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Justice O'Connor's Dilemma: The Baseline Question

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Many commentators view *City of Boerne v. Flores*,[1] in which a divided Supreme Court struck down the Religious Freedom Restoration Act of 1993 (RFRA),[2] as a major defeat in the battle for religious freedom in the United States.[3] Be that as it may, *Flores* is also an opportunity to begin a discussion on another issue entirely: the appropriate relationship between dissenting Justices and majority opinions. Should a Justice who disagrees with a majority of the Court nevertheless accept the majority's holding as defining the law for purposes of establishing a baseline for subsequent questions?

I. THE BASELINE DILEMMA

In order to understand the question I will address, some brief background on *Flores* is necessary. Prior to 1990, the Supreme Court interpreted the Free Exercise Clause of the Constitution—applicable to the states through the Fourteenth Amendment—to require the government to accommodate religious beliefs by granting exemptions to those with religious objections to generally applicable laws, unless the government could show

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1. 117 S. Ct. 2157 (1997).

2. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

3. A few, including myself, view it otherwise. *See, e.g.*, Suzanna Sherry, *RFRA-Vote Gambling: Why Paulsen is Wrong, As Usual*, 14 CONST. COMMENTARY 27 (1997); Suzanna Sherry, Lee v. Weisman, *Paradox Redux*, 1992 SUP. CT. REV. 123; Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65 (1996); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

a compelling interest. In 1990, in *Employment Division v. Smith*,[4] the Supreme Court abandoned this doctrine, concluding that neutral, generally applicable laws—even if they burdened religious practices—need only serve a legitimate state interest. In 1993, Congress, relying on the power granted to it by Section 5 of the Fourteenth Amendment ("Section 5"),[5] enacted RFRA by an overwhelming bipartisan vote.[6] RFRA reinstated the compelling interest test for any state or federal statute that substantially burdened religious exercise. The question before the Court in *Flores* was whether Congress's Section 5 powers were broad enough to support RFRA. Justice Kennedy's majority opinion concluded that in attempting to protect rights beyond those covered by the Constitution, as interpreted by the Supreme Court in *Smith*, Congress exceeded the powers granted to it by the Constitution.

Justice O'Connor issued a passionate dissent in *Flores*, arguing that the Court should both uphold RFRA and overrule *Smith*, the case that provoked the enactment of RFRA in the first place. We are left in no doubt about Justice O'Connor's views: she explicitly agreed with the majority that Congress's Section 5 powers are limited, and indeed agreed that were *Smith* the correct interpretation of the Free Exercise Clause, Congress would have no power to enact RFRA. Nevertheless, she dissented from the invalidation of RFRA on the ground that *Smith* was incorrectly decided—even though there are, at most, only four votes for that proposition.[7]

This constellation of conclusions—that *Smith* deprives Congress of the power to enact RFRA but that *Smith* is wrong—gives rise to a question that Justice O'Connor never explicitly answered. She agreed that Congress is limited to im-

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4. 494 U.S. 872 (1990).

5. Section 5 reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

6. *See* H.R. REP. NO. 103-88 (1993); S. REP. NO. 103-111 (1993).

7. Justices Souter and Breyer also dissented and called for reconsideration of *Smith*. *See Smith*, 494 U.S. at 2185-86 (Souter, J., dissenting), 2186 (Breyer, J., dissenting). For a discussion of the possibility that Justice Ginsburg might be willing to overrule *Smith*, despite the fact that she joined the majority in *Flores*, see *infra* pp. 890-91.

plementing the rights actually contained in the Fourteenth Amendment, as judicially defined. But should those rights be defined by the Court as a whole or by each individual Justice? To put it another way, Justice O'Connor's own view is that the congressional interpretation of free exercise rights is the constitutionally correct one, even though a majority of the Court disagrees. As far as Justice O'Connor is concerned, then, is Congress bound by the latter view or may it rely on the former? In one sense, this is asking whether the Court is a unitary entity, which can speak with only one voice, or a collection of individual Justices voting their individual consciences. If the Court is a unitary entity, then perhaps there are times when an individual Justice ought to vote against her own conscience. Whether, and when, she ought to do so, is the subject of this Essay.

Notice that only a Justice who *both* agrees with Justice Kennedy's narrow interpretation of Section 5 *and* disagrees with *Smith* is entangled in this question. If Justice O'Connor disagreed with Justice Kennedy's view of Section 5, for example, then she could easily dissent without raising the question of whose interpretation of the Constitution counts: even if *Smith* is correct, she might have written, Congress did not exceed its Section 5 powers in enacting this prophylactic statute.[8] It is only because Justice O'Connor agreed that Congress's Section 5 powers are to be narrowly construed, cabined by the judicially determined meaning of the Free Exercise Clause, that she must face the question at all.

The same question, which I will call the baseline question, arises in a variety of circumstances. In its broadest formulation,

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8. Justice Breyer might be thought to take this view. He joined Justice O'Connor's dissent to the extent that it questioned *Smith*, but rejected her endorsement of Justice Kennedy's discussion of Section 5. *See Smith*, 494 U.S. at 2176, 2186 (Breyer, J., dissenting).

Another possible approach for Justice O'Connor would have been to decide the case directly on free exercise grounds rather than on statutory or Section 5 grounds. She could have argued that RFRA was irrelevant, as the Free Exercise Clause—correctly interpreted—mandated that the church be given the exemption it desired. In that case, Justice O'Connor would simply have been dissenting, once again, from the Court's determination of the issue raised in *Smith*.

the question asks about the status of majority opinions of the Supreme Court as positive law. Does a majority decision of the Court constitute *the law*, even if it is incorrect? The Court clearly believes that its own determinations define the law as far as all other governmental actors are concerned, from the president to the lower federal courts to state officials. But to what extent do existing majority determinations define the law for individual Justices who dissented from, or now disagree with, the original determinations? It may be, in Chief Justice Marshall's oft-repeated words, "emphatically the province and duty of the judicial department to say what the law is."[9] But adherence to Justice Marshall's dogma—even in its strongest version—still does not answer the question with which I am concerned in this Essay: who can authoritatively speak for the judicial department?

The baseline question arises whenever the Court has to determine what the law is or was in order to answer a further question. The paradigmatic baseline is a case in which the question is whether some government body has disobeyed the Supreme Court's instructions. The Court cannot determine whether the instructions have been disobeyed without consulting the instructions themselves. The baseline question asks whether a Justice who disagrees with those instructions should nevertheless judge the actor against them. Variants of the baseline question arise in other contexts as well. In order to decide whether a new statute works a retroactive effect, for example, the Court has to establish what the law was at a prior point in time to set a baseline against which to measure the challenged action. Or when a majority of the Court determines that it has jurisdiction in a particular case, dissenting Justices have to decide whether to accept that determination and move on to the merits.

These situations sometimes require the Court, or individual Justices, to determine whether majority pronouncements are positive law and thus constitute the baseline from which to proceed to further questions. Justices who dissented from the original pronouncement are faced with a special dilemma: if they disagree with how the Court defined the law, should they also

9. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). For stronger variants of this sentiment, see cases discussed *infra* Part III.

reject the Court's ruling as the baseline, implicitly denying it the status of the law of the land? If there are five votes, then the new majority can of course *change* existing law. But if the law remains unchanged, is it still law as far as dissenting Justices are concerned? No Justice has ever directly addressed this question, nor has it been explored in the scholarly literature.[10]

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10. There has been scholarly discussion of two related topics. First, there has always been some controversy about the legitimacy of the Court's insistence that it is the final arbiter of the Constitution. That dispute has been played out in law reviews; unsurprisingly, the Court itself has not doubted its own authority. For a representative sampling of the debate, see, for example, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 81-105 (1987); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387; Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359 (1997); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). The baseline question only arises if one assumes—as the Court does—that Supreme Court decisions have some independent status as law and are therefore binding on at least some government actors.

Second, there is a burgeoning public choice literature addressing the question whether judges on multimember panels, including the Supreme Court, should vote by *outcome* or by *issue*. *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993); David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1069 (1996); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992); John M. Rogers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 VAND. L. REV. 997 (1996); John M. Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice As Epimenides*, 79 KY. L.J. 439 (1991) [hereinafter Rogers, *The Supreme Court Justice as Epimendes*]; Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045 (1996). My question is a slightly different one: in a case in which the Justices *do* indicate their votes on individual issues, is it appropriate for a Justice to take as a given a majority decision with which he or she disagrees? My analysis, therefore, unlike that on the outcome-issue debate, is applicable not only to single cases with multiple issues, but also to situations that arise as the result of a series of cases. Conversely, my analysis is limited to cases in which the subissues are dependent on one another; the classic case where issue-voting and outcome-voting produced different results, *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), does not raise the baseline question at all.

Notice that the baseline dilemma can be distinguished from another question to which it bears a superficial resemblance. Asking whether a dissenting Justice should accept the majority pronouncement as the law is not the same as determining whether a prior decision ought to be accorded the respect demanded by the doctrine of stare decisis. The stare decisis question asks whether the *Court as a whole* should overrule its prior decision; majority and dissenting Justices often disagree on that issue. Once a majority decides not to overrule, however, what should a dissenting Justice do in the next case?

