ON THE IMPORTANCE OF BEING EARNEST: CONTRASTING THE DANGERS OF MAKEWEIGHTS WITH THE VIRTUES OF JUDICIAL CANDOR IN CONSTITUTIONAL ADJUDICATION

Ronald J. Krotoszynski, Jr.

ON THE IMPORTANCE OF BEING EARNEST: CONTRASTING THE DANGERS OF MAKEWEIGHTS WITH THE VIRTUES OF JUDICIAL CANDOR IN CONSTITUTIONAL ADJUDICATION

*Ronald J. Krotoszynski, Jr.**

Contemporary constitutional doctrines vary widely and wildly in the degree to which federal judges will adhere to them reliably. Some constitutional doctrines reflect judicial candor—sincere judicial reason giving rather than judicial verisimilitude—and effectively constrain judicial discretion. For example, the First Amendment doctrine against prior restraints constitutes a meaningful constitutional rule. The federal courts apply it faithfully and reflexively to protect the right of the press to publish newsworthy information. By way of contrast, however, the Justices observe the "rules" that ostensibly govern the doctrine of stare decisis in constitutional cases far more often in the breach than in the observance. Accordingly, the doctrine of stare decisis, at least in constitutional cases, is nothing more than constitutional makeweight: The Supreme Court says one thing while actually doing another. This bad habit, which has persisted over time and variations in the ideological composition of the Supreme Court, makes federal judges appear even more political than they actually are. It also introduces needless uncertainty into the adjudication of constitutional rights.

Constitutional makeweights are pernicious and should be systematically weeded out of the pages of U.S. Reports. Federal judges, especially those serving on the Supreme Court, should mean what they say and say what they mean. The legitimacy of the federal courts' judgments largely rests on the persuasive force of the reasons that jurists offer in support of them; when federal judges offer bogus reasoning in support of a constitutional decision, the legitimacy of the judgment suffers. Unlike the President and members of Congress, Article III judges lack a democratic imprimatur; lacking both the power of the sword and the purse, as Alexander Hamilton observed in Federalist No. 78*, federal judges must rely on persuasion and legal logic to make their judgments stick. Moreover, rather than reduce ambiguity and uncertainty, ersatz reasons and reasoning actually increase them because participants in the legal system do not know whether to argue the stated rule or the de facto rule. Third and finally, constitutional makeweights fail in their core purpose because rather than reducing judicial discretion, they radically increase it. If federal judges expect We the People to credit their oft-repeated claim that they are engaged in something other than ordinary politics, then they must embrace with brio the virtue of candor when giving reasons in support of their constitutional judgments. Taking this step would help to arrest and perhaps even reverse the public's increasing—and quite justified—cynicism about the work of the federal courts.*

* John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. The University of Alabama Law School Foundation supported this project with generous summer research grants. With thanks to Professors Anita Bernstein, Keith Bybee, Neal Devins, Mike Dorf, Doron Dorfman, Heather Elliott, Liz Fisher, Charlotte Garden, Tara Leigh Grove, David Law, Grace Lee, Clark Lombardi, and Sid Shapiro for their helpful comments and suggestions on earlier drafts of this work. Thanks also to the editors of the *Duke Law Journal* for inviting me to present this Article at the 2021 *DLJ* 51st Annual Administrative Law Symposium, as well as to Dean Craig Boise and the Syracuse University College of Law for hosting a faculty workshop associated with it; I received very helpful and constructive comments at both events and *On the Importance of Being Earnest* reflects the benefit of this input. Jesse Westerhouse, UASL '22, supplied excellent and timely research assistance that greatly facilitated my work. Erica Nicholson, my assistant, provided key help with getting this piece into final publishable form. Finally, the usual disclaimer applies: Any and all errors or omissions are the solely the responsibility of the author.

Jack: That, my dear Algy, is the whole truth pure and simple.
Algernon: The truth is rarely pure and never simple.[1]

INTRODUCTION: THE PROBLEM OF CONSTITUTIONAL VERISIMILITUDE

For better or for worse—and mostly for worse—the Supreme Court does not always play it straight with We the People. In important areas of constitutional law, the Justices will adopt formal reasons in support of a judgment that are largely, if not completely, insincere. This phenomenon, which I call the adoption and use of constitutional makeweights, has manifested in the doctrine of stare decisis,[2] in judicial review of agency interpretations of ambiguous statutes,[3] and in cases involving the application of equal protection principles to government affirmative action programs.[4] One might ask, "Well, so what? Politicians routinely say one thing to get elected and, once in office, do something entirely different." A critical difference exists between a government official who possesses a democratic imprimatur by seeking and winning election to public office and a federal judge who enjoys a lifetime appointment and never faces any sort of direct democratic accountability.[5]

As the iconic legal philosopher Ronald Dworkin has explained, the legitimacy of a constitutional court's judgment relates directly to the quality and sincerity of the reasons offered in support of it.[6] As Professor Dworkin states the point, "[R]esponsibility for articulation is the nerve of adjudication."[7] Unlike politicians, "Judges are supposed to do nothing that they cannot justify in principle, and to appeal only to principles that they thereby undertake to respect in other contexts as well."[8] Accordingly, Dworkin posits that "[p]eople yearning for reasoning rather than faith or compromise would naturally turn to the institution that, at least compared to others, professes [a commitment to reason-giving and consistency]."[9] Of course, from time to time, judges will not meet

1. OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST, act I (1895), *reprinted in* 2 THE PLAYS OF OSCAR WILDE 8 (John W. Luce & Co. 1905).

2. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–69 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

3. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

4. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365 (2016); Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003).

5. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 43, 68–72 (1980); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23, 203–06 (1962).

6. *See* RONALD DWORKIN, LAW'S EMPIRE 190 (1986). Dworkin argues that judicial legitimacy requires that the reasons a judge offers to support a judicial decision must be sincere and transparent. *See id.*

7. Ronald Dworkin, *The Secular Papacy*, *in* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTENTIONAL CONVERSATION 78 (Robert Badinter & Stephen Breyer eds., 2004).

8. *Id.* Professor Frederick Schauer makes a very similar argument, positing that when a judge gives a reason in support of a judgment, they must be prepared to stand by that reason in future cases that squarely implicate it. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635 (1995) ("When lawyers argue and when judges write opinions, they seek to *justify* their conclusions, and they do so by offering *reasons*.").

9. Dworkin, *supra* note 7, at 78.

these expectations because they fail to articulate persuasive rationales for their decisions. Nevertheless, "the code of their craft promises that at least they will try."[10]

When judges offer ersatz reasons in support of their judgments, the reasons constitute a mere makeweight rather than a constitutional rule. Constitutional makeweights are bad. They undermine important rule of law values and make federal judges look at best unprincipled and at worst nakedly political. Article III judges should say what they mean and mean what they say; makeweights facially violate this maxim. People are far more likely to accept judgments with which they disagree when judges have the courage to offer the *actual reasons* that animate those judgments—rather than a verbal cellophane wrapper.[11] In the long run, constitutional makeweights will lead to a crisis of public confidence in the Article III courts because ordinary citizens will conclude that judges are actually engaged in a political, rather than legal, endeavor.[12]

This Article will proceed in four main parts. Part I describes and discusses the real and growing problem of constitutional makeweights—important, highly visible Supreme Court doctrines that do not seem to work in practice as the Supreme Court tells us they will work in theory. It develops the concept and explains how a device intended to reduce judicial discretion instead greatly enhances it.[13] Part II then provides several detailed examples of this jurisprudential phenomenon: the doctrine of stare decisis in constitutional cases, the *Chevron* doctrine, and the rule of strict scrutiny review of public college and university affirmative action admissions programs.[14]

Looking in the other direction, Part III considers constitutional rules—doctrines that the federal courts reliably and consistently use to frame and decide pending legal disputes. Illustrative examples include the First

10. *Id.*

11. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 135–40 (1990) (reporting and discussing empirical data that show litigants will accept an adverse decision more readily when they believe that the process that generated it was fundamentally fair). Professor Tyler's research found that "[t]he key dependent variable in the analysis of the meaning of procedural justice is the respondents' judgment about the fairness of the procedures they experienced with the police or courts." *Id.* at 136. The "quality of decisions" and "opportunity for correcting error[]" also constitute important factors in creating public confidence in the work of courts. *Id.* at 137; *see also id.* at 121–22, 143. So too, Tyler identifies "consistency of decision making" as an important procedural virtue that inspires confidence, rather than cynicism, about the fundamental fairness of the adjudicative process. *Id.* at 143.

12. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 299–300 (2020) (discussing the academic literature addressing the Supreme Court's "sociological legitimacy," positing that if the public comes to view the Supreme Court as an intrinsically ideological or even political institution, then "its overall public reputation would eventually decline," and warning that "the Supreme Court can function effectively only if it has external support"). *But cf.* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (rejecting an effort by the government of Arkansas to disregard the Supreme Court's holding in *Brown v. Board of Education* and observing that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

13. *See infra* text and accompanying notes 18–52.

14. *See infra* text and accompanying notes 53–271.

Amendment rule against prior restraints, the Dormant Commerce Clause proscription against protectionist state laws that facially discriminate against interstate commerce, and the Tenth Amendment rule that prohibits the federal government from commandeering state legislative or executive officials.[15] All three of these legal doctrines do real jurisprudential work on a predictable basis and, accordingly, are not constitutional makeweights.

In Part IV, the Article considers the importance of reason-giving to the persuasive force of judicial decisions—and thus to the public's willingness to accept them. A strong consensus exists among serious jurisprudential thinkers: Judicial sincerity is critically important to the legitimacy of the work of the Article III courts. Applying the lessons of the proceeding Parts, this Part also mounts a sustained normative argument against judges using constitutional makeweights to justify both their constitutional judgments and the reasoning that supports them.[16] This Article ends with a brief overview and conclusion.

When Article III judges offer reasons that they do not actually believe—or intend to credit going forward—they seriously undermine the institutional authority of the federal courts.[17] Such behavior also endangers the willingness of the political branches and the public to take their judgments seriously. Worse still, constitutional makeweights fail in constraining judicial discretion, securing stability in the law, and promoting the rule of law. All courts should, accordingly, abstain from the practice of offering bogus reasons in support of their judgments—and what holds true of courts in general holds doubly true of the Supreme Court of the United States.

I. FEDERAL JUDGES LACK A DEMOCRATIC IMPRIMATUR AND GIVING INSINCERE REASONS WILL FATALLY UNDERMINE THE PUBLIC'S CONFIDENCE IN THEIR WORK

Most judges serving on national constitutional courts do not seek election to the bench; they are not subject to any direct forms of democratic accountability. This means, as Professor Dworkin explains,[18] that their judgments can command obedience only to the extent that a judge offers persuasive reasons in support of her judgment. This view is shared by other well-regarded theorists of judicial legitimacy—for example, Professor Frederick Schauer has made very similar arguments.[19]

15. *See infra* text and accompanying notes 272–337.

16. *See infra* text and accompanying notes 338–73.

17. *See infra* text and accompanying notes 18–52.

18. *See* Dworkin, *supra* note 7, at 78–80.

19. *See* Schauer, *supra* note 8, at 656 ("Having given a reason, the reason-giver has, by virtue of an existing social practice, committed herself to deciding those cases within the scope of the reason in accordance with the reason.").

Indeed, in *Federalist No. 78*, Alexander Hamilton advances his "least dangerous" branch thesis, in which he posits that the ability of the federal courts to command obedience to their judgments necessarily turns on the strength of the reasons that judges offer to the public in support of those judgments.[20] Unlike the President and Congress, Article III courts "ha[ve] no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."[21] In fact, Hamilton posits that the federal courts lack both "force" and "will" and possess "merely judgment" that must be persuasive to the other branches if their rulings are to be respected and enforced.[22] For Hamilton, then, "judgment" is the judiciary's coin of the realm and serves to legitimate the constitutional decisions of the federal courts.

By way of contrast, "judgment" and "reason" are seldom thought to be mandatory attributes for those holding an elected public office (whether of a legislative or executive stripe). Unlike a federal judge, an elected politician is entirely free to take one position on an important public policy question today, another tomorrow, and yet a third position next week.[23] Inconsistency, borne of political expediency, is the stock in trade of many, perhaps even most, elected politicians.

Genuine peril exists, however, for a judge who assumes that they enjoy the same freedom of choice as an elected politician to take inconsistent positions over time in order to reach congenial results on important questions of constitutional law. For a judge to say one thing today, and then adopt an entirely inconsistent position tomorrow, makes it clear that the reasons offered in support of one of the judgments were insincere (at best) and patently false (at worst). Going forward, a reasonable consumer of that jurist's opinions will take whatever they say with a grain (or two) of salt. Perhaps the judge's stated reasons are the actual reasons for their judgment—or perhaps they are not.

Over time, a sensible person would give less credence to the reasons offered by a judge who exhibits little or no regard for embracing the outcomes that their own precedents, and the legal reasons set forth within those decisions,

---

20. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

21. *Id.*

22. *Id.* (emphasis omitted).

23. Former Secretary of State and Massachusetts Senator John Kerry, for example, famously explained that he was for the Iraq war until he was against it. Jodi Wilgoren, *The 2004 Campaign: Political Memo; Kerry's Words, and Bush's Use of Them, Offer Valuable Lesson in '04 Campaigning*, N.Y. TIMES (May 8, 2004), https://www.nytimes.com/2004/05/08/us/2004-campaign-political-memo-kerry-s-words-bush-s-use-them-offer-valuable-lesson.html ("I actually did vote for the $87 billion—before I voted against it."). In fact, former Senator Kerry continues to claim he opposed the Iraq War despite having voted in favor of authorizing it in 2003 and also having defended this vote on the merits afterward. PolitiFact scored Kerry's claim "mostly false" after he again repeated it in 2013. *See* Becky Bowers, *Secretary of State John Kerry Says as a Senator He 'Opposed the President's Decision to Go to Iraq*,' POLITIFACT (Sept. 13, 2013), https://www.politifact.com/factchecks/2013/sep/13/john-kerry/secretary-state-john-kerry-says-senator-he-opposed/.

would seem to compel.[24] Because "judgment" is constitutive of judicial legitimacy, offering bogus reasons in support of legal outcomes will engender widespread cynicism about the judiciary's work.[25] As Professor Tara Leigh Grove has posited, "[P]ublic respect for the Supreme Court is contingent, at least in the long run," and for the judiciary to maintain its credibility—and hence authority—the public must "view[] the Court as performing a different function from the political branches" by issuing judgments that are broadly accepted "as reasonable and authoritative, regardless of the outcome of a specific case."[26] In light of these general considerations about the source and importance of judicial legitimacy (namely judicial sincerity and candor), the alacrity with which the Supreme Court embraces constitutional makeweights is deeply puzzling.

To provide a concrete example, the *Chevron* doctrine constitutes a constitutional makeweight—the Supreme Court's invocation of the *Chevron* doctrine is merely a label given to hide several relevant, but mushy, underlying factors that actually drive the judicial decision making process when deciding whether to accept or reject a federal administrative agency's interpretation of an ambiguous statute or regulation.[27] Indeed, Justice Stephen Breyer has forthrightly admitted this reality—and in print to boot.[28] Strictly speaking, the Supreme Court claims that *Chevron* deference is the product of imaginary congressional delegations of statutory gap-filling power; yet, the Supreme Court's highly selective application of the *Chevron* doctrine[29] strongly suggests

---

24. *See* Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2297 (2017) (arguing that the legitimacy of judicial decision turns on judges practicing the virtue of candor when giving reasons and positing that to maintain their credibility with the general public, they must not "deliberately mislead nor make assertions that they know are likely to mislead").

25. *See generally* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS 38–43 (2009); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184–85 (2013); James L. Gibson & Michael J. Nelson, *Changes in Institutional Support for the U.S. Supreme Court: Is the Court's Legitimacy Imperiled By the Decisions it Makes?*, 80 PUB. OP. Q. 622, 623–25 (2016). Professors Gibson and Caldeira posit that over time, "the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution's legitimacy in the eyes of disaffected groups." GIBSON & CALDEIRA, *supra,* at 43.

26. Grove, *supra* note 12, at 299.

27. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (holding that when an agency interprets a statutory provision in its organic act, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute" but instead will defer to "a permissible construction of the statute," and resting this interpretative rule on Congress making a "legislative delegation to an agency on a particular question," a delegation that can be "implicit rather than explicit").

28. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 105 (2005) (observing that "[j]udges do not agree about how absolute *Chevron*'s approach is meant to be" and then asking "[w]hat lies behind *Chevron*?" and "[w]hat is its rationale?"). In the end, Breyer concludes that *Chevron* is merely a "rule of thumb" and not "absolute rule." *Id.* at 108. However, it bears noting that a mere "rule of thumb" is not really a "rule" at all but rather a kind of general framing device.

29. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008) (presenting an empirical study

that more practical considerations, involving the relative competence and expertise of administrative agencies and federal courts, actually prefigures whether the Justices will apply *Chevron* deference in a particular case.[30]

Other examples, sticking for the moment to the general area of administrative law: the zone of interests test for prudential standing and constitutional standing doctrine (more specifically, the injury in fact requirement as applied).[31] Both of these doctrines appear to be constitutional makeweights because the doctrines, as explicated and applied, do not seem to drive outcomes on a predictable basis.

With respect to constitutional standing and the injury in fact requirement, consider that the Supreme Court has held that ranchers and farmers worried about the possible loss of water rights, at some indefinite point in the future, possessed standing to challenge a government agency's biological opinion that *might* lead to water allocation reductions.[32] On the other hand, however, the Justices held that environmentalists and zoologists worried about the extinction of certain animal populations in the wild lacked a sufficient injury in fact to challenge federal funding of development projects abroad—despite the certainty that the animals' habitats would be threatened or destroyed by projects funded in part by the U.S. government.[33]

---

of Supreme Court deference to agency statutory interpretations, and based on this empirical data, positing that over a dozen variations of deference appear in Supreme Court decisions over time from 1984 to 2006).

