ninth Circuit in *Meinhold*—and instead placed gay and lesbian service members on inactive reserve pending formulation of a new policy. The new "don't ask, don't tell" policy resulting from those negotiations appears to be substantially similar to the old policy.[300]

Additionally, the Justice Department on appeal in *Meinhold* argued that the old ban was constitutional. The Clinton administration initially decided to discontinue contesting other cases brought under the old policy[301] and to wait instead for a challenge to its new policy.[302] However, in June, 1994, the administration was still defending the old policy

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296. Clinton's promise to end the ban won him wide support within the gay community during the election. However, the day after Clinton's inauguration, Senator Sam Nunn, Chairman of the Senate Armed Services Committee, led a strong opposition to this promise, supported by the Joint Chiefs of Staff. Clinton tried to establish a compromise policy, and after the *Meinhold* ruling stated:

> The issue is whether men and women who can and have served with real distinction should be excluded from military service solely on the basis of their status. And I believe they should not. The principle on which I base this position is this: I believe that American citizens who want to serve their country should be able to do so unless their conduct disqualifies them.

Chandler Burr, *Friendly Fire*, CAL. LAW., June 1994, at 54, 54-55.

297. *Id.* at 55.

298. For an interesting discussion on the constitutional underpinnings of the ban and a comparison between executive and legislative authority over the military, see Frank T. Pimentel, Note, *The Constitution as Chaperon: President Clinton's Flirtation with Gays in the Military*, 20 J. LEGIS. 57 (1994).

299. The Campaign for Military Service stressed that the distinction must be "status versus *mis*conduct" instead of "status versus conduct" as Clinton had repeatedly stated. For a detailed account of administration negotiations and the Campaign's efforts, see Burr, *supra* note 296, at 57-58.

300. U.S. Deputy Attorney General Jamie Gorelick argues that the new policy is better than if Clinton had issued a presidential order to lift the ban which would then have been reversed by Congress. At least, Gorelick says, a "small zone of privacy" has been created which represents an attempt to make incremental improvements for gays in the military. *Id.* at 100.

301. David G. Savage, *Administration Slow to Pick Gays-in-Service Case to Defend*, L.A. TIMES, Feb. 8, 1994, at A5.

302. The new policy states:

> A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
>
> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act....
>
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless

in court, apparently fearing that its ability to implement the new policy would be impeded by judicial findings that the old policy was unconstitutional.[303] Unconfirmed reports indicate that the Justice Department has decided not to pursue any further litigation under the old policy, and the government did not in fact appeal *Meinhold* to the Supreme Court.[304] Clinton must now pursue enforcement of the new policy although many of the same or similar constitutional questions remain.[305] Although it has discretion in choosing cases to appeal, the government will almost surely appeal the recent decision in *Able*[306] holding the new policy unconstitutional. The course of that litigation will show how aggressively Clinton plans to enforce the ban.

Other litigants also have opportunities to influence the ongoing public debate through litigation strategy. Challenges to the bans are often orchestrated by interest groups so that people with stellar military careers are selected to challenge the bans in order to present the best possible factual challenges.[307] Judges in several military ban cases called the service member litigants "remarkable" and "exceptional."[308] The military also has the opportunity to consider carefully its application of the new policy. In light of *Meinhold,* it too could become entangled in inconsistent court decisions, making administration of the policy difficult and uneven. For example, in December, 1994, the Navy Board of Inquiry, applying the new "don't ask, don't tell" policy, found that Zoe Dunning, who had stated that she was a lesbian, should not be separated from the service.[309] The Board agreed with Dunning's attorney that such a statement did not indicate an intent to practice homosexuality.[310] Thus, in light of *Meinhold* and concerns about the potential unconstitutionality of the new policy, the military may be avoiding fully defending the new policy.

In sum, numerous actors had the opportunity to participate in and influence the courts' actions on bans, and many participated actively. In response to court rulings, negotiations ensued between executive officials, legislative members, and administrators, and public debate over the military's policy appeared to increase significantly as a result of the Clinton administration's maneuvering after the election and the decision in *Meinhold.* Congress held hearings, and interest groups reflecting a wide spectrum of opinions about the ban voiced their views to members of Congress and the Clinton administration.

