vanced its penalty phase jurisprudence by protecting the right to a meaningful mitigation defense.[79] *Landrigan*, in sharp contrast, represents a considerable departure from this trend that, if continued, will have deplorable consequences for the rights of capital defendants.

C. Due Process

1. Abortion Rights — "Partial Birth" Abortion. — Constitutional adjudication in the shadow of scientific debate raises serious questions regarding how courts should respond when the legislature creates the possibility — but not the certainty — of an outcome the Constitution seeks to prevent. Last Term, the Supreme Court in *Gonzales v. Carhart*[1] upheld the federal Partial-Birth Abortion Ban Act of 2003[2] against a facial challenge, announcing that when there is no scientific consensus as to whether an abortion procedure can ever be medically necessary, a ban on the procedure that does not include a health exception is not facially invalid.[3] Although it may sometimes be appropriate for the Court to countenance constitutional harms that are probabilistic or uncertain, *Carhart*'s rule of blanket deference to Congress in the face of medical disagreement was inadequately theorized and swept too broadly. When the probability of harm is ascertainable, courts should intervene to prevent those potential harms that have a sufficiently high "expected value." When the probability of harm is not ascertainable, courts should consider the institutional roles of Congress and the courts, as well as the competing constitutional values at stake, in crafting an appropriately nuanced response.

In 2000, in *Stenberg v. Carhart*,[4] the Supreme Court struck down on facial challenge Nebraska's "partial-birth" abortion ban for failing to provide an exception allowing the procedure when necessary to protect the health of the mother.[5] The Court also found that the law unduly burdened the right to an abortion by encompassing not only "dilation and extraction" ("D & X"), but also "dilation and evacuation" ("D & E"), the most common second-trimester abortion procedure.[6]

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[79] *See* Rompilla v. Beard, 125 S. Ct. 2456, 2462–63 (2005); Wiggins v. Smith, 539 U.S. 510, 523 (2003).

[1] 127 S. Ct. 1610 (2007).

[2] Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. IV 2004)).

[3] *Carhart*, 127 S. Ct. at 1638.

[4] 530 U.S. 914 (2000).

[5] *Id.* at 937–38.

[6] *Id.* at 945–46. In a D & E procedure, a woman's cervix is dilated and the doctor uses forceps to evacuate the fetus, which breaks apart in the process. *Carhart*, 127 S. Ct. at 1620–21. In a D & X procedure, also called "intact D & E," the cervix is dilated enough that the entire fetus can be removed from the uterus without breaking apart, and the doctor crushes or punctures the fetus's skull before the whole body passes the cervix. *Id.* at 1621–23.

Three years after the Supreme Court struck down Nebraska's abortion restriction, Congress passed the Partial-Birth Abortion Ban Act of 2003. Adopting factual findings in disagreement with those the Court relied upon in *Stenberg*, Congress found that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary."[7] The Act criminalizes performing "partial-birth abortions," which it defines as "deliberately and intentionally vaginally deliver[ing] a living fetus" such that the "entire fetal head" or "any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus."[8] Excepted from the ban are abortions performed when the mother's "life is endangered by a physical disorder, physical illness, or physical injury."[9]

Several plaintiffs brought successful constitutional challenges to the Act. In *Carhart v. Ashcroft*,[10] the District of Nebraska held the law unconstitutional, reasoning that it was "very similar" to the law struck down in *Stenberg* for lacking a health exception.[11] In reaching this conclusion, the court did not defer to Congress's finding that a health exception was not necessary; it concluded that Congress's findings were not entitled to binding deference because Congress sought to "redefine the meaning of the Constitution as articulated by the Court in prior cases,"[12] and that Congress's findings were inconsistent with Congress's own record and evidence presented at trial.[13] Similarly, in *Planned Parenthood Federation of America v. Ashcroft*,[14] the Northern District of California struck down the law for imposing an undue burden on the right to an abortion, being unconstitutionally vague, and failing to include a health exception.[15]

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[7] Partial-Birth Abortion Ban Act of 2003 sec. 2(1), *reprinted in* 18 U.S.C. § 1531 note (Congressional Findings).

