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Modesty, of a Sort, in the Setting of Precedents

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MODESTY, OF A SORT, IN THE SETTING OF PRECEDENTS*

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This Article explores stare decisis from an unusual perspective, that of a court as it issues a precedent-setting decision rather than as it confronts existing ones. I ask specifically about the extent to which precedents would be expected to constrain the decisionmaking of lower court judges committed to following them faithfully. After surveying theoretical and methodological challenges in assessing the constraint imposed by a precedential decision and laying out a partial framework for the analysis of decisions along this dimension, I present some preliminary data comparing Supreme Court decisions across Justices and time. The Article concludes with suggestions for additional questions and methodological refinements.

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INTRODUCTION

Much speculation about and early analysis of the Roberts Court has focused on its treatment of existing precedents, as observers wonder at what pace it will dismantle what legacy remains of earlier Courts, especially the Warren and early Burger Courts.[1] This Article explores an issue that receives less attention than the treatment of precedents but is arguably just as important: how a court goes about creating precedents. I ask specifically about the potential constraining effect of a court's rulings. To what extent would a precedent be expected to fetter the discretion of other judges committed to following precedents faithfully, and can we measure this potential in a valid and reliable way?

In Part I of the Article, I develop and defend this way of thinking about a court's lawmaking. In Part II, I analyze various reasons why one precedent can be more or less constraining than another and discuss strategies for empirically assessing the amount of constraint likely to be imposed. Part III presents preliminary data allowing some comparisons of precedent-setting styles—the Roberts Court versus previous Courts and individual Justices against each other. The Article concludes with thoughts about how consequential different styles of precedent setting are in reality and suggestions for future research.

I. MAKING LAW MODESTLY

In nominating John Roberts for Chief Justice, President Bush maintained that Roberts would "strictly apply the Constitution and laws, not legislate from the bench."[2] At their confirmation hearings Judges Roberts and Alito both promised to eschew judicial activism and approach the work of judging with modesty, even humility. Terms like "activism" and "legislating from the bench" are often employed loosely,[3] especially around the time of judicial confirmation

1. In addition to the other Articles in this Symposium, see Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS, Sept. 27, 2007, at 92, 96–99, *available at* http://www.nybooks.com/articles/20570 (decrying what Dworkin sees as unacknowledged overrulings of precedents by the Roberts Court in the 2006 Term).

2. Press Release, The White House, President Announces Judge John Roberts as Supreme Court Nominee (July 19, 2005), http://www.whitehouse.gov/news/releases/2005/07/20050719-7.html.

3. For careful examinations of these terms, see Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 385, 387–89 (Stephen C. Halpern & Charles Lamb eds., 1982); Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 194–211 (2007).

hearings. And the nominees' promises covered a good deal of ground, including giving respect to precedent and the views of other judges.[4] But in describing what they saw as the proper judicial role, both gave considerable emphasis to their views of how a Supreme Court Justice should create precedents and made it clear that their definition of judicial modesty extended to this facet of judging. In response to Senator Hatch, Judge Alito said:

> I think that my philosophy of the way I approached issues is to try to make sure that I get right what I decide. And that counsels in favor of not trying to do too much, not trying to decide questions that are too broad, not trying to decide questions that don't have to be decided, and not going to broader grounds for a decision when a narrower ground is available.[5]

Judge Roberts repeatedly made statements along the same lines at his hearings.[6]

It would be unwise, of course, to read too much into statements made by a judicial nominee in the course of hearings. And some of the goals and principles announced by nominees Alito and Roberts might conflict with each other. In particular, setting a modest precedent limited to the specific facts of the case before the Court does little to ensure that precedent guides a court's decisions in future cases.[7] But their statements give us reason to think both of these

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4. *See, e.g.*, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318–19, 492 (2006) [hereinafter *Alito Confirmation Hearing*] (statement of Samuel A. Alito, Jr.); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) [hereinafter *Roberts Confirmation Hearing*] (opening statement of John G. Roberts, Jr.).

5. *Alito Confirmation Hearing*, *supra* note 4, at 343 (statement of Samuel A. Alito, Jr.).

6. *See, e.g.*, *Roberts Confirmation Hearing*, *supra* note 4, at 55–56 (opening statement of John G. Roberts, Jr.); *id.* at 550–51 (response of John G. Roberts, Jr. to the written questions of Sen. Joseph R. Biden, Jr.); *see also* Stephen Henderson & James Kuhnhenn, *Nominee's Emphasis: Restraint; Facing Committee Senators, Roberts Spoke of the Importance of Precedent and a Sense of Humility*, PHILA. INQUIRER, Sept. 13, 2005, at A1.

7. Consider these thoughts from Judge Sykes:

> Given the Chief Justice's apparent inclination in favor of rulings that clearly articulate "what the law is," it seems unlikely that he will be a fan of the weighing-and-balancing middle-ground compromises that characterize some of the late-Rehnquist Court's work. When the Chief Justice announced his preference for narrow decisions as a means of producing greater consensus on the Court, I don't think he meant "narrow" in the sense of fact-specific rulings that resolve the case before the Court but do not produce a clear legal rationale.... Also, fact-based

Justices care about how they make precedent. Furthermore, observers of the Court have frequently claimed to see differences in how Justices approach setting precedents. For instance, Justice O'Connor was widely viewed as unusually averse to broad rules, writing opinions in ways that often provided little guidance for deciding future cases.[8] Similar claims have been made about Justice Kennedy.[9] At the other end of the spectrum is Justice Scalia, who has forcefully argued in opinions and articles that Justices should decide cases on the basis of clearly articulated rules in order to impose constraint both on other judges and themselves.[10] Reputations for precedent-setting styles can even attach to whole Courts, with the Warren Court probably thought of by many as exemplifying a penchant for immodest rulemaking.

There might be no cause to care whether Roberts and Alito will be different from other Justices or whether the Roberts Court will be different from other Courts if the form precedents take did not matter for the quality and legitimacy of judging. But based on the confirmation debates, politicians and the media think it matters, and many academics agree. A good portion of Cass Sunstein's manifesto for judicial minimalism, *One Case at a Time*, is aimed at Scalia, with Sunstein agreeing with the Justice that precedential forms are consequential but disagreeing vigorously about the desirability of broad rules.[11] In Sunstein's view, while broad rulings are sometimes justifiable, even necessary, it is usually preferable for judges to

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balancing tests tend to enlarge the role of the courts at the expense of the other branches, and our new Chief Justice seems positively allergic to that.

Diane S. Sykes, *"Of a Judiciary Nature": Observations on the Chief Justice's First Opinions*, 34 PEPP. L. REV. 1027, 1042 (2007).

8. *See, e.g.*, Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated,"* 39 AKRON L. REV. 373, 379–84 (2006) (discussing O'Connor's willingness to decide cases based on factual context as opposed to clearly articulated legal rules); Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 107, 108 (2006) (criticizing, among other things, O'Connor's "reluctance to articulate principles governing cases").

9. "Kennedy's ruminations produce cases that have outcomes, but no settled rationale." Douglas W. Kmiec, *Overview of the Term: The Rule of Law and Roberts's Revolution of Restraint*, 34 PEPP. L. REV. 495, 497 (2007).

10. For a recent example from the bench, see *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. __, __, 127 S. Ct. 2652, 2679–84 (2007) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the plurality's rule as overly vague). *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) (suggesting that courts should base their opinions on clear, general pinciples of law rather than the judges' "personal discretion to do justice").

11. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 209–43 (1999).

"render decisions that are no broader than necessary to support the outcome,"[12] thereby reducing the threat of costly mistakes and refraining from undermining democratic deliberation.

The large literature on standards and rules shows the same concern with form. While studies have considered a wide variety of reasons when and why rules might be preferable to standards or vice versa, they tend to share an assumption that judges' decisions to cast statements of law one way rather than another are consequential.[13]

We have good reason, then, to think that judges vary in how they approach the crafting of legal principles in their opinions and that the variation in their approaches is worthy of our attention. But precisely what differences should we pay attention to? Is it possible to analyze those differences systematically?

A. *One Type of Modesty: Allowing Discretion Versus Imposing Constraint*

Naturally, there are a great many ways one could answer these questions. To move toward one set of answers, I begin with two more precise questions: First, given two precedents with differently formulated legal principles, how might we expect them to differ in their effects on other actors? Second, what is it about the ways the principles are formulated that would lead us to predict these different consequences?

The affected actors I choose to focus on are other judges. The manifestation of judicial (im)modesty analyzed here is the extent to which a precedent seems designed to rein in the discretion of other judges—more precisely, how much a given precedent would be

12. *Id.* at 11.