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there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts . . . .

10 U.S.C. § 654 (1994).

303. Bradley Graham, *U.S. Shields New Military-Gay Policy by Backing Old Expulsions in Court,* WASH. POST, June 22, 1994, at A7.

304. *Government Won't Appeal Gay Sailor's Reinstatement, supra* note 294, at A17.

305. *Id.* In a related matter, the Justice Department chose not to file an amicus brief in another discrimination case, in which a lower federal court found unconstitutional a 1993 citizen's initiative passed in Cincinnati prohibiting the city from providing any type of "preferential treatment" to homosexuals. Viveca Novak, *Administration, in First Test Since Election, Decides Not to File Brief in Gay-Rights Case,* WALL ST. J., Nov. 30, 1994, at A20. Six months later, in a similar case regarding a Colorado initiative, the Justice Department again chose not to file an amicus brief. John F. Harris, *U.S. Refuses to Join Gay Rights Test Case: Clinton Backs Reno on Colorado Amendment; Activists Are Angry,* WASH. POST, June 9, 1995, at A3.

306. Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995).

307. Amelia Craig, Staff Attorney, Lambda Legal Defense and Education Fund, Address at the University of Oregon School of Law (Nov. 24, 1994).

308. Steffan v. Aspin, 8 F.3d 57, 59 (D.C. Cir. 1993); Cammermeyer v. Aspin, 850 F. Supp. 910, 912 (W.D. Wash. 1994).

309. *Navy Board Backs Lesbian,* WASH. POST, Dec. 2, 1994, at A14.

310. *Id.*

Pollsters measured changing levels of support for the ban,[311] talk shows featured the issue, and a television movie on a major network recently recounted the career and litigation efforts of Margarethe Cammermeyer.[312]

4. Evaluation of Litigation Challenging the Ban

The narrowing of Judge Hatter's Fifth Amendment ruling by the appellate courts to concern only Meinhold typificd the extremely narrow approach of the *Webster* plurality to the rule of measured steps. Like *Webster*, this approach may have promoted deference and a gradual rate of change in constitutional law. The executive branch officials could respond to the judge's order by revising their future conduct regarding other service personnel to conform to the judge's ruling; or they could continue to challenge his ruling in litigation related to other service personnel, as has happened. With this approach, numerous constitutional actors—members of other federal branches, the military, other courts, litigants, interest groups, the press and public— have been engaged in an ongoing public dialogue about the military's policy.

As with the issue of abortion rights, maybe this example is aberrant or unusual because it is such a controversial, morally charged, and intimate issue. Any series of lower court rulings—whether measurcd or broad—concerning the issue of the ban's constitutionality would probably garner significant publie attention and generate significant response. Measured relief is thus not a prerequisite to continued debate on such an issue.

The *Meinhold* approach furthers a particular dialogic role for the Supreme Court as the ultimate arbiter of constitutional issues.[313] The *Meinhold* approach yields multiple interpretations by lower courts, which the Supreme Court can consider when it addresses the issue. The deference and gradualism justifications are partly based on the idca that there is value in "laboratories" which experiment with solutions and allow for percolation of approaches to constitutional problems. Multiple decisions by lower courts might thus enhance the thoughtfulness of the Supreme Court's resolution of an issue on the merits because the Court can heed the rcasoning and results of the earlier decisions. But how much percolation of a constitutional question is sufficient? Is any division of opinion among lower court judges or circuits sufficient? Or is consensus among numerous interpreters particularly valuable? And how do we assess whether multiple lower court decisions improve the Court's decisionmaking?

Some would also argue that multiple decisions at lower levels are valuable because they prepare the public for the Court's ruling on the issue. Judge Hatter's ruling and the reaction of others to it could pave the way for the Supreme Court to accord constitutional protection to gay and lesbian military service members, making the change in constitutional law more palatable for some. Before the Supreme Court addresses the issue, the responses of other constitutional actors may shed light on the polar views and areas for compromise. Time for the press to give attention to litigants and their stories

311. In early post-election surveys, voters stated they were unhappy with Clinton's pursuit of the liberal agenda, particularly his early emphasis on ending the ban to gays in the military, which detracted from attention to issues more important to the average American voter, like economic initiatives. Novak, *supra* note 305.