If the next case raises essentially the same question, then there is no baseline dilemma. The dissenting Justice can either concede the point or reargue the issue. Justices thus may occasionally continue to reject a particular holding of the Supreme Court from which they dissented, dissenting again and again in every case raising the same question or issue. Justices Brennan and Marshall took this approach in death penalty cases, for example, reiterating in every case their view—repeatedly rejected by the majority—that the death penalty was always unconstitutional.[11]

Repeated dissents on the same question, however, do not usually raise the baseline dilemma. Repeated dissents raise only the question of whether the original decision was correct, *not* the question of whether the original and presumably incorrect majority pronouncement should nevertheless be treated as establishing the legal baseline. It is only when the answer in the second case *depends on* the Court having already answered the initial question that the baseline dilemma arises. In repeated dissents, for example, no action is being judged by whether it conforms to the law as previously pronounced by the Supreme Court. Either the action is legal or it is not, and no prior Supreme Court decision is relevant to that determination except as a matter of stare decisis. In the baseline situation, by contrast, the outcome actually depends on whether the earlier pronouncement—right or wrong—should be taken as establishing the governing law. Repeated dissents continue to raise the same ques-

11. *See, e.g.*, Hammett v. Texas, 448 U.S. 725, 726 (1980) (Marshall, J., dissenting); Gregg v. Georgia, 428 U.S. 153, 227-28 (1976) (Brennan, J., dissenting).

tion, perhaps with slightly different frills. Baseline cases, however, raise entirely new questions, but ones that cannot be resolved without first consulting the law previously announced by the Court.

Justice O'Connor in *Flores*—without discussing the issue—declined to use *Smith* as a baseline, instead judging Congress's Section 5 power against her own, dissenting, view of the meaning of the Free Exercise Clause. It is easy to applaud Justice O'Connor's approach: after all, Section 5 gives Congress the power to enforce *the Fourteenth Amendment*, and if Justice O'Connor believes that the Fourteenth Amendment protects a right to religious exemptions, then she should vote to uphold a statute that enforces that right. Nevertheless, I think that an easy acceptance of Justice O'Connor's approach masks difficult questions about the extent to which dissenting Justices might have an obligation to accept the rulings of a majority of their colleagues as defining the law—especially given such cases as *Cooper v. Aaron*.[12] Had she felt such an obligation, Justice O'Connor might have instead concluded that Section 5 gives Congress the power to enforce the Fourteenth Amendment as interpreted by a majority of the Supreme Court.

In this Essay, I will make three arguments in support of the baseline approach. In Part II, I will demonstrate that in a variety of contexts, various Justices have assumed that majority decisions *do* define the law—even when the Justices in question disagree with the majority's holding. Indeed, in at least one other case, *Justice O'Connor* has been content to let a majority opinion with which she disagrees establish a baseline to define the boundaries of congressional power.[13] In Part III, I will examine the numerous cases, including some authored by Justice O'Connor, in which the Court has used language strongly suggestive of the view that it is the decisions of the Supreme Court *as a single unit* that determine the law. Finally, in Part IV, I

12. 358 U.S. 1, 18 (1958). *See generally* Farber, *supra* note 10 (discussing the "rule of law" and the Supreme Court in the context of *Cooper v. Aaron*).

13. *See infra* notes 23-30 and accompanying text.

will argue that in many—if not most—situations, it is appropriate for dissenting Justices to consider the views of a majority as the baseline for subsequent analysis.

II. ACCEPTING MAJORITY DECISIONS AS THE BASELINE

Justices most often confront the baseline question when deciding issues of retroactivity. In order to examine whether a new statute has a retroactive effect, the Court must always first determine what the law *was* at some past time. For purposes of this Essay, we can ask whether, in determining what the law was at some prior date, a Justice should consult her own views or those of the Court. In most cases, a Justice will look to the views of the majority for this baseline—even when that Justice dissented in the original case.

A series of events surrounding the correct interpretation of 42 U.S.C. § 1981 provides an example. Section 1981 prohibits race discrimination in the making and enforcing of contracts. In *Patterson v. McLean Credit Union*,[14] the Supreme Court interpreted § 1981 very narrowly. The Court in *Patterson* held that § 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."[15] The Court thus held that § 1981 did not reach racially motivated harassment, racially motivated discharge, or other racially discriminatory treatment on the job. Justices Stevens, Brennan, Marshall, and Blackmun dissented from that narrow interpretation of § 1981.[16]

In 1991, Congress overruled *Patterson* by enacting the Civil Rights Act of 1991 (the "1991 Act").[17] The 1991 Act expanded the scope of § 1981 by defining it to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[18] After 1991, then, § 1981 reached

14. 491 U.S. 164 (1989).

15. *Id.* at 171.

16. *See id.* at 189 (Brennan J., concurring in part and dissenting in part); *id.* at 219 (Stevens, J., concurring in part and dissenting in part).

17. 42 U.S.C. § 1981 (1994).

18. *Id.*

discriminatory discharges.

Inevitably, the Court was faced with the question of whether the 1991 Act should apply to cases arising prior to its enactment. The case raising this question arose in 1986, when Maurice Rivers and Robert Davison brought a § 1981 suit alleging that they had been discharged because of their race. At that time—prior to *Patterson*—most lower courts interpreted § 1981 to prohibit racially motivated discharges.[19] But before the case went to trial, the Supreme Court decided *Patterson*, and the district court accordingly dismissed the § 1981 suit. While the case was pending on appeal, the Civil Rights Act of 1991 took effect. Rivers and Davison thus argued that the 1991 Act should govern their case.

In *Rivers v. Roadway Express, Inc.*,[20] the Supreme Court held that Congress did not intend to give retroactive effect to the 1991 statute, and, therefore, that the case was governed by *Patterson*, not by the Civil Rights Act of 1991. The Court rejected the petitioners' argument that because the 1991 Act merely restored the law to the understanding that prevailed before *Patterson*, it would not be unfair to their employer to apply the rule "that the parties believed to be the law when they acted."[21] Justice Stevens, who dissented in *Patterson*, wrote the majority opinion in *Rivers*, using *Patterson* as the baseline against which to measure subsequent congressional action.

Justice Stevens's opinion made very clear that the baseline meaning of a law is defined by the Court, not by individual Justices:

> It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts

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19. *See, e.g.*, Edwards v. Jewish Hosp. of St. Louis, 855 F.2d 1345 (8th Cir. 1988); Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987); Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984); Davis v. United States Steel Supply, 688 F.2d 166 (3d Cir. 1982). The principal Supreme Court § 1981 case prior to *Patterson* is *Runyon v. McCrary*, 427 U.S. 160 (1976), which took a broad approach to § 1981 although it did not rule on the *Patterson* question.

20. 511 U.S. 298 (1994).

21. *Id.* at 309.

> to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction. Thus, *Patterson* provides the authoritative interpretation of the phrase "make and enforce contracts" in the Civil Rights Act of 1866 [§ 1981] before the 1991 amendment went into effect on November 21, 1991. That interpretation provides the baseline for our conclusion that that 1991 amendment would be "retroactive" if applied to cases arising before that date.[22]

The fact that Justice Stevens himself thought *Patterson* an incorrect interpretation of § 1981 and that the 1991 Act simply corrected that mistake, was irrelevant. Once the Court had spoken, the baseline was established—until and unless *Patterson* was overruled. The district court therefore correctly applied *Patterson* to a pending lawsuit, and the court of appeals correctly viewed any subsequent legislative change as inapplicable to the suit. The only remaining question was whether Congress intended the new statute to have retroactive effect. Justice Stevens's majority opinion concluded that it did not.

A slightly more convoluted version of the retroactivity baseline question was raised in *Plaut v. Spendthrift Farm, Inc.*[23] The genesis of *Plaut* lies in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,[24] in which the Court unexpectedly inter-

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22. *Id.* at 312-13. Justice Blackmun, who dissented in *Patterson*, also dissented in *Rivers*. *See id.* at 314-17 (Blackmun, J., dissenting). He did not rely on the incorrectness of *Patterson*, however, but rather on his view that Congress intended to give the statute retroactive effect. *See id.* at 317 (Blackmun, J., dissenting).

23. 514 U.S. 211 (1995).

24. 501 U.S. 350 (1991). *Lampf* may be viewed as raising the baseline problem for Justice Scalia, and he took his usual unique approach. His view on the statute of limitations question before the Court in *Lampf* was that if Congress does not specify a statute of limitations, then there should be no time limitation on suits at all. *See id.* at 364 (Scalia, J., concurring in part and concurring in the judgment). He also noted, however, that had he been presented with it as a question of first impression, he would not have even created the implied cause of action that was the subject of the statute of limitations dispute in *Lampf*. *See id.* at 365 (Scalia, J., concurring in part and concurring in the judgment). He claimed to be willing to accept the earlier majority decision creating the cause of action, as a matter of stare decisis, but he reasoned that to apply his "no limitations period at all" analysis to it would create "unintended and possibly irrational results." *Id.* at 365 (Scalia, J., con-

preted provisions of the Securities Exchange Act of 1934 (the "1934 Act") to provide for a very short statute of limitations. Justice O'Connor dissented from this holding, along with Justices Stevens, Souter, and Kennedy. Justice O'Connor was particularly unhappy about applying the new statute of limitations to bar the plaintiffs' suit in *Lampf* itself, preferring to apply the new rule only prospectively.[25]

In December, 1991, six months after *Lampf*, Congress passed a law amending the 1934 Act to provide for a longer statute of limitations.[26] The new law, in section 27A(b), also provided that any case that had been dismissed under *Lampf* but which fell within the new longer statute of limitations could be "reinstated on motion by the plaintiff" if such motion was made within sixty days of enactment of the new law.[27] In *Plaut*, the Supreme Court invalidated section 27A(b).

Plaut involved a securities fraud case that was pending in federal district court at the time of the *Lampf* decision. After *Lampf*, the district court dismissed the case as time-barred. The dismissal was warranted under the Supreme Court's decision in *James B. Beam Distilling Co. v. Georgia*,[28] which held that new

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curring in part and concurring in the judgment). He thus concurred in the Court's decision to borrow a statute of limitations from another provision of the Securities Exchange Act and to dismiss the suit as time barred. *See id.* at 364-66 (Scalia, J., concurring in part and concurring in the judgment). As in *American Trucking Ass'ns v. Smith*, discussed *infra* at notes 32-35 and accompanying text, Justice Scalia superficially adhered to the majority decision, but then voted against the result toward which this adherence directed him.