30. *See infra* text and accompanying notes 134–173 (providing an extended discussion of why the *Chevron* rule constitutes a constitutional makeweight); *see also* BREYER, *supra* note 28, at 103–07 (discussing *Chevron* and positing that agency expertise provides a persuasive rationale for judicial deference because "[t]he agency, experienced in administering the statute, will likely better understand the practical implications of competing alternative interpretations, consistency with congressional objectives, administrative difficulties, the consequences for the public and so forth").

31. *Compare* Air Courier Conf. of Am. v. Am. Postal Workers Union, 498 U.S. 517, 527–30 (1991) (finding that a postal employees union seeking to protect the revenue of the U.S. Postal Service did not seek to vindicate a claim within the zone of interests protected by the Postal Reorganization Act of 1970), *with* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 498–99 (1998) (holding that banks sought to vindicate an interest within the zone of interests protected by the Federal Credit Union Act involving membership limits). There is simply no principled way to reconcile the holdings of these two cases with each other; it would seem that whether a would-be plaintiff seeks to vindicate an interest within the zone of interests that a statute protects depends on whether a majority of the court wishes to reach the merits of the question presented and perhaps also on whether the merits favor the plaintiff or the defendant.

32. Bennett v. Spear, 520 U.S. 154, 167–71 (1997) (finding that injury in fact existed based on an entirely hypothetical loss of access to water allocations from a federal irrigation project). The farmers and ranchers feared a future injury—a reduction in their water allocation from the Klamath Project—but had not yet lost even a drop of water or even been notified that reductions in their water allocation were in the works. *But cf.* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) (holding that biologists and zoologists concerned about the loss of critical animal habitat abroad due to development projects supported in part by the U.S. government lacked standing to challenge the legality of the funding).

33. *Lujan*, 504 U.S. at 562–71. The *Lujan* majority held that persons with a professional interest in the animals whose habit would be damaged or destroyed lack a cognizable injury in fact to challenge federal support of the foreign development projects. *See id.* at 566–67. For a thoughtful and general discussion of the theoretical and practical shortcomings that afflict the contemporary Article III standing doctrine, see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

Another example of a constitutional makeweight: "strict scrutiny" of race-based affirmative action programs—neither *Fisher*[34] nor *Grutter*[35] apply the strict scrutiny of *Brown*,[36] *Loving*,[37] *Swann*,[38] or *Palmore*.[39] The *Fisher/Grutter* invocation of strict scrutiny, as actually applied, rather clearly constitutes a form of intermediate scrutiny because the means/end fit can be far from exact when a state government seeks to promote "diversity" but is really seeking to remediate the pervasive forms of social discrimination that we know exist in contemporary U.S. society.[40] In this context, the Supreme Court says one thing but actually does something else.[41]

Perhaps the biggest makeweight of them all is stare decisis in the context of constitutional questions. The formal reasons that supposedly govern this doctrine have little, if any, discernible effect on restricting the scope of judicial discretion to follow, modify, or simply disregard an existing constitutional precedent.[42] *Casey* provides perhaps the most embarrassing example of the makeweight nature of stare decisis as a meaningful constraint on the scope of judicial discretion in constitutional cases.[43]

To be sure, some legal tests do actual work. The rule against prior restraints in First Amendment law provides an obvious example. The federal courts,

34. *Fisher II*, 579 U.S. 365, 379–80, 388–89 (2016); *Fisher I*, 570 U.S. 297, 301–12 (2013).

35. Grutter v. Bollinger, 539 U.S. 306, 341–44 (2003).

36. Brown v. Bd. of Educ., 347 U.S. 483, 494–96 (1954).

37. Loving v. Virginia, 388 U.S. 1, 9–11 (1967).

38. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11–15 (1971).

39. Palmore v. Sidoti, 466 U.S. 429, 432–34 (1984).

40. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–504 (1989) (holding that a city government may seek to remediate the present-day effects of past racial discrimination *only* if the city bore some measure of responsibility, whether through discriminatory city ordinances or willing participation in discriminatory private markets with city funds, and could not seek to remedy the effects of racial discrimination for which it bears no direct responsibility); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307–10 (1978) (opining that the Supreme Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations" and that "[t]o hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination").

41. *See infra* text and accompanying notes 174–271

42. *See infra* text and accompanying notes 53–133. For a very recent salient example of just how little stare decisis effectively constrains a contemporary majority from overruling a prior constitutional decision, see Edwards v. Vannoy, 141 S. Ct. 1547 (2021). In *Edwards*, a 6 – 3 majority overturned a rule that applied "watershed" new constitutional criminal procedure rules in collateral federal habeas proceedings. *Id.* at 1560 ("New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund."). *But cf. id.* at 1574 (Kagan, J., dissenting) ("In overruling a critical aspect of *Teague*, the majority follows none of the usual rules of stare decisis." (emphasis omitted)).

43. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867, 874 (1992) (plurality opinion) (positing that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question" but then proceeding to overrule *Roe*'s trimester framework and standard of review, replacing it with an "undue burden" standard, and opining that "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

including the Supreme Court, strictly and consistently enforce the rule against injunctions prohibiting the press from publishing information that it possesses.[44] So too, the Dormant Commerce Clause rule involving "strict scrutiny" of protectionist state legislation effectively limits the ability of states to use their regulatory authority to favor in-state interests over out-of-state interests.[45]

Finally, some constitutional rules receive robust judicial enforcement but are designed to be easily evaded. For example, under the Tenth Amendment,[46] the federal courts will reliably enforce the rule against commandeering the state governments and, more specifically, a state's legislative[47] or executive officers.[48] Accordingly, these rules, and the anti-commandeering doctrine more generally, are not constitutional makeweights. Even though Congress can legislate around them,[49] in the absence of Congress utilizing a constitutionally permissible work-around, these rules reliably and predictably constrain Congress's policy-making options. Simply put, by using the alternative means—which include cooperative federalism schemes or conditional spending devices—Congress may evade the proscription against commandeering state governments.[50] In other words, the Supreme Court locks the front door but leaves the back door wide open.[51]

---

44. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971). The Supreme Court has explained that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 335 (2010) (holding that an FEC administrative review process of political advertising "function[ed] as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit").

45. *See generally* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571 (1997).

46. U.S. CONST. amend. X.

47. *See* New York v. United States, 505 U.S. 144, 161 (1992) ("As an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U. S. 264, 288 (1981)).

48. *See* Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). One should also note that the particulars of the effort to dragoon state executive officers into federal service are entirely irrelevant. *See id.* (opining that "[i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary" because federal efforts to force state executive officers to enforce federal laws "are fundamentally incompatible with our constitutional system of dual sovereignty").

49. For example, even though Congress may not command a state legislature to enact a state law or mandate that state executive officials enforce a federal statute, Congress may offer financial incentives to the states to comply with federal mandates on a voluntary basis. Provided that the program advances the general welfare, the state governments have clear notice of the conditions associated with federal grant monies, the terms of the grants are not unduly coercive, and the program's linkage of funding has a reasonable nexus with the purpose of the spending program, the conditional-spending regime is constitutional. *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

50. *See* Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599 (2012).

51. *See* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1919–20 (1995) (positing

Of the three types of constitutional doctrines—namely constitutional rules that cannot be evaded, constitutional rules that can be evaded through alternative means, and constitutional makeweights—only true makeweights place the legitimacy of the Article III courts at risk. This is so because the legitimacy of a Supreme Court decision rests, as Dworkin and Hamilton posit, primarily on the reasons given in support of it.[52] When the reasons given are ersatz, the persuasive force of a Supreme Court precedent falters.

II. THREE SALIENT EXAMPLES OF CONSTITUTIONAL MAKEWEIGHTS: STARE DECISIS, THE *CHEVRON* DOCTRINE, AND STRICT SCRUTINY REVIEW OF AFFIRMATIVE ACTION PROGRAMS

This Part provides three important and highly visible examples of constitutional makeweights: the stare decisis doctrine in constitutional cases, the *Chevron* doctrine, and the equal protection rule that requires strict judicial scrutiny of affirmative action programs. All three doctrines involve the Supreme Court offering highly implausible, if not outright false, reasons in support of its judgments. These three doctrines all fail in their core missions of promoting stability in the law, securing transparency in the adjudicative process, and advancing rule of law values more generally.

A. Stare Decisis in Constitutional Cases

Stare decisis presents a poster child example of a constitutional makeweight. The doctrine supposedly reflects a well-settled and ancient rule that requires a court, including the Supreme Court, to abide by its former decisions. The rule constitutes a kind of judicial "good housekeeping" doctrine that, in theory, serves to vindicate the reasonable reliance interests that arise naturally from prior judicial decisions.

Although the Supreme Court has identified over a half-dozen factors that ostensibly govern the application of the doctrine,[53] the stated factors do not in

that Congress could use conditional spending to avoid the Supreme Court's anti-commandeering rule). Professor Rosenthal observed that "[i]f the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed." Rosenthal, *supra*, at 1131. The argument has to work both ways; if Congress can use conditional spending to impose federally mandated duties on the state governments, limits on the Commerce Clause do not matter. *See* Baker, *supra*, at 1920, 1935 (positing that "if the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of 'a federal government of enumerated powers' will have no meaning" but observing that *South Dakota v. Dole* opens the door to precisely this outcome).

52. *See* DWORKIN, *supra* note 6; *see also* THE FEDERALIST NO. 78, *supra* note 20 (Alexander Hamilton).

53. *See infra* text and accompanying notes 65–75. For a comprehensive and thoughtful overview of the doctrine of stare decisis and the various tests and factors that the Supreme Court has used to define and apply

practice constrain a contemporary court's decision to follow, modify, or overrule a prior precedent.[54] Simply put, the stated rules seem to have little, if any, practical relevance to the outcome of cases. It should therefore come as no surprise that legal scholars have recognized that the modern doctrine is not applied in a consistent, much less coherent, fashion.[55] A more candid and intellectually honest approach to stare decisis in constitutional cases might well reduce the doctrine to little more than a generalized duty to acknowledge arguably relevant prior decisions but without a corresponding duty actually to follow a prior precedent.[56] Truth in advertising would involve straightforward recognition that the Constitution means what five Justices say it means *today*. As then-New York Governor, and later Chief Justice, Charles Evans Hughes quipped, "We are under a Constitution, but the Constitution is what the judges say it is . . . ."[57]

The framers of the U.S. Constitution acknowledged the doctrine. For example, in *Federalist* No. 78, Alexander Hamilton writes that "[t]o avoid an arbitrary discretion in the courts," the federal judiciary "should be bound . . . by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[58] This suggests that the doctrine was understood to be integral to a system of Anglo-American law. James Kent, who contributed significantly to early American jurisprudence, also wrote on stare decisis, noting that "judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case."[59]

---

the doctrine, see RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 21–25, 107–76 (2017).

54. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (overruling *Roe*, *Casey*, and all of the prior precedents applying them because in Justice Alito's view, "*Roe* was egregiously wrong from the start" and none of the principles of stare decisis support retaining it—notwithstanding the rather obvious reliance by millions of American women on a right to reproductive autonomy for more than a half a century); Edwards v. Vannoy, 141 S. Ct. 1547, 1560 (2021) (abandoning prior, well-settled case law on the retroactive effect of "watershed" constitutional decisions in favor of denying new constitutional criminal procedures any retroactive effect).

55. *See, e.g.*, Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414 (2010) ("The sheer number of [stare decisis] considerations, combined with the fact that the Court often selects a few items from the catalog without explaining how much work is being done by each, makes it difficult even to find a starting point for thinking critically about stare decisis as a judicial doctrine." (emphasis omitted)).

56. *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 9–16, 77–81 (1909). Gray posits that a legal "rule" must be created by the state and impose a binding duty on others; if a duty is not binding, then its source cannot be deemed a "law." *Id.* at 77–80.

57. Speech before the Elmira Chamber of Commerce (May 3, 1907), *in* ADDRESSES OF CHARLES EVANS HUGHES: 1906–1916, at 179, 185 (2d ed. 1916); *see* GUY F. BURNETT, THE SAFEGUARD OF LIBERTY AND PROPERTY 53–54 (2015) (quoting, discussing, and explaining Charles Evans Hughes's May 1907 speech and famous aphorism).

58. THE FEDERALIST NO. 78, *supra* note 20, at 471 (Alexander Hamilton).

59. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *475 (John M. Gould, ed., Boston, Little, Brown, & Co. 14th ed. 1896) (1826).

In England, the ultimate court of last resort (once the Appellate Committee of the House of Lords and now the Supreme Court of the United Kingdom) takes a relatively strict approach to observing the doctrine of stare decisis. In fact, the House of Lords "disclaimed the power to overrule its own decisions" until 1966, and since 1966, the House of Lords "has exercised the power very sparingly by American standards."[60] Professors P.S. Atiyah and Robert S. Summers observe that "[i]n the very strict version which prevailed in England in the first half of the twentieth century all courts were regarded as bound to follow their own previous decisions, and lower courts were also bound to follow the decisions of higher courts."[61]

By way of contrast, the Supreme Court of the United States has shown little, if any, reluctance to revisit its own prior decisions. As of 2019, the Supreme Court had overruled no fewer than 232 of its prior decisions.[62] The distinction between the American and British approaches to stare decisis shows that it is possible to imagine a legal system in which the doctrine has relatively strong application and meaningfully constrains judicial discretion in future cases. A legal system in which judges are comfortable openly exercising broad discretion—characteristic of the U.S. legal system—might be expected to embrace a weaker form of the doctrine than a legal system that observes a relatively high degree of rule formality—a system in which judges should avoid engaging in broad policymaking activity.[63]

The Supreme Court has explained that stare decisis "is at its weakest" with respect to constitutional precedents "because our interpretation [of the Constitution] can be altered only by constitutional amendment or by overruling our prior decisions."[64] Historically, when applying stare decisis in this important context, the Supreme Court has considered:

> [T]he quality of the . . . reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent.[65]

Unfortunately, however, as Justice Brett Kavanaugh has observed, "the Court has articulated and applied those various individual factors without establishing

60. P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 123 (1987).

61. *Id.* at 118.

62. *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, LIBRARY OF CONGRESS, https://constitution.congress.gov/resources/decisions-overruled/ (last visited Sept. 1, 2020).

63. *See* ATIYAH & SUMMERS, *supra* note 60, at 119–31, 146–50.

64. Agostini v. Felton, 521 U.S. 203, 235 (1997); *see also* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455–58 (2015) (describing and explaining the differences between constitutional and statutory precedents).

65. Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

any consistent methodology or roadmap for how to analyze all of the factors taken together."[66]

Despite inconsistencies in the doctrine's invocation and application, the Supreme Court still proclaims that it is bound by its prior precedents and must follow them in future cases presenting the same legal questions. In theory, as the Supreme Court explained in *Payne v. Tennessee*, respecting the doctrine of stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[67] *Payne* also recognized the importance of stare decisis as inhering in the "predictable, and consistent development of legal principles," in addition to the vindication of reasonable reliance interests.[68]

In *Payne*, writing for the majority, Chief Justice William H. Rehnquist noted that the Supreme Court is not bound by a prior precedent when that precedent is "unworkable or . . . badly reasoned."[69] The *Payne* majority then proceeded to overrule two prior precedents, *Booth*[70] and *Gathers*,[71] both of which held the Eighth Amendment prohibited the presentation of victim impact statements to the jury during a capital sentencing proceeding. Chief Justice Rehnquist explained that *Booth* and *Gathers* were "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," have been "questioned by Members of the Court in later decisions," and have proven incapable of "consistent application by the lower courts."[72]

Arguably the most bizarre modern application of stare decisis, set forth in the joint opinion authored by Justices Sandra Day O'Connor, Anthony M. Kennedy, and David H. Souter in *Casey*, involved reaffirming the "central holding" of *Roe v. Wade*[73] while overruling multiple decisions handed down between 1973 and 1992 that applied *Roe* to invalidate state laws restricting access to abortion.[74] In *Planned Parenthood v. Casey*, the Court applied "pragmatic considerations" such as (1) "whether the rule has proven to be intolerable simply in defying practical workability," (2) "whether the rule is subject

66. *Id.*

67. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

68. *Id.*

69. *Id.*

70. Booth v. Maryland, 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. 808.

71. South Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. 808.

72. *Payne*, 501 U.S. at 828–830.

73. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

74. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992) (plurality opinion), *overruled by Dobbs*, 142 S. Ct. 2228. The joint opinion overruled two prior precedents decided in 1983 and 1986 under the original *Roe* framework and involved substantially similar restrictions on access to abortion. *See id.* at 870–74, 881–82, 885; Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759–69 (1986), *overruled by Casey*, 505 U.S. 833; City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 442–45, 448–52 (1983), *overruled by Casey*, 505 U.S. 833.

to . . . reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," (3) "whether related principles of law have so far developed" to leave the old precedent a remnant, and (4) "whether facts have so changed" to "rob[] the old rule of significant application or justification."[75] The Court applied each factor and held that "the stronger argument is for affirming *Roe*'s central holding."[76] Having done this, however, the authors of the joint opinion proceeded to replace strict scrutiny with a newly minted "undue burden" test and sustained abortion restrictions that the Supreme Court had invalidated in prior decisions.[77]

The joint opinion's fast and loose approach to stare decisis drew the scorn of several members of the Supreme Court on both sides of the ideological spectrum. Chief Justice Rehnquist, for example, accused the authors of the joint opinion of devising and applying a "newly minted variation on stare decisis."[78] He also objected, with good cause, that "the joint opinion does not apply [stare decisis] in dealing with *Roe*," but merely "retains the outer shell."[79] Instead of actually applying *Roe* to Pennsylvania's anti-abortion law, the joint opinion's authors instead "beat[] a wholesale retreat from the substance of that case."[80]

Legal scholars have strongly criticized *Casey*'s "take what you want—leave what you don't want" approach to the doctrine of stare decisis.[81] Vanessa Laird, for example, argues that the joint opinion "ultimately fails to persuade us that its emphasis on stare decisis will in fact bring about the promised result of greater certainty in abortion jurisprudence." [82] Moreover, the doctrine does not "get us very far in attempting to explain the Justices' holding."[83] Trying to "distill[] the 'essential holding' from *Roe* too obviously involves a substantial degree of discretion, and the Justices' own sense that the trimester framework undervalued potential human life is too clearly involved in the distilling process."[84] In other words, when stare decisis enhances rather than restricts judicial discretion, it fails to advance its core purposes (namely vindicating reasonable reliance interests and promoting stability in the law).[85]

---

75. *Casey*, 505 U.S. at 854–55.