312. *Serving in Silence: The Margarethe Cammermeyer Story* (NBC television broadcast, Feb. 6, 1995).

313. This is a role the Court has sometimes proclaimed for itself, and one that scholars have both urged and rejected. *Compare* Farber, *supra* note 238 (discussing the impact of Supreme Court decisions on those not a party to the particular case) *with* BICKEL, *supra* note 115, at 112-13 (claiming that "[t]here is no moral duty always and invariably to obey" a judicial decision unless one is a party to the case).

may make the public aware of the ban's effects on individuals and the military's concerns. The Court could draw on Judge Hatter's reasoning, the differences among the lower courts, and the public debate in its decision. Of course, several lower court rulings favorable to gay and lesbian service members do not guarantee that the Court will recognize a new area of constitutional protection, but it makes the job easier if the Court is so inclined.

By focusing on deference, gradualism, and participation of multiple constitutional actors, we may overlook or trivialize harms to litigants. *Inconsistent,* narrow rulings by trial and appellate courts other than the Supreme Court promote uncertainty about federal rights, both for service members and government organizations.[314] With the narrow approach evidenced by the scope of the injunctions approved by the Supreme Court and Ninth Circuit in *Meinhold,* a series of lower courts could (and did) rule divergently on constitutional challenges to the same policy. This is troubling because uniformity seems particularly important in this context due to the federal, general nature of the military's challenged policy.

Furthermore, an ongoing debate about the scope of constitutional protection for sexual orientation comes at the expense of the gays and lesbians challenging the bans and others similarly situated. If we assume that Judge Hatter "correctly" considered the ban unconstitutional, rights would be more fully and quickly secured by a broad injunction of national application. With the measured injunctive approach, each service member subjected to an unconstitutional regulation must take the government to court, resulting in delayed clarification of rights, increased risk of inconsistent rulings, and significant expense. The disruption to numerous litigants' military careers presents a compelling argument that it is harmful not to enjoin the military's regulation more broadly. The measured injunctive approach also results in duplicative litigation, which is inefficient given the limited resources of the courts and government defendants.

Such an analysis assumes that Judge Hatter ruled "correctly" in securing individual rights. The lower federal courts which interpret the Constitution differently do not rule correctly; they allow unconstitutional conduct to continue. This analysis also assumes that this harm can be characterized and resolved ex ante. I resolve these difficulties by arguing that even if Judge Hatter was "wrong" (*i.e.*, the ban will eventually be declared constitutional by the Supreme Court), a balancing of harms calls for the protection of individuals at the expense of government implementation of its policy while the ruling is appealed. A primary function of the federal courts is to protect the rights of individuals and nonmajorities from the prejudices of the majority. While the Supreme Court has not yet ruled on the military's policy, this protective function to uphold federal rights uniformly and speedily is vested in the lower federal courts. On the other hand, if the District of Columbia court had ruled first—denying constitutional protection for gay and lesbian service members—I would not give its refusal to issue an injunction nationwide, binding effect. Because such a ruling would not protect individuals from majoritiarian

314. Yet, litigants must obey the rulings of lower courts—both state and federal—until an appellate court rules otherwise. BURT, *supra* note 102, at 313-14 (discussing the Court's ruling in Walker v. City of Birmingham, 388 U.S. 307 (1967)). "In *Walker,* the Court invoked judicial supremacy to preserve social order without regard to the legitimacy of that order; this was the clear implication of the Court's holding that even an unconstitutional judicial order must be obeyed." *Id.* at 314.

decisionmaking, the lower courts should consider other challenges until the Supreme Court addresses the issue.[315]

Even if gradual change and a multiplicity of voices at other levels is valuable on some constitutional questions, there is a need and justification for broader guidance and less gradualism from the Supreme Court on this particular issue. One option is for the Court to step in early to resolve the issue, as it did with the term limits case.[316] As noted earlier, Justice Ginsburg has argued that it is appropriate for the Court to "step ahead of the political branches in pursuit of a constitutional precept" when majoritarian dialogue cannot protect minority rights sufficiently.[317] Arguably, the Clinton administration's changing positions and eventual compromise on the ban demonstrate that the political branches cannot effectively address this issue. However, strong disagreement exists about the underlying rights for gay and lesbian service members and what level of constitutional protection is required to protect individuals and groups from majoritarian resolution in this context.