25. *See Lampf*, 501 U.S. at 369, 370 (O'Connor, J., dissenting):

> I write separately only to express my disagreement with the Court's decision in Part IV to apply the new limitations period *in this case*. In holding that respondents' suit is time barred under a limitations period that did not exist before today, the Court departs drastically from our established practice and inflicts an injustice on the respondents . . . . Quite simply, the Court shuts the courthouse door on respondents because they were unable to predict the future.

26. *See* Securities Exchange Act of 1934 § 27A, 15 U.S.C. § 78aa-1 (1994).

27. *Id.* § 78aa-1(b).

28. 501 U.S. 529 (1991); *see also* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 94-99 (1993) (recognizing the rule adopted by a majority of Justices in *Beam*, al-

Supreme Court interpretations of federal statutes must be applied to pending cases. The plaintiffs did not appeal the dismissal, and the judgment accordingly became final thirty days later. When section 27A(b) was enacted, plaintiffs moved to reopen the case. The district court found that reinstatement would be required under section 27A(b), but denied plaintiffs' motion on the ground that section 27A(b) was unconstitutional. The Supreme Court ultimately affirmed.

Justice Scalia's majority opinion in *Plaut* reasoned that in allowing final judgments to be reopened, Congress had violated separation-of-powers principles by depriving the judiciary of its authority to make final decisions in individual cases. This holding necessarily depends on *Lampf* as a valid statement of the law until the enactment of section 27A(b). If *Lampf*'s interpretation of the 1934 Act, which turned out to be incorrect, was for that reason *not the law*, then the district court acted lawlessly: it never should have dismissed the Plauts' action. Congress was only restoring all parties to the situations in which they would have been absent *Lampf*—something it was presumably entitled to do in the face of a lawless judicial act. All section 27A(b) did, then, was deny *Lampf* any residual retroactive effect.

So what should a Justice who thinks *Lampf* was wrongly decided do? The *Lampf* dissenters chose different paths: Justice O'Connor, along with Justices Souter and Kennedy, joined Justice Scalia's majority opinion in *Plaut*. Justice Stevens, on the other hand, dissented.[29] None of these Justices addressed the baseline question. Nonetheless, we can surmise that those who joined the majority opinion accepted *Lampf* as the baseline against which to judge subsequent congressional action, despite the fact that they individually disagreed with *Lampf*. Indeed, the language of Justice Scalia's opinion strongly implies that the Supreme Court—as a *unit*—is the one and only final spokesman for the U.S. judiciary: Article III, Justice Scalia wrote, creates "not a batch of unconnected courts, but a judicial *department*

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though in separate opinions).

29. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 246 (1995) (Stevens, J., dissenting). Justice Stevens's dissent, which took issue with the majority's separation-of-powers analysis, gave no clue as to whether he might also have been influenced by his disagreement with *Lampf*.

composed of 'inferior Courts' and 'one supreme Court.'"[30] *Plaut* thus provides an example of a case in which Justice O'Connor took an approach exactly opposite the one she took in *Flores*, and joined an opinion suggesting that the baseline is always the majority opinion of the Supreme Court. It is a particularly telling example, moreover, because section 27A(b) was designed to rectify the very aspect of *Lampf* that most troubled her—its retroactive application.

Not every Justice chooses to defer to earlier majority rulings in cases raising retroactivity questions. In one recent case, Justice Scalia explicitly took an approach mirroring Justice O'Connor's in *Flores*. In 1987, in *American Trucking Ass'ns v. Scheiner*,[31] the Court invalidated certain types of highway taxes on dormant commerce clause grounds. Justice Scalia dissented. Three years later, in a case confusingly styled *American Trucking Ass'ns v. Smith*,[32] the Court held that *Scheiner* did not apply retroactively to taxes imposed prior to 1987. Justice O'Connor's plurality opinion reached this conclusion by applying a three-factor test for retroactivity.[33]

Justice Scalia, however, refused to join the majority opinion in *American Trucking Ass'ns v. Smith*, although he concurred in the result. He rejected the majority's retroactivity test, reiterating his view that all Supreme Court constitutional decisions should have full retroactive effect[34] because the Court is announcing the meaning of the Constitution, which does not change. He nevertheless refused to give retroactive effect to *Scheiner*:

> I do not think that a sensible understanding of [*stare decisis*] requires me to vote contrary to my view of the law where such a

30. *Id.* at 227. Justice Scalia made the quoted statement in the course of explaining why Congress may alter a judgment still pending on appeal, but not a judgment from which all appeals have been foregone or completed.

31. 483 U.S. 266 (1987).

32. 496 U.S. 167 (1990).

33. *See id.* at 179-83.

34. Except when the Court announces a new rule of criminal procedure favoring criminal defendants. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 299-310 (1989); Penry v. Lynaugh, 492 U.S. 302, 350-51 (1989) (Scalia, J., dissenting in part).

> vote would not only impose upon a litigant liability I think to be wrong, *but would also upset that litigant's settled expectations* because the earlier decision for which *stare decisis* effect is claimed ... overruled prior law.... I think it appropriate, in other words—indeed, I think it necessary—for a judge whose view of the law causes him to dissent from an overruling to persist in that position (at least where his vote is necessary to the disposition of the case) with respect to action taken before the overruling occurred.[35]

In *American Trucking Ass'ns v. Smith*, Justice Scalia conceded that his views on retroactivity, when combined with *Scheiner*, yielded one result; but because of his disagreement with *Scheiner*, he voted for the opposite result. Justice O'Connor did the same thing in *Flores*: her views on Section 5 powers, when combined with (the other) *Smith*, would result in invalidating RFRA; but because of her disagreement with *Smith*, she voted to uphold RFRA. In *Rivers* and *Plaut*, however, the Justices who dissented in earlier cases took the opposite approach: they applied their general views on retroactivity and congressional powers to extend the applicability of existing precedent, even though they disagreed with the precedent.

It is arguable whether Justice Scalia was correct when he refused to take as the starting point for his retroactivity analysis the Court's decision in *Scheiner*. A series of cases from the 1950s, however, illustrates the absurd results that can occur if dissenting Justices routinely refuse to accept majority holdings as a baseline.[36] In 1944, Congress suspended the statute of limitations for prosecution for defrauding the government.[37] The

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35. *American Trucking Ass'ns*, 496 U.S. at 205. Justice O'Connor wrote the plurality opinion in *American Trucking Ass'ns v. Smith*, which applied the three-factor retroactivity test. When, four years later, a majority of the Court adopted Justice Scalia's position that new decisions should always be retroactively applied, Justice O'Connor dissented. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94-99 (1993); *id.* at 113 (O'Connor, J., dissenting). For an extended discussion of Justice Scalia's role in this series of cases, see Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281, 302-06 (1994).

36. I am indebted to Jack Cound for bringing these cases to my attention.

37. *See* Contract Settlement Act of 1944, Pub. L. No. 78-395, § 19, 58 Stat. 649, 667-68 (current version at 18 U.S.C. § 3287 (1994)).

purpose of the suspension was to give the government time, in the midst of wartime contracts and other activity, to ferret out defrauders. But the statute Congress enacted was ambiguous: it stated that "[t]he running of any existing statute of limitations [in fraud cases] . . . shall be suspended until three years after the termination of hostilities in the present war."[38] The war was officially declared terminated on December 31, 1946.[39] The ambiguity in the statute left open an important question, ultimately to be resolved by the Supreme Court: Did the ordinary three-year limitations period begin running again on January 1, 1947, or three years later on January 1, 1950?

The first case the Supreme Court decided involved crimes committed in 1947, after the war. In *United States v. Smith*,[40] a majority of the Supreme Court concluded that the ordinary three-year limitations period began to run again on January 1, 1947. The Court thus dismissed an indictment brought more than three years after the commission of the crime.[41] Four Justices dissented: Justices Minton, Reed, Jackson, and Burton reasoned that the entire statute of limitations was suspended until January 1, 1950, when it began to run again. The dissenters therefore would have upheld the indictment because it was brought within three years of that date. The dissent, and four Justices in the majority, apparently assumed—although they did not address the question explicitly—that crimes committed during and after the suspension period should each be subject to a three-year statute of limitations. They disagreed only on the appropriate starting date for the running of the statute of limitations. Justice Clark, however, joined the majority but wrote a separate concurrence in which he argued that the effect of the statute was to treat wartime offenses differently from post-war offenses. For wartime offenses, he would have agreed with the dissent and started the limitations period in 1950, giving the

38. *Id.* § 19(b).
39. *See* 3 C.F.R. 99, 100 (1943-48), *reprinted in* 50 U.S.C. app. at 289 (1994).
40. 342 U.S. 225 (1952).
41. *See id.* at 226, 229-30.

government "six years from the [proclamation ending the war] to investigate and prosecute."[42] But because *United States v. Smith* involved a post-war fraud, Justice Clark concluded the suspension act did not apply and the statute of limitations period was the ordinary three years. He was the only Justice to take this position.

Eighteen months later, the Court faced two cases raising the question of the appropriate limitations period for a *wartime offense*. In *United States v. Klinger*,[43] the Second Circuit unanimously dismissed a conviction brought more than three years after the end of the war. In *Klinger*, Judge Hand concluded that all the Justices except Justice Clark would dismiss the indictment. He reasoned that the minority Justices would take as a baseline the holding of the majority that the ordinary statute of limitations began to run again in 1947:

> Forced, as by hypothesis we are to assume that [the dissenters in *United States v. Smith*] would feel themselves to be, to hold that there was a statute of limitations before January 1st, 1950, at least as to some crimes; and that as to these it did not begin 'to run *again*' on that day, we have no warrant for supposing that they would hold that, crimes committed before January 1st, 1947, might be prosecuted at any time before January 1st, 1953, although those committed between January 1st, 1947 and January 1st, 1950, must be prosecuted before that date.[44]

When *Klinger* reached the Supreme Court, Justice Jackson did not participate. Justice Clark, following his earlier reasoning, presumably took the position that the suspension act meant exactly what Hand said it could not mean. But instead of Hand's expected seven to one affirmance, the Court affirmed by an equally divided vote. Each of the seven remaining Justices had apparently adhered to the position he had taken in *Smith*.