76. *Id.* at 861.

77. *See id.* at 870, 881–84.

78. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) (emphasis omitted).

79. *Id.* at 944, 954.

80. *Id.* at 944.

81. *See* Vanessa Laird, Planned Parenthood v. Casey*: The Role of Stare Decisis*, 57 MOD. L. REV. 461 (1994); Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from* Casey *to* Lawrence, 81 N.Y.U. L. REV. 1137 (2006); William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey*,* Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH. L. REV. 53.

82. Laird, *supra* note 81, at 466 (emphasis omitted).

83. *Id.* at 466–67.

84. *Id.* at 467.

85. *See* Ensign, *supra* note 81, at 1146–47 (arguing that Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989), had fatally undermined any plausible future reliance on *Roe*, including a majority declaring *Roe*

William Consovoy also questions the *Casey* Court's application of stare decisis. He argues that the joint opinion's "manipulation of precedent and misuse of stare decisis, as a 'tool' instead of a genuine limiting principle, will have significant ramifications in terms of society's behavior and attitude toward the Court."[86] He posits that workability was not really a plausible reason for retaining *Roe*'s shell and observes that "it remains unclear why such a workable doctrine mandated an abandonment of the very framework underlying its holding."[87] After all, "[i]t seems inconsistent that the authors of the Joint Opinion believed *Roe* workable, yet abandoned the very framework underlying its holding for their newly fashioned 'undue burden' test."[88]

In 2020, the Court undertook a comprehensive review and analysis of stare decisis in *Ramos v. Louisiana*.[89] The case involved whether a state jury could convict a defendant of criminal charges based on a non-unanimous vote—which the Supreme Court had found to be consistent with the Sixth Amendment right to a jury trial in *Apodaca v. Oregon*.[90]

In *Ramos,* the 6 – 3 majority, with Justice Neil Gorsuch writing for the majority, took into consideration the quality of *Apodaca*'s reasoning, the consistency of results over time, subsequent legal developments, and the extent to which a precedent has inspired reliance.[91] The Court overruled *Apodaca*, reasoning that "[w]e have an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time."[92] This application of stare decisis, however, was not unanimous. Justices Sotomayor, Kavanaugh, Thomas, and Alito each wrote separately to express a different view of stare decisis and how the majority should have applied it.[93] The strong disagreement among the Justices in *Ramos* demonstrates with crystal clarity how badly fractured the current members of the Supreme Court are on the very foundations of the doctrine (as well as how to apply it).

On the other hand, it probably goes too far to posit that stare decisis does *no* meaningful jurisprudential work. Consider, for example, Chief Justice Rehnquist's decision in *Dickerson v. United States*[94] to uphold the Supreme

"unsound in principle and unworkable in practice," and that accordingly, "the changed factual circumstances seemed to support overruling *Roe* rather than affirming it").

86. Consovoy, *supra* note 81, at 56.

87. *Id.* at 84.

88. *Id.* at 84 n.175.

89. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

90. Apodaca v. Oregon, 406 U.S. 404 (1972), *overruled by Ramos*, 140 S. Ct. 1390; *see also* Johnson v. Louisiana, 406 U.S. 356 (1972) (holding that a non-unanimous jury verdict does not violate the Sixth Amendment), *overruled by Ramos*, 140 S. Ct. 1390.

91. *Ramos*, 140 S. Ct. at 1405 (quoting Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)).

92. *Id.* at 1408.

93. *See id.* at 1408–40.

94. Dickerson v. United States, 530 U.S. 428 (2000).

Court's landmark decision in *Miranda v. Arizona*.[95] For many years, Chief Justice Rehnquist had been a persistent and vocal critic of *Miranda*. In prior opinions, he argued that *Miranda* had no textual basis (notably including the Self-Incrimination Clause of the Fifth Amendment)[96] and, accordingly, was not a valid constitutional precedent. *Dickerson* presented a clear opportunity for Chief Justice Rehnquist to overturn *Miranda* and end the rule that presumed an un-*Mirandized* suspect's voluntary confession was inadmissible on Fifth Amendment grounds.[97] However, the other shoe did not drop; the Chief Justice changed roles from cranky *Miranda* critic to defender of the status quo.

The Chief Justice reasoned that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[98] Chief Justice Rehnquist explained that departing from an established precedent always requires a "special justification."[99] Moreover, the doctrinal underpinnings of *Miranda* had not been undermined by subsequent cases but instead had been embraced in subsequent decisions that reaffirmed and extended "the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."[100] Thus, as one legal scholar explains, "[A]fter having repeatedly ridiculed the constitutional soundness of the decision requiring police officers to read suspects their *Miranda* rights, Chief Justice Rehnquist voted to uphold it."[101]

A second vote that seems driven by concerns about stare decisis: Chief Justice Robert's concurring vote and opinion in *June Medical Services*.[102] In *June Medical Services,* a bare 5 – 4 majority overturned a Louisiana anti-abortion law that was nearly identical to a Texas law that the Court had struck down just four years earlier in *Whole Woman's Health v. Hellerstedt*.[103] Roberts forthrightly acknowledged that he had joined the dissent in *Whole Woman's Health*[104] and

95. Miranda v. Arizona, 384 U.S. 436, 498–99 (1966) ("In dealing with custodial [police] interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed.").

96. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

97. *Miranda*, 384 U.S. at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

98. *Dickerson*, 530 U.S. at 443.

99. *Id.*

100. *Id.* at 443–44.

101. Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC, Apr. 2005.

102. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133–42 (2020) (Roberts, C.J., concurring), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

103. *See id.* at 2133, 2142; *see also* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), *abrogated by Dobbs*, 142 S. Ct. 2228.

104. *See Whole Woman's Health*, 579 U.S. at 644 (Alito, J., dissenting) (noting that Chief Justice Roberts joined Justice Alito's dissent).

"continue[d] to believe that the case was wrongly decided."[105] Even so, the Chief Justice voted to apply the rule announced in *Whole Woman's Health* because "[t]he question today . . . is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."[106] He reasoned that "[u]nder principles of stare decisis, I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law."[107] Based on that consideration, and that consideration alone, he "would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation."[108]

Of course, the Chief Justice's fealty to stare decisis is remarkable precisely because it is so rare. More often than not, members of the Supreme Court vote with alacrity to overrule constitutional precedents that they believe to be wrongly decided (and do so as soon as there are five votes in support of taking that step).[109] The Chief Justice's example in *June Medical Services* provides the exception that proves the general rule.[110]

---

105. *June Med. Servs. L.L.C.*, 140 S. Ct. at 2133 (Roberts, J., concurring).

106. *Id.*

107. *Id.* at 2139 (emphasis omitted).

108. *Id.*

109. *See* THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 17 (2006) (observing that "[r]esearch consistently indicates that the justices' policy preferences are the primary determinant of their votes on the merits of cases"); *see also* SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992, at 108–10 (1995) (reporting that "[w]hen we examined cumulative scales in which the content of the scales is defined as specifically as the data will allow, we discovered that attitudinal variables or, more precisely, the justices' personal policy preferences substantially explained their voting" and that "we found that over 97 percent of the votes in the overruling and overruled cases were attitudinally consistent"); Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 131 (arguing that "[a]s long as there are available in the decisional toolbox of the Justices multiple ways of rationalizing the avoidance of a seemingly applicable previous decision, the existence of that decision seldom stands as a significant barrier to what seems now to the Court or to individual Justices as the better decision to make, precedent aside, for the case before them").

110. It bears noting that the Supreme Court's use of stare decisis when deciding cases dealing with *statutory* precedent arguably constitutes the mirror image of the doctrine in constitutional cases. The Justices consistently claim that in the statutory context, the doctrine has greater force and enhanced salience—at least when contrasted with the doctrine's application in the context of constitutional precedents. In theory, this stronger form of stare decisis simply reflects Congress's ability to "fix" the Court's statutory decision if Congress concludes that the Supreme Court goofed in interpreting Congress's handiwork. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power . . . remains free to alter what we have done." (emphasis omitted)); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (reasoning that stare decisis "has 'special force' for 'Congress remains free to alter what we have done'" (quoting *Patterson*, 491 U.S. at 172–73)); Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015) ("Where, as here, the precedent interprets a statute, stare decisis carries enhanced force, since critics are free to take their objections to Congress." (emphasis omitted)). *See generally* BRYAN GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 333 (2016) (observing that "[s]tare decisis applies with special force to questions of statutory construction" (alteration in original)). *But cf.* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363 (1988) (questioning whether stare decisis actually applies more rigorously with respect to statutory precedents and observing that "the Supreme Court has overruled or materially modified statutory precedents more than eighty times since 1961"). Professor Eskridge cautions

The Supreme Court's recent opinion in *Dobbs v. Jackson Women's Health Organization*[111] continued the Justices' well-established practice of giving a rote paean to the doctrine of stare decisis and the importance of faithfully adhering to past decisions and then nevertheless proceeding to overrule a long-standing, highly important, and quite visible line of constitutional precedent (namely the *Roe*[112] and *Casey*[113] substantive due process line). Writing for a 5 – 4 majority on the question of overruling *Roe*, Justice Alito thundered that *Roe* was "egregiously wrong and deeply damaging" because "*Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed."[114] And what about stare decisis? The *Roe* line of cases did not merit continued adherence because even though "[p]recedents should be respected," this general rule does not apply when "the Court errs" by "issu[ing] an important decision that is egregiously wrong."[115]

Justice Alito, over the course of more than thirty pages,[116] purported to apply the six traditional factors that ostensibly inform the Court's decision to follow, modify, or overrule an existing constitutional decision (or line of precedent), including "[t]he nature of the Court's error,"[117] "[t]he quality of the

that "statutory precedent is particularly vulnerable to modification or overruling if the Court's original discussion of the issues is procedurally unsatisfactory, if the statute being interpreted is generally worded and has not been the subject of extensive legislative tinkering, and/or if subsequent legislative developments have undercut the rationale of the decision and private parties have not extensively relied on it." *Id.* Thus, stare decisis is not an inexorable command even in cases of statutory interpretation despite applying with considerably greater force in this context. *See* Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1177–78 (2016) (positing that the bright-line argument for stare decisis in statutory interpretation cases "fails to consider that statutory stare decisis is not a norm set in stone"); Lee Epstein et al., *The Decision to Depart (Or Not) From Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1146 (2015) (observing that "[f]or the Roberts Court, there is only a modicum of evidence suggesting that constitutional precedents are more vulnerable to departure than statutory ones"). Some empirical evidence does exist, however, to support the claim that statutory precedents command more adherence than constitutional precedents. *See id.* at 1134–36, 1140–41. A middle position might therefore come closest to the underlying reality; as Professor Randy Kozel notes, "[T]he Court's discussions of stare decisis do not treat the two categories as sealed off from one another," and "[t]hough there remains a doctrinal divide, there is a notable amount of conceptual convergence." Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1132 (2019) (alteration in original).

111. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Roe* and holding that the doctrine of substantive due process does not encompass a fundamental, yet unenumerated, right to terminate a pregnancy).

112. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

113. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion), *overruled by Dobbs*, 142 S. Ct. 2228.

114. *Dobbs*, 142 S. Ct. at 2265.

115. *Id.* at 2280.

116. Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 39–72 (S. Ct. June 24, 2022); *see also Dobbs*, 142 S. Ct. at 2261–85.

117. *Dobbs*, 142 S. Ct. at 2265 (emphasis omitted).

reasoning,"[118] "workability,"[119] the "[e]ffect on other areas of [the] law,"[120] "reliance interests,"[121] and potential adverse effects on the standing and perceived legitimacy of the federal judiciary.[122] Quite remarkably, the *Dobbs* majority found that *not one* of these considerations merited adhering to *Roe* and *Casey* rather than abolishing a nearly half-century old fundamental right to reproductive self-determination for women.

Having fully, fairly, and in good faith applied the doctrine of stare decisis (at least in the majority's view), Justice Alito concludes that the constitutional status quo cannot stand in the face of "egregiously wrong" decisions (like *Roe*). Despite the joint dissent's vociferous objection that the majority had cooked the stare decisis analysis to support a pre-determined outcome,[123] Justice Alito explained that "[o]ur decision today simply applies longstanding stare decisis factors instead of applying a version of the doctrine that seems to apply only in abortion cases."[124]

For the *Dobbs* majority, then, the only possibly constitutional conclusion was that "*Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[125] However, a cynical observer might suggest that all that really changed between 1973 and 2022, or between 1992 and 2022, was the composition of the Supreme Court itself and, more specifically, Justice Ruth Bader Ginsburg's death, on September 18, 2020, and her subsequent lightning-fast replacement with President Donald J. Trump's far more conservative nominee, Justice Amy Coney Barrett (literally days before a national election that Trump would lose) on October 27, 2020.[126] It bears noting that the more circumscribed approach of Chief Justice John Roberts, who would have sustained the Mississippi law criminalizing abortions after the fifteenth week of pregnancy without overturning *Roe*,[127] would have given stare decisis at least some meaningful weight as a limit on a contemporary majority's ability to embrace its preferred outcome on the merits.

After *Dobbs*, the doctrine of stare decisis—in constitutional cases at least—is now in complete tatters. No serious student of the Constitution and the

118. *Id.* at 2265–72 (emphasis omitted).

119. *Id.* at 2272–75 (emphasis omitted).

120. *Id.* at 2275–76 (emphasis omitted).

121. *Id.* at 2276–78 (emphasis omitted).

122. *Id.* at 2278–79.

123. *Id.* at 2320 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

124. *Id.* at 2280 (emphasis omitted).

125. *Id.* at 2279.

126. *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html.

127. *Dobbs*, 142 S. Ct. at 2310–11 (Roberts., C.J., concurring) (observing that "I would take a more measured course" than the majority and arguing that under *Roe* and *Casey*, the "right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability").

process of constitutional adjudication can or should take it seriously at this point. *Dobbs* makes it obvious that a prior "binding" precedent will not meaningfully constrain—and does not meaningfully constrain—a current majority that would prefer to travel a different constitutional road.

Regardless of a prior decision on point, or even an entire line of them stretching for almost fifty years, it would seem that Charles Evans Hughes was quite correct to posit that, at the end of the day, "the Constitution is what the judges say it is."[128] Indeed, in the wake of *Dobbs*, one should probably amend the quip to insert "today" at the very end. Whatever a judge, or group of judges, clearly said in a past published majority opinion plainly does not necessarily carry much (if any) weight with the newly-emboldened conservative majority. Simply put, the rules of stare decisis in constitutional cases are not really "rules" at all in any meaningful sense of the word.

Can stare decisis in constitutional cases be fixed? Or is it doomed to be nothing more than a constitutional makeweight? The doctrine could be rendered a constitutional rule if the Justices were simply more honest about the weakness of the doctrine. In truth, a prior decision does not, and probably cannot, bind a current majority that strongly disagrees with the decision's reasoning, outcome, or both. It is clear that Justices of all ideological stripes agree that stare decisis requires them to acknowledge, discuss, and justify their decision to follow, modify, or abolish a prior constitutional precedent that arguably governs a case *sub judice*. It is this process of acknowledging, considering, and explaining that constitutes the real doctrine of constitutional stare decisis. Whatever catchphrases or verbal formulations get trotted out, the fact remains that a current Supreme Court majority has no meaningful obligation to follow an earlier relevant decision rendered by a prior majority.

Inherent in the legal process within a common law system, however, is the idea that when a judge gives a reason in support of a judgment, they mean it.[129] Thus, for a court to simply ignore a prior precedent—and by implication to ignore the reasons given in support of it—is to undermine fatally the notion that reasons constrain and justify judgment.[130] However, reason giving might well lead a principled jurist, acting in good faith, to reject a prior court's reasoning in a case involving constitutional rights. Provided that a judge acknowledges the prior precedent and engages frankly and fairly with the prior court's judgment, and reasoning, the duty to give and respect reasons has been met.

Thus, stare decisis, at its core, is *procedural*, not *substantive*, in nature. It implies a duty to consider and engage the reasons that a prior court offered in

128. Speech before the Elmira Chamber of Commerce, *supra* note 57, at 185.

129. *See* Fallon, *supra* note 24, at 2297; Schauer, *supra* note 8, at 633–34; Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 988 (2008).

130. *See* Ronald Dworkin, *Introduction*, *in* A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY, 1, 54–55 (Ronald Dworkin ed., 2002).

support of a decision at an earlier point in time. But, it would arguably be a breach of the judicial duty to stand by those prior reasons if, on balance, they do not seem persuasive to a contemporary court. The key is that a prior court's reasons receive a full and fair hearing and that a decision to modify or abandon those reasons be acknowledged and explained.

Stare decisis thus imposes a duty to consider, but not necessarily to respect, the reasons that a prior court deemed to be controlling. Thus, the application of stare decisis in constitutional cases may be akin to *Skidmore*[131] deference concerning agency interpretations of statutes and regulations—prior constitutional decisions have the power to persuade but lack the power to compel.[132] Rather than pretend that a past court's decision inexorably binds a current court and entirely prohibits its members from following their own legal reasoning to what they deem to be the best decision, it would be better, all around, if the Supreme Court considerably moderated its description of what the doctrine of stare decisis requires of future courts in constitutional cases.[133]

B. The Chevron *Doctrine*

What role should a reviewing court play when questions arise regarding the meaning of either a statute or an agency regulation implementing it? Since the 1980s, the Supreme Court has adopted and often (but not always) applied twin doctrines of judicial deference: The *Chevron* and *Auer/Seminole Rock* doctrines. These doctrines require a reviewing court to defer to any reasonable agency interpretation if the reviewing court first concludes that a statute or regulation is ambiguous.[134] The *Chevron* doctrine, as presently defined and enforced, constitutes a constitutional makeweight because the reasons the Supreme Court offers in support of the doctrine and its application are patently insincere.