13. For helpful overviews, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (offering an economic analysis of the consequences of promulgating legal rules versus legal standards); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (dissecting the choice between rules and standards as the form for legal directives); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000) (analyzing the question of legal form from the perspective of law and behavioral science); and Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (setting forth a comprehensive analysis of the respective arguments for using rules and standards in Supreme Court decisions). For more skeptical views, see generally Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303 (2003) (questioning the significance of legal form, since actors who apply a court's rule often blur the line between standards and rules); and Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (arguing that dissecting the difference between standards and rules is fruitless since it focuses on legal form rather than legal substance).

expected to constrain the choices of other judges who attempt to follow it faithfully. A more modest precedent, on this dimension, is one that permits greater discretion to judges bound by it. For stylistic variety, I will also sometimes refer to precedents or formulations of law that should impose significant constraint as "strong."

It is important to note that judges could evince modesty in many other ways. For instance, they might act modestly by deferring to existing precedents, following even decisions whose wisdom they doubt. Or, in setting precedents, they might fetter the interpretations of other judges while—modestly—permitting more discretion to those whose behavior is directly regulated by their rulings.

Relatedly, the version of modesty highlighted in this Article is distinct from the concept of judicial restraint. Deferring to the decisions of elected officials is typically considered a restraintist position,[14] but an announcement, for example, that courts should never overturn a statute unless no reasonable person could view it as constitutional would be highly immodest by the standard employed here. Similarly, a decision to overrule a precedent that was itself highly constraining and replace it with one allowing other judges more room for individual judgment would be activist under some definitions of the term yet modest by this Article's standard.

Hence, a focus on the imposition of constraint on other judges will not capture all important aspects of judicial lawmaking. Studying constraint is nonetheless worthwhile for three important reasons. First, if precedents truly vary in the amount of constraint they impose on other judges, then the way a court goes about creating precedent will have major implications for the distribution of power in a judicial system. For one thing, it can affect the distribution of power between higher and lower courts. To the extent the high court in a system writes in strongly constraining terms, lawmaking should primarily come from above and tend to be more unified. Conversely, where a high court sets precedent more modestly, lower courts will enjoy more power and we would expect to see more diversity in doctrine, at

14. For example, in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), the Court, speaking through Justice Thomas, declared:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . This standard of review is a paradigm of judicial restraint.

Id. at 313–14.

least at certain stages. Similarly, the constraint imposed by a given precedent can affect the balance of temporal power. Where the first court to decide a case announces a clear and easily applicable statement of law, it has the most say over the direction that the doctrine will take. On the other hand, in a system where principles are allowed to emerge over time and retrospectively, more power resides with the courts that confront an issue later.[15]

Second, empirically measuring constraint should also allow us to speak to major normative debates about the best way to formulate legal rulings. Claims for the superiority of one type of formulation over another are especially common in the literature on rules and standards.[16] As the concept of constraint developed here is related to the rules/standards distinction, with rules tending to impose more constraint on judges committed to following them than standards do, some of those claims will also be relevant for this Article. For instance, "under a rule it is possible for citizens (with good legal advice) to know the legal status of their actions with reasonable certainty *ex ante*."[17] This is true of any highly constraining formulation, whether or not we call it a rule: where judges have limited discretion in deciding a type of case, their decisions will be more predictable, and potential litigants will be surer of what they can and cannot safely do. To take an argument on the other side, standards may carry less danger of unjust decisions in specific cases, as they "allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules."[18]

Third, judges who follow Sunstein's prescription to decide no more than necessary will also tend to leave more discretion to other judges, making it more likely that mistakes in earlier rulings will be corrected. Leaving the possibility of correction open may be particularly important given the context in which judicial decisions occur. As Professors Devins, Meese, and Schauer argue, the particular case before a judge will often be unrepresentative of the set of cases in which a given legal issue may arise, and we cannot always count on a judge to recognize how other cases could differ from the

15. For an excellent theoretical and historical discussion of these different modes of lawmaking, see generally Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187 (2007).

16. For a thorough overview of such claims, see Schlag, *supra* note 13, at 399–426.

17. Korobkin, *supra* note 13, at 25.

18. Sullivan, *supra* note 13, at 58–59.

present one and formulate doctrine accordingly.[19] Insofar as unrepresentativeness presents a problem that judges have difficulty overcoming, wisdom would seem to counsel that judges exercise modesty in the setting of precedents, allow doctrine to develop gradually as more and more cases are decided, and leave more ambitious rulemaking to officials with more information and broader perspectives.

Again, however, there are arguments on the other side. For instance, strong precedents might produce more legitimate decisions by leaving less room for future judges' personal values to come into play in their decisions. Regardless of which argument carries more force, an empirical consideration of how judges do (or do not) create constraining precedent will better inform the debate.

B. How Constraint/Discretion Differs from Other Approaches

By this point the phrase "reinventing the wheel" might have entered the reader's mind. In particular, it would be reasonable to ask why I am not content to apply the established distinction between rules and standards.

It is true that the distinction overlaps my distinction between more or less constraining formulations of legal rulings. Nevertheless, it seems to me that an effort to work within the rules/standards tradition is more likely to impede than facilitate progress toward clear conceptualization and valid, reliable empirical measurement.

One important reason is that scholars have not reached a consensus on how to define rules and standards. The following few examples of definitions, while perhaps reconcilable at some level, are nevertheless markedly different:

> [T]he only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act.[20]

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19. Neal Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. U. L. REV. 323, 325 (2005) (arguing that generating doctrine in cases that do not present generalizable facts can have serious consequences); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 890 (2006) (questioning whether it is detrimental for a general legal rule to arise in the context of a concrete dispute with unique facts).

20. Kaplow, *supra* note 13, at 560. Sunstein makes a similar distinction:

> By the aspiration to a system of rules, I therefore mean to refer to something very simple: approaches to law that try to make most or nearly all legal judgments under the governing legal provision in advance of actual cases. We have rules, or (better) "rule-ness," to the extent that the content of the law has been set down in advance of applications of the law.

> A standard refers directly to one of the substantive objectives of the legal order.... The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.[21]

> Rules establish legal boundaries based on the presence or absence of well-specified triggering facts.... Standards, in contrast, require adjudicators ... to incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule.[22]

> Standards are posited norms that contain vague or controversial moral or evaluative terms in their formulations.[23]

Even more importantly, attempts to fit theoretically rich analyses of lawmaking into the rules/standards tradition can introduce cloudiness into otherwise clear accounts without providing any particular benefits in compensation. Consider, for instance, Sullivan's discussion of the three-tier approach to judicial review. In her view, the "recurring distinction in constitutional law between 'categorization' and 'balancing' is a version of the rules/standards distinction. Categorization corresponds to rules, balancing to standards."[24] She illustrates this point through an argument that the development of the two oldest tiers, strict scrutiny and rational basis, imposed a rule-like quality on decisionmaking in areas where they are applied, while the more recent subjection of some types of laws to intermediate scrutiny represents a movement back toward balancing and standards.[25]

It seems indisputable that intermediate scrutiny is different from the others; it would appear to require more difficult judgments about which reasonable people would be more likely to disagree. But is this

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Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 961 (1994) (emphasis omitted).

21. Kennedy, *supra* note 13, at 1688.

22. Korobkin, *supra* note 13, at 25–26.

23. LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 29 (2001).

24. Sullivan, *supra* note 13, at 59.

25. *Id.* at 60–61. As defined by Justice O'Connor in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), strict scrutiny requires "narrowly tailored measures that further compelling governmental interests," *id.* at 227, while under intermediate scrutiny, a law must be "substantially related to the achievement of an important governmental objective," *id.* at 220 (internal quotation marks omitted). The rational basis test requires only that a law be "rationally related to a legitimate state interest." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 966 (1992) (Rehnquist, J., concurring in part and dissenting in part).

really because intermediate scrutiny is more standard-like and less rule-like than the other two levels of scrutiny? It is not easy to see why we should view the problem this way. The logical forms of all three tests are identical, each requiring a judgment as to how important a state interest is and how well tailored the law is to serve this interest. None of the three is tied more closely to background principles than the others, uses vaguer language, or calls for different types of evaluations or attention to a different set of facts. To preview a point that will be developed more fully later, I would argue that what separates intermediate scrutiny from the other tests is simply where it sets the threshold of decision. To pass strict scrutiny, a law must pass a very high threshold, while it need only pass a very low threshold under the rational basis test. For most laws, we could safely predict failure of the former test and passage of the latter. But intermediate scrutiny, as its name suggests, sets a threshold somewhere in between, where confident predictions are harder to make. In short, the difference in formulations that Sullivan points to is an important one, but it seems best understood as tangential to the rules/standards distinction.

