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Surveying the "Forms of Doctrine" on the Bright Line Balancing Test Continuum

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ARTICLES

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James G. Wilson*

I. INTRODUCTION

The long-standing jurisprudential controversy over whether courts should utilize bright line rules or balancing tests has failed to inform sufficiently lawyers and judges. For many years, most analysts contrasted rigid rules, such as the United States Supreme Court's striking down all legislative vetoes in *I.N.S. v. Chadha*,[1] with conclusory standards, like *Morrison v. Olson*'s upholding special prosecutors because they did not "impermissibly undermine the powers of the Executive Branch."[2] This stark dichotomy between archetypal rules and standards can distract us from evaluating courts' frequent application of other "forms of doctrine" and the foreseeable effects of those other forms. The phrase "forms of doctrine" refers to such doctrinal structures as exceptions, multiple factor tests, totality of the circumstances tests, "escape hatches," and several other hybrid variants (containing elements of both rules and standards), all of which can appear separately or in myriad combinations in a particular substantive area.

The rule/standard debate has not only erred empirically by failing to consider these other forms of doctrine, but many of the rule/standard discussions have also used inappropriate substantive criteria to evaluate the judiciary's employment of rules or standards. Professor Strauss, an exponent of pragmatic functionalism, condemned *Chadha*'s wholesale

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1. 462 U.S. 919, 959 (1983).

2. 487 U.S. 654, 695 (1988). Most of my examples are from constitutional law and administrative law, the subject areas that have been the focal point of my teaching and research. I believe this article's basic claims apply to all other doctrinal areas.

repudiation of the legislative veto as woodenly "formalistic."[3] Professor Henderson relied upon her feminist perspective to find the rule of law, including formal rules, "authoritarian."[4] Professor Aleinikoff generally disapproved of balancing tests,[5] while Professor Boyle found the choice between standards to be another verification of the Critical Legal Studies' claim of the indeterminacy of judicial rhetoric.[6] On the other hand, Professor Schauer has praised rules. For example, he characterized exceptions as the intersection of two rules.[7] Professor Entin considered

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3. Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 818 [hereinafter Strauss, *Baby*]; *see also* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987). For additional critical discussion, see E. Donald Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 131-44, and Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 471 (1987) (arguing that *Chadha*'s definition of legislative action was circular). For a more favorable view, see Harold H. Bruff, *Symposium on Administrative Law: The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987) (*Chadha* enhanced congressional accountability to the electorate).

4. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379 (1991); *see also* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges*, 61 S. CAL. L. REV. 1877 (1988). Professor Michelman thought that Justice O'Connor's affinity for balancing tests might reflect a feminine perspective. Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17 n.68, 33-36 (1986).

5. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

6. James A. Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985). At one time, the leading Critical Legal Studies scholar Duncan Kennedy attacked rules. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Along with other critical legal scholars, he argued that the legal system's deviations from rules demonstrates a crisis of liberalism. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 63-103 (1975); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987).

7. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991) [hereinafter Schauer, *Exceptions*]. No recent legal scholar has wrestled with rules as much as Professor Schauer. Schauer has advocated the use of formal rules. Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter Schauer, *Formalism*]; Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 470 (1989). For a Kantian defense of rules, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). *See also* Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319 (1992) (balancing favors liberal, activist, academic lawyers).

Professor Schauer's recent book on rules demonstrates how rules allocate power and discretion to different parts of our society. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 98, 158-62 (1991). It is undesirable to formulate all rules to allocate all power to a single source in a constitutional system that is premised upon the dispersal of power. Although the Supreme Court

Supreme Court vacillations between formalism and functionalism in separation of powers decisions like *Chadha* and *Morrison* to be "inconsistent."[8]

The Supreme Court has also contentiously considered this question. For instance, Justice Stevens has generally favored standards, proposing a universal "rationality" test in equal protection cases instead of the existing three-tiered approach of strict scrutiny, intermediate scrutiny, and the rational purpose test.[9] Justice Scalia has exacerbated the polarity with caustic commentary supporting his biding preference for rules.[10] For example, he did not consider *Morrison*'s conclusory standard even to be "law":

> [T]he governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the

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should assert its own power, it also ought to disperse powers to the other two federal branches, the states, juries, lower courts, individual citizens, and even future Supreme Courts. There are good reasons to distrust any of these decision-makers, but the Court nevertheless frequently must allocate discretionary power to all of them if society is to function. The real question is when to give different authorities discretion via standards, not whether to ever give them discretion.

Professor Schauer's book is more ambivalent about standards than some of his previous writings. He praises rules for serving reliability, predictablility, and certainty. *Id.* at 96-99. Rules also focus courts by excluding evidence. *Id.* at 88. But when he turns to standards, he seems less hostile than before. For example, he initially claims that the vague standard, "best interest of child," is not really rule-based. *Id.* at 11. But he later observes that the "reasonableness" standard is still a rule. *Id.* at 104 n.35. His major example, excluding dogs from restaurants, generates a rule against dogs in restaurants. *Id.* at 31. But he does not reject the alternative standard precluding all "boisterous" dogs from restaurants; it merely implies a different rule. *Id.* at 63. In other words, the creation of the appropriate rule raises contextual, cost-benefit questions. *Id.* at 142.

8. Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 210 (1990). Other legal scholars have voiced similar criticisms. *See, e.g.*, Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

9. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 88-90 (1991). Professor Kahn criticized Justice Powell for overly balancing community norms against individual rights. Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 56-59 (1987).

10. *See* Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Professor Nagel also preferred rules to standards. Robert F. Nagel, *The Fomulaic Constitution*, 84 MICH. L. REV. 165 (1985). Justice Black advocated clear rules. *See* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 36 (1994); *see also* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 148-61 (1960) (arguing that standards are contrary to the "rule of law").

> government of laws that the Constitution established; it is not a government of laws at all.[11]

Nevertheless, the debate has recently become somewhat less polarized. Judge Posner's pragmatism embraces both rules and standards.[12] While Professor Sullivan concluded that judges of any ideology can and will formulate rules or standards, she also observed that the Supreme Court's political "center" prefers balancing tests.[13] Even Justice Scalia conceded that he must sometimes balance,[14] reinforcing the growing belief that the rule/standard dichotomy exists on a continuum.[15] These views resemble the position I took some years ago that formal rules, that is, "doctrinal formalism," should coexist with balancing tests, because both rules and standards can generate the appropriate solution to a particular constitutional problem.[16]

This article's primary contribution to the rule/standard problem is to map the rule/standard continuum more precisely. This article will analyze several cases to reveal numerous forms of doctrine that are hybrids of the two archetypes, "rules" and "standards," including the aforementioned escape hatches, exceptions, and factor tests, and will also discuss costs and benefits of using each of these different forms, irrespective of substance. Judges must choose among a large number of valid forms, attempting to create the best "fit" between the chosen form, a judicial means, and higher-level ends, such as efficiency, social stability, consistency, or autonomy.

The article will then utilize the lessons gained from its survey of the rule/standard problem to reevaluate the more theoretical controversy over

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11. *Morrison*, 487 U.S. at 712. Justice Scalia's claim that *Morrison* was not "law" triggers the complex debate over the meaning of the word "law." During a discussion about this article, Professor Durchslag, Professor of Law at Case Western Reserve University School of Law, characterized Scalia's argument as a claim that only formal rules are "objective law" under the "rule of law." This article is already attempting enough without defining "objective," "law," and "rule of law." However, any definition of those three massive terms that precludes all hybrids and all balancing tests should also convince us why such a massive disruption of existing legal doctrine is justified.

The tension between theory and practice also informs the debate over constitutional interpretation. The best "refutation" of Raoul Berger's strict originalism is that he would have to overrule the desegregation opinion in *Brown v. Board of Education*. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 117-33, 363-72 (1977) (discussing segregated schools).

12. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 42-53 (1990).

13. Sullivan, *supra* note 9, at 100-03.

14. Scalia, *supra* note 10, at 1187. "We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible." *Id.*

15. Sullivan, *supra* note 9, at 58.

16. James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 436 (1983).

rules and standards. The choice of form of doctrine should be perceived as primarily a question of technique, not a manifestation of grand legal theory. Judges have properly created a diverse menu of forms to choose from, reflecting the complexity and uncertainty of the world they attempt to regulate. In other words, the numerous forms of doctrine demonstrate that the rule/standard dichotomy is empirically misleading and normatively wrong. The article will then query why many capable lawyers, judges, and legal theorists have characterized the formation of rules and standards, or both, as symptoms (often diseased) of particular ideologies.[17] One of the risks of the American legal culture's preference for theory is that theorists often eagerly apply a critique that may be valid or at least illuminating at one level of abstraction, such as moral-political philosophy, to another level of abstraction, in this case, the technical problem of formulating appropriate doctrine for a particular legal problem. Professor Noam Chomsky's left-wing views, for instance, describe odious aspects of American political and economic culture,[18] but his analysis cannot resolve the technical problems that courts face in creating proper doctrine in all substantive legal areas. To implement their agenda effectively, Chomskyite judges should use rules, standards, and hybrids. To make the point more globally, a judge ought to choose the form of doctrine that makes the best compromise between often conflicting ends, which the judge's normative philosophy established and ranked at a higher level.

This recurring error of commingling analysis of ends (such as justice, equality, efficiency, the role of the judiciary, or even flexibility) with means (like rules or standards) is understandable, because each form of doctrine advances a subset of substantive ends. Formal rules limit future judicial discretion[19] and generate predictability and consistency,[20] while vague standards preserve the needed flexibility to respond to unique or unforeseeable circumstances. Once rules have been created, judges find them easier to apply, thereby saving judicial time and mental energy—two

17. *But see* POSNER, *supra* note 12, at 44, 256; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 106-09 (1983).

18. *See, e.g.*, NOAM CHOMSKY, CHRONICLES OF DISSENT (1992); EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT (1988).

19. Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 7-9, 21-22 (1987).

20. The rule/standard debate immediately triggers concerns over stare decisis. Malleable standards create less precedential problems than rigid rules, because future courts may be forced to overrule rules to achieve desired results. *See* POSNER, *supra* note 12, at 134 ("[R]ules limit . . . the circumstances in which judges consider themselves free to overrule previous cases (that is, stare decisis.)").

scarce commodities.[21] But the internally conflicting judicial process ends of predictability, consistency, and flexibility are not a court's only concerns. The judiciary must weigh those conflicts while also furthering inharmonious substantive ends, ranging from protecting free speech and maintaining order under the First Amendment to encouraging inventiveness via patent law.[22]

The courts' creation of such a diverse set of doctrinal forms puts both sides of the rule/standard controversy in an awkward position. Jurisprudential purists who condemn either archetypal bright lines or balancing tests should also reject all hybrids, which contain elements of both archetypes. But that repudiation would undermine massive amounts of doctrine and improperly constrain the judiciary in the future, constituting a dubious triumph of theory over judicial and social experience. The controversy should not be over whether courts should ever use any of the particular techniques of rules, standards, or hybrids. The far more difficult issue is deciding when the court should employ a particular form in light of all the competing concerns.

On a more practical level, this article offers several options, supported by precedent and analysis, that litigants can offer judges who want to proceed in a certain direction, but also wish to hedge their positions. The article also provides an additional method to distinguish cases beyond the voluminously discussed distinctions based upon fact, dicta, or policy. Courts can profoundly alter law by transforming existing forms of doctrine.

II. CATEGORIZING THE FORMS OF DOCTRINE

This section describes some of the forms of doctrine that co-exist along the rules/standard continuum. The list is not meant to be exhaustive. Additional forms probably exist, and courts remain inventive.[23] The survey starts with rigid rules and proceeds to conclusory standards. Thus, the organizing motif is each form's tendency toward "ruleness," toward predictability and reduction of future discretion, both by the judiciary and by

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21. *Id.* at 53, 143; *see* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 572 (1992) ("The difference in promulgations costs favors standards, whereas that in enforcement costs favors rules."). Consequently, rules work better to resolve frequent, recurring events. *Id.* at 577.

22. *See* Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). For realist criticisms of judicial rules, see GRANT GILMORE, THE AGES OF AMERICAN LAW (1977) (castigating legal formalism) and JEROME FRANK, LAW AND THE MODERN MIND (1930) (condemning "rule fetishes").

23. Judge Posner, for example, transformed a multiple-factor test into an algorithm. *See* American Hosp. Supply Corp. v. Hospital Prods. Ltd., 780 F.2d 589, 593-94 (7th Cir. 1986).

the parties regulated by the rule. However, the forms overlap in theory and practice. Consequently, placements along the continuum are somewhat arbitrary; judicial application of a form of doctrine reveals at least as much about the form's predictability as examination of the form's structure or words. The following case examples demonstrate how different forms can provide the best "fit" with judicial ends.[24]

A. I.N.S. v. Chadha *and Vividly Bright Lines*

Chief Justice Burger's opinion in *I.N.S. v. Chadha*[25] combines daring breadth with excessive artificiality to decide correctly the particular issue and the appropriate form of doctrine, which was a rigid constitutional rule.[26] Chadha, a legal alien, faced deportation after an adverse administrative hearing, but the United States Attorney General decided that Chadha could remain in the United States.[27] Pursuant to the applicable statute, the case was referred to the House of Representatives. Without conducting a hearing, the Chair of a House subcommittee told the entire House that Chadha should be deported. The House of Representatives used the statutory legislative veto to reverse the Attorney General, thereby rendering a final decision to deport Chadha.[28] Arguing that all congressional vetoes were "legislative" and that all congressional "legislative" actions had to comply with the Bicameralism and Presentment Clauses, the Chief Justice all but invalidated the entire legislative veto system.[29] His bright line rule extended the opinion far beyond a single deportation.[30]

Unlike its outcome, Chief Justice Burger's opinion was riddled with flaws, all of which initially appear to support Professor Strauss's complaint that the Supreme Court blundered by creating bright line rules in several

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24. Judge Posner has described "reason" as the proper fitting of ends and means. POSNER, *supra* note 12, at 107.

25. 462 U.S. 919 (1983).

26. The Supreme Court can create extremely rigid rules in constitutional cases. In statutory cases, Congress always can rewrite a statute to overrule a prior judicial holding, including that holding's form. Nevertheless, a judicial statutory decision can generate a rule that is as effectively formalistic as any constitutional decision, at least until the legislative branch changes the interpreted law. Indeed, the Supreme Court has been more reluctant to overrule statutory decisions than constitutional ones. *See* Flood v. Kuhn, 407 U.S. 258, 282-85 (1972) (refusing to apply antitrust to baseball industry due to prior precedent that romanticized baseball as not being a business).

27. *Chadha*, 462 U.S. at 923.

28. *Id.* at 927.

29. *Id.* at 952-59.

30. At the time, 196 statutes contained 295 legislative vetoes. *Id.* at 944 (citing James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (1977)).

separation of powers cases.[31] First, Chief Justice Burger rejected Justice Powell's narrower concurrence, which held that Congress acted "judicially" by attempting to deport Chadha, thereby violating separation of powers.[32] By directly threatening only those congressional vetoes that involved adjudications of individual rights, Justice Powell's concurrence complied with Justice Brandeis' proposition that the Supreme Court should not decide more than is necessary in constitutional cases.[33]

The Chief Justice's analysis that Congress acted "legislatively" was also somewhat conclusory.[34] Chadha's deportation proceeding seemed "executive" when reviewed by the Attorney General, "legislative" while being summarily processed in Congress, and "adjudicative" before the courts and in the initial administrative hearing.[35] As Justice Stevens noted in a later separation of powers case, governmental functions resemble chameleons, "often tak[ing] on the aspect of the office to which it is assigned."[36] Of course, the definitional problem's plasticity reinforces the Chief Justice's argument that congressional action is presumptively legislative.[37]

Furthermore, Chief Justice Burger used only two modes of argument: text and history. Such a limited inquiry was inappropriate in this case. Federal administrative agencies have largely emerged outside constitutional text; their combination of executive, judicial, and legislative function flaunts any rigid conception of separation of powers. Congress arguably needed extratextual devices to constrain extratextual agencies. In terms of history, the Framers were almost as worried about executive tyranny as legislative

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31. Strauss, *Baby*, supra note 3, at 789-92; *see* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 212-13 (1984); *see also* Elliott, *supra* note 3, at 134 ("The core of the Court's reasoning is conceptual and formalistic . . . .").

32. *Chadha*, 462 U.S. at 959, 965.

33. *Compare id.* at 967 (Powell, J., concurring) *with* Ashwater v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

34. It has also been argued that the Court should pragmatically use formal definitions of phrases like "executive" and "legislative," instead of engaging in functionalist balancing in separation of powers cases. *See* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 454 (1991). The better solution is to sometimes create formal rules, as in *Chadha*, and sometimes balance, as in *Commodities Futures Trading Commission v. Schor* or when validating administrative agencies' commingling all three governmental functions. *See* Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

35. Bowsher v. Synar, 478 U.S. 714, 750 (1986) (Stevens, J., concurring).

36. *Id.* at 749 (Stevens, J., concurring).

37. *Chadha*, 462 U.S. at 951.

tyranny.[38] The Framers also had reacted against the inefficient government created by the Articles of Confederation, undercutting the Chief Justice's eschewal of efficiency as a relevant constitutional norm.[39] The Chief Justice made no policy arguments, such as arguing that congressional vetoes gave too much power to special interests and lobbyists, who could work with congressional members to implement and change policy in a relatively quiet way. It is romantic to believe that the Supreme Court should not and does not care about consequences; judges should consider the impact of their decisions. As Justice Jackson explained, separation of powers doctrine has the twin purposes of preventing tyranny *and* facilitating effective governance.[40]

Chadha also arguably failed to achieve its objectives. Louis Fisher observed that Congress quickly circumvented the decision.[41] Congress requires agencies to notify it before making particular decisions.[42] Congress provides general funding authorizations to agencies while stipulating in "appropriation reports" how the money should be spent.[43] If an agency wants continued appropriations, political support, and benign oversight, it should not change its planned allocations without first consulting the relevant members of Congress.[44]

1. The "Rule of Recognition" Validates *Chadha*

Despite all the above reservations, the *Chadha* opinion is validated by Professor H.L.A. Hart's "rule of recognition."[45] Professor Hart argued that

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38. The Declaration of Independence catalogued King George's abuses. John Locke, who influenced the Framers, observed that the Executive is the most dangerous branch. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 410 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

39. *Chadha*, 462 U.S. at 944.

40. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

41. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 162-83 (1985).

42. *Id.* at 183.

43. CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL 93 (1988). Based upon such tactics, Foreman concluded that "[t]he *Chadha* decision did not fundamentally alter the nature of the American legislative process." *Id.* at 143.

44. Sibbach v. Wilson & Co., 312 U.S. 1, 14-15 (1941) (upholding report-and-wait requirements).

45. H.L.A. HART, THE CONCEPT OF LAW 100-23 (2d ed. 1994). The American Constitution contains a set of explicit "secondary rules" that tells the Court and society when and how laws are created. Professor Hart uses the phrase "rule of recognition" in different ways. His ultimate rule of recognition is a social fact, not a legal fact. *Id.* at 112. This article is not referring to that ultimate rule of recognition. We all need to first agree that the Constitution is the relevant authority

every sophisticated legal system needs "secondary rules" that inform society as to which phenomena are binding governmental laws.[46] Although Hart did not make the following claim, secondary rules should be few and simple, enabling everyone to know what is or is not law. Such clarity is particularly important for analyzing the most potent form of majoritarian legal authority in American society, congressional legislation. Congressional statutes reside just below the Constitution in American legal hierarchy, trumping treaties, administrative regulations, executive orders, virtually all state laws,[47] and most judicial decisions. Several congressional laws, such as the federal statute fixing at nine the number of Justices on the Supreme Court, have enormous constitutional implications. It is crucial for all of us, not just the Supreme Court, to know when Congress has exercised its power.