One might ask, given *Marbury v. Madison* and the duty of the federal courts to "say what the law is,"[135] whether a reviewing court should defer to a federal administrative agency's interpretation of an ambiguous statute.[136] The Supreme

131. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

132. *Id.* at 140 (explaining that a federal court should defer to an agency's interpretation of an ambiguous statutory provision depending on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

133. *See* Schwartzman, *supra* note 129, at 1008–10 (explaining the importance of judges giving sincere reasons in support of their judgments and arguing that judges labor under "a duty to make publicly available the reasons that they believe justify their decisions"); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (arguing that "the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another").

134. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945); Auer v. Robbins, 519 U.S. 452, 461–62 (1997).

135. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

136. *Cf. id.* ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

Court's answer, initially set forth in *Chevron*, decided in 1984, is that Congress makes imaginary delegations of gap-filling authority to federal administrative agencies; under the separation of powers doctrine, federal courts should respect such imaginary delegations of gap-filling authority rather than impose their own reading of the statute on the agency.[137]

Thus, under *Chevron*, the Supreme Court claims (without much, if any, good empirical evidence to support the claim) that Congress intends for administrative agencies to fill any gaps that arise from either ambiguous statutory or regulatory language.[138] This theory of implied delegation, however, has always been something of a legal fiction[139]—a constitutional makeweight. This is so because "[t]he fact that Congress preferred that the agency, rather than the reviewing court, fill in the blanks says nothing of value regarding the reliability or rationality of the particular agency action at bar."[140]

Prior to *Chevron*, the federal courts directly interpreted federal statutes themselves. In practice, however, an agency's interpretation of an ambiguous statute or regulation would still receive significant judicial deference. Under *Skidmore v. Swift & Co.*, decided in 1944, a federal court had an obligation to consider seriously an agency's interpretation of an ambiguous statutory or regulatory provision, and such agency readings possessed the "power to persuade, if lacking power to control."[141] The degree of judicial deference under *Skidmore* turns on the care with which an agency considered the question, the quality of the agency's legal and policy analysis, the consistency of the agency's position regarding the question over time, and the degree to which a question's answer would benefit from being informed by agency expertise.[142] *Chevron*

137. *See Chevron*, 467 U.S. at 843–44.

138. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) (observing that "we presume that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules"); *see also* Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); *Chevron*, 467 U.S. at 843–44 (holding that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" but cautioning that "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit").

139. *See* Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 754 (2002) ("If expertise, rather than some sort of fictional delegation of lawmaking power, undergirds judicial deference to administrative interpretations of ambiguous statutory texts, judicial review will have to rely upon a sliding scale of deference, depending on the indicia of expertise associated with a particular agency decision."); *see also* 5 U.S.C. § 706(2)(A) (2012) (requiring a reviewing court to invalidate agency action if such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

140. Krotoszynski, *supra* note 139, at 755–56.

141. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

142. *See id.*; *see also* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5–7, 134–50, 271–75 (1994) (arguing that some public policy problems are better suited to resolution by one branch of government over another and that governance can be enhanced and improved if the government institution best suited to a particular task undertakes that task).

displaced *Skidmore* and replaced a deference spectrum with a jurisprudential binary code—consisting of no deference or abject deference, depending on whether a legal text is, in the reviewing court's eyes, "ambiguous."[143]

Rather than resting on pragmatic considerations of comparative institutional advantage,[144] *Chevron*'s decisional logic rests on an (unpersuasive) application of the separation of powers doctrine (namely, that Congress gets to choose whether federal courts or federal agencies will enjoy interpretative primacy).[145] Because the Supreme Court never really took *Chevron*'s congressional delegation justification very seriously and routinely considers other, more relevant factors when deciding whether to apply *Chevron*,[146] the decision does not really constrain judicial discretion much—if at all. To state the matter simply, no good reasons exist for a federal court to defer to an ill-considered and poorly reasoned agency interpretation—an interpretation that does not demonstrably reflect the benefit of agency expertise, fails to account for past agency policies and practices (and perhaps is inconsistent with those past policies and practices),[147] and was not the result of a careful and deliberative process within the agency.[148]

The Supreme Court might be open to abandoning reliance on its bogus reasoning for deference to agency interpretations of ambiguous statutory and regulatory language.[149] In *Kisor v. Wilkie*, decided in 2019, several Justices clearly signaled that going forward, judicial review would involve a more rigorous, and

---

Professor Komesar argues that "[i]nstitutional choice is difficult as well as essential" because "[t]he choice is always a choice among highly imperfect alternatives." *Id.* at 5.

143. *See Chevron*, 467 U.S. at 843–44.

144. KOMESAR, *supra* note 142, at 5–7, 134–36, 150; *see* NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 23–24 (2001) (arguing that "if all institutions deteriorate in ability as numbers and complexity increase, then we must be careful about the context (the level of numbers and complexity) from which we draw generalizations or judgments about any of these institutions [meaning courts, legislatures, and administrative agencies]" and cautioning against "[t]he implicit assumption . . . that a perfect or idealized institution is waiting in the wings").

145. *Chevron*, 467 U.S. at 842–44.

146. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 229–31 (2001) (holding that the quality of an agency's decisional process should prefigure whether or not an agency interpretation should receive *Chevron* deference); *see also* BREYER, *supra* note 28, at 105–07 (acknowledging that agency expertise and its potential relevance to a regulatory problem will prefigure whether a reviewing court will apply *Chevron*).

147. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983) (holding that an administrative agency "changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance" and that a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress").

148. *Compare Chevron*, 467 U.S. at 843–44 (relying on direct or implied delegations to justify judicial deference to agency interpretations of ambiguous statutory or regulatory texts), *with* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (setting forth the procedural and substantive considerations that should prefigure whether a reviewing court should accept an agency's interpretation of a statute or regulation).

149. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Gorsuch, J., concurring) (positing that "[i]f today's opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it").

less deferential, approach to scrutinizing agency interpretations of their own regulations.[150] In addition, all nine Justices have embraced—admittedly to varying degrees[151]—renormalizing the theoretical justification for judicial deference from a legal fiction (namely implied delegations from Congress) and instead toward what previously constituted the governing analytical consideration (namely, an agency's demonstrated application of its expertise in a context where such expertise should play a meaningful role in the attainment of Congress's statutory objectives).[152]

Unfortunately, however, Justice Kagan's Janus-like majority opinion in *Kisor* points in both the direction of the implied delegation theory[153] and also the superior expertise theory.[154] Even more worrisome, Chief Justice Roberts's concurring opinion seems to suggest that judicial deference to agency interpretations of ambiguous *statutes* should go the way of the dodo bird.[155] In my view, it would be a mistake (and a big one) to replace abject deference to agency interpretations with unthinking judicial supremacy. A better approach would be to embrace the necessity of a flexible balancing approach that affords agency interpretations deference when the context and circumstances warrant doing so.[156]

---

150. *Id.* at 2448 (Kavanaugh, J., concurring) (suggesting that enhanced review and application of the traditional tools of statutory construction when reviewing agency interpretations of their own regulations "means that courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations" and positing that although "[f]ormally rejecting *Auer* would have been a more direct approach," the majority's approach mandating more rigorous review of such agency interpretations "should lead in most cases to the same general destination" (alteration in original)). On the potential benefits of using an agency's formal explanation for the adoption of new regulations to constrain its future interpretation of those regulations, see Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012).

151. Indeed, Chief Justice Roberts's renormalization of deference from an implied delegation theory to agency expertise is crystal clear. *See Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring) (holding that a reviewing court should defer to an agency interpretation of its own regulation when it is "reasonable" and "reflect its authoritative, expertise-based, and fair and considered judgment"). This is essentially the *Skidmore* formulation. *See infra* note 152.

152. *See Skidmore*, 323 U.S. at 140 (holding that agency interpretations of a statute within its jurisdiction "while not controlling upon the courts by reason of their authority" merit deference because they "constitute a body of experience and informed judgment," and explaining that judicial deference to a particular agency interpretation should "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

153. *See Kisor*, 139 S. Ct. at 2416 ("As explained above, we give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to.").

154. *Id.* at 2417 (opining that "the agency's interpretation must in some way implicate its substantive expertise" and cautioning that "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference").

155. *See id.* at 2425 (Roberts, C.J., concurring) (observing that "[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress" and warning that "I do not regard the Court's decision today to touch upon the latter [*Chevron*] question").

156. *See* BREYER, *supra* note 28, at 103–07.

The federal courts should afford expert agencies deference for both interpretations of regulations *and* statutes when two conditions, discussed below, have been met. As it happens, congressional action is needed but this action has little, if anything, to do with the legal fiction of an "implied delegation" of interpretative primacy.

First, Congress must *expressly* and *clearly* vest an agency with the power to speak with the force and effect of law. Typically, Congress does this by vesting an administrative agency with the power to engage in notice and comment rulemaking, formal adjudications, or both. When Congress empowers an agency to speak with the force and effect of law, it signals that the agency will possess relevant expertise that justifies some margin of appreciation by reviewing courts for the agency's handiwork. By way of contrast, when an agency lacks the power to speak with the force and effect of law (for example, the EEOC[157]), Congress sends a clear signal to the federal courts that they should take the laboring oar in resolving any questions that may arise regarding the scope or meaning of the agency's organic act.

Second, it is not enough that Congress empowers an agency to speak with the force and effect of law—the agency must actually *do this*. Although the Supreme Court has not, strictly speaking, limited *Chevron* deference to instances where an agency uses relatively formal procedures (meaning informal notice and comment rulemaking or formal adjudication), it has walked right up to this line.[158] *Mead Corp.* correctly tethers judicial deference to an agency actually demonstrating that it has brought relevant expertise to bear when deciding how best to go about implementing and enforcing a statute.[159]

We must hope that the Supreme Court does not simply exchange one constitutional makeweight for another in the context of agency interpretations of statutes (as opposed to regulations). It is clear beyond peradventure that going forward, some variant of the *Skidmore* rule will govern judicial review of agency interpretations of regulations crafted by the agency in the first place. This is well and good—for the reasons ably articulated by Chief Justice Roberts and Justices Kagan, Gorsuch, and Kavanaugh. However, the same approach should also be applied to agency interpretations of ambiguous statutes.

---

157. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1737, 1738–39 (2020) (independently interpreting Title VII's prohibition of sex discrimination to encompass discrimination based on sexual orientation or transgender status and without providing any deference to the EEOC's interpretation of the statute); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256–57 (1991) (declining to defer to the EEOC's interpretation of Title VII on the question of the statute's extraterritorial application because "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations" and, accordingly, the EEOC's statutory interpretations qualify only for *Skidmore* deference (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976))), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071., 1077–78.

158. *See* United States v. Mead Corp., 533 U.S. 218, 229–31 (2001) (conditioning *Chevron* deference on an agency using procedures that indicate an intention to speak with the force and effect of law).

159. *Id.* at 227–28.

In *Kisor*, Justice Kavanaugh's opinion, and to a lesser degree Chief Justice Roberts's opinion, both seem to signal that less judicial deference might be requisite when an agency parses its own organic act. The most obvious alternative to *Skidmore* deference would be for judges independently to find concrete meaning in statutes—perhaps through recourse to things like randomly selected dictionaries.[160] Replacing undue deference to agency interpretations of statutes with the false certainty of interpretation-by-dictionary—when scant or even no evidence exists to suggest that Congress actually crafted statutory language with a particular dictionary definition in mind—would replace judicial abdication with judicial usurpation.[161] Taking this approach would be to reject one problematic approach for another: Undue judicial deference for judicial fiat.

Contrary to Justice Scalia's vociferous objections,[162] it makes perfect sense for a reviewing court and an agency to engage in an ongoing dialectic about how a statute should best be interpreted and applied. Depending on the nature of the statutory question, an agency's expertise might have more, or less, potential relevance. For example, the Supreme Court does not generally defer to an agency's interpretation of judicial review provisions contained in an organic act—even if the agency can speak with the force and effect of law and has purported to do so. Why? Because, Justice Sonia Sotomayor tells us, "The scope of judicial review . . . is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency."[163] Of course, this is not really the reason for withholding *Chevron* deference in this context.

The real reason, the better reason, and the reason that should be controlling, is that an agency lacks any special competence in parsing the mechanics or standards of judicial review. Simply put, the agency cannot plausibly claim any comparative institutional advantage over a court in interpreting and applying judicial review requirements.[164] Indeed, such questions are particularly well-suited to federal judges rather than to bureaucrats.

So too, when an agency attempts to radically expand or contract the scope of its regulatory authority, good reasons exist for a reviewing court to adopt a skeptical stance and withhold judicial deference.[165] The "major questions"

160. *See, e.g.*, MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225–28 (1994).

161. *See* BREYER, *supra* note 28, at 116–18, 124 (rejecting "literalism" as an "unsatisfying" interpretative approach to the Constitution and positing that "[t]he literalist's tools—language and structure, history and tradition—often fail to provide objective guidance").

162. *See Mead Corp.*, 533 U.S. at 239–41 (Scalia, J., dissenting) (objecting to applying *Skidmore* deference when an agency interpretation does not merit *Chevron* deference and arguing vociferously that this approach "is neither sound in principle nor sustainable in practice").

163. Smith v. Berryhill, 139 S. Ct. 1765, 1778 (2019).

164. *See* KOMESAR, *supra* note 142, at 4–7, 121–43.

165. *But cf.* City of Arlington v. FCC, 569 U.S. 290, 301–05 (2013) (holding that an agency may receive *Chevron* deference when it determines the scope of its own regulatory authority or jurisdiction).

doctrine (also known as the "elephants in mouse holes" canon), reflected in decisions such as *King v. Burwell*[166] and *FDA v. Brown & Williamson*,[167] plainly incorporates a junior varsity version of this rule. An agency should not be able to rewrite the scope of its regulatory authority to suit its liking. If a question of statutory construction implicates central questions of social and economic policy, an agency's expertise probably will be of rather limited relevance to asking and answering it. In such circumstances, courts, not agencies, should take primary responsibility for interpreting a statute's meaning because such questions are not typically rooted in expert knowledge implicating science and technology (i.e., matters that especially call out for agency expertise).

In short, Justice Scalia's herculean effort to restrain judicial discretion in cases involving judicial review of an agency's interpretation of either a statute or a regulation was well-intentioned but ill-advised. There is simply no alternative to courts exercising sound discretion when deciding whether and to what degree they should afford deference to an administrative agency's interpretation of a law or regulation. Although the federal courts, under *Marbury*, have a constitutional obligation to "say what the law is,"[168] they also lack the scientific and technical expertise required to determine how best to operationalize a complicated regulatory scheme that seeks to use the best available science and technology to reduce air pollution or to discern the requirements that must be met for the safe operation of a nuclear power plant.[169] Accordingly, judicial deference has to exist on something of a continuum—from relatively little deference on questions involving the mechanics and standards governing judicial review of agency action, to relatively robust deference when deciding how best to lower air pollution generated by coal-fired industrial plants.

Aristotle admonished in his *Nichomachean Ethics* that virtue typically constitutes the "mean" between two extremes (meaning too much or too little of the requisite quality).[170] To provide an example, bravery (or courage) constitutes the virtuous mean between the problematic extremes of cowardice and foolhardiness. So too, generosity (or magnanimity) serves as the virtuous mean between the extremes of being either a miser or a spendthrift. Judicial

166. King v. Burwell, 576 U.S. 473 (2015).

167. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

168. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that "[i]t is emphatically the province and duty of the judicial department to say what the law is" and explaining that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule").

169. *See* Ronald J. Krotoszynski, Jr., *"History Belongs to the Winners": The Bazleon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 1005–11 (2006).

170. ARISTOTLE, THE NICHOMACHEAN ETHICS 23–30, paras. 1106a5–1109b (Terence Irwin trans., 2d ed. 1999); *see* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 286–88 (1996) (describing and discussing the Aristotelian concept of the "virtuous mean" and noting that it lies between problematic extreme forms of behavior that reflect either a surfeit or a shortage of a particular character trait).

review of agency interpretations of both laws and regulations should seek to find and hold the virtuous mean between the vicious extremes of abject and undue deference[171] and judicial overreaching into realms for which Article III judges lack the requisite experience and expertise.[172]

Taking this approach will require that the federal courts learn to live with some play in the joints. Simply put, the transparent and principled exercise of discretion cannot be avoided in the context of judicial review of a federal agency's interpretation of an ambiguous statutory or regulatory provision. The federal courts should calibrate deference to agency interpretations of laws and regulations based on the precise facts and circumstances of a case at bar. In truth, this is actually what the federal courts have been doing already—although they have tried to obfuscate this fact by claiming that they will defer to "reasonable" agency work product (but finding myriad excuses for actually not deferring reliably in practice). Additionally, the open exercise of judicial discretion has been a central feature of other aspects of judicial review of agency decision making (for example, assessing whether an agency's procedures comport with the requirements of procedural due process).[173]

Judicial review of agency action would be significantly improved if the federal courts abandoned their reliance on a constitutional makeweight (namely *Chevron*) and instead simply owned up to what they have actually been doing since *Skidmore* (and continued doing even after *Chevron* and *Auer*). Perhaps paradoxically, being intellectually honest—admitting that the level of judicial deference owed an agency critically depends on the nature of the question, the relevance of agency expertise to answering it correctly, and convincing evidence that the agency actually brought its expertise and experience to bear in crafting its answer—would make judicial review of agency interpretations more, rather than less, predictable.

Explicating and expanding on the mechanics of *Skidmore* would renormalize judicial review of agency actions and put all the relevant players (agencies, regulated enterprises and trade associations, public interest groups,

171. *Seminole Rock*'s formulation of the governing standard of review applicable to agency interpretations of their own regulations provides a clear example of deference gone awry. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (requiring judicial deference unless an agency's interpretation "is plainly erroneous or inconsistent with the regulation").