A second example comes from Ehrlich and Posner.[26] The authors are interested primarily in a legal formulation's specificity or precision (they use the terms interchangeably). However, they invite readers to "treat the specificity-generality continuum as if it were a dichotomy between 'rules' and 'standards,' " with rules distinguished from standards in this way: "standard" denotes "a general criterion of social choice," while "[a] rule withdraws from the decisionmaker's consideration one or more of the circumstances that would be relevant to decision according to a standard."[27] When it comes to precision, they import the quantitative element of this definition, maintaining that "the fewer and simpler the facts to which definite legal consequences attach, the more precise is a legal obligation."[28] This move strikes me as a slight, but definite, mistake, as the following two examples demonstrate.

Federal law and most state laws distinguish between first and second degree murder in similar ways. This is how the crimes are defined under federal law:

26. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

27. *Id.* at 258.

28. *Id.* at 261.

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.[29]

Determining whether a first-degree murder was committed requires a decisionmaker to consider many more facts than a case of second-degree murder would. But it is hard to imagine any widely acceptable definition of either precision or specificity under which the definition of first-degree murder could be viewed as the *less* precise or specific of the two. In fact, I suspect that the vast majority of English speakers would agree that the definition of first-degree murder is *more* precise and specific.

For an example of judge-made law, consider *New York Times v. Sullivan*,[30] in which the Court held that a public official defamed by a false statement cannot win damages for libel unless he or she also proves that "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[31] The rule adopted by the Court requires decisionmakers to take into account more circumstances than would a simpler rule requiring only proof of a statement's falsity without regard to the speaker's mental state. But would the actual rule be considered less precise or specific under any natural use of those terms? Again, the answer clearly seems to be no.

In these and other instances of thoughtful, sophisticated theorizing, references to the rules/standards distinction seem to do little or nothing to enhance the intellectual contributions of the authors while potentially undermining those contributions or at least distracting the reader from them. By no means am I suggesting that the distinction between rules and standards has no value. But I do believe that in thinking about the character of legal formulations, we

29. 18 U.S.C. § 1111(a) (2000).
30. 376 U.S. 254 (1964).
31. *Id.* at 279–80.

will typically be better served by worrying less about what a formulation of law should be called and focusing more on what it is about the formulation's characteristics and effects that makes it importantly different from others.

Sunstein does just this in his defense of minimalism,[32] and there are obvious similarities between his notion of breadth and the concept of potential constraint developed here. Nevertheless, there are important differences. True, a judicial opinion that says no more than is necessary to decide the present case will normally leave more freedom to future judges than a broad ruling. But this will not always be the case. For instance, imagine two possible formulations of law in search and seizure: (1) X-ray searches of baggage at airports are constitutional under any circumstances, and (2) a suspicionless search may be undertaken if interests of public safety substantially outweigh the individual's interest in privacy. The latter formulation seems much broader but would likely impose less constraint on judges willing to be bound by it than would the former.[33]

My approach most closely tracks Alexander and Sherwin's discussion of the "determinateness" and "generality" of rules.[34] The more determinate a rule in their usage, the less disagreement there will be over how to apply it, with a perfectly determinate rule generating the same answer for anyone attempting to apply it to a given case.[35] A strongly determinate rule that was also highly general, covering a large set of possible cases, would impose substantial constraint on judges committed to following it. However, for purposes of this Article, it is crucial to recognize that a rule can vary

32. *See generally* SUNSTEIN, *supra* note 11.

33. The fact that Sunstein's concepts do not seem to have been developed with empirical measurement in mind also make them less useful for this Article. Siegel attempts to render Sunstein's concept of minimalism more useful by providing an operational definition of it:

> [T]o be minimalist according to the operational definition, a decision must have two components: it must (a) result from the (apparently) intentional choice by a majority of the Justices (b) to decide a case on the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available. To say the same thing a slightly different way, a decision is minimalist if and only if at least five Justices had reasonably available a broader and deeper result, but consciously (as best one can tell) decided the case as narrowly and shallowly as reasonably possible.

Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1963–64 (2005). But even this definition does not bring us very close to a workable measurement strategy.

34. ALEXANDER & SHERWIN, *supra* note 23, at 28–32.

35. *Id.* at 31.

in its level of determinateness according to the person viewing it. For instance, the *Chevron*[36] rule that judges should defer to an administrative agency's reasonable interpretation of a statute should be highly constraining for judges but not for agency officials.

C. *Refining the Definition*

So far I have defined the phenomenon to be explored here as the extent to which a precedent would constrain the decisionmaking of judges who attempt to apply it faithfully. But this is only a small step toward an operational definition that would allow for empirical analysis of the phenomenon. How can we tell how much constraint a precedent should impose on such judges or whether one should impose more than another?

As an additional step, we can reframe the concept in numerical terms by way of a thought experiment. Imagine that one hundred randomly selected judges (with a surprising amount of time on their hands) agree to participate in an exercise. We present them with a precedential case and a large and varied set of hypothetical claims involving the same issue, very broadly defined, as the precedent-setting one, e.g., product liability, equal protection, price fixing. We then ask them to decide each hypothetical claim, applying the precedent as accurately as possible without regard to their feelings about the precedent's wisdom. In each case, the judges achieve a certain level of agreement as to the proper outcome; for instance, in the first case, ninety-two of the one hundred judges agree that the plaintiff should prevail, in the second case, seventy-six agree that the defendant should. By averaging across all cases, we could calculate a mean agreement rate for applications of a particular precedent. This mean agreement rate would constitute the numerical measure of a precedent's strength. An extremely strong, constraint-imposing precedent would produce a mean agreement rate near one hundred percent. A very weak precedent would generate an agreement rate close to fifty percent.

Of course, in actuality we would never be able to calculate a precedent's strength this way. The utility of this thought experiment is in making it clearer what we should be asking. Unfortunately, though, the refinement is only partially successful. To resolve a contested legal issue, a judge often must answer several discrete questions. It will not always be obvious how agreement or disagreement about one particular question will affect agreement

36. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

about the ultimate issue. For example, suppose in deciding a tort case the precedent-setting court laid down a very clear, easily applied test for the imposition of strict liability. We would expect a large majority of the judges applying it to reach the same conclusion about whether a defendant was strictly liable in a given case. But where strict liability was deemed inapplicable, a court could still rule for the plaintiff if it found the defendant negligent, and determinations of negligence might occasion a good deal of disagreement.[37]

These problems will not arise in many instances, but where they do, we can overcome them through a slightly more complicated approach. Instead of case outcomes, we can focus on the discrete questions—of both law and fact—that judges address in a given case. Not only may different judges answer the same questions differently, but if their approaches diverge enough, they may ask different questions to begin with. Under a perfectly constraining precedent, all judges will ask the same questions and answer them in the same way. Under the weakest possible precedent, we might find a hundred unique patterns of questions and answers among the hundred judges. Under the revised definition, then, "agreement rate" refers to the percentage of judges asking and answering the same questions in the same way in a given case. A stronger, more constraining rule will produce higher mean levels of such agreement across many cases. Again, I do not suppose that one could actually measure constraint in this way. But it should be possible to engage in thought experiments and roughly estimate the levels of agreement that would be found if the tests could really be run. Engaging in such thought experiments should provide considerably more guidance than asking vaguer questions about a precedent's general character.

Armed with this definition, we can turn to the separate question of what characteristics of precedents should give them more or less constraining force. In addition to being interesting in themselves, the answers might provide an alternative, albeit incomplete, method for empirically assessing constraint.

37. In fact, it is not difficult to imagine a scenario in which greater agreement about strict liability results in less agreement about the ultimate outcome of the case. Suppose that under Rule A, 100 judges would split evenly on the question of whether the defendant was strictly liable and that the 50 who decided against strict liability would again divide evenly on the question of whether the defendant was negligent. The result would be 75 votes for the defendant (50 on the grounds of strict liability, 25 on negligence), 25 for the plaintiff. Now suppose that under alternative Rule B, there was much wider agreement about strict liability, with 90 of the judges agreeing that it is not applicable. These 90 judges then split evenly on the question of negligence. The result would be a considerably more divided vote: 55 for the defendant, 45 for the plaintiff.

