OUR PERFECT, PERFECT CONSTITUTION

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I suffer from a peculiar and aggressive strain of Stockholm syndrome, the psychological tendency of kidnapping victims to identify with, and even come to adore, their captors. The strain with which I am afflicted is unique to teachers of constitutional law. I am now in my twentieth year as a law professor. (Unbelievable, I know. Yes, indeed, I started very, very young—evidently sometime in my early teens.) Before that, I was a student and practitioner (of sorts) of constitutional law. I have been a hostage to constitutional law for a long time.

Constant exposure results in a certain degree of contamination. Eventually, it produces utter transformation. And so it is that I must now announce that I have, finally, succumbed. *I now believe that everything in the U.S. Constitution is perfect*. More than that, I have come around to the understanding that *every Supreme Court interpretation of the Constitution is perfect as well* and indeed must be regarded as *part of* the Constitution. I hereby repudiate everything I have ever said or written to the contrary (which is to say, essentially my entire academic career to date).

Alas, this leaves me in something of a quandary. What could I possibly contribute to a *Constitutional Commentary* symposium asking participants how they would re-write the Constitution? There is no room for improvement! All that remains is for our perfect written Constitution to be updated to reflect, perfectly, the Supreme Court's perfect interpretations of it. Thus, my relatively minor contribution to this symposium is a series of "amendments"—if one could really call them that—to bring the text more fully into harmony with the Supreme Court's pronouncements. These pseudo-amendments might usefully be

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added as a "pocket part" to pocket copies of the Constitution, so that folks (like me) who carry around a copy of the Constitution with them in their jacket pocket have a short-and-sweet text that includes not only what the Constitution says but also what it really means.

I've tried to keep the "amended" text brief and to-the-point. For verification purposes and ease of reference, I've included here a few footnotes identifying the authoritative Supreme Court decisions that establish the propositions set forth in these conforming amendments. For purposes of the pocket Constitution editors, it should be noted that the footnotes probably need not be included in the actual copies of the Constitution. I include them here just to show that they are, indeed, part of our incomparably perfect, perfect Constitution.

CONFORMING AMENDMENTS TO THE CONSTITUTION

1. Article I, Section 1, Clause 1 is amended to delete the words "herein granted." It shall hereafter read: "All legislative Powers shall be vested in a Congress of the United States."[1]

2. Article I, Section 8 is amended to add the following sentence, after the listing of enumerated powers: "The enumeration in this article of certain legislative powers shall not be construed to deny or disparage the power of Congress to exercise all legislative powers and enact any laws it likes; provided however, that such legislative power is subject to such restrictions and rights as the Supreme Court sees fit to prescribe by decision."[2]

1. U.S. Reports *passim*. *See generally* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that Congress may regulate wholly intrastate production and consumption of wheat for personal use); Gonzales v. Raich, 545 U.S. 1 (2005) (holding that Congress may regulate wholly intrastate production and consumption of weed for personal use). The Supreme Court has held that the Commerce Clause does not authorize Congress to regulate wholly intrastate noncommercial activity that does not substantially affect interstate commerce (or does not require proof that something—anything at all—involved in the activity has moved in interstate commerce). United States v. Lopez, 514 U.S. 549 (1995); *see* United States v. Morrison, 529 U.S. 598 (2000). But that "limitation" is so easily satisfied by the barest efforts of even the stupidest Congress that we might just as well dispense with it, don't you think?

2. *Cf.* M'Culloch v. Maryland, 17 U.S. 316 (1819). *See generally* sources cited in previous note. This conforming amendment is largely redundant of the content of supplemental interpretive amendment 1, but is added for purposes of clarity, in order to avoid any unsound inference of limitation on congressional power as a result of the enumeration in Article I of specific legislative powers.