172. *See* KOMESAR, *supra* note 142, at 134–40. Komesar explains that "[f]rom the perspective of technical expertise, [administrative] agencies with their narrower scope and more specialized staffing are superior to [more] generalist trial court judges and randomly chosen juries." *Id.* at 140. For tasks particularly calling for the ability to apply highly specialized knowledge, "[j]uries and judges can easily be unfavorably contrasted with the technically more expert bureaucrats of administrative agencies." *Id.* at 139.

173. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (applying a three-part balancing test to assess whether an agency's procedures comport with procedural due process and explaining that due process must be flexible and account for "time, place and circumstances" (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)). Judicial deference doctrines should resemble procedural due process analysis and reflect context-sensitive balancing—not rigid categorical rules that restrict discretion but largely fail to take into account highly relevant factors and considerations.

practicing lawyers, and the inferior federal courts) on clear notice of the rules of the road in this important area of administrative law. To be sure, because *Skidmore* relies on a spectrum of deference, rather than a binary yes/no analysis, as a constitutional rule, it overtly and transparently vests judges with more discretion than *Chevron*. Nevertheless, taking this approach would have the distinct virtue of embracing judicial candor.

C. Strict Scrutiny Review of Government-Sponsored Affirmative Action Programs

In theory, under controlling equal protection precedents, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[174] Strict scrutiny requires that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[175] In recent decades, the Supreme Court has purported to use strict scrutiny when reviewing race-based admissions policies adopted by public institutions of higher learning.[176] In practice, however, these decisions do not actually apply the strict scrutiny that the Court has historically applied in the context of government-sponsored racial discrimination.[177] Instead, the Court appears to apply an unspoken form of intermediate scrutiny.[178]

In *Korematsu v. United States*, the Supreme Court held "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and, accordingly, the federal courts "must subject them to the most rigid scrutiny."[179] Although *Korematsu* dealt with the military's forced relocation and imprisonment of U.S. citizens of Japanese ancestry, the Supreme Court has repeatedly applied strict scrutiny to race-based government classifications in a very wide variety of contexts including familial relationships,[180] targeted

174. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

175. *Id.*

176. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); *Fisher II*, 579 U.S. 365 (2016).

177. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); McLaughlin v. Florida, 379 U.S. 184 (1964); Norwood v. Harrison, 413 U.S. 455 (1973); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Palmore v. Sidoti, 466 U.S. 429 (1984); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *Adarand*, 515 U.S. 200; Johnson v. California, 543 U.S. 499 (2005); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

178. *See infra* text and accompanying notes 185–244.

179. Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

180. *See Palmore*, 466 U.S. at 433–34 (reversing a Florida family court custody decision that denied a mother custody of her daughter because "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody" and "the law cannot, directly or indirectly, give [private biases] effect"); *McLaughlin*, 379 U.S. at 192, 196 (holding that a Florida law that prohibited interracial couples from cohabitating faced "a heavy burden of justification" under the Equal Protection Clause that required "the 'most rigid scrutiny'" and proceeding to invalidate it).

government support to private institutions that practice racial discrimination,[181] government contracts,[182] and the penal system.[183] Consistent with its more general approach to government racial classifications, the Supreme Court claims to apply strict scrutiny when analyzing whether a public college or university has adopted a constitutionally-acceptable affirmative action admissions program.[184]

The root of the Supreme Court's insincerity goes back to its first merits ruling on the permissibility of race-conscious admissions policies, *Regents of University of California v. Bakke*.[185] In *Bakke*, the University of California-Davis Medical School maintained a policy that reserved 16/100 seats in its entering class for members of designated minority groups. The Justices splintered badly, dividing 4 – 1 – 4, on whether the medical school's policy was constitutional.[186]

Justice William J. Brennan Jr., writing for himself and three other Justices, applied intermediate scrutiny to the program and concluded that "[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past . . . prejudice."[187] Under this approach, when a public university seeks to remediate the present-day effects of either governmental or social discrimination, the government's objective is constitutionally permissible.

Justice John Paul Stevens, writing for himself and three other Justices, did not reach the constitutional question, instead finding that the medical school

181. *See Bob Jones Univ.*, 461 U.S. at 604 (holding that the Internal Revenue Service could deny a pervasively discriminatory university charitable status because "eradicating racial discrimination in education" is a compelling government interest and an "interest [that] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs"); *Norwood*, 413 U.S. at 464–66 (holding that "if [a private] school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination" and emphasizing that "[r]acial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish'" (third alteration in original) (quoting Lee v. Macon Cnty. Bd. of Educ., 267 F. Supp. 458, 475–76 (M.D. Ala. 1967))).

182. *See J.A. Croson Co.*, 461 U.S. at 493 (invalidating a 30% set-aside for minority contractors on equal protection grounds, explaining that "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics," and holding that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool").

183. *See* Johnson v. California, 543 U.S. 499, 512–13 (2005) (applying strict scrutiny to a California state policy of segregating new inmates by race for up to sixty days and explaining that "[w]e did not relax the standard of review for racial classifications in prison in *Lee*, and we refuse to do so today").

184. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher I, 570 U.S. 297 (2013); *Fisher II*, 579 U.S. 365 (2016); *see also* Ronald J. Krotoszynski Jr., *The Argot of Equality: On the Importance of Disentangling "Diversity" and "Remediation" as Justifications for Race-Conscious Government Action*, 87 WASH. U. L. REV. 907, 916 (2010).

185. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265.

186. *Id.*

187. *Id.* at 325 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

had violated Title VI by discriminating against Bakke based on race.[188] Applying the statute's plain language, these Justices concluded that the medical school's reservation of sixteen seats for minority applicants violated the Civil Rights Act of 1964.

Justice Lewis Powell, who technically only wrote for himself, cast the deciding vote and wrote the opinion that lower courts later followed.[189] He posited that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"[190] and "[w]hen [government decisions] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[191]

Turning to the particulars of the medical school's admission program, Justice Powell noted that its purposes included "countering the effects of societal discrimination," "increasing the number of physicians who will practice in communities currently underserved," and "obtaining the educational benefits that flow from an ethnically diverse student body."[192] He rejected all of the medical school's objectives, save "the attainment of a diverse student body."[193] Even though the medical school sought to promote a permissible objective, "it [wa]s evident that the Davis special admissions program involve[d] the use of an explicit racial classification never before countenanced by this Court."[194] Because the medical school had adopted an explicit racial quota, the admissions program was "invalid under the Fourteenth Amendment."[195]

On the other hand, however, Justice Powell observed in dicta that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin," leaving the door open for future affirmative action programs that use race as a factor (but not the *only* diversity factor).[196] Although Justice Powell was the only vote for applying strict scrutiny but permitting race-conscious admissions programs, later Supreme Court decisions have broadly endorsed his approach.[197]

Twenty-five years later, in *Grutter v. Bollinger*,[198] the Court considered a University of Michigan Law School (UMLS) admissions policy that "require[d] admissions officials to evaluate each applicant based on all the information

188. *Id.* at 408–09 (Stevens, J., concurring in part and dissenting in part).
189. *Id.* at 269.
190. *Id.* at 291.
191. *Id.* at 299.
192. *Id.* at 306.
193. *Id.* at 311.
194. *Id.* at 319.
195. *Id.* at 319–20.
196. *Id.* at 320.
197. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003).
198. *Id.* at 306.

available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School."[199] The policy also encompassed "diversity," and although it did not restrict the concept to racial or ethnic diversity, it nevertheless "reaffirm[ed] the Law School's longstanding commitment to . . . 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics[,] and Native Americans."[200] UMLS sought to enroll a "critical mass" of minority students drawn from these groups in order to obtain their "unique contributions to the character of the Law School."[201]

Writing for the 5 – 4 majority, Justice O'Connor explained, when reviewing the constitutionality of the UMLS's diversity program, that "[s]ince this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies."[202] Importantly, the *Grutter* Court explicitly "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[203] The Court also noted that "strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."[204] Consistent with this approach, the Court held that the "Law School has a compelling interest in attaining a diverse student body," and noted that the majority's "holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[205]

So far, so good. But a reasonable observer might question the sincerity of Justice O'Connor's position. When applying strict scrutiny, she gave the law school every benefit of the doubt, observing that "[t]he Law School's admissions program bears the hallmarks of a narrowly tailored plan" and that "[u]niversities can . . . consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."[206] More specifically, the law school had "sufficiently considered

199. *Id.* at 315.

200. *Id.* at 315–16.

201. *Id.* at 316.

202. *Id.* at 323.

203. *Id.* at 325.

204. *Id.* at 327.

205. *Id.* at 328.

206. *Id.* at 334. Professor Jessica Bulman-Pozen thoughtfully observes that "*Grutter*'s insistence on individualized consideration not only creates a tension within the opinion, but also conflicts with the emphasis on objective decision-making and numerical accountability that long has guided employers' affirmative action

workable race-neutral alternatives," such as a lottery system and decreasing emphasis on GPA and test scores and properly concluded that "these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."[207] However, the devil is in the details, and the details strongly suggested that the law school was matching admissions offers to the demographic composition of its applicant pool.

Justice Kennedy, concurring in part and dissenting in part, questioned whether the majority actually applied true strict scrutiny and argued that its approach to "strict scrutiny" had "undermine[d] both the test and its own controlling precedents."[208] He explained that "[t]he Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal,"[209] reflecting an uncritical "accept[ance of] the . . . Law School's . . . assurances that its admissions process meets with constitutional requirements."[210] For example, although he was open to the concept of a "critical mass" of particular minority law students, the imprecision in its use and the radical differences in the numbers of Black, Latino, and Native American students suggested that the concept, as actually implemented, was a "delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."[211]

Justice Kennedy's opinion and conclusion possess substantial persuasive force. In point of fact, the law school appeared to issue offers of admission based on the demographic composition of the applicant pool but, unlike U.C. Davis's medical school, wrapped this practice in the "verbal cellophane"[212] of an open-ended, holistic diversity program. Yet, numbers do not lie—for five consecutive years, the offers of admission tracked, almost perfectly, the demographic composition of the UMLS applicant pool (at least for Black, Latino, and Native American applicants).[213]

More specifically, UMLS failed to show any principled method to select diverse applicants, failed to define what a "critical mass" entails, and offered totally unsubstantiated claims that a less race-conscious approach would not work.[214] To the last point, the Court in *Croson* specifically rejected "blind judicial

plans under Title VII." Jessica Bulman-Pozen, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1420 (2006).

207. *Grutter*, 539 U.S. at 340.

208. *Id.* at 387 (Kennedy, J., concurring in part and dissenting in part).

209. *Id.* at 388.

210. *Id.* at 388–89.

211. *Id.* at 389.

212. United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting), *overruled by* Marchetti v. United States, 390 U.S. 39 (1968).

213. *Grutter*, 539 U.S. at 383–84 (Rehnquist, J., dissenting).

214. For example, many law schools today will admit students either without an LSAT test score or with an alternative test score (such as the GRE). *See* Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 TEMP. L. REV. 799, 800 ("The number of law schools accepting the Graduate Record

deference" as having "no place in equal protection analysis."[215] Genuine strict scrutiny review should require greater skepticism on the majority's part; rather than skepticism, however, Justice O'Connor's majority opinion gave the law school every possible benefit of the doubt. Provided that the law school proffered a plausible justification for its actions, strict scrutiny's narrow tailoring requirement was satisfied.

Years later in *Fisher v. University of Texas at Austin* (*Fisher I*),[216] the Supreme Court considered a challenge to the University of Texas-Austin's admissions policy that used race as "one of many 'plus factors,'" and, although not assigning race a numerical value, recognized that "the University has committed itself to increasing racial minority enrollment on campus" with it "refer[ring] to this goal as a 'critical mass.'"[217] Important to the policy was the Texas Top Ten Percent Law,[218] which created an affirmative action program that "grants automatic admission to any public state college, . . . to all students in the top 10% of their class at high schools in Texas."[219] The Top Ten Percent Law

Examination (GRE) as an alternative to the Law School Admission Test (LSAT) continues to grow."); Kathryn Rubino, *25 Percent of Law Schools Say They Plan to Accept the GRE*, ABOVE THE LAW (Sept. 18, 2017, 9:40 AM), https://abovethelaw.com/2017/09/25-percent-of-law-schools-say-they-plan-to-accept-the-gre/ (reporting that, as of 2017, 25% of law schools would accept the GRE and not require submission of an LSAT score); *see also* Hilary G. Escajeda, *Legal Education: A New Growth Vision Part I—The Issue: Sustainable Growth or Dead Cat Bounce? A Strategic Inflection Point Analysis*, 97 NEB. L. REV. 628, 710 (2019) (observing "[t]he end of the Law School Admission Test (LSAT)'s monopoly" as a means of gaining admission to well-regarded law schools); *id.* at 710–11 ("[I]n a tactical move to broaden the law student applicant pool and respond to plummeting enrollments, Harvard, Northwestern, Georgetown, Columbia, University of Southern California-Gould, New York University, Washington University, and an expanding list of other law schools will accept the Graduate Record Examination (GRE) test in lieu of the LSAT for admission."); Mona E. Robbins, *Race and Higher Education: Is the LSAT Systemic of Racial Differences in Education Attainment?* (Aug. 20, 2017) (unnumbered working paper), https://repository.upenn.edu/spur/18 ("Law school is the least diverse graduate school program [in higher education] . . . . One of the most significant barriers has shown to be the Law School Admissions Test."). Today, some law schools also will accept the Graduate Management Admission Test (GMAT) or have simply abandoned requiring the submission of any standardized test score at all. Escajeda, *supra*, at 711–13. To be sure, to adopt such an approach in 2003, UMLS would have needed to seek and obtain a waiver from the ABA's governing standards for law school admissions policies at an accredited law school, but the law school never sought a waiver, even when other law schools sought and received them (for example, permitting the admission of a law school's home university's alumni without an LSAT score). In the 2000s, the University of Alabama School of Law sought and obtained such a waiver, and the device facilitated the enrollment of a very capable—and diverse—group of high-GPA University of Alabama Honors College undergraduate alumni. This approach—namely not placing undue reliance on standardized test scores that empirical data show to have systematically disadvantaged racial minority applicants—constitutes a race-neutral means of achieving diversity in a law school's entering class. *See* Dorothy A. Brown, *The LSAT Sweepstakes*, 2 J. GENDER, RACE & JUST. 59 (1998); William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055 (2001). Yet, UMLS never attempted to use this alternative to an overtly race-conscious approach, and the Supreme Court was fine with this failure to think outside the box. Narrow tailoring in the context of strict scrutiny review should demand more from a government entity seeking to show the absolute necessity of a race-conscious classification.

215. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989).

216. *Fisher I*, 570 U.S. 297 (2013).

217. *Id.* at 300–01, 305.

218. *Id.* at 305.

219. *Id.*

brings in 75% of the incoming class, and the internal admissions policy that considers race as a diversity factor fills the remaining 25% of the freshman class.[220]

This time, it was Justice Kennedy who claimed strict scrutiny should apply, but he ultimately traveled the same path that Justice O'Connor charted in *Grutter*. Writing for the majority in *Fisher I*, Justice Kennedy scolded the United States Court of Appeals for the Fifth Circuit for failing to apply strict scrutiny to the university's affirmative action program.[221] The Fifth Circuit upheld the plan because of the "good faith" of the university, giving the University of Texas great deference.[222]

In Justice Kennedy's view, the lower court had applied the wrong standard of review.[223] Accordingly, the *Fisher I* majority remanded the case for a proper application of strict scrutiny by the lower federal courts.[224] In explaining the proper application of strict scrutiny, Justice Kennedy noted that "there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation."[225] This means that "[t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal."[226] Justice Kennedy explained that when conducting strict scrutiny review of a race-conscious university admissions policy, "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes," but, nevertheless, "it remains at all times the university's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'"[227] He emphasized that "[o]n this point, the University receives no deference."[228]

Three years later in *Fisher II*,[229] the Court considered whether the UT-Austin plan was sufficiently narrowly tailored to meet strict scrutiny. Once again writing for the majority, Justice Kennedy affirmed the Fifth Circuit's holding that the university's admissions policies were sufficiently narrowly tailored and therefore passed constitutional muster.[230] He noted that race enters the admissions process "at one stage and one stage only—the calculation of the [Personal Achievement Score (PAS)]," and that "there is no dispute that race is

220. *Fisher II*, 579 U.S. 365, 373 (2016).
221. *Fisher I*, 570 U.S. at 313.
222. *Id.*
223. *Id.* at 303.
224. *Id.*
225. *Id.* at 311.
226. *Id.*
227. *Id.* at 311–12 (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)).
228. *Id.* at 311.
229. *Fisher II*, 579 U.S. 365 (2016).
230. *Id.* at 387–89.

but a 'factor of a factor of a factor' in the holistic-review calculus."[231] Yet, he acknowledged that "[t]here is also no dispute, however, that race . . . can alter an applicant's PAS score."[232]

Looking specifically at the means used to justify the ends, Justice Kennedy reasoned that "it is not a failure of narrow tailoring for the impact of racial consideration to be minor."[233] Indeed, "[t]he fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality."[234] He found that less race-conscious alternatives would not secure a diverse entering class and concluded that "[t]he University ha[d] thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored."[235] Justice Kennedy observed that "[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission"[236] and that "public universities, like the States themselves, can serve as 'laboratories for experimentation.'"[237]

Justice Samuel Alito wrote a scathing dissent that focused much more closely on the particulars of the university's affirmative action plan. Joined by Chief Justice Roberts and Justice Clarence Thomas, Justice Alito wrote that the university clearly had failed to meet the legal standard for strict scrutiny that Justice Kennedy himself set out in *Fisher I*—namely, invoking "the educational benefits of diversity" with no identifiable metric, maintaining an undefined and totally amorphous "critical mass," and failing to consider (at all) whether individual classes at the university actually featured diverse learning environments.[238] Given these circumstances, "the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny."[239] Justice Alito's concerns seem to be well-founded—at least if a traditional strict scrutiny review applies in this context.[240]

In truth, Justice Kennedy and the majority applied something less demanding than strict scrutiny. As Professor Ronald Turner has argued, one can "[c]ompare and contrast [strict scrutiny here] with [the view] taken by

231. *Id.* at 374–75 (quoting Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009), *aff'd,* 631 F.2d 213 (5th Cir. 2011), *vacated,* 570 U.S. 297 (2013)).