By requiring all external congressional laws[48] to satisfy the Constitution's few procedural mandates, Chief Justice Burger brought needed predictability and certainty to the Constitution's rule of recognition.[49] Consequently, Justice Powell's limiting distinction only delayed the desired outcome—the elimination of all legislative vetoes.[50] In other words, *Chadha* makes the American legal system simpler and more comprehensible; ends that are related to, but different than, accountability.

Political concerns about special interest group dominance or congressional end runs become less relevant when viewed from the rule of recognition perspective. The Supreme Court has a fundamental constitutional responsibility to ensure that everyone knows what is and is not law.[51] Preventing bad faith application of those clear-cut rules of recognition

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before we can do anything else. *Chadha* raises questions about how to interpret the Constitution's "rule of recognition" of subsequent congressional law; it involves a "secondary rule." According to Hart, courts decide "the most fundamental constitutional rules," *id.* at 153, creating "rules of recognition specifying the criteria of legal validity and its rules of change," *id.* at 115. Of course, the Constitution also contains normative standards of justice. *Id.* at 203.

46. Hart's definition of secondary rules includes the jurisdictional components of Article III: "[T]he existence of a court entails the existence of secondary rules conferring jurisdiction on a changing succession of individuals and so making their decisions authoritative." *Id.* at 136.

47. The Supreme Court has recently interpreted the Tenth Amendment to preclude Congress from regulating state laws. New York v. United States, 505 U.S. 144, 177 (1992) (Congress cannot force states either to regulate nuclear waste or to take title to private nuclear waste); Gregory v. Ashcroft, 501 U.S. 452, 473 (1990) (dicta asserting that Congress cannot extend age discrimination laws to state judges).

48. Congress does not have to comply with *Chadha*'s rule of recognition when engaging in internal, investigatory, or oversight functions.

49. *See Chadha*, 462 U.S. at 958.

50. *See id.*

51. The rule of recognition, created by the House of Lords, is the most important element of the English legal system. The Lords cannot overturn any law that has passed through the House of

primarily rests with the body politic. Congress can negotiate with agencies without violating the formal rule of recognition, but Congress cannot expect the courts to legally compel the agencies to honor those informal negotiations. If the public does not like Congress using such indirect pressures, they can vote in new members. In addition, basing core constitutional separation of powers doctrine on political science may be as risky as grounding core individual rights on sociology, as the Supreme Court erroneously did in *Brown v. Board of Education*.[52] First, political science can be wrong. Second, political science changes as new events, trends, and ideologies percolate through society. Third, unintended consequences often frustrate judicial ambitions. The Court would be seeking to accomplish too much if it designs constitutional doctrine to prevent Congress from being dominated by special interests.

Professor Bruff praised *Chadha* for making congressional processes more accountable,[53] but Louis Fisher has shown how Congress has accomplished many of its same goals in a more stealthy fashion than before.[54] A phone call or memorandum establishing informal spending criteria is far less public than a legislative veto. Thus, *Chadha* increased congressional accountability by forcing Congress to pass new laws but also pressured Congress to employ more devious means. If one justifies *Chadha* largely on the need for a clear rule of recognition, which clarifies the constitutional structure and guarantees notice to all parties, instead of primarily on accountability grounds, the case's lack of significant impact suddenly becomes a virtue, not a defect. *Chadha* protects the rule of recognition, which is the most the Court could hope to accomplish in the situation. Overall, *Chadha* is simultaneously an affirmation of judicial power, calling hundreds of congressional laws into question, and judicial restraint, creating a simple rule that does not drastically disturb the existing distribution of political powers. Nothing better could serve the limited end of determining what is or is not preeminent congressional law than *Chadha's* broad, rigid rule.[55]

Commons, House of Lords, and the Queen. Nor can any Parliament bind its successors. *See* COLIN R. MUNRO, STUDIES IN CONSTITUTIONAL LAW 79-108 (1987).

52. 347 U.S. 483 (1954). Professor Cahn criticized *Brown* for placing such an important right on such an unreliable foundation. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 168 (1955).

53. Bruff, *supra* note 3, at 507.

54. FISHER, *supra* note 41, at 162-83.

55. The Court properly has been more reluctant to closely scrutinize internal congressional proceedings. However, it has required Congress to comply with the Origination Clause's requirement that all revenue bills begin in the House of Representatives. United States v. Munoz-Flores, 495 U.S. 385 (1990). The Court should have adopted Justice Scalia's concurring argument of complete deference to all bills that congressional leaders from both Houses have attested to being

Whether the reader agrees with this additional defense of *Chadha* is secondary to the analysis of rules, standards, and hybrids. This article will show how different forms pragmatically achieve different ends; it does not completely defend the ultimate results of these examples. For the sake of subsequent arguments, merely assume that *Chadha's* simple, rigid rule best satisfies the need for a clear, rigid rule of recognition of congressional legislation, a desirable substantive goal.[56] That assumption enables us to sweep aside several misunderstandings about the place of formal rules within the American legal system.

2. Misunderstandings Regarding Formal Rules

The previous section demonstrated how a decision may "correctly" resolve the immediate controversy and choose the best form of doctrine, both of which will influence future related cases, even when the opinion's reasoning is unpersuasive. Chief Justice Burger's narrow focus on text in the area of administrative law, which has emerged primarily outside constitutional text, his distorted history, and his unwillingness to provide pragmatic reasons weaken, but do not invalidate his results.

In addition, rules can be "judicially active," if one defines that acrimonious phrase as the judicial assertion of its power of judicial review over the other political branches through findings of unconstitutionality.

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in compliance. *Id.* at 410 (Scalia, J., concurring). Instead, the Court held that it would strike down all bills that had the "purpose" of raising revenues instead of bills that "incidentally raised revenues." *Id.* at 397 (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 880 (3d ed. 1858), *quoted in* Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897)). This is an inquiry that entangles the Court within congressional internal process.

56. Judges who often disagree on the merits nevertheless see the value of strict rules in a variety of contexts. Justice Souter explained why bus companies have to pay a full sales tax on their ticket sales even though much of the trip took place out of state: "[T]here is no reason to leave the line of longstanding precedent and lose the simplicity of our general rule sustaining sales tax measured by full value, simply to carve out an exception for the subcategory of sales of interstate transportation services." Oklahoma Tax Comm'n v. Jefferson Lines, 115 S. Ct. 1331, 1344 (1995). Justice Thomas's opposition to an expansive district court school desegregation remedy combined history, form, and substance: "At the very least, given the Federalists' public explanation during the ratification of the federal equity power, we should exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use." Missouri v. Jenkins, 115 S. Ct. 2038, 2070 (1995) (Thomas, J., concurring).

Justice Thomas has not elevated form over substance. Concurring with the decision that proscribes Congress from prohibiting firearms on public school grounds, he conceded that the dissent's high level of deference generated a rule: "The one advantage of the dissent's standard is certainty: it is certain under its analysis everything may be regulated under the guise of the Commerce Clause." United States v. Lopez, 115 S. Ct. 1624, 1650 (1995) (Thomas, J., concurring).

After all, *Chadha*'s rule invalidated 195 congressional statutes containing legislative vetoes. Justice Scalia's rule formalism, for instance, would require the Supreme Court to strike down many majoritarian innovations concerning administrative agencies, ranging from special prosecutors[57] and sentencing commissions[58] to independent regulatory agencies.[59] Thus, rules do not necessarily reduce judicial power or increase judicial restraint.

Chadha also demonstrates how rules can simultaneously reduce future judicial discretion and expand judicial power, depending upon the party being constrained by the particular rule. *Chadha*'s rule moderately increased both executive and judicial power at the expense of Congress. Congress can only overturn executive action by passing a new law, which may be vetoed and remains subject to judicial review. If the legislative veto had been upheld, who knows what scope of review, if any, the Court would have applied to subsequent vetoes? The Court could have found the issue nonjusticiable. Conversely, judicial rules can limit both future judicial discretion and judicial power. Justice White's *Chadha* dissent, which was highly deferential to Congress, would have created by its application a rule giving Congress almost complete discretion to create and apply legislative vetoes.[60]

Nor are rules directly related to "originalism," despite *Chadha*'s exclusive, excessive reliance on text and history, which are originalism's only legitimate modes of constitutional rhetoric.[61] This article has provided a more pragmatic reason to support *Chadha*: the desirability of a clear rule of recognition to determine when Congress has exercised its formal, external legislative power. Furthermore, it is hard to be relentlessly originalist in administrative law; most of that Fourth Branch arose a century after the original Constitution was ratified.[62] How can we possibly know what the Framers thought or would have thought about a form of government that they had never seen? In other words, there is no direct relationship between formal rules and the constitutional dispute over the valid modes of

57. Morrison v. Olson, 487 U.S. 654, 677 (1988).

58. Mistretta v. United States, 488 U.S. 361, 412 (1989).

59. Justice Scalia's *Morrison* argument that all executive functions need to be under presidential supervision undermines all independent regulatory agencies. *See* 487 U.S. at 705 (Scalia, J., dissenting).

60. 462 U.S. at 997 (White, J., dissenting) ("In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices.").

61. *See generally* BERGER, *supra* note 11.

62. There is a poor relationship between originalism and judicial activism. For starters, a judicial return to 1789 would require the Supreme Court to prohibit paper money and eliminate most of the New Deal regulatory state.

argument—text, history, policy, precedent, and the like. A pragmatic functionalist can be a doctrinal formalist.[63]

Next, judicial formulation of rules does not depend upon the form of constitutional text. Admittedly, the Bicameralism and Presentment Clauses, by their specificity, present additional good reasons for a strict rule. But rules can properly be extrapolated from amorphous texts. For example, the Court has interpreted the Equal Protection Clause to proscribe all racist laws.[64] Conversely, the Court has construed the relatively determinate text of Article III to permit Congress to allocate some Article III common law issues to congressional agencies so long as Congress does not "impermissibly threaten" the "institutional integrity of the Judicial Branch."[65] In *Planned Parenthood of Southeast Pennsylvania v. Casey*, the plurality interpreted the amorphous doctrine of substantive due process to create two forms: a bright line at viability striking down bans on abortions and an "undue burden" balancing test that will tolerate some but not all state abortion regulations.[66]

Finally, even the most rigid of constitutional rules only partially limits future judicial discretion and judicial power. Rules make future outcomes more predictable only when future judges abide by them. *Chadha*, for instance, always needs at least five supportive Justices to remain viable. Consequently, formal rules limit the discretion of other governmental actors much more than the Court, which can always overrule or distinguish existing rules. To summarize, no direct correlation exists between formal rules and judicial power, judicial activism, or modes of argument.

B. Double Rules

The technical problem of creating the right form to solve a particular legal issue is not limited to constitutional law. In *United States v. Florida*

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63. Wilson, *supra* note 16, at 436.

64. "Pressing public necessity may sometimes justify the existence of such [racial] restrictions; racial antagonism never can . . . ." Korematsu v. United States, 323 U.S. 214, 216 (1944) (upholding internment of Japanese-Americans during World War II).

65. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

66. 112 S. Ct. 2791, 2816, 2821 (1992). This methodology also improves statutory analysis. For instance, a lawyer would usually advise her client to settle after being caught driving seventy miles an hour in violation of a rule limiting the speed limit to fifteen miles an hour in a school zone during school hours. Yet lawyers and judges instinctively recognize a more contentious case had the client only been charged with "reckless driving" on a snowy expressway, a standard that forces them to balance and contextualize all the facts.

East Coast Railway Co.,[67] then-Justice Rehnquist decided that the Interstate Commerce Commission, which had promulgated regulations to reduce a chronic freight-car shortage, need not provide formal rulemaking procedures under sections 556 and 557 of the Administrative Procedure Act ("APA"), which require cross-examination, oral testimony, and the like.[68] He concluded that the agency did not have to provide formal rulemaking, because section 1(14)(a) of the Interstate Commerce Act[69] only required the agency to formulate rules "after hearing."[70] Rehnquist interpreted the word "hearing" to only require the APA's informal rulemaking process under section 553(b), which mandates notice and an opportunity to comment.[71] Furthermore, the enabling statute did not use the APA's text at section 553(c), which establishes more formal requirements "[w]hen rules are required by statute to be made on the record after an opportunity for an agency hearing . . . ."[72] Justice Rehnquist's textualism supported the congressional effort under the APA to empower agencies with the faster, simpler informal rulemaking, a process that litigants often find more difficult to challenge because of its simplicity and its less developed record.

But Congress could still require formal rulemaking by conditioning its grant of rulemaking authority on the agency providing an "opportunity for a hearing on the record." Thus, the *Florida East Coast* court created two clear-cut rules echoing the dual structure of formal and informal hearings within the APA. The two rules complement each other, making the APA more coherent. They fulfill the APA's underlying purpose of providing two ways to create substantive rules. One simply looks at the enabling statute's text, which grants rulemaking authority,[73] to determine if the agency must comply with formal or informal rulemaking procedures under the APA. Predicting future litigation outcomes becomes very easy. But one cannot foresee which avenue Congress will prefer in the future—whether formal or informal rulemaking will predominate. Only Congress can determine if formal or informal rulemaking will be exceptional.

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67. 410 U.S. 224 (1973); *see also* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972). *Florida East Coast* confirmed the similar Supreme Court holding in *Allegheny-Ludlum Steel*.

68. *Florida East Coast*, 410 U.S. at 227-28.

69. 54 Stat. 901 (1940) (current version at 49 U.S.C. § 11122 (1988)).

70. *Florida East Coast*, 410 U.S. at 225-26 & n.1.

71. *Id.* at 241-42.

72. *Id.* at 234-35.

73. Agencies cannot create substantive rules without express statutory authorization.

C. Bright Line Escape Hatches

The two previous sections did not attempt to "prove" the desirability of *Chadha*'s rigid rule or *Florida East Coast's* double rule. Mathematical-type proofs appear to be impossible in this normative realm.[74] Persuasion is a law review article's only weapon. This section develops the article's defense of formal rules (and embarks on its advocacy of balancing tests) by studying a hybrid form of doctrine that resides very close to unyielding rules, a form labeled "bright line escape hatches." A "bright line escape hatch" exists when a judge expressly leaves a tiny opening to soften the impact of an otherwise rigid rule. The escape hatch metaphor creates the sense of a minute, normally inaccessible possibility, available only in extreme situations. By providing an opening that reduces pressure on the underlying rule, the escape hatch strengthens that rule. Escape hatches permit the courts to formulate rigid doctrine, even though the judges cannot envision all possible issues and all potential abuses that might arise. To develop the metaphor a bit more, escape hatches let off steam that otherwise might rupture a rigid rule.

Nonjusticiability, for instance, is a very formal doctrine. It is jurisdictional in tone, a conclusion that a particular issue should not be in the courthouse but ought to be resolved by the political branches. Although the Supreme Court has rarely found nonjusticiability under any of the six criteria set forth in *Baker v. Carr*,[75] the defendant is assured of victory whenever the Court determines that one of those tests is controlling. However, Justice O'Connor's dicta in *New York v. United States*, a Tenth Amendment case, asserted that not all claims arising under a particular constitutional text are necessarily either justiciable or nonjusticiable.[76] The problem did not remain hypothetical for long. *Nixon v. United States*[77] dismissed as nonjusticiable a federal court judge's claim that the Senate acted unconstitutionally by impeaching him without conducting a hearing in front of the entire Senate. Chief Justice Rehnquist reaffirmed the most formal conception of nonjusticiability, holding that all claims surrounding impeachment were nonjusticiable.[78] But in a concurrence, Justice Souter contended that at some outrageous point, the Court could and should review certain Senate impeachment procedures, such as deciding an impeachment by a flip of a

74. KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 51 (5th ed. rev. 1989).
75. 369 U.S. 186, 217 (1962).
76. 505 U.S. 144, 185 (1992).
77. 113 S. Ct. 732, 740 (1993).
78. *Id.* at 734-40.

coin.[79] Justice Souter, in other words, created an escape hatch, an opening without any content or standard beyond his extreme hypothetical, that future impeached officials could attempt to exploit.

Justice Souter's escape hatch arguably solves the doctrinal dilemma better than Chief Justice Rehnquist's completely inflexible, *Chadha*-like rule. For Souter, nonjusticiability became a doctrine of hyper-deference, far more deferential than the very passive "rational purpose test."[80] The Court should only review political actions arising under a text generally found to be nonjusticiable when the political body has exceeded the "outer perimeter" of its authority.[81] Whether anyone would agree with Justice Souter that coin-flipping would be justiciable, many would expect the Court to review an impeachment based upon a confession obtained by torture. To prevent the use of such vile evidence, the Court probably would rely on another part of the Constitution, such as the Fifth Amendment's prohibition against self-incrimination (just as Due Process probably would most likely be triggered by Justice Souter's coin-flipping hypothetical), to pierce the normally successful defense of nonjusticiability in impeachment cases. Justice Souter's escape hatch demonstrates how a highly deferential scope of review best reinforces the nonjusticiability doctrine, which has been criticized for being dangerous, incoherent, or mythical.[82] Under his test, almost all

79. *Id.* at 748 (Souter, J., concurring).

80. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) (rational basis test used in upholding special interest legislation favoring optometrists and ophthalmologists over opticians).

81. The Court held that Cabinet officials were immunized from tort suits unless they exceeded the "outer perimeter" of their authority. Barr v. Mateo, 360 U.S. 564, 575 (1959). The Court later created virtually absolute presidential immunity from tort damages, but left an "escape hatch" for plaintiffs to allege that the President exceeded the "outer perimeter" of his authority. Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

82. The nonjusticiability doctrine remains elusive, requiring the Supreme Court to decide when it cannot decide a case. Litigants face the peculiar situation of having a case briefed, argued, and dismissed, giving victory to the defendant, because the Court claims it should not be involved at all. Professor McCormack described the doctrine as a myth. Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 599-611, 627-30 (1987). Professor Henkin doubted its existence. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). Professor Redish disapproved of judicially unreviewable political power. Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1984). For defenses of the doctrine, see James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645, 705-16 (1992); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988); and Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989). Professor McCormack has modified his views to incorporate the concept of conventions, thereby creating some scope for the political question doctrine. Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 U. DET. L. REV. 793, 810 (1993).

impeachment issues will and ought to be finally resolved by Congress. Admittedly, his doctrine of nonjusticiability would create pockets of political power beyond meaningful reach of constitutional law. The extremity of Justice Souter's example—coin flipping—indicates that Congress can easily satisfy his severely limited scope of judicial review by implementing minimal procedures. Nevertheless, Justice Souter's tiny, hypothetical compromise with pure formality better serves the purposes of the doctrine of nonjusticiability than Chief Justice Rehnquist's rigid formalism, which apparently validates all impeachments, no matter how they are conducted.