The military ban cases also demonstrate why the lower federal courts should sometimes depart from the rule of measured steps. If Judge Hatter's broad constitutional ruling with its broad injunctive relief had remained intact, other courts could follow that ruling until the Supreme Court stepped in.[318] The danger is that no Supreme Court resolution is guaranteed, or that resolution may not follow speedily. Thus, the first trial court to issue an injunction on a constitutional challenge may have tremendous power. Lower courts should depart only cautiously and infrequently from the rule because of these ramifications. Because it is impractical for the Supreme Court to hear all cases presenting inconsistent constitutional rulings, the lower courts will continue to bear most of this responsibility.[319] To the extent that lower federal courts must perform some lawsaying functions of the Supreme Court by default, the lower courts should adopt a flexible approach to measured steps which emphasize their heightened role in providing guidance and uniformity and departing from gradualism in certain substantive contexts.

It is impossible to evaluate potential detriments of the *Meinhold* model apart from the merits of the constitutional right at stake. We cannot and should not separate the procedural rule of measured steps from its substantive outcome in cases. In each context, courts should inquire about the rule's effect, and in so doing, explicate their vision of the federal courts' mission.

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315. This asymmetrical approach is similar to offensive and defensive preclusion. Each litigant is entitled to one day in court, but repeat players like the military can be bound by others' offensive use of preclusion in some circumstances. *See* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 907-82 (2d ed. 1992).

316. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995); Greenhouse, *supra* note 262.

317. Ginsburg, *supra* note 4, at 1206.

318. This Article uses the broad scope of Judge Hatter's early injunction as an example of a departure from measured steps by a trial court. It contrasts that departure with the narrow approach toward the scope of relief used by the Supreme Court and the second Ninth Circuit ruling in *Meinhold*. This Article does not explore important collateral areas concerning the scope of lower court rulings, including the rulings' precedential effects, preclusive effects, and aggregation possibilities.

319. Chemerinsky & Kramer, *supra* note 209, at 84.

CONCLUSION

The rule of measured steps should be applied with a case's context and substantive constitutional issue in mind.[320] That is, for certain types of rights claims, avoidance may advance a principle of gradualism, increase temporary deference, and encourage varied participation in constitutional dialogue without undue costs. For other rights, measured rulings which result in a lack of uniform, speedy protection of federal rights and lessened judicial guidance are harmful.[321] A flexible approach considers multiple factors within a substantive context, and does not view the rule in its absolute form of never formulating a constitutional ruling broader than the precise facts permit.

A flexible approach leaves courts with hard choices. Justice Scalia provides a good starting point for discussion with his factors in *Webster*. His approach advocates that the Supreme Court depart from the rule whenever "good cause" exists, emphasizing the public guidance function of the Supreme Court. He directly links analysis of the factors to the substantive constitutional context. Justice Stevens, in several references to the rule, appears to advocate a "dispute resolution" model which would lead to fewer departures from measured steps for the Court. Justice Ginsburg advocates measured steps generally, but recognizes that the Court must sometimes depart from measured motions to protect sufficiently nonmajoritarian concerns.

Courts should consider many variables in applying a flexible, context-dependent approach to the rule of measured steps. Courts must be aware of the complexity of characterizing a ruling as measured or broad. This Article offered several axes to gauge measuredness, including the justifications for using measured steps offered by the Supreme Court and the other varied aspects of measuredness. Although the Supreme Court has in fact a flexible approach, the Justices frequently describe the rule as an unquestionable rule of judicial restraint. But application of the rule is not mechanical and should not be assumed. In employing or ignoring the rule of measured steps, the courts make value choices about the substance of constitutional law. Courts should consider the rule a collection of competing factors to be weighed within a substantive context. By discussing their choices, courts will elucidate their vision of the appropriate role of the courts in a dialogue about federal constitutional issues.