3. The Tenth Article of Amendment to this Constitution is repealed.[3]

4. Congress may delegate the power to make laws to such persons or entities as it sees fit, including (but not limited to) agencies or officers it creates from time to time, international organizations, and foreign nations.[4]

5. The first sentence of Article II, Section 1 is amended to read: "The executive Power shall be vested in a President of the United States of America and in such other offices and officers as Congress shall from time to time ordain and establish. Such other executive officers shall be appointed in a manner prescribed by Congress, removable in a manner prescribed by Congress, and subject to direction and control either of Congress or of such persons or officers as Congress shall determine, including other such executive officers created by Congress. The title and designation "President of the United States" shall not be construed to imply an unrestricted power of presidential direction, control, supervision, discipline, or removal of such other executive officers as Congress shall from time to time ordain and establish, except to the extent that Congress may so require or provide."[5]

6. Article II, Section 2, in the clause preceding the first semi-colon, is amended to read as follows: "The President shall be Commander in Chief of the Army and Navy of the United States,

3. This is implicit in the preceding amendments, but the point is usefully clarified.

4. Mistretta v. United States, 488 U.S. 361 (1989) (ruling that Congress may delegate the power to make laws to an "independent agency" not part of the executive branch). *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (upholding limited power of "international law norms" to generate U.S. legal obligations and rights); The Paquette Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law" and includes "the customs and usages of civilized nations," evidence of which may be found in the "works of jurists and commentators"). Delegations and apparent delegations of power to non-U.S. entities to take legislative, executive, and judicial action that purports to bind the U.S. are ubiquitous. They have been criticized by some scholars, see, for example, Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003), but have not been held unconstitutional by U.S. courts.

5. Morrison v. Olson, 487 U.S. 654 (1988) (holding that Congress may by statute vest executive power in an officer not appointed either by the President or by a subordinate executive officer appointed by the President, and who is not subject to the direction, control, and removal of the President); United States v. Nixon, 418 U.S. 683 (1974) (a subordinate executive branch officer may exercise the executive power of the United States, and courts will enforce such actions as the final actions of the executive branch, even where in opposition to the expressed position of the President of the United States). *But cf.* Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010) (not disputing this general principle but finding unconstitutional a two-level good-cause removal restriction on the President's ability to require subordinates to execute laws in accordance with his directives).

and of the militia of the several States, when called into the actual Service of the United States, provided that neither this power nor the "executive Power" of the President shall be construed to include the constitutional power to prescribe military policies or actions concerning the capture, detention, interrogation, and appropriate imposition of military punishment for offenses against the law of war, of enemy prisoners captured in the course of ongoing hostilities pursuant to a congressional declaration of war or authorization for use of military force."[6]

7. Article II, Section 4 is amended to read as follows: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. Provided, however, that the commission by the President of the felonies of perjury and obstruction of justice, committed while in office as President and involving dishonesty with respect to the administration of justice, shall not justify removal from office, if the criminally dishonest and felonious conduct in question involves a cover-up of an exploitative sexual relationship with a subordinate employee in the White House and if the President retains the political support of his party in Congress."[7]

8. Article III, Section 1 is amended to add the following sentence at the conclusion of the present language of this section: "Provided, however, that Congress may vest the judicial power in such administrative agencies as it sees fit, to be exercised by persons of such qualifications, appointed in such a manner, and

6. Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that President's constitutional military power as Commander-in-Chief does not include independent power to institute and carry out military policies and punishment with respect to captured enemy prisoners of war and unlawful enemy combatants).

7. 145 CONG. REC. 2376–78 (1999) (U.S. Senate Rollcall Vote February 12, 1999); *See Trial of the President; Excerpts of Debate Comments; Senators Spell Out Their Convictions,* L.A. TIMES, Feb. 11, 1999, at A27 (excerpting statements of Senators voting to acquit President Clinton of perjury and obstruction of justice because they did not regard such conduct, by Clinton, as a "high crime[] [or] misdemeanor[]"within the meaning of the Constitution); *The Senate Verdict; Excerpts of Vote Comments; Respect for Law, Defense of Presidency Cited as Impetus for Votes*, L.A. TIMES, Feb. 13, 1999 at A22 (citing statements from Senators voting to acquit President Clinton of the impeachment crimes in part because Clinton retained strong political support). On the question of the proper understanding of what properly constitute "high crimes and misdemeanors" justifying impeachment and removal of federal officers, the Senate is the final, authoritative interpreter of the Constitution because the Supreme Court, as final, authoritative interpreter of the Constitution, has said that in this instance the Senate is the final, authoritative interpreter of the Constitution. Nixon v. United States, 506 U.S. 224 (1993).