The Supreme Court always needs to be careful in creating constitutional legal doctrine, which is relatively immutable law created by unelected officials in a democracy. Aside from everything else, it is difficult to reverse most of the Court's decisions. Thus, formal constitutional doctrine, which is designed to bind the future more completely, is more risky than balancing tests, which can easily be adjusted. Nevertheless, most Americans want the Court to finalize some constitutional issues, even though they will disagree over which issues should receive such treatment; they favor resolution of major issues, even though those settlements will not last forever. As a result, the Supreme Court will be perpetually torn between creating rules to enhance predictability and formulating standards to allow future generations to adapt to unforeseeable problems and to introduce different perspectives based upon their different experiences. Whether the Court is deciding to intervene, as in *Chadha*, or withdraw, as in *Nixon*, it will be tempted to leave its successors an opening to deal with the unknown and the unforeseeable. The escape hatch permits the Court to create predictable, clear-cut rules that cover virtually all relevant situations without completely sacrificing flexibility or permitting those protected by the rule to flagrantly abuse their trust. The far more difficult problem is determining when to use which form. The Court should not give Congress *carte blanche* to terrorize the Executive and Judicial branches through its impeachment powers but should rigidly require Congress to comply with the Constitution's rule of recognition to determine what governmental actions carry the authority of congressional law.

D. Bright Line Peepholes

The Supreme Court rarely makes its doctrine too simple, either in form or content. We need to return to *Florida East Coast* to consider another form of doctrine: bright line peepholes. *Florida East Coast*'s double rule that requires informal rulemaking unless the enabling statute mandated

formal rulemaking with the words, "on the record after an opportunity for an agency hearing" could have resolved all related issues.[83] But the decision has to be read in conjunction with an earlier case, *United States v. Allegheny-Ludlum Steel Corp.*,[84] in which Justice Rehnquist created a "bright line peephole" that hedged his formality.[85] A "bright line peephole" is a tiny hypothetical exception that might expand in the future to fulfill the underlying purposes of the rule (or double rule). Rehnquist stated that the APA language "on the record" was not talismanic: "We do not suggest that only the precise words 'on the record' in the applicable statute will suffice to make [sections] 556 and 557 applicable to rulemaking proceedings . . . ."[86] Formal rulemaking might be necessary even if the enabling statute's text deviated slightly from the APA's text. Justice Rehnquist provided neither reasons nor examples to determine the scope or purpose of this conceivable exception.

Litigants may be able to exploit this opportunity by arguing that a particular enabling statute's text, which probably would resemble *Florida East Coast*'s triggering language, evidences congressional intent to require formal rulemaking. Litigants would probably also need favorable legislative history. The size of such hypothetical exceptions will be determined over time. In practice, nobody has prevailed under the *Florida East Coast* peephole. After all, the government has the potent counter-argument that Congress can easily specify formal rulemaking by complying with *Florida East Coast*'s simple, well-known linguistic requirements. Any other text indicates that Congress did not intend to require formal rulemaking. Why would Congress take a chance when an easy, explicit way exists for it to express its intentions to the Court?[87] Nevertheless, private parties might be able to demonstrate clear congressional intent from some minor deviation from the magic language, such as "on the *full* record after opportunity for an agency hearing," text that only adds a more aggressive adjective.

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83. 410 U.S. at 234.

84. 406 U.S. 742 (1972).

85. *Id.* at 757.

86. *Id.*

87. The same reasoning justifies the Supreme Court's frequent use of "clear statements" in several constitutional areas. For example, the Court has interpreted the Eleventh Amendment to hold that congressional statutes establishing general liability do not apply to states, unless Congress has included a "clear statement" extending liability to the states. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 69 (1989); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statements as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611-12 (1992); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 70 (1989).

Although the prior two cases established the minimal rulemaking requirements that agencies had to satisfy to comply with the APA, they did not decide if courts could command additional procedures after the agencies complied with the APA. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[88] Justice Rehnquist rejected environmentalists' procedural challenges to federal nuclear power regulations that had been promulgated without cross examination or discovery.[89] Relying on conclusory charts with artificial statistics, those regulations stated (outrageously) that the disposal of nuclear waste from nuclear power plants had no adverse environmental consequences. Justice Rehnquist ruled that the agency need not provide such procedures, because section 553 of the APA did not require them in informal rulemaking proceedings. Thus, the APA created minimal, mandatory procedural requirements and established the maximum process that Courts could enforce.[90]

A bitter judicial controversy helped generate the rule. Justice Rehnquist extrapolated a formal rule from the statutory language of the APA to stop widespread lower federal court "Monday morning quarterbacking" of administrative agencies.[91] Led by the District of Columbia Court of Appeals, lower federal courts created balancing tests to determine the need for supplemental procedures.[92]

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88. 435 U.S. 519 (1978). For criticism, see Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1819 (1978) ("The . . . best approach is for courts to provide guidance for administrators and litigants by requiring the use of hybrid procedures likely in most cases to produce an adequate record for judicial review."). For a defense, see Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978). Not yet a member of the federal judiciary, Antonin Scalia described *Vermont Yankee's* judicial politics, the struggle between the Supreme Court and the D.C. Circuit. Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345. For a general discussion of how the Court communicates with Congress, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 66-71, 81-87 (1994).

89. The substantive challenges were remanded. *Vermont Yankee*, 435 U.S. at 525. The Supreme Court eventually upheld ludicrous charts finding no environmental problems in disposal of nuclear waste. *See* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 103 (1983), *rev'g* Natural Resources Defense Council v. NRC, 685 F.2d 459 (D.C. Cir. 1982).

90. The agency could add additional procedures at its own discretion. In *Vermont Yankee*, for instance, the Atomic Energy Commission held oral, public hearings, provided access to records, and developed a transcript. 435 U.S. at 529. Of course, particular enabling statutes or agency regulations may require additional procedures in either rulemaking or adjudication that agencies must comply with. The Clean Air Act, for instance, establishes an elaborate process surrounding rulemaking. 42 U.S.C. § 7607(d) (1988).

91. *Vermont Yankee*, 435 U.S. at 547.

92. These APA examples also demonstrate how federal courts can disagree about the appropriate forms of doctrines in statutory cases as well as constitutional ones.

Having implied a rigid rule from the statutory text, Justice Rehnquist nevertheless cryptically noted that a court could mandate additional procedures to informal rulemaking if there were "extremely compelling circumstances."[93] Sometimes one need not wait for additional cases to estimate the size of a peephole; this particular peephole had to be very small, because Justice Rehnquist refused to apply it to the pending case. Hardly anything could generate more "extremely compelling circumstances" than the disposal of radioactive nuclear waste. In other words, the size or form of a peephole can only be determined by putting it in the context of the case's facts, competing policies, and underlying substantive laws. Nevertheless, these peepholes leave slightly more discretion to future courts than escape hatches.

Overall, Justice Rehnquist chose the appropriate mix of forms of doctrine to resolve these administrative law issues. He created bright line rules that will determine virtually all cases. Congress can require formal rulemaking by including the magic "on the record" language, putting particular procedures in an enabling statute, or even by amending the APA. But Justice Rehnquist also created tiny peepholes in both cases that private litigants might be able to utilize in the future.[94]

Carefully tracing the forms of doctrine enables a litigant to determine possible existing avenues for winning under the existing legal structure. Initially, the private party seeking more process for rulemaking than available under section 553 consults the enabling statute to discern if the law has the preferred "on the record" language requiring formal rulemaking. Absent this statutory language, the private party has three options: (1) request Congress to change the language; (2) argue, with little chance of success, that the relevant text satisfies *Florida East Coast*, or (3) argue that

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93. *Vermont Yankee*, 435 U.S. at 543. Justice Rehnquist also noted that plaintiffs might have a case if agencies abruptly changed their procedures or if the Due Process Clause were triggered because a few individuals were uniquely affected. He cited Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915) (holding that Due Process does not require any procedures for broad-based, prospective rules).

94. Because doctrine is formed by language and application, it is particularly hard to determine the size of some openings immediately following a decision. For example, Justice Kennedy's concurrence, joined by Justice O'Connor, created a peephole of indeterminate size by conditionally supporting Justice Breyer's decision that a state supreme court cannot continue to apply a statute that the Supreme Court had previously found unconstitutional to claims that accrued before the Supreme Court's decision. The concurrence stated in part: "We do not read today's opinion to surrender in advance our authority to decide that *in some exceptional cases*, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decision." Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745, 1752 (1995) (Kennedy, J., concurring) (emphasis added). The rest of us will have a better idea of the nature and size of that opening only with the passage of time.

additional procedures are needed because of "compelling circumstances" under *Vermont Yankee*. Creating peepholes is more justifiable here than in *Chadha*. The Court is trying to determine congressional purposes. It should not elevate linguistic formalism above clear manifestation of congressional intent. Nor are the stakes so high. Congress can eliminate or expand the Court's rules or peepholes simply by amending the APA or carefully drafting its enabling statutes.

Escape hatches and peepholes cannot be reduced to either pure bright lines or balancing tests. They enhance bright lines but also require the Court to choose between the line or the opening. Furthermore, these small gaps often use balancing terminology. Justice Rehnquist permitted lower courts to require additional administrative procedures in *Vermont Yankee* whenever there is a "compelling circumstance"—an amorphous standard. He gave no direction in *Florida East Coast* for when and why other text might be sufficient to trigger formal rulemaking.

E. Realized Adverse Exceptions

Using Chief Justice Rehnquist's dissent in a recent American flag-burning case,[95] Professor Frederick Schauer supported his hypothesis that exceptions are the convergence of two rules.[96] The Chief Justice would have upheld convictions of protesters who burn American flags in public to express contempt for American policies, thereby creating an exception to the general First Amendment rule proscribing viewpoint discrimination.[97] Schauer applauded Chief Justice Rehnquist's combination of a general, bright line rule—no suppression of political speech or conduct for ideological content—with a narrow, bright line exception—*except* for the burning or mutilation of the American flag. According to Schauer, the Chief Justice's solution was a reasoned resolution of two powerful and traditional themes, free speech and the hallowed status of the American flag.[98]

Professor Schauer's claim triggers several interrelated questions that call this article's methodology into question. What does the word "rule" mean?

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95. Texas v. Johnson, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting); *see also* United States v. Eichman, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting) (joined by the Chief Justice). *See generally* Kent Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925 (1990); Frank I. Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990).

96. Schauer, *Exceptions*, *supra* note 7, at 880-86.

97. The Chief Justice did not directly attack the underlying rule against viewpoint discrimination or deny the rule's applicability.

98. Schauer, *Exceptions*, *supra* note 7, at 885-86.

Are all hybrids, including escape hatches and peepholes, nothing more than "exceptions"—a semantic outcome that converts them into Schauer's rules? If so, there would be no need to create categories like escape hatches, loopholes, or double rules.[99] Or, at the very least, are exceptions so rule-like that they should be placed closer to *Chadha* type rules than escape hatches, peepholes, or double rules? This article's answers to these questions of definition, categorization, and ranking demonstrates that Professor Schauer's proposition illuminates, but ultimately misleads.

Schauer sought to expand the domain of formal rules; he did not seek to enlarge the definition of "rule" or "exception" to swallow the rule/standard controversy. Like Justice Scalia, he has strongly advocated formal doctrine.[100] In other words, Schauer did not make the expansive claim that exceptions are combinations of any two forms of doctrines, all of which are "rules." Nevertheless, that argument has to be considered first. All forms of doctrine are "rules" in the sense that they constitute an element of the "rule of law" and are judicial commands or instructions. "Unnecessary roughness" and "delay of game" violations are both football "rules," even though the interpretation and application of the unnecessary roughness standard is less definable, more unpredictable, more contextual, and harder to enforce than the delay of game rule, which is determined by a clock. But that definition of "rule" is so all-encompassing that it fails to address the rule/standard controversy.

Nor did Schauer equate his flag-burning example, which contained a formal rule and a formal exception, with a rule containing a standard as the exception or with a standard containing a rule as the exception. His underlying preference for formal rules led him to describe exceptions as combinations of two formal rules, which is empirically erroneous. This article has already evaluated several combinations of rules and standards, all of which seem reasonable. Justice Souter's concurrence in *United States v. Nixon* created an escape hatch by example, without providing any reasoning or criteria. The six prong nonjusticiability test in *Baker v. Carr* is very indeterminate. This article will demonstrate that Justice Rehnquist is not wedded to a narrow set of forms. His peephole standards were purposely vague in *Vermont Yankee* and nonexistent in *Florida East Coast*.

Expanding the scope of doctrinal inquiry into an entire area of law confirms the limited amount of formal "ruleness" in contemporary legal doctrine. For example, First Amendment doctrine resembles a legal code, a

99. *Cf.* POPPER, *supra* note 74, at 350. Ockham's Razor requires that there be no more categories than are necessary.

100. *See, e.g.*, Schauer, *Formalism*, supra note 7.

prolix morass of rules, standards, factor tests, definitions, loopholes, and exceptions.[101] The Court has protected sexually charged communication but created exceptions for obscenity (doctrine dominated by vague standards and delegations of power to local juries via the "community standard" standard)[102] and for child pornography (doctrine that combines a rule—covering "children" under the age of eighteen—with a vague, diluted *Miller*-like standard).[103] Schauer's descriptive error leads to normative error. To purge all exceptions of standards and to reduce all doctrine to formal rules would reduce the plasticity that often warrants exceptions in the first place.

Even if Schauer had too formalistic a conception of "exceptions," his analysis raises another classification challenge. Escape hatches, peepholes, and double rules can all plausibly be defined as "exceptions," although they do not always contain two rigid rules, as Schauer claims. Perhaps this article is overly complicated, because there should be neither more nor less categories than necessary. But reducing all hybrids to "exceptions" obscures the following distinctions between types of rules—distinctions that helped create this article's categorizations: (1) Is the exception hypothetical or realized?; (2) Does the exception conflict with or support the purposes of the underlying rule?; (3) How likely is a party to prevail under a given form, or, in other words, how predictable is the form?; (4) What purposes does the form fulfill?; and (5) What are the effects of the different forms?

Hypothetical exceptions like escape hatches and peepholes should not be equated with Chief Justice Rehnquist's flag-burning exceptions, which signify the triumph of concerns hostile to predominant First Amendment norms.[104] Hypothetical exceptions like escape hatches and peepholes are judicial genuflections to uncertainty. They theoretically provide the groundwork for future changes, but in practice they shore up dominant rules by their very remoteness. However, in the case of realized exceptions, rival parties know they have a chance in the future, because their side has already prevailed in the area, either under the rule or the exception. The doctrine is

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101. *See, e.g.*, John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorizations and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Laurent Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); *see also* David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829 (1993).

102. Miller v. California, 413 U.S. 15, 24 (1973).

103. New York v. Ferber, 458 U.S. 747, 755 (1982).

104. *See generally* AMBROSE BIERCE, THE DEVIL'S DICTIONARY 38 (1958) (rejecting the platitude that "the exception proves the rule," "the exception *tests* the rule, puts it to the proof, not *confirms* it").

at war with itself. Future litigants chafing under the rule may either fit their facts within the exception or extend the exception's reasoning to cover their case. Admittedly, adverse exceptions consisting of bright line rules remain predictable so long as the existing exception is rigidly followed. But consider the following hypothetical. State officials arrest those who refuse to stand during the Star Spangled Banner. That song has also been around for a long time. Should it also be protected like the American flag?

If one believes that the right to express controversial political views is a "core right" that needs to be protected by a formal rule proscribing viewpoint discrimination, one becomes wary of any exceptions not just because of their own significance, but also due to their precedential authority to generate additional exceptions. After all, it is a platitude that exceptions can swallow rules.

The need for a separate category of "double rules" should now be more clear. *Florida East Coast*'s two rules work in tandem to achieve a consistent goal under the APA, while Chief Justice Rehnquist's flag-burning exception signaled the triumph of one set of norms over a rival cluster of values. One can call formal rulemaking an "exception" to the rule favoring informal rulemaking, but that type of exception is not as destabilizing as an adverse exception. *Florida East Coast's* double rule makes the entire APA more coherent and determinate, while Chief Justice Rehnquist's American flag-burning exception would have made important First Amendment doctrine more indeterminate.

Lawyers need to predict the size, purpose, direction, and durability of exceptions. Creating a narrow, clear-cut flag-burning exception generates more legal volatility than acknowledging, without elaborate reasoning, potential, remote exceptions via "escape hatches" or "peepholes." Perhaps some readers do not like these particular metaphors, just as some do not like the Supreme Court's three level Equal Protection doctrine of "strict scrutiny," "intermediate scrutiny," and "rational purpose." However, such metaphors help litigants determine their odds of winning. Parties are not likely to get around bright line rules, double rules, or use escape hatches. Their odds slightly improve with peepholes. But both sides will be far less certain about cases containing realized adverse exceptions, because both sides will have already won prior cases and will have competing facts, law, and reasons to rely on. Adverse exceptions provide clear-cut opportunities to avoid the underlying rule and the purposes that the rule serves.[105]

105. So long as they are not taken too seriously, numerical odds provide a crude metaphor to capture the distinctions between these forms. Escape hatches, designed to empower the rule instead of undermining it, are likely to open once in a thousand cases. Peepholes might be successfully

These technical problems of categorization should not dissuade the reader from accepting the article's main thesis that there are many forms of doctrine combining aspects of rules and standards. Even if the article has erred in naming, dividing, or ranking the forms, such mistakes do not in themselves refute the article's propositions that many forms exist; those forms ought to exist; and the rule/standard debate has often degenerated into a false and misleading dichotomy.

F. Extensions

Exceptions shrink pre-existing rules, while extensions expand them.[106] Courts often will reconsider even the most rigid rules, because potential beneficiaries of those rules will attempt to extend those rules' scope, while potential losers will seek to distinguish or limit their influence.[107] For instance, the Court relied on *I.N.S. v. Chadha* to hold in a per curiam decision that congressional compliance with the Bicameralism Clause did not cure noncompliance with the Presentment Clause; Congress had still passed an unconstitutional legislative veto.[108] The Court eliminated a residual ambiguity not precisely covered by the particular facts of *Chadha*—Congress must comply with both clauses to satisfy the Constitution's rule of recognition.[109]

H.L.A. Hart's famous example of interpreting prohibitions against vehicles in parks[110] reminds us of the difficult questions of rule application. The Supreme Court probably will not extend *Chadha* to proscribe administrative regulations or executive orders, even though those two types of federal law fail to comply with bicameralism. Such formalism would gut the administrative system of needed flexibility, power, and speed.

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used one percent of the time. Realized exceptions always provide opportunities in terms of application or expansion to get around the predominant rule. Of course, the exception may be very small and rigid. After all, the American flag is arguably a unique symbol generating a unique exception to a general rule. Nevertheless, a realized exception is a greater crack in a rule than a hypothetical escape hatch or peephole.

106. Exceptions can swallow rules, while extensions can expand preexisting rules beyond recognition.

107. *See* POSNER, *supra* note 12, at 46.

108. Process Gas Consumers Corp. v. Consumer Energy Council of Am., 463 U.S. 1216 (1983), *aff'g* Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982).

109. *Consumer Energy Council*, 673 F.2d at 448.

110. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-08 (1958). Professor Fuller provided an almost equally famous rebuttal in Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). For a constitutional application of the vehicle in the park problem, see Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991).