II. CONSTRAINING FORCE OF PRECEDENTS

A. *Announcing a Rule*

Of all the decisions a precedent-setting court can make to affect the discretion of later judges, the simplest and most consequential is whether or not to include in its opinion an explicit statement of the law justifying the case outcome. A decision not to include such a statement does not necessarily leave later judges without a compass. They can apply traditional legal methods to identify the implicit rationale behind the first court's decision, and there may be some cases where the rationale is so obvious that an explicit statement would add nothing to it. In general, however, the inclusion of a statement of law can be expected to produce more constraint.[38] As Peter Tiersma notes:

> When a holding is set forth in such a textual form, it becomes much harder for a court lower in the hierarchy to avoid it by ignoring it or distinguishing it in some way. In fact, an appellate court itself will find it difficult to tactfully avoid mentioning an embarrassing precedent.[39]

By the same token, an explicit statement of law will provide more useful guidance to a court that desires to follow precedent faithfully.[40]

Normally, therefore, a precedent that sets out an explicit legal rule[41] will be more constraining than one that does not. However, the

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38. One can imagine circumstances when judges feel less constrained following the announcement of a new rule because the new rule brings uncertainty into an area where the law had been settled and well understood. But in such circumstances it is probably not the announcement itself that creates the uncertainty but the departure from existing doctrine. Imagine that a court, while reaching a result that cannot be reconciled with existing doctrine, fails to offer a new legal basis for its decision. We would typically expect other judges faced with such a decision to experience at least as much, if not more, uncertainty as they would if the court explained its departure with a new rule.

39. Tiersma, *supra* note 15, at 1256. Tiersma refers here to the explicit statement of holdings, just one of several modern American practices that he defines as constituting "textualization." *Id.* at 1188. Others include changes in official reporting to emphasize the written opinion of a judge to the exclusion of almost anything else (such as exchanges in oral argument) and the replacement of seriatim opinions with opinions for the court. *Id.* at 1229–33.

40. Richard Fallon and Mitchell Berman distinguish abstract statements of what the Constitution means or requires from statements of law that read more as instructions to lower courts for how to decide a constitutional question. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37–41 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 7–9 (2004). Although this distinction strikes me as both valid and valuable, I do not attempt to apply it in this Article, instead counting any statement of law that could provide guidance to other judges, no matter how abstract.

amount of constraint the statement imposes will depend on the character of the statement.

Most obviously, a court can impose more or less constraint on other judges by forbidding or allowing them to do something. In *Rita v. United States*,[42] the Supreme Court did both. It had previously ruled, in *United States v. Booker*,[43] that the federal sentencing guidelines were not mandatory and that circuit courts should review the sentencing decisions of district judges under a "reasonableness" standard. In *Rita*, the Court held: (a) it is constitutional for a court of appeals to presume that a sentence falling within the guidelines is reasonable;[44] but (b) the sentencing judge, as opposed to appeals court, may not begin with a presumption that a sentence within the guidelines is reasonable.[45]

A bit more subtly, a court can make a rule less constraining than it otherwise would be by including language that turns it into more of a suggestion than a command. For instance, in *Riggins v. Nevada*,[46] the Court held as follows: "Under *Harper*, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords *at least as much* protection to persons the State detains for trial."[47] The Court was similarly noncommittal in the First Amendment case of *Rankin v. McPherson*[48]:

> [I]n weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, *some attention must be paid* to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak *will vary*

41. To avoid awkwardness, from this point I will use the term "rule" interchangeably with "statement of law" and "legal formulation." I employ the term broadly, not, as in the rules/standards debate, to denote a particular kind of formulation. A rule here can be broad or narrow, highly constraining or not.

42. 551 U.S. __, 127 S. Ct. 2456 (2007).

43. 543 U.S. 220 (2005).

44. *Rita*, 551 U.S. at __, 127 S. Ct. at 2462.

45. *Id.* at __, 127 S. Ct. at 2465.

46. 504 U.S. 127 (1992).

47. *Id.* at 135 (emphasis added) (referencing Washington v. Harper, 494 U.S. 210 (1990)).

48. 483 U.S. 378 (1987).

with the extent of authority and public accountability the employee's role entails.[49]

B. *Characteristics of Rules*

Turning to more specific characteristics of legal statements, it is probably impossible to catalogue all of those that can affect the level of constraint imposed. However, we can hope to identify some of the most important by focusing on two general traits: how directly a rule's legal conclusion follows from its factual premise(s) and how easy it is to determine the soundness of the factual premise(s).

To begin, consider the following examples of legal formulations contained in following cases:

> *Roper v. Simmons*[50]: The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.[51]
>
> *Printz v. United States*[52]: We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. 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. It 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.[53]
>
> *United States v. Dunn*[54]: [W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.... We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct" answer to all

49. *Id.* at 390 (emphases added).
50. 543 U.S. 551 (2005).
51. *Id.* at 578.
52. 521 U.S. 898 (1997).
53. *Id.* at 935 (referring to New York v. United States, 505 U.S. 144 (1991)).
54. 480 U.S. 294 (1987).

> extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.[55]

One characteristic, evident in the first two rules, is what we might call absoluteness or definitiveness. A legal principle can usefully be viewed as having an "if *p*, then *q*" structure, where *p* denotes an initial determination required of a judge and *q* denotes the legal conclusion that should follow.[56] The *Roper* and *Printz* rules appear strong because they call for no complicated analyses and allow for no doubt whether *q* should follow from *p*. This is not true for all statements of law. Some take a form that could be expressed as "if *p*, then probably *q*." For example, in *People v. Brendlin*,[57] the California Supreme Court held that a passenger in a vehicle stopped by the police is not necessarily seized for Fourth Amendment purposes; there is no constitutional seizure "in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority."[58]

We also see this attenuation of the link between premise and conclusion in rules that create presumptions. One example is the Court's test for equal protection violations in the use of peremptory challenges. Under *Batson v. Kentucky*[59] and later cases extending it, once the objecting party makes a prima facie case of race- or gender-based discrimination, the burden of proof shifts to the other party to come forward with a neutral explanation of its pattern of challenges.[60]

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55. *Id.* at 301.

56. This point has been made by numerous scholars. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 47–52 (1991); Ehrlich & Posner, *supra* note 26, at 259; Kennedy, *supra* note 13, at 1689–90; Schlag, *supra* note 13, at 383–90.

57. 136 P.3d 845 (Cal. 2006).

58. *Id.* at 846. By reversing the California Supreme Court and rejecting this approach in favor of a definitive rule that the passenger is automatically seized, the U.S. Supreme Court announced a rule, like those in *Printz* and *Roper*, that falls far to the side of constraining side of the constraint/discretion dimension. *See* Brendlin v. California, 551 U.S. __, __, 127 S. Ct. 2400, 2403 (2007) ("When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.").

59. 476 U.S. 79 (1986).

60. *Id.* at 97; J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127, 144–45 (1994) ("As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie

Similarly, under *Arizona v. Fulminante*,[61] when confronted with a constitutional violation in a criminal trial, the reviewing court asks whether the violation was a "structural" error, affecting "[t]he entire conduct of the trial from beginning to end,"[62] or a "trial" error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented."[63] If the violation is a structural error, only one result can follow—the conviction must be reversed. However, if it is a trial error, the reviewing court must take an additional step, asking whether the error was harmless beyond a reasonable doubt. If so, the conviction stands; if not, it must be reversed.[64]

More definitive rules, then, will normally be stronger than ones that call for additional judgments after *p* has been established. But this does not mean all definitive rules will be equally strong. While the rules in *Roper* and *Printz* appear equally absolute, most observers would probably agree that the rules in the first case imposes somewhat more constraint than the rule in the second. This is because the conclusion in *Roper* is triggered by a simple finding of fact—that the offender committed the crime as a minor.[65] By contrast, under *Printz* a judge must first determine whether Congress has indeed attempted to "compel the States to enact or enforce a federal regulatory program,"[66] a judgment that will sometimes, but not always, be obvious. Broadly, while the two cases are alike in that the legal conclusion *q* follows automatically, or nearly automatically, from recognition of premise *p*, they differ in the extent to which the judgment whether the premise holds is open to serious disagreement.

The distinction may be clearer if we include *Dunn*, the curtilage case, in the comparison. The Court's test for identifying curtilage is obviously a far weaker formulation than those in *Roper* or *Printz*. The reason is partly that *q* does not follow immediately from *p* in curtilage cases: a search of the grounds outside the curtilage falls outside the protections of the Fourth Amendment, but a search within the curtilage is not necessarily unconstitutional.[67] But even more important is that adjudging whether *p* holds (the search

showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike.").