[8] 18 U.S.C. § 1531(b)(1)(A).

[9] *Id.* § 1531(a). This exception includes "life-endangering physical condition[s] caused by or arising from the pregnancy itself." *Id. But cf. Stenberg*, 530 U.S. at 938 ("*Casey* requires the statute to include a health exception when the procedure is '"necessary . . . for the preservation of the life *or* health of the mother."'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)) (emphasis added)).

[10] 331 F. Supp. 2d 805 (D. Neb. 2004).

[11] *Id.* at 1004. The court also held that Congress had imposed an undue burden under *Stenberg* because the Act covered many instances of D & E. *Id.*

[12] *Id.* at 1006.

[13] *Id.* at 1004–30.

[14] 320 F. Supp. 2d 957 (N.D. Cal. 2004).

[15] *Id.* at 1034–35. In a third case, not consolidated with *Carhart* in the Supreme Court, the Southern District of New York also struck down the Act. *See* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *aff'd sub nom.* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006).

The Eighth Circuit affirmed the decision in *Carhart*, addressing only the health exception issue.[16] The court noted that although the case presented a facial challenge, the "traditional standard" for evaluating such challenges — that a statute is facially invalid only if there exists "no set of circumstances" in which it would be constitutional[17] — was inconsistent with Supreme Court abortion jurisprudence.[18] Interpreting *Stenberg* as establishing a per se rule requiring a health exception,[19] the court concluded that no medical consensus existed regarding whether an exception to the restriction would ever be necessary for a woman's health.[20] When there is no such consensus, the court held, "the Constitution requires legislatures to err on the side of protecting women's health by including a health exception."[21] The Ninth Circuit also affirmed the district court's decision in *Planned Parenthood*,[22] refusing to accept Congress's findings and echoing the Eighth Circuit's conclusion that when medical uncertainty exists, *Stenberg* requires a health exception.[23]

The Supreme Court reversed both decisions.[24] Writing for the Court, Justice Kennedy[25] held that the Act survived a facial attack under the framework of the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[26] which he "assume[d]" was controlling.[27] The Court first held that the Act was not void for vagueness, reasoning that the Act "define[d] the line between potentially criminal conduct on the one hand and lawful abortion on the other" and that its mens rea requirement would protect doctors who inadvertently performed banned procedures.[28] Next, the Court held that the Act was not overbroad because, unlike the Nebraska law, it restricted only "deliver[y] of a living fetus" past certain "anatomical landmarks" and thus permitted the more common D & E procedure.[29]

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16 Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005).

17 *Id.* at 794 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

18 *Id.* at 794–95.

19 *Id.* at 796.

20 *Id.* at 802.

21 *Id.* at 796.

22 Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

23 *Id.* at 1172–76. The court also held that the Act unconstitutionally restricted D & E, *id.* at 1178–79, and that it was unconstitutionally vague, *id.* at 1181.

24 *Carhart*, 127 S. Ct. at 1639.

25 Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

26 505 U.S. 833 (1992).

27 *Carhart*, 127 S. Ct. at 1635. In characterizing the Court's opinion as consistent with, not an endorsement of, prevailing abortion jurisprudence, Justice Kennedy noted that the *Casey* plurality "did not find support from all those who join the instant opinion." *Id.* at 1626.

28 *Id.* at 1628.

29 *Id.* at 1629–30.