Furthermore, Congress can trump those laws with legislation. Greater formality is needed to regulate and determine the exercise of greater power. But nobody can confidently predict how the Court will evaluate legislative vetoes created pursuant to the congressional power to declare war, which arguably is not "legislative" action, but rather is a constitutional grant of "executive" power to the legislative branch.[111]

The Court extended *Chadha* in *Bowsher v. Synar*[112] by holding that congressional placements of congressional members or agents in executive positions were the functional equivalents of legislative vetoes. The Court combined *Buckley v. Valeo*'s[113] ban on congressional personnel being placed within the executive branch with *Chadha*'s ban on legislative vetoes to create another vivid bright line. In *Buckley*, Congress had created a statute that permitted them to appoint congressional members to supervise election reform. The Court could have distinguished *Chadha* and *Buckley* in *Bowsher* on the ground that the Solicitor General was an agent of Congress, not a member of Congress. Issues of agency invariably complicate litigation, providing potential distinctions even in constitutional cases. For instance, the Court previously held that police officials were not responsible for unconstitutional actions of police officers in *Rizzo v. Goode*.[114] Nor were states responsible for school segregation caused by their municipalities in *Milliken v. Bradley*.[115]

By combining *Buckley* and *Chadha*, the Court reinforced both formal rules. Those two rules prevent Congress from invading the executive branch, either directly through a veto or indirectly through individual congressional members or congressional agents. Thus, there is some merit in criticizing Chief Justice Burger's crude characterization of all legislative vetoes in *Chadha* as "legislative." An element of "executive" action also existed when the House of Representatives refused to permit Chadha to remain in the United States. But that element constituted another violation of separation of powers principles. The need for a clear rule of recognition, combined with the desirability of keeping the personnel of all three branches separate from each other as much as possible, supports the Court's

111. *See* War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1988).

112. 478 U.S. 714, 726-27 (1986); *cf.* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 269 (1991) (Congress cannot place its members as citizen-users on board overseeing Washington airports).

113. 424 U.S. 1, 124-37 (1976).

114. 423 U.S. 362, 377 (1976).

115. 418 U.S. 717, 748-49 (1974). *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE (1991) (arguing that the liberal Warren Court's agenda failed).

formalistic outcomes in these cases.[116] Thus, another legitimate goal—segregating the three federal branches' personnel—adds additional force to *Chadha's* rigid conclusion.

G. Factor Tests

Forms of doctrine can help determine which facts litigants need to prove in subsequent cases.[117] After *Chadha* and its progeny, for example, a plaintiff need only show that Congress placed one of its members or agents in an executive position or passed a legislative veto to prove a violation of the bicameralism or presentment requirements or both. Factor tests explicitly limit relevancy, thereby partially constraining future judicial discretion and making the law more predictable. But factor tests are not as predictable as bright lines, because they require courts to continue to balance the various factors, which may be incommensurable.

Mathews v. Eldridge[118] is the most influential factor test in contemporary constitutional law. Justice Powell refused to grant a formal pre-termination hearing to a Social Security disability recipient whose benefits had been terminated. Justice Powell created a three prong cost-benefit test to determine the amount of process "due" a particular claimant under the Due Process Clauses. Courts must only consider: (1) the plaintiff's interest, (2) the amount of increased accuracy the additional procedures requested by the plaintiff will add to the existing process, and (3) the cost of those additional procedures.[119] Applying those factors, Justice Powell concluded that the plaintiff was not entitled to a formal pre-termination hearing, unlike welfare recipients who had received elaborate procedural protections in *Goldberg v. Kelly*.[120]

First, the Social Security disability plaintiff's need for the procedures was not likely to be as great, because welfare recipients relied on their benefits to live while Social Security disability recipients were more financially secure.[121] Second, existing informal Social Security pre-termination

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116. *See* James G. Wilson, *Altered States: A Comparison of Separation of Powers in the United States and in the United Kingdom*, 18 HASTINGS CONST. L.Q. 125, 165-75 (1990).

117. *See* POSNER, *supra* note 12, at 318. Posner described one cost of choosing personal justice, which looks at each case's particulars, over formal rules: "By greatly expanding the boundaries of the relevant, personal justice makes the process of decision enormously cumbersome and legal obligations unpredictable." *Id.*

118. 424 U.S. 319 (1976).

119. *Id.* at 335.

120. 397 U.S. 254 (1970).

121. *Eldridge*, 424 U.S. at 342.

procedures were adequate.[122] Because the doctors played a major role in determining physical or mental disability, the Court found the issue of disability was more "objective," based on more reliable medical proof.[123] In contrast, the typical welfare determination is less "sharply focused,"[124] and centers on such disputes as having "men in the house" or failing to report income. Justice Powell also noted the increased costs of formal pre-termination hearings.[125]

Professor Mashaw criticized *Eldridge* for failing to include, as an additional factor, the dignitary value that hearings provide to recipients, whether they win or lose.[126] Perhaps dignitary benefits were folded into the first factor, the "plaintiff's interest." But the *Eldridge* Court did not appear to care about the plaintiff's feelings. Overall, the *Eldridge* factor test not only curbed future judicial discretion as to which facts and emotions to consider, but it also favored the government. As importantly, Justice Powell explicitly made governmental expenses constitutionally relevant in his third prong, thereby rejecting rhetoric flourishing among lower federal courts that no price could be put on constitutional rights.[127]

The degree of predictability, which has been this article's baseline, requires an additional distinction between "objective" and "subjective" factors.[128] Proof of "objective" factors exists outside the courtroom, while "subjective" factors are the judge's viewpoints. "Objective" factors are slightly more predictable because litigants can determine what evidence

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122. *Id.* at 343.

123. *Id.* at 344.

124. *Id.* at 343.

125. *Id.* at 347.

126. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976).

127. *Eldridge*, 424 U.S. at 347. Justice Powell also did not adopt the view in *Goldberg* that the government had a major interest in making sure that eligible recipients should continue to receive their benefits. 397 U.S. at 264. For Justice Powell, all the governmental interests existed on one side of the scales.

The relationship between forms of doctrines and evidentiary relevance could lead to the erroneous conclusion that forms of doctrines are merely rules of evidence. Although everything may eventually converge in jurisprudence, it is helpful to separate the forms of doctrine from the technical rules of evidence, just as it is useful to categorize the forms themselves. The rules of evidence exist within the courtroom, as tools that determine how parties prove facts to satisfy a particular form's substantive requirements. The rules of evidence do not, in themselves, yield particular substantive outcomes. In addition, the rules of evidence contain forms of doctrine. A conclusive presumption, for instance, is a bright line rule. Consequently, the rules of evidence are means that serve forms of doctrine, just as different forms of doctrine are means that advance substantive ends, such as predictability.

128. The Court must engage in a meta-subjective balancing test to determine which factors, objective and subjective, to include in its final formulation of doctrine.

matters. Objective factor tests also somewhat limit judicial discretion because judges must explain how they derived their conclusions from the verifiable facts. In *Eldridge*, for example, the cost factor is relatively objective. Parties can fairly accurately determine the costs of existing procedural systems. Although it will be more difficult, litigants can estimate additional costs of the plaintiff's alternative procedures.

Yet, it is hard to predict how much more accuracy additional procedures will give to an adjudication. One problem is knowing when the legal-administrative system gets a decision "right." One cannot easily prove that different processes would yield different outcomes when a case is only tried once under one set of procedures; there cannot be any "double blind" test of each process. Nevertheless, parties have developed somewhat artificial techniques to reveal the accuracy of different procedural structures. For example, in *Eldridge,* the plaintiffs pointed out that administrative law judges reversed over fifty percent of appealed Social Security disability termination cases.[129]

The plaintiff's interest, however, requires the most subjective judicial determination. Justice Powell arguably blundered in *Eldridge* by distinguishing all Social Security disability cases from welfare cases. Supplemental Social Security Income disability recipients frequently had no other possible source of income; many states did not assist individuals without families or provide a minimal amount of general assistance.[130] Furthermore, disability recipients could have been worse off than many welfare recipients because of their inability to work.

The Court subsequently demonstrated the subjectivity of determining the "plaintiff's interest" when it decided that a horse trainer accused of improperly drugging one of his horses had a right to a formal pre-termination hearing.[131] It is unclear why a horse trainer's interests were greater than a Social Security recipient's need for minimal income.[132] Nevertheless, even the third test requires the Court to explain the plaintiff's

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129. 424 U.S. at 346.

130. In 1993, Governor Engel of Michigan abolished general assistance for 83,000 recipients. *Off the Rolls and Into What?*, THE ECONOMIST, Mar. 13, 1993, at 32.

131. Barry v. Barchi, 443 U.S. 55, 66 (1979).

132. *See* Coker v. Georgia, 433 U.S. 584 (1977) (holding that states could not execute convicted rapists). The Court applied a two prong test that expressly applied a subjective and an objective test to determine if a penalty was so "disproportionate" that is violated the Eighth Amendment's ban on cruel and unusual punishment. *Id.* at 592. The Court first had to decide if the penalty was "excessive." *Id.* Few things are less predictable than any person's rankings of penalties and crimes. The Court also would count statutes and jury verdicts under its "objective" test. *Id.* We thus can predict what will be relevant, but we still cannot predict what weight will be given to that "objective" law.

interests, enabling critics to point out such errors as underestimating the amount of injury to terminated Social Security disability recipients.[133]

The "objectivity" of objective factor tests should not be exaggerated. Judges subjectively decide which objective and subjective factors count in interpreting the "objective" data. For example, the Court has frequently surveyed State laws for "objective" information about societal norms.[134] In *Powell v. Alabama*, the Court held that defendants facing the death penalty had a right to a lawyer without charge even though no states provided paid counsel at the time.[135] In *Coker v. Georgia*, Justice White held that the fact that only four states authorized the death penalty for rape was "objective" proof that the penalty was disproportionate.[136] Finally, the Court held that parents had no right to a paid lawyer in termination of parental rights cases even though thirty-three States provided such a service.[137]

H. Definitions

Definitions differ from factor tests more in form than function, because they also establish a limited set of criteria that litigants must satisfy.[138] For example, in the First Amendment case *Brandenburg v. Ohio,*[139] the Supreme Court defined unprotected "incitement" as: "such advocacy [of the use of force or of law violation] that is directed to inciting or producing imminent

133. The Supreme Court does not always give equal weight to its factors. For example, the Court created a six-factor test to determine the applicability of Eleventh Amendment immunity in Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-02 (1979). Although those "indicators of immunity point[ed] in different directions" in Hess v. Port Auth. Trans-Hudson Corp., the Supreme Court did not grant immunity. 115 S. Ct. 394, 404 (1994). It approvingly cited court of appeals determinations that "the vulnerability of the State's purse [is] the most salient factor." *Id.* The Court also apparently created a per se rule precluding immunity to entities formed via interstate compacts. *Id.* at 406.

Narrowing the focus does not necessarily generate a rule. In the course of finding that a congressional statute did not preempt common law tort actions, the Court observed: "At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." Freightliner Corp. v. Myrick, 115 S. Ct. 1483, 1488 (1995) (referring to Cipollone v. Liggett Group Inc., 112 S. Ct. 2608 (1992)).

134. Justice Scalia calls this quest "tradition."

135. 287 U.S. 45, 71 (1932).

136. 433 U.S. at 593.

137. Lassiter v. Department of Social Services, 452 U.S. 18, 33 (1981).

138. Professor Gelman recently formulated a seven-factor test with a rigid, five-part definition to protect what he believes is a fundamental constitutional right not to be biologically altered by the government. Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203, 1215-16, 1284 (1995). As applied by Gelman, this doctrine will almost always trump the government.

139. 395 U.S. 444 (1969).

lawless action and is likely to incite or produce such action."[140] Under this definition, a prosecutor must prove and need only prove (1) advocacy (2) of the use of force or of law violation, (3) the intention to incite or produce unlawful action, (4) the imminence of the unlawful act, and (5) the likelihood that such action will be produced. The Court concluded that the defendant, a leader of the Ku Klux Klan, should not have been convicted of incitement, because the trial court failed to instruct the jury on the difference between "mere advocacy" and "incitement to imminent lawless action.[141] As with factor tests, some parts of the definition force litigants to develop facts, while other parts primarily appeal to the trier of fact's judgment. Under *Brandenburg*, prosecutors will have the easiest time proving advocacy of the use of force or law violation, more difficulty with mens rea, and either an easier or harder time proving imminence and likelihood, depending on whether or not force or lawlessness eventually occurred.

Definitions are somewhat different than factor tests, because factor tests contain separate variables that must first be considered separately and then balanced against each other. Under *Eldridge*, for instance, a court must compare the plaintiff's interest and the plaintiff's predictions of improved accuracy caused by requiring additional procedures against predicted increased costs. But *Brandenburg* requires the prosecutor to prove all of the definition's elements beyond a reasonable doubt. Nevertheless, the *Brandenburg* definition also is a simultaneous equation. Courts will and should consider how the different parts of the definition interact in light of the particular facts of the case. The jury or judge will be more likely to find bad intent, imminence, and likely harm when reviewing a serious proposal to destroy a nuclear power plant than a plea to participate in a college sit-in.[142]

Brandenburg's fluid definition balanced the often conflicting ends of free speech and social peace.[143] Society (including the judiciary) should not tolerate violence nor anarchical lawlessness, yet governmental critics ought to be able to express themselves freely and fiercely. Unconditional protection of political speech would eliminate all crimes of conspiracy, while

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140. *Id.* at 447.

141. *Id.* at 448.

142. Judge Learned Hand created a formula to express the trade-off: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950). Judge Hand's formula was cited favorably in Dennis v. United States, 341 U.S. 494, 510 (1951) (upholding facial challenge to statute permitting conviction of Communist Party leaders); *see also* William Van Alystyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 124 (1982) (providing a graph describing Hand's analysis).

143. Of course, civil libertarians believe that an expanded definition of free speech increases the likelihood of social peace.

defining "incitement" as advocating lawlessness without any immediacy element could criminalize all discussions about civil disobedience, jokes, crank proposals, and classroom hypotheticals. Potential defendants need to know as precisely as possible what combination of events will make them liable for criminal prosecution. Furthermore, due process precludes prosecutors from picking and choosing among elements. Finally, the Supreme Court's technique of separating out certain categories of speech as being unprotected or deserving less than full First Amendment protection seems best advanced by definitions that will place clusters of words within those categories. Perhaps the only way to make "child pornography" an unprotected form of speech is to define "child pornography."[144]

I. Pure Balancing Tests

Just as all forms of doctrine can be characterized as "rules," they also can be defined as "balancing tests." First, courts must engage in a meta-balancing test to choose the appropriate form, considering different forms' strengths and weaknesses.[145] For instance, the Supreme Court balanced the costs and benefits of regulating child pornography before creating a bright-line rule that all filmed or photographed child pornography could be outlawed.[146] Because such pornography was so vile, harmful to children, and socially worthless, the Court concluded there was no need for case-by-case determinations.[147] Second, every form includes traces of balancing. Even the most rigid bright line rule contains a possible equity exception or remains vulnerable to being overruled or modified. But labeling all forms "balancing tests" is as excessive as describing all forms as "rules." Both definitions are so global that they approach triviality. Neither definition enables courts to decide which form or forms are appropriate in a particular case. Nor does either definition help resolve the rule/standard dispute.

The typical doctrinal balancing test requires the court to weigh two competing clusters of facts and norms.[148] For example, the rigorous

144. *See* Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825 (1962) (explaining the need for definitions in First Amendment doctrine).

145. Chief Justice Rehnquist observed that the Court balances individual freedom against majority rule in constitutional cases. WILLIAM A. REHNQUIST, THE SUPREME COURT—HOW IT WAS, HOW IT IS 318-19 (1987).

146. New York v. Ferber, 458 U.S. 747, 756-57, 759-60 (1982).

147. *Id.* at 763-64.

148. Balancing tests can tip dramatically with one change in the facts. In the course of deciding that Congress could not prohibit all government employees from being compensated for speech outside their employment, the Court distinguished a prior holding limiting the First

balancing test called "strict scrutiny" compares "fundamental rights" with "compelling state interests."[149] Although such conclusory rhetoric supports the allegation that balancing tests are ad hoc, it is not so easy to place such balancing tests on the predictability continuum. One cannot tell how rule-like these tests are simply by examining their language. The common law "reasonable man" tort standard is designed to be indeterminate and evolutionary, while the "rational purpose" test in constitutional law virtually guarantees a victory for the government.

1. The Rational Purpose Balancing Test

As applied by the Supreme Court, the rational purpose test generates about as bright a line as one will find in constitutional law,[150] even though it putatively weighs the plaintiff's interests against the government's interests and means. These examples reconfirm the error of castigating all balancing tests or all bright line rules. Balancing tests of varying degrees of predictability pervade constitutional law, reflecting the high stakes caused by the perpetual, underlying tension between freedom and authority. Once one concedes that particular constitutional text protects some rights but does not completely preclude governmental regulation, balancing has begun. The alternative is to believe in absolute rights and absolute powers. Even if rights are trumps, it is not clear who has, much less who should have the ace of trumps.

The line generated by the rational purpose test is not perfectly bright. The Supreme Court decided that a city "irrationally" discriminated against the mentally retarded in *City of Cleburne v. Cleburne Living Center*,[151] and

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Amendment rights of government employees in Pickering v. Board of Educ., 391 U.S. 563, 568 (1968): "[W]e established that the Government must be able to satisfy a balancing test of the *Pickering* form to maintain a statutory restriction on employee speech . . . we did not determine how the components of the *Pickering* balance should be analyzed in the context of a sweeping statutory impediment to speech." United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1013 (1995).

149. In 1993, the Supreme Court upheld a state law prohibiting the distribution of campaign material within 100 feet of a polling booth even though that statute had to be strictly scrutinized under three different doctrines designed to protect the fundamental right of free speech: the statute was content-based; it regulated the sidewalks, a public forum; and it discriminated against political speech, the most favored category. Burson v. Freeman, 504 U.S. 191, 196 (1992). In other words, the level of scrutiny frames the issue but does not decide any particular case.

150. Many doctrines that superficially look like balancing tests operate like formal rules. Professor Sullivan observed that strict scrutiny is rule-like. Kathleen Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605, 606 (1992). On the other hand, intermediate scrutiny is real balancing. *Id.*

151. 473 U.S. 432, 433 (1985).

held that Congress "irrationally" denied food stamps to communes in *Department of Agriculture v. Moreno*.[152] Such variations prove that the rational purpose test is not as formal as the rule in *Chadha*. But the test is clearly more rule-like, more predictable than the *Craig v. Boren*[153] intermediate scrutiny test in gender discrimination cases. Both in theory and in practice, it is impossible to know when five Justices will find that the government has proven that a gender-based classification is "substantially related" to achievement of "important governmental objectives."[154] Only young women will be protected by statutory rape laws,[155] but young men will have the same rights as young women to drink liquor.[156]

Are deviations from the general application of the usually rigid rational purpose rule nothing more than exceptions? Once again, the indiscriminate use of the word "exception" distorts more than it reveals. Explicit exceptions to rules should not be equated with differing applications of rules, as in *Cleburne*. Realized adverse exceptions arise when the Court concludes that competing considerations trumped the purposes of the underlying rule: burning the American flag would not be protected by the otherwise valid, applicable rule proscribing viewpoint discrimination. When the Court applies the rational purpose rule, it upholds all statutes that have "rational purposes" and invalidates all those that do not. A rule does not lose its ruleness because it does not resolve every related outcome in one direction. The alternative—describing the Court's protection of the mentally retarded in *Cleburne* as an exception to the rational purpose test—is like describing a doctor's victory in a medical malpractice suit as an exception to the negligence rule.

2. Formulating Rules With the "Tools of Doctrine"

One problem with emphasizing one level of legal abstraction is that other important judicial techniques may be ignored or insufficiently integrated into the analysis. Judicial craft extends far beyond the choice of a form of doctrine.[157] The actual scope of judicial review is also found in the Court's

152. 413 U.S. 528, 538 (1973). The Supreme Court undermined *Moreno* in Lyng v. International Union, UAW, 485 U.S. 360, 371 (1988), which upheld a congressional ban on food stamps to striking workers.