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42. *Id.* at 231 (Clark, J., concurring).

43. 199 F.2d 645 (2d Cir. 1952), *aff'd by an equally divided Court*, 345 U.S. 979 (1953).

44. *Id.* at 647.

One final development occurred. In *United States v. Grainger*,[45] the other wartime offense case (handed down the same day as *Klinger*), Chief Justice Vinson switched sides, leaving only three Justices who thought that the time for prosecution had expired three years after the end of the war. Five Justices—the Chief Justice, Justice Clark, and the three *Smith* dissenters besides the absent Jackson—held that an indictment for a wartime offense could be brought at any time until January 1, 1953. Note that Chief Justice Vinson's change of heart made the difference only because Justice Jackson did not participate in either case. Had Justice Jackson participated and joined his fellow *Smith* dissenters, the Court in *Klinger* would have reversed Judge Hand by a vote of five to four; *Grainger* would have simply followed as a matter of course.[46]

Despite the fact that eight Justices—all but Justice Clark—believed that wartime and postwar offenses should be subject to identical limitations periods, they were not. Offenses committed during the war could be prosecuted for six years after the end of the war, while offenses committed after the war could only be prosecuted for three years after they were committed. With no effective changes in personnel or in views, Justice Clark's solo opinion in *Smith* became the law. This occurred because the dissenters refused to take the baseline approach. If adherence to a prior dissent sometimes leads to the absurd result of treating differently two cases that *eight* Justices believe should be treated alike, then sometimes such adherence *must* be wrong.[47]

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45. 346 U.S. 235 (1953).

46. Similarly, if we were to ignore both Justice Jackson and Chief Justice Vinson—depriving each side in *Smith* of one vote—the result in *Grainger* would have been the same by a vote of four to three.

47. One might argue that *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), raised a similar problem. In *County of Allegheny*, the Court confronted an Establishment Clause challenge to two displays: a creche and a menorah. *See id.* at 578. Four Justices concluded that both displays were constitutional. *See id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part). Three Justices concluded that both displays were unconstitutional. *See id.* at 637, 654-55 (Brennan, J., concurring in part and dissenting in part). All seven agreed that the two should

An analogous—although not identical—baseline question can arise within a single decision. When the Court must answer a series of questions in sequence in order to dispose of a case, what is the appropriate response of a Justice who disagrees with the majority's answer to an early question in the series? Should she stop there, affirming or reversing the lower court merely on the basis of this partial answer, or should the Justice instead abide by the majority's answer and address subsequent questions? In four different cases, eight different Justices have suggested that it is appropriate to take the majority's determination as a baseline.[48]

The simplest example is Justice White's approach in *Pennsylvania v. Union Gas Co.*[49] *Union Gas* raised two questions: (1) whether Congress, in enacting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) or the Superfund Amendments and Reauthorization Act of 1986 (SARA), had intended to abrogate state sovereign immunity and thus to subject states to suits for damages in federal court; and (2) whether Congress was constitutionally permitted to do so. The second question does not arise unless the first question is answered affirmatively.[50] The court of ap-

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be treated alike. Justices Blackmun and O'Connor concluded, however, that the two were distinguishable and that only the menorah display was constitutional. *See id.* at 613-21 (Blackmun, J.), 632-37 (O'Connor, J.). Despite the fact that seven Justices would have treated the creche and menorah together, then, one stood and one fell. The problem with treating *County of Allegheny* as a baseline question, however, is that it is difficult to know *which view* should be considered the baseline. The conclusion of the four—not a majority—that neither display raised constitutional problems? The conclusion of the seven—on a question not explicitly raised or considered as a separate issue—that the two should be treated alike? Even if they had agreed to accept the latter, how should Justices Blackmun and O'Connor have voted? *County of Allegheny* suggests that voting by issue rather than by outcome might sometimes be appropriate, but it does not tell us much about the baseline problem.

48. Some of these cases also implicate the debate over voting by outcome or by issue and are discussed extensively in that literature. *See supra* note 10.

49. 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996).

50. *See, e.g.*, Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 474-76 (1987) (finding no explicit intent to abrogate and therefore not deciding the constitutional question); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-46 (1985) (same). It is, of course, logically possible to reverse the order of the questions: If the Constitution would not permit Congress to abrogate state sovereign immunity,

peals answered both questions affirmatively, allowing the lawsuit to proceed.

When the case reached the Supreme Court, Justice White concluded that Congress had not, in fact, intended to abrogate state sovereign immunity in enacting CERCLA or SARA. Justice White's dilemma arose because five of his brethren disagreed, concluding that CERCLA, as amended by SARA, contained a sufficiently explicit abrogation of immunity. But only four of the Justices who found that CERCLA abrogated immunity went on to conclude that Congress was constitutionally empowered to do so; Justice Scalia, after deciding that CERCLA abrogated immunity, would have invalidated that part of CERCLA as unconstitutional.[51]

Justice White was therefore faced with the baseline dilemma. Should he simply cast the fifth vote to reverse the lower court, on the ground that CERCLA did not authorize the suit—thus joining Justice Scalia and three Justices who thought that the abrogation was *both* outside the statute and unconstitutional—or should he take as settled the majority ruling that CERCLA did authorize the suit and then decide whether CERCLA was constitutional? He chose the latter course:

> My view on the statutory issue has not prevailed, however; a majority of the Court has ruled that the statute, as amended, plainly intended to abrogate the immunity of the States from suit in the federal courts. *I accept that judgment.* This brings me to the question whether Congress has the constitutional power to abrogate the States' immunity.[52]

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the Court need not address whether Congress has nevertheless futilely tried to do so. To order the questions that way, however, would conflict with the Court's general practice of avoiding unnecessary constitutional questions. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341, 346 (1936) (Brandeis, J., concurring).

51. *See Union Gas*, 491 U.S. at 35-42 (dissenting opinion). Justice Scalia's view ultimately prevailed seven years later in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

52. *Union Gas*, 491 U.S. at 56-57 (White, J., concurring in the judgment) (emphasis added).

Justice White concluded that Congress did have the constitutional power, thus providing the crucial fifth vote for affirming the lower court and allowing the lawsuit to proceed.[53]

In an essentially identical single baseline case almost two decades before *Union Gas*, Justices Harlan and Blackmun chose the same course. In *United States v. Vuitch*,[54] the Court reviewed a district court decision invalidating a District of Columbia antiabortion law. The case raised novel and serious jurisdictional questions, and only five Justices concluded that the Supreme Court had jurisdiction over the appeal of the United States. Justices Harlan and Blackmun were among the dissenters from that conclusion. They would have dismissed the appeal for lack of jurisdiction, letting stand the lower court's invalidation of the statute.[55] They nevertheless deferred to the majority's finding of proper jurisdiction and went on to vote to reverse the district court and to uphold the statute. Justice Blackmun briefly explained his decision to reach the merits: "Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits."[56] Justice Harlan reached the merits "substantially for the reasons set forth in MR. JUSTICE BLACKMUN'S separate opinion."[57] Like Justice White, their perceived obligations to the deliberative body overcame their individual disagreement with

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53. *See id.* at 57 (White, J., concurring in the judgment). One commentator has derided Justice White's approach as "madness" and "slightly ludicrous." Michael Stokes Paulsen, *Counting Heads on RFRA*, 14 CONST. COMMENTARY 7, 11 n.12 (1997). Another called it "[p]ossibly the most unsettling phenomenon" of that term. Rogers, *The Supreme Court Justice as Epimenidis*, *supra* note 10, at 439. One point of my Essay, of course, is to suggest that Justice White's position is not only defensible, but has been taken by numerous Justices at various times.

54. 402 U.S. 62 (1971).

55. *See id.* at 81-96 (Harlan, J., dissenting as to jurisdiction). The jurisdictional statute allowed direct appeals to the Supreme Court in all cases in which an indictment was dismissed because of the unconstitutionality of the statute. *See id.* at 66. The Court divided over whether the term "statute" included laws governing only the District of Columbia, which, in the days before home rule, were passed by Congress. *See id.* at 64-66; *id.* at 81-96 (Harlan, J., dissenting as to jurisdiction).

56. *Id.* at 98 (Blackmun, J., concurring in part and concurring in the judgment).

57. *Id.* at 96 (Harlan, J., concurring in part and concurring in the judgment). Justices Brennan and Marshall, who also found that the Court lacked jurisdiction, chose the opposite course, and did not reach the merits. *See id.* at 81 (Harlan, J., dissenting as to jurisdiction).

the result reached by a majority. Moreover, *Vuitch* may be considered an especially important example of the baseline approach, because Justices Harlan's and Blackmun's dissenting view of jurisdiction not only would have warranted a different disposition of the case, it would have deprived them of any authority to reach the merits.

A slightly more complex example of the single-case baseline question is presented by *Arizona v. Fulminante*.[58] Oreste Fulminante challenged his conviction for murder on the ground that the trial court erroneously admitted into evidence a coerced confession. The Arizona Supreme Court agreed, reversing his conviction. A badly fractured U.S. Supreme Court agreed, affirming the Arizona Supreme Court. The case, as presented to the U.S. Supreme Court, raised three questions: (1) Was Fulminante's confession coerced? (2) Are coerced confessions subject to harmless error analysis, so that a conviction in such a case might sometimes stand despite the erroneous admission of the confession? and (3) Was the admission of Fulminante's coerced confession actually harmless? Again, as in *Union Gas* and *Vuitch*, each of the first two questions must be answered affirmatively in order for the subsequent question(s) to be raised.[59] Three different majorities answered each of the first two questions affirmatively and the last question negatively, with the result that the conviction was invalidated on the ground that admitting Fulminante's coerced confession was not harmless error. No Justice was in the majority on all three questions. Because of the shifting majorities, Justice Kennedy was faced with the baseline question.