Turning to whether the Act unconstitutionally placed a "substantial obstacle in the path of a woman seeking a[previability] abortion," the Court first established that Congress had a rational basis for restricting D & X.[30] The Court deemed legitimate several governmental interests underlying the ban: expressing "respect for the dignity of human life,"[31] "protecting the integrity and ethics of the medical profession,"[32] and discouraging women from making a "painful" moral decision that some would come to regret.[33] This threshold inquiry satisfied, the Court focused next on whether the Act nonetheless created an undue burden by failing to provide a health exception. The Court refused to "[u]ncritical[ly]" accept Congress's findings bearing on this question, some of which it characterized as "factually incorrect";[34] however, it noted the "documented medical disagreement" over whether the banned procedure was ever medically necessary and held that, given this medical uncertainty, a facial attack on the Act could not succeed.[35] The Court left open the possibility of an as-applied challenge to the Act, reasoning that the litigants bringing the facial challenge had simply not demonstrated that the Act would be unconstitutional "in a large fraction of relevant cases."[36]

Justice Thomas concurred,[37] agreeing that the Court had "accurately applie[d] current jurisprudence" but restating his view that *Roe v. Wade*[38] and *Casey* were wrongly decided.[39]

Justice Ginsburg dissented.[40] Alarmed by the Court's choice of language, Justice Ginsburg argued that the majority displayed hostility to the abortion right.[41] Stressing the right's basis in the autonomy and equality of women,[42] the dissent attacked the majority for allowing

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[30] *Id.* at 1632–35 (quoting *Casey*, 505 U.S. at 878 (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

[31] *Id.* at 1633.

[32] *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)) (internal quotation mark omitted).

[33] *Id.* at 1634. The Court acknowledged that it lacked data to support this proposition but nonetheless found it "unexceptionable." *Id.*

[34] *Id.* at 1638.

[35] *Id.* at 1636–37.

[36] *Id.* at 1639 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992)).

[37] Justice Thomas was joined by Justice Scalia.

[38] 410 U.S. 113 (1973).

[39] *Carhart*, 127 S. Ct. at 1639–40 (Thomas, J., concurring). Justice Thomas also noted that the plaintiffs had not raised Commerce Clause issues. *Id.* at 1640.

[40] Justice Ginsburg was joined by Justices Stevens, Souter, and Breyer.

[41] *Carhart*, 127 S. Ct. at 1650 (Ginsburg, J., dissenting). Justice Ginsburg chastised the majority for referring to obstetrician-gynecologists as "abortion doctor[s]," to a fetus as an "unborn child" or "baby," and to medical judgments as "preferences." *Id.*

[42] *See id.* at 1641 (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992)).

"moral concerns" to override past precedent,[43] particularly condemning its invocation of an unsupported "antiabortion shibboleth" that women come to regret the decision to terminate a pregnancy.[44] Accordingly, Justice Ginsburg argued that the Act furthered no legitimate governmental interests, and in fact did not even further the government's asserted interest in protecting potential life, due to the availability of alternative late-term abortion procedures.[45] She further criticized the majority for disregarding *Stenberg*'s requirement of a health exception notwithstanding the medical uncertainty concerning the procedure's necessity.[46] Finally, the dissent lamented the Court's rejection of a facial attack, since such challenges had been approved in similar circumstances, and because requiring a showing of unconstitutionality in "a large fraction" of cases was inconsistent with a constitutionally mandated "health *exception*," the purpose of which was "to protect women in *exceptional* cases."[47]

Under prevailing jurisprudence that the Court assumed was controlling, the Constitution prevents the government from barring access to medically necessary abortions[48] — and yet the Court upheld an abortion restriction without knowing whether necessary abortions would in fact be barred.[49] Although under some conditions it may be acceptable for Congress to risk creating a constitutional harm, the Court in *Carhart* failed to adequately justify its willingness to tolerate the potential for such a harm, either by establishing a low likelihood of harm, or by balancing the institutional competencies and constitutional values at stake in cases of genuine uncertainty.