possessing such tenure in office, as Congress shall determine, and subject to such review as Congress thinks proper by the Judges of superior and inferior courts hereinbefore described."[8]

9. Non-citizens of the United States who commit acts of war, war crimes, crimes against humanity or other atrocities against the United States, its armed forces, or its civilian citizens, thereby acquire U.S. constitutional rights, including the Privilege of the Writ of Habeas Corpus to challenge their military detention by U.S. armed forces outside the United States, in time of war.[9]

10. Article I, Section 9, Clause 2 is amended to read as follows: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. Provided, however, that Congress may not suspend the Privilege of the Writ of Habeas Corpus with respect to enemy alien combatants detained abroad in time of war, even if Congress provides for judicial review by other means of executive branch military detention."[10]

11. Article VI, Clause 2, is amended to add the following language at its conclusion: "Provided, however, that notwithstanding any other provision in this Constitution or implication from its structure of separation of powers, the Supreme Court's interpretations of this Constitution shall be the Supreme Law of the Land, anything in the Constitution, laws, or treaties of the United States to the contrary notwithstanding. The Supreme Court's interpretations of the Constitution, laws, and treaties of the United States shall be binding on all other branches and officers of the national and state governments, and on the people themselves, who shall be tested by following the Court's commands. The authoritative status of the Supreme Court's decisions and its authority to speak before all others for the Constitution, shall not be challenged or questioned in any other place, on the ground of being contrary to the meaning of the Constitution or for any other reason."[11]

8. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851(1986) (holding that Congress may "depart from the requirements of Article III" and assign the judicial power to non-Article III tribunals, depending on the "origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III").

9. Boumediene v. Bush, 553 U.S. 723 (2008).

10. *Id.*

11. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (equating decisions of the Supreme Court with the Constitution as "supreme Law of the Land" and stating that "the federal judiciary is supreme in the exposition of the law of the Constitution"); *accord* United States v. Nixon, 418 U.S. 683, 704 (1974) (Supreme Court is "ultimate interpreter of the

12. The doctrine of stare decisis being fundamental to the rule of law, to public perceptions of the integrity of the Supreme Court, and to stability, predictability and reliability, the Supreme Court shall always adhere to its prior constitutional decisions,[12] *except when it decides not to do so.* [13]

13. The right of the people to kill living human embryos or fetuses, as specified more fully below, shall not be infringed for any reason or on any pretext. Specifically:

> *Section 1. There shall be an absolute right of a pregnant woman to kill a living human embryo or fetus gestating in her womb. That right may be exercised for any reason the woman and abortionist think proper, up until the point when the human embryo or fetus could live outside his or her mother's womb, after which time the right to kill may be exercised for any medical, psychological, emotional, social, or family reason the woman and abortionist think proper.*[14]
>
> *Section 2. Government may prohibit, as a method of killing the human fetus, the process of inducing delivery of a born human child except for the head, puncturing the head with a sharp instrument, vacuuming or suctioning the contents of the skull from the child's head, collapsing the skull, and completing the delivery of the deceased fetus; provided, however, that government may prohibit this method only if some equally effective method of killing the fetus is available to the pregnant*

Constitution") (citing Baker v. Carr, 369 U.S. 186, 210-11 (1962) and Powell v. McCormack, 395 U.S. 486, 549 (1969) for this proposition); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (Court is the "ultimate expositor of the constitutional text"). *See* Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992) (Court is "invested with the authority to decide [the people's] constitutional cases and speak before all others for their constitutional ideals").

12. Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992) (setting forth a grand general theory of the importance of stare decisis as fundamental to its decision to reaffirm *Roe v. Wade*, 410 U.S. 113 (1973)); Dickerson v. United States, 530 U.S. 428 (2000) (relying on stare decisis to reaffirm *Miranda v. Arizona*, 384 U.S. 436 (1966)).

13. Planned Parenthood v. Casey, 505 U.S. at 873, 882 (overturning the trimester framework of *Roe v. Wade* and overruling two constitutional decisions applying it); Lawrence v. Texas, 539 U.S. 558 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986) on the ground that it was "not correct when it was decided, and it is not correct today" and therefore "ought not to remain binding precedent."); *see also, e.g.,* Atkins v. Virginia, 536 U.S. 304 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)); Roper v. Simmons, 543 U.S. 551 (2005) (overruling Stanford v. Kentucky, 492 U.S. 361 (1989)).