Justice White, writing for himself and Justices Marshall, Blackmun, Stevens, and Scalia, found the confession to be coerced. The other four Justices dissented from that holding. Only

58. 499 U.S. 279 (1991).

59. It is possible to treat the questions in a slightly different order, asking first whether the confession was coerced, then whether the error was harmless, and reaching the appropriateness of the harmless error analysis to coerced confessions only if the error is first found to be harmless. That ordering, however, still requires an affirmative answer to each question before proceeding to the next one.

four of the Justices in this majority, however, also concluded that the determination of coercion should end the case. Justice Scalia joined the four dissenters to create a majority holding that the admission of a coerced confession need not invalidate the conviction if the error was harmless.

In reaching the second question—whether harmless error analysis applies to coerced confessions—despite their negative answer to the question of whether Fulminante's confession was coerced, the Justices who dissented from the finding of coercion were not really faced with a baseline question. To see why, imagine that Justice Scalia had joined all of Justice White's opinion, leaving the same four dissenters on every question. Certainly, in that case, Chief Justice Rehnquist's dissenting opinion could quite legitimately have reached all three questions as alternative grounds pointing in the same direction: the confession was not coerced, and even if it had been, the error was harmless. The Chief Justice therefore need not care whether a majority disagreed with his finding of voluntariness; the harmless error analysis simply provided an alternative reason to uphold the conviction despite the majority's ruling.

Similarly, the fact that Justices White, Marshall, Blackmun, and Stevens thought that no coerced confession could *ever* constitute harmless error should not stop them from analyzing whether the admission of *this* coerced confession was harmless, once a majority has concluded that the harmless error rule is applicable. Again, had they been in dissent throughout, they could have argued that the harmless error rule did not apply *and* that even if it did, admitting the confession was not harmless.

But Justice Kennedy *was* faced with the baseline question, and he answered it the same way that Justice White did in *Union Gas* and Justices Harlan and Blackmun did in *Vuitch*. Justice Kennedy agreed with Chief Justice Rehnquist on the first two questions: he found the confession voluntary, and he thought that even coerced confessions should be subject to harmless error analysis. He nevertheless joined the four Justices with whom he had disagreed on both questions and cast the fifth vote to invalidate the conviction on the ground that "admission of the confession could not be harmless error when viewed in light of

all the other evidence."[60] He thus reversed the conviction because, although he thought the confession was properly admitted, he agreed that if the confession *had* been improperly admitted the error could not be considered harmless.

Justice Kennedy cast his vote with a clear acknowledgement that he was necessarily accepting as a baseline a conclusion with which he disagreed, simply because five Justices had reached it. His explanation is worth quoting at length:

> For the reasons stated by THE CHIEF JUSTICE, I agree that Fulminante's confession . . . was not coerced. In my view, the trial court did not err in admitting this testimony. A majority of the Court, however, finds the confession coerced and proceeds to consider whether harmless-error analysis may be used when a coerced confession has been admitted at trial. With the case in this posture, it is appropriate for me to address the harmless-error issue.
>
> Again for the reasons stated by THE CHIEF JUSTICE, I agree that harmless-error analysis should apply in the case of a coerced confession. That said, the court conducting a harmless error inquiry must appreciate the indelible impact a full confession may have on the trier of fact . . . If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence. For the reasons given by JUSTICE WHITE . . . I cannot with confidence find admission of Fulminante's confession . . . to be harmless error.
>
> The same majority of the Court does not agree on the three issues presented by the trial court's determination to admit Fulminante's first confession . . . . My own view that the confession was not coerced does not command a majority.
>
> In the interests of providing a clear mandate to the Arizona Supreme Court in this capital case, *I deem it proper to*

60. *Fulminante*, 499 U.S. at 314 (Kennedy, J., concurring in the judgment).

> *accept in the case now before us the holding of five Justices that the confession was coerced and inadmissible.*[61]

Like Justices White, Harlan, and Blackmun—and unlike Justice O'Connor in *Flores*—Justice Kennedy believed that he was obliged to accept the Court's decision as a baseline against which to consider the remaining questions.[62]

In all three of these cases, the Justices in question faced an especially difficult decision. Each Justice provided the dispositive vote against an ultimate outcome that he favored. Justice White in *Union Gas*, for example, believed that the Court should have dismissed the suit on statutory grounds, and it was only his decision to waive the statutory point and to address the constitutional issue anyway that resulted in affirming the lower court and allowing the suit to go forward. If Justices Harlan and Blackmun had prevailed on the jurisdictional issue in *Vuitch*, then the Court would have dismissed the appeal, leaving intact the lower court's invalidation of the statute. They nevertheless provided the two necessary votes to reverse the lower court and uphold the statute, in a case in which they believed they lacked jurisdiction. Similarly, if Justice Kennedy had adhered to his position that the confession was not coerced, then the Court would have reinstated the conviction; if admitting the confession was not even constitutional *error*, then it was certainly harmless.

In at least two other cases, four different Justices took the baseline approach, but it did not affect the ultimate outcome of the litigation. In *United States v. Jorn*,[63] the lower court dismissed an indictment on double jeopardy grounds. When the case reached the Supreme Court, Justices Black and Brennan dissented from the Court's decision that it had jurisdiction. They nevertheless joined four other Justices to provide a majority for

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61. *Id.* at 313-14 (Kennedy, J., concurring in the judgment) (emphasis added).

62. As Lewis Kornhauser and Lawrence Sager have pointed out, there may be some circumstances in which judges may *have* to act as White, Harlan, Blackmun, and Kennedy did in order for the court to issue a ruling at all. *See* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 113-14 (1986); Rogers, *The Supreme Court Justice as Epimenidis*, *supra* note 10, at 459-61. Neither *Union Gas*, *Vuitch*, nor *Fulminante* involved such circumstances.

63. 400 U.S. 470 (1971).

affirming the lower court's dismissal on the merits: "MR. JUSTICE BLACK and MR. JUSTICE BRENNAN believe that the Court lacks jurisdiction over this appeal . . . . However, in view of a decision by a majority of the Court to reach the merits, they join the judgment of the Court."[64] Their choice did not alter the ultimate outcome of the case: a refusal to join the majority in reaching the merits would still have left the lower court decision standing, with four Justices voting to affirm the appeal and two to dismiss it. Nevertheless, there is a significant difference between an affirmance and a dismissal of an appeal for lack of jurisdiction.

Similarly, in *Kesler v. Department of Public Safety*,[65] only six of the eight participating Justices thought that the Court had jurisdiction over the case. Only four of the six voted to affirm the lower court and uphold the challenged statute, which denied driving privileges to certain debtors. Justice Stewart thought there was no jurisdiction, but provided the fifth vote to affirm: "The Court, however, holds that this appeal is properly here, and on the merits of the litigation I agree with the Court's conclusion."[66] Chief Justice Warren similarly reached the merits despite his view that the Court lacked jurisdiction; he would have invalidated a portion of the statute while upholding much of it. In Justice Stewart's case, as with Justices Black and Brennan in *Jorn*, his vote to affirm on the merits had the same ultimate effect as a vote to dismiss the appeal for lack of jurisdiction. In the Chief Justice's case, his vote on the merits to reverse in part would have yielded a different outcome than his vote to dismiss the appeal—but because only two other Justices supported reversal, the Chief Justice's vote did not have any actual effect.

These two cases are less important than *Union Gas*, *Vuitch*, and *Fulminante*, because the Justices who accepted a majority determination with which they disagreed did not have to provide

64. *Id.* at 488 (Black and Brennan, JJ., concurring in judgment).
65. 369 U.S. 153 (1962).
66. *Id.* at 174 (Stewart, J., concurring).

the crucial vote against their preferred outcome. Nevertheless, their willingness to accede to the majority rather than insisting on their own reasons for affirmance or reversal demonstrates a similar commitment to treating a majority decision as a baseline.[67]

One final case may—or may not—provide a counter-example to Justice O'Connor's approach. The perfect contrast to Justice O'Connor would be a Justice who agreed with her that *Smith* was wrong and that Congress's Section 5 powers are severely limited, but who nevertheless chose to accept *Smith* as the baseline and to strike down RFRA. Justice Ginsburg may be that Justice. But there's a catch: although we know—because she joined Justice Kennedy's majority opinion in *Flores*—that Justice Ginsburg agrees with Justice O'Connor on the question of Congress's Section 5 powers, she has never commented on *Smith*. An opinion she wrote in 1984, while still on the court of appeals, however, might provide some evidence that she disagrees with *Smith*.