153. 429 U.S. 190, 197 (1976).

154. *Id.* at 197.

155. Michael M. v. Superior Court, 450 U.S. 464, 471-72 (1981).

156. *Craig*, 429 U.S. at 201-02.

157. Perhaps because they have read study aids such as GILBERT'S too much, some law students blunder by stopping their legal analysis too soon. They apparently believe they have

"tools of doctrine," devices it has created to separate the constitutional from the unconstitutional. This article will temporarily shift levels of abstraction to demonstrate how the forms of doctrine and the tools of doctrine work together. Lawyers can only predict how rule-like a rule will actually be after studying the Court's choice of forms and tools.[158]

In *McCulloch v. Maryland*,[159] the Court upheld a decision favoring a National Bank and prohibited states from taxing that Bank's operations. Chief Justice Marshall set forth a famous test that focused on unconstitutional ends, unconstitutional means, and poor fits between constitutional ends and means:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[160]

Under this approach, the Court first intensifies its scope of review by being more critical of asserted governmental purposes, of alleged "ends." In *Shapiro v. Thompson*, for instance, the Court said Colorado could not preclude new residents from receiving welfare benefits, because it was an unconstitutional goal to deter potential recipients from living there.[161] In *Regents of the University of California v. Bakke*,[162] Justice Powell held that state universities could not implement affirmative action plans to remedy "societal discrimination."[163] Further, the Court will not tolerate certain means, such as torture, in any situation. Powell's *Bakke* opinion proscribed the use of strict racial quotas.[164]

But *McCulloch* also requires the Court to ferret out "pretexts"[165]—situations where the government claims it is fulfilling a constitutional

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completed their job after citing appropriate text, cases, levels of scrutiny, and incantations like "compelling state interest."

158. Sometimes the Court includes some of these tools within its formal doctrine. In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 US. 557 (1980), the Court held that if the regulated commercial speech is lawful and not misleading and if the alleged governmental interest is substantial, then the Court must determine if "the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest." *Id.* at 566. Close analysis of the record, subtle shifts in burdens of proof, choice of alternatives, and claims of overinclusiveness and underinclusiveness are the tools that determine that fit. For additional discussion of *Central Hudson,* see the Step Test section, *infra* notes 175-85.

159. 17 U.S. (4 Wheat.) 316 (1819).

160. *Id.* at 421.

161. 394 U.S. 618, 627 (1969).

162. 438 U.S. 265 (1978).

163. *Id.* at 310.

164. *Id.* at 289.

165. 17 U.S. at 423.

purpose, but is actually acting unconstitutionally. The Court must not automatically accept the government's alleged purposes. For example, the Court rejected the City of Hialeah's claim that its ban on religious animal sacrifices was passed to prevent cruelty to animals; the Court believed the City passed the ordinance to punish a single religious sect.[166]

The Court has created several devices, several "tools of doctrine," to evaluate the "fit" between ends and means. "Poor fits" indicate unconstitutional motives and purposes or reveal violations of *McCulloch*'s requirement that means be "plainly adapted to [the] end."[167] The Court considers whether the State could have used less constitutionally provocative alternatives. In *Shapiro*, the Court claimed that the state could prevent fraud, a legitimate end, without prohibiting all new residents from receiving welfare. Instead, the state could supervise claimants more closely and prosecute violators.[168] In addition, the Court can determine if the challenged statute is "underinclusive" or "overinclusive." Does the statute not cover people it should or does it affect those it should not? For instance, a state could not preclude an adult living in his parents' home from voting in a school district election because the ban precludes the plaintiff, who is interested in school issues, but permits an uninterested renter to participate.[169] The Court also closely scrutinizes the record, second-guessing facts and beliefs. The *Cleburne* plurality protected the mentally retarded because "negative attitude[s]" toward them constituted an "irrational prejudice."[170]

Another way to constrain future judicial choices is to skew the burden of proof. In *Keyes v. School District No. 1*, the Court held that the only way a school district could rebut a segregation claim after a finding of segregative intent in one part of the system was to prove "that the [segregated area] is a separate, identifiable, and unrelated section of the school district."[171] The defendant school district must also show that "other segregated schools within the system are not also the result of intentional segregative actions."[172] Such burdens of proof create virtual bright line rules. No school district can demonstrate that one of its parts is "unrelated" to the rest, much less prove the negative that its other segregated schools were not the result of intentional segregative actions. Everybody knows that segregative

166. Church of the Lukumi Babuli Aye v. City of Hialeah, 113 S. Ct. 2217, 2227 (1993).
167. 17 U.S. at 421.
168. 394 U.S. at 637 & n.18.
169. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 n.15 (1969).
170. 473 U.S. at 450.
171. 413 U.S. 189, 213 (1973).
172. *Id.* at 208.

intent can occur without any express statements in the record. To summarize, one cannot be sure how rule-like a holding is by simply studying the holding or the form of doctrine; one has to analyze the many other ways courts can stack the odds.

J. Step Tests

Sometimes the Court establishes a series of doctrinal hurdles. Over the past two decades, Justices from a broad range of political perspectives have interpreted the First Amendment to protect commercial speech. One can defend such judicial activism on the ground that the information contained in commercial speech can be very valuable to consumer and producer alike. In addition, commercial speech always has a "political" element. Even when advertisements are not draped in the American flag or do not soar with a bald eagle, they send implicit messages defending capitalism and corporatism as well as presenting the redemptive power of individualistic consumerism. Many ads are politically explicit, extolling their creators' environmentalism, views on health policy, or compassion. Not only are television ads often the best produced parts of many shows, but they also contain more effective ideological messages than more expressly political programs. But as Chief Justice Rehnquist observed in his early dissents, providing constitutional protection for the market system triggers uncomfortable memories of *Lochner v. New York*,[173] in which the Supreme Court construed due process to preclude states from regulating the hours that bakers worked even though a study indicated that many were dying prematurely from overwork.[174] Furthermore, some products, such as cigarettes, firearms, and alcohol, are legal, but nonetheless harmful.

The Court's solution in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[175] has been to create an elaborate, four-step, intermediate scrutiny test, a test that always gives vast discretionary power to future Justices:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive

173. 198 U.S. 45 (1905).

174. *Id.* at 70-71 (Harlan, J., dissenting); *see also id.* at 70 (quoting Professor Hirt's *Diseases of the Workers*).

175. 447 U.S. 557 (1980).

> answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[176]

The Justices must first determine if the expression is protected by the First Amendment. Obscene commercials, for example, could be prohibited because the Court is unwilling to defend any form of obscenity.[177] Even regular commercial speech is protected only when it concerns "lawful activity" and is not "misleading."[178] Although the Court can easily determine if a product or service is lawful by consulting the positive law, it will have more difficulty applying the "misleading" standard. Do excessive numbers of children's ads mislead? Assuming that this first step, which focuses on the regulated speech, has been satisfied, the Court next determines if the governmental interest is "substantial"[179]—the favorite judicial adjective in intermediate scrutiny tests. Needless to say, "substantial" is a vague standard, traditionally used by the Court in a very unpredictable way. The government will always claim it is regulating a substantial harm, but it is impossible to predict how much deference the Court will give to legislative findings of harm under the First Amendment.[180]

The Court then pauses to determine if each of these two stages have been answered positively.[181] Assuming that the ads cover lawful material in a nondeceptive fashion and that the government has a substantial interest, the Court next determines if the "regulation directly advances the governmental interest asserted."[182] The use of the adverb "directly" might suggest that this step is onerous, but the government will always have a prima facie case that reducing or regulating the advertisements will reduce the demand for the harmful activity, the alleged governmental interest that provoked the regulation in the first place. The fourth step provides the tougher part of this ends-means inquiry; the Court must determine if the regulation is "not more

176. *Id.* at 566.

177. *See* Roth v. United States, 354 U.S. 476, 485 (1957).

178. *Central Hudson*, 447 U.S. at 566.

179. *Id.*

180. The Court was willing to accept legislative findings of harm for child pornography far more easily than it was congressional concerns that cable television would dominate and even destroy free broadcast television. *Compare* New York v. Ferber, 458 U.S. 747, 756-58 (1982) *with* Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2450 (1994).

181. Step tests force judges and litigants to separate and sequence their claims. In Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995), the Supreme Court criticized a court of appeals for combining steps 2 and 3 of Batson v. Kentucky, 476 U.S. 79, 96-98 (1986), a three-step test to determine improper use of peremptory challenges striking potential jurors.

182. *Central Hudson*, 447 U.S. at 566.

extensive than necessary to serve that interest."[183] Although this standard could be read to require a tight fit between ends and means, like the "least restrictive alternative" requirement, the Court has in practice been increasingly deferential to governmental regulations of commercial speech,[184] particularly when "vice" is involved.[185] Overall, the Court created an elaborate dance pattern under which it must separately answer such questions—questions that vary in form and burden of proof. Nevertheless, the steps flow together, somewhat resembling factor tests and definitions. When the governmental interest is very substantial in preventing a severe, foreseeable harm—regulating the sale and use of firearms, for example—the Court will be more deferential throughout its analysis. The advantage of the step test is that the Court can sometimes stop its inquiry before wrestling with fits between legislative ends and means. If the speech is not protected or the governmental interest is not substantial, the case is over.

K. Competing Considerations Test

Many of Justice Harlan's opinions retain their vitality because of their nuanced, candid decision-making. Dissenting in *Shapiro v. Thompson*, Justice Harlan applied a variant of balancing tests—the "competing considerations" inquiry—in which he strongly expressed both sides' arguments.[186] Although he considered potent arguments for both sides, he ultimately concluded, without much discussion, that states did not have to pay welfare to new residents.[187]

Some may find this approach vacuous and semantically indistinguishable from balancing tests. Nevertheless, Justice Harlan's approach lets all parties know that their arguments have been evaluated. Courts often didactically and confidently use jargon to make their decisions appear inevitable. They define a plaintiff's interest as a "fundamental right" or not, briskly evaluate alternatives to see if they are "too restrictive," and dismiss governmental purposes that are not "compelling." Tensions within cases fade behind doctrinal forms and tools. Such slaughters belie how close many cases are, reflecting the regrettable tendency of many American judges to make their

183. *Id.*

184. *See* Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (requiring only a "reasonable" fit between ends and means).

185. *See* United States v. Edge Broadcasting, 113 S. Ct. 2696, 2703 (1993) (permitting state banning of radio lottery ads).

186. 394 U.S. 618, 663 (1969) (Harlan, J., dissenting).

187. *Id.* at 677.

opinions appear impregnable by attempting to repudiate completely the losing side.

Admiration for Harlan's straightforward presentation of the partial validity of both sides' positions does not last long. His approach brings forth an anxiety lurking underneath all the forms of doctrine. Even after a judge chooses a form, how should the judge apply that form? What makes a judge reach the final conclusion, both as to form and application of that form? Justice Harlan did not seriously explain why he chose the government's cluster of positions over the claims of welfare recipients. His candor revealed a huge chasm at the heart of legal reasoning, a void at the very moment that additional reasons seem most necessary. Talk about indeterminacy![188]

The problem may be partially solved and partially aggravated by considering our legal culture's complex understanding of the concept of "reason." Many American lawyers and judges are on a quest for "right reason," which contains such inspiring traits as Objectivity and Truth. Others take a purely instrumental view, reducing "reason" to optimal fitting of means to ends.[189] The philosopher Karl Popper offered another definition. Scientists can never be certain they know the truth; everything is opinion, conjecture.[190] But Popper's inability to find essence or knowledge of truth did not drive him into existential despair or pure relativism. He argued that humans will seek and even approach truth by using the critical scientific method, a procedural form of "reason" that tests conjectures with facts, even though humans can never be certain that they have found the truth.[191] Although there are many differences between the scientific and legal methods, particularly in terms of verification, Popper's notion of "reason" resembles Justice Harlan's *Shapiro* dissent.[192] Justice Harlan considered all arguments without pretending that solutions were easy or cost-free. Harlan's form described his decision-making process: acknowledge all

188. Requiring reasons for reason's sake eventually resembles the "Why" game played by young children. One has to stop somewhere, often with intimations of force. In addition, there is an unexplained, perhaps unexplainable leap between different reasons, norms, and principles and their applications. All the Supreme Court Justices would claim that their opinions prevent tyranny, a noble end, but could not prove that the particular outcome of most of their cases can be derived from or will serve that general purpose.

189. POSNER, *supra* note 12, at 105-08.

190. Karl Popper explained that science is ultimately based on a form of adversarial process: "The rationalist tradition, the tradition of critical discussion, represents the only practicable way of expanding our knowledge—conjectural or hypothetical knowledge, of course." POPPER, *supra* note 74, at 151.

191. *Id.*

192. *See* 394 U.S. at 655-77 (Harlan, J., dissenting).

colorable arguments and make a choice, even if one cannot prove the validity of the ultimate decision.

Popper's methodology also demonstrates the limits of process-based reason. There is no logical, scientific, or objective way to proceed from listing considerations to ranking them. Perhaps Justice Harlan could have provided additional "reasons" to explain his final decision. But a leap remained in his method, a leap from evaluation and presentation to resolution, that may be impossible to explain fully. Judges are always comparing incommensurables, weighing such competing interests like fiscal responsibility and starvation. Even if one disagrees with Justice Harlan in outcome or form, one has to acknowledge the honest doubts that pervade the opinion. At the least, the form requires a judge to list all the arguments that he or she considered. That very process informs future litigants and parties as to what types of arguments are worthwhile and serves as a limited constraint of the judge. It is Popper's process-based "reason."

It is probably unwise to ask for too much more. Over two thousand years ago, Aristotle distinguished formal logic from legal-political analysis. When advocates attempt to persuade others to take a certain political direction, they use "enthymemes," not logical syllogisms.[193] Aristotle explained that the methodology of enthymemes resembles logic only in form.[194] The advocate derives premises from prevailing public opinions, not from rigid linguistic conventions or geometrical assumptions. The advocate then attempts to predict the consequences of different proposed solutions.[195] Assuming that all legal arguments and judicial opinions are enthymemes, the choice of form of doctrine is an important component of a successful judicial enthymeme. Justice Harlan's competing considerations test offers the virtues and vices of candor, replicating a judge's mulling over competing concerns and eventually reaching a final resolution without fully explaining why. One should not be surprised that Justice Harlan's tentative, candid approach has

193. ARISTOTLE, 1 RHETORIC, *reprinted in* THE COMPLETE WORKS OF ARISTOTLE 2153 (Jonathan Barnes ed. & J.O. Urmson revised trans., 1984).

194. *Id.* at 2153-56; *see also* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986) (distinguishing between the formalistic use of deductive logic and realism's use of policy analysis).

195. "The deliberative orator aims at establishing the expediency or the harmfulness of a proposed course of action; if he urges its acceptance, he does so on the ground that it will do good; if he urges its rejection, he does so on the ground that it will do harm; and all other points, such as to whether the proposal be just or unjust, honourable or dishonourable, he brings in as subsidiary and relative to this main consideration." ARISTOTLE, *supra* note 193, at 2160. Thus Justice Holmes' famous epigram, "The life of the law has not been logic: it has been experience," has an ancient pedigree. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Mark Deburke Hare ed., 1963) (1881).

not been emulated in a society that puts a premium on the appearance of correctness. His test accurately describes how judges ought to think and often do think while in their chambers, but it is not culturally persuasive. Quite simply, later Justices have not frequently utilized Justice Harlan's competing considerations test as the form of doctrine to support their judicial enthymeme.

L. Totality of the Circumstances Test

The Supreme Court recently may have resolved a major constitutional conundrum in *Church of the Lukumi Babuli Aye v. City of Hialeah*.[196] Without a dissent, the Court struck down municipal ordinances that prohibited believers in the Santeria religion from engaging in ritual animal sacrifice.[197] Because the ordinances did not mention the Santerians by name, the city argued the ordinances were facially "neutral" and consequently were constitutional.[198] Existing First Amendment-Equal Protection doctrines could not completely resolve the problem. No glaring facial discrimination existed similar to the explicit segregation of African-American school-children in *Brown v. Board of Education*.[199] Because so few were affected by the ordinances and because everyone covered by the narrow terms of the statute was likely to be prosecuted, plaintiffs could not prove any "stark pattern" of discriminatory enforcement which would invalidate the implementation of an otherwise valid statute or ordinance.[200] Nor could the case easily be based upon statistics to reveal disparate impact, which would imply invidious intent. The Court recently had upheld a general state statute banning peyote as applied to Indian religious practices.[201] Indians could not complain if they were the only ones caught violating the facially neutral law.[202] Thus, any constitutional infirmity in *Lukumi* had to exist primarily in the ordinances' text, not their application.

Writing for the majority, Justice Kennedy solved the problem by studying the facially neutral ordinances in light of all the surrounding circumstances to discover the ordinances' impermissible purposes of targeting and suppressing "the central element of the Santeria worship."[203] The majority did not have

196. 113 S. Ct. 2217 (1993).
197. *Id.* at 2233.
198. *Id.* at 2227.
199. 347 U.S. 483, 488 (1954).
200. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).
201. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).
202. *See id.* at 879.
203. *Lukumi*, 113 S. Ct. at 2227.

to look hard. One resolution sought to ban acts that "certain religions may propose to engage in . . . which are inconsistent with public morals, peace, or safety."[204] The ordinances exempted Jews' ritualized killings and almost all other killings of animals aside from religious sacrifice.[205] The legislative history confirmed the ordinances' suppressive agenda. A crowd applauded one Councilman's assertion that in pre-revolutionary Cuba "people were put in jail for practicing this religion."[206]

Although he did not use the following phrase, Justice Kennedy created a new constitutional doctrine—the "stark statute" standard—under which the Court will look at the totality of circumstances to invalidate statutes that carefully avoid using constitutionally suspect terms but nevertheless violate constitutional norms. Consider the following hypotheticals concerning prohibition of hats in elementary schools. The Court probably would accept an elementary school regulation banning all hats in a classroom; the school's need for classroom decorum, discipline, and visibility would most likely prevail over student self-expression.[207] Conversely, the Court would not permit a school to ban only yarmulkes, because that ban would be aimed at a Jewish religious practice. Nor would the Court permit the school to enforce the facially valid law only against Jews wearing yarmulkes (or only against women or blacks, for that matter). But what about a regulation that only banned all round, concave hats of less than nine inches? The statute is not explicitly anti-Semitic and covers everyone wearing similar hats. Under *Lukumi*, the Court could apply the "stark statute" test to invalidate the statute. There can be no doubt that the hypothetical rule is anti-Semitic, that the neutral language is pretextual.

Although its future remains uncertain, some form of the "stark statute" test is likely to be the center of subsequent constitutional issues.[208] The *Lukumi* Justices did not disagree about the "stark statute" technique; they disagreed about the proper form of doctrine. Justice Scalia's concurrence claimed that the Court should only have to study the statute's text, not surrounding circumstances. Once again Justice Scalia advocated rigid textualism, consistent with his rejection of legislative history in statutory interpretation and his reliance on text, history, and tradition in constitutional

204. *Id.* at 2228 (quoting Resolution 87-66).

205. *Id.*

206. *Id.* at 2231.

207. *See* Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) (upholding military order that Orthodox Jew could not wear yarmulke while on duty and in uniform).