An analysis of the problem first requires distinguishing between two scenarios in which a fact or outcome is not certain. In one subset of cases, those involving "risk," probabilities for different outcomes are knowable; in other instances, called conditions of "uncertainty," it is impossible to isolate the probabilities of different outcomes occurring.[50] It is not obvious whether *Carhart* was a situation of risk or uncer-

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[43] *Id.* at 1647. In arguing that the Court's "moral concerns" were inappropriate, Justice Ginsburg noted Justice Kennedy's position that the state could not enforce moral concerns through the criminal law. *Id.* (Ginsburg, J., dissenting) (quoting Lawrence v. Texas, 539 U.S. 558, 571 (2003)).

[44] *Id.* at 1648–49; *see also id.* at 1649 ("This way of thinking reflects ancient notions about women's place in the family and under the Constitution — ideas that have long since been discredited.").

[45] *Id.* at 1647.

[46] *Id.* at 1642–43. Justice Ginsburg detailed numerous factual errors Congress had made in deeming D & X unnecessary. *Id.* at 1643–44.

[47] *Id.* at 1651.

[48] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[49] *See Carhart*, 127 S. Ct. at 1636–37.

[50] Jon Elster, *Risk, Uncertainty, and Nuclear Power*, 18 SOC. SCI. INFO. 371, 372–73 (1979).

tainty, and the Court hinted at both interpretations.[51] Whichever paradigm it had in mind, however, the Court failed to adequately justify its willingness to countenance the possibility of a constitutionally bad outcome.

Consider first the implications of the lack of a health exception under conditions of risk. The facts of *Carhart* might have established a 25% chance that, in a large enough fraction of cases to warrant facial invalidation, medically necessary abortions would be prevented; it is equally plausible, however, that the chance was 75%. If the Court meant that any lack of certainty requires complete deference to Congress, then a law with a 75% chance of causing a forbidden outcome would be just as constitutional as one with a 25% chance of causing that outcome. The Court's position would then imply that it does not regard a probabilistic harm as remediable.

Although the notion of the Court countenancing the likelihood of a constitutionally bad outcome is jarring, it is not novel. As Professor Cass Sunstein notes, public law is notoriously infused with private law principles of compensatory justice derived from tort, contract, and property.[52] The Court's jurisprudence, constitutional and otherwise, has traditionally ignored the law's role of managing risk and instead has focused on remedying only non-probabilistic harms.[53] Yet to say that the Supreme Court has traditionally conceptualized the law in this way is not to say that it ought to. If the Court is to maintain the role of judicial review when legal questions implicate debates over contentious issues like abortion, climate change, and the war on terrorism, it will need to consistently engage with the sorts of factual questions that render probabilistic many harms worth regulating.

A better approach will, of course, need to be nuanced. The Eighth and Ninth Circuits' view that *any* lack of consensus regarding medical necessity requires an abortion restriction to contain a health exception[54] may have swept too broadly; such reasoning risks condemning legislation that is unlikely to produce constitutionally worrisome outcomes, and it ignores the constitutional value in permitting the politi-

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[51] While the Court prominently invoked uncertainty, *Carhart*, 127 S. Ct. at 1636, there were some indications that the Court contemplated risk, *see id.* at 1638 (discussing deference to Congress in light of the "balance of risks"). In fact, one might sensibly conclude that the breadth of authority supporting a position correlates with the probability that the position is correct — rendering *Carhart* potentially a case not of uncertainty but of risk. *See* Elster, *supra* note 50, at 382–83 (explaining that probabilities not definitely known may be derived from scientific theories).

[52] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 322–33 (1993).

[53] *See id.* at 334.

[54] Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1172–73 (9th Cir. 2006); Carhart v. Gonzales, 413 F.3d 791, 796 (8th Cir. 2005).

cal branches to act freely within their zone of authority.[55] Instead, courts should factor in the likelihood of a constitutionally bad outcome when determining whether the possibility of constitutional harm requires judicial intervention.

In fact, *Carhart* aside, the Court has at times deployed just such an approach. Tentatively stepping away from a binary, private-law approach to harm, the Court has addressed issues in the areas of standing and procedural due process through the lens of expected value. In other words, the Court has slowly begun to view the relevant target of legislative and constitutional regulation not as certain harm, but as expected harm — the harm's gravity discounted by its probability.