In 1984, long before *Smith*, the Court of Appeals for the District of Columbia Circuit decided a religious freedom case that would eventually reach the Supreme Court. The court of appeals held

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67. Justice Blackmun cited these two cases, as well as two others, in his opinion in *Vuitch*. *See* United States v. Vuitch, 402 U.S. 62, 98 (1971). One commentator dismisses as distinguishable all four of the cases relied on by Justice Blackmun. *See* Rogers, *The Supreme Court Justice as Epimenidis*, *supra* note 10, at 462-63. Rogers suggested that *Jorn* was "a decision on alternate grounds." *Id.* at 462 & n.76. The statement by Justices Black and Brennan, however, asserts that they concur specifically "in view of a decision by a majority of the Court to reach the merits." *Jorn*, 400 U.S. at 488. (Except for a half-sentence description of their reason for finding no jurisdiction, I have quoted their statement in its entirety, *supra* in text accompanying note 64.). That formulation strongly implies that they did something other than simply reach the same conclusion on alternate grounds. Rogers distinguished *Kesler* because the Justices' votes were "unclear and made no difference in the outcome." Rogers, *The Supreme Court Justice as Epimenidis*, *supra* note 10, at 463 & n.77. The Justices in *Kesler* were very clear about their views on jurisdiction and their views on the merits; I do not understand Rogers's characterization. The idea that their votes made no difference to the outcome, which is true of *Jorn* as well, only means that their votes did not require the same amount of principled integrity as did the votes in *Union Gas*, *Vuitch*, and *Fulminante*; it does not change the fact these four Justices recognized the baseline problem and made a choice different from the one Justice O'Connor made in *Flores*. As to the other two cases cited by Justice Blackmun in *Vuitch*, I agree with Rogers that they are distinguishable.

that Simcha Goldman, an Orthodox Jew in the Air Force, had no constitutionally protected right to wear the yarmulke required by his religion.[68] It therefore upheld an Air Force regulation barring the wearing of headgear indoors, rejecting Goldman's request for an exemption under the Free Exercise Clause. Goldman moved for rehearing en banc, which was denied. Three judges dissented from the denial of rehearing. Judge Kenneth Starr wrote a passionate opinion declaring that the panel opinion upholding the Air Force regulation "does considerable violence to the bulwark of freedom guaranteed by the Free Exercise Clause."[69] He cited *Wisconsin v. Yoder*[70] for the proposition that government must "accommodate those who wish to exercise their religious liberties, unless the accommodation would prove unduly burdensome."[71] Judge Starr's plea for the application of the pre-*Smith* rule to protect Goldman's religious freedom was praised by none other than then-Judge Ginsburg. She, too, dissented from the denial of rehearing, "[f]or the reasons indicated in Judge Starr's eloquent statement."[72] Her endorsement of *Yoder* might thus constitute some evidence that she would not support *Smith*. It cannot be dispositive evidence, however, for one primary reason: The third dissenter from rehearing, who joined Judge Ginsburg's opinion, was then-Judge Scalia. And if we know anything, we know that Justice Scalia thought *Smith* was rightly decided—and so dissenting in *Goldman* cannot be definitively equated with disagreement with *Smith*.[73]

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68. *See* Goldman v. Secretary of Defense, 734 F.2d 1531 (D.C. Cir. 1984), *aff'd sub nom.* Goldman v. Weinberger, 475 U.S. 503 (1986).

69. *Id.* at 658 (Starr, J., dissenting).

70. 406 U.S. 205 (1972).

71. *Goldman*, 739 F.2d at 659 (Starr, J., dissenting).

72. *Id.* at 660 (Ginsburg, J., dissenting).

73. Judge Ginsburg also wrote opinions for the court of appeals in *Leahy v. District of Columbia*, 833 F.2d 1046 (D.C. Cir. 1987), and *Olsen v. DEA*, 878 F.2d 1458 (1989), but neither case provides much evidence of her views on *Smith*. In *Leahy*, Judge Ginsburg's opinion for a unanimous panel held that the District of Columbia was required to show a compelling interest for its refusal to accept a passport and birth certificate in lieu of a social security number for a driver's license applicant with religious objections to providing his social security number. *See Leahy*, 833 F.2d at 1048. According to the court of appeals, the district court misread *Bowen v. Roy*, 476 U.S. 693 (1986), as substituting a balancing test for the compelling interest

There are undoubtedly other cases raising the baseline question and other Justices who have chosen to take as given rulings with which they disagree. The cases discussed, however, should be sufficient to suggest that Justice O'Connor truly faced a choice between valid competing approaches.

III. SPEAKING WITH ONE VOICE

Although the Court has never squarely faced the question of whether its own decisions should be taken as a baseline by dissenting members, it has frequently reiterated the broader view that its decisions are the binding law of the land. Usually it does so in the course of chastising some rebellious state or federal official—or some recalcitrant lower federal court—for ignoring the Court's pronouncements. The language that the Court has used in this context tends to confirm the unitary nature of the Supreme Court, brushing off the views of individual Justices as largely irrelevant.

The strongest example is a case decided two days before *Flores*. Justice O'Connor's majority opinion in *Agostini v. Felton*[74] addressed the question of whether prior precedent had been effectively overruled, justifying the grant of a Rule 60(b)(5) motion for relief from an injunction. The earlier precedent, *Aguilar v. Felton*,[75] prohibited states—on Establishment Clause grounds—from sending remedial teachers into parochial schools. In the intervening time, five Justices in individual opinions indicated a willingness to overrule *Aguilar*.[76] The school board therefore sought relief from the injunction prohibiting it from sending remedial teachers into parochial schools, on the ground

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analysis. *See id.* Judge Ginsburg's unexceptional citation of such cases as *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987), shows only that as a court of appeals judge she followed Supreme Court precedent. In *Olsen*, the court of appeals held that the government need not exempt the religious use of marijuana from criminal prosecution. Judge Ginsburg's opinion followed both Supreme Court and lower court precedent to conclude that the exemption would unduly interfere with the government's interest in controlling the use of marijuana generally. *See Olsen*, 878 F.2d at 1464.

74. 117 S. Ct. 1997 (1997).

75. 473 U.S. 402 (1985).

76. *See* Board of Educ. v. Grumet, 512 U.S. 687, 750 (1994).

that *Aguilar* had been effectively overruled.

The Supreme Court ultimately concluded in *Agostini* that subsequent Establishment Clause cases had "so undermined *Aguilar* that it [was] no longer good law."[77] But Justice O'Connor was careful to distinguish that ruling from the claim that the statements of five individual Justices had overruled *Aguilar*:

> We also agree with respondents that the statements made by five Justices in [*Board of Education of*] Kiryas Joel [*v. Grumet*[78]] do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed. In *Kiryas Joel*, . . . [f]ive Justices joined opinions calling for reconsideration of *Aguilar*. . . . But the question of *Aguilar*'s propriety was not before us. The views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.[79]

Thus, the Court held, the district court in *Agostini* acted correctly in denying the Rule 60(b) motion.[80] The district court, wrote Justice O'Connor, held correctly "that the motion had to be denied unless and until this Court reinterpreted the binding

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77. *Agostini*, 117 S. Ct. at 2007.

78. 512 U.S. 687 (1994).

79. *Agostini*, 117 S. Ct. at 2007. It is instructive to compare Justice O'Connor's approach to one taken by Fourth Circuit Judge John Parker fifty-five years earlier. In *Barnette v. West Virginia Board of Education*, 47 F. Supp. 251 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943), Judge Parker, writing for a unanimous three-judge district court, refused to follow the Supreme Court's ruling in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). *See Barnette*, 47 F. Supp. at 253. He reasoned that a sufficient number of Justices had subsequently announced their disagreement with *Gobitis* as to impair its authority. He thus enjoined school officials from requiring Jehovah's Witness children to salute the flag, despite the fact that the Court in *Gobitis* had rejected an identical challenge to a flag-salute requirement. *See id.* at 255. The Supreme Court affirmed the three-judge court's injunction without commenting on Judge Parker's nose counting. *See Barnette*, 319 U.S. 586 (1940). Those were different times.

80. *See Agostini*, 117 S. Ct. at 2018-19. The Supreme Court, in an unusual maneuver, reversed *Aguilar* and itself granted the motion dissolving the injunction. *See id.*

precedent."[81] Even though five Justices found *Aguilar* unpersuasive, it remained the law of the land until it was overruled by a majority opinion.

Justice O'Connor's careful distinction in *Agostini* also raises more directly an interesting question about the baseline dilemma. Imagine that there had been *four* votes, not five, to overrule *Aguilar*, and that the district court had nevertheless *granted* the Rule 60(b) motion. What would Justice O'Connor—believing *Aguilar* to be wrongly decided—have done? Her suggestion that the district court acted properly even in the face of five votes to overrule *Aguilar* strongly implies that in my counter-factual world of only four votes she would have voted to reverse an errant district court. She might have concurred separately, arguing in her opinion that *Aguilar* was ripe for overruling, but she could hardly have reasoned that the Rule 60(b) motion should have been granted. It was only the somewhat doubtful conclusion that the Court's own powers included the power to grant a Rule 60(b) motion—in the same case in which it provided the change in the law justifying such a grant—that allowed it to reverse the district court. Had there not been five votes to change the law, there would have been no justification for any court, including the Supreme Court, to grant the motion. Comments in a dissenting opinion, as Justice Rehnquist noted almost two decades ago, "are just that: comments in a dissenting opinion."[82]

Justice O'Connor also authored a dissenting opinion that comes intriguingly close to the precise question I pose in this Essay. In *James B. Beam Distilling Co. v. Georgia*,[83] Justice O'Connor dissented from the majority's holding that new Supreme Court rulings should always be applied retroactively. Instead, she argued, the Court should decide the retroactivity question case by case, depending on the equities. She reasoned that when the Court announces a new rule, it is changing the law, and it is not always fair to apply new law to old cases: "[P]recisely because this Court has the power to say what the

81. *Id.* at 2017.
82. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 176-77 n.10 (1980).
83. 501 U.S. 529 (1991).

law is, *Marbury v. Madison*, when the Court changes its mind, the law changes with it."[84] Her language is tantalizingly suggestive. Did she mean to answer the question left open in *Marbury*—who speaks for the judiciary?—by suggesting that the law changes *only* when the *Court* changes its mind?

Similar, though somewhat less powerful, suggestions that only official pronouncements of the Court as a whole can be taken as the baseline can be found in other cases. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[85] the Court warned lower courts against concluding on their own that Supreme Court precedent had been so undermined as to be of no value: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, then the Court of Appeals should follow the case which directly controls, *leaving to this Court* the prerogative of overruling its own decisions."[86]

In *Cooper v. Aaron*,[87] the first and broadest statement of the Court's omnipotence, both the majority opinion and Justice Frankfurter's concurrence seemed to view the Court as an indivisible unit. The majority opinion—signed by every Justice—announced that "the interpretation of the Fourteenth Amendment enunciated *by this Court in the Brown* case is the supreme law of the land . . . ."[88] The opinion went on to suggest that any official who disobeyed *Brown* was violating his oath to support the Constitution. The Court thus implicitly equated its own interpretation of the Constitution with the Constitution itself. By so doing—admittedly the most controversial aspect of

84. *Id.* at 550 (O'Connor, J., dissenting) (citations and internal quotations marks omitted). Justice O'Connor also quoted this statement in her dissent in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 115 (1993).