This Article examined the multiple factors of measuredness in evaluating the effects of measured steps in two substantive contexts: a Supreme Court ruling on abortion regulation and a series of lower federal court rulings concerning bans on gay and lesbian service members. The examples demonstrate the difficulty of weighing the competing factors. The advantages of measured steps have tradeoffs which some would classify as disadvantages. For example, the promotion of deference in *Webster* appeared to generate substantial public interest and response, invigorated pro-choice voters, and forced some formerly neutral politicians to state their positions on abortion regulation. The majority result also advanced a principle of gradualism: it slowed the pace of change, which

320. For example, some feminists and pragmatists prefer situativeness and contextual application of legal rules rather than essentialist abstractions. *See* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1707 (1990).

321. *See* CHOPER, *supra* note 196; ELY, *supra* note 196; SUNSTEIN, *supra* note 25; *see also* Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981) (calling for a constitutional theory which focuses on substantive results as much as a fair process).

afforded time for Justice Kennedy to alter his vote, Justice Souter to join the Court, and a majority to preserve a core of *Roe* in *Casey*.

But that gradualism and deference was not without costs. The Court provided less clear guidance, leaving the content of federal law ambiguous and less uniform. Justice Scalia argued that the failure to directly overturn *Roe* by departing from the rule of measured steps retained the status quo and did not recognize the power he viewed states as possessing under the Constitution. Others who differ greatly from Scalia on the merits of abortion rights could also reject a measured approach for the federal courts in that context, arguing that the federal courts fail to protect meaningfully this fundamental right when they are ambiguous, move gradually, and defer too extensively to other constitutional actors. The ensuing "dialogue" is more like a cacophony which interferes with the courts' securing important federal rights. Thus, weighing the costs and benefits of gradualism and deference will depend on the substantive issue and a jurist's view of the merits of that issue.

In my judgment, gradualism and respect for maximizing deference to other decisionmakers are not appropriate when other decisionmakers will not allow full participation in constitutional dialogue or have blocked access to the dialogue. Further, the Supreme Court's unique role in providing guidance and promoting uniformity justifies more frequent departures from the rule of measured steps by the Court. Uniformity in federal law is best achieved if the Supreme Court addresses many constitutional issues broadly but urges the lower federal courts and state courts to use more measured steps in constitutional adjudication. The Court serves a symbolic function, providing standards and recognizing areas of constitutional protection. Thus, in some contexts, a broad statement (like the one in *Roe*) is important. In contrast, it is generally more appropriate for lower federal courts, state courts, and other constitutional actors to implement the Court's broad statements and standards, applying them to new fact situations and responding in other ways to the Court's constitutional pronouncements.

However, courts other than the Supreme Court should also use the same flexible, context-dependent approach to depart from measured steps in some circumstances. If Judge Hatter's broad injunctive relief had remained intact, other courts could follow that ruling until the Supreme Court stepped in, either affirming or denying the constitutional protection afforded by Judge Hatter. This is a close and difficult call because of the great power a single trial court has under this approach. In determining whether to depart from the rule, courts should ask whether uniform protection of a right is particularly important. I argue that uniformity is important with the national military ban cases due to the general nature of the government's regulation. Additionally, I conclude that the federal protection of individuals and nonmajoritarian interests requires a broader, less gradual step. In contexts where unanticipated problems are likely to develop, courts may want to proceed more slowly. Courts should ask whether lower courts will benefit from broad rulings on a given issue and how best to balance guidance with lower court discretion in the implementation of a flexible standard.

This analysis of the rule of measured steps is grounded on my preference for increased dialogue, both by the courts and other constitutional actors, and is intertwined with my vision of the federal courts' role. The federal courts—particularly the Supreme Court—have a duty to provide clear statements on constitutional law, promote uniformity in the law, protect nonmajoritarian concerns, and make the Constitution meaningful over time through a willingness to reassess the status quo. My application of the rule is also

influenced by my substantive views in the two contexts discussed. Rather than rely mechanically on avoidance, courts should use the rule of measured steps as a cautionary admonition—as a reminder not to foreelose dialogue completely. As courts explicate their applications of the rule, they will promote a sharing of the power and responsibility to develop constitutional law. They will not encourage others to ignore this shared responsibility or to believe incorrectly that the courts have foreclosed their ability to respond. Multiple, long-term opportunities for participation exist as long as the Supreme Court and other actors do not perceive that only the Court has the "last word" on a given constitutional issue.