232. *Id.* at 375.

233. *Id.* at 384.

234. *Id.* at 384–85.

235. *Id.* at 388.

236. *Id.*

237. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

238. *Id.* at 401–02 (Alito, J., dissenting).

239. *Id.* at 401.

240. Justice O'Connor noted similar concerns in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight.").

Justice Kennedy in his *Grutter* dissent, wherein he argued that '[d]eference is antithetical to strict scrutiny, not consistent with it'" and instead uncritically "accept[ed] the institution's assurance that it was acting in good faith."[241] In Turner's view, Justice Kennedy's "differing approach to deference [in *Fisher II*], whether because of a change of mind or a change of heart, is telling and critical to his vote and opinion."[242] In short, Justice Kennedy said one thing (strict scrutiny review applies) while actually doing another (by applying a forgiving standard of review more akin to intermediate scrutiny).

Even more problematic, the *Fisher II* majority failed to acknowledge the remedial nature of the "diversity" plans in question. Indeed, the approaches taken by Justices Powell, O'Connor, and Kennedy all effectively credit remedial measures as a component in public college and university admissions programs without having the courage or intellectual honesty to say so directly. In this regard, consider Justice O'Connor's logic in *Grutter* that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[243] If the University of Michigan Law School's primary goal was truly diversity rather than remediation, wouldn't the plan be necessary to ensure diversity twenty-five years from now? By way of contrast, at some point in time, remedial measures should succeed in ending the present-day effects of past discriminatory government actions and, at that point, come to an end.[244] Hidden in plain sight is Justice O'Connor's recognition that schools are attempting to remediate past wrongs that implicate both de jure and de facto forms of racial discrimination. The same holds true for the university admissions policy in *Fisher*.

The Supreme Court's evolving standards of strict scrutiny as applied to race-based public college and university admissions policies—as shown by Justice Kennedy's inconsistent, if not incoherent, opinions—evidence makeweight status. Like other makeweights, the Court's opinions lack precision

241. Ronald Turner, *Justice Kennedy's Surprising Vote and Opinion in* Fisher v. University of Texas at Austin, WAKE FOREST L. REV. ONLINE (Oct. 31, 2016), http://wakeforestlawreview.com/2016/10/ justice-kennedys-surprising-vote-and-opinion-in-fisher-v-university-of-texas-at-austin/ (fourth alteration in original) (quoting Grutter v. Bollinger, 539 U.S. 306, 394–95 (2003) (Kennedy, J., dissenting)).

242. *Id.*

243. *Grutter*, 539 U.S. at 343.

244. United States v. Fordice, 505 U.S. 717, 728–32 (1992) (holding that the Equal Protection Clause requires a state government not merely to cease engaging in de jure racial discrimination but also to remediate any and all present-day effects of such discrimination); *see* Freeman v. Pitts, 503 U.S. 467, 485 (1992) ("The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system. This is required in order to ensure that the principal wrong of the de jure system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present." (emphasis omitted)); *see also* Cory Todd Wilson, Note, *Mississippi Learning: Curriculum for the Post-*Brown *Era of Higher Education Desegregation*, 104 YALE L.J. 243, 243–45 (1994) ("*Brown* has not eliminated many of the vestiges of de jure segregation." (emphasis omitted)); *id.* (criticizing the Supreme Court for its failure to require effective remediation of the present-day effects of past discrimination due, in large part, to "years of standardless jurisprudence, offering little hope for an effective remedy of dual-college systems" and arguing that the federal courts' efforts failed to generate a viable remedial program capable of effective enforcement).

and consistency and thus strip citizens, similarly situated defendants, and lower courts of clear rules of the constitutional road. This raises the question: What, if anything, can the Court do to remedy the misalignment between what it says it is doing and what it is actually doing in this context?

Perhaps the Justices should simply admit to what they have actually been doing: Acknowledge forthrightly that the Court is applying a form of intermediate—rather than strict—scrutiny to public college and university affirmative action programs. The de facto standard of review requires an "important governmental objective[] and must be substantially related to achievement of those objectives."[245] On a few occasions, the Supreme Court has upheld affirmative action programs that incorporate gender classifications under intermediate scrutiny.[246] The governmental interest in increasing diversity in higher education would almost certainly qualify as an "important governmental objective[]."[247] Moreover, the more relaxed requirement of the policy being "substantially related" to the government's remedial and diversity objectives would allow the Court to be more honest about the race-based admissions policies it reviews and upholds rather than provide a distorted version of strict scrutiny review.

A common thread in both *Grutter* and *Fisher* is that non-minorities also benefitted from the program, or at least could conceivably benefit.[248] Justice O'Connor mentioned that non-minority applicants with lower LSAT scores were also admitted on diversity grounds,[249] seeming to seal the deal for her that the policy was permissible.[250] This reasoning—that so long as, in theory at least, all students competed for all spots, and no strict quota applied—would appear to satisfy the Court's version of "strict scrutiny lite" and would surely pass intermediate scrutiny. This would be so even where, as in *Grutter*, the school tracks the demographics for offers of admission and the applicant pool.[251]

Moreover, *Fisher I* and *II* tell us that a percentage plan (Top 10%) with implied, rather than overt, racial remediation goals is constitutionally

245. Craig v. Boren, 429 U.S. 190, 197 (1976).

246. *See* Califano v. Webster, 430 U.S. 313, 317 (1977) (upholding a provision of the Social Security Act that calculated benefits for women more advantageously than for men because the goal was to "redress[] our society's longstanding disparate treatment of women"); Schlesinger v. Ballard, 419 U.S. 498, 508–10 (1975) (upholding a federal statute that gave female Naval officers four more years of commissioned service before mandatory discharge because in the military, men had more opportunities for promotion than women).

247. *Craig*, 429 U.S. at 197.

248. Bulman-Pozen, *supra* note 206, at 1417–18, 1420; Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34–46 (2002). *But cf.* Krotoszynski, *supra* note 184, at 910 ("[T]he Supreme Court's own invocation of 'diversity' as a basis for race-conscious government action has not reflected a consistent and coherent use of nomenclature.").

249. Grutter v. Bollinger, 539 U.S. 306, 338 (2003).

250. *Id.* at 338–39.

251. *See* PETER H. SCHUCK, MEDITATIONS OF A MILITANT MODERATE 12–18 (2006); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 519–21, 559–65 (2007).

acceptable.[252] We also know that a set quota[253] or an explicit boost in an applicant's admissions score[254] is not constitutionally acceptable. One might infer that the explicitness of the racial preference provides the key to whether the affirmative action program is constitutional. A public college or university may seek to remediate the effects of social discrimination provided that its "diversity" program is not limited to race or ethnicity and the means used to achieve racial diversity are facially race-neutral. The constitutional bottom line is that affirmative action policies designed to achieve both diversity and remediation goals are permissible—if drawn up with sufficient care.

In trying to disentangle a public college's or university's motive in adopting a "diversity" program, it seems reasonably clear that these programs seek to promote *both* "diversity" and "remediation."[255] By correcting for pervasive forms of social discrimination that adversely affect educational outcomes, these policy initiatives represent a larger, broader, and quite legitimate effort to create and maintain a diverse learning environment.[256] Thus, the truth of the matter is that affirmative action programs work synergistically to redress structural inequalities that adversely impact educational achievement (despite a comparable capacity for learning) and create broadly diverse learning environments on campus that best prepare students for life and work in a diverse, pluralistic society.

In many ways, the application of strict scrutiny that the Court applied in *Grutter* and *Fisher* is akin to setting a speed limit.[257] Often, a speed limit is set knowing that drivers will exceed it—i.e., many, perhaps most, drivers will go thirty-four in a twenty-five miles per hour zone.[258] The Justices advocating for

252. *See Fisher II*, 579 U.S. 365, 385–88 (2016).

253. *See Grutter*, 539 U.S. at 334.

254. *See* Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

255. Krotoszynski, *supra* note 184, at 915, 976–77.

256. *See id.* at 912, 914–15, 925–27, 932–33 (discussing contexts in which diversity is self-evidently a compelling government interest, positing that remediating social discrimination might well lead courts "to maintain the formal rhetoric rejecting remediation of social discrimination, while at the same time giving a wink and a nod to thoughtful programs that have this purpose and effect notwithstanding being labeled efforts to promote 'diversity'"); *id.* at 932 ("In contexts such as higher education or the military, one can certainly mount a strong case that diversity bears a significant relationship to the quality of the government's program or the program's efficacy in advancing the government's objectives.").

257. *See* JOHN G. MILLIKEN ET AL., NAT'L RSCH. COUNCIL, MANAGING SPEED: REVIEW OF CURRENT PRACTICE FOR SETTING SPEEDS AND ENFORCING SPEED LIMITS 21–24 (1998).

258. *Id.* at 29 ("In part because of driver underestimation or misjudgment of the effects of speed in driving, most drivers in the United States do not interpret speed limits as rigid thresholds that must be observed," and most drivers "have come to expect enforcement 'tolerances' of up to 10 mph (16 km/h)"); *see* JOHN L. CAMPBELL ET AL., NAT'L RSCH. BOARD, HUMAN FACTORS GUIDELINES FOR ROAD SYSTEMS 17-9 (2010) ("It is quite clear from both everyday observation and existing research data that most drivers do not comply with posted speed limits," reporting that many drivers exceed posted speed limits by five to ten mph and positing that "most drivers will drive at what they consider an appropriate speed regardless of the speed limit."). Because drivers in the United States have come to expect a range of "enforcement tolerance," state and local governments routinely take this expectation into account when establishing both speed limits and speed limit enforcement policies. *See* MILLIKEN ET AL., *supra* note 257, at 7–11, 105–06. Strict speed limits can be self-defeating. When speed limits are set artificially low, compliance actually suffers. *See id.* at 10–11

strict scrutiny seem to take the same approach by setting the standard of review for remedial affirmative action programs in higher education at strict scrutiny. They do so knowing that affirmative action programs that meet intermediate scrutiny will not be invalidated. Yet, they seem to fear that if they were to say "intermediate scrutiny is the standard," then rational basis review would quickly become the reality (as noted by Justice Kennedy in *Parents Involved*[259]). Indeed, some Justices appear to have adopted precisely this approach—claiming intermediate scrutiny review but effectively deferring to any theoretically rational affirmative action program.[260]

However, an important difference exists between a constitutional court and a local cop wielding a radar gun. The Supreme Court is setting a standard that others must apply (including lower federal courts, government officials, and practicing lawyers). A rule that is not applied as stated is highly conducive to chaos in the legal system, as a multitude of stakeholders must fight amongst themselves over the actual rule that limits the scope of race-conscious government action.[261] As I have observed previously, "[b]oth the conservative and liberal wings of the Court are guilty of malapropism in the use of key terms of art such as remediation, diversity, and affirmative action."[262]

One should also note that the need for these programs arises from gross disparities in K–12 public school funding (which remains largely based on local property taxes).[263] Funding disparities invariably lead to serious differentials in educational outcomes based entirely on the accident of geography (namely, the ZIP code where a child currently lives).[264] Stated plainly, neither substantive due process nor equal protection principles require a state to equalize the quality of public education.[265] The widely different levels of access to high-quality public K–12 education lead to the reality that it is unlikely a poor Black or Brown child

("Neighborhood pressures may result in setting very low speed limits on residential streets, but often they are not enforced—or enforcement tolerances are large—and compliance is poor even by some neighborhood residents.").

259. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 791 (2007) (Kennedy, J., concurring).

260. *See id.* at 803–70 (Breyer, J., dissenting) (calling for a more permissive strict scrutiny that appears to constitute nothing more than a form of traditional, meaning highly deferential, rational basis review). *But cf.* Krotoszynski, *supra* note 184, at 970–71 ("[T]he means selected [by Seattle], aggregating all people of color into one undifferentiated mass and treating all people of color as essentially fungible, lacked even a rational relationship to a plausible conception of racial diversity in the public schools. . . . [and, accordingly,] [t]o vote to uphold such a program is essentially to adopt a rule that commits to the political safeguards of equal protection any self-described benign race-conscious government action." (footnote omitted)).

261. Krotoszynski, *supra* note 184, at 909–13, 917–18, 975–76 (noting the incoherence of the Supreme Court's nomenclature and approach to matching up ends and means when considering affirmation action programs in the context of public schools, colleges, and universities).

262. *Id.* at 973.

263. *See* Kimberly Jenkins Robinson, Comment, Fisher*'s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 235 (2016).

264. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 8 (1973).

265. *See id.* at 54–55; *see* Milliken v. Bradley, 418 U.S. 717, 753–56 (1974) (Stewart, J., concurring); Freeman v. Pitts, 503 U.S. 467, 488–90, 496–97 (1992).

will make his or her way to a UT-Austin flagship state university. Thus, the question becomes: if a student lacks the same skill sets as another student who went to a better-performing public school, may a university take that fact into account when making admissions decisions? *Fisher II* says "yes."[266]

Although federal courts have little appetite for fixing the nation's public schools,[267] college and university administrators should be able to level the playing field with admissions policies that take educational opportunity into account. If you keep a car in second gear, you will never learn how fast it can go, and many of our nation's marginal and failing public schools keep their pupils in second gear.[268] A facially race-neutral plan, such as Florida's and Texas's top 10% plans,[269] corrects for this by using excellent performance, even within a failing school, as an effective proxy for potential. Thus, the top 10% plans constitute a practical way to allow for the most talented students to access a state's best public institutions of higher learning.

Of course, it would be better if the states would simply fix their dysfunctional public schools. But, in a world of imperfect alternatives,[270] the top 10% solution should be seen as constitutionally tolerable. Moreover, these plans are a means of correcting for social discrimination that tends to keep minority students at K–12 schools in less wealthy public school districts—meaning that they will enjoy fewer educational opportunities than students who attend public schools in wealthier communities or private schools.[271] Simply acknowledging that college and university affirmative action plans need only

266. *See Fisher II*, 579 U.S. 365, 386–89 (2016).

267. *See Freeman*, 503 U.S. at 471; Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237, 246–49 (1991); Missouri v. Jenkins, 515 U.S. 70, 100 (1995); *see also* KOMESAR, *supra* note 142, at 81–82.

268. *See* MARTHA R. BIREDA, SCHOOLING POOR MINORITY CHILDREN: NEW SEGREGATION IN THE POST-*BROWN* ERA 39–48 (2011); NOLIWE M. ROOKS, CUTTING SCHOOL: THE SEGRENOMICS OF AMERICAN EDUCATION 145–48 (2020).

269. *See Fisher II*, 579 U.S. at 371–72.

270. *See* KOMESAR, *supra* note 142, at 5–7, 81–82, 123–31, 146–50.

271. *See* Joe R. Feagin & Bernice McNair Barnett, *Success* and *Failure: How Systemic Racism Trumped the* Brown v. Board of Education *Decision*, 2004 U. ILL. L. REV. 1099, 1113 (2005) ("Today, de facto segregated schools are segregated not only by racial group, but also by income. Most black and Latino children remain in schools where low-income children are the majority, yet most white children attend schools where the majority of students are middle-class."); *see also* GARY ORFIELD & SUSAN E. EATON, HARVARD PROJECT ON SCH. DESEGREGATION, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1–13 (1996) (noting the failure of the federal courts to effectively enforce *Brown* and a concomitant failure to insist that children of color living in poor communities enjoy access to public schools of equal quality to those in wealthier, predominantly white communities); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1527–28 (2003) ("Blacks who attended desegregated schools attain higher educational and occupational levels than those who did not . . . ."); Robinson, *supra* note 263, at 188 ("[M]uch greater care and attention must be paid to the educational opportunity gaps and resulting achievement gaps that prompt many colleges and universities to rely on affirmative action."); Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 272, 277 (2015) ("[W]ith regard to race-conscious affirmative action, courts should guide their considerations by the role law must play in mitigating long-term, structural disadvantages maintained through race, which now functions as caste within the United States.").

satisfy intermediate scrutiny would go a long way toward transforming a constitutional makeweight into a constitutional rule.

III. CONSTITUTIONAL RULES DISTINGUISHED FROM MAKEWEIGHTS: LEGAL DOCTRINES THAT ACTUALLY FRAME AND CONTROL THE OUTCOME OF PENDING CASES PRESENTING SIMILAR QUESTIONS.

Constitutional makeweights, although more commonplace than they should be, constitute exceptions rather than the general rule. The Supreme Court has created many constitutional rules and doctrines that it enforces on a predictable and reliable basis. Indeed, attempting to catalogue all of them would require several books rather than a single law review article. For present purposes, a few illustrative examples will suffice to prove the point. The First Amendment rule against prior restraints, the Dormant Commerce Clause proscription against state laws that facially discriminate against out-of-state interests, and the Tenth Amendment bar against Congress "commandeering" the legislative or executive officers of state governments all constitute constitutional rules—doctrines that serve to frame and decide cases that fall within their scope of application.

A. The Rule Against Prior Restraints

The First Amendment rule against prior restraints provides a poster-child example of a constitutional rule. Legal scholars argue vigorously and at length about the proper scope and meaning of the Free Speech Clause of the First Amendment.[272] Despite these intense and never-ending debates, virtually all of the participants would agree that whatever else the First Amendment means, or should mean, it prohibits the government from imposing prior restraints against speaking.[273] Indeed, Anglo-American law recognized this prohibition against government censorship well before December 15, 1791, the date on which Virginia became the eleventh state of fourteen to ratify the Bill of Rights (which included the First Amendment) and secured the three-fourths majority necessary to bring it into force and effect.[274]

---

272. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

273. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984).

274. RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 109–10 (2012) (noting that "James Madison proposed amendments to the Constitution that would eventually become the Bill of Rights . . . to the House of Representatives on June 8, 1789" with the Bill of Rights coming into force after "Virginia became the eleventh state to ratify the Bill of Rights, on December 15, 1791"). Connecticut, Georgia, and Massachusetts did not ratify the Bill of Rights until 1939—

William Blackstone, in his iconic *Commentaries*, wrote that English common law recognized the freedom of the press, and by implication the freedom of speech: "The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."[275] On the other hand, imposing civil or criminal liability *after* publication would be entirely lawful.[276] Blackstone explained:

> [T]o punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.[277]

The Supreme Court's free speech jurisprudence embraces Blackstone's approach.[278] As a general matter, the government may not prohibit a press entity from publishing information that has come into its possession (even if a third party purloined the information).[279] The Supreme Court in *Near v. Minnesota* cited Blackstone and observed that "[i]n determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."[280]

Although the rule against prior restraints is not absolute, it is almost so.[281] Thus, "[t]he exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[282] When the federal government appears at bar in federal courts and pleads that the nation's foreign affairs, military affairs, or national security require the suspension or abridgement of a constitutional right, it usually will get its way. For better or worse, and mostly for worse, this general proposition holds true even in the

---

its sesquicentennial. DONALD P. KOMMERS ET AL., AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES 434, 434 n.13 (2d ed. 2004).

275. 4 WILLIAM BLACKSTONE, COMMENTARIES *151 (1769) (emphasis omitted).

276. *Id.* at *151–52 ("Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.").

277. *Id.* at *152.

278. Patterson v. Colorado *ex rel.* Att'y Gen. of Colo., 205 U.S 454, 462 (1907) ("[T]he main purpose of [the Free Speech and Press Clauses] is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." (emphasis omitted) (quoting Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313–14 (1825)).

279. *See* Bartnicki v. Vopper, 532 U.S. 514, 535 (2001).

280. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

281. *See id.* at 713–20.

282. *Id.* at 716.

context of the First Amendment.[283] This trend does not hold true, however, with respect to prior restraints.

Federal courts routinely reject government efforts to obtain an injunction against publication even when the government plausibly invokes foreign affairs, military affairs, or national security interests as a basis for seeking the injunction.[284] Under the First Amendment, the *New York Times* and the *Washington Post* were constitutionally entitled to publish excerpts from stolen Department of Defense analyses of the war in Vietnam because "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[285]

The rule against prior restraints also limits the ability of government to impose licensing schemes for the public exhibition of motion pictures,[286] the sale of books and other reading materials,[287] or the distribution of leaflets in areas open to the general public.[288] Although not all permitting schemes are unconstitutional, any content-based licensing requirement constitutes a prior restraint and must contain procedural safeguards to ensure that the regulatory scheme is not an engine for government censorship.[289] Among the procedural safeguards that a government must observe are placing the burden of proof on the government, strict standards that constrain the government's discretion to censor, and prompt access to judicial review.[290] Although the Supreme Court has repeatedly cautioned that the rule against prior restraints is not "absolute," the burden on the government to justify a prior restraint would appear to be if not insurmountable, then nearly so.[291]

---

283. *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 33–39 (2010) (upholding a statute that threatened criminal sanctions for associating and speaking abroad with members of organizations that the State Department had identified previously as supporting terrorism). Note that because the federal law at issue in *Humanitarian Law Project* did not prohibit going abroad to meet and speak with members of allegedly terrorist organizations but instead authorized after-the-fact criminal charges, it did not impose a prior restraint.

284. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam). For a general historical and legal overview of the prior restraint doctrine, see Vincent A. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); and John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983).

285. *New York Times*, 403 U.S. at 714 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

286. Freedman v. Maryland, 380 U.S. 51, 57–60 (1965).

287. *Bantam Books*, 372 U.S. at 70–72.

288. Org. for a Better Austin v. Keefe, 402 U.S. 415, 419–20 (1971).

289. *See Freedman*, 380 U.S. at 58–60.

290. *Id.* at 58–59; *see* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 228–30 (1990) (holding unconstitutional on prior restraint grounds a Dallas, Texas city ordinance that failed to limit the time the city could take to rule on an application to operate a sexually-oriented "adult" business); *id.* at 228 ("[Such decisions] must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.").

291. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) ("Prior restraints are not unconstitutional per se . . . . Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.'" (emphasis omitted) (quoting *Bantam Books*, 372 U.S. at 70)).

Professor Vincent Blasi describes injunctions against publication as "a particularly repressive method of regulating speech"[292] and explains that "[a]s one who believes that a central function of free expression is to check the abuse of governmental power, my chief concern is that speech relating to the behavior of public officials be disseminated soon enough to permit a checking process to operate."[293] Moreover, the ability to require prior official approval before a would-be speaker can say their piece reflects a distrust of speakers and the view "that it is more dangerous to trust audiences with controversial communications than it is to trust the legal process with the power to suppress speech."[294] Prior restraints are also objectionable because such devices assume that free speech "represents a threat to, rather than an integral feature of, the social order," demeans the agency of would be speakers, and empowers the government to extract concessions from those would-be speakers to alter their messages on pain of being either delayed or entirely prohibited from speaking.[295]

Blasi persuasively posits that the chilling effects of prior restraints and licensing schemes are potentially more damaging to democratic discourse than rules that impose after-the-fact legal liability. This is so because these regulatory measures "encourage regulatory agents to overuse the power to regulate" and "adversely affect audience reception of controversial messages."[296] Accordingly, the federal courts' consistent and strong application of the rule against prior restraints reflects the deep-seated nature of the rule as well as the strong normative arguments against permitting the government to require would-be speakers to seek and obtain the government's consent before speaking. Even if the rule does not flatly prohibit the issuance of injunctions against publication, it is all but impossible to obtain such an injunction in practice.[297] It is, thus, plainly a constitutional "rule" rather than a mere "makeweight."

B. The Dormant Commerce Clause's Proscription Against State Laws That Facially Discriminate Against Out-of-State Interests

The Supreme Court consistently has held that the states may not use their regulatory authority to adopt regulations that facially discriminate against out-

292. Blasi, *supra* note 284, at 14.

293. *Id.* at 65.

294. *Id.* at 85.

295. *Id.* at 80–85.

296. *Id.* at 93.

297. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975) ("The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." (emphasis omitted)).

of-state interests, and "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected."[298] The Court has explained that "[t]he clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders."[299] Banning the importation of out-of-state goods,[300] attempting to trap privately owned resources for the benefit of in-state consumers,[301] or attempting to force in-state consumers to purchase goods and services from in-state rather than out-of-state suppliers[302] all violate this rule against states using their police powers to adopt protectionist schemes. Differential taxation based on the location of a corporation's headquarters or based on the state residence of a company's customers also constitutes constitutionally impermissible protectionism.[303]

In order to survive constitutional review, the law must pass strict judicial scrutiny, defined in this instance as advancing a legitimate government interest using the least discriminatory means possible to do so.[304] In virtually every case involving facial discrimination against out-of-state interests, the Supreme Court has reflexively invalidated the state law. The one exception—which proves the general rule—involved a Maine law that banned the importation of live baitfish from out-of-state.[305]

In *Maine v. Taylor*, the Supreme Court sustained Maine's law as a necessary restriction to protect its local ecosystem.[306] The majority accepted the state's characterization of the law as environmental protection rather than an effort to prohibit live baitfish sellers in neighboring states, most likely New Hampshire and Massachusetts, from exporting live baitfish to Maine.[307] The *Taylor* majority explained its decision to sustain the law despite its facially protectionist aims by noting that "[a]s long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."[308]

---

298. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (emphasis omitted).

299. *Id.*

300. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354–56 (1951).

301. Hughes v. Oklahoma, 441 U.S. 322, 336–38 (1979).

302. Wyoming v. Oklahoma, 502 U.S. 437, 454–57 (1992).

303. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575–83 (1997); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–78 (1988).

304. *See Hughes*, 441 U.S. at 337 ("Such facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends.' At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." (citation omitted) (quoting City of Philadelphia v. New Jersey, 437 U.S 617, 626 (1978))).

305. Maine v. Taylor, 477 U.S. 131, 151–52 (1986).

306. *See id.* at 148–51.

307. *Id.* at 148 ("Moreover, we agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible.").

308. *Id.* at 151 (citation omitted) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)).

One could reasonably question, however, whether Maine needed to do more than ban the importation of non-native live baitfish; the degree of discrimination, under Dormant Commerce Clause strict scrutiny, must be precise. Given that Maine shares borders with New Hampshire and Massachusetts and these borders are crossed by numerous streams and rivers, it is difficult to understand why Maine had to ban *all* out-of-state baitfish as opposed to *non-native species* of baitfish. If a less discriminatory means exists to advance a state's legitimate purpose, the governing case law, at least prior to *Taylor*, says a state must use it.[309] To be clear, the error in *Taylor* is a factual one rather than a legal one: Maine could have adopted a less restrictive policy that would have advanced its legitimate interest in protecting the local ecosystem by permitting indigenous species from neighboring states to be imported into Maine (while still banning non-native baitfish).

On the other hand, *exceptions* to the Dormant Commerce Clause exist and apply when a state adopts a discriminatory policy but does not use its regulatory power to achieve the discrimination (whether by making it harder for out-of-staters to do business within the state[310] or by attempting to trap privately-owned resources for the exclusive benefit of in-state consumers[311]). For example, if the state enters a market as a participant—meaning as the buyer or seller of goods or services rather than as a regulator of commercial transactions—it may favor in-state interests over out-of-state interests.[312] In addition, the Supreme Court has assumed, without deciding, that a state government may offer direct financial support to in-state businesses and industries[313]—provided that it does so through the usual annual appropriations process.[314] This would seem to constitute just another form of buying and selling goods and services; for example, when a state uses general revenue funds

309. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) (upholding a Minnesota state law because there was "no approach with 'a lesser impact on interstate activities'" available to Minnesota (quoting Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970))).

310. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); Guy v. City of Baltimore, 100 U.S. 434, 439–40 (1879).

311. Thus, New Jersey could not constitutionally prohibit private landfills in the state from selling waste storage space to customers in Pennsylvania, including to the City of Philadelphia. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 627–29 (1978). Nor could Oklahoma prohibit the exportation of native baitfish to Texas. Hughes v. Oklahoma, 441 U.S. 322, 336–38 ("[Oklahoma's law] on its face discriminates against interstate commerce" and "thus 'overtly blocks the flow of interstate commerce at [the] State's borders.'" (second alteration in original) (quoting *City of Philadelphia*, 437 U.S. at 624)).

312. Reeves, Inc. v. Stake, 447 U.S. 429, 438–39 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806–10 (1976).

313. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the Dormant Commerce Clause doctrine]; discriminatory taxation of out-of-state manufacturers does.").

314. *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194–97 (1994) (invalidating a closed-loop regulatory scheme that taxed all milk wholesalers but then remitted all the tax monies collected to in-state milk producers because it functioned as a discriminatory tax that applied only to out-of-state milk producers).

to support television and motion picture productions within the state, it is arguably "buying" such activity.

From a law and economics perspective, of course, a discriminatory tax and a direct subsidy can have an identical effect on the ability of out-of-staters to compete for sales within the state.[315] However, the Supreme Court has always treated the Dormant Commerce Clause doctrine as being about the means used to achieve the protectionism rather than about the fact of protectionism as such. Using regulatory authority, such as the taxing power, to favor in-state interests constitutes the paradigmatic example of an impermissible policy—even though a state can evade this rule either by buying or selling a good or service itself or by giving in-state producers direct subsidies funded by annual appropriations.

The fact that a rule may be evaded, however, does not render it a constitutional makeweight. Save for the unfortunate *Taylor* decision, the Supreme Court has reliably and vigilantly enforced the rule that a state may not erect regulatory walls to trap privately owned resources within the state or to fence out competition from out-of-state producers.

C. Anti-Commandeering Rules under the Tenth Amendment

The Supreme Court has held that the Tenth Amendment prohibits Congress from directly requiring state legislative and executive officials to enforce federal laws.[316] Called the anti-commandeering principle, the idea is that if Congress could directly issue commands to a state legislature to enact a law or to state executive officials to enforce a law, important principles of accountability would be fatally undermined.[317] However, the principle is easily evaded: "Congress retains a veritable arsenal of constitutional powers with which to corrupt even the most virtuous state government."[318] However, the fact that a constitutional rule can be evaded does not render it a makeweight (as is the case with the prior example of state laws that facially discriminate against out-of-state interests). The question, in any case, is whether the stated reasons for the rule are the actual reasons for the doctrine and whether the rule in practice serves as the framing device for cases raising similar constitutional questions going forward.

315. *See* Edward A. Zelinsky, Essay, *The Incoherence of Dormant Commerce Clause Nondiscrimination: A Rejoinder to Professor Denning*, 77 MISS. L.J. 653, 653–54 (2007).

316. Printz v. United States, 521 U.S. 898, 935 (1997).

317. *See id.* at 925–26.

318. Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 11 (1998).

In 1992, the Supreme Court held that Congress may not enact legislation that requires a state government to enact a law.[319] *New York v. United States*[320] held that Congress cannot enact legislation that "commandeers" a state government.[321] Writing for the 5 – 4 majority, Justice O'Connor explained that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'"[322] because Congress only possesses direct legislative authority "over individuals rather than over States."[323]

Justice O'Connor explained that allowing Congress to enact legislation requiring state legislatures to pass new state laws would also diminish "the accountability of both state and federal officials."[324] Each level of government could, in theory, point the finger at the other with respect to unpopular regulatory decisions: "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[325] Thus, "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation,"[326] voters are less able to hold either the state or federal government accountable through the electoral process.

In *Printz v. United States*,[327] decided in 1997, the Supreme Court extended *New York*'s anti-commandeering principal to state executive officers.[328] Writing for the 5 – 4 majority, Justice Scalia explained that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[329] Moreover, "[i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[330] Because "[t]he Constitution thus contemplates that a State's government will represent

319. New York v. United States, 505 U.S. 144, 188 (1992).

320. *Id.*

321. *Id.* at 161–62, 175–77.

322. *Id.* at 161 (alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n., 452 U.S. 264, 288 (1981)).

323. *Id.* at 165; *see id.* at 166 ("In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice.").

324. *Id.* at 168.

325. *Id.* at 169.

326. *Id.*

327. Printz v. United States, 521 U.S. 898 (1997).

328. *Id.* at 935.

329. *Id.*

330. *Id.*

and remain accountable to its own citizens," Congress may not require state and local executive branch officials to implement federal laws.[331]

Even though Congress may not escape the anti-commandeering principle directly, it may avoid its application by legislating cleverly. Perhaps most obvious, Congress may use its broad regulatory authority under the Commerce Clause to regulate directly commercial or economic activity. For example, consider the regulatory policy at issue in *New York*—the permanent storage of low-level radioactive waste.[332] Congress could have established a national program that licensed the creation and operation of low-level radioactive waste storage sites;[333] such a law would have pre-empted any state or local laws that sought to prohibit the operation of such facilities within the jurisdiction.[334]

Alternatively, Congress could have used conditional spending to bribe states into complying with its wishes—in fact, the very law at issue in *New York* made use of this tool.[335] The Supreme Court has, with a single prominent exception, not made much effort to establish and enforce meaningful limits on the power of Congress to offer federal largesse to the states in exchange for regulating in ways that Congress wishes for them to regulate.[336] As one commentator has wryly observed, "[i]f the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed."[337]

---

331. *Id.* at 920.

332. New York v. United States, 505 U.S. 144, 149–54 (1992).

333. *Id.* at 167–68.

334. *See* U.S. CONST. art. VI, cl. 2; *see also* Gibbons v. Ogden, 22 U.S. 1, 210–11 (1824) ("[The Constitution] declar[es] the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law."). In other words, when a federal and state law issue conflicting commands, "[i]n every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 211.

335. The Supreme Court sustained the conditional spending provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as 42 U.S.C. § 2021b–2021j). *See New York*, 505 U.S. at 158–59, 167–68, 171–72; *see also* South Dakota v. Dole, 483 U.S. 203, 206–07 (1987); Krotoszynski, *supra* note 318, at 14–17 (arguing that Congress's broad power to use conditional spending to bribe states to do what Congress wants them to do—but cannot constitutionally command them to do—significantly undermines the practical effects of other doctrinal rules, including the Tenth Amendment's anti-commandeering principle because Congress need only legislate carefully in order to secure compliance from state governments). For critical analyses of the Supreme Court's failure to limit the potential scope of Congress's conditional spending power, see Baker, *supra* note 51, at 1935; Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85; and William W. Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303 (1993).

336. *See Dole*, 483 U.S. at 206–07. *But cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576–85 (2012) (holding that the Medicaid funding provisions of the Affordable Care Act, which would have withdrawn *all* Medicaid funding from states that failed to expand eligibility and establish insurance exchanges for their uninsured residents, was unduly coercive of state governments and therefore exceeded the scope of Congress's authority under the Spending Clause).

337. Rosenthal, *supra* note 51, at 1131.

Both the Commerce Clause and Spending Clause empower Congress to work its will—in one case by simply displacing state regulatory authority and in the other by creating sufficiently powerful, but not unduly coercive, inducements to secure the states' "voluntary" cooperation with federal regulatory mandates. However, the fact that Congress may use other constitutional powers to have its way does not render the Tenth Amendment's anti-commandeering rule a makeweight—the rule still governs in instances where Congress directly orders the states to legislate or have their executive officers enforce federal statutes.