85. 490 U.S. 477 (1989).

86. *Id.* at 484 (emphasis added). Justice O'Connor joined Justice Kennedy's majority opinion in this case. She also repeated the quoted language in her own plurality opinion in *American Trucking Ass'ns Inc. v. Smith*, 496 U.S. 167, 180 (1990) (plurality opinion).

87. 358 U.S. 1 (1958).

88. *Id.* at 18 (emphasis added) (discussing Brown v. Board of Educ., 349 U.S. 294 (1954)).

Cooper—the Court also necessarily implied that individual Justices, who themselves take an oath to support the Constitution, are bound to respect decisions of the Court as equivalent to the Constitution itself, until those decisions are overruled.

Justice Frankfurter's concurrence was even more explicit in denying the Justices any individuality. "The Constitution," he wrote, "is not the formulation of the merely personal views of the members of this Court . . . ."[89] The sentiment in *Cooper* that Supreme Court decisions *are* the Constitution was reiterated recently by Justice Scalia. In his concurrence in *American Trucking Ass'ns v. Smith*,[90] he declared: "To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it."[91]

Finally, the discussion of stare decisis in *Planned Parenthood v. Casey*[92] hints at allegiance to the view that the Court speaks as a single unit, not as a plurality of individual voices. The plurality opinion authored by Justices O'Connor, Kennedy, and Souter distinguished two earlier refusals to adhere to precedent: *Brown v. Board of Education*,[93] which failed to adhere to *Plessy v. Ferguson*,[94] and *West Coast Hotel Co. v. Parrish*,[95] which overruled *Adkins v. Children's Hospital*[96] and thus fatally undermined *Lochner v. New York*.[97] According to the plurality opinion in *Casey*, the decisions in *Brown* and *West Coast Hotel* were not merely due to a change in membership. The decisions were "defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before."[98] The members of the plurality—including Justice O'Connor who had previously urged the

89. *Id.* at 24-25 (Frankfurter, J., concurring).
90. 496 U.S. 167 (1990).
91. *Id.* at 201 (Scalia, J., concurring).
92. 505 U.S. 833 (1992).
93. 347 U.S. 483 (1954).
94. 163 U.S. 537 (1896).
95. 300 U.S. 379 (1937).
96. 261 U.S. 525 (1923).
97. 198 U.S. 45 (1905).
98. Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) (plurality opinion).

overruling of *Roe v. Wade*[99]—voted to adhere to *Roe* as the law of the land despite their personal views to the contrary.[100]

Thus, although the Court has never directly confronted the baseline question, it has sometimes framed the *Cooper* question in such a way as to suggest that even dissenting Supreme Court Justices owe allegiance to majority opinions until and unless they are overruled. Again, this demonstrates that the choice facing Justice O'Connor in *Flores* was a real one: she could legitimately, and with ample precedent, have chosen a course other than the one she chose.

IV. BUT IS IT RIGHT?

The principal burden of this Essay has been to show that various Justices of the Supreme Court have taken the view that a dissenting Justice should nevertheless abide by the decision of the majority in some cases. That a baseline approach may sometimes be appropriate, however, does not demonstrate that Justice O'Connor was necessarily wrong to choose another course in *Flores*. All I have shown so far is that Justice O'Connor's approach is not so obviously correct as it first seems. Because I have raised the issue, however, it would be remiss of me not to offer at least a tentative suggestion of an appropriate resolution.

A colleague suggested an analogy that illustrates the problem well. Imagine that a law faculty is trying to decide whether to make a lateral appointment with tenure. The faculty must decide both whether to hire the candidate and whether to tenure her. The candidate may very well accept an appointment without tenure, but she would prefer a tenured offer. After much thought and discussion, you have reached two conclusions: (1) your law school should not hire the candidate, because you already have enough faculty members in her field; and (2) she is clearly deserving of tenure under your school's tenure standards.

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99. 410 U.S. 113 (1973).

100. *See* City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 454 (1983) (O'Connor, J., dissenting) (asserting that *Roe*'s trimester framework is "unworkable").

In a bifurcated vote, you vote against hiring her—but you are outvoted. How should you then vote on tenure? I think our intuitive reaction is to vote to grant tenure: a contrary vote would be seen as mean-spirited or unprincipled. Notice, incidentally, that it does not matter whether the hiring and tenure decisions are part of a single "case" or take place several years apart; the baseline question can arise within a single case or as a result of a series of cases.

How might we apply the insight of the hiring-and-tenure hypothetical to Supreme Court decision making? Let us start with the jurisdictional cases, such as *Vuitch*. We might view the jurisdictional cases as the most difficult example of the baseline dilemma: Justices who find no jurisdiction are in a sense acting ultra vires if they reach the merits. If this description is accurate, then the fact that some Justices have chosen the baseline approach in this difficult context is strong evidence that it is usually preferable in analogous but easier contexts. Indeed, even if Justices Harlan and Blackmun were wrong in *Vuitch*, everyone will agree that sometimes the baseline approach is appropriate even in jurisdictional cases.

In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[101] for example, the Court held that Congress could constitutionally confer diversity jurisdiction over cases between a citizen of a state and a citizen of the District of Columbia.[102] (Never mind that this case raises other interesting questions.) Justice Frankfurter dissented. Does his dissent in that case mean that he should have refused to reach the merits in every subsequent case before the Court in which the jurisdictional basis was the statute challenged unsuccessfully in *Tidewater*? Surely not. At some point, even if he continued to believe that the statute was unconstitutional—and would vote to strike it down and overrule *Tidewater* if he ever amassed enough support among his brethren—he had to accept as the baseline that federal jurisdiction existed in these cases. Thus, the jurisdictional cases offer strong support for the baseline approach.

But an argument might be made that these sorts of cases offer

101. 337 U.S. 582 (1949).
102. *See id.* at 600.

the *least* controversial application of the baseline approach. Despite the dissenting Justices' best efforts, the case is before them. As in the hiring-and-tenure hypothetical, the initial opposition is almost beside the point: fairness seems to require recognizing the undisputed presence of the case—or of the new, but as yet untenured, colleague. If this alternative description of the jurisdictional cases is the more accurate one, then perhaps both they and the hiring-and-tenure hypothetical present a unique situation, which should not be extended by analogy to other cases.

Moreover, it is easy to imagine cases in which we would be appalled if a Justice accepted the ruling of a majority and ultimately voted against his or her own preferred outcome. Justice Kennedy in *Fulminante* cast the deciding vote to overturn Fulminante's conviction, but what if the situation were exactly reversed? Imagine that Justice Kennedy had concluded that the confession was coerced and that the admission of coerced confessions should not be subject to the harmless error analysis. Had he been outvoted on the harmless error question, and therefore gone on to conclude that the admission did *not* constitute harmless error, then he would have sent a man to his death despite his belief that the conviction was unconstitutional!

So let us examine another hypothetical, this one closer to *Flores* itself. Imagine that Justice Scalia only mustered four votes in *Smith*. The Court continued to hold, over his dissent, that states must give religious exemptions absent a compelling interest. Emboldened by the Court's steadfastness, Congress enacts the Religious Freedom Restoration and Enforcement Act (RFREA), which allows individuals who are unconstitutionally denied exemptions to sue states for money damages. A state is then sued for damages for its failure to provide an exemption. The state claims immunity from suit under the Eleventh Amendment, arguing that RFREA is unconstitutional because Congress does not have the power to subject states to suit in federal court. In fact, under *Seminole Tribe v. Florida*,[103] Congress may abrogate state sovereign immunity—thus allowing

103. 517 U.S. 44 (1996).

damage suits against states in federal court—if and only if it does so as part of a legitimate exercise of its Section 5 power. Assuming that Congress explicitly invoked its Section 5 power in enacting RFREA, citing the counterfactual-*Smith* as precedent for the free exercise rights it was enforcing, how should Justice Scalia vote on the constitutionality of RFREA?

If your instincts are the same as mine, then you easily concluded that Justice Scalia should vote to uphold RFREA. If the Supreme Court of the United States has determined that the First and Fourteenth Amendments include a right to exemptions, then how can any individual Justice fault Congress for enforcing that right? This might help us conclude that Justice O'Connor, faced with the converse situation, similarly should have accepted the will of the majority as the definitive statement of the law.

Of course, your instincts may differ from mine, or voting to uphold RFREA and voting to strike down RFRA may be different. To hone in on how Justice O'Connor should have voted in *Flores*, we need to discover the crucial differences among the various cases and hypotheticals so far discussed. What distinguishes the counterfactual *Fulminante* hypothetical—in which we would all condemn Justice Kennedy for voting against his conscience—from *Union Gas*, the jurisdictional cases, the retroactivity cases, and the RFREA hypothetical? I suggest that all of the latter raise separation-of-powers issues, while the hypothetical *Fulminante* raises questions of individual rights. *And a case about individual rights is not really a baseline case.* Nor, as I shall suggest in a moment, is a case that is primarily about federalism.[104]

To see why, let us explore the Court's Section 5 jurisprudence in greater detail. What exactly is the purpose served by limiting Congress to enforcing *judicially defined* rights? Why can't Congress interpret the Fourteenth Amendment as it chooses and

104. The actual *Fulminante* case, of course, was also about individual rights. But in voting against one's preferred outcome, there is a difference between casting a vote that will, perhaps erroneously, protect individual rights, and casting a vote that will, perhaps erroneously, deny protection. The difference is especially stark in cases like *Fulminante*: It is the difference between setting free a man one thinks should be executed and executing a man one thinks should be set free. *See supra* p. 894.

enforce the rights *it* finds there?