208. Justice Scalia construed the state court's construction of a city's Bias-Motivated Crime Ordinance to be viewpoint discrimination in R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992).

interpretation.[209] And once again I am puzzled. Returning to the hypothetical, how can one determine the significance of a yarmulke without looking beyond statutory text to learn particular religious practices? How can one ascertain a new religious symbol or practice without contextualizing the text? If one purpose of constitutional law is to ferret out unconstitutional purposes, why not look at the "mischief" that provoked the law in the first place? How can one know that Jewish kosher practices were exempted religious practices in *Lukumi* without knowing something about the Jewish religion that could only be learned outside the ordinances' text? Because one purpose of the Constitution is to make sure certain groups are not picked on, the Court should look more closely when those groups are the center of a controversy that provokes the hostile majority to take legislative action. The Court should learn what was said about the religious group and its practices when those practices were put under a legal cloud. In other words, Justice Scalia's obsessive textualism makes a lousy enthymeme, because many of us will be unconvinced by judicial efforts to tease unconstitutional ends exclusively out of general statutory language. Either the judges will miss subtle forms of religious persecution or will overreact, finding unconstitutional discrimination when it may not have existed.[210] The Court will apply the "stark statute" test more accurately by studying the totality of surrounding circumstances, not just text.[211]

M. The "Shock the Conscience" Test (and Other Emotional Responses)

One of the peculiarities of American constitutional law is that some of the Justices most respected for being lawyerly, restrained, and "conservative" have been quite emotional in their opinions. This article already described how Justice Harlan's competing considerations test generated an opinion setting forth a range of arguments and then concluded that one set outweighs the other, never pretending to find an ultimate standard to resolve the tension.

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209. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).

210. In his dissent, Justice White accused Justice Scalia of overreacting in discovering viewpoint discrimination in *R.A.V.*, 112 S. Ct. at 2558. Justice White believed Justice Scalia was trying to resolve the constitutionality of "politically correct" regulations, not the particular city ordinance. *Id.* at 2561; *see also* Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 25 (1988) (judges prefer balancing tests to the totality of circumstances test); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 759 (1963) (the court and its role invariably is part of the balancing equation).

211. By limiting the number of variables, factor tests are slightly more predictable than the totality of the circumstances test.

Nor was Justice Holmes a pure rationalist. According to Judge Posner, Justice Holmes frequently used terse epigrams to demonstrate the limits of reason.[212] After all, Holmes' famous description of laws as a manifestation of "*felt* necessities" emphasizes the feelings that animate the law.[213]

Justice Frankfurter tried to determine how much constitutional protection state criminal defendants should receive by applying a "shock the conscience" test.[214] He had been appalled when police used a stomach pump to obtain narcotics a defendant had swallowed.[215] Justice Frankfurter's test varies from traditional balancing tests by requiring a higher standard of outrageousness (shocking) while also being purely subjective, a question of judicial conscience. Litigants have little way of predicting when something will be so "shocking" that it will disturb a given Justice's conscience, much less five consciences. Who would be as shocked if the police used a stomach pump on a terrorist who had swallowed a computer chip containing information on a planned bombing? It is impossible to escape law's emotional underpinnings.

Judge Posner, a self-styled "cold" jurist, described his scope of constitutional review of "foolish statutes":

> It might be a foolish statute, but (provided it is constitutional—that is, not too foolish, not vicious, and not contrary to one of the specific prohibitions in the Constitution) if it is correctly interpreted and applied, the judges have done their job and no more can be asked.[216]

Judge Posner's "too foolish" and "viciousness" tests are overtly laden with emotion and subjectivity.

N. Conclusory Standards

Courts frequently create rules that by themselves provide no predictability; they are nothing more than conclusions. For instance, the Supreme Court upheld special prosecutors in *Morrison v. Olson* because they did not impermissibly interfere with the President's authority under Article II.[217] The circle is complete in an instant. Who, after all, would permit

212. POSNER, *supra* note 12, at 241.

213. HOLMES, *supra* note 195, at 5. Holmes also observed that much of law sprang from the emotion of vengeance. *Id.* at 6.

214. *See* Rochin v. California, 342 U.S. 165, 172 (1952).

215. *Id.*

216. POSNER, *supra* note 12, at 251.

217. 487 U.S. 654, 693 (1988).

impermissible interferences? The Court has literally said that Congress violates separation of power principles when it violates separation of power principles. Such tests are not limited by facts, factors, or even an express balancing of competing interests. Closer scrutiny of opinions like *Morrison* discloses a supporting hodgepodge of facts, arguments, assertions, and definitions. For instance, Chief Justice Rehnquist noted that the Ethics in Government Act gave the Attorney General initial authority to appoint a special prosecutor and removal power for "good cause."[218] Furthermore, the lower federal court panel had continuing jurisdiction but could only dismiss the prosecutor when the case appeared finished.[219] Dominated by a conclusory standard, the form approaches formlessness.

Whether one agrees with *Morrison* or not, conclusory standards have traditionally played a major role in American legal doctrine. In tort law, plaintiffs are liable if they have "caused" injury by acting "unreasonably" or "negligently." Not all such standards are perpetually vague. Courts and litigants eventually develop a sense of how cases will be decided by consulting relevant precedents. As with balancing tests, the "ruleness" of an initially conclusory standard may become evident over time. From *Morrison*, the Supreme Court may eventually develop additional forms to separate "permissible" from "impermissible" intrusions, or the Court may eventually create a rule that upholds all special prosecutors not directly appointed by Congress.

Conclusory balancing tests' formless nature fails to provide clear directions to future litigants who must attempt to derive a favorable rule from the case or at least make plausible analogies or distinctions. Courts often resort to formless forms when entering new areas of law.[220] Judges

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218. *Id.* at 660-63.

219. *Id.* at 664. Congress recently passed a new statute authorizing special prosecutors. 28 U.S.C.A. §§ 591-599 (West Supp. 1995). The statute contains some significant differences from the statute the Court upheld in *Morrison v. Olson*. In particular, the Special Division of the D.C. Circuit now has more supervisory powers. *See* 28 U.S.C.A. §§ 49, 591-599 (West Supp. 1995). The *Morrison* Court partially upheld the prior statute because the special court could only terminate the special prosecutor when the case was "complete" or "substantially completed." 487 U.S. at 664. Consequently, we have no way of knowing if this change, which further entangles the judiciary in controversial, executive prosecutorial decisions, will shift the balance enough to void the statute. In other words, we cannot predict by simply looking at *Morrison*'s balancing test, how close the balance was or will be in the future to tipping towards unconstitutionality.

220. The "conservative" wing of the Supreme Court creates new balancing tests when necessary. Chief Justice Rehnquist, joined by Justices Scalia, Thomas, O'Connor, and Kennedy, sifted through a number of variables to decide that Congress had no authority under the Commerce Clause to ban firearms from public schools in United States v. Lopez, 115 S. Ct. 1624, 1634 (1995). Joined by Justice O'Connor, Justice Kennedy defended Rehnquist's "formless form" in a concurrence:

may doubt the "correctness" of their decision, privately disagree with each other over the scope and meaning of the decision behind the facade of the written opinion, worry about future consequences, or wish to move gradually until they learn the public reaction to their initial foray. After several cases have been litigated in a related area, litigants, scholars, and judges may be able to infer a more rigid rule where only an impulse initially existed. The formless form is also unstable, because it is so fact specific. We know that a party won a given case because a certain set of facts generated a set of reasons and conclusions. Every new case will have different facts that can provide grounds for additional arguments or distinctions.

The need for congressional flexibility in designing and regulating the Executive Branch supports *Morrison*'s outcome and form. Even if one believes for other reasons that *Morrison* was wrongly decided,[221] Justice Scalia's dissent goes too far by condemning the Court for creating conclusory, lawless standards:

> Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the 'totality of the circumstances' mode of analysis that this Court has in recent years become fond of.[222]

Justice Scalia's rule formalism separates judicial, executive, and legislative functions, radically threatening every administrative agency that

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> [W]e are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines. The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.

Id. at 1640 (Kennedy, J., concurring).

Once again we see the tendency to merge form with content. Instead, the Court should resolve structural and individual rights cases through the best mixture of bright lines, balancing tests, and hybrids. It is also worth noting that Justice Scalia, who champions bright lines in structural cases, was silent.

221. Wilson, *supra* note 116, at 165-75.

222. *Morrison,* 487 U.S. at 733 (Scalia, J., dissenting). *Compare* Skinner v. Railway Labor Executive Ass'n., 489 U.S. 602 (1989) *with* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). In *Skinner*, Justice Scalia joined the Court's opinion which adopted balancing techniques, including careful scrutiny of the record, to uphold mandatory drug testing of railroad crew members who were involved in railroad accidents. 489 U.S. at 633-34. Justice Scalia dissented in *National Treasury Employees Union* which permitted suspicionless testing of custom service personnel. 489 U.S. at 680-81.

combines rulemaking, adjudication, or prosecutorial powers.[223] Yet he also has disapproved of administrative agencies that only contain legislative functions.[224] Once again Scalia's textual fetish excludes important information. Separation of powers questions are difficult, because they need to be contextualized. Otherwise, the Court may develop elaborate technical doctrines that are completely swamped by non-legal shifts in governmental power. The *Morrison* Court may have been thinking about the Executive Branch's recurring habit of breaking laws and violating constitutional norms.[225] If the Executive Branch had a more honorable record, the case might have been decided differently. A vague standard, which makes *Morrison* a weak precedent that can be easily distinguishable on the facts or reasons, may be the best way to grope in this difficult area of constitutional law.

Although most of this article's examples come from public law, its insights extend to private law. For example, Judge Hutcheson used patent law to demonstrate how judges rely on "hunches" more than "logic" to decide if a patent applicant proposed an "inventive" idea instead of a "mechanical advance."[226] The "inventiveness" standard is a conclusory restatement of the patent law's purpose, to grant patents to inventions. Nevertheless, Judge Hutcheson did not find the standard to be either unworkable or undesirable.[227] The vague standard required him to listen carefully to all sides, mull over the facts and arguments, and wait for the

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223. Although he had joined Chief Justice Rehnquist's amorphous decision limiting congressional power under the Commerce Clause in United States v. Lopez, 115 S. Ct. 1624 (1995), Justice Scalia continued his campaign to formalize separation of powers jurisprudence when he held that Congress cannot reverse final judicial decisions in Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995). He explicitly rejected particularized assessment of harm:

> [T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judgments is surely one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Id. at 1463.

224. Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

225. *See Morrison*, 487 U.S. at 688.

226. Hutcheson, *supra* note 22, at 280. The problem of form also had affected maritime tort law. In Louisiana *ex rel.* Guste v. M/P Testbank, 752 F. 2d 1019, 1026 (5th Cir. 1985) (en banc), the court of appeals rejected a balancing test: ". . . we disagree with a case-by-case approach because we think the value of a rule is significant in these maritime decisions." The Court noted that a rule would keep decisions out of the hands of juries and trial judges, making the law more predictable "with the vice of creating results in cases at its edge that are said to be 'unjust' or 'unfair.'" *Id.* at 1029. Rules thus empower appellate courts while standards tend to allocate many final decisions to juries and judges. *See* POSNER, *supra* note 12, at 49 n.12.

227. Hutcheson, *supra* note 22, at 280.

"hunch" to tell him which side should win.[228] Neither is the "hunch" lawless; it reflects precedent, the judge's legal experience, and the judge's life experience.[229] The above tort and patent examples suggest that standards are particularly desirable when the judiciary wants an area of law to evolve over time in response to ever-changing circumstances and norms. Sometimes the virtues of flexibility overwhelm the competing values of predictability and limiting judicial discretion.

O. Combinations

Until now, this article has isolated forms of doctrine. In the real world, lawyers need a broader field of vision, because most legal areas contain numerous forms of doctrine. Rules, standards, and hybrids occur in myriad combinations. Even some of the prior examples were not single forms. Chief Justice Rehnquist's bright line interpretation of nonjusticiability in *United States v. Nixon* sprang from *Baker v. Carr*'s six prong test, a mix of standards ("impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of the government") and at least one reasonably directive rule ("a textually demonstratable constitutional commitment of the issue to a coordinate political branch").[230] Justice Rehnquist's *Vermont Yankee* opinion contained a bright line immunizing agency discretion in providing supplementary procedures from judicial second-guessing and a peephole that permits the Court to avoid a rigid interpretation of the rule.[231]

Another way to conceptualize constitutional legal doctrine is to rank issues by the amount of deference the Supreme Court gives to the governmental defendant. Although existing equal protection doctrine always begins with balancing, it consists of two quasi-rules ("strict scrutiny" and "rational purpose") and one standard ("intermediate scrutiny"). The notorious adjective "quasi" needs to be added to the two rules, because they are not completely predictable. For example, Justices Powell, O'Connor, and Scalia have applied different conceptions of strict scrutiny to affirmative action cases.[232] In the First Amendment context, the Supreme Court is more

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228. *Id.* at 278.

229. *Id.* at 277.

230. *See* 113 S. Ct. 732, 735 (1993) (using the test of Baker v. Carr, 369 U.S. 186, 217 (1962)).

231. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524 (1978).

232. Strict scrutiny of governmental actions that explicitly consider race has at least three degrees of strictness. Justice Scalia's strict scrutiny would invalidate all affirmative action

deferential to legislative findings of harms related to commercial advertisements of "vice" than of findings of danger caused by political dissent.[233] The Court applies an amorphous balancing test for commercial speech but a quite rigid rule proscribing governmental suppression of political viewpoints.[234]

P. Metaphors

It is difficult to find one's way through the maze of the law without using metaphors. Indeed, the two archetype forms of doctrine—"bright lines" and "balancing tests"—are metaphors. The Supreme Court does not use an actual scales or draw colorful lines. This article has proposed metaphors like "escape hatches" and "peepholes" to isolate different forms of doctrine. Envisioning steam emitting from an "escape hatch" captures that form's function better than a simple description of the rule. But just as a potent metaphor can clarify, it also can obfuscate.[235] There is always a risk in comparing one thing—a legal rule—with another, the metaphor, which may contain literary and realistic implications. Future courts have a great deal of discretion in interpreting most legal metaphors, since there is no direct correspondence between the legal problem and the chosen image.

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programs. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 519-20 (Scalia, J., concurring). Justice O'Connor's strict scrutiny required heavy substantive and procedural requirements. In Shaw v. Reno, 113 S. Ct. 2816 (1993), she only invalidated grotesquely shaped congressional districts instead of all congressional districts that took race into account (which probably would have meant all congressional districts). Justice Powell applied strict scrutiny in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), to invalidate quotas but to uphold the use of race as a factor to diversify a state medical school. *Id.* at 320. But even Justice Scalia would not strike down all statutes that take race into consideration; he probably would have upheld the internment of Japanese-Americans during World War II, deferring to the government for acting pursuant to the benign motive of national security, a motive that courts could not examine closely. Korematsu v. United States, 323 U.S. 214 (1944). In a perverse way, *Korematsu* is the first affirmative action case. For a discussion of Justice Scalia's creative deference to claims of national security, see Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597, 1622-24, 1651-52.

233. *See* United States v. Edge Broadcasting, 113 S. Ct. 2696, 2707 (1993); *cf.* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

234. If one looks at a field of doctrine as broad as "administrative law," the number of forms explode, ranging from the bright lines in *Chadha*, peephole in *Vermont Yankee*, factor test in *Eldridge*, to a conclusory standard in *Morrison*.

235. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 733 (1987) ("Lawyers in general, and judges in particular, coin or adopt metaphors and then forget they are only metaphors.").

Despite such risks, courts often include metaphors to persuade and guide future litigation.[236] Justice O'Connor recently invoked a provocative metaphor in *New York v. United States* while striking down a federal law that required the State of New York to take title to radioactive nuclear waste or to assume regulatory responsibility for disposal under congressional direction.[237] She claimed that the state government's constitutional power was a "mirror image" of the national government's authority.[238] This metaphor manages to be vividly accessible and mystically bewildering at the same time. It is fairly easy to envision the metaphor—the federal government staring at its likeness, state governments—but it is very hard to understand, much less to apply to future legal disputes. One can first attack the metaphor for being wrong; Justice O'Connor is suggesting parity between the states and the federal government, even though Congress retains the Constitution's textual trump of the Supremacy Clause (not to mention many other powers). Justice O'Connor may be arguing that the two powers never overlap, separated by a mirror. Yet she conceded that Congress had concurrent power under the Commerce Clause to regulate nuclear waste.[239] Congress could regulate nuclear waste; it only chose an unconstitutional means.[240]

But take her description at face value. Who is reflecting whom? Is the federal government looking at the states? Or are the states on this side of the mirror? In other words, which government is the reflection, and which one is reality? When the federal government lifts its right arm, the state will lift its left arm. What, if anything, does that signify? And which side of the mirror are we on—whose shoulder are we looking over? Or is it possible that we were not supposed to look that deeply into the metaphor? Perhaps Justice O'Connor is only arguing for the illusion of equality, not actual parity.

The obscure nature of this Wonderland[241] metaphor confirms the common sense intuition that most lawyers, even allowing for their linguistic facility, don't make good poets. There should be little surprise that metaphors, which frequently contain a vast range of elusive and allusive traits, are near

236. Justice Cardozo described how metaphors start "as a device to liberate thought, [but] they end often by enslaving it." Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (1926); *see also* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

237. 112 S. Ct. 2408, 2414 (1992).

238. *Id.* at 2417.

239. *Id.* at 2420.

240. *Id.* at 2423.

241. *See* LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE 5 (Ariel Books/Alfred A. Knopf 1986).

the end of the bright line-balancing test continuum. Although some metaphors are helpful, perhaps even essential to legal analysis, others leave us more confused than ever. Like most efforts, judicial metaphors must survive the test of time. Justice Holmes' "marketplace of ideas" remains vibrant, attracting some conservatives who might otherwise have preferred a more authoritarian interpretation of the First Amendment.[242] Justice O'Connor's mirror image may end up in the attic.

Q. Equity Exceptions

Litigants and judges do not finish their analysis after determining the existing forms of doctrine that influence a particular area of substantive law, because Western law has for millennia included an implied equitable standard. This form's dynamic, unpredictable nature places it at the end of the rule/standard continuum.[243] Over two thousand years ago, Aristotle wrote that judges should not be bound by existing rules and texts.[244] They sometimes should transcend legal text to satisfy the purposes that inspired the text:

> When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known.[245]

Aristotle proceeded beyond originalism to a more substantive conception of equitable justice: "Equity must be applied to forgivable actions . . . . Equity bids us to be merciful to the weakness of human nature."[246] Equity is a form of equality, undermining written law. To demonstrate his views, Aristotle quoted Antigone's plea in Sophocles' *Antigone* on the supremacy of

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242. *See* Abrams v. United States, 250 U.S. 616, 630 (1919).

243. Schauer, *Exceptions*, *supra* note 7, at 893. The implied equity exception to rules also does not satisfy Professor Schauer's definition of exceptions as the intersection of two rules.

244. ARISTOTLE, THE NICOMACHEAN ETHICS, *reprinted in* THE COMPLETE WORKS OF ARISTOTLE 1796 (Jonathan Barnes ed. & J.O. Urmson revised trans., 1984).

245. *Id.* The equity exception can differ from the adverse exception by fulfilling the underlying purpose of the existing law or by operating because the existing law's underlying purpose is defective. ARISTOTLE, *supra* note 193, at 2188. In other words, the equity exception advances the purposes of the pre-existing rule, while the adverse exception undermines those goals. Furthermore, equity sometimes is concerned about purposes beyond original legislative intentions. *Id.*

246. ARISTOTLE, *supra* note 193, at 2188-89.

universal, unwritten principles over the written law.[247] Thus, courts are caught in an enduring struggle between complying with legal texts and doing the right thing, between positivism and some form of natural law.