Standing law, for instance, has long wrestled with the implications of factual ambiguity: can a constitutionally sufficient injury in fact exist when it is unclear whether the harm will materialize or whether the proposed remedy would cure the harm? The Court has sometimes insisted that the relevant harm be "actual or imminent, not 'conjectural' or 'hypothetical,'"[56] and that the efficacy of the sought-after remedy not be "merely 'speculative.'"[57] Just this past Term, however, the Court suggested, if only obliquely, that an expected value approach to standing might be appropriate. Faced with the contention that EPA regulation of greenhouse gases would not resolve the problem of global climate change, the Court in *Massachusetts v. EPA*[58] responded that the "enormity" of the potential harm rendered its certainty less important, citing two appellate decisions finding standing based on probabilistic harms.[59] This response neatly captured expected value logic: instead of disregarding probabilistic harms, the Court impliedly invoked the net expected harm of climate change, which in turn became the relevant measure of harm for constitutional standing purposes.

The Court's procedural due process jurisprudence has long reflected similar logic. The *Mathews v. Eldridge*[60] calculus calibrates the amount of process required based in part on the probability of erroneous deprivations.[61] Applying this approach, the Court's analysis of war on terrorism issues has reflected a practice of constitutional risk

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[55] *Cf.* Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983) (arguing that the canon of avoiding serious constitutional questions risks creating a "constitutional 'penumbra'" that unjustifiably restricts political branch action).

[56] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

[57] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 43 (1976)).

[58] 127 S. Ct. 1438 (2007).

[59] *Id.* at 1458 & n.23 (citing Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234 (D.C. Cir. 1996); Vill. of Elk Grove Vill. v. Evans, 997 F.2d 328, 329 (7th Cir. 1993)).

[60] 424 U.S. 319 (1976).

[61] *Id.* at 335.

management. In *Hamdi v. Rumsfeld*,[62] the Court applied the *Mathews* test to arrive at a carefully tailored process for determining the status of an alleged enemy combatant captured in Afghanistan.[63] This fact-specific analysis suggests that the level of process due detainees increases as the likelihood of error increases — if, for example, the capture occurs domestically.[64] By applying the probability-conscious *Mathews* test to detention of alleged unlawful combatants, the Court has affirmed the protection of constitutional rights in a context rife with the risk of unlawful detentions.

These examples illustrate a growing recognition of the ubiquity of probabilistic harms and the need for public law to address them. Indeed, on one view, constitutional law is more oriented around "risk avoidance," as opposed to "consequence avoidance," than is commonly recognized.[65] Although the prevalence of this consideration in contemporary public law should not be overstated, these cases do evince the Court's growing recognition of a constitutional risk avoidance principle — a principle the *Carhart* Court failed even to acknowledge.

The analysis changes somewhat if the Court is understood to have employed the technical definition of "uncertainty," meaning that it could not make any determination about the likelihood that the D & X restriction would prevent necessary abortions. Under this reading, the Court's deference to Congress initially appears more justifiable: while refusal to weigh a determinate probability of constitutional harm reflects private-law bias, refusal to provide a remedy when courts find the probability to be indeterminate may instead reflect a legitimate determination that Congress is best positioned to resolve factual uncertainties,[66] or that a more accountable branch of government should control policy when its choices are not demonstrably in violation of the

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[62] 542 U.S. 507 (2004).

[63] *Id.* at 534 (plurality opinion).

[64] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2122–23 (2005) ("Th[e] distinction between power and process applies just as forcefully, and probably more so, to the detention of enemy combatants captured in the United States.").