IV. THE IMPORTANCE OF JUDICIAL CANDOR IN GIVING REASONS IN SUPPORT OF JUDGMENTS

Constitutional makeweights seriously undermine confidence in the federal courts and in the judicial process more generally, so they should be avoided. When judges offer bogus reasons in support of their judgments, it risks the public's faith and confidence in the work of the federal courts. Insincere reasons can bind judges to outcomes in future cases that they neither intend nor support, damage the legitimacy of the courts, reduce their accountability, muddy the line between the legal and the political process, and undermine the rule of law. These are points on which major jurisprudential thinkers seem to agree.[338]

Thomas Paine famously claimed that "in America the law is king."[339] By way of contrast, "in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other."[340] Paine's distinction is between a system of rules that establish and demarcate the rights of the individual and a system in which the rights of the individual are subject to the whims of a despotic monarch. The problem, of course, is that laws are not self-

338. *See* DWORKIN, *supra* note 6, at 190 ("A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state, a justification that holds except in special cases when some competing argument is specially powerful. Each conception's organizing center is the explanation it offers of this justifying force."); Fallon, *supra* note 24, at 2306 ("For a judge not to disclose a consideration that she believed legally necessary to justify her decision would foreseeably mislead readers of her opinion, who otherwise would be entitled to assume that she believed her stated reasons legally sufficient."); Shapiro, *supra* note 133, at 738 n.33 ("[Although] a judge is [not] obligated to search out and disclose the 'deepest' explanation of his actions . . . the reasons given for action should not be inconsistent with whatever additional motivation has risen to the level of the judge's consciousness, nor should they be mere pretexts."); Schauer, *supra* note 8, at 633–37, 658 ("Even if compliance is not the issue, giving reasons is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one."); *id.* at 652 ("[Although] there are things we can think but cannot write down," it is entirely implausible for a judge to "believe an outcome to be correct when it could not be explained by a reason."); Schwartzman, *supra* note 129, at 990 ("[Judicial] decisions are backed with the collective and coercive force of political society, the exercise of which requires justification."); *id.* at 991 ("Under ordinary circumstances, judges have a general duty to comply with a principle of sincerity in their decisionmaking.").

339. THOMAS PAINE, *Common Sense*, *in* COMMON SENSE AND OTHER POLITICAL WRITINGS 3, 32 (Nelson F. Adkins ed., 1953) (emphasis omitted).

340. *Id.* (emphasis omitted).

enforcing; courts provide their animating mechanism. This fact of life means that whether the law is king or the judge is king depends, to a great extent, on the judge.

In the United States, the federal courts, at least historically, have enjoyed a relatively high degree of public confidence.[341] This confidence arises because, in the main, the federal courts offer sincere and plausible reasons for their judgments, which generates public trust. When "judges undertake their duties in a systematic, transparent, and apparently principled fashion,"[342] the public tends to credit those judgments (even when they disagree with them).

When a court follows the legal rules of the road—the institutional norms that the public associates with legitimate judicial behavior—a court's claim that its decision flows from the law, rather than the subjective policy preferences of the judges, becomes credible. Legal process values, if conscientiously and consistently observed, constrain judicial discretion and promote stability in the law. As Professor Richard Fallon explains, observing the norms of the legal process reassures the public that the judiciary's role in making public policy "is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers."[343]

Judicial legitimacy flows from courts following, not breaking, the rules that are understood to constrain the scope of judicial discretion when deciding the cases and controversies that come before them. As Professor Charles Barzun states the proposition, "[A]djudication can be rational insofar as those materials—whether case law, statutes, or the Constitution—are applied in a principled manner and interpreted by reference to their purpose."[344] Thus, "courts have a significant, but limited, role to play within a legal system that includes other important decision-making institutions such as legislatures and administrative agencies."[345]

Herbert Wechsler, perhaps the most important advocate of legal process as a means of securing public support and acceptance of judicial decisions, argued that the judicial role was fundamentally different from the legislative role because "intrinsic to judicial action" is a generalized duty "to support its choice of values by . . . reasoned explanation."[346] (Wechsler, along with Professors Henry M. Hart and Albert M. Sacks, are the most well-known advocates of

341. *See* Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017) https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx (showing that 68% of Americans trust the judicial branch, the historical average since 1972).

342. Ronald J. Krotoszynski, *"I'd Like to Teach the World to Sing (in Perfect Harmony)": International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1347 (2006).

343. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 964–66 (1994).

344. Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 9 (2013).

345. *Id.*

346. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV L. REV. 1, 15–16 (1959).

Legal Process Theory.[347]) Because of this, Wechsler posits that "[t]he virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees."[348]

So, although the view is not universally held,[349] many scholars of judicial process posit that there are significant benefits that flow from judges offering sincere reasons in support of their judgments. Arguments in favor of judicial insincerity fall into two general categories.

The first is instrumental. Schwartzman explains that:

> [S]incerity and candor must often be sacrificed to maintain the perceived legitimacy of the judiciary; to obtain public compliance with controversial judgments; to secure preferred outcomes through strategic action on multimember courts; to promote the clarity, coherence, and continuity of legal doctrine; to avoid the destructive consequences of openly recognizing "tragic choices" between conflicting moral values; to preserve collegiality and civility in the courts; and to prevent the unnecessary proliferation of separate opinions.[350]

One should note that these strategic reasons for judicial insincerity do not involve giving false reasons in support of a judicial decision, or no reasons, simply because a judge possesses the raw power to do so. Moreover, all of these justifications for offering insincere reasons seek to advance legal process values.

In the end, however, Schwartzman ultimately pulls his punch, conceding that truthful reason-giving "constrains the exercise of judicial power, makes judges more accountable to the law, provides better guidance to lower courts and litigants, promotes trust and reduces public cynicism, and strengthens the institutional legitimacy of the courts."[351] He concedes that the better view is probably that "[a]djudication is legitimate only if judges have sufficient reasons to justify their legal decisions."[352]

---

347. The Hart and Sacks book, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, arguably constitutes the theory's Bible. *See* Barzun, *supra* note 344, at 9–11, 15–18. Like Wechsler, Hart and Sacks argue that the process judges follow to reach judgments strongly prefigures the legitimacy of the outcome. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 2–6, 152–58, 642–47 (1994).

348. Wechsler, *supra* note 346, at 19–20; *see* McCreary Cnty. v. ACLU, 545 U.S. 844, 890–91 (2005) (Scalia, J., dissenting) ("What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that—thumbs up or thumbs down—as their personal preferences dictate."); *see also* Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 909 (1979) ("[I]t is one thing for a judge to adopt a theory of political morality because it is his own; it is another for him to exercise his judgment about what the political morality implied by the Constitution is." (emphasis omitted)).

349. *See* Schwartzman, *supra* note 129, at 988–89 ("[T]he idea that judges must adhere to a principle of sincerity is surprisingly controversial. Some judges and legal theorists reject the notion that judges must believe what they say in their opinions.").

350. *Id.* (footnotes omitted).

351. *Id.* at 989 (footnotes omitted).

352. *Id.* at 999.

The second justification for a judge failing to give sincere and truthful reasons in support of a judgment involves patently unjust or immoral laws.[353] If a judge finds that applying a clear legal rule would work a serious moral wrong and therefore a miscarriage of justice, a judge might give false reasons to avoid that outcome. For example, suppose that a law is facially racist but a judge lacks the power to invalidate it; avoiding a racist judgment could provide a plausible basis for giving an insincere reason in support of a judicial decision.[354] As Professor Shapiro states the proposition, "[N]otice must on extraordinary occasions yield to emergency conditions, and fidelity to law may, on similar extraordinary occasions, yield to moral duty."[355] Of course, most instances of constitutional makeweights do not involve self-evidently immoral laws—the *Chevron* doctrine bears little relationship to either apartheid in pre-1993 South Africa or Jim Crow in the pre-Civil Rights Era Deep South.

So much for the benefits of judges offering truthful reasons in support of their decisions. What about the costs of offering bogus reasons—what downside risks do the embrace of constitutional makeweights potentially pose for the Article III courts? The downside risks, according to theorists of judicial legitimacy, involve both larger normative concerns and more granular practical concerns.

Of the larger normative concerns, giving insincere reasons arguably puts the rule of law itself at risk. Professor Eric Segall states the proposition: "The rule of law, at a minimum, should prevent judges from offering patently false, demonstrably incorrect, or hopelessly inconsistent reasons for their judicial decisions."[356]

David Shapiro echoes these rule of law concerns, arguing that "the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another."[357] So too, Kent Greenawalt opines that "[i]f the Court fails when it gives no reasons . . . , it follows that it must also fail if it gives false reasons, even if the false reasons are not themselves demonstrably inconsistent with neutral principles" and, hence, the rule of law.[358] Richard Fallon also warns that the routine practice of giving false reasons in support of judgments will undermine the rule of law because "[t]here is a legal obligation of judicial candor, rooted in the nature of the judicial role within the American legal system."[359] In sum, as Shapiro posits, "[T]he fidelity of judges to law can be fairly measured only if they believe what

353. Shapiro, *supra* note 133, at 747 ("Guido Calabresi and Philip Bobbitt have argued that a certain amount of dishonesty may be desirable, if not inevitable, when life-and-death or other critical choices involve a clash of basic values.").

354. *Id.* at 739, 749–50.

355. *Id.* at 750.

356. Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 107, 111 (2006).

357. Shapiro, *supra* note 133, at 737.

358. Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 990 (1978).

359. Fallon, *supra* note 24, at 2311.

they say in their opinions and orders, and thus a good case can be made that the obligation to candor is absolute."[360]

A related, but distinct, cost of offering bogus reasons in support of judicial decisions is a loss of institutional credibility. As Shapiro observes, "lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges."[361] When this happens, moreover, the federal judiciary will forfeit "the wide respect accorded to those twentieth-century judges whose opinions are especially notable for their candid recognition of the difficulties of decision and the strength of competing arguments."[362]

False reasons also signal both cynicism and a lack of due respect for We the People, making judicial decision-making appear to constitute simply another form of ordinary politics.[363] Simply put, in conventional social interactions, lying is usually perceived as insulting and degrading; it is also immoral. Fallon makes this point, observing that "[a] general interest[] in not being lied to or misled" exists in everyday life and that "[t]hese interests assume a special sharpness . . . in cases involving the potentially coercive exercise of power by governmental officials, judges among them."[364] Accordingly, "[l]ies or manipulation by political officials, including judges, demean our status as partners in self-government and treat us more nearly as subjects, ruled unaccountably by others."[365] In sum, lying is bad and reflects a lack of respect to the person being lied to,[366] and judges simply should not do it.[367]

---

360. Shapiro, *supra* note 133, at 750.

361. *Id.* at 737.

362. *Id.* at 740.

363. Segall, *supra* note 356, at 135 ("When U.S. Supreme Court Justices decide cases with reasoning that either cannot be applied in the future, or with reasoning that is overtly arbitrary, they come much closer to dissolving the already murky line between the legal and the political process."). Of course, many political scientists—and particularly those within the behavioralist camp—squarely reject the idea that law can be meaningfully distinguished from ordinary politics. *See* HANSFORD & SPRIGGS, *supra* note 109, at 112–18, 129–32; BRENNER & SPAETH, *supra* note 109, at 108–10. As Hansford and Spriggs state the matter, "the policy preferences of the justices not only affect their votes on the merits of a case" but "also influence how the Court handles existing precedents when deciding a case." HANSFORD & SPRIGGS, *supra* note 109, at 129. That said, they also caution that "the justices do not change law simply based on their policy preferences or on the existing state of precedent; they do so based on an interactive relationship between these two factors." *Id.* at 130.

364. Fallon, *supra* note 24, at 2281.

365. *Id.*

366. Shapiro, *supra* note 133, at 747 ("[P]eople might well ask for and appreciate the respect that full disclosure would accord them."); *see also* Fallon, *supra* note 24, at 2306 ("For a judge not to disclose a consideration that she believed legally necessary to justify her decision would foreseeably mislead readers of her opinion, who otherwise would be entitled to assume that she believed her stated reasons legally sufficient.").

367. Fallon, *supra* note 24, at 2282 (positing that there should be a minimal requirement that bars a judge from "lies and deliberat[e] efforts to mislead"); *see also* Schwartzman, *supra* note 129, at 1021 ("[Judges] have a role-based responsibility to give reasons for the exercise of coercive power. If they fail to state such reasons, . . . then they have abdicated that responsibility and sacrificed the underlying ideal of political legitimacy from which it is derived.").

At a more granular level, insincere reasons in support of judicial decisions undermine the practical values of "stability, predictability, [and] transparency" that serve "to differentiate legal rules from personal preferences."[368] The practice also renders it much harder to hold courts accountable for their decisions.[369] Failing to give reasons is a tell for either an inability to reach the result using conventional legal reasoning[370] or, worse still, an effort to fool or mislead the public.[371] As Schauer explains, the "artificial constraint" of giving sincere reasons "is designed to counteract this tendency [of partiality]."[372] The legal system relies on judges giving sincere reasons in support of their judgments, and when they fail to meet this expectation, skirting their institutional responsibility, they render the law a hash—a hot mess—and deprive the public of the opportunity to engage in a full and honest debate about a judicial decision's merit (or lack of it).

Reasons matter—and matter greatly in judicial opinion writing. Providing sincere reasons in support of judgment safeguards the rule of law, helps to maintain the line of demarcation that separates law from politics, renders the judicial process transparent, safeguards judicial legitimacy, and gives litigants, in addition to interested third parties, the opportunity to be heard and actively engage in the judicial process. A judge should resist the siren call of constitutional makeweights because the potential institutional costs of judicial insincerity are much higher than the costs associated with admitting that some cases present difficult questions that cannot be answered in clear and categorical terms.[373]

CONCLUSION

Reliance on constitutional makeweights constitutes a bad judicial habit—and a habit that the Supreme Court needs to forsake. Courts should consistently justify their decisions with sincere reasons—the actual legal, policy, and factual considerations that led them to reach a particular result. What's more, the invocation of ersatz reasons to support a judicial decision simply does not work. When the reasons given and the results reached in a specific case do not align, it becomes obvious to God and country alike that the reasons given are

368. Segall, *supra* note 356, at 108.

369. *Id.* at 112 ("The public cannot hold the Court accountable [for failing to treat similarly situated parties similarly] unless the Court offers reasons for its decisions.").

370. Schauer, *supra* note 8, at 652 (suggesting that a failure to give honest reasons might reflect the fact that a judge's reasons are "legally, socially, or morally impermissible" and that courts cannot legitimately decide cases "by 'hunch,' by 'gestalt,' by 'situation sense,' or by some other nonformulaic method").

371. Shapiro, *supra* note 133, at 742 (arguing that failing to give reasons often bespeaks "an intent to mislead or a cynical indifference to the opinion's effect").

372. Schauer, *supra* note 8, at 653.

373. *See* BREYER, *supra* note 7, at 115–32. As Oscar Wilde put it, "[t]he truth is rarely pure and never simple." WILDE, *supra* note 1, at 8.

insincere. Accordingly, when the Justices come to realize that a constitutional "rule" or "doctrine" constitutes nothing more than a constitutional makeweight—or to use Justice Gorsuch's preferred pejorative term, a "tin god"[374]—they should abandon its use.

The Supreme Court's reputation would benefit if the Justices, individually and collectively, would own up to certain stated rules constituting jurisprudential Potemkin villages—mere facades that serve to hide an underlying and unacknowledged reality. Constitutional makeweights do not do much, if any, real jurisprudential work and fail to constrain judicial discretion (and thereby also fail to promote stability and predictability in the law). Categorical, multi-factored tests that do not actually capture the vectors of decision sow chaos, not certainty, in the law, as lawyers and lower federal and state court judges attempt to square a circle (that is, to reconcile results that self-evidently do not follow from the stated legal test or standard). What's more, the legitimacy of courts as *legal* as opposed to *political* institutions rests on the ability and willingness of judges to give sincere reasons in support of their judgments.[375]

A better approach would involve truth in advertising—that is to say, judges should always at least attempt to articulate the considerations that drive the process of judicial decision making across cases raising the same legal question. In some instances, candor might result in "rules" that are self-evidently open-ended and do not strictly constrain judicial discretion. But, what of it? A legal rule need not strictly limit judicial discretion in order for it to accurately report the basis of a decision and reflect the analytical process that a court will use to frame and decide similar cases going forward.

Stare decisis, for example, constitutes a procedural, rather than substantive, commitment.[376] Despite the invocation of over a half dozen substantive considerations that ostensibly govern whether the Justices will follow or depart from a prior constitutional decision, the doctrine really implies only a duty to consider and explain the court's decision to apply, modify, or abandon a prior constitutional rule.[377] A more candid articulation of the doctrine's ability to constrain judges in constitutional cases would render the doctrine considerably weaker than the Supreme Court currently claims it to be. Even so, however, it would be better all-around if the Supreme Court defined and applied the doctrine of stare decisis in this context more consistently. In sum, brutal but prudent candor about the doctrine's weakness in constitutional cases would enhance, rather than diminish, the Supreme Court's institutional credibility.

374. Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Gorsuch, J., concurring).

375. DWORKIN, *supra* note 6, at 190; Dworkin, *supra* note 130, at 54–55.

376. *See supra* Subpart II.A.

377. *See supra id.*

Along similar lines, if the Supreme Court were to adopt this approach, *Chevron* should be abandoned in favor of *Skidmore* because the *Chevron* doctrine, as a rule of decision, fails to identify the real reasons that lead federal judges to defer to an agency's interpretation of an ambiguous federal statute. So too, if courts are prepared to sustain against Equal Protection Clause challenges government efforts to combat the pernicious effects of pervasive and widespread social discrimination, they should openly admit that such programs are constitutional under a form of intermediate scrutiny review; they should also articulate with clarity and particularity the precise design elements that make an affirmative action program more (or less) likely to fall on the right side of the constitutional line.

In sum, constitutional rules, to constitute rules rather than little more than talking points, must effectively and reliably serve as the basis for decision in cases presenting the same legal questions. So too, constitutional rules must constrain judicial discretion—at least with respect to the governing legal framework. A constitutional rule can vest judges with wide discretion—balancing tests invariably convey discretion, for example[378]—but the "rule" must encompass the analytical framework and legal standards that the court will apply to decide future cases raising the same legal question. When a legal doctrine does not set forth the considerations that actually animate outcomes and when decisions turn on unarticulated reasons, continued judicial reliance on the bogus doctrine will undermine the public's confidence in the judiciary's work. Unelected, life-tenured federal judges have a duty to We the People to articulate and defend the actual basis for their resolution of a pending constitutional dispute rather than invoke a verbal shibboleth that has little, if any, meaningful impact on either the court's reasoning or decision.

378. RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT 16–21, 216–26 (2019) (discussing the potential benefits and downsides of open-ended balancing tests over categorical rules in the context of the First Amendment).