One of Aristotle's enduring attractions is his capacity to shift from moralist to analyst. Although he had a preferred conception of justice, he also discussed the rhetorical value of equitable arguments.[248] For example, both sides in a contract dispute can always invoke a group of predictable arguments. One side will argue that a written contract is part of the written law and satisfies the contractors' expectations. In addition, invalidating written contracts destabilizes the economy by undermining trust and predictability. The other side will counter with equitable arguments to invalidate a written contract, claiming fraud, force, injustice, universal law, the existence of other contracts, or even utility.[249] No bright line determined which side should prevail; one needs an experienced judge to choose between these legitimate, rival conceptions of justice, between written text and equity.

The equity exception indicates how the desirable legal norms of stability, predictability, and consistency among parties perpetually conflict with flexibility, responsiveness to unforeseeable consequences and rival conceptions of equality, such as the judicial commitment to fairness and purpose. Civilized legal systems contain competing conceptions of equality. Litigants pleading strict adherence to the text appeal to the need for equal treatment under that text, while equity litigants request equal treatment under the purposes of the text or to fulfill basic societal norms.[250] Everyone wants to be treated individually and equally. The question remains: when should courts emphasize the unique or the general aspects of a case?

This cursory examination of equity's relationship to such general ends as "purpose" or "fairness" demonstrates more generally how various forms of doctrine are related to particular ends, ranging from predictability to honoring the Framers' intentions. The conflict between law and equity helps explain why many legal theorists have attacked particular forms of doctrine. They seek to preclude a particular end by eliminating the means that best

247. *Id.* at 2190.

248. *Id.* at 2190. One level of this article is purely rhetorical—providing lawyers and judges with a variety of forms of doctrines to choose among and supporting arguments (including precedent) for those forms.

249. *Id.* at 2192-94.

250. Thomas Hobbes, who was no sentimentalist, believed that equity should be informed by the Golden Rule. THOMAS HOBBES, LEVIATHAN 188 (Cambridge ed. 1991) (1651). Judge Posner claims the tension between rules and standards is a reflection of the conflict between formal justice and substantive justice. POSNER, *supra* note 12, at 44, 318.

fulfills that end. If one doesn't like judicial discretion and substantive justice, eliminate equitable exceptions. One way to rebut such proposed purges is to appeal to tradition. The Western legal system's dual commitment to law and equity can be easily traced from Aristotle through Aquinas[251] to the Anglican common law-equity system.[252] One can reject the system's experience and its triumphs (as well as its failures) in favor of interpretive abstractions, such as pure textualism. Nevertheless, tradition and practice should prevail over theory. Courts ought to retain the American culture's spectrum of conflicting means and ends, in the belief that the Western legal system has done more overall good than harm.[253] Those who wish to convert the rule of law into the law of rules have the burden of proof to show why their radical abstractions are desirable, much less necessary, much less the only "legitimate" way to adjudicate.

III. TRANSFORMING EXISTING LAW: THE SECOND STAGE OF DOCTRINAL ANALYSIS

There are many articles and books discussing how courts distinguish precedent by using different facts, manipulating holdings, changing substantive doctrines, and asserting different policies.[254] This section briefly demonstrates how courts also distinguish cases by transforming forms of doctrine. Litigants who probably will not prevail under existing forms of doctrine can use these examples as precedents to support their requests for profound doctrinal alterations in form and content.

A. Transforming Forms

Properly believing that law is inherently fluid, many legal analysts assume there is little or no place for rigid rules. Admittedly, our legal system is a dynamic process, resembling the flow of water throughout the biosphere. Because everything is in flux, the important empirical problem is

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251. Aquinas relied on equity to answer affirmatively his question "Whether He who is Under a Law May Act Beside the Letter of the Law?" ST. THOMAS AQUINAS, 1 SUMMA THEOLOGICA 1021 (Richard C. Meyer, trans., 1947).

252. PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 11-12 (1990).

253. For discussion of tradition, see Donald H. Gjerdingen, *The Future of Legal Scholarship and the Search for a Modern Theory of Law*, 35 BUFF. L. REV. 381 (1976); *see also* David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991).

254. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING v-viii (1948) (describing judicial evolution of "known rules").

determining the rate of change in different areas. Many constitutional doctrines are as unpredictable as future appointments to the Supreme Court. On the other hand, property law manifests its importance by its relative degree of continuity.[255]

To function in these fluid situations, judges and lawyers should first "freeze" the relevant law concerning the pending case, treating the existing doctrine as if it were a completed system.[256] They should initially assume there will be no change in the law. They then should diagnose the forms of doctrine contained within the existing caselaw to help them predict how the parties will fare.[257] For example, an abortion-rights lawyer could quickly determine that a state ban on abortions during the first trimester would be unconstitutional under *Planned Parenthood v. Casey*, which created a "core right" to choose to have an abortion before "viability."[258] The litigator simply counts the number of days until "viability" and proves that "viability" occurs well after the first trimester.[259] That same advocate would

255. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988) ("In a sense, hard-edged rules like these . . . are what property is all about."). The choice of a particular form provides only limited value in predicting the rate of change in a given area. Courts are capable of quickly substituting balancing tests for rigid rules. For instance, the Court quickly rejected a rigidly formal interpretation of Article III precluding Congress from shifting some common law private claims to administrative agencies. *Compare* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (Congress could not confer bankruptcy powers on federal magistrates who did not have Article III protections) *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 859 (1986) (upholding option to assert contract counterclaim in administrative proceeding).

256. This two step process helps explain the conflict many law professors and law students have over the purpose of their inquiry. Many law professors, immersed in legal process and exposed to myriad doctrinal changes over the decades of their careers, emphasize law's plasticity. Law students, on the other hand, want to know what the law "is." They know that many professors emphasize the dynamic nature of law in class but primarily test them under the first, "frozen" stage of analysis. Most professors expect the students to apply the existing law, including existing forms, to new facts, not to transform or ignore existing forms.

257. Holmes' prediction theory has generated much criticism. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 932-34 (1951). *See generally* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); H.L.A. Hart, *Scandinavian Positivism*, 1959 CAMBRIDGE L.J. 233; David H. Moskowitz, *The Prediction Theory of Law*, 39 TEMP. L.Q. 413 (1966). Under this article's two-stage approach, Justice Holmes' prediction theory is relevant at the initial diagnostic stage but tells us nothing about how and when courts will transform existing forms or create new forms.

258. 112 S. Ct. 2791, 2804 (1992) (labeling this right as the "essential holding" of *Roe v. Wade*).

259. Of course, even this rule is not completely rigid. "Viability" may change over time as medical science is able to protect fetuses earlier in the pregnancy. Some constitutional rules are very rigid. For example, the Court limited state residency requirements for voting to thirty days. Dunn v. Blumstein, 405 U.S. 330, 348 (1972).

have far more difficulty determining the unconstitutionality of state regulations of abortion procedures under *Casey*'s "undue burden" balancing test.[260]

This freezing only lasts during the lawyers' primary assessment of probable outcomes under existing doctrine. When clients seem unlikely to prevail under the existing forms, lawyers can propose refinements, alterations, or even repudiations of existing forms of doctrine. In addition, prevailing forms do not always adequately resolve the pending case, forcing everyone to design new doctrine to handle the pending case and influence future related cases. Judges are much more likely to grant relief in difficult cases when lawyers present them with a remedy, including viable doctrine in terms of form, that apparently improves the legal system not just for the winning litigant but also for society. By more precisely mapping out the roles of forms of doctrine at both the diagnostic and modification stages of litigation, lawyers can better understand how the law is likely to operate in a particular case (assuming no change in the doctrine) and how it mutates over time.

Recent Tenth Amendment doctrine provides a dramatic example. Not only can judges create new forms to solve new problems, they can also transform existing forms of doctrine. For many years, the area was moribund. The Supreme Court had dismissed the text as a "truism" in *United States v. Darby*, thereby creating a bright line rule of complete deference to Congress.[261] *Maryland v. Wirtz* reaffirmed that attitude by upholding congressionally mandated minimum wage and hour requirements for State employers.[262]

But Justice Rehnquist revived the Tenth Amendment in *National League of Cities v. Usery*.[263] He mixed conclusory arguments with factual observations, as he later would in *Morrison v. Olson*,[264] to explain why Congress cannot require states to pay minimum wage or overtime to state employees.[265] For example, he distinguished congressional regulation of "states as states" from congressional regulation of private individuals.[266] In addition, the state power to determine wages was both an "undoubted attribute of state sovereignty" and a function "essential to separate and

260. 112 S. Ct. at 2820.
261. 312 U.S. 100, 124 (1941).
262. 392 U.S. 183, 192, 195 (1968).
263. 426 U.S. 833, 852 (1976).
264. *See* 487 U.S. 654, 685-96 (1988).
265. *Usery*, 426 U.S. at 852.
266. *Id.* at 845.

independent existence."[267] The congressional requirement would have a "significant impact" on state budgets.[268] It also was "coercive."[269] Finally, the law "impermissibly interfered" with "integral governmental functions" that "states have traditionally afforded their citizens."[270] As in *Morrison*, Justice Rehnquist had found "impermissible interference" via a potpourri of claims and facts.[271]

Usery's immediate fate demonstrates the vulnerability of the formless form that lurks beneath conclusory standards. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, private strip mine operators challenged a federal law requiring them to return used mines to their natural condition.[272] All four *Usery* dissenters joined the *Hodel* opinion to convert Justice Rehnquist's arguments and observations into a three-pronged test. Justice Rehnquist's assortment of justifications for activist judicial review under the Tenth Amendment suddenly developed into specific requirements. Tenth Amendment plaintiffs had to show that the congressional law affected (1) states as states, (2) an essential attribute of sovereignty, and (3) a traditional governmental function.[273] The *Hodel* Court even added a potential adverse exception in a footnote: "There are situations in which the nature of the federal interest advanced may be such that it justifies state submission."[274] This opening was far more expansive than an "escape hatch" or a "peephole," given the *Usery* dissenters' relentless opposition to any judicial application of the Tenth Amendment. It was a vast exception designed to devour whatever remained of the original *Usery* approach. Thus it came as little surprise that these five Justices subsequently upheld the application of the Federal Age Discrimination Act against the states.[275]

Justice Blackmun, who concurred in *Usery*, overruled *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*.[276] He determined that lower courts were unable to apply the *Hodel* standards coherently, particularly the "traditional governmental function" test.[277] He said he thought *Usery* established a balancing test, but it turned out to be something else (Justice

267. *Id.*
268. *See id.* at 846.
269. *See id.* at 850.
270. *Id.* at 851.
271. *Id.*
272. 452 U.S. 264, 268-73 (1981).
273. *Id.* at 287-88.
274. *Id.* at 288 n.29.
275. E.E.O.C. v. Wyoming, 460 U.S. 226, 229 (1983).
276. 469 U.S. 528, 531 (1985).
277. *Id.* at 538-40.

Blackmun never explained what).[278] He also attempted to inter *Usery* by including a "bright line escape hatch," a gesture toward flexibility that actually enhanced his rigid rule of deference to Congress, a rule premised upon the belief that the states were adequately protected by the "political safeguards of federalism."[279] Instead of arguing that all Tenth Amendment claims were nonjusticiable, which would have effectively precluded meaningful judicial review, he quoted Justice Frankfurter: "The process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency."[280] In other words, Justice Blackmun enhanced the strength of his highly deferential rule by leaving open the possibility of judicial review of egregious congressional behavior.

Justice O'Connor, a consistent supporter of Tenth Amendment judicial activism, saw no need to wait for extremities. Or perhaps she thought such federal abuses already flourished. In *New York v. United States*,[281] she wrote the majority opinion prohibiting Congress from compelling recalcitrant states, which refused to fully participate in the regulation of existing nuclear waste disposal plans, to either take title to unwanted private nuclear waste or regulate the disposal of private nuclear waste in compliance with federal law.[282]

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278. *See id.* at 561-62 (Powell, J., dissenting).

279. *Id.* at 551 n.11 (citing Herbert Weschler, *The Political Safeguards of Federalism: The Role of the State in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)).

280. *Id.* at 556 (quoting New York v. United States, 326 U.S. 572, 583 (1946)). For a useful discussion of "floodgate" style arguments, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

281. 505 U.S. 144 (1992).

282. *Id.* at 188. The scope of *New York* remains uncertain. Its limitation to "facial violations" could be expanded by its prohibition of "coercion," a notoriously vague legal concept. *See id.* at 175. The decision also could be narrowed to federal laws that commandeer state regulatory mechanisms. *See id.* at 176. Furthermore, Justice O'Connor also included a mysterious metaphor, arguing that the Tenth Amendment and the Commerce Clause "are mirror images of each other." *Id.* at 155-56. Future refinements seem inevitable.

Surveying pending federal health care legislation, Professor Hoke has described seven different types of federal regulatory schemes that raise Tenth Amendment problems under *New York*. Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489, 501-02 (1994). Other scholars are more critical of *New York*. *See, e.g.*, Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994); Martin H. Redish, *Doing It With Mirrors*: New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593 (1994).

The opinion claimed not to overrule *Garcia*, which involved a "generally applicable law,"[283] a law that applied equally to states and to private parties. *New York* voided a statute that facially discriminated against states,[284] while *Garcia* had upheld federal wage and hours regulations that affected many private and public employees.[285] In other words, *New York* created an adverse exception, limited to "facial" discrimination, to *Garcia*'s general rule of judicial restraint. The dissenters argued that the exception was pulled out of thin air without explanation.[286]

But the exception can be justified as part of the Court's general constitutional jurisprudence of being most skeptical of statutes that expressly focus on protected classes, rights, or entities.[287] The *New York* exception can be defended as a "reverse *McCulloch*." In *McCulloch v. Maryland*, Chief Justice Marshall held that states could not tax federal bank operations.[288] The Chief Justice explained that states were not accountable to the federal electorate.[289] States would be tempted to raise taxes on federal operations either to destroy locally unpopular federal enterprises, or to receive more in federal receipts than the state citizens would pay in federal tax revenues. On the other hand, Chief Justice Marshall also held that states could continue to tax federal land holdings under general revenue laws that affected everyone "in common," because states would be politically constrained by their own electorate from excessively raising local, broad-based taxes.[290] Generally worded statutes raise fewer constitutional questions than focused statutes, because the majority, which will be covered by the general law, is unlikely to overburden itself.[291] The *New York* facial

283. *New York*, 505 U.S. at 160.

284. *Id.* at 188.

285. 469 U.S. at 557.

286. *New York*, 505 U.S. at 201 (White, J., dissenting).

287. Categorizing *New York* as an exception to *Garcia* is not a neutral process. *New York* can be read more broadly to justify overruling *Garcia*, since *Garcia* partially was premised upon the false assumption that the Court could not create judicially manageable standards. *See Garcia*, 469 U.S. at 538-47.

288. 17 U.S. (4 Wheat.) 316, 436 (1819).

289. *Id.* at 435.

290. *Id.* at 436.

291. Professor Hoke has argued that the republican process norms underlying *New York*'s interpretation of the Tenth Amendment warrant extending the case to preclude the federal government from pressuring states to enter federal programs by taxing private individuals if the states do not comply. Hoke, *supra* note 282, at 564-67. That extension would not fit within the "reverse *McCulloch*" defense of the exception, which limits Supreme Court interventions to federal statutes that exclusively aim at states. Furthermore, *New York* can also be narrowed to its facts, to situations where the federal government forces states to take title over undesirable private property. Justice Scalia showed little inclination to limit the Tenth Amendment to states when he wrote that Congress had to use "clear and manifest language" to "displace traditional State regulation" of

exception protects states; Congress is much less likely to abuse states under general statutes which would also injure its broader constituency. This argument not only justifies the exception but also limits its scope. The internal validity of the exception and the exception's ability to coexist with the rule are both important, because on another level *New York* directly threatened *Garcia*. *Garcia* justified the withdrawal of judicial review on the ground that the Court could not create coherent Tenth Amendment doctrine,[292] a claim *New York* effectively refuted.[293]

This abbreviated review of Tenth Amendment doctrine demonstrates how much can be understood simply by focusing on forms of doctrine. It also shows how the majority of the Court chooses the particular form that best fits its substantive concerns, whether those be federalism, judicial restraint, or judicial competence to formulate viable doctrine. More generally, the Tenth Amendment cases stand as a set of precedents that permit courts to alter forms of doctrine in any other area.

B. Limited Supreme Court Sovereignty and the Art of Overruling

Applying the concept of "sovereignty" to the American legal system is one of the more difficult American jurisprudential problems. There are no obvious answers to determining who has the last word; how they can exercise it; and when they have it. Is the President sovereign during a time of Civil War? The average soldier when ordered to fire upon rebellious citizens? The people? The electorate? The amendment process under Article V? Doesn't Congress have some form of majoritarian legislative sovereignty? The Tenth Amendment cases reflect judicial disagreements over the meaning of state sovereignty. John Stuart Mill claimed individuals also have a sphere of sovereignty: "Over himself, over his own body and mind, the individual is sovereign."[294] This complexity constitutes another virtue of the American legal system, exemplifying its divide and conquer approach to power.[295]

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bankruptcy foreclosure sales. BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1765 (1995) (quoting English v. General Electric Co., 496 U.S. 72, 79 (1970)). Thus there are nascent, competing forms that lurk throughout current Tenth Amendment jurisprudence.

292. 469 U.S. at 531.

293. *See New York*, 505 U.S. at 155-69.

294. JOHN STUART MILL, ON LIBERTY 13 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

295. Americans have long been ambivalent about the concept of sovereignty. *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 43-50 (1991).

This section shall focus on yet another example of limited sovereignty: Supreme Court sovereignty. On one level, the ever-changing majorities on the Supreme Court have limited sovereignty, because they are not absolutely bound by prior Supreme Court decisions. Supreme Court majorities cannot "entrench" their opinions to protect them from future Supreme Court majorities. For example, no doctrine or rule can preclude five future Justices from adopting Judge Learned Hand's argument that *Marbury v. Madison*[296] was wrongly decided, because the constitutional text does not authorize Supreme Court review over congressional legislation,[297] or from overruling *McCulloch v. Maryland*, perhaps by aggressively using Dean Choper's argument that all federal-state issues are nonjusticiable.[298] The Court could legitimately withdraw from all constitutional judicial review until the country passed an appropriate amendment. Only the populace can use the amendment process either to entrench or to repudiate permanently Supreme Court doctrine.

This fundamental instability to all Supreme Court doctrine reveals the quixotic nature of Justice Scalia's attempt to limit judicial discretion through formal rules. Five Justices can overrule any judicial rule. Overruling is the penultimate legal loophole (formal constitutional amendment is the ultimate loophole). Consequently, constitutional law never can provide complete predictability. But Justice Scalia's quest for certainty is not just futile; it approaches the paradoxical. He seeks to overrule decisions that he believes were "illegitimately" decided, either because of their improper modes of reasoning (using public opinion or personal morality, for instance) or their form of doctrine (particularly noxious standards). But future Courts can use his transformations and reversals as precedents to reject his particular outcomes and rules, and as more general examples of how one Justice's particular judicial ideology and innovative legal theory can legitimately trump existing judicial practice. Overall, Justice Scalia's aggressive, abstract jurisprudence may well increase future judicial discretion. If he can transform constitutional doctrine and practice under a rigid set of theoretical criteria, who knows how other ambitious Justices, who may have radically different jurisprudential views, will use his example in the future?