[65] *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 881 (1999). Professor Levinson discusses the role of "risk avoidance" in the courts' treatment of prison reform litigation, explaining that certain prophylactic remedies (for example, implementing classification systems or hiring more guards) have been incorporated into the definition of the Eighth Amendment right so as to "alleviate ripe risks of unconstitutional violence." *Id.* at 880–81. *Miranda v. Arizona*, 384 U.S. 436 (1966), as well as a great deal of First Amendment jurisprudence, can be viewed not as providing remedies for outright constitutional violations but as mitigating the risks of unconstitutional outcomes. *See* Levinson, *supra*, at 900–04.

[66] *Cf.* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985) ("When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.").

Constitution.[67] However, the Court failed to grapple with the complexities and normative complications of this institutional competence argument.

The Court could have approached the problem posed by true uncertainty in at least three ways. One approach, analogous to that taken by the Court in some Commerce Clause cases, would have held that Congress was entitled to extensive deference in deciding factual questions.[68] Although the *Carhart* Court did not articulate this justification, it is the best explanation for the Court's conclusion that scientific uncertainty requires deference to congressional determinations. What *Carhart*'s brief treatment of this subject leaves unexplored, however, is whether the rationale of deference to legislative factfinding applies with equal force to congressional actions potentially compromising individual rights rather than mere structural arrangements.[69]

Motivated perhaps by this distinction, the Court could have employed a second approach to uncertainty by deciding for itself whether the possibility of a constitutionally bad outcome was serious enough to warrant striking down a government action. Justice Thomas has worried that allowing Congress the power to make a statute constitutional through factfinding would reduce judicial review to "an elaborate farce."[70] More recently, Justice Thomas came close to endorsing the view that considerations of institutional competence make courts the appropriate adjudicator of factual uncertainties bearing on individual rights. While the plurality in *Parents Involved in Community Schools v. Seattle School District No. 1*[71] declined to resolve the issue of whether racial diversity yields educational benefits,[72] Justice Thomas asserted that the social science was "inconclusive" and that therefore the purported educational benefits of diversity could not be a compelling interest.[73] This factual uncertainty means that the school dis-

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[67] *Cf.* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

[68] *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). The Court's recent federalism cases have curtailed the deference congressional factfinding receives. *See* United States v. Morrison, 529 U.S. 598, 613–15 (2000).

[69] Since lawmakers may not have incentives to override federalism limitations, *see* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 942 (2005), deference to Congress may be more appropriate in federalism cases than in cases where Congress's motives may be at odds with constitutional values. *Cf.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, . . . the Court in practice defers to empirical legislative judgments — at least where that deference does not risk . . . constitutional evils . . . .").

[70] Lamprecht v. FCC, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Thomas, J., sitting as Circuit Justice).

[71] 127 S. Ct. 2738 (2007).

[72] *See id.* at 2755 (opinion of Roberts, C.J.).

[73] *See id.* at 2777–78 (Thomas, J., concurring).

tricts' plans may not have violated the Equal Protection Clause, but Justice Thomas's opinion suggests that the political branches are not entitled to resolve such uncertainties.[74]

A third approach, drawn from decision theory, counsels that when the facts are genuinely uncertain, the optimal course is to pursue the alternative whose worst consequences are least bad.[75] The circuit courts in *Carhart*, if viewing the case as one not of risk but of uncertainty, may have implicitly adopted this approach by "err[ing] on the side of protecting women's health."[76] This may be the most promising approach to uncertainty, as it recognizes that one branch or another must engage in guesswork and that bad outcomes cannot be avoided with certainty. The difficulty, however, is that it forces courts to make a choice that cuts to the heart of judicial review: is it worse to unnecessarily curtail democratic decisionmaking or to underprotect individual rights? Perhaps the circuit courts erred in the proper direction, or perhaps the Supreme Court's deference to Congress was the correct approach; the question is profoundly difficult, but at the very least it calls for a recognition by the Court of the constitutional values implicated on both sides. Thus, the Court's conclusion may have been defensible — if based on the institutional competencies of Congress and the courts, or on a view of constitutionalism privileging democratic decisionmaking over certain individual rights — but the Court failed to defend it, and failed to appreciate the need to weigh competing values.