14. Roe v. Wade, 410 U.S. 113, 153, 163-65 (1973) (setting forth trimester framework explicitly permitting abortion for any reason prior to viability and permitting abortion for any "health" reason thereafter); Doe v. Bolton, 410 U.S. 179, 192, 195–201 (1973) (defining "health" to include family, social, and emotional reasons for wishing to have an abortion); Planned Parenthood v. Casey, 505 U.S. at 872–74 (employing a viability line but carrying forward the Roe-Doe definition of "health").

woman, like dismemberment of the fetus in the womb.[15]

Section 3. Government may regulate abortion procedures and require provision of informed-consent information to pregnant women considering killing the human embryo or fetus, as long as providing such information presents no substantial obstacle to exercise of the right to kill the embryo or fetus.[16]

14. The Equal Protection Clause of the Fourteenth Amendment is amended to add the following clarification: "State governments are categorically forbidden from using race or color as a basis of classification for the granting of benefits, the imposition of burdens, or separate or discriminatory treatment in any other form; provided, however, that state governments may engage in such classification to the detriment of persons of white or Asian race, color, or ethnicity, in consideration for admission to state universities."[17]

15. The provisions of the First Amendment concerning freedom of religion are amended or clarified as follows.

Section 1. Government may not make and enforce laws preventing, punishing, or penalizing the exercise of religion; provided, however, that it may make and enforce such laws if it does not say that that is their purpose and if they are cast in facially neutral terms.[18]

Section 2. Government may destroy Native American traditional religious holy sites in America, without thereby burdening the free exercise of site-specific Native American religious observance, because we stole their land fair and square.[19]

Section 3. Government may not discriminate against religious persons or groups on the basis of their religious identity, profession, exercise, or expression, except that it may do so in certain government scholarship programs.[20]

15. Gonzales v. Carhart, 550 U.S. 124, 156 (2007) (prohibition of "partial-birth abortion" valid because "requiring doctors to intend dismemberment before delivery" will not prohibit "the vast majority of D&E abortions."); *id.* at 164, 165 (ban on "partial-birth" method does not require a "health" exception because "it appears likely that an injection that kills the fetus is an alternative" not prohibited by the act. "Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.").

16. Planned Parenthood v. Casey, 505 U.S. at 877–87.

17. Grutter v. Bollinger, 539 U.S. 306 (2003).

18. Employment Division v. Smith, 494 U.S. 872 (1990).

19. Lyng v. Northwest Indian Cemetery Prot. Ass'n, 485 U.S. 439, 453 (1988) ("Whatever rights the Indians might have to use of the area, however, those rights do not divest the Government of the right to use what is, after all, *its* land.").

20. Locke v. Davey, 540 U.S. 712 (2004).

Section 4. The freedom of speech extends to religious persons and groups. Accordingly, government may not impose a financial penalty on expression because of its religious nature, content, or viewpoint, except that it may do so in government scholarship programs.[21]

Section 5. The freedom of association for expressive purposes exists for all private groups and extends to religious persons and groups. Government may not abridge the freedom of persons to engage in group expression, worship and association; nor may it abridge the freedom of persons to form groups for expressive purposes of any kind, free of government interference with their membership decisions and ability to define their group's goals, purposes and identity; provided, however, that the government may regulate private, commercial, nonexpressive associations for reasons thought to be compelling;[22] *and provided further that the freedom of expressive association shall not apply to student groups at state universities, if state officials so decide, at least in the case of student religious groups.*[23]

Section 6. Government violates religious freedom when it enacts a law to accommodate the circumstances of public school children with disabilities or special education needs who belong to a minority religious group.[24]

Section 7. This Constitution shall be construed to forbid the display on government property of Christmas nativity scene displays depicting the birth of Jesus, unless the display includes elves and a talking wishing well, but to permit the display on government property of a Hanukkah menorah if it is close to a pagan Christmas tree.[25] *This Constitution further shall be construed to forbid the display on government property of the Ten Commandments and to permit the display on government property of the Ten Commandments, depending.*[26]

16. The right to freedom of speech and expressive conduct protected by the First Amendment shall include the right to burn

21. *Id.* at 720 n.3.