296. 5 U.S. (1 Cranch) 137 (1803).

297. LEARNED HAND, THE BILL OF RIGHTS 4-30 (1958).

298. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 233-35 (1980).

IV. LIMITS OF THEORY

This article has made several descriptive claims. First, there are many more forms of doctrines than the two forms—formal rules and ad hoc standards—which academics and judges have primarily contrasted. Second, this survey of forms reinforces the frequently made assertion that rules advance predictability and limit judicial discretion, while standards promote flexibility. It also conveys how many other substantive ends the forms can serve. Forms help determine which side probably will win, how a court will analyze an issue, what evidence is relevant, and how the case will be processed through the legal-political system.

The article also makes the normative claim that the additional forms appropriately fulfill different functions in different cases, providing good "fits" between form and content. Hybrids like escape hatches and peepholes strengthen rules, while factor tests simplify litigation and advance particular substantive ends by emphasizing certain facts and arguments at the expense of others.

This normative claim is harder to verify. Lawyers have difficulty proving the longer-term consequences of particular decisions, particularly major constitutional decisions, because the law is interacting with complex human beings who contend with many other variables, legal and non-legal, over long periods of time. For instance, nobody can be sure what effect *Milliken v. Bradley*'s refusal to extend desegregation by busing into the suburbs[299] had on race relations because so many other factors—continual racism, "crack" cocaine, unemployment, widespread anti-intellectualism, the growth of hedonism, and the effects of cases ranging from *Brown* to *Bakke*—also affected the races. Furthermore, once the Court makes a major decision in one direction, nobody can prove what would have happened if the Court had gone the other way.

The political partisans who dominate contemporary American political discourse usually interpret subsequent events in a way that reinforces their previously held positions. For example, the American Civil Liberties Union maintains that a bright line excluding all prayers from public schools[300] has prevented increased religious antagonism and has had a positive effect on social mores by promoting diversity and tolerance. Opponents contend that such a formal rule exacerbates religious differences and undermines morality. None of us can be sure who is correct, because we cannot rerun our society over the last thirty years to ascertain what would be the different

299. 418 U.S. 717, 753 (1974).

300. Epperson v. Arkansas, 393 U.S. 97, 106 (1968).

effects, if any, of different constitutional doctrine in form and content. None of us can ever know what our society would now look like if mandatory school prayer had remained legal. Perhaps the country would be basking in rectitude if we had all prayed when we were young school-children. But then our society might have degenerated into Northern Ireland or even Bosnia.

Despite such verification difficulties, the article made the additional normative claim that a large variety of forms, including all the forms studied, should exist. The article's main tool of persuasion has been its case examples. The examples carry the authority of legal precedent, legal tradition, the legal culture's sense of proper fits between ends and means, and the lawyerly intuition that a complicated world cannot be simplistically ruled. This article is a massive empirical enthymeme, eschewing formal logic in favor of examples, appealing to widely held beliefs, and predicting consequences. One cannot logically refute those who have a bright line fetish or those who dread rigidity. One can only delineate the potentially adverse consequences of rejecting all the forms of doctrine that are not pure bright lines like *Chadha*, or formless, conclusory balancing tests like *Morrison*.

I am somewhat tempted to conclude the article at this moment. After all, one of my complaints has been that legal theorists tend to extend their initially illuminating insights to areas where their previously valid perspective distorts more than clarifies, creating numerous straw arguments in the process. Legal academics are frequently guilty of an excessive degree of inference.

Such a dodge, however, would fail to address an important question: Why have so many contemporary lawyers and judges taken such strong positions on the rule/standard debate? One reason is that their claims are not completely unfounded. There is a relationship between different forms of doctrine and different judicial ends, between form and content. There is also a link between forms of doctrines and the role of the judiciary, between form and structure. These relationships tempt theorists to weed out completely not only unwanted ends, but also any means that sometimes serve those ends. The problem, of course, is that those means also serve other ends, including some of the theorists' ends. A feminist who dislikes rules, seeing them as disguised forms of sexism or residual phallocentricism,[301] might nevertheless prefer the more rule-like, aggressive, strict scrutiny balancing test in gender discrimination cases instead of the Supreme Court's amorphous intermediate

301. *See* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP 108 (1988).

scrutiny standard. The remainder of this section shall evaluate some Right, Left, and Center views of the rule/standard dispute.

A. The Right

The conservative political philosopher Michael Oakeshott observed that rationalism has permeated modern conservatism almost as much as contemporary liberalism.[302] Oakeshott criticized Friedrich Hayek for elevating abstractions above tradition, accepting only a minimalist state. That approach turned Hayek into a theoretical rationalist, resembling the socialists he loathed.[303] According to Oakeshott, rationalists also err by emphasizing technique at the expense of practice.[304] They try to solve everything rigidly and systematically, instead of contextualizing particular problems within the appropriate tradition or practice.

To the degree that Justice Scalia leads and inspires modern American conservative politics, his constitutional jurisprudence demonstrates that whatever else modern American conservatism is, it is not Oakeshott's traditional conservatism. Justice Scalia claims to be "conservative" but dreams of finding the interpretive Holy Grail amidst the perpetual squalor of political-legal conflict. Both his quest for right answers and his reification of textualist technique reflect the Rationalists' loathing of tradition.[305] The belief in one right answer or one right technique undercuts the tentative, evolutionary natures of private and constitutional common law. It also substitutes the appearance of logic for the Aristotelian concept of enthymemes. By praising or demonizing particular techniques that have long been used by American courts, such as utilizing many doctrinal forms and modes of argument, Justice Scalia has submerged careful practice to his abstractions. To put the claim more concretely, Justice Scalia's constitutionalization of "tradition" by counting statutes in cases like *Michael H.*[306] rings a bit hollow, when his other theories of constitutional and

302. MICHAEL OAKESHOTT, *Rationalism in Politics*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 26 (Foreword by Timothy Fuller, 1991) (1962).

303. *Id.* Hayek's rationalism covered the bright line-balancing test controversy. He only accepted rigid rules and loathed discretionary standards. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72-87 (1944).

304. OAKESHOTT, *supra* note 302, at 11-17.

305. Whether it be law and economics or originalism, many contemporary conservatives are enamored with grand theory. As then-Judge Bork explained: "To approach the subject of economic rights it is necessary to state a general theory about how a judge should deal with cases which require interpretation of the United States Constitution." Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

306. Michael H. v. Gerald D., 491 U.S. 110, 122-27 (1988).

statutory interpretation repudiate as illegitimate thousands of prior cases' reasoning, forms, and outcomes.

Oakeshott's conservatism is premised on the belief that nobody fully understands how a particular society functions and flourishes. Consequently, everyone should be wary of employing their ideas to change radically the system and culture, whether those aggressive changes come from below in revolutionary dress or from above as rigid theories of constitutional interpretation. Thus, the burden of proof is on those "conservatives" who want to transform current legal techniques. This article has tried to reinforce the norm of judicial prudence by revealing some of the concerns that judges ought to consider when choosing between differing forms and by demonstrating some of the pragmatic benefits of having a vast array of forms.

Ideological purists, who require rigid judicial compliance not just with their ends but also with a narrow set of means, also face the more prosaic problem of remaining consistent, unless they woodenly pursue only one end. Justice Scalia praises bright lines but sometimes must balance. He consults "tradition" to determine the extent of governmental power, but tradition can conflict with principle and clear-cut rules. The American people develop their traditions without much concern for consistency. Justice Scalia has approved of such exceptions to a rigid separation-of-Church-and-State rule as legislative chaplains and the motto on American currency, "In God We Trust."[307] In his typically sardonic way, Justice Scalia condemned balancing tests for attempting to compare incommensurables: "It is more like judging whether a particular line is longer than a particular rock is heavy."[308] But are not text, history, principle, and tradition, his preferred modes of thought, often incommensurate?

B. The Left

Karl Popper maintained that the Left is even more bedeviled by excessive rationalism than the Right.[309] Still influenced by Hegel and Marx, leftists tend to believe they can scientifically diagnose and cure all of society's ills. Their truths are self-evident and live in harmony. Because they know what

307. County of Allegheny v. ACLU, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in part and dissenting in part) (joined by Justice Scalia, discussing the American motto, and citing with approval Lynch v. Donnelly, 465 U.S. 668 (1984)).

308. Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 897 (1988).

309. *See, e.g.*, KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES, VOLUME II, THE HIGH TIDE OF PROPHECY: HEGEL, MARX, AND THE AFTERMATH (1966).

is "reasonable," anyone who disagrees with them must be "prejudiced." Indeed, many members of the Left are attracted to conspiracy theories to explain why their self-evident truths do not immediately triumph.[310] They gain excessive confidence in their beliefs, because few would disagree that our society suffers from class conflict, sexism, racism, and cultural intolerance.

Their fury at the American judiciary, which refuses to adopt all of their ends immediately or completely, leads them to attack the entire legal enterprise. All existing judicial ends and means become suspicious, because some judicial means and ends do not satisfy their substantive standards. If some or all of the judges are class warriors or sexists, then it follows that all their means are equally tainted. Rules are no longer tools available to decisionmakers of all ideological perspectives, but become venal weapons of oppression. Thus, the leftist zeal to purge the system of prejudice creates a prejudice against judicial means that traditionally has been used to advance a wide range of ideologies. The Left and Right end up resembling each other by strictly applying different litmus tests to both judicial ends and judicial means to determine if a particular decision is politically correct.

At the least, leftists feel they have successfully indicted the legal system by demonstrating its lack of logic. Roberto Unger described modern liberalism as riddled with antimonies—logical contradictions.[311] Thus, they claim that balancing tests' indeterminacies or courts' fluctuations between forms reveals liberalism's incoherence. Technical problems are translated into core dilemmas of political philosophy.

This article's examples demonstrate that there is no "logical" contradiction in using different means to satisfy conflicting ends. Legal opinions are enthymemes, not logical syllogisms. One should not expect complete coherence, because all legal enthymemes are premised upon prevailing public norms, which are not and need not be completely internally consistent. Most of us are understandably ambivalent about our fellow citizens. For instance, each of us wants to be treated individually (substantive justice) and equally (formal justice). Less abstractly, most of us are torn between maximizing one's own advantage and generating a civil, stable society. The legal Left's fascination with theory is particularly tragic, because leftist lawyers need to use all available technical tools to alter

310. *See* POPPER, *supra* note 74, at 7 ("The conspiracy theory of ignorance is fairly well known in its Marxian form as the conspiracy of a capitalist press that perverts and suppresses truth and fills the workers' minds with false ideologies.").

311. ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 51-55 (1975); *see also* Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1984).

society. Their clients cannot afford the luxury of lawyers trained exclusively in grand theory, "correct" outcomes, and indifference to legal technique.

C. The Center

Most law professors consciously or unconsciously accept Holmes' observation that law raises questions of degree more than questions of kind.[312] Indeed, this article has shown that there are degrees of predictability within different forms of doctrine. Law professors want their students to manipulate doctrine to benefit clients. Lawyers should not see legal doctrine as a cookbook; law is far more pliable. Clients, after all, want to escape adverse existing law while preserving supportive doctrine. Furthermore, lawyers and many clients have a vested interest in indeterminacy, in being able to make legal distinctions based upon "policy" or whatever else courts think is appropriate. As a result, the underlying ideology of most law school classes is a blend of low-grade skepticism and pragmatism that can degenerate into amoral relativism. Such attitudes tend to be confirmed by experience; law professors who have taught for many years have witnessed and studied many cultural, political, and legal changes.

The Legal Realists demonstrated how allegedly "scientific" legal rules invariably included controversial policy judgments. But many Realists jumped from that valid observation to condemn all formal rules. Judge Jerome Frank thought rules emanated from unresolved Freudian problems.[313] Grant Gilmore dismissed formal rules as retrograde methodology.[314] Contemporary pragmatists like Professor Strauss find rules to be so crude as to be dysfunctional.[315] As with the Right and the Left, the skeptical Center made its potent insights too global.

One can be skeptical and pragmatic and still prefer rules. There is no need to fall into relativism, much less nihilism. David Hume moved beyond

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312. In a letter to Professor Freund, Holmes observed that "pretty much the whole body of law . . . [is] a matter of degree." Douglas H. Ginsburg, *Afterword to Harry Kalven, Jr., Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 245 (1973) (quoting F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 76-77 (2d ed. 1961)).

313. JEROME FRANK, LAW AND THE MODERN MIND 18-21, 249-50 (1930). H.L.A. Hart, in turn, diagnosed rule-skeptics like Frank: "The rule-skeptic is sometimes a disappointed absolutist." H.L.A. HART, THE CONCEPT OF LAW 135 (1961).

314. GRANT GILMORE, THE AGES OF AMERICAN LAW 42 (1977) ("Langdell [the founder of legal formalism] seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius . . . . Langdell's idea was that law is a science."); *see also* Ellen A. Peters, *Grant Gilmore and the Illusion of Certainty*, 92 YALE L.J. 8 (1982).

315. Strauss, *Baby*, *supra* note 3, at 818.

his dizzying philosophical skepticism, which even undermined the concept of causation, to advocate general rules for the distribution and regulation of property.[316] Judge Posner recently wrote that pragmatism can use neither rules nor standards.[317] Kathleen Sullivan concluded that rules and standards rest on a continuum available to all factions.[318]

Nevertheless, there seems an almost irresistible impulse to make overly generalized claims about rules and standards. Judge Posner claimed that rules tend to benefit minorities. Obviously he was not referring to Southern segregation laws, which were breathtakingly formal. Furthermore, minorities presently benefit from *Yick Wo*'s "stark pattern" test and *Lukumi*'s "stark statute" test, neither of which is a pure rule. Carefully studying recent Supreme Court cases, Professor Sullivan concluded that the Court's "center" has preferred balancing tests, while the wings, led by Justices Brennan and Scalia, gravitate toward rules. Even if that claim reasonably describes current practice, it cannot be applied more universally. Justice Douglas did whatever he felt like. We have seen Chief Justice Rehnquist use a plethora of forms. Relatively conservative Justices like Frankfurter, Harlan,[319] Stewart,[320] and Clark[321] frequently resorted to balancing tests. Nor should bright lines be equated with "core rights" or other important interests. The First Amendment contains a medley of forms designed to best protect the fundamental right to free speech.

This article's relentless use of examples is consistent with its primary claim that theory should not devour practice and technique. I do not know how to "prove" that all the previously discussed forms are useful and valid, any more than I can "refute" those who prefer a single form. The numerous examples are appeals to the reader's experience in evaluating legal controversies and to the reader's sense of the proper fit between ends and means. These examples, which could be increased a thousand-fold, also

316. Hume's skepticism did not prevent him from creating rigid, legal rules. DAVID HUME, A TREATISE OF HUMAN NATURE 526 (L. Selby-Bigge 2d ed. 1978) (1740).

317. See POSNER, *supra* note 12, at 27 n.41; *see also* Steven H. Shriffin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983) (balancing need not be equated with either instrumentalism or cost-benefit analysis).

318. Sullivan, *supra* note 9, at 57.

319. Justice Harlan struck down a law regulating birth control because ". . . the enactment violates basic values 'implicit in the concept of ordered liberty.'" Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

320. Justice Stewart created a famous obscenity test: "But I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

321. Justice Clark would have only required reapportionment when a state's majority was "stymied" from changing the system by an entrenched minority. Baker v. Carr, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

establish the massive destabilization and loss of judicial flexibility that would be created by devotion to a sole form.

There is another reason to defend technique. What frequently passes for "theory" these days is little more than a cluster of fashionable positions allegedly linked to such reassuring premises as efficiency, justice, or equality. Many jurisprudential authors seem to be satisfied once they have asserted what they believe are proper conclusions; they dismiss technical skill as a minor, even squalid concern that can be easily resolved by their more grandiose jurisprudential abstractions. In the real world, lawyers and law students need to master technique so they can adequately compete on behalf of their clients, and if they are lucky or willful, on behalf of their particular conception of justice.

Such ambiguous responses may leave many readers dissatisfied. They will want to know exactly when a court should use a particular form. My inability to answer that question confirms Aristotle's observation that political-legal decisionmaking is more an art than a science.[322] Choosing the proper form is part of a simultaneous equation, which arguably includes at least the following other factors: the plaintiff's interests, defendant's interests, ease of formulating a remedy, nature of the claim (constitutional versus statutory or common law), foreseeable costs and benefits of favoring either party, degree of concern about future abuses by similar parties, nature of those abuses, prior record of similar parties, any relevant statutory or constitutional text, purposes of that text, legislative history, subsequent history, mischief that the text was attempting to cure, structure of the system the text created, judicial competence, role of the judiciary, precedent, judge's personal views and experiences, public opinion, judge's sense of self-confidence, concerns about future discretion, evidentiary problems, and competing legitimate ends, both substantive and judicial process, that judges must try to achieve. The very length of this list demonstrates that the question of form is only part of the adjudicative equation.

V. CONCLUSION

Periodically, while teaching or thinking about constitutional law, I have been overwhelmed by frightful uncertainty. This vertigo could occur at any moment but often arose while dismissing a judicial opinion, a student's comment, or an exam answer as "conclusory," a rebuttal which sounded conclusory at such a time. Perhaps I had partially internalized the perpetual

322. ARISTOTLE, *supra* note 193, at 2152.

panic of some of my better students, who were working through classes not all that different than this article. After all, they had pressing instrumental reasons to find out what I was looking for. How disturbing it must have been for them to sense that at many levels I was more bewildered than they were. During one such classroom moment, I told them that analyzing constitutional law problems resembled the advertisement describing James Arness's battle against gigantic radioactive ants in the movie *Them!* The ad went something like this: "For every one that is killed, there are two more."[323] For some reason, this analogy did not seem to reassure my students, so I explained that I had never found any ultimate meaning to life. How could they expect me to discover it in legal doctrine?

So much for epiphanies. My immediate classroom solution has been to emphasize technique (also the focal point of this article). Lawyers and judges who are insufficiently self-conscious about their craft are more likely to injure their clients. Lawyers need to crunch doctrine, to know how courts employ such devices as forms of doctrine and tools of doctrine (alternatives, burdens of proof, etc.) to implement their choices among competing ends.

Mastery of technique, however, is not enough. The forms of doctrine are like rules of grammar; they reveal underlying structures of judicial thought but provide little guidance in how to apply those structures in any particular situation. It is easier to know the difference between a subject and a verb than to write a decent sentence. It is likewise more difficult to create a good "fit" between a form of doctrine and a desired outcome than to reveal the existence of forms. The proper form, after all, is partially premised upon uncertain predictions. Bereft of formal logic or confirmation via scientific methodology, judicial choices of forms of doctrine can only resonate within our legal tradition as a powerful enthymeme.[324] Reading and analyzing thousands of cases in law school develops an "ear" for arguments that may work in related situations, for developing the experience that is part of any powerful tradition.

Neither is practice, elegantly fitting ends with means, sufficient. Sadism can be inflicted ever so exquisitely. American lawyers and judges need to be empowered by technique, informed by practice, and grounded in their traditions, but they ultimately must return to theory, to deciding what is right and wrong and what can be done to improve their society and government.

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323. The image is ultimately derived from the Greek myth of the Hydra, a monster who spawned two heads for every one chopped off.

324. Because they are backed by neither authority nor force, law review articles must make compelling enthymemes, enhanced by relevant examples, to be persuasive.