61. 499 U.S. 279 (1991).
62. *Id.* at 309.
63. *Id.* at 307–08.
64. *Id.* at 295–96.
65. Roper v. Simmons, 543 U.S. 551, 568 (2005).
66. Printz v. United States, 521 U.S. 898, 935 (1997).
67. United States v. Dunn, 480 U.S. 294, 303–04 (1987).

occurred within the curtilage) is a complex task. Why, exactly? Perhaps the main reason is that it calls for a judge to take into account multiple considerations in making that determination. Now, multiple considerations need not always entail a weaker rule. For instance, imagine the Court were to limit the *Roper* rule so that the death penalty could be applied to someone who was convicted of committing more than one murder as a minor. The new rule would allow no more discretion than the existing one. But where, as in *Dunn*, considerations leave room for disagreement, requiring more of them will normally result in greater discretion.[68]

Accordingly, to rein in lower courts' discretion, the Supreme Court will sometimes rule expressly that a particular consideration may *not* be taken into account in judges' reasoning. We see this, for example, in *Colorado v. Spring*[69]: "[W]e hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege."[70]

Even where the assessment of *p* requires only a single judgment, some formulations will be more constraining than others. As with the *Roper* and *Printz* rules, the difference will sometimes lie in how precise or narrow a determination is called for. The *Roper* rule seems stronger than the rule announced in *Printz*, but both are clearly more constraining than the rule announced in *Greene v. Lindsey*[71]: "[W]here an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service" violates the Due Process Clause.[72] Reasonable people are more likely to disagree about whether a mechanism is inexpensive and efficient than whether Congress has attempted to compel state enforcement of a federal program.

Unfortunately, the concept of precision is difficult to define or apply systematically. The concept does not lend itself to absolute

68. One could reasonably view multiple-considerations formulations as substantially similar to the exceptions and presumptions formulations discussed earlier. But conceptual clarity is aided by the effort to refine categories, and I think it is useful to distinguish between cases that require multiple steps from antecedent to consequent (exceptions and presumptions cases) and those requiring complicated assessments to determine a single antecedent.

69. 479 U.S. 564 (1987).

70. *Id.* at 577.

71. 456 U.S. 444 (1982).

72. *Id.* at 455.

judgments; we will often be uncomfortable labeling a rule "precise" or "imprecise" and will frequently have trouble telling which of two rules is more precise. Nevertheless, where disparities between formulations are large, we can confidently adjudge one formulation more constraining than another.

Much the same can be said about a distinction between formulations calling for subjective evaluations and those calling for determinations of fact. As a general rule, the former allow more discretion than the latter. And the distinction will sometimes be easy to make. Applying strict scrutiny requires one to make a subjective evaluation: Is the governmental interest at issue compelling? Applying the *Roper* and *Printz* rules does not. But other cases will be more difficult to categorize. For instance, where, as in *Greene* above, a judge is asked to decide whether a mechanism is "inexpensive and efficient," is the judge being asked to make a subjective or objective evaluation? A plausible argument could be made on either side.

Where a formulation does not call for a judgment that is highly precise and objective, a third characteristic can be important for determining how much constraint the rule will impose. Many decisions can be thought of as requiring a judge to decide whether a certain threshold has been crossed. Consider again the question whether a mechanism is "inexpensive and efficient." Inexpensiveness, like efficiency, is not a discrete trait that is simply possessed or not. To judge whether something is inexpensive, one asks whether the cost is low enough—that is, whether it falls below a certain threshold. Often the threshold will not be perfectly defined, and in such instances it will be more difficult to categorize an item that falls near the threshold. (A $50,000 car is not inexpensive, a $3,000 car is. What about a $15,000 car? That is harder to say.) Even if one judge has a very well defined threshold (e.g., all and only cars priced under $13,000 are inexpensive), other judges may set the threshold at a different spot, resulting, again, in more disagreement over items that fall near the threshold. Consequently, if a threshold is set at a point near which many cases would be expected to fall, we would expect it to generate more disagreement than a threshold set farther away.

To repeat a claim made earlier, both the strict scrutiny and rational basis tests should produce more consensus across a broad set of cases than intermediate scrutiny. We would not expect a high proportion of statutes passed by a legislature to fall near either the rational basis or strict scrutiny side of the spectrum; most laws are clearly rationally related to a legitimate interest and just as clearly not

narrowly tailored to serve a compelling interest. On the other hand, many laws will fall close to the "substantially related to an important interest" threshold,[73] generating more disagreement about which side of the threshold they fall on. For another example, imagine restating the *Greene* rule from above as follows: Where a *very* inexpensive and *extremely* efficient mechanism is available to enhance the reliability of an otherwise *manifestly* unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service violates the Due Process Clause. The addition of strict qualifiers to the key adjectives would shift the thresholds in directions that should make people less likely to disagree about the average case, resulting in a stronger, more constraining rule.

C. *Generality and Context*

So far I have argued that the amount of constraint imposed by a legal formulation will depend in part on how assuredly a conclusion (q) follows from a premise (p) and in part on how much room there is to disagree about whether the premise is correct. Levels of disagreement about whether p holds will be affected by: the number of separate judgments required to assess p, how precise the decision rule is, how objective or subjective the determination is, and where the threshold between p and not-p occurs.

It may seem like an obvious and important characteristic has been overlooked. Kennedy[74] and Alexander and Sherwin[75] both point to "generality" as an important component of a legal statement and are clearly right to do so. Consider *Tull v. United States*,[76] where the Court was called upon to decide whether the Seventh Amendment gave a defendant the right to have its penalty for violating the Clean Water Act determined by a jury.[77] The Court could have contented itself with deciding that there was no right to a jury determination of penalties imposed under the Clean Water Act. However, the Court opted for a broader rule: "[A] determination of a civil penalty is not an essential function of a jury trial, and . . . the Seventh Amendment does not require a jury trial for that purpose in a civil action."[78] It seems fair to label such a rule, clearly going

73. These tests are probably better viewed as involving two thresholds, but that is not important for this example.

74. Kennedy, *supra* note 13, at 1689–90.

75. ALEXANDER & SHERWIN, *supra* note 23, at 28–32.

76. 481 U.S. 412 (1987).

77. *Id.* at 414.

78. *Id.* at 427.

beyond what is strictly necessary to decide the case, as strong or even immodest.

As important as generality would seem to be, however, it does not turn out to have much direct application to the task of this Article.[79] This is largely because the constraining effects of generality are straightforward only when a court writes on a blank slate, which courts today rarely do. When a new rule modifies existing doctrine, the relationship between generality and constraint depends crucially on the character of the doctrine being modified. Suppose that the Court were to reconsider *Tull* this Term and decide that it was too absolute, ruling instead that there is a right to a jury where the conduct occasioning the penalty could have justified a prosecution under criminal law. If the scope of this new rule were precisely the same as in *Tull*, covering all civil actions, it would introduce discretionary judgment in all those cases where *Tull* allowed none. But if the new rule applied to only a single statute or class of statutes, this less general version of the new rule would leave more constraint in place.

In fact, the effects of generality are not always straightforward even when a court is addressing an issue for the first time. In the short term, a more general rule will always impose more constraint than a less general one, because it will leave fewer areas of complete discretion. But the announcement of a broad rule at the first stage may forestall the development of different rules for specific subsets of issues. Where these rules would have been more definitive, precise, or otherwise more constraining than the general rule, the long-term effect will be to leave other judges less constrained than they otherwise would have been.

It turns out, then, that the key question for an analysis of constraint is not how general a rule is but whether it expands or reduces the set of cases in which disagreement is likely to occur. One important and recurring type of case where the Court does one or the other involves the question of how broadly to interpret the scope of a constitutional right. Compare *Plyler v. Doe*,[80] in which the Court

79. Paul Mahoney and Chris Sanchirico provide another reason to think that generality is important, demonstrating that under certain conditions, rules directed at specific activities will be more likely to privilege the interests of regulated actors over those of society generally than would rules governing a range of activities. Paul G. Mahoney & Chris William Sanchirico, *General and Specific Legal Rules*, 161 J. INSTITUTIONAL & THEORETICAL ECON. 329, 344–45 (2005). However, their analysis depends only on generality per se and not on the extent to which general rules are more constraining, as defined here.

80. 457 U.S. 202 (1982).

ruled that the Equal Protection Clause applies to illegal aliens,[81] with *United States v. Place*,[82] where the Court ruled that allowing drug dogs to sniff a person's luggage does not constitute a search under the Fourth Amendment.[83] The former ruling expands the discretion of other judges by adding more cases to the set in which a violation might be found; the latter reduces discretion by eliminating cases from the set.