22. Roberts v. United States Jaycees, 468 U.S. 609 (1984).

23. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010); *contra* Healy v. James, 408 U.S. 169 (1972).

24. Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

25. Allegheny County v. ACLU, 492 U.S. 573 (1989).

26. McCreary County v. ACLU, 545 U.S. 844 (2005) (invalidating a Ten Commandments display included as part of a display of historic legal documents in a Kentucky courthouse); Van Orden v. Perry, 545 U.S. 677 (2005) (upholding freestanding Ten Commandments monument erected on the grounds of the Texas state capitol building).

the United States flag as an act of protest, the right to distribute pornography, the right to be free from regulation of the time, place, and manner of portrayals of explicit sexual material on cable television channels or on the internet, and the right to portray sexual sadism involving the killing of animals,[27] *but shall not include the right to distribute literature or engage in counseling or advocacy on public sidewalks within eight feet of another person, near abortion clinics.*[28] *No injunctions shall issue to restrict the publication of classified national security information in time of war,*[29] *nor shall any injunction issue against the speech or expressive activities of any person or group, on account of the content, viewpoint, or identity of such advocacy or on account of affiliation with any group or because of tortious or otherwise disruptive activities of members of a group with which the speaker is associated in common advocacy activities,*[30] *unless the group of speakers is engaged in advocacy in opposition to the killing of human fetuses.*[31] *Nor shall the offensiveness of public expression by individuals or groups ever be an appropriate basis for prohibiting, restricting, punishing, or penalizing such expression,*[32] *unless the expression criticizes the killing of human fetuses and such expression would upset or displease persons engaged in such killing, in which case the opposite rule shall apply.*[33]

17. The right of the people to be free from unreasonable searches and seizures includes the right of persons who have committed crimes to exclude from admission into evidence against them any information resulting from such a search or seizure, but persons who have not committed such crimes shall have no

27. Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); Miller v. California, 413 U.S. 15 (1973) (First Amendment protects patently offensive sexually explicit material that possesses any "serious literary, artistic, or scientific merit"); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (First Amendment protects child pornography created with virtual images of children rather than with the use of actual children); Reno v. ACLU, 521 U.S. 844 (1997) (First Amendment protects internet pornography); Stevens v. United States, 130 S. Ct. 1577 (2010) (First Amendment protects "crush videos" depicting a living animal being intentionally maimed, mutilated, tortured, wounded, or killed).

28. Hill v. Colorado, 530 U.S. 703 (2000).

29. New York Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713 (1971).

30. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

31. Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

32. Cohen v. California, 403 U.S. 15 (1971); Hustler v. Falwell, 485 U.S. 46 (1988); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

33. *See* Hill v. Colorado, 530 U.S. 703 (2000); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994); *see also* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc).

effectual remedy for violation of their rights to be free from unreasonable searches and seizures because it all works out best for everybody this way.[34]

18. No person shall be compelled in any criminal case to be a witness against himself, and the police shall be obliged to make certain that no person voluntarily makes any statement or provides any information that would assist the police in any way to prove that such person has committed a crime.[35]

19. If government executes a person for the crime of raping a child, the government is being cruel and must refrain from such cruel conduct. If government executes a teenager for the crime of gang-raping and then murdering an old woman by duct-taping her mouth, tying her up, raping her and throwing her off a bridge to drown, the government is being cruel and must refrain from such cruel conduct, because that is what some nations in Europe probably think.[36]

20. The right of two (or more) men to engage in anal sex with one another is a transcendent dimension of liberty, and shall not be infringed.[37]

There! Perfect.

34. Mapp v. Ohio, 367 U.S. 643 (1961).

35. Miranda v. Arizona, 384 U.S. 436 (1966); Brewer v. Williams, 430 U.S. 387 (1977).

36. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) ("national consensus" exists against imposing the death penalty for raping children); Roper v. Simmons, 543 U.S. 551 (2005) (minors may not be executed for kidnap, torture, and murder) (considering evidence of what other nations do).

37. Lawrence v. Texas, 539 U.S. 558, 562–63 (2003) ("The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions. . . . The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in . . . 'deviate sexual intercourse, namely anal sex.'"); *id.* at 578–79 ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. . . . As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").