Regardless of whether the Court was adjudicating in the face of risk or uncertainty, it failed to grapple with the reality of the constitutionally bad outcome that, by its own admission, remained possible.[77] If the proper reading of the scientific evidence was that some quantifiable risk existed that Congress had banned a medically necessary procedure, then the Court failed to apply the appropriate expected value logic to the question of constitutional remediation. If, on the other hand, the probability that the procedure was medically necessary was

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[74] Recognition of the merits of Justice Thomas's methodology need not entail acceptance of his entire analysis. For instance, one might argue that the social science supporting the existence of educational benefits, though not unanimous, is sufficiently strong to render the likelihood of constitutional harm acceptably low (positing, as Justice Breyer arguably did, that this was a situation not of uncertainty but of risk — and a sufficiently low risk, given the data). *See id.* at 2821 (Breyer, J., dissenting).

[75] This is termed the "maximin criterion." Elster, *supra* note 50, at 373. The calculus becomes more complicated if the best consequences of the different alternatives are not the same. *See id.*

[76] Carhart v. Gonzales, 413 F.3d 791, 796 (8th Cir. 2005).

[77] This unwillingness becomes more explicable if the dissent correctly identified the majority's "hostility" to the abortion right. *See Carhart*, 127 S. Ct. at 1650 (Ginsburg, J., dissenting). If the Court undervalued the abortion right, the expected value of the constitutional harm would be lowered. Alternatively, in noting that interests such as protecting women from the purported detrimental consequences of abortions "bear[] upon" the health exception analysis, *id.* at 1635 (majority opinion), the Court may have factored offsetting benefits into the analysis.

genuinely unknown, then the Court responded to uncertainty in a way that was justifiable under one view of its institutional role; it failed, however, to consider alternative — and potentially more appealing — approaches that would have taken into account the possibility of an unconstitutional infringement of individual rights. Beyond the politically unique context of the abortion right, the majority's unwillingness to tackle the problems posed by probabilistic harm and adjudication under uncertainty may impede the Court's ability to meaningfully apply judicial review to the array of governmental actions taken in the shadow of risk and uncertainty.

2. Punitive Damages. — The history of the Fourteenth Amendment is one of hierarchy and capitalism. In the Amendment's first 139 years, courts have consistently used it to perpetuate dominant notions of class and culture — to maintain deeply rooted inequality and resist meaningful changes in the areas of poverty, race, and gender. While the Amendment's beautiful language and spirit could have been used to ensure equality and meaningful participation in all aspects of a civil community, its words have instead been employed as a tool for just the opposite. Last Term, in *Philip Morris USA v. Williams*,[1] the Supreme Court used the Fourteenth Amendment to reaffirm and enrich procedural and substantive due process protections for corporations sued for punitive damages. This is the sad reality of a legal system and a culture that have often lacked the courage necessary to promote the practice of daily human life in a manner consistent with our values. But by reconceptualizing the kinds of harms that it addresses, we can transform the Amendment — now itself part of the machinery of cruel myth and illusion — into a tool for equality and justice.

Philip Morris is a large corporation. It is charged by law with making as much money as possible.[2] Over the course of the past half-century, Philip Morris has thrived in American capitalism, nurturing artificial wants through psychological manipulation[3] and pharmacological addiction. It has made billions for its shareholders.[4]

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[1] 127 S. Ct. 1057 (2007).

[2] *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

[3] *See* Williams v. Philip Morris Inc., 127 P.3d 1165, 1169 (Or. 2006) (describing internal Philip Morris memoranda, including one that advocated giving "smokers a psychological crutch and a self-rationale that would encourage them to continue smoking"). *See generally* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999).

[4] Altria Group, Philip Morris's parent company, had net revenues of over $101 billion in 2006. ALTRIA GROUP, INC., 2006 ANNUAL REPORT, http://www.altria.com/AnnualReport/ar2006/2006ar_07_0500_01.aspx (last visited Oct. 6, 2007).