An even more direct way to impose constraint by reducing the set of controversial cases is to declare some types of cases off limits to the courts. Think of Supreme Court decisions in the last two decades denying parties standing, especially in environmental[84] and Establishment Clause[85] cases, or finding suits against states barred by the Eleventh Amendment.[86] Each decision of this sort imposes constraint by defining a set of cases where judges have no decision to make at all and hence cannot disagree with each other on the merits.

To label such a ruling strong or immodest might seem odd. A devotee of Bickel[87] or Justice Frankfurter[88] would applaud it as an example of necessary and salutary restraint. One response is to recall that a decision can be modest in more than one way, and this Article is concerned with only one. But there is also an argument to be made that rulings that at first glance seem modest under other definitions may in fact not be. Note, for instance, that given the usual perspectives of plaintiffs in Establishment Clause and environmental cases, denials of standing will typically ensure that conservative

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81. *Id.* at 230.

82. 462 U.S. 696 (1983).

83. *Id.* at 706–07.

84. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (denying standing based on a lack of injury and redressability).

85. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. __, __, 127 S. Ct. 2553, 2563 (2007) (rejecting claim of standing because interest asserted was "too generalized and attenuated").

86. *See, e.g.*, Alden v. Maine 527 U.S. 706, 760 (1999) (holding that the Fair Labor Standards Act of 1938 does not abrogate a state's sovereign immunity); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 75–76 (1996) (holding that Congress did not have authority under the Indian Commerce Clause to abrogate states' sovereign immunity).

87. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (defending the legitimacy of judicial review but arguing that judges should often refrain from exercising it through the "passive virtues" of issue avoidance).

88. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (cautioning that "[d]isregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces" involved in apportionment disputes, but also "may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' ").

policies prevail. Denying access to courts for positions a judge disagrees with is a highly effective way of shaping policy in the judge's desired direction and in this sense can be seen as a significant exertion of power.

III. EMPIRICAL DATA

To this point I have set out an operational definition of the extent to which a precedent imposes constraint on later judges and identified a set of characteristics tending to make precedents stronger or weaker in this sense. Although neither the definition nor the list is complete, they should offer sufficient guidance to allow for some preliminary empirical explorations of how individual Justices and the Court as a whole go about setting precedents. The questions I hope to address are whether the Supreme Court as an institution shows any clear tendencies toward more or less modest precedents and whether there are interesting similarities or differences across Courts and Justices. More specifically, is there evidence that the behavior of the Roberts Court is likely to diverge much from that of earlier Courts?

As suggested earlier, how much constraint to impose through a precedent can be viewed as involving two decisions: whether to include an explicit statement of law in the court's opinion and, if a statement is to be included, how to formulate it. There may be rare cases where the logic or principle underlying a decision is so obvious that the decision can guide other judges even where the law is not expressly stated. But most often the decision not to include a statement of law will allow for more disagreement among judges in future cases. On the other hand, the inclusion of an explicit rule will not always result in significant constraint. That depends on the characteristics of the rule. Accordingly, I ask the following questions about each case: Does the Court set out an explicit statement of law? If so, how constraining is the statement?

A. Coding Rules

Ascertaining the presence or absence of an explicit rule requires attentive reading of cases but is otherwise a fairly straightforward task in most instances. A court will often signal that a statement of law is to come with a phrase such as "We hold" or "In our view." Whether or not they are so prefaced, rules typically appear near the beginnings or ends of delineated sections of an opinion. The syllabus of the case can also be helpful in identifying statements of law.

In my coding of cases, two judgments presented the most frequent problems. First, I counted a holding as a rule only if it was framed broadly enough to be understood as intended to govern a non-trivial number of cases. For example, the Court's holding that "application of the Unruh Act to California Rotary Clubs does not violate the right of expressive association afforded by the First Amendment" is not counted as a rule.[89] A close reading might uncover logic applicable to other statutes or organizations, but the Court chose to state the law in a way that did not explicitly apply to them. It is difficult to offer a more precise coding rule, so the reader should bear in mind that some narrow holdings that might qualify as rules in some people's eyes are not treated as rules here. Under the same principle, I did not ask whether a legal statement should be considered a holding or dicta. If the Court announced a rule, I coded it as one, regardless of whether the rule was necessary to the decision of the case.

The second sometimes problematic judgment was whether a rule was new. Because this is an Article about the setting of precedents, not the treatment of existing ones, it would not make sense to count simple citations of established rules. However, an extension or limitation of an existing rule could affect levels of constraint, as could an attempt to restate a rule in new terms. For this reason, I coded any alteration of a rule as a new one. A case was coded as making an explicit statement of law only where these guidelines allowed for a confident determination. In cases of doubt, the coding decision was "no rule."

Ideally, having identified a rule I would be able to assess its strength in absolute terms so as to be able to compare it with rules from other cases. But it would be very difficult to make such an assessment even qualitatively and using few categories (e.g., very strong, fairly strong, fairly weak, etc.). For one thing, a single rule can possess several characteristics that operate in opposing ways, some enhancing discretion, others reducing it. Furthermore, appearances can be deceiving, and rules will not always operate in practice as we would expect them to. Sometimes what appears to be an open-ended rule will turn out to allow few real options to judges in actual cases, while a rule that seems strong and clear will prove confusing in practice.[90]

89. Bd. of Dirs. of Rotary Int'l. v. Rotary Club, 481 U.S. 537, 549 (1987).

90. For a fuller discussion of this problem, see Kaplow, *supra* note 13, at 588–93. *See also* Schlag, *supra* note 13, at 406–12 (arguing that the degree of certainty afforded by

Because I coded the results without assistance, assessing absolute levels of constraint was not feasible.[91] Therefore, I chose instead to code the rule in each case relative to an alternative. Specifically, I asked whether the Court's ruling in a case appeared to impose more, less, or about the same amount of constraint as the rule proposed by the party whose position on the relevant issue was rejected by the Court. In many cases, the Court describes the alternative in a summary of the parties' arguments. Where it omits this summary but reverses the lower court, the alternative can usually be found in its summary of the lower court's reasoning. In the small minority of cases where the alternative is not clearly spelled out in one place or the other, it is often a fairly simple matter to infer the alternative from the Court's discussion.

To judge the relative effect of the rule, I drew on both the operational definition and list of characteristics described above. That is, I began by identifying key characteristics and noting their implications: e.g., the Court's rule is more objective than the alternative (more constraining); the Court's rule would require judges to make an additional judgment (less constraining). But the ultimate coding question was whether the Court's rule would be expected to produce higher rates of agreement among the hypothetical sample of judges (more constraining), lower rates (less constraining), or similar rates (neutral).

Probably the most common reason for coding a rule as neutral—occurring in ten cases—was that it constituted an answer to a simple yes-or-no question. For example, in *Rodriguez v. Popular Democratic Party*,[92] the Court announced that a state or territory may, consistent with the Constitution, allow a legislative vacancy to be filled by a vote of the vacating representative's political party.[93] Had the Court ruled the opposite way, the resulting rule would have been no more or less constraining on other judges. In the interest of drawing cautious conclusions from the data, I also coded as neutral any rule that I could not confidently assess.

Some cases produced more than one rule. Rather than count a single case more than once, I took into account all rules in assessing the precedent's overall strength. Where the rules tended in the same

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rules necessarily depends on how a court characterizes the context in which it is to be applied).

91. Reliably coding absolute levels of constraint, if possible at all, would require multiple coders and tests of intercoder agreement.

92. 457 U.S. 1 (1982).

93. *Id.* at 12.

direction, of course, the coding decision was simple. Where one was constraining and one discretion-enhancing, I attempted to discern which rule would likely be relevant to a greater number of future decisions. Where this was easy to discern, I coded the precedent according to the direction of the more significant rule. In the five cases where it was not, I coded the precedent as neutral.

While this approach does have the benefit of being more reliable than attempts to code constraint in absolute terms, it carries significant costs in terms of validity. Most importantly, we would rarely expect judges' choices between competing positions to be driven primarily by considerations of constraint and discretion. Rather, we would expect them to choose the positions that strike them as sounder on the merits. So the choice of a more constraining rule might not reflect a judge's views on constraint. That said, a judge wishing to proceed modestly, leaving more discretion to other judges, always has the option not to include an explicit statement of a new legal rule. Another concern is that the stronger of two possible rules in one case might be much weaker than the stronger rule in another. Accordingly, we should be somewhat cautious in making comparisons across cases and, therefore, comparisons across Courts and Justices. That is, if we find that one Justice writes relatively constraining rules more often than another, we can view that finding as evidence that the first Justice is a greater proponent of strong rules but should be aware that the evidence is far from conclusive.