One possibility is that Section 5 is primarily a protection of federalism. We cannot let Congress run roughshod over the states. Cabining Congress might be necessary to protect states from intrusions on their sovereignty beyond those that are constitutionally permissible. Congress cannot redefine the scope of the Fourteenth Amendment because to do so would be to violate the rights of states. If that is true, then perhaps Justice O'Connor was correct to dissent in *Flores*. If the ultimate question is whether the states are being trampled upon unnecessarily, then her answer to that question is independent of the answer given by even a majority of her colleagues. Notice, however, that this analysis also justifies Justice Scalia's hypothetical vote to strike down RFREA. If RFREA goes beyond the Free Exercise Clause, then it intrudes unnecessarily into state sovereignty.

Viewing Section 5 as a federalism provision, however, makes all the difference. If Section 5 protects federalism, then the question of the constitutionality of RFRA, or RFREA, is not really *dependent* on the Court's definition of free exercise rights, but rather *raises anew* the same question as that raised in *Smith*: To what extent are the prerogatives of states limited by constitutional considerations? Either state prerogatives are curtailed when it comes to religious objections to neutral laws or they are not. Under the federalism view of Section 5, asking whether the Free Exercise Clause curtails state prerogatives by requiring exemptions raises the same underlying question as asking whether Congress is trampling on state prerogatives by requiring exemptions. The question really has to do with *states*, not with Congress. Congress only happened to get in the picture by arguably interfering with state prerogatives.

In answering the underlying question for the second time, it may not matter to individual Justices what the Court has said before, any more than it matters in repeat dissents. Repeat dissents involve the persistence of the *same* disagreement, not the determination of a new question dependent on the answer to a previous question. One clue that differentiates repeat dissents from baseline cases is that no Justice in a repeat dissent is like-

ly to write as Justice O'Connor did in *Flores*—that "if I agreed with the Court's standard in [Case *A*], I would join the opinion" in Case *B*.[105] In a repeat dissent that statement would be silly: "If I agreed with the majority the first time they decided this question the wrong way, I would agree with them now that they are making the same mistake again." A Justice in a repeat dissent case would be much more likely to declare that "I thought the Court was wrong in Case *A*, and I still think so, and therefore I dissent in this case too."

The same analysis applies if *Flores* was really about individual liberty: the religious freedom of the church to renovate its building despite the city's wish to preserve it as a landmark. In that case, it really would not matter to any individual Justice whether it is the First Amendment or RFRA that protects the church's religious liberty. The crucial question would be whether religious liberty was infringed by the city's refusal to issue a building permit. Again, the issue is not really about Congress, but about the prerogatives of the church. Similarly, in the hypothetical *Fulminante* case, the question before the Court is not so much whether the state trial court erred but whether Fulminante should be executed.

The foregoing analysis assumes that Section 5, as interpreted, is designed to further federalism or individual rights. What if it is instead a separation-of-powers provision? If Section 5 is primarily a separation-of-powers provision, then *Flores* is exactly the paradigm baseline case. It asks whether Congress has exceeded the Court's instructions about the meaning of Section 5. Under a separation-of-powers approach, the reason that Congress is limited to enforcing *judicial* interpretations of the Fourteenth Amendment is not primarily to keep Congress from intruding on states but to keep it from transgressing its own constitutional limits. The limits themselves may have federalism implications, but it is separation-of-powers concerns that place the ultimate and binding interpretation of those limits in the hands of the Court rather than of Congress itself. Congress

105. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting) ("Indeed, if I agreed with the Court's standard in *Smith*, I would join [Justice Kennedy's] opinion.").

cannot redefine the scope of the Fourteenth Amendment because that is the Court's job.

And therein lies the baseline dilemma: is it *the Court's job* or the job of *individual Justices*? Here is where the cases discussed in Parts II and III of this Essay are useful. These cases indicate that in general, the Justices have viewed themselves as a unitary entity when it comes to separation of powers. *Agostini* in particular illustrates the Court's adherence to a unitary vision of the Court. On a separation-of-powers view, limiting Congress's Section 5 power to enforcing judicially defined rights is necessary to keep Congress from "jumping the fence" and taking off on its own.

That approach is analogous to the Supreme Court's view of the effect of its own precedent on lower courts. Lower courts are similarly precluded from jumping the fence and concluding on their own that Supreme Court doctrines lack force. The limits on Section 5 do the same thing horizontally that the requirement that lower courts follow Supreme Court precedent does vertically. But if, as Justice O'Connor concluded in *Agostini*, the independent voices of five Justices do not give lower courts license to jump the fence, then why should the independent voices of fewer than five Justices give Congress such license?

Moreover, the most persuasive reasons for making the Court the ultimate arbiter of the Constitution—depriving Congress of the power to jump the fence—require giving it a unitary voice. Larry Alexander and Frederick Schauer have recently argued that the "settlement function" of law justifies the Supreme Court's primacy as constitutional interpreter.[106] In order to avoid chaos, they suggest, we must "giv[e] agents reasons to obey laws with which they disagree."[107] They ultimately conclude that we cannot definitely provide such "content-independent" reasons for official obedience to the law unless we have a single authoritative interpreter of the Constitution. Whether one agrees in the end that Alexander's and Schauer's theory actually

106. *See* Alexander & Schauer, *supra* note 10.
107. *Id.* at 1371.

supports the Supreme Court's most self-aggrandizing statements in *Cooper*, they have offered the most powerful justification of *Cooper* we have yet seen. If their argument fails, then *Cooper* may well be unsupportable.

But to the extent that the settlement function of law requires a single constitutional arbiter, that function is undermined if individual Justices do not accept prior decisions as authoritative statements of law. It is one thing for the Court to change its collective mind, although if it does so often enough, we might lose much of the value of having a single final arbiter. It is quite another, however, for individual Justices to take the position that a prior decision of the Court need not bind other governmental actors simply because it was incorrect. A Justice who takes such a position is in effect denying that she or any other governmental actor has any content-independent reason for obeying the dictates of the Supreme Court.

I am, at least tentatively, persuaded that *Flores* raised primarily separation-of-powers issues, and that Alexander and Schauer are correct to defend *Cooper*. I therefore conclude that Justice O'Connor should have taken the baseline approach and accepted *Smith* as positive law even if it was incorrectly decided.

The real question for our purposes, however, is what *Justice O'Connor* thinks. Here there is little room for doubt. Even the most cursory glance at Section III-A of Justice Kennedy's opinion, which she explicitly approves, makes it clear that the primary defect of RFRA is that it violates Congress's duty to stay within the limits prescribed by the Court, not that it trespasses on state prerogatives. Nor does Justice O'Connor think that *Flores* was primarily an individual rights case. Had she viewed the question as whether the church's rights were being violated, she would not have needed to address the constitutionality of RFRA. She could instead have applied pre-*Smith* doctrine to reach a conclusion about the ultimate merits of the case. RFRA would have been irrelevant. But Justice O'Connor never tells us her views on the religious liberty issue. We do not know whether, even under her preferred interpretation of the Free Exercise Clause, the church is legally entitled to its building permit. The issue that concerns Justice O'Connor, then, is the same one that concerns the majority, and it is a question of separation of pow-

ers: whether Congress transgressed Court-imposed limits when it enacted RFRA. Her only dispute with the majority is about the content of those Court-imposed limits.[108]

Justice O'Connor's allegiance to *Cooper* is shown not only by the same portion of Kennedy's opinion, which one commentator has described as a reaffirmation of the rule of obedience announced in *Cooper*,[109] but also by her concurrence in the repeated statements of the Court canvassed in Part III of this Essay. Justice O'Connor apparently views the limits on Congress's Section 5 power as but one instantiation of the basic separation-of-powers rule that the Court, and not Congress, has the final say on the meaning of the Constitution. Taking that view, however, ought to trigger at least a presumption that when the Court has spoken, its word remains law until five Justices say otherwise.

V. CONCLUSION

In *Flores*, Justice O'Connor chose to base congressional power to enforce the Constitution on her own dissenting constitutional interpretation, rather than on the interpretation of the Supreme Court. She thus implicitly rejected a view that she and other Justices have often endorsed, at least in separation-of-powers cases: That the Supreme Court as a whole, and not merely the collected votes of individual Justices, determines what the law is at any given time. On this view, even dissenting Justices must take majority decisions as a baseline for measuring later actions, until five Justices agree to overrule those decisions.

Instead of measuring congressional power against the view of the Free Exercise Clause that she wished had prevailed, Justice O'Connor might have chosen to accept that *Smith* marked the

108. Another way to put this is to suggest that Justice O'Connor, by voting on the constitutionality of RFRA rather than on the church's entitlement to a building permit, chose to vote by issue rather than by outcome. Having done that, however, she then chose to ignore the majority's decision on one of the issues.

109. *See* Emily Sherwin, *Ducking* Dred Scott*: A Response to Alexander and Schauer*, 15 CONST. COMMENTARY (forthcoming 1998).

boundaries of congressional power, despite her substantive disagreement with that decision. The appeal of Justice O'Connor's unselfconscious refusal to accept the interpretation of the majority may be apparent. After all, it was the Constitution she was expounding. A closer examination, however, reveals that the appeal was *only* apparent. The purpose of this Essay has been to suggest that, at least if *Flores* is viewed primarily as a separation-of-powers case, then Justice O'Connor should indeed have voted to invalidate RFRA, or at least have explained why she did not do so. In fact, Justice O'Connor did not address the baseline question at all. The question is a difficult one, and although I have offered my own answer, I am open to persuasion. Even so, I am certain that the question is substantial enough to warrant more consideration than Justice O'Connor provided.