B. The Cases

Although the coding scheme laid out here could be applied to any type of case, I have elected to restrict this analysis to cases where the primary issue involves the U.S. Constitution.[94] The chief reason is that, in my experience, statutory cases more often present the Supreme Court with precise questions that do not leave as much room for choices about whether and how to set out explicit rules. Other types of cases allow for more variation but are not as common before the Court and would make comparisons across time and Justices more difficult.

94. Constitutional cases were identified using the issue variable from Harold Spaeth's United States Supreme Court Judicial Database, 1953–2006 Terms, http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm. My thanks to Stefanie Lindquist for providing a do-file to define these cases in STATA.

My sampling strategy was to start with the October 2006 Term ("OT 2006")[95] and work backwards in five-year steps, coding every constitutional case resulting in a written opinion on the merits, whether signed or per curiam. To make sure of including some data from the Warren Court, I coded the 1966 Term. Finally, because the Court's docket has shrunk in recent years and I wanted sufficient data on all of the Justices who have served in the past few years, I supplemented the sample by adding the first Term of the Roberts Court and the last two Terms of the Rehnquist Court. Thus, the dataset comprises all constitutional decisions from the following Terms: 1966, 1981, 1986, 1991, 1996, 2001, 2003, 2004, 2005, and 2006. There are 330 cases in all.

Table 1. Percentage of Cases Containing an Explicit New Statement of Law.

Term	Percent Announcing Explicit Rule	Total Cases
1966	52.5	40
1981	61.9	63
1986	47.5	59
1991	66.7	36
1996	58.3	24
2001	50.0	20
2003	47.4	19
2004	54.2	24
2005	60.9	23
2006	45.5	22
Total	55.2	330

95. "OT [year]" refers to the Term of the Supreme Court beginning in October of the year noted.

Table 2: Level of Constraint Imposed by Statement of Law, Relative to Rejected Alternative.

Term	Less Constraint (%)	Same (%)	More Constraint (%)	Total
1966	28.6	14.3	57.1	21
1981	35.9	15.4	48.7	39
1986	10.7	35.7	53.6	28
1991	66.7	8.3	25.0	24
1996	42.9	7.1	50.0	14
2001	30.0	30.0	40.0	10
2003	22.2	0	77.8	9
2004	30.8	7.7	61.5	13
2005	42.9	7.1	50.0	14
2006	0	30.0	70.0	10
Total	34.1	15.9	50.0	182

I begin with a broad overview of the Court's lawmaking behavior before turning to variation across time and across Justices. According to my coding, the Court explicitly set out a new statement of law in 182 (55.2%) of these cases. While I did not begin this study with clear expectations, this strikes me as a surprisingly low figure. When a court refrains from laying down a legal rule in the course of an opinion, it almost always leaves more discretion to other judges than it otherwise would. The Supreme Court defines federal constitutional law for every other court in the country, and, as the Justices have been known to remark, views its chief function as lawmaking, not error correction.[96] For that Court to refrain from announcing a rule in nearly half its cases is, in my view, a fairly striking display of judicial modesty.

Conservative coding rules may be partially responsible for this finding. Recall that I only counted statements of law that clearly included something the Court had not previously said. One could argue that even in cases where the Court only cites an existing rule it

96. *See* Ross v. Moffitt, 417 U.S. 600, 616–17 (1974) ("This Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

can still provide guidance to lower courts by demonstrating how the rule should be applied. This is surely correct, but the fact remains that the Court could provide even more guidance by coupling its example with a new statement of the rule to help clarify it. Moreover, a count of rules announced does not tell the whole story. What did the Court do in those rules? By my coding, in only half (ninety-one) of the cases where the Court chose to lay out a rule did it choose the more constraining alternative. In over a third of the cases (sixty-two), the rule it announced imposed less constraint on other judges than the rule it rejected would have. In all, the Court was presented with 330 opportunities to issue strongly constraining legal rules. It did so in just over a quarter of these cases.

Is there important variation over time or across Justices? Tables 1 and 2 display results by Term. Someone looking hard for patterns in the percentages might detect a slight tendency for earlier Courts in the sample to announce rules more readily, and perhaps if the data were extended to include more cases from the Burger and, especially, Warren Courts, a sharper pattern would emerge.[97] But the disparities shown here are not particularly large or systematic. They look smaller still when we turn to levels of constraint. Note that while the Court in earlier Terms was slightly more likely to issue rules, those rules were slightly less likely to be more constraining than the rejected alternatives. Comparing the percentage of all cases that resulted in highly constraining statements of law, we are left with no basis to conclude that recent Courts have been more modest. For instance, the rates were thirty percent in OT 1981 and only seventeen percent in OT 1991 versus twenty-nine percent in OT 2005 and thirty-two percent in OT 2006.[98]

It is important to emphasize here that this Article is concerned with only one way in which the Court might impose constraint on other judges. Other strategies are also available. For instance, it could attempt to rein them in by exercising more discretion and taking more cases. (Viewed this way, the 1981 Term Court stands out.) Or it could take and decide cases in particular patterns, in an

97. We would be even more likely to find a pattern if we surveyed the entire history of the Court. *See* Tiersma, *supra* note 15, at 1248–55 (showing that the Court was much less inclined in its early years than it is now to state legal rules boldly, using such terms as "We hold").

98. I do not present measures of statistical significance for these differences because they would offer a false sense of precision. The measures employed here are at a preliminary stage of development, and general patterns should be given more weight than specific numbers.

effort to guide lower courts through example even without reformulating doctrine. The data in this study illustrate how the Court responds to opportunities to use one particular method.

Table 3. Frequency and Relative Constraint of Rules, Selected Justices.

Justice	% Explicit Statements	% of Statements High-Constraint	% of Statements Low-Constraint	% of All Decisions High-Constraint	Total Decisions
Rehnquist	63.2	70.8	29.2	44.7	38
O'Connor	42.9	22.2	55.6	9.5	21
Stevens	60.6	40.0	35.0	24.2	33
Scalia	69.0	55.0	30.0	37.9	29
Kennedy	58.8	50.0	50.0	29.4	17
Souter	42.9	33.3	66.7	14.3	14
Thomas	44.4	50.0	25.0	22.2	9
Ginsburg	66.7	33.3	16.7	22.2	9
Breyer	53.9	28.6	42.9	15.4	13
Blackmun	60.0	55.6	11.1	33.3	15
White	54.2	23.1	50.0	12.5	24

Note: High-Constraint means the Court's rule is more constraining than rejected alternative; Low-Constraint means the opposite.

Interesting variation across Justices is immediately apparent in Table 3, which displays results for opinions of the Court[99] written by the last eleven Justices to sit on the Court before Roberts joined it.

99. It is possible that Justices are constrained in their writing by the types of cases they are assigned or the voting coalitions in those cases. A study of separate opinions might give us more purchase on individual Justices' tendencies. But someone wishing to undertake such a study would have to think hard about the proper baseline for comparison across Justices since, compared to the opinion of the court, there is less expectation that judges will provide guiding statements of law in dissents and no such expectations for concurrences, which can be written for a whole host of reasons.

One striking finding is that the scores for Justices Scalia and O'Connor are strongly consistent with their reputations. Scalia announces an explicit rule in the highest percentage of cases; O'Connor is tied (with Justice Souter) for the lowest percentage. Of course, O'Connor might have used her few rules to impose serious constraint on other judges, while Scalia's rules might tend to leave them with more discretion. Taking into account relative constraint does change the picture, but only slightly. Looking in the fourth column of the Table, we see that O'Connor still comes out as the most modest Justice, announcing a rule more constraining than the rejected alternative in only nine percent of her cases (two of twenty-one). Scalia is no longer the most immodest Justice by this measure, losing his spot to Justice Rehnquist, who announced slightly fewer rules but was a bit more likely to make his rules constraining. Justice Blackmun comes in a fairly close third, with numbers that look much like Scalia's. Interestingly, Justice Ginsburg, who is just behind Scalia in rulemaking rate, slips back to the middle of the pack under the final measure, as only a small proportion of the rules she announces are relatively highly constraining. Of course, the reader should note that her scores are based on only nine cases and so should be regarded with caution.

We also have too few cases from Justice Alito or Chief Justice Roberts to make confident evaluations, but it is worth noting that Roberts has begun his tenure showing a preference for strong precedents, announcing rules in five of seven cases and choosing the more constraining alternative in four of those five.[100]

A larger number of cases across the board would allow for more definitive conclusions, but I think these results lend support to our intuitions that there are real differences across Justices and that, say, a Court made up of Scalias would make constitutional law quite differently from one made up of O'Connors. On the other hand, the evidence does not give us much reason to suppose that Roberts Court lawmaking will depart in a dramatic way from past practice in this respect, in part because it is far from clear that Roberts will refrain from imposing constraint on other judges, and in part because the Justice replaced by Alito was one of the most modest in this regard. If forced to bet, then, I would wager that the Roberts Court will not make constitutional law in an unusually modest fashion. That said, this Court is only two years old, and the empirical methods employed

100. Alito has only two cases in this dataset. He announced a relatively constraining rule in one, and no rule in the other.

here are not sufficiently sound to support strong conclusions. If a study employing more fully developed measures were to be conducted several years from now, it might well yield different conclusions.

CONCLUSION

As is probably evident from this Article, developing a solid measure of a precedent's potential to impose constraint on other judges is a daunting task. Clear conceptualization is a necessary first step, and I hope this Article will be viewed as having taken that step. It has also demonstrated, I believe, that the difficulties involved in coding potential constraint are not intractable. Nevertheless, those decisions entail enough judgment to call the reliability of the measure into question. That is, we cannot be confident that different observers would code different cases the same way.

In a world where scores of judges had the time and inclination to decide scores of hypothetical cases, there would be no problem; we would simply calculate agreement rates and have our measure. In the world we actually live in, the best solution is probably to have multiple expert coders each estimate a judicial agreement rate for a given rule. Judges or lawyers would be ideal coders, but third- or even second-year law students would likely have sufficient training. Provided we found reasonable rates of agreement across coders, averaging their estimates would take us some way toward the ideal of testing a rule on many judges in many cases.

It is possible that this estimation task is simply too difficult, and we would wind up with wildly varying estimates. Perhaps there are too many subtle qualities that vary across rules for different observers to agree about their ability to constrain. In that case, another option would be to leave aside the more global question and focus instead on the rule characteristics analyzed in this Article, refining definitions of them where necessary, and having a panel of expert judges code for each characteristic separately. One could then compute a measure of constraint based on the ratio of constraint-promoting characteristics to discretion-promoting characteristics. Alternatively, one could give up on a general measure of constraint altogether and engage only in comparisons of discrete characteristics: for example, does a court's willingness to allow exceptions to its rules vary over time, or is one court or judge more inclined to call for subjective evaluations than another?

To the extent we are successful in creating sufficiently valid and reliable measures, we can use them to address more theoretically ambitious questions about the reasons for and consequences of judges' actions. For example, judges' options will sometimes be limited by the posture in which a case reaches them, but they will often have a good deal of freedom to choose a more or less constraining action. Can we say anything systematic about when and why judges opt for constraining rules in their opinions?

One natural hypothesis is that judges choose to impose more or less constraint depending on which approach would do more to further their policy preferences. A liberal judge who feels compelled to decide a case in favor of the government in a criminal case or a coal company in an environmental case might choose to announce only a weak rule in support of the decision or, better yet, not announce any rule at all, leaving plenty of room for other judges to reach liberal decisions in slightly different cases. A conservative judge deciding a case where established doctrine is liberal might elect to grant lower court judges more discretion in applying it by establishing an exception to the rule or redefining it to allow for a less precise or more subjective judgment.

Alternatively, a higher court judge hoping to promote his or her policy preferences might think more strategically about the preferences of lower court judges and, following Jacobi and Tiller,[101] allow more discretion in areas where the preferences of the higher and lower court judges are more consistent, and less discretion where the judges are ideologically further apart. Or perhaps the judge might care more about the proper guidance function of the high court than about particular policies and act to improve the balance of constraint and discretion where it appears to be off.

The most important question is one that this Article has largely begged so far: To what extent does the form a precedent takes actually matter? I have written as if we can be confident that a judge's decision to write an opinion in a certain way will have important consequences for decisions in other cases. But a central truth of judging is that the set of judges who issue a precedent can never maintain perfect control over the application of that precedent by other judges. As Sunstein notes:

101. Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 333–40 (2007) (suggesting that a move away from highly discretionary tests should follow from preference divergence between higher and lower courts).

> Courts deciding particular cases have limited authority over the subsequent reach of their opinion.... A court that is determined to be maximalist may fill its opinion with broad pronouncements, but those pronouncements may subsequently appear as "dicta" and be disregarded by future courts.... A court may write a self-consciously minimalist opinion ..., but subsequent courts may take the case to stand for a broad principle that covers many other cases as well.[102]

From the perspective of a high court like the Supreme Court, the effects of its pronouncements depend very much on how lower courts respond to them.[103]

To begin with, note that if lower courts made no effort to apply higher court precedents faithfully, the way in which higher courts wrote precedent-setting cases would be irrelevant. A substantial empirical literature suggests that lower court judges do indeed take precedents seriously, but it does not indicate that they are always willing to subordinate their own views to those of their institutional superiors.[104] A study of decisionmaking in the U.S. Courts of Appeals by Lindquist and Cross shows one intriguing way in which a partial commitment to compliance can play out.[105] The authors found that the influence of ideology on circuit judges' opinions is greater in cases involving issues of first impression, suggesting that once the Supreme Court speaks, circuit judges feel greater constraint.[106] However, in an analysis of cases in one particular area of law, the effect of ideology began to increase after time, presumably because the profusion of sometimes inconsistent precedents from the Supreme Court allowed the circuit judges more flexibility to decide as they wished.[107] As this study demonstrates, not only do lower court judges' commitment to compliance shape the effects of higher court decisions, but it can do so in ways too complex to be covered in this Article.

Even where lower court judges make their best efforts to apply precedent faithfully, higher court precedents might not have the effects we expect. For one thing, there is no consensus in the legal

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102. SUNSTEIN, *supra* note 11, at 21.

103. In fact, it can depend at least as much on the responses of many other nonjudicial actors, such as executive officials, lawyers, and potential litigants. But exploring these variations would require an additional article.

104. For a thorough recent overview, see generally Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007).

105. Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156 (2005).

106. *Id.* at 1184.

107. *Id.* at 1194–96 (analyzing cases on "color of law" under 42 U.S.C. § 1983 (2000)).

community as to how precedent is to be used and understood, whether the job of the later judge is to follow the language in earlier cases or to go deeper, analyzing the facts and outcomes and discerning the principles implicit in the decisions.[108] Relatedly, judges disagree about whether lower courts are bound to follow the dicta of their superiors and, of course, about how to define dicta in the first place.[109]

Even compliant judges who see themselves as bound by the language of the Court might not apply that language as its authors imagined. As Schauer argues, there can be large gaps between how a formulation works in theory and how it is applied in practice.[110] Judges attempting to apply a well defined rule may find that it leads to absurd or otherwise unacceptable results and begin to carve out exceptions to it.[111] Judges operating under a more diffuse standard, finding that application of the weak formulation makes their jobs too difficult, might supplement it with their own more determinate formulations.[112]

Thus, in order to know how consequential lawmaking styles in higher courts are, we would need to know much more than we do now about how lower courts think about and employ precedents. But even that would not be enough, for the consequences also depend crucially on how higher courts treat their own precedents and how they respond to the actions of lower courts. Do they reverse lower courts for departing from established precedents even where those precedents diverge from the policy preferences of the current judges? Do they expect lower court judges to honor their statements of law and reverse them when they do not, or do they permit well reasoned applications of underlying principles? There are also many more subtle ways in which courts can undermine or solidify their own precedents, a topic far too vast for me to do more than mention in this Article.[113]

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108. *See, e.g.*, Tiersma, *supra* note 15, at 1189 (arguing that the increasing textualization of precedent is likely to "intensify the shift from legal reasoning to close reading"); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 5 (1989) (discussing three different methods of following precedent, including the "natural model," "rule model," and "result model" of precedent).

109. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 (1994).

110. Schauer, *supra* note 13, at 312.

111. *Id.*

112. *Id.* at 315–16.

113. For an important recent discussion, see Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 922–33 (2005) (examining five characteristics common to constraining precedent).

In short, there is abundant reason to question whether the way in which judges choose to write in their opinions ultimately affects the influence the opinions exert on other judges. With solid measures allowing us to distinguish more and less constraining legal formulations, we could test for effects by, for instance, seeing whether cases decided under more constraining formulations produce higher rates of consistency in winning rates for one type of party. In turn this would allow us to reach firmer judgments about how much judicial modesty—at least, of the sort under consideration here—really matters.